

Report

Ad Hoc Expert Meeting: The role of competition law and policy in fostering sustainable development and trade through the enhancement of domestic and international competitiveness of developing countries

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Palais des Nations, Room XVIII

In his opening address, the Chair of the Meeting and President of the Competition Authority of Malaysia, Mr Sothi Rachagan, set the context for this *Ad Hoc Expert Meeting on the role of competition law and policy in fostering sustainable development and trade through the enhancement of domestic and international competitiveness of developing countries*. He reminded that UNCTAD, as the focal point for competition issues within the UN system, maintains close linkages with existing networks of competition authorities and with other organizations interested in competition issues. He then outlined the program of the Meeting, highlighting that it would tackle the issues of the interface of competition and various public policies, and the impact of competition on inclusive and sustainable growth. Finally, he explained that for each of the two Parts of the Meeting an introduction would be given by academics, followed by presentations of invited experts from international organizations (OECD, WIPO and WTO), who would intervene in their personal capacities. He also encouraged contributions from the floor.

Mr John Fingleton, former Chief Executive of the Competition Authority of the UK, made an introductory speech in which he addressed three questions: Firstly, whether competition policy should address inclusive growth; secondly, what competition policy has to say about inclusive growth; and thirdly, how competition policy can be relevant to the inclusive growth agenda. Regarding the first question, Mr Fingleton mentioned that inclusive growth is widely recognised and embraced by international organizations, such as the OECD and the World Economic Forum. Unequal growth can be highly risky for political stability and can undermine global trade and investment. He provided some country specific examples and referred to inequality in access to politics and government. He stated that globalisation can amplify some of these features and that competition policy is part of the path leading to inclusive growth.

Regarding the second question, Mr Fingleton argued that competition contributes to growth. Competition combats cartels involved in certain markets and sectors where the poor are harmed the most, and tends to reduce rent-seeking behaviour, but it is true that competition authorities say little about distribution. There is often no trade-off between efficiency and equity (it may exist in service sectors, less critical to developing economies). Defending non-discrimination alone can lead to bad solutions - a case was mentioned where energy prices were raised for everybody instead of lowering the price for the poor or disadvantaged. Competition combats crony capitalism too. He noted that competition was acceptable to people if the rules were clear, fair and equitable.

With respect to the third question, Mr Fingleton encouraged national competition authorities to engage in competition advocacy and tackle the links between politics and business; to focus on competition merits; to identify and advocate the positive effects of competition on inclusive growth; to be transparent about trade-offs and to support other government policies which address trade-offs; and to engage with politicians and globalisation outside of the narrow competition world. He also stressed the importance of building alliances within the

country (to fight corruption for example) and abroad. To conclude, he insisted that competition policy should care about inclusive growth, and added that the functionality of markets and democracy should not be taken for granted. Political independence of competition authorities is good but there is a risk of isolation.

Professor Alberto Heimler, Chair of WP2 of the OECD Competition Committee, was in charge of delivering some introductory remarks to Part I of the Meeting. He argued that governments play a significant role in determining how markets function and use a variety of policies for this purpose, including economic regulation, trade policy, IP rights protection and antitrust. Some of these policies (i.e. trade policy and antitrust) in principle promote competition directly but sometimes are too intrusive, while others pursue other general interest objectives and in so doing restrict competition, sometimes beyond what is strictly necessary. He highlighted the importance of public policies taking into account incentives to invest, to innovate, to lower prices, etc., which is not always the case, and the advantage of competition policy in this regard. That is why involving competition authorities in public policy making, as well as assessing the impact on competition of regulation, is so important.

The session panel was composed of Mr Giovanni Napolitano from the World Intellectual Property Organization (WIPO), Mr John Davies from the Organization for Economic Cooperation and Development (OECD), Mr Hassan Qaqaya from the United Nations Conference on Trade and Development (UNCTAD) and Mr Robert Anderson from the World Trade Organization (WTO).

Mr Napolitano gave a presentation on IP rights, innovation, competition and growth. His main conclusions were that there is a need to balance IP rights protection and competition, that competition and IP agencies must talk to each other and cooperate, and that competition enforcement has a role in controlling IP rights misuse and in promoting growth. Competition law and enforcement may create or strengthen the economic context that will foster innovation and growth in those countries where the IP rights system is less developed or exploited.

Mr John Davies presented on competitive neutrality and development. SOEs are becoming more prevalent in the world economy, mainly as a result of the increasing development of jurisdictions with more state ownership. Most policy communities are mainly concerned with foreign SOEs as investors in cross-border investments because of the unfair advantages they can have (through public subsidies from the home country for example), but the competition community focus is usually on inefficiencies and distortions in national markets and in this sense they advocate policies to promote competition in markets with SOE involvement, i.e., competitive neutrality principles to level the playing field for all companies regardless of their public or private ownership. Often, when doing so, competition experts will seek to differentiate the social functions of an SOE from its more commercial functions. However, although this may work for an SOE charged with specific social responsibilities, it is a model that is much harder to apply when state ownership (or other controls and support) has been established in the pursuit of general economic development goals. Mr Davies stated that the OECD tries to bring competition, corporate governance and investment communities together and there are publications that provide evidence on the relationship between competition and productivity growth. OECD Competition Assessment Toolkit vol. 3, with new country examples, is forthcoming.

Mr Hassan Qaqaya gave a presentation on competition and resource-based development, particularly with regard to extractive industries-based development. This sector is very important for a large number of developing countries, and competition policy can do a lot to help make the most of it for sustainable and inclusive growth, avoiding the so-called 'resource curse'. However, it is that competition policy cannot achieve this independently. A comprehensive approach and appropriate policy mix is necessary, including competitive, transparent and non-discretionary procedures for the award of licenses and concessions for exploration and production, clear and fair regulatory and contractual frameworks, well defined institutional responsibilities and capacity to monitor compliance, transparent and sound revenue management and allocation within a development strategy for the country, a right policy choice as regards public ownership of companies and competitive neutrality, clear measures for environmental management and remediation, including site rehabilitation and the management of environmental hazards, and programmes for community development and economic diversification in the host countries.

Mr Robert Anderson referred to the complementarities and interface between trade and competition policies. Effective (national) competition policies are important to the success of the multilateral trading system including its contribution to development. This is because of (1) the importance of competition policy in deterring international cartels, which have the ability to undermine directly the gains from trade; (2) the importance of pro-competitive structural reforms in enabling businesses in developing and transition economies to take advantage of market access opportunities created by trade agreements; and (3) the importance of competition rules as an adjunct to liberalised government procurement regimes, as embodied in the WTO Agreement on Government Procurement and the chapters on government procurement incorporated in many recent regional trade agreements. Thus, the success of the international trading system depends to an important degree on the existence of effective national competition policies. Since 2004, WTO does not have a formal work programme on competition policy, but competition issues are taken into account in WTO's work. Only WTO member States can bring competition back in the formal agenda of WTO. Meanwhile, WTO can contribute to competition policy objectives by (1) progressively eliminating barriers to trade in goods and services so expanding the possibilities for beneficial competition in the markets; (2) ensuring adherence to principles such as non-discrimination, transparency and procedural fairness; (3) providing a forum for reflection and potential action against public and private restraints to competition; and (4) facilitating the development of special solutions for sector concerns (e.g. telecoms, possibly energy).

Professor Eleanor Fox, from the New York University School of Law, provided some comments on the presentations by the panellists. She saw a lot of agreement among them: the benefits of competition on the merits, the importance of providing the right incentives so businesses contribute to the good of the people, the principles of transparency, good governance and non-discrimination, the fight against cronyism, etc. She stated that she saw no disagreement. However, there may be some underlying disagreements regarding what she called the 'inequality challenge' and the 'governance challenge'. The inequality challenge is concerned with the top few getting the majority of the benefits and the risk is that competition law enforcement plays into the hands of the powerful. She said that competition policies and competition authorities should worry about this. The governance challenge has to do with the non-existent 'global governance structure' which most people oppose. We should ask ourselves how our decisions impact on developing countries and on the poor, the least connected, and the least powerful in developing countries. Asking these kind of questions would open our minds to sustainable development issues.

Mr Kiyoshi Adachi (IP Unit in UNCTAD Secretariat) referred to UNCTAD's mandate on the development dimension of IP rights. While recognising that IP protection is essential to recoup R&D investments, he said that developing countries should make use of the exceptions, transition periods and flexibilities available to them in multilateral agreements dealing with IP rights protection (the TRIPS Agreement). He explained the case of the production of generic medicines in developing countries, in particular anti-retroviral medicines to treat HIV-AIDS, which has a tremendous impact on inclusiveness.

The panel discussion was followed by interventions from the floor. One delegate spoke on the problem of corruption, particularly in resource-rich countries. Allocation of resources and revenues will take place anyway, and functioning markets seem to provide the best mechanism for allocation. If competition does not prevail, the rich will get richer and the poor will get poorer. A second delegate argued that there are areas where markets cannot work, while a third asked about the right balance between IP rights protection and competition. A delegate referred to the anticompetitive cases that their competition authority has dealt with in the oil sector, involving both SOEs and private companies. The competitive neutrality principle was applied fully. Another delegate mentioned that the issue of competitive neutrality has gained importance in their jurisdiction and referred to some recent competition cases involving, and finally sanctioning quite heavily, SOEs. A delegate argued that developing countries face huge challenges regarding inclusiveness, inequality and poverty, and that there is need to find evidence on how competition policies contribute to resolving these issues. He suggested that the OECD could tackle the issue by including the development dimension in their paper on competition and growth. Mr Davies responded that indeed the relationship between competition and inequality is an interesting unexplored area. A delegate from Benin explained the new strategy for sustainable development that the country has drafted and is implementing. Competition is not present there and she wondered what measures could be taken so that it could be included. A delegate defended the position that competition policies should have inclusive development as an objective, otherwise they would be irrelevant in developing countries. He also referred to the problem of corruption. A delegate from CARICOM drew attention to the fact that regional trade agreements are increasingly incorporating a chapter on competition, with the objective of avoiding the risk that unfair business practices outweigh the benefits of trade liberalisation. Mr Anderson said that he could not think of a reason why what is good for regional trade agreements would not be good for multilateral trade agreements.

Part II: The role of competition law and policy in fostering sustainable development and trade through the enhancement of domestic and international competitiveness of developing countries: Trade liberalisation, global value chains, IP rights and international cooperation in enforcing competition law

The Chair greeted participants to Part II of the Meeting, which began with the introductory remarks of Professor Eleanor Fox. Prof. Fox referred to the issue of inequality as ‘the elephant on the table’, which everybody would see but nobody would talk about. In particular, antitrust and trade policy areas do not get to talk to each other meaningfully, and surely do not talk about inequality. She highlighted how the perceived trade-off between inequality and growth has been reversed. As some IMF studies have pointed out, taking action to reduce extreme inequality would probably increase, not reduce, economic growth. Thus, those concerned by efficiency and growth should also be concerned by inequality. On trade liberalisation, Prof. Fox said that some liberalisations are more pro-development than others, certainly not those in which developed countries selectively liberalise (e.g. cotton subsidies and market access for textiles). Global value chains (GVCs) have ambiguous results for developing countries: certainly they provide opportunities for consumers and producers in these developing countries, but they can also lead to exploitation and exclusion. Competition law could protect against anticompetitive exclusion and monopsony, but there are other forms of positive action by competition authorities, such as taking into account public interest criteria in merger control decisions (e.g. South Africa and the Walmart case).

Regarding IP rights protection, Prof. Fox regretted that developed countries are including overly protective provisions in trade agreements. Antitrust and IP rights protection talk to each other, with antitrust probably being too friendly to IP rights protection, but again, they are not considering inequality issues. Competitive neutrality is symbiotic with competition, and sympathetic to developing countries’ needs for growth and development. The worst competition constraints are often by governments and their cronies, and often involve corruption. Co-operation is working well within competition and trade silos, but not across borders. The linkages between competition and trade policies are very well summarised in the 1980 WTO Special Report on Trade and Competition. Prof. Fox called to set ‘inclusive growth and development’, and not just ‘growth and development’, as the objective of public policies that should talk to each other across all issues.

The panellists were as follows: Ms Anna Müller (WTO), Mr Richard Bolwijn (UNCTAD), Mr John Davies (OECD) and Mr Nuno Pires de Carvalho (WIPO).

Ms Anna Müller presented five principles or recommendations to promote inclusive growth. First, policy makers should focus on easy to implement, effective and economically sound approaches to competition, which may be found by sharing best practices. Second, public acceptance and support is crucial for competition policy reforms and legislation, so it is important to focus on advocacy to create public buy-in. Third, policy needs to focus on poorer citizens as producers, not only as consumers, so as to reduce the costs of doing business and preserve export interests of developing countries’ producers in the GVC. Fourth, competition policy is wider than the mandate of competition agencies, so it needs to be taken into account when drafting regulation. Fifth, new forms of international co-operation may need to be considered to address the changing landscape of competition policy, in particular the worldwide effect of GVCs’ failures. Ms Müller illustrated her arguments with two examples, one on the reform of infrastructure sectors, the other on monopsonistic practices in international supply chains.

Mr Richard Bolwijn examined the role of competition policy in GVCs. He highlighted the findings of UNCTAD's World Investment Report of 2013, which actually analysed the participation of developing countries in GVCs and the value they add to them. Competition policies take on a crucial role as countries increase GVC participation. Value capture for the domestic economy is often determined by power relationships within GVCs, which may involve restrictive contractual arrangements. Competition policies can play a crucial role in preventing or sanctioning such anticompetitive behaviour, and thus in safeguarding and maximising the benefits that economies can derive from their participation in GVCs. Those developing countries that set participation in GVCs as a main goal should give priority to anticompetitive vertical practices in the enforcement of competition law, followed by collusive practices, and finally abuses of dominant position and anti-competitive mergers. More international co-operation will be needed too.

Mr John Davies recognised that competition authorities are linking up more and more, although there is great concentration in cooperation (quite a lot of cooperation but between very few authorities) and cooperation in cases is still rare. Enhanced cooperation will be needed as globalisation of business develops (this is just the beginning). As an example he referred to the global merger case Glencore/Xstrata in the mining sector, which has been examined by different jurisdictions, some of which cleared without conditions while others blocked partially or approved with conditions. Regardless of the accuracy or not of the decisions made by the different authorities, and of the potential contradictions between them, he wondered whether the way global mergers are currently assessed makes real sense. The OECD Competition Committee is preparing a revision of the 1995 Recommendation on international cooperation in competition enforcement, which will not be revolutionary but rather an update. In particular, the revised recommendation will seek to improve the ability of agencies to exchange confidential information, including the enhancement of security standards, as well as to promote the use of waivers.

Mr Nuno Pires de Carvalho discussed the relationship between IP rights protection and competition in WIPO-administered treaties. He identified three levels to the interface between IP rights and competition: IP in the wrong dosage (when protection is too strong, preventing businesses from creating their own intangible assets or, on the contrary, too feeble, failing to protect genuinely differentiated assets), anticompetitive abuses and essential facilities (when compulsory licensing is necessary), and concluded that WIPO-administered treaties are ambiguous on the interface between IP and competition. Further, WIPO member States are not foreseeing harmonisation, instead focusing on promoting better understanding of the issues, facilitating the sharing of experiences and considering the promotion of pro-competitive IP licensing practices.

Prof. Heimler referred to the impact that the fight against international cartels that provide industrial inputs within developing countries, and of the importance of cooperation in merger control – recalling that this was at the origins of the International Competition Network (ICN) in 2001.

During interventions from the floor, many delegates reflected on the role of SOEs in developing countries. Some insisted on the need to take account of the historical background of economies and of the important role that SOEs can still play in improving the economic capacity of developing countries. This should not be incompatible with introducing measures to level the playing field between SOEs and private companies (competitive neutrality). Mr Davies acknowledged that, in the case of developing countries, the distinction between

commercial and non-commercial activities can be very difficult, and as a consequence the approach to competitive neutrality could not be so mechanical. He also highlighted the important role that regional cooperation in competition enforcement is playing, with some systems evolving towards joint decision-making. However, it is also important to enhance cooperation with trade partners. Prof. Fox suggested that UNCTAD has an important and interesting role to play in strengthening the voices of developing countries, vis-à-vis that of developed countries.

The Chair of the Meeting asked experts to send by email to the UNCTAD Secretariat their suggestions as to the new issues that the organization could address in the next few years. The Chair congratulated the UNCTAD Secretariat for organising the Ad Hoc Expert Meeting and participants for their contributions, before duly closing the Meeting.