

## Globalisation: *Enhancing Competition or Creating Monopolies?*

### **Executive Summary**

The need for an effective competition regime at national as well as some kind of arrangement at the international level to curb anti-competitive conduct of the firms has been felt ever since the processes of globalisation and liberalisation have begun. Discussions taking place on various international fora such as the WTO (World Trade Organisation), which has formed a Working Group on the interaction between Trade and Competition Policy and UNCTAD (United Nations Conference on Trade and Development) adequately reflect the same. Though at present around 80 countries have a competition law, many countries, mainly in the South, are in the process of enacting a new competition law or amending the existing one to suit the new challenges.

Developing countries, more or less, agree on the fact that globalisation, being fostered by trade and investment liberalisation, is adding newer and complex dimensions to definitions of market structures and pushing its competition agencies to redefine concepts like 'dominance' *et al*/to suit the changing context. Interestingly, the extraterritorial dimensions of restrictive business practices has spurred competition agencies of developing countries to start thinking about cooperation with their counterparts, both in developed and the developing world.

However, when it comes to any multilateral arrangement for the anti-competitive behaviour having potential for cross-border abuses, developing nations are over-cautious and at times skeptic. This is mainly because of their experience with the present multilateral trading system under WTO, where the game of market access is normally being played under the guise of free trade, detrimental to the third world interest. They apprehend a similar game under any multilateral arrangement on competition rules.

But at the same time sections of the civil society in the South are in favour of some sort of bilateral, regional or multilateral arrangement to deal with cross-border competition concerns. It will be interesting to see how they influence their respective governments.

This briefing paper argues for a multilateral framework on competition rules and tries to do away with misconceptions with respect to the same. It further throws light on development dimension of competition law/policy and how to built-in such dimension into the multilateral framework in order to make it an equitable system.

The Paper further argues that it is high time that a binding multilateral agreement on competition is on place, and that time should not be wasted in discussing about the feasibility and opportunity of launching negotiations on a multilateral framework on competition at the WTO. The reason being that large multinational firms are merging into still larger mega-corporations apart from increasing probabilities of international cartels in order to capture more and more market. Most importantly, though developed countries are able to somehow deal with these, developing countries are generally in a weak position to take effective actions in this regard.

The Paper, in conclusion, highlights the UNCTAD's contribution towards the whole exercise and its future plans. In particular, as resolved in the UNCTAD X, it recommends that the UNCTAD should study in-depth the developmental impact of possible agreements on competition, the relationship between competition and competitiveness as well as trade-related aspects of competition. Finally the Paper makes some important recommendations to the governments around the globe.

## Introduction

### *A global world in the new millennium*

The rapid pace of innovation and restructuring which is taking place in both the so-called 'old' and 'new high-tech' economies point to one clear fact: at the dawn of the new millennium, the new economy will be quite different from the relatively static, old economy we have experienced in the half-century or so since the end of World War II.

On the one hand we have formidable technological innovations - such as e-commerce and telecom in general, which accelerate the pace of globalization, and hence, encourage direct rivalry or competition among diverse types of suppliers in very distant – and initially different – markets. In time this trend will tend to level out. On the other hand, we have a formidable effort made by existing firms to adapt to changing structures, by competing fiercely to satisfy their constituencies. These constituencies are not only the final consumers, but also, their shareholders and large institutional investors. This leads them to accelerate the pace of mergers and acquisitions, and global alliances, in an effort to constantly improve their returns on investment (RoI) and to increase their "shareholder value". This accelerates the pace at which large firms become even larger through repetitive concentrations, and reduces substantially the number of main actors in each sector of economic activity.

Constantly looking for achieving new economies of scale, a handful of mega firms might end up controlling world markets either by colluding among themselves or by concentrating into world monopolies. Some sectors like civil aviation and aeronautics and space for example, have almost reached that stage. Others, like automobiles, telecommunications, banking and financial institutions, to cite just a few, are rapidly consolidating. Not one day passes without reading about a still larger merger or acquisition in the press.

In the face of such formidable processes of change at the global level, action to set up and implement competition rules is broadly limited by the borders of

nation-States. Large trading powers such as the US or the EU have competition rules and apply them when anticompetitive practices affect their markets. However, restrictive business practices (RBPs) do not affect all markets alike.

An international merger might well be authorized in a large country where sufficient competition exists after a merger takes place between two multinational firms, while in a smaller country the same merger might result in unacceptable dominance or in pure monopoly of their combined subsidiaries.

An international cartel might avoid including certain countries or regions where antitrust rules are very rigorously implemented, while controlling markets where such rules are non-existent or ineffectively applied.

Hence the need for the smaller trading partner - possibly a developing country - to be able to take effective action. For this it should (i) have a domestic competition law and control authority; and (ii) the authority should have the means to secure its findings and implement its decisions, which is not always an easy task in the absence of any binding international arrangement.

## **Misconceptions on the role of competition**

The Seattle events have highlighted the concerns of interest groups in both developed and developing countries. It ranges from fears about the adverse effects of worldwide changes taking place in particular under the nickname of "globalisation" to the spreading effects of the Asian crisis in emerging markets.

The skyrocketing income-distribution gap between rich and poor, both inter-country and intra-country including that within so-called rich countries, add to their concerns. The problem is that such concerns, expressed by widely diverse interest groups, aim indiscriminately at the forces behind globalization as well as those in the international organizations who try to promote equitable multilateral rules of the game aimed at making globalisation more development oriented.

### **Box 1: UNCTAD's concern for development**

UNCTAD's concern for development means that (i) it seeks to help all countries, in particular developing and least developing countries (LDCs) to strengthen their competition policy and capacity of implementing their competition rules at the national level; and (ii) it aims at assisting the international community, and in particular the developing countries in their efforts to develop cooperation at all levels, including through multilaterally agreed equitable principles and rules of competition.

A first step in this direction was achieved with the adoption, in 1980, of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices called as 'the Set'. While the principles contained in the UN Set are still fully valid today, the UN Set is in the form of a recommendation unanimously adopted in a General Assembly Resolution, but it is not a mandatory instrument.

First, it should be noted that many interest groups vociferous at Seattle had contradictory objectives, often aimed at protecting vested interests in industrialized countries against competition coming from the developing world. This "unholy alliance" was not defending the interests of developing countries.

Secondly, in developing countries themselves, the idea of a rules based system is often resented because it is felt that it would be better to continue to live in a world without rules, rather than to be constrained by rules which are set in large part by the developed world experts, especially from the larger trading partners, who basically aim at safeguarding their vested interests.

Existing rules derived from the Uruguay Round, for example, are considered by some to have been tailor made to serve these interests by:

- liberalizing sectors where industrialized countries had all to gain;
- avoiding liberalisation in sectors such as agriculture and textile;
- strictly controlling intellectual property rights; and
- allowing antidumping systems which could easily be abused to halt too much competition.

The skepticism expressed against investment and competition rules at WTO largely derives from this sentiment.

It should be recalled in this connection that at the Singapore WTO Ministerial Meeting in December 1996, the developing countries insisted and obtained that while the WTO Working Groups, respectively on investment and competition were established, UNCTAD and other organizations active in these areas should be consulted so as to ensure that the development dimension was fully taken into account. There is a serious case in favour of exploring the possibilities of reaching agreement on rules that respect the "development dimension" and hence, would be advantageous for smaller economies and especially for developing countries.

## **Competition and the development dimension**

The path to development is specially delicate, as two contradictory realities have to be reconciled. On the one hand, it is clear that without competitive pressure it is difficult – if not impossible – to achieve self-sustained, efficient sectors which will reach international competitiveness. On the other hand, economies of scale often necessitate ever-larger firms, operating in global markets. And for such economies of scale, small, lesser-developed countries, having internal markets with low purchasing power, are clearly at a disadvantage.

This disadvantage is often cited by those who believe that only monopolies will allow developing country firms to have a chance to attain the necessary critical mass and achieve economies of scale to allow them to resist foreign competitors. They also accuse supporters of free trade and competition rules of aiming at opening developing country markets in order to give up local industry to foreign competitors.

Local firms are usually highly protected from foreign competition, either by high tariff walls, or simply by a restriction of foreign entry to preserve a domestic monopoly. Yet empirical evidence has amply demonstrated that total protection from competition creates lame-duck enterprises, unable to sustain competition, eager to take advantage of monopolistic rents for a few, while diverting natural resources of already backward economies still further away from optimal allocation of these highly needed resources for development. Often such protected sectors concern the basic infrastructure of the economy which in fact should be the most effective sectors, because of their trickle-down effect over the development of the rest of the economy.

If, because of monopolistic protection, essential utilities such as energy, telecom, transport, banking and insurance are kept inefficient and backward, the rest of the economy that depends on these essential facilities for development, will be kept in a state of backwardness and underdevelopment.

For instance, Switzerland, in spite of being a developed country, has had many monopolies until recently. Take the Swiss telecom sector for example. Since the end of the monopoly in the sector, prices have come down by half; at the same time consumer-service quality has considerably improved. More so, there has been increase in the productivity of the economy as a whole, as telecom is used by all other sectors of the economy. The same applies for transport sector. If rail transport of merchandise is kept inefficient and dear, it is the whole economy that suffers. If road transport is kept inefficient and expensive because of truckers' cartel, it is the whole economy that suffers, and so forth. Hence the special importance of securing efficient, competitive infrastructure in order to accelerate development.

There are, however, cases where opening local industry to competition, especially to foreign competition, too abruptly, has wiped out the local companies. These are especially so if local producers have been shielded from competition for too long and are therefore unable to face such competition suddenly. In order to avoid this, a certain transitory period might be necessary.

Certain sectors might need aid to restructure and improve their competitiveness. Adjustments may need to take place.

Depending on the level of development, lesser-developed countries might need longer-term transitory period in certain sectors than other, more advanced countries. Hence the need for a certain degree of flexibility in relation to the pace of reform, especially in the least-developed countries, which might necessitate a higher degree of State intervention to make up for immediate necessities and emergency situations and because of more frequent cases of market failures.

It should be noted that the less developed countries often face more market failures than countries that are at a more advanced stage of economic development. For example, bad roads and broken down, intermittent transportation networks create excessively small and segmented markets in remote areas of the country. It is easy then, for local suppliers to take advantage of temporary monopoly situations to hoard supplies and increase prices of goods they supply. This often results in worse sales conditions such as higher prices and poor quality of services. Also, low capital formation and excessively high interest rates reduce the business opportunities, and there might be absence of entrepreneurs even where opportunities would exist in more advanced countries.

Examples abound to explain why even the poorest countries need competition policy to ensure that market failures do not result in monopolies which further

aggravate the economic backwardness. Therefore, irrespective of the level of development, competition policy and the means to implement it should exist in all countries, including the least developed ones.

Given the considerable difficulty for governments to fine-tune the economy by achieving the best mix of competition and, where necessary, protection and government support; it is essential for developing countries to have the flexibility to decide how they will conduct their economic development. They should have the liberty to decide which markets need to be shielded (temporarily at least), from full-scale external competition, and which ones should be subject to full-fledged competitive forces, and when.

### **The need for a “development friendly” competition framework**

At the national level, countries should be free to decide if they need or not, to adopt a comprehensive competition law and establish a competition authority. International Organizations, such as UNCTAD recommend (see for example, World Investment Report 1997 and the UN RBP Set) that all countries, especially when liberalising and opening up their markets to foreign competition, should adopt and have the means to implement modern competition laws and establish a powerful competition authority capable of understanding the issues at stake and of implementing the laws. Such laws should be tailor-made, taking into account the specificities of each country, its level of development, judicial system, etc. However, even viewing the fact of increasing instances of market failures in lesser-developed countries, it is a mistake to believe that this kind of legislation is a luxury which is useful only for advanced economies.

While domestic competition legislation is a necessity, such legislation is often not sufficient to come to grips with all types of anticompetitive practices, particularly if such practices originate from abroad, and have adverse effects within the national boundaries. For instance the national competition authority may be unable or face difficulties in obtaining the proof of violation of the law when such body of proof is situated abroad. It may also be difficult to apply a decision or to impose a fine, if assets are held abroad or if there are conflicts of jurisdiction with the country where these firms originate, and/or, if pressures are exerted by their government.

Cooperation agreements in the field of competition policy can take bilateral, regional or multilateral forms. Bilateral agreements exist mainly between powerful trading partners, while countries willing to join regional groupings such as the European Union have signed such competition cooperation agreements with the EU.

At the regional level, many projects of regional cooperation in the field of competition exist, including some which envisage the adoption of rules to be implemented at supra-national level. So far, however, only the European Union has achieved this. Agreement on a multilateral competition framework is also envisaged

at the WTO, as part of future negotiations of the world trading system.

### **The urgency of binding multilateral rules**

While time is lost in discussing about the feasibility and opportunity of launching negotiations on a multilateral framework on competition at WTO, large multinational firms merge into still larger mega-corporations. Developing countries are generally in a weak position to take effective action with respect to such concentrations of market power when they have anticompetitive effects on their own territory. The same can be said of international cartels adversely affecting their markets. So far, the only effective action to halt anticompetitive practices such as the international vitamins cartel is that taken by large trading partners, such as the US or the EU.

Obviously, countries take action when such practices affect their own domestic markets, and not when the adverse effects are felt exclusively in third countries, while their firms are able to reap the monopolistic (or cartel) rents, increasing export revenues and profit remittances. In such case, smaller economies including developing countries badly need the support of equitable multilateral rules with a binding character for all trading partners.

Obviously, if such rules do not take into account the specific needs of the developing countries, especially a certain degree of flexibility as discussed above, it might well be better not to adopt them. But in view of the importance of the stakes at issue, it is worthwhile making every effort to obtain a fair deal in a binding agreement.

Most developed countries have, or have had for a long time, exceptions to their competition rules. It should be easy to understand that less developed countries might need certain exemptions from their competition law. One way of making such a competition framework binding, would be to place it under a special WTO dispute-settlement mechanism. A mechanism, which in principle would provide equitable treatment to all parties, large or small, developed or developing.

### **In search of an equitable multilateral framework**

The GATT/WTO system is based on a number of fundamental free-trade principles. The “most favored nation” principle, backed with “non-discrimination” and “national treatment”, as well as “transparency” and “reciprocity” and “elimination of quantitative restrictions” are principles which have shown their value in roughly half a century of trade-liberalization efforts.

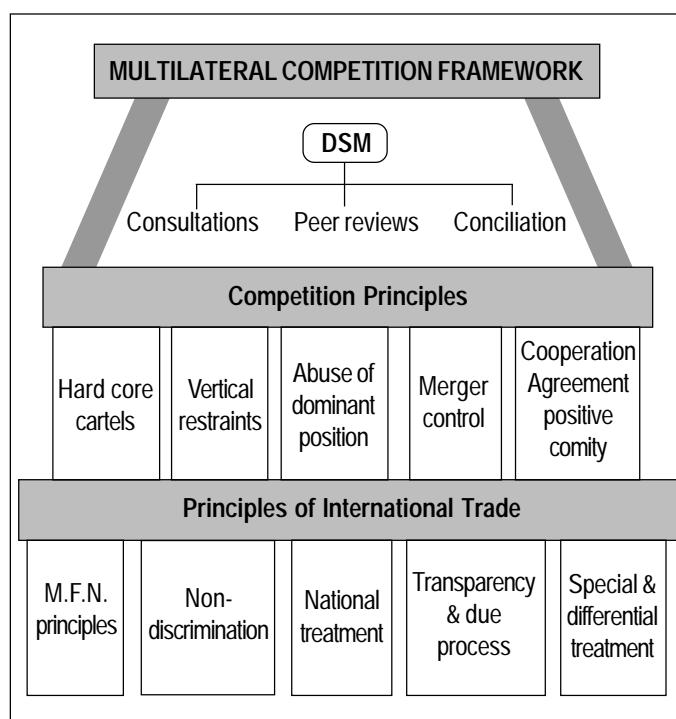
The GATT has also adopted another principle, especially important for the developing countries, for which UNCTAD has been a pioneer since the second UNCTAD Conference in Delhi, in 1968: the principle of “special and differential treatment for developing countries”. With time, that principle, which was mainly applied to the General System of Preferences, has evolved in the

Uruguay Round Agreements to offer mainly delay periods (5 years for developing countries; 10 years for the LDCs) and some technical assistance for developing countries to be able to fully implement the new rules.

What would be needed for a multilateral framework on competition, is recognition of all the basic GATT/WTO principles listed above, including the S&D principle for development. Hence, a competition agreement would have to conform to the basic principles of non-discrimination, reciprocity, transparency as well as S&D treatment for developing countries. The latter would essentially be used as waiver for developing country governments to have the right to intervene where market failures make it necessary, in sectors which they believe are not ready to sustain full-fledged competitive forces. Such a regime of development-related exceptions would be dependent upon the level of development and would have to be constantly revised by the country in question to ensure it is economically sound. The more developed a country, the less exceptions would be needed or tolerated.

The WTO competition agreement would be subject to a dispute-settlement mechanism, which decisions would be binding, essentially to determine whether national competition rules are applied in conformity with the basic GATT/WTO principles listed above (*see chart*).

The agreement could also include general rules prohibiting cartels and other restraints to competition, including concentration of market power, depending on the degree of advancement of discussions in these areas where the DSM (Dispute Settlement Mechanism) would be used to ensure that decisions of national competition authorities which are in conformity with the basic principles expressed above are actually implemented by all parties, large or small, developed or least developed countries.



For example, if there was agreement to ban collusive tendering and hard-core international cartels, it could be agreed to make such a ban mandatory.

For other issues where more time would be needed by the international community to agree, negotiations could continue while general principles would remain in the form of a recommendation, for example on abuse of dominance or on vertical restraints.

The DSM would not, however, be empowered to second-guess the results of decisions of national competition authorities, except with regard to the basic principles (non-discrimination, etc.) enunciated above. Such a multilateral system would nevertheless, improve considerably the implementation capacity of national competition authorities everywhere in the world, and would also provide a benchmark effect to strengthen the position of competition authorities internally, i.e. their status *viz.* their own government.

## Conclusion

*UNCTAD's contribution in building a new architecture of trade and competition*

UNCTAD X, following on the steps of the WTO Singapore Ministerial Declaration of 1996 which called upon UNCTAD *inter alia* to defend the development dimension, decided that: "In addition to national efforts, the international community as a whole has the responsibility to ensure an enabling global environment through enhanced cooperation in the fields of trade, investment, competition and finance (...) so as to make globalization more efficient and equitable."

Accordingly, the Conference decided that UNCTAD should study in-depth the developmental impact of possible international agreements on competition and that "UNCTAD should also further study, clarify and monitor, including through specific country and case studies, the relationship between competition and competitiveness as well as trade-related aspects of competition".

With its experience with the UN RBP Set and its special position in responding to the needs of the developing countries, in particular the least developed, UNCTAD is well placed to contribute to the creation of a new world economic architecture based on efficiency considerations resulting from the impetus of competition, while respecting equitable rules. Thus making it possible for less developed countries to participate successfully in the challenges of the new economy resulting from the continued globalization of world trade.

In this respect, UNCTAD is now well engaged in studying and further clarifying the nexus between competition, competitiveness and development and further assist developing countries in their search for a multilateral trading system aimed at making globalisation more efficient and equitable.

## Recommendations

### Countries should:

- Formulate/enact a national competition policy/law that should provide for a competition authority with means to secure its findings and implement its decisions. This is a must irrespective of the fact whether it is a developed, developing or least developed country.
- The competition law should be commensurate with the level of development of the country and it may provide for sectoral or other exemptions necessary for the country.
- Negotiate cooperation agreements with other countries to deal with cross-border competition concerns. The agreement could be bilateral, regional or multilateral.
- Negotiate for an effective and equitable multilateral arrangement of competition rules, particularly to deal with cross-border effects of M&As and international cartels.
- Actively take part and contribute to the UNCTAD's ongoing efforts with respect to competition policy/law.
- Educate officials, consumers, business, media and other stakeholders about the competition issues.

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