

Trade and Competition Policy in the WTO

by Cecilia Oh

Developing countries could benefit from having an appropriate competition policy, contends Cecilia Oh, but not from a multilateral competition framework under the aegis of the WTO, for the latter would likely hinder the growth of domestic enterprise capacity.

1. Background

In Cancun, one of the most important decisions for Ministers will be whether or not to launch negotiations on new WTO agreements on investment, competition, transparency in government procurement, trade facilitation. These four "new issues" are being pushed primarily by the EU, aided by the other Quad countries (Japan, Canada and the US) in varying degrees of force depending on the specific issue of their preference.

Although most developing country governments have stated their objections against the launch of negotiations on the new issues, there are fears these governments may be pressured into agreement at Cancun. Prior to, and during, the Doha Ministerial Conference, manipulative negotiating tactics, undemocratic and non-transparent decision-making processes were used to push and pressure developing countries into a grudging acceptance of an expanded WTO mandate on the new issues.

In the Doha Ministerial Declaration, Ministers recognized "the case for a multilateral framework of competition policy to enhance the contribution of competition policy to international trade and development" and agreed that "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" (Paragraph 23). The Doha Declaration also provides identical mandates for the other new issues.

2. The Doha Mandate for Trade and Competition Policy

The Doha Declaration implies that negotiations on

competition policy would be launched after the Cancun Ministerial Conference, subject however, to an explicit consensus on the "modalities" of negotiations. This convoluted text was the result of manipulative manoeuvres by the developed countries to insert language to commit WTO Members to start negotiations on a multilateral competition framework (MCF), and the attempts by developing countries to block such language.

In the final moments of the Doha Conference - on the insistence of a number of developing countries - the Chair of the Conference provided a clarification of this mandate. He said that the reference to explicit consensus on modalities meant that it was a pre-condition for the commencement of negotiations and that any Member could prevent the start of negotiations by withholding the consensus.

The Doha Declaration further instructed WTO Members to focus on the clarification of six elements; i.e., core principles of transparency, non-discrimination and procedural fairness, provisions on hardcore cartels, modalities for voluntary cooperation and support for progressive reinforcement of competition institutions in developing countries through capacity building (Paragraph 25). This work would be undertaken in the Working Group on the Interaction between Trade and Competition Policy (established by the Singapore Ministerial Conference in 1996).

Paragraph 25 also explicitly requires that "full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them". Developing countries have thus interpreted this to be the central focus of the clarification process, which requires consideration of the

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need for appropriate flexibility for developing countries to develop and implement trade and competition policies that meet their development needs and interests.

3. Appropriate Forms of Competition Policy for Developing Countries

Competition law and policy, in appropriate forms, are undoubtedly beneficial including for developing countries. Whilst not denying the need for regulation to prevent abuse of monopoly power and other anti-competitive practices, the key question is what form of regulation is appropriate for developing country needs.

From a development perspective, there is a fundamental imperative to build, develop and re-inforce national capacity, especially through domestic enterprises developing the scales and co-ordination necessary to enable them to compete effectively in the face of large-scale intrusion in the domestic economy, as a result of increasing liberalisation. Development of domestic enterprise with sufficient economies of scale is crucial for diffusion of technology and adaptation of imported technologies to domestic circumstances; domestic economic integration with spill-over effects in different sectors of economic and employment creation. This requires protection from the “free” and full force of the world market for the time it takes for the local capacity to build up. It also requires a vital role for the state, which has to play the role of nurturing and encouraging domestic firms. Therefore, competition policy should complement national objectives — and these objectives may range from a comprehensive national industrial policy, the promotion of certain vital sectors and the enhancement of capacity of domestic entrepreneurs and farmers.

There are different approaches to competition policy and law. The European and the US models of competition policy represent an approach (although with important differences) that puts competition policy at the forefront and seeks to control and regulate anti-competitive and monopolistic behaviour of large corporations. There are limitations of this approach, namely; the over-arching focus on competition *per se* in which other social and economic considerations are secondary and the failure to address areas in which competition can be subjected, and promoted by, co-ordinated support for domestic industries to counter-balance existing big companies.

The Japanese model of the 1950-1970s, which locates competition policy within an industrial policy and the overall national policy objectives, provides an interesting contrast. The Japanese model of that time represents a more flexible approach to competition policy, premised on the application of positive discrimination between the needs of domestic enterprise for the development of a domestic economy against the market access needs of foreign enterprises in the local economy. Whilst the Japanese approach, in terms of economic theory and development-friendly policy would appear to be one more suited to developing country needs, the pressure in the

WTO to negotiate a MCF would force developing countries to adopt a diametrically opposite model of competition policy.

With respect to the international economy, it would also be important to curb the mega-mergers and acquisitions taking place, which threaten the competitive position of local firms in developing countries. World Bank analysis highlights the fact that the most important restraints on competition are policy barriers to trade. Subsidies and trade barriers in agriculture, and trade barriers in clothing and textiles, in the developed countries have adverse effects on developing countries. In addition, anti-dumping actions have been a favoured vehicle of the developed countries to restrict competition from developing countries' products. Restrictive business practices of large firms also hinder competition. Yet, calls to address these issues also do not find favour with the promoters of a MCF in the WTO.

The main pre-occupation of the proponents of the MCF seems to be focused on the need for foreign firms to be accorded “national treatment”. This implies that foreign firms and their products be given equal or even better treatment than that given to local firms. It would curb the right of developing country governments to provide advantages to local firms, and local firms themselves may be restricted from practices, which are to their advantage.

4. Clarification in the Working Group: Divergence, not Consensus

The most insistent proponent of a multilateral competition framework is the EU, which had been pushing for inclusion of competition in the WTO since 1996. The EU has since “lowered its ambitions” in light of the resistance to their original proposals for a competition agreement in the WTO, which did little to disguise their market access objectives. Nevertheless, current EU proposals still create problems for the majority of developing countries.

The proposals have the three main features:

- 1) an prohibition on hard core cartels domestic legislation,
- 2) domestic competition laws shall be in conformity with the so-called core WTO principles of non-discrimination, transparency and procedural fairness, and
- 3) the multilateral competition framework is subject to the dispute settlement system.

Discussions in the Working Group reveal major differences between the proponents of a multilateral framework on competition policy, such as the EU and Japan, on one hand, and developing countries, including India and some African countries, on the other. There is also some divergence in the views of the EU as between and other developed countries, such as the US, Canada and Korea. The views and positions of WTO Members on the elements identified for clarification clearly indicate that the clarification process has not engendered a common understanding of the issues, much less any agreement, between them.

4.1 Core principles — non-discrimination, transparency and procedural fairness principles

The proposal is for the principles of non-discrimination, transparency and procedural fairness principles to be made binding on all Members, in that they should be applicable to the entirety of a competition law that is adopted in a country. Developing countries have argued that these principles not universally applicable to all issues, developed as they were in the context of the original purpose of the GATT as an agreement to facilitate reduction of barriers to international trade in goods. It is not self-evident that it is either appropriate or desirable for these principles to be applied to competition policy.

Transparency: The proposal is that this principle should cover all aspects of competition regime - from legislation, rules and institutional structures to decision-making processes, including decisions on sectoral exclusions and exemptions. This would represent an extension of the transparency requirement in the WTO (GATT, Article X) which is limited only to the publication of trade regulations and does not extend to decision-making. There may even be a case for narrowing this remit, as the requirement for publication of “judicial decisions and administrative rulings of general application”, which would be unduly burdensome and potentially unworkable in the context of competition policy. There is also a questioning of the insistence of the proponents in excluding confidential information from transparency requirements, when such information will increase effectiveness in enforcement.

Non-discrimination: The current EU proposal is for the non-discrimination principle to be applicable only to de jure discrimination; i.e., applicable only to discrimination contained in the legislation, not to how legislation is applied in individual cases. The extension of the national treatment principle to a possible MCF may mean that “national treatment” has to be ensured for foreign firms (and their goods and services) vis-à-vis local firms in the domestic market. Such “equality” would only accentuate the inequality in market outcomes, since local firms are generally smaller than the large foreign firms and transnational corporations (TNCs).

Procedural fairness: A key component of this principle is the guarantee of rights of access to the system of appeal, including right to reasoned final decision providing detailed grounds on which such decisions were based, and the right of parties to be heard. The concern is that developing countries with dissimilar legal systems to developed countries, or with insufficient resources will run the risk of not meeting the requisite standard of procedural fairness. Notions of fundamental fairness differ among legal systems and political and legal cultures, and there is as yet no broad consensus on the meaning of procedural fairness in the context of competition law enforcement.

4.2 Hard core cartels

The EU has insisted on the regulation of hard core cartels in the proposed multilateral competition framework, and

an obligation at national level for the enforcement of this prohibition. A fundamental problem with this proposal is that there is as yet no generally accepted definition of hard core cartels. Moreover, the assumption that all hard core cartels have adverse impacts for all countries in all markets at all stages of their development is questioned. The experience of some Asian countries in which cartelization was, for a time, an element of their industrial policies, challenges this assumption. In addition, nearly all developed countries have had exemptions (and continue to maintain some of them) on the basis of overriding economic or public interest grounds, or allow co-operation by small and medium sized enterprises (SMEs) to countervail the market power of a dominant firm on the other side. Although the proponents envisage the possibility of allowing existing (and future) exemptions or exclusions, there has not been sufficient clarity on the scope of such exemptions/exclusions.

Developing countries may not be able to define *ex ante* in their laws, which cartels would be exempted or excluded, and these exemptions and exclusions may change according to economic and socio-political exigencies. A multilateral obligation on hard core cartel prohibition will restrict the policy flexibility of developing countries.

4.3 Modalities for voluntary cooperation

In contrast to the other proposals for binding obligations, the proposals for modalities on co-operation (i.e. among countries) are non-binding in nature. Developing countries have questioned the rationale of developed countries in proposing merely voluntary modalities for cooperation, whilst insisting on binding obligations for other aspects. Binding obligations in the WTO assumed in respect of domestic competition policy will clearly weigh more heavily on the developing countries. In contrast, best endeavour clauses on co-operation serve little purpose for developing countries, which would require much assistance in their enforcement efforts.

4.4 The special needs of developing countries

Developing countries have raised the importance of their need to take certain policy measures affecting trade and competition, in line with their national developmental needs and objectives.

These include measures such as those taken: (i) to maintain and enhance the competitiveness of domestic firms, particularly small firms, including aspects of industrial policy related inter alia to financial assistance, subsidies, local content policy and preferences in government procurement; (ii) for promoting developing country products and services in developed countries, including reducing anti-competitive practices such as anti-dumping actions, subsidies (especially in agriculture) and tariff and non-tariff barriers; (iii) at international level to curb anti-competitive effects of intellectual property rights, the practices of TNCs, including the need to address the monopoly or near monopoly in certain sectors/areas of production and the anti-competitive effects of corporate mega-mergers.

Other issues include: (i) Measures to formulate the obligations and responsibilities of foreign firms to the host country; and (ii) Measures to formulate the obligation of the home governments to ensure the foreign firms fulfill their obligations vis-à-vis host countries.

5. Options at Cancun

In the preparations for the Cancun Ministerial Conference, three options for a decision on competition policy were put forward by the Chair of the Working Group. The first option is to start negotiations on a binding multilateral agreement on competition. The second is to have a decision on modalities for a framework for cooperation in the WTO, without any binding rules (termed the “soft agreement” approach). The third is for the continuation of the clarification process in the Working Group. The first option is, of course, that preferred by the proponents of the multilateral competition framework. The third option has been put forward by a number of developing countries, which have serious concerns regarding the implications of the MCF in the WTO. Whilst the second option of a “soft agreement” appears to be a formulation designed to strike a compromise between the first and the third options, it raises serious concerns that this may be a means by which the first option is re-introduced through the back door.

The history of GATT and WTO negotiations demonstrate that a fairly innocuous proposal is often put forward as a means of gaining agreement, in order to push through the real objective of the proponents. The mandate for negotiating the TRIPS Agreement, which developed countries contrived to infer from the Punta del Este Ministerial Declaration of 1986, is a good illustration. Furthermore, if the real intention is to develop non-binding rules or guidelines, it would be far more constructive to consider how the UN Set of Principles and Rules could be implemented in the context of UNCTAD, rather than duplicating the effort in the WTO.

6. Conclusion

There is not a convincing case for a multilateral set of binding rules to govern the competition policies and laws of countries. There are justified grounds for serious concern if such an agreement were to be located within the WTO, as it is likely to be skewed in a manner inappropriate for the developing country interests.

The EU’s objectives for a MCF to provide “effective opportunity for competition” in the local market for foreign firms, by applying “WTO core principles” would affect the needed flexibility for developing countries to define their appropriate model of competition policy and law. As stated in a communication by the EU, a WTO Agreement would help “lock Members into these principles”, thus “limiting the possibility of formal discriminatory treatment at a later point in time”. For countries without a competition framework, acceptance of the national treatment principle would thus deny them of the possibility of such measures in the future.

There is also the requirement for “explicit consensus” on the modalities of negotiations. As previously mentioned, there is little common understanding on the elements clarified by the Working Group, much less an explicit consensus on the modalities of negotiations.

Developing countries have explicitly voiced their objections to the start of negotiations on a MCF. At several recent regional meetings (the AU Conference of African Ministers of Trade in Mauritius, the Dhaka Declaration Conference of Least Developed Countries and the Meeting of ACP Ministers in Brussels), Trade Ministers of developing countries have clearly stated their unwillingness to start negotiations on agreements on competition and other new issues in the WTO.

More recently, in a communication to the Ministerial Conference, the group of Least-developed countries (LDCs) together with 15 other countries (Botswana, China, Cuba, Egypt, India, Indonesia, Kenya, Malaysia, Nigeria, Philippines, Tanzania, Uganda, Venezuela, Zambia and Zimbabwe) have made clear that they are in favour of a decision that would continue the clarification process in the Working Group, as opposed to the start of negotiations, on the new issues. The communication from these 40 developing countries also puts forward proposed text, which sets forth these Members’ views on the elements that require further clarification with regard to the new issues.

The communication is a criticism of the process and content of the draft text of the Cancun Ministerial Declaration. The developing countries state that the parts of the draft Ministerial Declaration dealing with the new issues, whilst indicating 2 options for the decision on the new issues, still provides a “distorted view” in that the Annexes to the draft Ministerial Declaration reflect only the views of the proponents of the new issues. Thus, the communication seeks to provide a proper reflection of the views of those Members which favour the continuation of the clarificatory process, by putting forward a listing of issues that require further clarification in the respective Working Groups.

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CECILIA OH is a representative and Legal Advisor of the Third World Network based in Geneva.