Deep Globalization and Antitrust

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Globalization and the heterogeneity of competition law systems

Interaction between national competition law systems and globalization

1) The proliferation and heterogeneity of competition law systems increase transaction costs and reduce the advantages (and the advance) of globalization.

But the proliferation of competition laws facilitates globalization

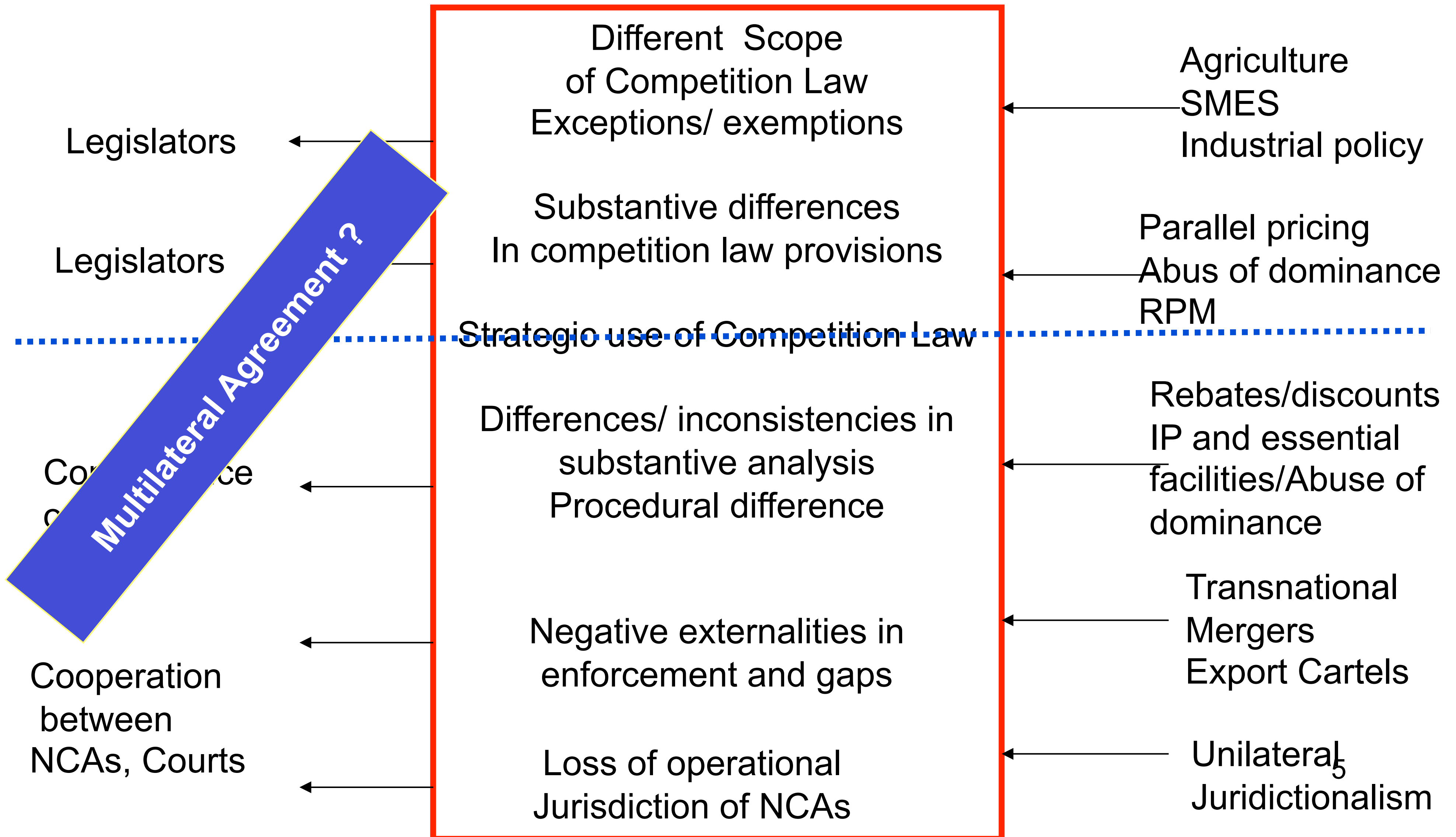
Interaction between globalization and national competition law systems

2) The globalization of economic activity (in a world characterized by unilateral juridictionalism in competition law enforcement) can limit competition in two ways :

- National competition authorities can take measures or allow transactions which protect competition domestically but limit competition in other jurisdictions
- National competition authorities may not be able to exercise their operational sovereignty and apply their law to transnational anticompetitive practices originating abroad and restricting competition on their territory.

But the advance of globalization increases competition

Potential conflicts in competition law enforcement



Antitrust convergence as a response to globalization

Antitrust convergence: is the glass half empty or half full ?

This paper makes the case that despite different histories, cultures, legal systems, and statutes, and not withstanding occasional differences, the competition authorities of the United States, the European Union (EU), and other developed countries have substantially converged toward a consumer welfare based model of antitrust enforcement.

Substantial Antitrust Convergence, Margaret Bloom, ABA Antitrust Section Spring Meeting, Washington, DC March 30 – April 1, 2005

Antitrust convergence: is the glass half empty or half full ?

"(…) the factors that influence decisional outcomes in the US system are often virtually unique. To assume that competition law systems throughout the world are likely to converge around them is to underestimate this uniqueness and the impact of this uniqueness on the mechanics of antitrust convergence".

International Antitrust Convergence:The Real and Imagined Roles of U.S. Antitrust Law, David J. Gerber2005
ABA Spring Antitrust Meeting, March 30, 2005, in Washington, D.C.

Convergence in competition law and enforcement

Scope →

Competition law adopted in a great many countries
In the 1990s and early 2000s (120 countries to date)

Goal →

July 2001: Mario Monti: « **the goal of competition policy in all its aspects is to protect consumer welfare** »

Substance →

Vertical agreements: Commission Regulation 2790/1999 on vertical restrictions

Merger control: December 2003 **New European merger test « significant impediment to effective competition »**
Compare Horizontal Merger Guidelines with the European Commission's own guidelines

Abuse of Dominance: December 2008 Publication of EC guidance on exclusionary abusive behaviour by dominant firms

Convergence in competition law and enforcement

Instruments → Ex: All OECD countries (and many non-OECD countries) now have a **leniency** program. Many competition authorities now have **dawn raids** power and **settlement** procedures

Priorities → **Cartel enforcement**: OECD Hard Core Cartel Recommendation; increased severity. In the EU there were 21 cartel decisions in the period 1990-1999 and 66 decisions in the period 2000-2009 in the EU fines amounted to approx € 830 ml in the period 1990-1999 and to more than € 13 bl in the period 2000-2009).

Remedies → Some coordination: US/EU , others

Procedure

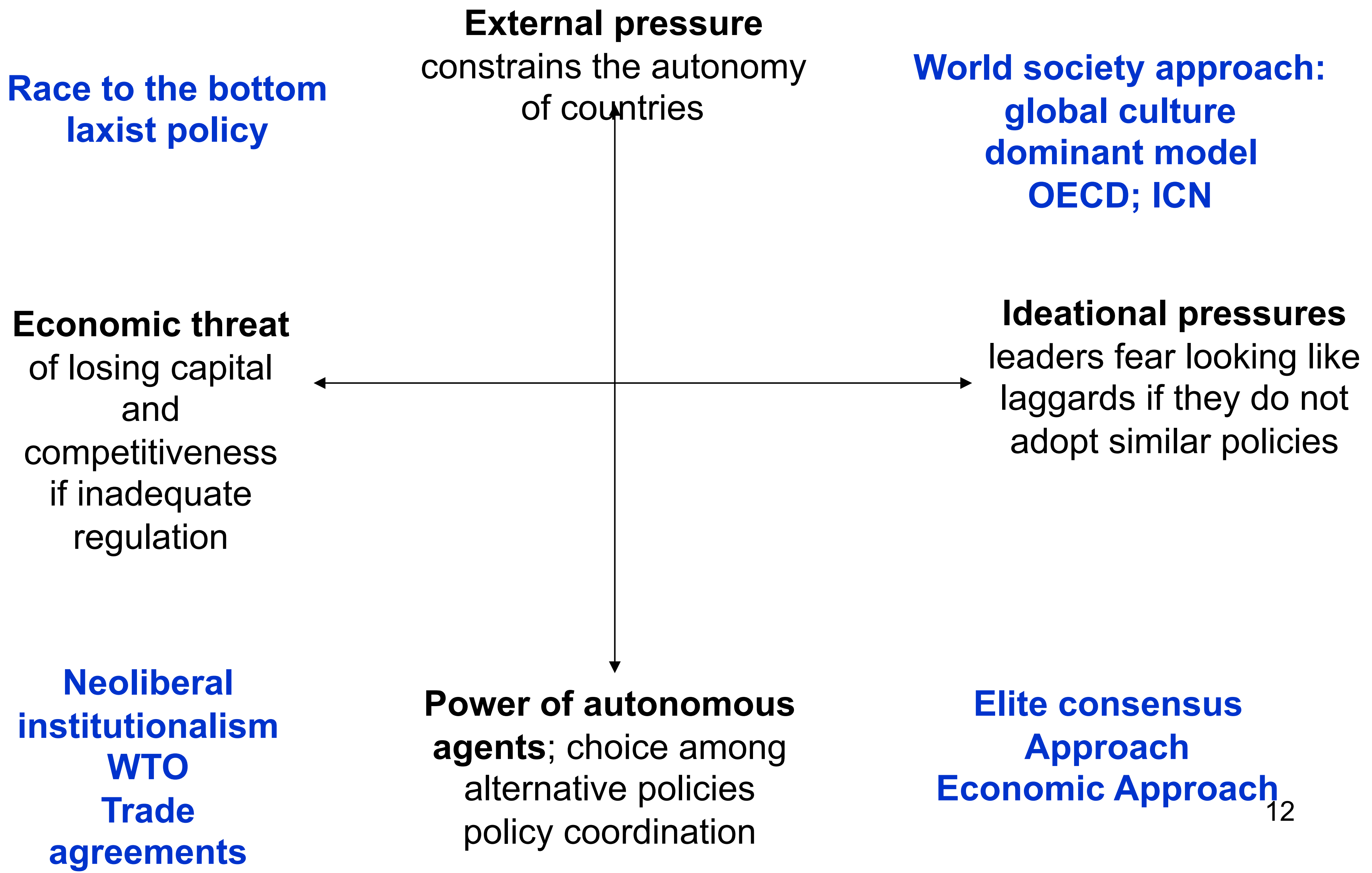
Fast convergence of instruments: ex. leniency programs

The first discussion on leniency programs happened at the OECD at the end of the 1990s following the adoption by the Council of the 1998 Recommendation on Hard Core Cartels.

In particular, the 2002 Report of the Committee on Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes promoted the use of leniency programs as one of the most effective, if not the most effective, enforcement tools to fight cartels in the OECD. **When the report was drafted only a few OECD jurisdictions had a leniency/amnesty policy (US effectively since 1993; EU since 1996, Korea since 1997), while others had only announced that they were going to adopt similar programs (Canada, UK, Germany, France and Sweden).**

Today, all 34 OECD jurisdictions have leniency/amnesty programs.

The process of convergence: four models



Areas where convergence is less obvious

-1) **Scope of competition laws** (state aid control/ mergers control/ abuse of buying power etc…..)

-2) **Relationship of competition authority with sectoral regulators** (cf UK model versus upcoming Dutch model or Australian model or New Zealand model)

-3) Positions on **type I versus type II errors** (Type I in US versus type II in Europe)

-4) **Substantive analysis of exclusionary abuses of dominance/ monopolization** (including concept of essential facility, treatment of refusal to deal or discounts)

Areas where convergence is less obvious

6) **Relationship between competition law and consumer law**

6) **State Interventions** (between Europe and the rest of the world)

7) **Sanctions**, nature of sanctions (weak movement for criminal sanctions for HCC (for ex in UK and Ireland) but still a small minority of countries rely on criminal sanctions), level of sanctions

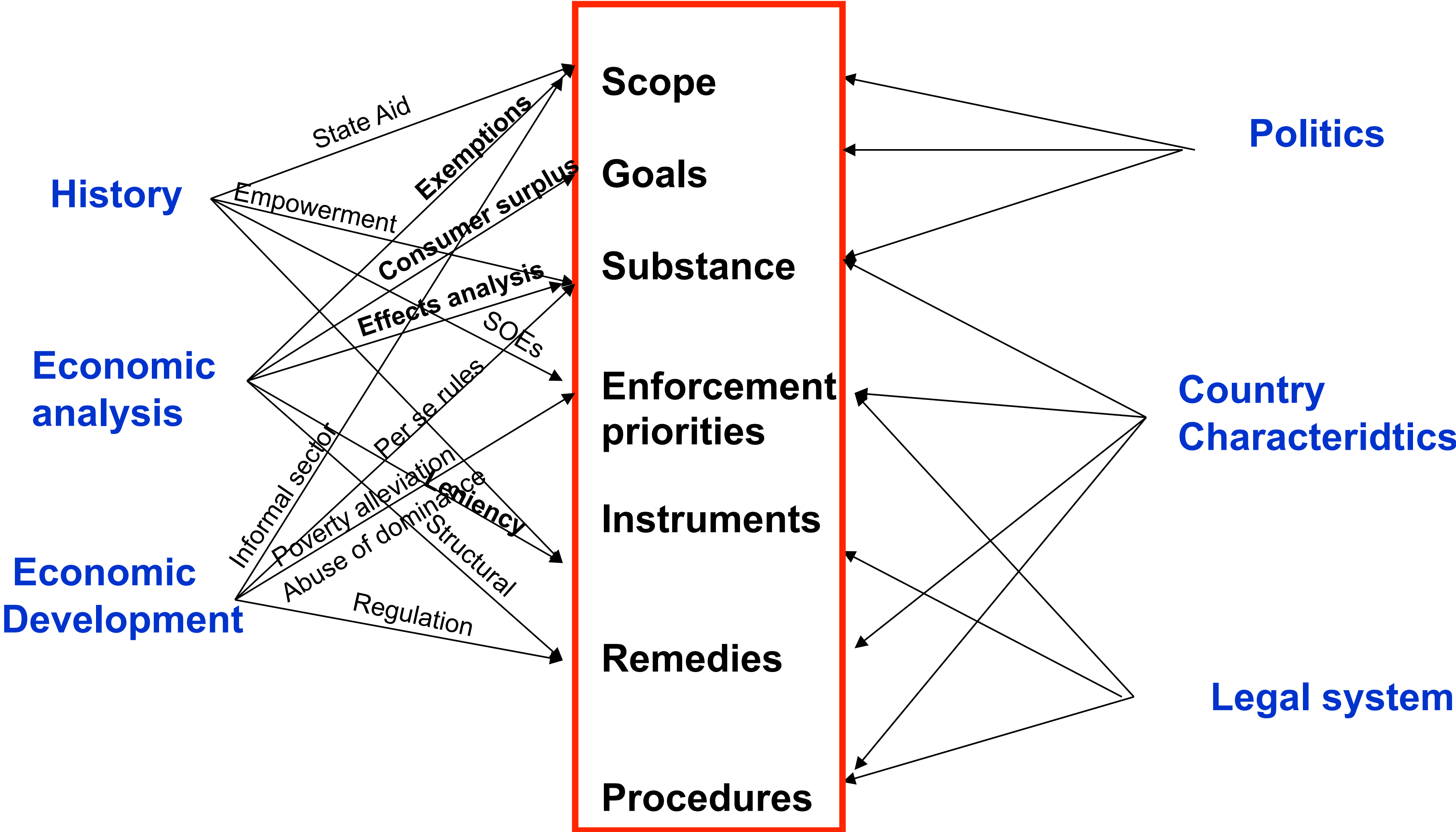
8) **Due process**

The future of convergence

« Given the relative weakness of its impetus factors and the obstacles that convergence face there is little basis for expecting extensive convergence to occur (at least in the near future) across wide ranges and dimensions of competition law and on a global basis ».

David Gerber, « Global Competition law, markets, and Globalization, Oxford University Press, p289

Determinants of competition law



Cost of procedural heterogeneity

Hansen highlights the various challenges faced by leniency applicants having participated in an international cartel, which can act as a deterrent to their cooperation as well as hinder cooperation among competition agencies.

These include, inter alia:

- **Different timing of the investigative steps;**
- **Different requirements for the marker, and the leniency and immunity applicant;**
- **Different scope of proceedings, and in turn, standards of leniency and immunity;**
- **Leaks from leniency to non-leniency jurisdictions;**
- **Risks of evidence leaking to third parties, such as the plaintiffs;**
- **Difficulty of reconciling demands on witnesses;**
- **Inability to comply with strict confidentiality requirements in leniency regimes (such as the EU regime);**
- **National legal constraints on authorities***

1) Review of the experience gained so far in enforcement cooperation, including at the regional level, Note by the UNCTAD secretariat, Geneva, 19–21 July 2011 and Hansen's presentation at the Fair Trade Centre in Tokyo 2010: http://www.lw.com/upload/attorneyBios/upload/docs/doc112.pdf.

Is the heterogenity of antitrust law systems unique ?

Consider also the insolvency of a multinational corporate enterprise,with assets, debtors and creditors scattered around the world. It is possible to address that insolvency through an aggregation of local bankruptcy proceedings conducted under national bankruptcy laws— one in each country in which assets of that enterprise are located. Yet without a global plan to identify all assets and to ensure that all creditors are treated similarly, no fair distribution can take place—and certainly the reorganization of that enterprise would be difficult. Here, then, the goal of equitable distribution of an insolvent enterprise's assets has shifted up to the global level.

Consider also : Securities , Environment, Corruption, Taxation, Intellectual Property etc…

Does the global antitrust system need to be fixed ?

Gerber: « **As long as conflicts are few and minor in importance, the conflict-generating tendency of unilateral jurisdictionalism may be overlooked, but as these conflicts become more frequent and more costly, they will attract increasing attention and concern.**

Randy Tritell (FTC) “**Conflicting outcomes in merger reviews make for interesting conference programs but the real headline in this area is the rarity of such conflicts, especially given that there are now nearly 100 merger review regimes worldwide.**

Few actual conflicts

Cases	Year	Conflicts
Dyestuff	1972	Cartel
Uranium Westinghouse	1982	Cartel
Transatlantic Ocean Shipping	1983	Cartel
IBM	1985	Abuse of Dominance
Wood Pulp	1988	Cartel
De Havilland Alenia-Aerospatiale	1991	Merger
California/Hartford Fire Insurance	1993	Cartel
Boeing/McDonnell Douglas	1997	Merger
Air Liquide /BOC	1999	Merger
General Electric/Honeywell	2001	Merger
Microsoft	2004	Abuse of Dominance

Cooperation agreements as a response to globalization

Cooperation

Even, if all countries had the same competition law, in a world characterized by unilateral juridictionalism, there would still be conflicts in the treatment of global competition tissues:

-Each country's competition authority would have limited operational jurisdiction

-There would be gaps in enforcement

Thus a system of cooperation is a necessary complement to convergence.

International cooperation on competition

- **Scope** Bilateral (EU/USA USA/Can. Aust/NZ)
  Regional (Mercosur, Andean Pact, Caricom)
  Plurilateral (OECD)
  Multilateral (Unctad, WTO)

- **Context** Agreements between competition authorities
  Agreements between governments

- **Levels** Consultations
  Technical assistance
  Exchange of non confidential information
  Positive and negative comity
  Joint investigations
  Exchange of confidential information

- **Types** « optional » (ex bilateral)
  « commitments » (ex WTO)

F.Jenny

Political economy of cooperation

International cooperation significantly enhances the autonomy of EU and US competition authorities.

If cooperation fails and competition authorities clash over individual cases, they become susceptible to external influence. Then,

-Governments may try to intervene;

-Firms can choose forums;

- Judges get the ultimate say in cases of conflict.

By contrast, trans-governmental networking makes competition authorities institutionally more independent and allows them to privilege more clearly undistorted competition over other policy goals.

Michael Blauberger, The Governance of Overlapping Jurisdictions. How International Cooperati on Enhances the Autonomy of Competi ti on Authorities, Transformation of State Working paper 102, Bremen 2009

Is China different ?

Reasons for which China may not be interested in joining the ICN

-Network of independent competition agencies. The concept of an independent administrative body is alien to the Chinese system

- Devoted to competition only and competition all the time. The concept of a competition law enforcement or policy independent of other governmental economic polixies (in particular of industrial policy, state aid, and trade policy) is alien to the Chinese system

-Becoming a member of ICN means accepting some commitments (following best practices or recommendations) ; this is alien to the strong desire of China to find its own way, at its own pace in the evolution of its economic system

-China can get all the technical benefits it wants from the ICN by logging on to the ICN web site.

Regional cooperation on competition

-1) The economy of a country is usually more deeply integrated with other economies of the same region than with more distant economies;

-2) Furthermore neighbouring countries may have fairly similar levels of economic development and share the same legal systems;

-3) Finally regional agreements are easier to negotiate hence the idea of regional cooperation on competition.

Regional cooperation on competition

A large number of regional agreements on competition (often in the context of a trade agreement establishing a custom's union or a common market) have developed in Latin America and Africa : ex

-Mercosur (4 member states, custom union) ,
-Andean Community (5 member states,
-Caricom (15 member states,single market economy),
-Waemu (9 member states, common market),
-Ecowas (15 member states, economic community),
-Comesa (19 member states, common market),
-SACU (5 member states, custom union),
-The Southern African Development Community (case specific cooperation)
-East African Community (EAC) (3 states, custom union),

-The European competition network (all EU members,cooperation on competition)
-the Nordic countries (4 states, cooperation on competition including exchange of confidential information),
-the Interstate Council on Antimonopoly Policy of the Commonwealth of Independent States (joint investigations of interregional markets),
-the Association of Southeast Asian Nations (ASEAN) (ASEAN Regional Guidelines on Competition Policy and published the Handbook on Competition Policy and Law in ASEAN for Businesses) etc..

Regional cooperation on competition

A number of the agreements require the member States to establish a domestic law competition laws

Some agreements provide for a « federal » competition law even if all countries party to the agreement do not have a domestic competition law (ex Caricom, Waemu);

Some agreements provide for the direct application of the federal law in member states

Other agreements provide for a cooperation mechanism between the Member States or their competition authorities (ex Comesa, Mercosur);

Regional cooperation on competition

Uneven results:

- Contribute to raising the awareness of member states on the usefulness of competition and competition law enforcement (ex Arab League, Asean)

- Some « peer » pressure put on member states to adopt or upgrade their national law but not always sufficient (ex Mercosur, Caricom)

- A few examples of cases adjudicated at the « federal level » (ex Waemu)
- Some examples of conflicts avoidance and resolution

- General technical assistance between member countries

Cooperation among competition authorities from developed and developing countries: some successes

89. « More cooperation in merger reviews now happens in mergers not involving United States and EU authorities.

For example, Zambian and Zimbabwean competition authorities consulted each other and the Australian competition authorities during their merger assessment of the Coca-Cola/Schweppes merger in 1998.

In addition, the Zambian and Zimbabwean authorities engaged in extensive consultations during the Rothams of Pall Mal/British American Tobacco (1999) merger in order to arrive at appropriate decisions, given their close geographical and economic proximity ».

(1) Review of the experience gained so far in enforcement cooperation, including at the regional level, Note by the UNCTAD secretariat, 10 May 2011

Cooperation among competition authorities from developing and developed countries: many failures

In May 2004, the Authority initiated an informal request to the EU's Directorate General for Competition (DG COMP), inquiring whether the EU's ongoing investigation of a cartel in the electrical equipment industry had revealed any information about the cartel's activities in Turkey.

DG Comp replied that it could not provide any information to the TCA because the material collected was confidential and subject to the disclosure prohibition applied to such material by Article 28 of the EU's general competition regulation (No. 2003R001). DG COMP also noted that, under Article 36 of the Customs Union Agreement, any information exchanges between Turkey and the EU were subject to "the limitations imposed by the requirements of professional and business secrecy ».

Positive Comity: theTurkish Experience

In June 2004, the TCA initiated a more formal request to DG COMP under Article 43 of the Customs Union Agreement. Article 43 provides that either the EU or Turkey may request the other party to initiate enforcement action if conduct carried out in the territory of the second party adversely affects the interests of the requesting party. Under Article 43(3), however, the second party retains full discretion to decide whether or not to initiate an investigation. The TCA's request arose from an investigation into a possible cartel in the coal industry that involved enterprises based in EU member countries but whose activities affected Turkish markets. The TCA sought an investigation by DG COMP and also requested that, if no EC enforcement action resulted, any relevant investigative information be provided to the TCA.

In its response, DG COMP referred to the discretion it retained under Article 43(3) and noted that the Commission saw no appreciable effect in the EU arising from the conduct in question. Further, the response observed that because any information obtained would have been seized during an investigation, EU confidentiality regulations would have prevented its disclosure to the TCA.

Multilateral agreement as a response to globalization: the WTO experience

Competition and the WTO

« Including competition law in the WTO under its basic, trade-oriented rules would subject the development of competition law to a different agenda, ie the trade development agenda, which involves different issues and dynamics and may be unduly restrictive.

In contrast, a commitment pathway strategy (…) provides the basis for a normative regime specifically designed to support competition law development. (…) It takes into account the need to embed competition laws in the societies and institutions on which it must depend for its effectiveness. (…) It adjusts the cost and burdens of agreements to the roles and capacities of the participants and thus maximizes the attractiveness of participation and enhances its likely effectivenss.

A pathway strtategy can be pursued on its own, but it may also be possible to create a separate competition law regime within the WTO ».

1) David Gerber, Global Competition, Oxford University Press, 2010

The discussion of the European Union proposal in the WTO

What the discussion in the WTO Working Group on Trade and Competition Policy was not about :

The discussion was not about creating a supranational antitrust law or agency

The discussion was not about the harmonization of national antitrust laws

The discussion was not about all aspects of antitrust law

The discussion was not about subjecting individual decisions of national Competition authorities to the Dispute Settlement Mechanism

The discussion was not about changing antidumping laws

The parameters of the discussion

The discussion was about how to address the issue of transnational cartels which defeat the purpose of trade liberalization or deprive trading nations of the benefits of trade liberalization

The main elements of the EU proposal, which was the focus of the discussion, were:

- Every country would adopt a competition law regime
- All antitrust (national or regional) laws would include a provision prohibiting hard core cartels but each country would remain free to include other provisions (on vertical restraints, abuse of dominance, merger control etc…).
- Competition laws would meet the WTO standards of transparency, non discrimination, procedural fairness.

The parameters of the discussion (III)

- A mechanism of consultation and voluntary cooperation on transnational hard core cartels between countries parties to the agreement would be established

- A WTO competition committee would be established to monitor the agreement and facilitate cooperation between Countries (for ex through peer reviews)

- Technical assistance would be offered to countries which do not have extensive experience in competition law

The discussions were largely focused on how much progressivity and flexibility should be provided for in a potential agreement, the extent of cooperation that parties to the agreement could get from other countries and under which circumstances failure to cooperate or to adopt a competition law would be actionable under the DSM

Plurilateral or mulilateral cooperation networks

Promote soft harmonization, non case specific cooperation and technical assistance:

OECD (Governmental Recommendations, substantial analyis)

ICN (Best practices ex Anti-cartel Enforcement Manual)

UNCTAD (Model law, The UN set, development dimension)

Conclusions

1) International trade and investment have grown significantly in the 1990s and the 2000s until the financial crisis in spite of the heterogeneity of national legal systems.

2) Conflicts due to the heterogeneity of national competition systems have not increased but have disappeared or significnatly decreased over time.

3) There are complementary ways to address the problems raised by the heterogeneity of competition law systems and the increasing globalization of economic activity.

4) Significant convergence among competition law systems, together with a proliferation of competition laws, have characterized the last two decades. There is no reason to believe that further progresses cannot be achieved on convergence, even if there is no one size fits all.

5) Voluntary cooperation between competition authorities in developed countries has developed significantly; however small or medium size-developing countries which are victims of transational anticompetitive have rarely been offered the benefits of bilateral cooperation.

Conclusions

6) Regional agreements are easier to negotiate than multilateral agreements and there are often deeper economic exchanges, more similar levels of economic development, more like-mindedness, and more commonalities in legal systems among neighbouring countries. However the governance of regional agreements varies greatly and so does their effectiveness.

7) Competition authorities promote soft convergence and cooperation among themselves but are weary of international agreements which require governement approval. Yet, their independence can limit their ability to promote convergence (for ex when such convergence requires legislative changes).

8) An agreement between the EU and the US on cartels, while welcome, would not address a pressing problem in global antitrust enforcement and would not be meaningful unless it included criminalization of cartels in Europe and the elimination of export cartels (which competition authorities cannot deliver without government involvement).

Conclusions

9) If progress is to be made in creating a more homogeneous and seamless Global antitrust law enfocement system, two pre-conditions have to be met:

- Economists have to make a compelling case for the usefulness of competition for economic development. So far, there is no clear link between competition intensity and innovation, no clear link between competition intensity and economic growth, no clear link between competition intensity and employment, no clear link between competition and poverty alleviation.

-Competition authorities have to recognize that competition law enforcement is but one of the elements which determine the intensity of competition on global markets and therefore they have to start a dialogue and join forces with policy makers in related fields (industrial policy, trade policy, investment policy, regulatory policy etc…) to establish the contours of a workable system of governance for global markets .

Thank you very much

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