UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

MULTILATERAL COMPETITION POLICY AND ECONOMIC DEVELOPMENT

A Developing Country Perspective on the European Community Proposals

by

Ajit Singh
University of Cambridge

UNCTAD Series on
Issues in Competition Law and Policy

UNITED NATIONS
New York and Geneva, 2004

NOTE

This is a revised version of a paper that was presented at the fifth session of the Intergovernmental Group of Experts on Competition Law and Policy, held in Geneva from 2 to 4 July 2003. The author would like to thank the participants for their valuable comments. Financial support for this project from UNCTAD is gratefully acknowledged. The author alone is responsible for the views expressed and any errors that may remain.

Please send any comments, inquiries and suggestions to:

Professor Ajit Singh, Faculty of Economics and Politics, University of Cambridge

Cambridge CB3 9DE

E-mail: as14@econ.cam.ac.uk.

Telephone: +44 1223350434

Fax: +44 1223740479

UNCTAD/DITC/CLP/2003/10

CONTENTS

Introduction

At the Doha Ministerial Conference of the WTO in 2001 a number of decisions were taken that were regarded by developing countries as controversial if not unhelpful. These included, notably, recommendations for work on the four "Singapore issues" comprising competition policy, investment, government procurement and trade facilitation, with a view to preparing them for possible negotiations. This paper is concerned with the first of those subjects – competition policy – and particularly with the question of what kinds, if any, of domestic and multilateral competition policies will be most conducive to economic development in emerging countries.

As far as competition policy is concerned, the following paragraphs of the Doha Declaration are relevant:

> "23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, **we agree the negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.**
>
> 24. We recognized the needs of developing and least-developed countries for enhanced support for technical assistance and capacity-building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organizations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.
>
> 25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity-building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them." (UNCTAD, 2002, emphasis added)

There is a dispute about the interpretation of the words highlighted in the last part of paragraph 23. According to the chairman of the Doha session, Mr. Youssef Hussain Kamel, the wording in that paragraph gave "each Member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that Member is prepared to join an explicit consensus".

This explanation by the chairman has been taken by many developing countries to imply that the negotiations on competition policy and other Singapore issues can only start if there is an explicit consensus among all countries on modalities. There is, however, a dispute about the interpretation of the term "modalities". The position of the European Community (EC) is that it is simply a minor procedural matter of setting out an agenda and a timetable for negotiations. As the concept

of modalities is not defined in the WTO Agreements, developing countries, on the basis of the practice with respect to modalities for negotiations on agriculture, attach a more substantive meaning to the concept. This includes a consideration of the following kinds of questions. What kind of competition policies should be considered in the negotiations – all kinds or just multilateral and plurilateral, or domestic as well as bilateral. What kind of burden would such policies impose on developing countries (DCs) and what can be done to relieve these burdens? The answers to these questions are important for defining the terms of the modalities to be followed and for the focus of prospective negotiations.

However, it is quite clear that we are far away from satisfactory answers to these questions. Therefore, any negotiations on the subject are premature. The Working Group on the Interaction between Trade and Competition Policy (hereinafter referred to as the Working Group) has made some progress, but there is still a need for a further period of reflection and clarification of issues between DCs and ACs (advanced countries). Developing countries thus have a substantive point that unlike Canada and the United States, which have had competition policies in their domestic economies for the last 100 years, until the end of 1980s, very few developing countries had any competition laws at all. Most of the 90 or so developing countries, which now have such laws, acquired them only during the 1990s.[1] However, for such laws to be effective new institutions have often to be created, judges and lawyers trained, and the laws understood and assimilated by the corporations and the people. All this takes time, perhaps a couple of decades for the appropriate social and legal culture of competition and competition policy to evolve. In this context, Professor Scherer (1996, p. 18) rightly reminds us:

> "…it must be recognized that historically, a considerable time interval passed before national competition policy enforcement agencies learned how to do their work effectively. Seven years elapsed between passage of the US Sherman Act and the first Supreme Court prohibition of a price-fixing ring; twelve years between the Treaty of Rome and the first imposition of fines against European Community Cartels; eleven years between the creation of the UK Monopolies and Restrictive Practices Commission and the first prohibition of a cartel by the Restrictive Practices Court; and 20 years between the post-occupation amendment of Japan's Anti-Monopoly Law and a Fair Trade Commission attack on illegal cartels, including the Commission's first criminal price-fixing indictment. Before serious enforcement can proceed, much learning must occur, and political support must be built."

In these circumstances, it is perfectly legitimate and reasonable for developing countries to argue that they do not have sufficient experience with these laws to be able to participate meaningfully in a treaty concerning multilateral competition policy.

The purpose of this paper is educational and clarificatory: it reviews some new developments in the international debate on the subject.[2] The paper provides an economic analysis of the main issues involved in the new EC proposals for a multilateral competition treaty. These proposals, which have only recently been tabled by the EC in the WTO Working Group on the Interaction between Trade and Competition Policy, involve significant concessions to the criticisms, that had been made of these countries' earlier submissions. The latest EC proposals, which are

[1] See table 1 in the Annex, which provides information, collected by UNCTAD, on how many countries have competition laws and when those were established. See also World Bank (2002).

[2] The paper is thus squarely in the "non-negotiating educational mode" as described below.

undoubtedly more modest than those put forward by this group of countries in the previous five years, are outlined in section II.[3]

An essential issue for this paper is whether these new EC proposals go far enough, or more to the point, are scaled down sufficiently so as not to harm the developmental interests of emerging countries. Will the adoption of these proposals at both the national and international levels be helpful for developing countries or would this hinder their development? Are there alternative policies, either at the domestic or at the international level in the area of competition policy, which will be superior to those proposed by the EC?

There is, however, a prior question: why should competition policy, which is normally a domestic issue, be considered at all at the WTO, an organization that concerns itself with multilateral issues in the field of trade? To elucidate the links between the two subjects, the WTO Working Group mentioned above has been discussing for several years in a "non-negotiating educational mode" the relationship between international trade, competition and competition policy in the domestic economy. These discussions have been able to indicate the nature of some of the links between these matters. There is, however, no consensus on the robustness of these links or whether they are strong enough to warrant the need for a multilateral competition policy, let alone for an agreement on such a policy under the aegis of the WTO. However, the Working Group has at least provided a forum for clarifying the issues involved and for considering proposals such as those of the EC on trade and competition policy matters. Singh and Dhumale (2001) expressed their great disappointment that the Working Group's considerable efforts did not appear to be development-oriented. Indeed, it was argued that the basic concepts being used in the Group's discourse were inimical to the interests of developing countries and that new definitions and concepts were required in order to address adequately the concerns of developing countries. Singh and Dhumale went on to provide a few of these new concepts and definitions. This issue will be examined further in section IV in the analysis of the so-called core WTO concepts: transparency, non-discrimination and procedural fairness.

The rest of the paper is organized as follows: section I outlines the EC's proposals for multilateral competition policy and section II discusses whether DCs need a domestic or an international competition policy, or both. The question what kind of such policies at the domestic and international levels will be appropriate will be examined in section III, which includes an analysis of the relationship between industrial policy and competition policy with particular reference to the East Asian experience. In the light of that analysis section IV provides a critical examination of the new EC proposals for establishing a multilateral competition policy. Section V suggests an alternative policy framework that may better meets the needs of developing countries, while section VI sums up.

[3] See European Community (2003).

I. EC Proposals on multilateral competition policy[4]

The European Community's revised and more modest proposals for a multilateral competition policy have the following main features:

(a) All member countries should declare hard-core cartels to be illegal. Countries should cooperate in implementing such a ban. Other than this ban on hard-core cartels countries can have any provisions they like in their competition laws.

(b) However, these domestic competition laws should be in conformity with the core WTO principles of most favoured nation, non-discrimination, national treatment, transparency and procedural fairness.

(c) The proposal is for a multilateral agreement under the WTO and one that is therefore subject to its dispute settlement mechanism. In response to objections from both rich and poor countries, the EC has agreed to limit the scope of the application of WTO's Dispute Settlement Understanding (DSU) in the manner specified below:

  (i) Thus the proposals stress that "WTO dispute settlement would be strictly limited – as is also currently the case under the DSU and the covered agreement – to complaints brought forward by WTO Members. Private individuals and firms would have no standing therefore" (European Community, 2003, p. 2). There will be no obligations regarding the conduct of individual competition cases.

  (ii) The proposals suggest: "we also agree with this view, and strongly believe that dispute settlement should be strictly limited to assessing the overall conformity of the actual law, regulations and guidelines of general applications against the core principles contained in a WTO agreement, including a ban on hard core cartels".

  (iii) In addition, the proposals indicate that the DSU would recognize the "specific circumstances of developing country members" in considering a dispute.

  (iv) The proposals also contain an informal peer review in relation to compliance and issues of confidentiality. "Unlike dispute settlement which would apply to the obligations contained in the WTO competition agreement (cf. above), peer review would aim at a wider range of competition law and policy matters. As a WTO competition agreement would merely set out a limited number of binding obligations, WTO Members would remain at liberty to decide for themselves whether or not to include additional substantive areas in their domestic competition law, including e.g. abuse of dominance. Given the distinct nature of peer review, it would be natural and indeed appropriate for such a process to address the entirety of a domestic competition law framework". This kind of peer review would complement the provisions of the DSU.

  (v) In addition, the proposals envisage that "a consultation and a co-operation mechanism would be a key component of any WTO competition agreement. A range of issues could be raised under the consultation provisions of such an

[4] I am grateful to Dr. Kern Alexander of the Judge Institute of Management Studies in Cambridge for helpful discussions on this subject.

agreement, including one WTO Member's assessment – rightly or wrongly – that the domestic legislation of another WTO Member does not meet the standards contained in the WTO agreement, in particular as regards the core principles of transparency, non-discrimination and procedural fairness".

On the face of it, these EC proposals would seem to be entirely reasonable and ones to which nobody should be able to object. The claim is that the proposed multilateral competition policy for the whole world involves only a minimum set of rules on which all right-minded people everywhere would agree. It is recognized that many developing countries will, however, not have the capacity to implement competition laws, and so assistance with capacity building is an important part of the EC proposals. How could anyone be against the banning of hard-core cartels, especially once they have been so labelled?

As we shall see below, the answer to this rhetorical question is not straightforward. Economic theory and analysis have a much more sophisticated and nuanced view of cartel price-fixing. But before we examine this issue in section V below, it may be useful to set out what in an ideal world would be the best kind of competition policy, domestic or multilateral, that would be most conducive to economic development. That perspective will give us another benchmark against which to assess the EC proposals.

II. Domestic and international competition policies for developing countries: Developmental perspective

II.1 Need for domestic and international competition policies

It was noted above that few developing countries have had experience with competition policies over any length of time. Most of these countries have not had competition policies until recently. One of the main reasons for this was that such policies were probably not needed as Governments often intervened directly in economic activity, setting prices for essential products. (Even an advanced country such as Belgium did not have a competition policy until 1987.) However, with worldwide deregulation, privatization and liberalization, the situation has changed and developing countries now need a competition policy. The growing role of the private sector in the economy needs to be monitored to ensure essentially that public monopolies are not simply replaced by private monopolies.