UNCTAD/ITCD/CLP/Misc.14

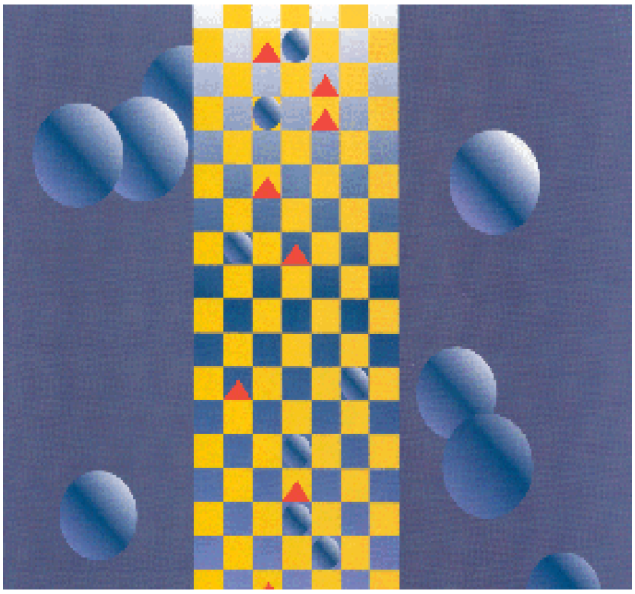
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

THE ROLE OF COMPETITION POLICY FOR DEVELOPMENT IN GLOBALIZING WORLD MARKETS

Papers presented at the pre-UNCTAD X Seminar

Geneva, 14-15 June 1999

UNCTAD Series on Issues in Competition Law and Policy



UNITED NATIONS
Geneva, 1999

NOTE

CONTENTS

PART I

SUMMARY OF THE PROCEEDINGS OF THE PRE-UNCTAD X SEMINAR ON THE ROLE OF COMPETITION POLICY FOR DEVELOPMENT IN GLOBALIZING WORLD MARKETS

Executive Summary

The pre-UNCTAD X Seminar focused on the interface between competition policy and development by organizing discussions around (i) worldwide concentration of market power through mega-mergers etc.; (ii) deregulation and privatization; (iii) transfer of technology and intellectual property rules; and (iv) the role of business and consumers to promote competition and development proved highly successful. It brought home the point that integration of developing countries into the world economy depends to a large extent on their ability to gain an equal opportunity to access technology, human and financial resources and export markets, which in turn depends on the ability to challenge anti-competitive practices and abusive conduct of firms with market power (e.g. international cartels, mega-mergers leading to monopolies or dominant powers, abuse of IPR to corner markets, etc.).

The discussions showed that, in addition to the measures to be taken at the national level, there is a strong case for exploring the merits of studying the implications for development of a possible multilateral framework on competition policy. Further research and analysis are needed to evaluate the policy implications and possible international commitments which may emerge from such an agreement. This would allow developing countries to form an opinion on the merits of such a multilateral framework. The discussion also focused on consumer welfare and benefits arising from implementing effective competition law and policy. Participants were of the view that ways and means should be identified to set up a new forum to discuss consumer policy at UNCTAD, distinct from the IGE on Competition Law and Policy.

The Seminar also addressed the issues of (i) whether the direction given to the work programme meets the needs of member States, and primarily developing countries; (ii) identifying research and policy issues requiring priority attention on the part of UNCTAD and the international community; (iii) assessing the capacity and institutional building needs of developing countries and economies in transition in the area of competition law and policy; (iv) on the basis of the above, formulating a list of proposals which could constitute the first step of reflection on a programme of work for the secretariat that could be adopted by UNCTAD X. In addition to the above policy issues, the highlights of the discussions which took place during this Seminar are listed below:

(*a*) Since Midrand, the work of UNCTAD on competition law and policy has been broadened to cover a range of related development issues brought about by liberalization and globalization. This development was highly appreciated by member countries and most delegates felt that it should be continued;

(*b*) UNCTAD should increase support of developing and other countries in respect of capacity-building in the field of competition law and policy, both at national and multilateral levels;

(*c*) To this end, work should cover specific areas, such as IPRs, parallel imports and exhaustion of intellectual property rights, in order to clarify the competition dimension of IPR negotiations, such as TRIPs and other multilateral talks taking place at WTO and elsewhere;

(*d*) In order to increase transparency and increase access to information for developing countries, UNCTAD should publish annually a world report on competition law and policy;

(*e*) The creation of a competition culture is an essential component of the success of market-oriented reforms in developing countries and economies in transition; the positive role that consumer organizations and businesses themselves can play in this respect should be further explored at UNCTAD X; and ways and means of closer cooperation with UNDP in this context should be developed.

About the authors

Mr. André R. van Heemstra	Member of the Executive Council of Unilever
Mr. Pradeep Mehta	Secretary-General Consumer Unity & Trust Society (CUTS) CUTS Centre for International Trade Economics & Environment India
Ms. Joanna R. Shelton	Deputy Secretary-General of OECD Paris
Mr. Olexander L. Zavada	Chairman Antimonopoly Committee of Ukraine Kiev, Ukraine
Mr. George K. Lipimile	Executive-Director Zambia Competition Commission Lusaka, Zambia
Prof. Dr. Hanns Ullrich	München Universität Germany
Prof. Frederick M. Abbott	Professor of Law Chicago-Kent College of Law United States
Ms. Geraldine Foster	Special Adviser to CARICOM Jamaica
Ms. Maria del Carmen Riego	Deputy-Director of Mergers and Acquisition Federal Competition Commission of Mexico Mexico
Prof. Dr. Ernst-Ulrich Petersmann	University of Geneva and WTO Geneva
Mr. Wolfgang H. Reinicke	Senior Partner Corporate Strategy Group The World Bank Washington

A. Introduction

1. In order to provoke a debate on key competition issues that impact on development with a view to contributing towards building a consensus in this area of UNCTAD's work for consideration by UNCTAD X, the Secretary-General of UNCTAD convened a one and a half day seminar in Geneva, at the Palais des Nations, on 14-15 June 1999. This decision was approved by the President of the Trade and Development Board, on 30 March 1999.

2. As decided by the Secretary-General, the seminar was divided into three sessions, and a concluding panel. The first session, devoted to globalization, competition and development, reviewed three issues of major importance for developing countries and economies in transition, namely (i) FDI, mergers and alliances; (ii) Deregulation, demonopolization and privatization; and (iii) Intellectual property rights, competition and transfer of technology. The second session explored the possible role of the civil society (both consumer organizations and business representatives) in promoting competitive markets supportive of sustainable developments. The third session, on Tuesday 15 June, exchanged views on the role of competition policy in providing a more equitable playing field for development in globalizing markets. This session was directed at competition and trade policy issues linked to development, and views were expressed about the issue of a possible multilateral framework on competition. The final panel, consisting of key speakers and panellists, reviewed appropriate measures to address the specific needs of developing countries, including LDCs, and economies in transition, in promoting a competition culture (at the national level) and in building a more equitable playing field (in global markets).

B. Summary of substantive discussions

3. The Secretary-General of UNCTAD, opening the seminar, noted that, despite the growing importance of competition and of mergers in the world economy, developing countries' role in this area had so far been limited; few of them had effectively applied competition laws. With its specific development perspective, UNCTAD was trying to assist developing countries to adapt to global economic trends, including by establishing the institutional framework necessary to enforce competition laws. Two key issues were (i) how competition policy could be integrated into development strategies, and (ii) how UNCTAD, in cooperation with other international organizations, could best promote competition policy principles and demonstrate their relevance for development. After welcoming the participants, he immediately went on to the first session of the seminar.

Session I. Globalization, competition and development

4. The first item to be discussed under this session was that of *foreign direct investment, mega-mergers and strategic alliances: Is global competition accelerating development or heading towards world monopolies*? The speaker from the private sector expressed confidence that globalization and the integration of national and regional economies into the global economy would bring large benefits to all in the long term, while recognizing the suspicions that globalization had provoked. The focus should therefore be on practical issues of how to make globalization work for the benefit of all. He felt that the trend towards mega-mergers should be kept in perspective—they were mainly concentrated in a few sectors in developed countries, there had been a parallel trend towards divestment, and FDI continued to flow to developing countries, bringing important benefits for growth, technology transfer and consumer welfare. There was little risk of global monopolies. Most mergers had a neutral impact upon firms' performance, market dominance usually eroded rapidly when markets functioned effectively, and there was competition from substitute products and from local or regional competitors. But the regulation of markets by governments lagged behind the reality of globalization. A level playing field would be created by greater transparency of, and consistency among, national competition systems, as well as international rules providing for adoption of national competition laws, common approaches in this area and international cooperation which should safeguard business confidentiality.

5. Another speaker noted that global mergers had not so far had a significant impact in the Southern African region, little new FDI was taking place, and only a few countries of the region had adopted competition laws. This called into question the relevance for the time being to the region of international competition rules. He drew attention to the manner in which privatization in the region was taking place, without adequate competition safeguards.

6. Describing current trends relating to mergers and strategic alliances, a speaker from a consumer organization reviewed the determinants of such trends and the motivations and effects of mergers. He warned that such trends were leading to concentration of wealth, economic and market power, while not necessarily leading to greater efficiency. Appropriate competition regimes were therefore necessary at national as well as international levels.

7. In the discussion which followed, it was noted that competition policy and trade and investment liberalization were consistent and complementary, leading to market integration and a level playing field. However, while there were long-term benefits to market opening, there were also short-term costs. The ability of countries to take advantage of market opportunities depended upon levels of technological development, endowments and culture. The distribution of gains and losses was thus unequal among countries and over time. This led to tensions between economics (focused on the long-term benefits) and politics (focused on the short-term losses). Both competition policy (in respect of exemptions, exceptions and prosecutorial discretion) and trade policies (in respect of anti-dumping and safeguards) were therefore not always consistent with the ultimate goal of the opening of markets. It was incorrect to consider that competition policy instruments were "purer" than trade instruments.

8. The resistance of some developing countries to the adoption and implementation of competition policy was due to the weight given to the short-term costs rather than

the long-term benefits. This concern needed to be addressed. There was evidence that developing countries' markets were affected by international cartels, abuses of dominance and mergers, and that the adoption and effective enforcement of national competition laws would help to control or deter anti-competitive practices emanating from abroad.

9. National action was insufficient and needed to be complemented by international cooperation. Voluntary international cooperation would not suffice because: (*a*) it gave no incentive to developing countries to adopt competition regimes; (*b*) as the decision to enter into cooperation agreements was left to the initiative of each country, countries with advanced competition regimes would see no benefit from entering into cooperation with countries without competition regimes, or with regimes considered inadequate; (*c*) cooperation on individual cases would only occur where interests converged such as in the case where import cartels blocked market access. A multilateral framework involving commitments to adopt and effectively enforce competition laws and to cooperate in respect of problems arising in the interface between competition and trade was therefore necessary. The GATS and the TRIPS Agreements (in respect of standards for enforcement) were useful models for this purpose. As the recent cases brought to the WTO dispute settlement body indicate, problems might arise in respect of substantive standards and dispute settlement. Any minimum standards adopted should be flexible and progressive. Competition policies were adopted and implemented within the context of specific national environments, and differences among them were legitimate. Common approaches might be adopted. A balance should be sought between commitment and flexibility. Another approach was to make the provisions of trade agreements more consumer- and competition-oriented.

10. The second item under the first session addressed the following question: *Deregulation, demonopolization and privatization: how to ensure consistency with competition*?

11. A speaker noted that competition law and policy were an important part of the institutional and regulatory framework needed for countries to be able to address today's challenges. In this connection it was important for each country to consider reforms in the light of its own environment. Competition policy contributed to the efficiency, development and equity of an economy seeking to offset two main forces that work against these goals—monopoly power and inefficient government regulation. The recent financial crisis in Asia and elsewhere provided a useful lens through which to examine the role of competition policy, as competition in crisis economies was sometimes hindered by various measures and restrictions. The enactment of a competition law was also considered to be an important element of regulatory reform and a matter of economic self-defence, especially taking account of the evidence that international cartels operate in ways particularly harmful to developing countries.

12. There were a number of economic reasons and political benefits of privatization and demonopolization was one of its central goals. Regulatory reforms, privatization and demonopolization policies needed to be implemented with careful attention to the underlying goals of using market forces to yield beneficial results. The most important thing a country could do to assure the pro-competitive potential of its economy and its regulatory regime consisted of having a sound competition law, enforced by a strong competition authority. These authorities needed to cooperate in their competition law enforcement work to deal with restrictions that have cross-border effects. Increased globalization and a higher percentage of competition cases with a significant international component require increased international cooperation in the design and implementation of competition law and policies. This could be achieved at different levels and under different forms including voluntary cooperation among competition agencies, voluntary convergence in competition laws and enforcement practices as well as development of a multilateral agreement—an issue of growing attention in the context of preparations for the WTO Ministerial meeting.

13. Another speaker stressed that deregulation, demonopolization and privatization were inseparable and major parts of economic reforms carried out in many countries and that there were no common mechanisms ensuring correspondence among various elements of these reforms. Deregulation, demonopolization and privatization were treated in his country simultaneously, while the reform affected practically all enterprises which, as a result, were put under the pressure of competition. This was favoured by the establishment of a mechanism of interaction between the competition authority and other State bodies. It was necessary to elaborate various elements for such interaction, namely the agreed purposes of activities; joint programmes of action; and mechanisms to resolve conflicts. In his view the combining of functions in support of competition with functions of regulating specific industries in a single body would be mistaken owing to the fact that the activities of a competition authority consisted of the protection of a competitive market mechanism, while regulation provided for substitution of a market mechanism by means of decisions taken by a State body. The relevant State body would not be able to assess objectively its activities from the point of view of competition.

14. Describing his country's experience in privatization, a speaker stressed the need for transparency, speed and public awareness, while political interference in the privatization programme should not be permitted and perpetuation of monopolies should be avoided by opening up to competition and restructuring large enterprises. He referred to a Privatization Trust Fund which had been set up to achieve wider local ownership by enabling the widest number of citizens to participate in the privatization process. The economic benefits of privatization consisted of improving enterprise efficiency and performance; developing competitive industry; accessing capital, know-how and markets; achieving effective corporate governance; developing well-functioning capital markets; and securing optional sale price. These factors determine the institutional framework and approach of the privatization programme, while political transparency strengthens support for it.

15. One participant pointed to the importance for the competition authority to play a role in the privatization process. Referring to the experience of his country, he said that in the absence of such a role, privatization had

resulted in the creation of monopolies in several sectors of the economy. Regulatory bodies are needed in the process of privatization, but the lack of their connection to competition authorities and absence of merger control could result in the absence of competitive environment. Another participant stressed the importance of keeping markets open and competitive in order to avoid crisis situations. Referring to the experience of his country, he noted that the behaviour of monopolies had largely contributed to recent crises. In this respect, his Government had taken measures to promote competition and encourage foreign investors, who, however, preferred to create strategic alliances among themselves rather than to enter into new areas altogether. Having a strong connection between competition authorities and regulatory bodies, while keeping independence of the former, was essential. Another participant also stressed the critical role of pro-competition educational programmes, especially those provided by technical assistance, and their role in the creation of competition culture. He pointed to the role of his country's competition authority which had an opportunity to influence the design of privatization and deregulation programmes.

16. The third item to be discussed under session I included *competition, IPRs and transfer of technology*.

17. A speaker under this item pointed out that the basic problem related to transfer of technology stemmed from the fact that innovation was a costly and risky exercise for the innovating firm and that, therefore, it was necessary to provide intellectual protection (be it factual or legal) if innovation was to be fostered. Technology transfer, he added, meant that the temporary monopoly (or quasi-monopoly) secured by the innovating firm would be shared with competitors. Consequently, for such a transfer to be agreeable to the innovating firm, the innovator needed to be able to keep the transferee at some distance and to maintain its control over the technology as a source of extra income. The interests of the transferee ran in the opposite direction, namely to secure technology by limiting to a minimum the constraints imposed on him to use such technology and profit therefrom. Rather than being conceived of as a barrier to trade and to competition, IPRs were looked upon, particularly since the 1980s, as a means of enhancing competitiveness. Lack of adequate protection was then considered to be an obstacle to fair trade and a distortion of competition. He warned, however, that the technology transfer dilemma had not faded away. He recalled that TRIPs itself recognized the existence of the problem by providing that the Agreement should not stand in the way of measures to prevent the abuse of intellectual property rights. The reach of relevant provisions of TRIPs, however, remained unclear and their practical application uncertain at best. He then raised the question of whether TRIPs provided a suitable framework for the transfer of technology, as he asserted that TRIPs did not establish an international framework for the transfer of technology. Under TRIPs, it was for Governments to define what relevant measures ought to be taken, albeit in consistency with TRIPs and in coordination with member States. Article 40 of TRIPs required member States to tolerate the competition policies of other member States. Within this framework, intellectual property was not supposed to be dealt with in a manner different from that in which other types of property are tackled by competition law. The rationale for intellectual property thus is not protection but rather the promotion of competition in an efficient manner. TRIPs, however, leaves out of its scope most of the problems arising from technology transfer. Such transfer is connected with foreign direct investment, R & D cooperation, joint ventures, strategic alliances, matters which are not covered by article 40 of TRIPs. In concluding, he stressed that his analysis should not be construed as reducing the importance of intellectual property but rather as an attempt to place intellectual property in an appropriate perspective. Intellectual property law, in his view, was fully subject to general antitrust principles. Therefore, antitrust control must apply to restraints related to intellectual property as much as it applies to any other type of restraint.

18. Another speaker dwelled upon the issue of parallel imports and territorial exclusivity. He addressed the question of whether or not parallel imports were advantageous for developing countries. He recalled that enterprises based in developing countries were often licensees and recipients of intellectual property. These countries had a competitive advantage to produce and export a wide array of exports. They, however, were often not allowed to enter world markets as such a move would reduce the profitability of licensors. Parallel imports tended to enable developing countries to secure goods from sources other than the established licensee. Parallel imports thus tended to be advantageous for developing countries that were not producers of the goods in question as they could obtain such goods from sources cheaper than the licensee who had secured the territorial exclusivity contract, but not for the developing countries that could produce such goods.

19. Another speaker stressed the importance of examining the links between intellectual property and competition from a developing country perspective and recalled the evolution of thinking which had taken place in developing countries in this connection. Today, he asserted, it is widely accepted that intellectual property constitutes an important means of promoting competition. Intellectual property entails the recognition of the efforts and costs involved in the development of technology. The promotion of intellectual property, therefore, can be a means of promoting development since jobs and competition among trade marks and service-providers are thereby created. As regards copyrights, these can foster economic activity, particularly in the field of publishing and advertising. He further asserted that international and regional exhaustion of intellectual property tends to promote merchandise trade and, as a result, facilitates globalization. In the discussion which followed, it was stressed that developing countries and economies in transition needed to enact provisions aimed at promoting international standards. It was added that standards are a complement of, rather than a substitute for, patents. Countries were urged not to mix different policies (e.g. competition and intellectual property policies), as the aims of these policies differ from each other. Another participant also stressed the importance of ensuring a free exchange of technology-related data.

Session II. The role of business and consumers in promoting competitive markets supportive of sustainable development

20. The first item discussed under this item related to *ensuring consumer benefits from competition in globalizing markets and creating a competition culture supportive of development.*

21. Introducing the nexus between competition and consumer welfare, a speaker recalled the eight principles enchained in the United Nations Guidelines on Consumer Protection adopted in 1985, and stated that consumer policy should clearly figure in UNCTAD's programme of work. Consumer rights were more explicitly defended in consumer protection legislation, which should go hand in hand with competition law. In particular, special attention needed to be paid to the poor and vulnerable segments of society. Also equitable access for small producers to export markets was essential for sustainable development in developing countries, and such markets should not be limited to TNCs. Such concerns were not the object of competition laws and hence, there was need to develop, alongside competition policy, a genuine consumer policy including the adoption, where necessary, of consumer protection laws. All speakers under this item of the agenda stated that the role of mobilizing consumer groups and raising awareness among the civil society including, in particular, through educating the society as a whole in the creation of a culture of competition, should be a priority for policy makers. The view was expressed that UNCTAD's work on developmental issues should reflect the Eight Principles of the United Nations Guidelines, which should also have a bearing on the work at WTO.

22. In the discussion which followed, it was proposed that the promotion of consumer rights should be made an integral part of UNCTAD's work. To this end, it was suggested that a *competition culture and consumer protection agenda* be adopted by UNCTAD X with a view to accelerating the following essential objectives:

(*a*) Capacity-building, human resources and expertise development in the field of competition policy;

(*b*) Solid analysis and research to evaluate the benefits of competition policy for consumers, in order to promote regulation in both competition and consumer areas;

(*c*) Taking into account the nature of the problems at hand and analysing the consequences of not addressing effectively anti-competitive practices on industry performance and consumer welfare in developing countries and economies in transition;

(*d*) Educating and informing consumers about the benefits of competition policy and consumer rights in order to create an effective competition culture in all sectors of society.

23. The second item under session II was more particularly addressed at the business community to discuss *how business could generate wealth and development without stifling competition in emerging markets*. A view that emerged from the presentations was that this could not be done in a vacuum, but needed to be coordinated with other policies, including consumer regulations, regulatory reform, including deregulation and privatization, etc. It was also essential, when adopting competition rules, to revise existing rules which might contradict the objectives of competition principles, in order to avoid turf wars with other parts of the administration. The debate then focused on how to introduce an effective competition policy that is supportive of development and ensuring consumer benefits from competition in globalizing markets. The view was made that consumer protection issues should not hijack competition policy objectives, which were aimed at increasing efficiency and promoting competition. One speaker stated that competition policy should be based on four principles: transparency, non-discrimination, minimal bureaucracy and flexibility. In addition, it was necessary to keep costs of compliance at reasonable levels, in order not to stifle business activity for the sake of competition and consumer principles. Concern was also expressed about the confusion made between unfair competition and free competition. Some country experiences emphasized a dual track based on case-by-case analysis rather than outright prohibition which is still the case in other countries. The discussion also evolved around the question of whether consumers should be protected by the same agency as the competition authorities, or under different departments. Different existing systems were described, and the prevalent view seemed to be that since competition policy objectives and consumer welfare were not identical, the two issues should essentially be administered by two independent agencies, regulating distinct laws.

24. The discussion concluded on the need to raise the profile of regulatory agencies to defend consumer interests. The essential issue was the political commitment and the resources devoted to promote competition and consumer welfare. This also raised cross-border cooperation issues, and coordinated action by governments, international organizations and the civil society. UNCTAD X could be instrumental in this regard, by launching an initiative to promote a competition culture supportive of consumer welfare and delegations might be interested in establishing an expert group on consumer policy, as a distinct body from the Intergovernmental Group of Experts on Competition Law and Policy, to promote consumer interests in compliance with the 1985 United Nations Guidelines, as an integral part of UNCTAD's programme of work.

Section III. The role of competition policy in providing a more equitable playing field for development in globalizing markets: A challenge for governments and multilateral organizations

25. A speaker on this subject noted that while in the past governments relied on State intervention to regulate their economies, including industrial policy, in recent years the introduction of competition has led to significant decreases in costs and prices, and increase in the diversity and quality of services offered to consumers. This trend had undeniably accelerated economic growth, and to the extent such progress is also achieved in developing countries and economies in transition, this has accelerated the

development of these economies. He noted that according to eminent economists, industrial policy can be successful in the initial stage of development, while becoming a clumsy instrument for promoting complex or high-tech industries at a later stage of economic development. As economic development proceeds, and as products from technologically sophisticated industries become more and more important for the growth of all developed economies, there is a general movement away from government intervention towards free market mechanisms.

26. He also noted that government interference in market mechanisms, distorting competition, often under the pressure of business lobby groups, had adverse effects on consumer welfare, and this increasingly resulted as being unfair and anti-democratic.

27. After reviewing a number of cases of such international cartels and other anti-competitive behaviour affecting international markets, he drew a number of lessons. First, such trade-distorting or trade-restraining practices did exist in a number of important sectors and were likely to have a significant negative impact on the economic development of both developed as well as developing countries. Secondly, international cartels were likely in certain circumstances to undergo dumping activities in countries outside the scope of the cartel territories, justifying in turn the desire of the latter countries to protect their national industries by applying anti-dumping rules. In turn, such anti-dumping action could, sometimes, be used in ways restraining trade and competition even in cases where dumping was not associated with a restraint of competition in the exporting country. Thirdly, it was clear that the effective use of national competition rules acted as a deterrent against international cartels, which chose to operate elsewhere, and that such rules enabled authorities of countries where the adverse effects of international cartels are felt to successfully prosecute the firms involved. In this last case, bilateral cooperation involved the application of positive committee (i.e. action by a country against a restraint of competition by its own firms affecting the territory of another country). It was felt, however, that some countries were reluctant to adopt competition laws because while giving it the means to curb the abuses of foreign firms on its own territory, the country in question committed itself to enforcing this law against anti-competitive practices emanating from its own domestic firms. Such a course of action may be at odds with the desire of the country to promote economic growth through industrial policy measures designed to foster concentration on the domestic market (whether through mergers or through cartel-like cooperation among local firms) and to shelter its national champions from competition. However, it was felt that countries that had based their economic development on export-led growth had come under increasing pressure from their trading partners to adopt and reinforce their competition laws. In the absence of such measures, these countries were becoming primary targets of anti-dumping measures. The example of the European Community was cited to note that, thanks to the vigorous enforcement of the competition rules within the EU, member States were able to abandon the use of anti-dumping measures among them.

28. Discussion under this session then turned around international cooperation in the enforcement of competition laws, bilateral cooperation, involving the use of positive and negative committee, as well as the pros and cons of multilateral rules on competition. In this connection, after citing different cases where difficulties are raised by the limited jurisdiction of national competition agencies, the first speaker stated that the success of the GATT/WTO negotiations over the past two decades bears testimony to the fact that there is a wider and wider agreement that market forces can play a useful role in international trade towards promoting economic development. Hence, addressing the issue of competition rules both at national and international levels was a natural follow-up and a necessary complement to past achievements in the area of trade liberalization and deregulation. Another speaker noted that competition rules, with their non-discriminatory focus on consumer welfare, equal individual rights and access to courts, were more equitable (in terms of constitutional law and welfare economics) than many trade policy rules, which usually have a producer-bias, power-oriented procedure, etc. He stated that without competition rules, governments could not maximize consumer welfare, and consumers risked being exploited by private anti-competitive practices as well as by governmental protectionism.

29. Turning to the level of international trade, he then noted that if one wanted to promote non-discriminatory conditions across borders, competition policy should be defined broadly so that national rules would stop exempting export cartels and regulated industries and trade authorities should stop restricting and distorting import and export competition.

30. To this end, competition-oriented reforms of the WTO trading system were necessary for rendering both trade and competition policies more coherent and, thereby, enhancing economic freedom, non-discriminatory conditions of competition, and promoting consumer welfare both within and among countries. He noted that in Europe, most countries had introduced national competition laws only after they had previously accepted international (e.g. EC or free-trade agreements concluded with the EC or EU) competition rules. He therefore considered the EC proposal for negotiating new WTO “minimum standards” for competition rules to offer important advantages. He concluded that in his opinion the United States preference for unilateralism and bilateralism was due to its unique situation, but that it was not convincing because in competition policy as in trade policy, multilateralism was more rule-oriented and evidently more efficient than bilateralism or unilateralism.

31. Another speaker recalled that the central challenge for public policy in the twenty-first century was to ensure that globalization remains sustainable from all perspectives. He noted that public policy could only succeed in this task if societies accepted to delegate some aspects of policy-making to organizations outside the public arena, such as businesses, NGOs and other interested non-State parties which had a direct stake in the outcome of global public policy. While there was a tendency to perceive globalization as something irreversible, he warned this was not the case. Therefore, now was the time to take proper action to establish global public policy networks that would ensure the right policy-mix in the turn of the century.

Concluding panel

Appropriate measures to address the specific needs of developing countries and LDCs in promoting a competition culture and in building a more equitable playing field in global markets

32. A speaker in this panel stressed that current trends towards globalization, liberalization and deregulation were a reality on which international discussion and policy action needed to be based. A new economic order was emerging, an order in which transnational corporations had increased power and an increased weight, a phenomenon which, he added, had profound implications as regards industrial location, price determination, international specialization and technology transfer. The competitiveness of the different countries was bound to be affected by these trends, and the degree of autonomy of governments in their conduct of national policy, and even the extent to which regional and international negotiations could influence events, were likely to be constrained thereby. Instead of trying to oppose this reality, he argued, what was needed was to seek ways and means of safeguarding and promoting the interests of developing countries by seizing opportunities and limiting costs. The importance of competition policy for developing countries had grown over time as a result of the above-mentioned realities, but much needed to be done in terms of clarifying the implications and effects of such policies. UNCTAD, with its long-standing experience in competition law and policy and with its development vocation, had a salient role to play in this respect. He identified four areas in which UNCTAD could focus its work:

(*a*) Periodic analysis should be carried out with regard to the implications for competition of current world economic trends, of the role of transnational corporations, of the evolution of markets, as well as with regard to how the competition culture was evolving;

(*b*) UNCTAD could be a forum of debate aimed at preparing for the eventual negotiation of a multilateral competition framework profitable to developing countries;

(*c*) UNCTAD should continue to provide technical cooperation on competition policies; and

(*d*) UNCTAD should monitor action taken in other international forums in the field of competition policies.

33. In support of the above, another panellist argued that UNCTAD's work on competition should be elevated to the level of a programme in itself, as was the case in OECD as well as in UNCTAD's work on investment. He drew attention in particular to the following problems which affected significantly developing countries and required action at the international level:

(*a*) Collusion in essential services (in particular air and maritime transport);

(*b*) Anti-competitive practices in the field of tourism resulting from global alliances;

(*c*) Collusive agreements among transnational corporations which affected developing countries and which could not be redressed by mere action at the national level;

(*d*) Undue protection of pharmaceutical products of foreign firms by recourse to patents whose legitimacy (in terms of novelty and period of protection) was questionable and which constituted a hindrance to the exercise of the right to health care for the people of the region;

(*e*) Defamation practices against developing country firms through false accusations of non-compliance with international rules;

(*f*) Anti-competitive effects of the implementation of TRIPs, effects which were contrary to the stated aims of TRIPs and the existence of which justified exploring the possibility of a multilateral framework on competition policy.

34. He thus called upon UNCTAD to produce regularly an annual report on competition policies and practices, akin to the *World Investment Report* prepared by the Investment Division of UNCTAD.

35. Another panellist drew attention to the need for promoting a competition culture at international and national levels, particularly in less developed countries having no competition law and policy. In many of these countries privatization was taking place and appropriate bodies were set up, which should take due account of competition in their activities. At the same time, possibilities to promote greater competition in specific sectors should also be explored and a dialogue between consumers and investors should be promoted. International agencies could give special attention in their technical assistance programmes to countries having no competition law and policy, including by means of exchanging experiences with countries having such laws and policies.

36. Another panellist argued that bilateral agreements in the field of competition should be fostered as an increased number of such agreements would pave the way for broader, plurilateral and multilateral agreements. He felt that it would be premature to try to devise a binding multilateral framework on competition policy. What could realistically be attempted, he added, was to establish a general framework with basic principles that should govern the institution of bilateral agreements. He further stressed the complementary nature of the work being done in this area by WTO, OECD and UNCTAD and, as a result, emphasized the importance of a cooperative scheme between these organizations.

37. Another panellist suggested that draft papers for UNCTAD X should study the issue of launching multilateral negotiations on competition and pointed to the need to take into account the interests of countries which were so far non-members of WTO.

38. Another panellist suggested that UNCTAD should contribute to the promotion of a competition culture by supporting the elaboration of competition laws and policies in developing countries and by helping resolve the problem of financing competition authorities in developing countries, of promoting the exchange of information

on competition at the international level, as well as of establishing a permanent training framework on competition, including the possible setting up of a training centre.

39. The last panellist drew attention to the importance of consumer protection policies as a vital part of any successful development policy. The link between development policy and consumer protection, he added, was duly recognized by the European Union. A similar recognition deserved to be made at a broader international level, which could eventually lead to the establishment of an international consumer protection agency. He expressed the hope that UNCTAD X could consider and adopt policies in the field of consumer protection with a view, in particular, to promoting international cooperation and developing an institutional framework in this area as well as to assisting national consumer associations as a means of fostering the development of a competition culture.

40. In closing the seminar, Mr. Ricupero, Secretary-General of UNCTAD, pointed out that the seminar fully met the expectations that had been placed upon it and had reached three critical conclusions:

(*a*) It became evident at the seminar why competition policy and consumer protection were decisive components of development and why relevant international organizations, including UNCTAD, needed to tackle these issues as critical elements of human sustainable development;

(*b*) It was necessary not only to promote legislation and multilateral norms in these areas, but also to look at the institutional aspects thereof;

(*c*) No single organization could take on itself the huge task of tackling all the aspects related to competition policy and consumer protection. What was necessary, he stressed, was a trilateral network which would involve governments, the business community and the civil society, including international organizations. This network, he asserted, was indispensable for the successful promotion of a competition and consumer protection culture.

PART II

SUBSTANTIVE CONTRIBUTIONS

A. GLOBALIZATION, COMPETITION AND DEVELOPMENT

Foreign direct investment, mega-mergers and strategic alliances: is global competition accelerating development or heading towards world monopolies?

André van Heemstra

Member of the Executive Board of Unilever
President, East Asia Pacific Group, Unilever

Introduction

Globalization is an issue which provokes a variety of emotions. I have no doubt that, in the long run, the globalization of trade and investment, and the integration of local and regional economies into a global market, will bring enormous benefits to countries in all parts of the world. Yet I also understand the suspicions that globalization provokes, particularly in countries which are working hard to foster and develop strong domestic industries.

I am always happier, therefore, when discussion about globalization moves from the abstract and theoretical to practical issues about how to make globalization work for the benefit of all.

I am no academic expert in business economics or competition policy. What I will be able to provide is an international business perspective on the issues we are discussing today.

My background is in Unilever, a large, internationally operating company in what we call "fast moving consumer goods", such as foods, detergents and personal products. We sell our products in 160 countries around the world—and around 150 million times every day a consumer decides to buy one of them.

Our roots in the markets in which we operate are often long-standing and deep. We invest for the long term, and we are strongly integrated into local and regional economies. We see ourselves very much as a "multi-local multinational", and that is one of the reasons why I am privileged to have responsibility for the company's operations in East Asia and the Pacific.

The facts

I want to begin with a few facts, to put the issues of international investment and mergers in the right context.

"Mega-mergers" have been headline news in the financial press a lot over the last year. The number of big, cross-border mergers rose sharply in 1998, when they were worth around US$ 500 billion—an increase of around 60 per cent on the year before. The average size of these mega-mergers also increased significantly.

Last year also saw a number of high-profile national mega-mergers. The merger between Travelers and CitiCorp in the United States, for example, was the second-largest merger of 1998. We are not only seeing cross-border business integration, but also consolidation within national borders.

We have also registered significant growth in the number of strategic alliances over recent years. According to Booz, Allen & Hamilton, 32,000 new alliances were formed between 1995 and 1998, three-quarters of them across borders. Alliances now account for 18 per cent of the revenues of America's largest companies, and from our own experience in Unilever, we know how much value such alliances can create for both our business and our consumers.

However, we need to keep the mega-mergers that grab the headlines in perspective. First of all, most of these mergers have taken place between companies in the industrialized world. They are not a global phenomenon. According to UNCTAD's *World Investment Report 1998*,[1] only 8 per cent of mega-mergers in 1997 involved countries outside the industrialized world—and I do not get the impression that this has changed dramatically over the last year.

Second, it is important to recognize the extent to which mega-mergers are concentrated in a small number of sectors. The bulk of them occurred in banking, the oil industry, among pharmaceutical companies and in the motor industry, and more often than not were driven by circumstances uniquely pertaining to the individual industry sector. In other sectors, mega-mergers were far less prominent. We should therefore be wary of concluding that we are witnessing widespread, global trends that affect all industry sectors.

The third point to make is that, for all the mega-mergers of the last couple of years, there has been a parallel trend

[1] UNCTAD, *World Investment Report 1998: Trends and Determinants* (United Nations publication, Sales No. E.98.II.D.5, New York and Geneva, 1998).

towards divestment, as companies seek a stronger focus on their core business. The chemicals industry is a prime example of this. In recent years, there has been massive reshuffling of portfolios as companies have attempted to rationalize their product ranges, and to focus resources on their areas of greatest strength. In 1997, my own company, Unilever, divested its chemical operations and sold these to ICI for US$ 8 billion. In turn, we have built up our core businesses—and last year alone we acquired 20 new companies in these areas.

The fourth point is that outside the industrialized world, globalization manifests itself in particular in the continuing flow of foreign direct investment. While other financial flows to emerging and developing economies dropped sharply during 1998 in the wake of the economic crisis, foreign direct investment generally held up much better. In those countries, like Indonesia, where there *was* a significant drop in direct investment, the social unrest that followed the economic turmoil was a significant factor. On the whole, however, direct investment continued at levels close to those of 1997. This reflected an ongoing commitment among internationally-operating companies to develop new markets and create new opportunities by building new facilities, concluding joint ventures or acquiring existing companies.

This sort of long-term direct investment has a very positive impact on local and regional economies. To give you an example, Unilever has been operating in Indonesia since 1933. Our activities, based on the injection of technology, skills and energetic marketing, have helped to expand local markets. Contrary to what is often believed, such investment, far from reducing opportunities for local companies, actually creates more room and opportunity for competitors. Suppliers benefit from the technology input and high quality standards, which in turn enable them to serve other customers better and strengthen their market position. On the distribution side, thousands of people are working for us in real partnerships, from distributors and their employees to street-sellers, selling our ice cream.

In Indonesia, we directly employ about 2,200 people. In addition 13,700 people are engaged in our activities through various direct partnerships. So for every person directly employed by Unilever Indonesia, there are six more who are working with us in a dedicated partnership. And this excludes the many thousands more who are employed by suppliers of raw materials, advertising agencies, and so on, who do not work on an exclusive basis with us. This is a good example of the very positive impact of direct foreign investment on local economic development.

This ongoing flow of investment—running at hundreds of billions of dollars a year—is five to six times higher than the level of official development assistance. This private finance plays a crucial role in integrating developing and emerging economies into the world economy.

Mega-mergers, global monopolies and development

We should be wary about making sweeping generalizations about the impact of international investment, alliances and mergers on development. There is, for example, a concern in some quarters that the growing number of mega-mergers is likely to result in global monopolies which will restrict broader development, but, as I have already said, it is important to keep things in perspective. For a start, the record of mergers is by no means universally positive. Academic research suggests that most mergers do not achieve anything like the anticipated benefits. According to some sources, only around 15 per cent of all mergers achieve their synergy objectives. Another 15 per cent actually lead to declining results. The rest—the overwhelming majority—apparently have a neutral impact. You might conclude that this is a pretty dismal record, given all the hype that surrounds most mergers.

Even more importantly, both history and business experience provide some solid reassurance to all those who are worried that a steady stream of mega-mergers will lead us inexorably to global monopolies. History suggests that it is much harder to establish and entrench dominant market positions than many people realize. We do not have to go too far back to find well-known companies dominating whole industries. I think, for example, of IBM in computers, AT & T in telecoms or the “Seven Sisters” in oil. Yet within only a few decades we have seen a rapid erosion of their positions. IBM is now facing fierce competition; quite aside from the pressure of the antitrust authorities, AT & T has undergone major restructuring in the face of a host of new competitors; while the oil industry’s Seven Sisters are increasingly being challenged by smaller contenders.

The business experience is that any strong market position is continuously challenged by new and smaller companies. These smaller, less established enterprises attempt to win market share by fast innovation, by creating new combinations, by redefining markets and developing new consumer loyalties. This is an ongoing battle! Competition inspires new ideas and new forms of wealth creation. Any company, large or small, needs to be on the alert to win the battle—and the large ones, by definition, do not always have the upper hand.

All the time, competition between international companies is becoming fiercer—both in new markets and in established markets. But competition does not just come from similar products produced by rival companies. These days it comes from a much wider range of adjacent products. Consider tea, for example. We should not judge the highly competitive tea market simply by looking at the number of tea-producing companies in any given market, as tea also competes with other drinks, such as coffee, soft drinks, mineral water and beer. Another good example is ice cream, which not only competes within its own narrow sector but also with a wide range of other snacks. New combinations or innovations in any of these categories can have a major impact on other ones. High market shares in narrowly defined markets are often misleading. In fact, markets are highly dynamic and often interact.

At the same time, large international companies also face strong competition from local and regional competitors. These companies are often well established, know their markets extremely well and often enjoy high brand loyalty. There is no way for newcomers to establish themselves easily in such markets. Penetrating these markets can be very costly, and the only way to succeed is on the basis of innovation which caters for the preferences of the local consumer and offers value in terms of price and quality.

So, I do not believe in world monopolies—at least not in the manufacturing or service sectors. There may be greater concentration in other sectors—oligopolies, as economists call them—but even these are neither stable nor permanent. Where capital, people and knowledge freely flow, there is no sustainable position for a monopoly. The dynamics of an effectively functioning market are quick to erode any vested position.

Unfortunately, markets do not always function effectively. When governments resort to protectionism, they can stifle competition and help to create or entrench monopolies. At the same time, unless governments put effective competition rules in place, dominant players will be able to abuse their market position.

The role of governments

No market exists within a vacuum: markets only exist within the frameworks of rules created by governments. The way in which governments decide to regulate markets is therefore critical. And, in my view, governments have lagged behind the reality and dynamics of globalization when it comes to competition policy. Am I saying that internationally operating companies should be able to move around the world like “free radicals”, unhindered or unaccountable? Absolutely not. In fact, I believe quite the opposite—that we need more effective and transparent competition rules.

There is already, of course, a patchwork of national systems. But these are not always fully transparent or predictable, let alone mutually consistent. This is recognized by governments, and competition is therefore on the list of issues to be included in the next round of multilateral trade negotiations. Meanwhile, a growing number of countries are introducing comprehensive national competition regulation. I understand that there are now some 60 countries with such legislation, including all 15 countries of the European Union. This was certainly not the case 5 or 10 years ago. Many developing and emerging economies may increasingly find themselves considering such legislation. It would provide them with a more transparent business environment and at the same time with a more effective tool to fight abuse of market positions.

The growing importance of cross-border mergers underlines the need for greater transparency and consistency between the various national systems. The merger between Boeing and McDonnell/Douglas in the United States, for example, strongly involved the competition authority of the European Union. There is clearly a need for a move towards more cohesive and integrated international rules.

I realize that this is an extremely complicated area, and that national competition authorities are proud of their position and their systems. Worldwide competition rules are a long way off. But a start should be made to construct a basic architecture of competition rules within the framework of the World Trade Organization (WTO). This may include:

— Commitments to adopt comprehensive and transparent national competition legislation;

— Common approaches on anti-competitive practices, an area where both the Organization for Economic Cooperation and Development (OECD) and UNCTAD are already active;

— Provisions for international cooperation, provided confidentiality of business information could be assured.

I am not attempting to set out an exhaustive agenda for WTO discussions on the issue. But the elements I have outlined seem to me to be the key to the creation of a more level playing field for business in an integrating world economy—and the key to ensuring that the benefits of competition and globalization are spread more widely.

Concluding remarks

Headline-grabbing mega-mergers are only part of the story. The trend towards mega-merger is not a worldwide one, nor even an industry-wide one—nor is the trend in business one-way. Corporate focus is also driving divestment. In my view, the risk of world monopolies, or situations approaching this, is remote. History shows that market dynamism is quick to correct such developments, at least where markets are functioning effectively. However, Governments have a crucial role to play in creating the right framework of competition—a more level playing field in competition policy, simple and transparent rules, and greater coherence in international competition policy.

I would like to underline the positive contribution that direct foreign investment and competition can make to development. Direct investment is one of the fastest and most effective means of transferring technology and expertise. It is one of the most effective ways of expanding local markets and creating more room for local businesses. And the whole process fosters stronger and deeper understanding between different cultures.

I have one final comment. At the end of the day, it is consumers who desire and demand greater choice. Competition and cross-border investment is opening up that choice—and creating stronger local economies in the process.

There is still much to do to ensure that the fruits of globalization are more widely shared. But let us not lose sight of the very real benefits that increasing economic integration can bring—and is already bringing.

Foreign direct investment, mega-mergers and strategic alliances: is global competition accelerating development or heading towards world monopolies?

Pradeep S. Mehta

Secretary-General, Consumer Unity and Trust Society (CUTS), CUTS Centre for International Trade, Economics and Environment, India

Introduction

Competition is an amalgam of factors that stimulate economic rivalry. Competition can be considered to be a dynamic concept, as it attempts to judge forms of industrial organization and the policies of firms by reference to the extent to which they promote or hamper this rivalry. Competition describes the kind of market pressure that must be exerted to penalize laggards and to reward the enterprising, and in this way to promote economic progress. However, competition reduces the number of players as the incompetent fall by the wayside. This results in concentrated market structures, which may hamper economic progress.

The world has travelled a long way since Clark propounded his theory on workable competition. Currently, liberalization and globalization have dominated the international economic scene, which has witnessed an unprecedented spate of mergers and acquisitions (M & As). This is both the cause and the effect. Consequently, for firms to remain competitive, they are adopting global strategies. As the number, size and scope of activities of transnational companies (TNCs) increase, more and more of them are entering into partnerships through strategic alliances and their commercial practices have a greater international dimension than ever before.

Fear of competition is one important factor that has spurred the restructuring wave that is sweeping through the corporate world. From banking to oil exploration, and telecommunications to power generation, companies are coming together as never before. The extent of activity can also be gauged from the fact that 9 of the top 10 deals in terms of value took place in 1998 (see table 1). The biggest deal to date is the Exxon-Mobil merger, valued at US$ 86.35 billion. In 1998, the value of such M&As exceeded US$ 2.6 trillion, 55 per cent more than in 1997. M&As formed more than half (58 per cent) of all FDI flows, while 90 per cent of these M & As were from TNCs located in the rich countries.

M & As have now become a popular mode of investment for companies wanting to protect, consolidate and advance their positions by acquiring other companies that would enhance their competitiveness. In the corporate world this is called restructuring.

— At the risk of stating the obvious, a competition policy law has three main goals:

— Consumer welfare;

— Economic efficiency; and

— A check on industrial concentration.

Broadly speaking, M & As can lead to increased concentration, but decreased economic efficiency and/or consumer welfare. They may also be desirable, and may increase both economic efficiency and consumer welfare. M & As can be categorized under three categories: horizontal, vertical and conglomerate.

— *Horizontal mergers*: mergers between firms in the same line of business and in the same market intended to increase efficiencies and to acquire market power;

— *Vertical mergers*: mergers between firms engaged in different stages of production and marketing, intended to reduce transaction costs and other costs through internalization of different stages of production and distribution;

— *Conglomerate mergers*: mergers between firms in diversified and unrelated businesses intended to *reduce risk substantially* and to *exploit different types of economies* in the areas of finance, resources, etc.

The importance of cross-border M & As has increased markedly over the past two decades, to such an extent that foreign direct investment (FDI) by M & As has become the main form of entry, exceeding greenfields entry.

The growth in cross-border M & As has only been matched in popularity by the growth of strategic business alliances (SBAs) between firms. The popularity of SBAs has grown alongside the cost of technology. Data from the Maastricht Institute in the Netherlands indicate that joint research and development, along with technology agreements, have grown relative to joint ventures and research corporations, minority ownerships and cross-holdings, and perhaps customer-supplier relationships.

Current trends

According to preliminary data released by UNCTAD, world FDI inflows in 1998 increased by 39 per cent in 1997, to US$ 644 billion. This increase was due largely to a substantial increase in cross-border M & As among developed-country firms. FDI flows to developing countries as a whole declined by 4 per cent, from US$ 172 billion in 1997 to US$ 165 billion in 1998.

Cross-border mega-deals, with transaction values of over US$ 3 billion, were the defining characteristic of 1998. The number of such deals reached 32, compared to 15 in 1997 and 8 in 1996. Nearly 90 per cent of the majority-owned cross-border M & A sales (in terms of value) in 1998 were concluded in developed countries, where this mode of entry by firms is far more important than in developing countries.

Majority-owned M & As accounted for US$ 236 billion of global FDI inflows in 1997—nearly three fifths of the total, and an increase of almost a half as compared with 1996. Many of the 1997 M & As deals were large: 58 of them were each worth more than US$ 1 billion. The overall value of majority-owned, international M & As amounted to US$ 411 billion in 1998, nearly double the 1997 figure and triple the 1995 figure. The surge in M & As is partly the result of increased competition brought about by liberalization, and the need to consolidate business internationally.

If one looks at the kind of industries where there has been a heightened restructuring activity, one finds that only a few sectors have dominated M & A activity. Overall, finance and banking accounted for 16 per cent of all the deals, followed by insurance (8 per cent), telecommunications (7 per cent), technology (7 per cent), media (7 per cent), utilities (7 per cent) and others (48 per cent).

Some examples of M & A activity are:

— The Great Western Financial and H. F. Ahmanson merger, which created the largest thrift and savings institution in the United States;

— The AT & T-TCI, Bell Atlantic-GTE and SBC-Ameritech deals which were among the biggest deals in telecommunications;

— The Exxon-Mobil, BP-Amoco and Total-Petrofina mergers, which were the biggest in the oil sector, where low international oil prices promoted huge mergers;

— The Zeneca-Astra, Hoechst-Rhône Poulenc and Sanofi-Synthelabo deals, which were among the biggest in the health-care industry, which also witnessed significant activity in 1998.

The value of consolidation, diversification and globalization moves rose significantly in 1998 from the previous year's value. However, consolidation efforts contributed the most to overall M & A activity followed by globalization. Many companies also embarked on divestitures to focus on their core activities; some prominent cases being Atlantic Richfield's sale of its chemical business to Lyondell; and Philips' sale of its music division, Polygram, to Universal Studios. Most deals involved hiving off under-performing businesses and eliminating asynergies between divisions.

Developing countries remain in a relatively unimportant position in the cross-border M & A market, as compared to their position in FDI flows. One recent feature is that M & As among large or dominant TNCs, resulting in even larger TNCs, seem to impel other major TNCs to move towards restructuring or to make similar deals. The pharmaceutical, automobile, telecommunications and financial sectors are typical examples of industries in which this[1] trend can be observed. The result is a change in industry structure.

TNCs are achieving their goals of strategic positioning or restructuring not only through M & As but also through inter-firm agreements. A subset of such agreements involves technology-related activities and is a response to the increased knowledge-intensity of production, the shortening of production cycles and the need to remain at the forefront of the constant technological advances. Such agreements are particularly relevant for enhancing the technological competitiveness of firms, and their number has increased from an annual average of less than 300 in the early 1980s to over 600 in the mid-1990s. Given their emphasis on technology or joint research and development (R & D), it is not surprising that inter-firm agreements are prominent in knowledge-intensive industries, such as the information industry, pharmaceuticals and, more recently, automobiles.

TABLE 1

The top 10 mergers in 1998

Acquirer	*Target*	*Value ($bn.)*
Exxon	Mobil	86.35
Travelers	Citicorp	72.55
SBC	Ameritech	72.35
Bell Atlantic	GTE	71.32
AT & T	TCI	69.87
NationsBank	Bank America	61.63
BP	Amoco	55.04
WorldCom[a]	*MCI*	*43.35*
Daimler-Benz	Chrysler	39.51
Northwest	Wells Fargo	34.35

[a] 1997

Determinants

According to a study by a leading financial daily in India (*Business Line*, 28 March 1999), the extent of overcapacity in almost all industrial segments, across all regions is one of the key drivers of the unprecedented M & A activity globally. Excess capacity increases competition, drives down profits and reduces growth. Instinctively, companies adopt the easiest way to insulate themselves from competition-induced pressures. As many restrictive business practices are illegal, the M & A

[1] UNCTAD, *World Investment Report 1998*: *Trends and Determinants* (United Nations publication, Sales No. E.98 II. D.5, New York and Geneva, 1998).

route offers an easier way to maintain growth and competitiveness. M & As, which were once the domain of conglomerates, are now about concentration.

There are other causes for the merger mania. European and Asian markets have become more receptive to M & A activity. On the one hand, the European countries face competitive pressures from the creation of a single currency. On the other, the crises in parts of Asia have forced most of the affected nations to look to the West for technological and capital support to keep their industries going.

In some industries such as transport, and aviation in particular, deregulation has led to inter-firm agreements rather than outright mergers. Underlying the upsurge in inter-firm technology agreements are a number of changes in the pattern of production and competition. During the 1980s and 1990s, production became more knowledge-intensive across a wide range of industries. This in turn led to increases in R & D expenditures and in the speed with which new products were developed and marketed. Product life cycles have thus shortened and the costs, risks and uncertainties of keeping up with, or setting the pace in, technological advances have increased. To respond to these new competitive conditions, firms have sought to increase their flexibility and leverage their R & D investments through inter-firm agreements.

The need to amortize the higher costs of R & D across a wider geographical territory and the opening up of new markets to competition have accelerated the pace of M & As within the overall process of both foreign and domestic investment.[2]

To sum up, a variety of strategic imperatives have been driving companies towards M & As. They include: globalization, consolidation, product differentiation, customer demands, vertical integration/deregulation, technology requirements, and refashioning.

Globalization

The merger of Daimler-Benz and Chrysler is a good example of globalization. There is an overcapacity of around 30 per cent in the global car industry, which will soon produce 23 million more cars than it can sell. The merger will help the functional Chrysler cars to enter the European market, and the prestigious Daimler-Benz vehicles to enter the American market. With prices falling faster than productivity gains, volume producers in Europe could face a gap of some US$ 18 billion between revenues and costs by 2000. In this context a merger to globalize operations makes sense.

Consolidation

The mergers of British Petroleum and Amoco, and of Exxon and Mobil are major consolidation moves in the oil sector. The aim is to exploit economies of scale by attaining critical mass and achieving cost savings. Research has also shown that return on capital goes up as the concentration index rises. Bigger size makes it possible for efficient producers to slash unit costs when oil prices are low.

While one reason for the merger of the oil majors is to create big firms better able to face the bleak future that appears to await the industry, the rationale is cost-cutting. For instance, the Exxon-Mobil merger is expected to result in savings of US $ 4 billion. The collapse of oil prices, which has been squeezing the companies' margins, is just one reason to cut costs. Companies such as Shell and Exxon, with their international presence, have clearly outperformed those with just a domestic focus. This indicates that size is becoming increasingly important, especially when it takes a lot of capital and a matching appetite for risk to undertake projects in remote areas.

The acquisition of Union Carbide by Dow Chemicals is the latest and most dramatic sign of the rapid consolidation in the chemicals industry, driven by low prices in the cyclical downturn and globalization.[3]

Product differentiation

The proposed acquisition of the non-United States soft-drinks arm of Cadbury Schweppes by Coca-Cola highlights the importance of product differentiation strategy as a determinant for M & As. According to the proposed deal, Coke would acquire drinks such as Dr. Pepper, Seven-Up, Canada Dry and Schweppes, thereby expanding its set of brands and further increasing its market size.

Customer demands

The aim of the merger between Grand Metropolitan and Guinness that created Diageo was to increase the number of product offerings. In an industry where there are no "must-stock" spirit brands, the ability to offer a number of in-demand products is the key to greater profitability. The more such products a firm can offer, the greater is its ability to fight retainers, who have the power to make or break a brand. This reasoning implies the existence of a greater monopoly power.

Vertical integration/deregulation

The AT & T-TCI merger is a good example of vertical integration. The deregulation of the telecommunications industry has resulted in various combinations among the long-distance carriers and local distributors. Entry into either segment is costly, unless it is achieved through a merger process. However, the AT & T-TCI merger is slightly different. Shunned by local distributors, AT & T acquired cable operator TCI to link its long-distance carrier lines to individual homes and businesses. It can now have access to homes and business establishments without the aid of local distributors. Cost-cutting due to a shared network and overheads should help the long-distance giant to price its products, competitivity and maintain its lead in the market.

Technology

The inability to keep pace with technology or to graduate to a higher level of technology was the reason for the merger of Digital and Compaq (and IBM and Lotus

[2] Ibid.

[3] *Financial Times*, 5 August 1999.

Corporation earlier). Compaq's hold in the lower-end product segment and Digital's strengths in mini-computers were brought together by the merger. Many pharmaceutical companies are also merging for reasons linked to technology factors. One reason cited is that the costs of developing a new drug are very high, while the "harvesting" period is no more than 10 years. Hence it is important for companies to merge to reap economies of scale.

A series of strategic alliances unveiled in Australia's financial sector in June 1999 highlighted how technology is driving competition in global capital markets. The Australian Stock Exchange has entered into an agreement with Nasdaq in the United States that will enable companies to raise capital on both exchanges simultaneously. A stock exchange software and share registry, Computershare, has formed an alliance with the Australian telecommunications company, Telstra, to jointly develop financial products and new commodities markets.[4]

Refashioning

Some M & As result from a company's desire to "refashion" itself. For example, by acquiring Polygram from Philips, Seagram moved from the low-margin spirits business to the high-margin media segment. After operating as an engineering conglomerate for 111 years, the Westinghouse Electric (based in the United States) has now become a media giant: since 1994 it has sold off all its non-media interests, while acquiring other media companies.

Nationalistic interests are another cause for mergers. Brazil's new brewing giant, American Beverage Co., used nationalistic slogans in an attempt to overcome possible regulatory objections to a merger with Antartica that would lock up 70 per cent of the US$ 2.9 billion beer market in the United States. The company chief said that Brazil needed national champions to compete equally in international markets. While the company officials were hopeful, the regulators did not approve the merger. Brazilian competition law requires pre-merger scrutiny for any resultant undertaking which would lead to more than a 35 per cent market share.

Motives

The following could be identified as the major motives behind mergers:

(1) To utilize competition or to achieve monopoly profits;

(2) To utilize unutilized market power;

(3) To respond to shrinking opportunities for growth or profit in one's own industry due to shrinking demand or excessive competition;

(4) To diversify in order to reduce business risk;

(5) To achieve a large enough size to realize economies of scale of production or distribution;

(6) To overcome critical drawbacks in one's own company by acquiring the necessary complementary resources, patents or other factors of production;

(7) To achieve sufficient size to have efficient access to capital markets or inexpensive advertising;

(8) To utilize more fully particular resources or personnel controlled by the firm, particularly as regards managerial skills;

(9) To oust the existing management;

(10) To utilize tax benefits not available without merging;

(11) To acquire assets at lower than the market price;

(12) To grow without a gestation period.

In a globalizing world, domestic units need to be global players; M & As are one way to become one.

PHARMACEUTICALS: A CASE STUDY

Currently the drugs and pharmaceuticals industry has been affected by a merger spree. It is predicted that the industry will inevitably become more concentrated, with fewer, bigger companies grabbing a larger slice of sales. The factors underlying this trend are:

Patent expirations: As the patents on top-selling products expire, the companies holding them are estimated to lose a significant chunk of their sales. The fear of declining sales drives the companies to merge. For instance, Glaxo merged with Wellcome in the mid-1990s when its patent on Zantac, the anti-ulcer drug, was running out.

Market power: The need for more marketing muscle is another driving factor behind mergers. Hoechst and Rhône-Poulenc cited the need to build marketing clout in the United States as a principal benefit of merging.

The perceived need for scale in research and development: Advances in various fields are revolutionalizing the drug discovery process, but such tools do not come cheap. Cap Gemini, a consultancy group, estimates that the cost of bringing a new drug to the market rose from US$ 116 million in 1976 to US$ 500 million in 1996.

Weakness: As compared to the fast-growing United States pharmaceutical companies, smaller European companies are resorting to mergers. This is because the larger ones are outperforming them in terms of sales and expenditure on research and marketing.

---

[4] Ibid., 18 June 1999.

Effects

Merged entity

One of the main advantages arising out of mergers is the possible resultant economies of scale. The merger of two units manufacturing or dealing with the same or similar product can lead to a reduction in both production and marketing costs. The merger of two companies, one supplying raw materials to the other for the production of final products, can lead to a reduction in the cost of overheads and inventories.

Irrespective of the industry, the older and bigger the merging entities are, the more painful the aftermath of the merger is going to be. This is because these entities have established a unique culture within themselves, and imposing a new culture on any of the partners after the merger can only be disastrous. Deciding to merge just on the basis of figures in the balance sheet can never be a profitable proposition. And merging just to achieve cost savings can only indicate that the entities do not see any opportunities in the future.

The downside of M & As is that they are often unproductive and fail to generate profit. According to a research by Professor Hans Schenk, of Tilburg University, the Netherlands, 70 per cent of all mergers bring neither real benefits nor real disadvantages. Another 15 per cent are failures, and only 15 per cent are real winners. These findings are based on studies of 8,000 M & As. It was also shown that companies systematically lag behind in profitability for a period of several years after a merger.

Industry

FDI into developing and other countries has usually had extensive effects in either increasing or reducing competition, as well as in increasing efficiency, in the markets where it is concentrated. M & As are of growing importance in the world market. One consequence is the greater industrial concentration in the hands of a few firms in each business sector. However, one cannot categorically state that most of the mergers that have taken place have distorted competition or have set a bad precedent. For instance, the merger between Industrial Credit and Investment Corporation of India (ICICI) and Anagram Finance Ltd. in India has surely increased the strength of the merged entity in terms of being competitive while also protecting the rights of the minority shareholders, an often-neglected set of individuals.

In industries requiring substantial expenditure on R & D projects that have a long gestation period, such as the pharmaceutical industry or (probably) the chemical industry, an overseas merger may create particular problems for developing countries where the products of the merging parties are sold. For instance, the merger of Glaxo and Wellcome in 1995 would have integrated Wellcome's R & D "pipeline" products, which included "311C90", an anti-migraine treatment which, in the absence of the merger, would have competed with Glaxo's Sumatriptran. This led the United States Federal Trade Commission to obtain a consent order for the divestiture of Wellcome's 311C90 assets. If, however, individual "home" jurisdictions do not ensure worldwide applications of their remedies, competition problems could well result in other countries, particularly in developing countries.

In a developing country the scene can be worse. When their parents merge, the subsidiaries of major TNCs get into a much more advantageous position than local companies, as they also become bigger as a result of the merger of their parents. For example, the merger between Lipton and Brooke Bond in the United Kingdom led to the merger of their subsidiaries in India.

Subsidiaries of the merged entities

One point under examination in WTO is the impact of home-country mergers, acquisitions and alliances on their operations in developing countries. For instance, the merger of Clariant and Ciba Speciality Chemicals will result in the world's largest speciality chemical company. Competition is bound to decrease substantially. Both operate in India as well, and the merger of their subsidiaries in India may face some problems due to some twists and turns in their understanding with others due to the existing "non-compete" agreements. What a paradox!

According to Allan Asher, vice-chairman of the Australian Consumer and Competition Commission (personal communication), chemical markets are quite commonly international in scope and hence a merger in one country can potentially lessen competition globally.

Consumers

Mergers are likely to adversely affect the consumers in markets characterized by few firms and a large number of buyers and where buyers have no influence over the market price (i.e. markets with an oligopolistic structure). In such markets there is a high probability that there will be an implied agreement between firms not to resort to price competition. Instead they go in for non-price competition (e.g. aggressive advertising, quality upgradation). No profitable deviation is possible in such an arrangement. The market share is determined by non-price competition. Consumers are adversely affected by the gradual increase in prices. Furthermore, horizontal mergers reduce consumer choice, thereby leading to the reduction in their total utility.

This is shown by the nature of rivalry that exists between Coca-Cola and Pepsi. A controversy arose when Coca-Cola took over an Indian cola-bottling company, Parle, along with its brands for a huge price. As a result of this takeover, there are now only two competitors making colas in India, viz. Coca-Cola and Pepsi. Competition between Coca-Cola and Pepsi did benefit consumers in the short term; initially, the bottle size was increased from 250 ml to 300 ml with no price increase. But since then, the prices of both colas have been spiralling upwards. For instance, the price of the two colas has risen from 6 rupees per 300 ml bottle, when they were introduced in the market, to the current price of 9 rupees. Part of this increase can be explained in terms of the rise in costs over time, but it is the equal rise in prices for both colas that creates suspicion.

Mergers are most likely to work against the interests of consumers in industries where the companies depend directly on the end-users, such as branded foods, spirits, cigarettes, hotels and pharmaceuticals.

This is not to say that all M & As are bad for the consumers. Economies of scale can result in lower prices, improved quality and easier availability. However, this is most likely a short-term phenomenon.

Labour and employment

Restructuring can result in the shedding of jobs to achieve economies of scale. For instance, Sun Life and Provincial Holdings, the British arm of the French insurer Axa, has decided to cut 2,000 general insurance jobs after acquiring Guardian Royal Exchange, its rival composite.

Novartis AG, the world's biggest maker of crop-protection products, has planned to slash 1,100 jobs worldwide to cut costs and help make up for sagging sales in its agri-business unit. The job cuts represent the second major cost-saving programme since the merger of Ciba-Geigy AG and Sandoz AG created Novartis in 1996. At the same time, the company has planned to reduce its entire payroll by about 10,000. There are several similar examples littered in other M & As.

Rivalry can also lead to "dirty tricks". In India, Pepsi has moved the Delhi High Court to restrain Coca-Cola from poaching its employees. The high court did not oblige, as any citizen of India has a fundamental right to take up any occupation or a job.

Ripple effects

Mergers and acquisitions in one part of the world can lead to similar trends in other parts. For instance, the big mergers of Daimler and Chrysler, Sandoz and Ciba, and Mobil and Exxon led to a series of deals in Japan. Goodyear's effective takeover of Sumitomo Rubber, the country's third-biggest tyre company, is one such example.

Implications in terms of development and monopolies

It is generally accepted that FDI increases the stock of productive capital in the economy. But is that always the case? Suppose a TNC acquires a going concern in a country other than its home country, paying the current owners of the firm in cash. Here we find that FDI has entered the economy but has not resulted in any addition to the stock of productive capital. Such takeovers can be disastrous if the firm taken over is performing efficiently, but one cannot at the outset of the takeover predict what will happen after the takeover. For example, the new firm might export its output and get some valuable foreign exchange for the host country, or the new set-up might be highly import-intensive, thereby placing an added burden on the foreign exchange reserves of the economy.

Mergers per se are not bad. Such arrangements may be necessary for economies of scale and result in better allocation of resources as well as increased consumer welfare. It is those mergers and/or acquisitions that result in the merged entity becoming the dominant player in the market that could lead to anti-competitive situations.

Economies have increasingly become concentrated; to such an extent, that about three-quarters of all sectors show a domination by the few. (For instance, Unilever, Procter & Gamble, Akzo Nobel and BASF compete in markets and shadow the movements of rivals.)

The increase in market power and concentration is well illustrated by the takeover strategy of companies controlled by Lever Bros. Till the promulgation of the new industrial policy, Hindustan Lever's acquisition was limited to acquiring small, sick firms through the Board for Industrial and Financial Restructuring in India. It promoted a number of small units to manufacture products reserved for the small-scale sector and to get around the capacity restrictions. However, the most remarkable coup of the decade was its acquisition of TOMCO Ltd. (Tata Oil Mills Co.) which further enhanced the dominant position of Hindustan Lever Ltd. (HLL), the Indian subsidiary of Unilever, in the soaps and detergents market. HLL now controls 75 per cent of the toilet-soap market and 30 per cent of the detergent market in India. This has given it a near monopoly position.

The developments in the auto industry in the United States can be cited as a prime example of how competition leads to market domination. In the late nineteenth century there were more than 200 car manufacturers in the United States, none of which operated on a national scale. With innovations in mass production, the market consolidated and the number of manufacturers dwindled to about 80. Within a matter of a few years, the market had consolidated further until there were only three major players, General Motors, Ford and Chrysler, resulting in an oligopolistic structure.

The merger between Du Pont Co. and Monsanto Co. provides another example of the emergence of a dominant player. The merger could create a company capable of dominating the world's farming industry. However, the real significance of the deal could lie in the near future, when the anticipated biotechnology revolution in world farming takes place. The unravelling of the genetic make-up of plants promises to revolutionize the way crops are raised. Monsanto has led the way in this anticipated revolution, creating a brand of soya that is resistant to its own herbicide.

M & As may worsen the unemployment scenario, particularly in a developing country. A merger between two parent companies in the international market would strengthen the position of the subsidiaries in the domestic market. Given that being competitive is one of the motives behind mergers, this will make the subsidiaries more competitive. The increase in their competitive strength would result in a large market share accruing to the merged entities, implying a squeeze in the share of other firms. This squeeze will erode the latter's competitive position, ultimately leading to the closure of the weak firms. The result is an addition to the pool of unemployed. If the closed units are small, this will result in particular hardship, given that small units are labour-intensive and per-unit employment is higher than that in large enterprises.

This is precisely the reason for the opposition in India to the setting up of 100 per cent subsidiaries by foreign companies. It is believed that such a move will result in the domestic producers losing out to foreign competition. In the case of Rothmans, the tobacco major, the Federation of Indian Chambers of Commerce and Industry claims that the funds brought in will be sufficient to meet only the advertising and trading costs. The multinational has no intention of setting up a new factory to help bring in technology or create additional employment.

Furthermore, the surfacing of the “vitamin cartel” controversy has brought to the fore the negative aspects of the restructuring activities that are going all around the world. Three European chemical groups, Roche Holding AG of Switzerland, BASF of Germany, and Rhône-Poulenc SA of France, have been accused of fixing global vitamin prices and dividing the markets in this US$ 3 billion global industry, costing consumers millions of dollars. The three companies together control about 75 per cent of the global vitamins market. “Vitamins Inc”, the cartel that controlled the worldwide vitamins market, was a conspiracy worthy of a business school textbook. The cartel operated successfully from its creation at the beginning of 1990 until February 1999. The allocations, in products such as vitamins A, E and C, were fixed according to the market shares at the start of the cartel. The companies reached a settlement with the United States antitrust department to pay about US$ 850 million to end all civil claims, though this did not put an end to their woes.

M & As are a window to corporate restructuring. They have come to categorize all kinds of restructuring activities: hiving off businesses, selling non-core areas, shedding members of the workforce, bringing in another partner, or refocusing the entire group strategy. One of the arguments in favour of M & As is that the big companies and banks, enjoying economies of scale and name recognition, are bound to be in a commanding situation because their risks are spread across more regions and market segments. This is precisely the reason Japan is planning to go ahead with a scheme of mergers to stabilize its troubled banking and financial sector. Recently, three of its big banks (Industrial Bank, Dai-Ichi Kangyo Bank and Fuji Bank) have entered into an alliance to work together. The alliance is now the biggest bank in the world, with combined assets of about US$ 1,300 billion. This alliance is expected to speed up further consolidation in the Japanese banking industry: in the past two years the number of big banks in that country has fallen from 21 to 16.

The implications of mergers for the banking system and the economy are considerable. The banks are likely to emerge stronger and with better earning capacity, enabling them to strengthen their capital base from retained earnings. The improvement in capital will enable the banks to take up new and diversified activities such as equity underwriting, offering investment and insurance products, and issuing asset-based securities.

Conclusions

M & As emerge for a variety of reasons, such as the desire to maximize growth, reduce risk through diversification or lower the cost of financing, but the performance of the new entity after the merger may suffer because of the high cost of coordinating diverse and unrelated economic activities in the case of conglomerate mergers.

As mentioned in the introduction, one of the goals of a competition policy law is to keep a check on industrial concentration; it is this goal that can be adversely affected by M & As. This is not to say that “demergers” cannot take place or be ordered by the relevant authorities, as provisions for it exist in many competition laws. However, rather than adopt curative steps when the problem arises, it is better to take preventive steps. Merger mania has to be checked by all progressive forces, for it is leading to the concentration of wealth and economic power. As well as creating imbalances in economic growth, it will generate huge political power in the hands of a few mega corporations, which few Governments will be able to cope with. This can undermine democratic institutions and the independence of government economic policy-making.

Furthermore, the trade-off between the reduction in competition and potential gains in economic efficiency needs to be carefully evaluated. In an anti-competitive merger, a modest decrease in the cost of production can be offset by the adverse effects of a large increase in prices. Cost reduction arises from economies of scale, while savings result from the integration of production facilities, rationalization and financial economies. Efficiencies from improvements in product quality, the introduction of better products, and innovations and better choice—in both goods and services—for the consumer cannot always be translated into price and cost terms.

There are several examples of proposed mergers that were stopped for various reasons. In 1998, Canada disallowed a merger between four of the five big banks. The banks concerned planned to merge to create two mega banks. The Canadian Competition Bureau pointed out that these merged entities would have an excessive market share in sectors such as retail banking, credit cards, wealth management and brokerage services. One reason cited, which stands out, is that if one bank became sick there would be few other Canadian banks to bail them out. Moreover there was a strong consumer protest too.

In another move with the same aim, the European Commission has launched an in-depth probe into the proposed acquisition by Anglo-American oil giant BP Amoco plc of rival United States firm Atlantic Richfield Co. The move was dictated by concerns that a small group of companies could control oil exploration globally and because of BP Amoco and ARCO’s combined strength in North Sea gas. Earlier, the Commission had also launched a full-scale investigation into the merger between Exxon Corp and Mobil Corp, citing fears that the recent wave of consolidations might adversely affect fair competition.

In yet another move, the Competition Commission in Britain is planning to restructure the domestic ice-cream industry after concluding that the monopoly built up by Walls (an offshoot of Unilever) is based on its control of the distribution network to tens of thousands of small shops. The Commission found that Walls and other manufacturers such as Nestlé and Mars were involved in “complex monopolies”, practices that restrict or distort competition. These practices include supplying retailers with freezer cabinets for their products only. The Commission is expected to publish a list of measures to open the market to competitors by forcing Walls to dismantle or spin off its distribution operation. The aim will be to reduce vertical integration in the ice-cream industry, which allows manufacturers to control distribution and exclude competitors in retail outlets.

M & As and SBAs can have certain adverse impacts on public and consumer interests. They include the reduction of the number of players in the market, the acquisition of enormous economic strength by the resulting entity, the discouragement of new entrants in the market, the dictation of prices by the large merged entities, and the dominance of the merged entities. All of these are matters of concern. Therefore, there is an imperative need to have an appropriate competition regime at both the national and the international levels to enable surveillance and regulation of such activities. Furthermore, such a regime should make cooperation mandatory in checking cross-border situations.

Deregulation, demonopolization and privatization: how to ensure consistency with competition

Joanna R. Shelton

Deputy Secretary-General, Organization for Economic Co-operation and Development, Paris, France

Introduction

In December 1996, when speaking to the first Ministerial Conference of the World Trade Organization (WTO) in Singapore, the Secretary-General of the Organization for Economic Co-operation and Development (OECD), Donald Johnson, stated that "This is the dawn of the age of globalization, and when historians tell of it, let us make sure that it is a good story."

I am not a historian, and it is too early to tell what future historians will say, but it is a good time to discuss the role of competition policy in bringing about the Secretary-General's vision. Since the Ministerial Conference in Singapore, the financial crisis that hit Asia and other countries has made us all more aware of the extent to which globalization has magnified the interdependence of the world's economies. In such a world, OECD and its member countries must cooperate more closely than ever with countries around the world. Indeed, a few weeks ago for the first time, our annual ministerial meeting in Paris included a special dialogue with non-member countries. Although competition policy was not a separate agenda item in that dialogue, we are becoming more and more aware that competition policy is central to countries' efforts to promote structural reform. As the Foreign Minister of India said, the debate over the role of the State is over: it is to support the creative, entrepreneurial capacities of the people. The question is whether the institutions are capable of addressing today's challenges. In my view, competition law and policy are an important part of the institutional and regulatory framework that can help countries ensure that they are indeed capable of addressing these challenges.

The timing of this UNCTAD seminar is also good because many of these challenges were studied at an OECD/World Bank International Conference on Competition Policy and Economic Adjustment in Bangkok, on 27 and 28 May. That conference focused primarily on Asia, but it also included experts from many other developing countries. It will take us time to put together the two publications from that conference, but I am pleased to be able to offer you an advance look at some of the discussions.

The heart of my message to you today is that the most important thing a country can do to assure the pro-competitive potential of its economy and its regulatory regime is to have a sound competition law, enforced by a strong competition authority. I hope my remarks will make it clear why I believe that to be the case.

First, I will make a few general observations about OECD work with non-members in the area of competition policy. Second, I will discuss how competition policy can be used to benefit society as a whole. Since this seminar concerns development issues, I will focus on competition's role in contributing to the worldwide development of efficient, productive economies that are able to sustain growth that is both equitable and long term. Third, I will discuss regulatory reform, demonopolization and privatization, noting how they can be beneficial, how they can be counterproductive, and how a country can seek to maximize the benefits and minimize the risks of harm. And fourth, I will offer a few observations about the implications of the globalization process for the way in which countries pursue competition law enforcement.

OECD competition policy outreach

The past decade's expansion of interest in competition policy has been accompanied by an enormous expansion of OECD's competition policy work with non-members. Our premise—that OECD members' experiences can be useful to other countries, and theirs can provide important insights to OECD members—has been confirmed time and time again.

Before proceeding any further, I want to emphasize two points. First, I am not suggesting that any country should adopt wholesale the reforms that have been adopted by OECD members. There are often variations in the policies of OECD members, and it is important for each country to consider reforms in the light of its own economic, legal, and cultural environment. Second, by "competition", I do not mean pure laissez-faire competition, but rather the regulatory system that has come to be known as competition policy. Competition policy seeks to achieve the benefits of competitive markets. However, it also recognizes that regulation is necessary to overcome market failure and that governments sometimes choose to sacrifice some of the benefits of competition in order to pursue other social goals. A competition policy approach to regulatory reform can be used to determine the most efficient form of regulation to achieve social goals. To emphasize these points, we at OECD do not use the term "deregulation", but rather "regulatory reform", which is why the title of my remarks does not quite match the title of this session.

Why competition policy matters

Using competition policy to benefit society—efficiency, development, and equity

In general, the goal of competition policy is to benefit society as a whole by ensuring that countries' economies work well in permitting buyers to decide and communicate what products and services they want, and in permitting sellers to respond to this consumer demand as completely and inexpensively as possible. There are two main forces that work against this goal: monopoly power and inefficient government regulation. Competition law and policy seek to offset these forces.

To understand how competition law and policy can benefit society—and in particular to understand its efficiency, development and equity benefits to developing countries—it is important to understand how monopolists and cartels generally obtain their monopoly profits. In order to obtain monopoly profits, monopolists and cartels restrict output, which means they produce less than consumers want. They deliberately create an artificial shortage, as a result of which some consumers are not able to obtain the product at all, while those who succeed in getting the product pay an inflated, or monopoly, price. It is easy to see that such output restrictions reduce productivity, cause inefficiency and hinder development.

Moreover, monopoly interests generally take steps to perpetuate their economic power, which reduces the overall degree of competition in a market. Countries with non-competitive economies have relatively little economic opportunity for the majority of their citizens—instead, economic power and opportunity are concentrated in the hands of just a few. When entry barriers are lowered, special treatment of protected businesses is halted. Well-conceived privatization programmes get assets into the hands of more people with the incentive and ability to grow companies through innovation and efficiency; and far more of a country's citizens have a better chance to contribute to, and benefit from, the resulting economic growth.

It is not just private anti-competitive behaviour that is the source of inefficiencies. Poorly designed or outmoded government regulation can contribute to the creation of private monopoly and can have effects similar to those of private monopoly, including the diminution of economic opportunity. Government ownership and operation of business entities can also have these effects.

I have mentioned competition policy's contribution to the efficiency and equity of an economy, but I also want to note that macroeconomic benefits can also result. Our regulatory review programme has produced interesting and important indications that regulatory reform, backed by a strong competition law and policy, can improve economies' capacity to adjust to internal and external shocks. That is an increasingly important consideration in a world characterized by highly mobile capital flows.

The recent financial crisis and competition policy

The recent financial crisis in Asia and elsewhere provides a useful lens through which to examine the role of competition policy. The affected countries generally had experienced extraordinary growth in recent decades and followed sound macroeconomic policies. Speaking generally, however, many of these countries did not have adequate transparency and accountability in the operation of their enterprises, a factor which undermined investor confidence. Improved corporate governance is one remedy to this situation. Improved competition policy is another. Indeed, competition in the crisis economies was sometimes hindered through special treatment given to certain firms resulting from non-transparent, discriminatory policies, such as secret government-directed loans, and sometimes even from corruption. In addition, many of these countries had an unusually large number of State-owned monopolies and private firms with monopoly licences. Foreign takeovers often were subject to restrictions. Finally, some countries also provided import protection and other forms of official or unofficial support for private cartels.

Whereas in competitive markets, high prices and profits generally signal good business and investment opportunities, in some emerging countries and industries these indicators sometimes reflected instead the monopoly rents that had resulted from these opaque arrangements. Thus, anti-competitive product markets helped create unrealistic levels of demand for investment; and neither financial regulations nor corporate governance rules required the kind of transparency and accountability that would have warned investors and ultimately protected Asian and other emerging countries from the eventual loss of investor confidence.

The need for competition law

In our Bangkok Conference, participants from developing and developed countries generally agreed on the importance of basing economic reform on sound competition principles. Central to that reform is the enactment of a competition law. This is not merely an important element of regulatory reform, but a matter of economic self-defence. There is considerable economic evidence that international cartels operate in ways that are particularly harmful to developing countries. Moreover, an anti-competitive merger among multinational enterprises can be particularly harmful to those countries which are least able to pay. Without a competition law, a country has no chance of preventing such harm. For example, because of competition law considerations, the recently proposed acquisition by one internationally known soft-drinks company of another well-known soft-drinks company does not include the United States assets of the firm to be acquired; and the proposed acquisition has been cancelled or modified in a variety of countries whose authorities objected that it was anti-competitive. Countries lacking competition laws and effective enforcement institutions are largely powerless to protect themselves in such circumstances.

Competition policy and the social safety net

What about the human element in competition policy? The adoption of competition law and policy does not mean leaving all members of society to rise or fall based only on their ability to compete. Indeed, OECD countries are learning how they can use market forces and targeted policies to improve their ability to provide a "safety net" for the poor and disadvantaged. In our work on regulatory and labour market reform, OECD has identified a number of ways in which governments can address social concerns as they move towards more competitive markets, without unduly distorting the efficient functioning of markets.

Implementing regulatory reform, privatization and demonopolization

Regulatory reform

Providing a framework for competition. Efficient market competition can exist only in a supportive legal and structural framework. One of the problems some countries have faced is that their civil codes, criminal laws and court systems are inadequate to protect firms' and peoples' rights. One important challenge of regulatory reform in countries with economies in transition and in developing countries is to develop such a framework, which also includes a need for transparency in government and business operations. In some countries with economies in transition, the competition law applies directly to the government and can be used to challenge anti-competitive behaviour or outright corruption by government officials, as well as unauthorized anti-competitive actions by government executive bodies, including ministries. This model might be useful for those developing countries in which governments have been substantially involved in business affairs and where there is incomplete development of conflict-of-interest laws and, more generally, of the rule of law.

Reducing inefficient regulation. In those instances where competition policy analysis indicates that little or no regulation is needed, regulatory reform might take the form of deregulation—for example, eliminating restrictions on the number of hours that a shop or business may remain open. In general, however, regulatory reform consists of finding better, cheaper ways of regulating. This often involves replacing so-called "command-and-control" regulatory systems—in which the regulator specifies precisely how firms must meet a particular regulation—with incentive-based systems that rely to the maximum extent possible on market forces. For example, in the area of pollution control, this means that regulators would not tell a firm what type of smokestack scrubbing technology it must use; rather, regulators would set a limit on the permissible level of emissions and leave it to the firm to find the most efficient, effective way of meeting the target level.

Privatization

In recent years, many countries have moved away from government ownership of economic entities, in order to improve standards of living and raise growth rates. State-owned enterprises are generally less efficient than private ones, which is not surprising, given that these enterprises are not likely to be allowed to fail and thus lack an incentive to operate efficiently. In addition, although many State-owned enterprises operate in an entirely legitimate manner, such enterprises do present the risk of corruption and cronyism. Politicians and senior bureaucrats can use such enterprises to channel funds to themselves and friends of the government, or they can distort the enterprises' hiring or investment decisions for political ends. As the World Bank has clearly documented, the net effect of such arrangements is lower investment, lower growth and reduced welfare for all.

There are many economic benefits that flow from privatization, including improved public finances, a greater ability of private firms to raise funds for modernization, and broader and deeper capital markets. In addition to the economic reasons why countries around the world are engaging in more and more privatization, there is also a political one: private ownership of production tends to support democratic institutions, because it results in shared power, whereas public ownership tends to concentrate both political and economic power in the same hands.

Demonopolization

Demonopolization—reducing or eliminating public ownership of firms—is one of the central goals of privatization. However, some countries, and especially some developing countries, have given legal monopolies to private firms. Eliminating those legal monopolies is an important step towards greater competition that will surely be opposed by the monopolist but may often be able to produce quick and substantial benefits to a country's economy.

Ensuring competitive benefits of regulatory reform, demonopolization and privatization

Despite the potential benefits to society of regulatory reform, demonopolization and privatization, these policies must be implemented with careful attention to the underlying goal of using market forces to yield beneficial results. For example, regulatory reform may remove government inefficiency but leave firms with the incentive and the ability to abuse a dominant position or form a cartel. Similarly, eliminating a government monopoly may be very slow to bring about any benefits, if the firm is free to act in anti-competitive ways to prevent entry of other firms. An unwise privatization may simply replace government monopoly with private monopoly; and even a privatization that divides a firm may produce no benefits if the former components of the firm are left to cartelize and recreate the monopoly.

In all the above circumstances, the most important thing a country can do to assure the pro-competitive potential of its economy and its regulatory regime is to have a sound competition law enforced by a strong competition authority. As I noted at the outset, that is the heart of my message to you today.

There is another reason why it is important to have a strong competition authority. There are many difficult questions that arise in deciding how to regulate a utility: what steps are necessary to demonopolize a market? Can a privatization be structured so as to promote competition, and, if so, how? These are not the sort of questions most regulators are used to considering, and OECD countries have found it very useful to use their competition authorities to provide expert advice to their legislatures and to other ministries on these questions.

The need for international cooperation in competition policies

Even before the current globalization process became apparent, it was clear that competition authorities needed to cooperate in their competition law enforcement work in order to deal effectively with restrictions on competition that have cross-border effects. Increased globalization has meant that a higher percentage of competition cases have now significant international components. As trade and investment liberalization reduces entry barriers, firms may have greater incentives to engage in anti-competitive practices and mergers which limit foreign fírms' market access. Therefore, the need for increased international co-operation in the design and implementation of competition laws and policies is gaining greater prominence in international forums such as OECD and WTO.

Improved international cooperation can be achieved at different levels and under different forms. Let me briefly mention some of the approaches which OECD members are presently using or exploring.

One approach is to enhance voluntary cooperation among competition agencies. The OECD's Competition Law and Policy Committee has recently adopted a report on how competition authorities can benefit from using so-called "positive comity". Under that principle, a country is urged to give "full and sympathetic consideration" to another country's request that it open a law enforcement action to pursue illegal anti-competitive conduct in its territory that is allegedly harming the interests of the requesting country.

Another approach is to encourage voluntary convergence in competition laws and enforcement practices. The OECD Council adopted in 1998 a recommendation against "hard-core" cartels. These cartels constitute the most damaging and egregious violations of competition laws, since they are directed at fixing prices, rigging bids, restricting outputs, or sharing or dividing markets. Under this recommendation, members are urged to ensure that their competition laws effectively halt and deter hard-core cartels, and to cooperate in enforcing their laws in this domain.

A third approach under discussion is the development of a multilateral agreement containing competition provisions. This is an issue which is receiving growing attention in the context of preparations for the upcoming WTO Ministerial Conference in Seattle. OECD's Competition Law and Policy Committee and Trade Committee are carrying out joint work to assess the pros and cons of the various options available. Among these options, consideration is being given to an approach involving the adoption of: (1) a limited set of core principles (such as non-discrimination) that are enforceable under a dispute settlement process; and (2) some "common approaches" (such as guidelines on merger analysis) that are not subject to dispute settlement. This approach would have the advantage of being sensitive to enforcement realities (because individual cases would not be subject to dispute settlement) and to different conditions and historical experiences across countries. Overall, however, significant differences of view remain even among OECD member countries as to what additional steps should be taken in this area.

OECD's work with non-OECD countries in the area of competition policy is designed to share the results of on-going OECD work and engage in a two-way dialogue with non-members on all these issues. While we believe it is important for countries to adopt competition laws and to pursue cooperation and convergence in competition laws and enforcement practices, the ultimate goal of our work is not a uniform international competition law. OECD member countries themselves would be the first to resist such uniformity. There is room for competition among competition law enforcement systems, and competition law should take into account a country's legal, economic and cultural situation.

Deregulation, demonopolization and privatization: how to ensure consistency with competition

Olexander L. Zavada

Chairman of the Anti-Monopoly Committee of Ukraine, Kiev

Introduction

Deregulation, demonopolization and privatization are an inseparable and major part of the economic reforms being actively carried out in many countries of the world in the last years of the second millennium. Proceeding from extremely different starting conditions, each country takes measures of differing scope and proportions: there are no common mechanisms to ensure correspondence among the various elements of economic reform. At the same time, the greater the economic reform and the more enterprises it affects, the more important the issue under discussion becomes. Only 10 years ago, a planned economy, centrally controlled by the State, existed in Ukraine. That is why we have had to arrange matters of deregulation, demonopolization and privatization simultaneously, and the reform has affected practically all enterprises.

At present, the most important reforms have been accomplished: the bulk of enterprises have been privatized, prices (except those of natural monopolies) have been liberalized and major trade barriers have been removed. As a result, the pressure of competition, higher or lower, is felt by practically every enterprise. This was facilitated to a great extent by the establishment of a mechanism of interaction between the Anti-Monopoly Committee of Ukraine and other State bodies. I wish here to concentrate on the structure and technical basis for that interaction.

State bodies responsible for the implementation of the policy of deregulation, demonopolization and privatization

In Ukraine, a number of bodies are responsible for carrying out the complex task of implementing this policy. Privatization is carried out by the State Property Fund.

Deregulation, including regulation, is carried out by, among others:

- The National Commission of Ukraine on Regulation in the Sphere of Electrical Energy Industry (with respect to that industry);
- The National Bank of Ukraine with respect to banking activities; and
- The State Committee on Supervision of Insurance Activities with respect to those activities.

Central and local bodies of executive power are responsible for demonopolization, and the Competition Authority ensures the application of the competition law.

Grounds for interaction

The experience of Ukraine shows that it is necessary to have the following three elements in place for successful interaction among the various State competition bodies:

(*a*) An agreement about the purposes of activities of each body;

(*b*) Joint and agreed programmes concerning the practical activities of those bodies; and

(c) The existence and perfection of a mechanism to resolve any conflicts.

(a) *Agreed purposes*

The purposes of the above-mentioned State bodies of Ukraine provide for, among other things, the development of competition, its support and protection. These purposes are established by the relevant laws and by-laws. At the top of that legislative tree is article 42 of the Constitution of Ukraine, which proclaims that the State must ensure protection of competition and prohibits the unlawful restriction of competition. Thus the requirements affect not only the above-mentioned bodies, but also any State bodies of the legislative, executive and judicial branches of power.

At the same time it should be pointed out that a common purpose does not mean duplication, since each body makes its contribution to the achievement of the purpose by whatever means are inherent in the relevant body.

This delimitation of powers among various State bodies makes it possible to avoid situations where different decisions are taken on the same matter.

(b) *Joint programmes of action*

Considering that purposes are formulated, as a rule, in very general and diffuse terms, one can say that the determination of specific ways to achieve those purposes in certain branches and spheres is critically important for successful activities. In this connection the State Programme for Demonopolization of the Economy and Development of Competition, adopted by Parliament as early as 1993, is the principal document in Ukraine. For three years, branch and regional plans for measures had been elaborated and approved with a view to implementing the State programme. The Concept for the Development of Civil Aviation, the Programme for Restructuring Railway Transport and the Concept for the Development of Banking Activities can be considered as examples of more specialized documents.

(c) *Mechanism to resolve conflicts*

No mechanisms can function without breakdowns. This applies also to mechanisms whose functioning is ensured by hundreds of people with different knowledge, opinions and experience. That is why a mechanism to resolve conflicts occupies a central place in the process of ensuring perfect interaction among State competition bodies. Such a mechanism should embrace all aspects of competition policy and legislation, from drafting to implementation. In Ukraine, the mechanism has the following features:

(*a*) The Competition Authority has the task of encouraging the development of competition in all spheres of the economy;

(*b*) The powers of the Competition Authority include the prevention, detection and termination of violations of the competition law not only in the form of abuses of dominant position and anti-competitive concerted actions, but also in the form of unfair competition. They also include control over economic concentration. At the same time, the competition law contains no branch or sectoral exemptions. Some exemptions ensue from other laws, but they are rare and do not concern branches or sectors on the whole, but specific types of activities of certain economic entities;

(*c*) The Competition Authority has the right to apply compulsory measures to any regulatory bodies (with the exception of the National Bank of Ukraine) that violate the competition law. Under these compulsory measures, the Competition Authority has the right to consider certain actions or decisions of the relevant State body to be violations of the competition law and to oblige the body to terminate the violations (including in cases where violators voluntarily repeal their wrong decisions), or to appeal to the court with a view to annulling the relevant decision;

(*d*) Central and local bodies of executive power are obliged, in accordance with the law, to come to an agreement with the Competition Authority on drafts for such power decisions that can affect competition, drafts for laws and other normative acts;

(*e*) The Competition Authority has the right to give State bodies its recommendations and proposals concerning the development of competition;

(*f*) The Competition Authority, before taking its decisions, may, and in some cases is obliged to, receive conclusions made by other State bodies concerning drafts for those decisions.

Given that there is more common ground in the activities of the regulatory bodies and the Competition Authority, the types of interaction procedure that are not associated with the use of compulsory measures are applied most often in practice. It goes without saying that interaction mechanisms of that sort give a certain priority to the support to competition rather than to other specific purposes of regulation. Procedural advantages of that sort, however, do not result in discrimination, but merely equalize chances.

At the same time, the only anti-competitive actions of regulatory bodies that are considered to be violations are those that are not necessary to achieve the purposes of regulation or those that cause great damage to public interests owing to the restriction of competition in comparison with the benefits resulting from regulation.

A separate mechanism for interaction is provided for disputable matters in the sphere of the demonopolization of the economy and the development of competition, that is, for actions of regulatory bodies that cannot be considered as violations of the competition law. The Interdepartmental Commission on Demonopolization of the Economy is empowered to resolve conflicts of that sort. The Commission consists of representatives of the Competition Authority, the Ministry of the Economy, the Ministry of Finance and the State Property Fund. The Commission is headed by the Vice-Prime Minister responsible for economic policy. It has been due to the existence of the Commission and the decisions it has taken that demonopolization, on the whole, has been carried out in Ukraine.

It should be pointed out that decisions concerning demonopolization in the most important cases which affected national security were adopted at the highest level by the President of Ukraine, the Parliament or the Government, after the opinions of all the bodies had been taken into account.

The highest level of interaction in the course of arranging matters of deregulation, privatization and demonopolization is based on the mentioned provisions of article 42 of the Constitution of Ukraine, which may be directly applied by both the Constitution Court and courts of general jurisdiction. Any natural or legal person may appeal to the relevant judicial body against a decision taken by any State body that unlawfully restricts competition.

That is the general form of the mechanism of interaction. In addition, interaction in particular matters has its peculiar features. For example, the privatization of monopoly formations is carried out by the State Property Fund only after agreement has been reached with the Competition Authority. This made it possible for the Authority to require that demonopolization should be carried out before privatization. Requirements of that sort were made only where demonopolization was possible and advisable. Another example is associated with the sphere of regulation of the electrical energy branch. There, conditions with respect to licences, in particular with respect to the mechanism of pricing, may be changed by the National Commission on Regulation of the Electrical Energy Industry only by consent of the licensee. If there is no consent, the dispute is to be examined by the Competition Authority.

A mechanism for interaction or one multifunctional body?

The mechanism described is, undoubtedly, complex and its implementation requires considerable effort. In this connection, the question whether it is advisable to unite at least some, if not all, competition bodies and regulatory bodies is quite logical. The question is legitimate, especially given that there are amalgamations of that sort in some countries. Proposals to that effect have been made in Ukraine as well. The experience of Ukraine, however, suggests that such proposals are mistaken.

The major reason why the functions to support competition in all spheres of the economy and the functions to regulate certain branches may not be combined in a single body is that the protection of a competitive market mechanism against monopolies constitutes the content of the activities of any competition authority. Regulation, on the other hand, provides for support to the market mechanism by means of decisions taken by a State body, in particular by means of decisions about licensing and pricing. Once the relevant State body has taken on the functions of an economic entity, it is not able to assess objectively its own activities from the point of view of competition. One should not ignore the risk of a situation in which a united body of that sort can be captivated not only with respect to a particular branch or several branches, but also with respect to all its activities to support competition in the whole economy.

Given the importance of that matter for the elaboration of efficient competition policy, it would be advisable to fix the above-mentioned provisions in the relevant international documents, in particular in those of UNCTAD and WTO.

Deregulation, demonopolization and privatization: how to ensure consistency with competition

The Zambian experience of privatization

George K. Lipimile

Executive Director, Zambia Competition Commission, Lusaka

Introduction

A brief history of pre-reform Zambia will help to demonstrate that privatization in Zambia has been driven by both necessity and ideology to reverse the economic decline that had hit the country. Zambia embarked with a vengeance on a fully-fledged economic reform programme, with privatization as a cornerstone. In the Zambian context, privatization entailed much more than the mere transfer of ownership from the State to the private sector. It was an integral part of economic policy reform aimed at achieving stability and sustainable growth. It required opening up the economy for domestic firms to compete internationally; improving the regulatory frameworks to foster domestic competition and also permitting the market to make investment decisions; reducing the burden of excess red tape and debureaucratizing of government procedures; imposing anti-inflationary measures to restrict money supply; removing all restrictions of foreign exchange; ending all price controls and discontinuing subsidies to State enterprises, to allow direct foreign participation in the economy; and creating an investment-friendly climate and legislation responsive to the needs of the private sector.

The Zambian Government is committed to economic restructuring through measures which include increasing the participation of the private sector in economic management. This is being achieved through the privatization of former State-owned enterprises and the promotion of small and medium-sized industries. At the beginning of the privatization programme, there were 281 State-owned enterprises: to date, 241 of these companies have been sold to the private sector.

Privatization is not a phenomenon peculiar to Zambia, but a programme being embarked on by all the countries in the region. It becomes important to assess how the privatization programme affects competition in the individual countries. It is important to note that the most significant contribution to the increase in private-sector investment has been the privatization programme, which has offered investors readily available concrete opportunities for investment.

It was realized during the privatization process that if the sale of State-owned enterprises was not carefully planned, the whole privatization process might end up turning the State monopoly into a private "hard-core" monopoly. This has caused great worry to many governments. It was evident that there was no readily available local capital to purchase these companies. Further, it was realized that most of the indigenous people did not have the financial muscle required to buy these companies and later on invest in the capital goods and technology required in larger companies. However, the Government was and is still committed to its privatization programme. The programme above all has become the most viable tool for attracting foreign direct investment worldwide.

The manner of sale of these companies remains a major concern to the Competition Authorities. Firstly, the Zambia Privatization Act clearly specifies that during the privatization of State-owned enterprises, the Privatization Agency shall ensure that monopolies are not created in the process. Although the Privatization Authority is not obliged to consult the Competition Authority on the competition position of the market when selling a company, this provision is enough to compel them to take into account competition considerations.

It was also recognized that, in practice, it does not matter to whom the privatized company is sold, or whether sale will lead to a concentration which will create or strengthen a dominant position. The important consideration is whether a sale will impede competition in the market. The Government has to create a regulatory framework which aims to improve efficiency of the national economy and which has the ability to adapt to change and remain competitive. The fostering of a "culture of competition" is an important aspect during privatization.

However, it is interesting to note that the Competition and Fair Trading Act exempts the application of the Act to any activities expressly approved or required under a treaty or agreement to which the Republic of Zambia is a party. This in real terms exempts all initial transactions involving the privatization of State-owned companies from the application of the Competition and Fair Trading Act, since the State, as owner of State companies, is a party to any privatization sale. However, the effect of this exemption has no significant consequences on competition. The exemption relates only to the initial transaction: thereafter any future transactions or behaviour by the enterprise are covered by the Act.

In 1992, the Zambia Privatization Agency was established as an independent, powerful "one-stop" centre for all privatization matters. Transparency is paramount in implementing privatization and this was ensured through:

(*a*) An in-built private-sector majority on the board;

(*b*) The requirement for independent professional valuations of the enterprises earmarked for privatization;

(*c*) The appointment of independent negotiating teams for each enterprise earmarked for privatization;

(*d*) Statutory reporting requirements coupled with monthly press briefings at which details of transactions are discussed; and

(*e*) A parliamentary select committee on parastatals that monitors operations of the Privatization Agency.

Initial constraints on the privatization programme

Initially, the privatization process was slow, as a result of a number of constraints such as:

(*a*) The lack of precedents for such an undertaking and the subsequent learning curve;

(*b*) The initial lack of political consensus and the incoherent policies of the Government;

(*c*) The narrow and illiquid financial markets and non-existent capital markets;

(*d*) Strong opposition by the State holding company to privatization—a case of vested interests;

(*e*) The initial "wait-and-see" attitude of local and foreign investors; and

(*f*) Overstaffing in parastatals, their unsuitable locations and liquidity problems, which made them unattractive.

The Government dealt with the impediment posed by the State holding company by closing it down and transferring its responsibilities to a directorate of State enterprises, reporting to the Minister of Finance, who is charged with the overall implementation of the privatization programme.

Political interference in the programme was never permitted: we never relented on aspects of transparency, speed and public awareness. We avoided the perpetuation of monopolies by opening up to competition and restructuring large enterprises into smaller units wherever possible. The Government also declared that there were no "sacred cows" in Zambia's privatization programme and that everything would be privatized. Consequently all State enterprises, whether in strategic industries or not, will eventually be privatized.

Ownership and local participation

Let me share with you our experience on the thorny issue of Zambian participation. Like all other African countries, Zambia would like to have as many of its nationals as possible to participate in the privatization programme. The objective of broadening local participation reinforces the whole privatization process. Specifically, broadening local participation in privatization secures consensus of the general public, helps to depoliticize and speed up the process, indicates a strong commitment to transparency and sends an encouraging signal to foreign investors. It satisfies national aspirations, and also encourages political acceptance of the privatization programme. Broadening ownership is frequently cited by most African Governments, as one of the objectives of privatization.

As a way of achieving wider share ownership, the Government set up the Zambia Privatization Trust Fund. The Fund offers a mechanism for warehousing and then selling to the public minority shareholdings in certain major, newly privatized enterprises once the majority of shares have been sold by the Agency to core private investors. The objectives of the Fund are to enable the greatest possible number of Zambian citizens to participate in the privatization process, to protect the value of the minority shareholdings until they are sold, and to ensure transparency. The Fund gives priority to individual Zambian investors who wish to acquire a small number of shares, and even sells shares to Zambians at a discount. If, however, less than favourable market conditions prevail, it will sell shares to financial institutions who are investing on behalf of Zambian citizens.

Of all the methods of broadening ownership, public flotations through stock markets are the easiest and most efficient way of reaching the general public. On occasion, eligibility criteria are set in order to broaden ownership or to avoid a concentration of economic power. However, the Government often favours or wants a core investor in larger enterprises before shares are floated to ensure that a sound management team and good corporate governance are in place. Another reason for having a core investor is to improve operational performance prior to flotation. Given the current State of most parastatals, without a core investor, corporate governance becomes a potential problem.

Privatization and stock-market development are inextricably linked and mutually reinforcing. In Zambia, the Government enacted the Securities Act, which established the Securities and Exchange Commission and the Lusaka Stock Exchange, with the aim of regulating all participants in the stock market with the prime purpose of protecting investors. However, it is important to note that the number of the companies listed on the Lusaka Stock Exchange has increased due to privatization flotations.

There are other forms of participation by Zambians which we also consider important. The following are the various ways in which the Government is trying to achieve Zambian direct participation:

(a) *Management and employee buy-outs*: these are acquisitions by management or employees generally of the shares or principal assets of an enterprise. They can be through either a competitive process (with or without the management or employee team being given preferred terms) or a non-competitive process. We have recorded over 20 management buy-outs to date;

(b) *Directed group ownership*: we provided an opportunity for people who are functionally involved in a particular production sector with limited or no capital to participate in privatization. The scheme aims to broaden local participation by offering equity at discounted prices or on deferred terms. This was the case of Bonnita Zambia which purchased some dairy produce-based factories and included four dairy cooperatives as shareholders;

(c) *Deferred share payments*: we have allowed for these where they are supported by projected cash flows, as in most management buy-out transactions and those involving Zambian individuals. The Privatization Act allows for Zambian and management buy-outs to pay for shares over a number of years and a number of such transactions have been done;

(d) We have also enhanced Zambian participation by getting investors to pledge future share flotations to Zambian investors.

Concluding remarks

The following are a few of the lessons that can be drawn from the Zambian experience:

(*a*) Privatization should be viewed as part of a comprehensive economic reform programme, rather than as the mere transfer of ownership. It needs the roles of the State and the private sector in production and distribution of goods and services to be clearly redefined. No room should be allowed for subsidies to production and other forms of distortion that work against the development of efficient and competitive enterprises;

(*b*) Share ownership is but one form of participation, and carries with it its own inherent risks and benefits. Other forms of participation (including indirect forms) must be explored and implemented vigorously;

(*c*) It is advisable when privatizing, to begin with the smaller, less complicated companies, to minimize the costs of failure, and to move to the bigger, more complex ones at a later stage of the learning curve. Making a mistake selling a dry-cleaning company is less costly than bungling the sale of the largest commercial bank or telecommunication company in the country. However, this should not be an excuse for moving the programme slowly as the costs for delays may be high, as in the case of the privatization of Zambia Consolidated Copper Mines;

(*d*) The general public should be kept well informed to build up credibility and confidence in the programme. Honest and above-board dealings must be fully demonstrated to the public via television, radio, public forums, newspapers, workshops, etc;

(*e*) Price should not be the driving force or motive in accepting bids: a whole range of criteria, including the financial and technical capacity of the investor to build a growing and profitable enterprise and broader participation by citizens, also needs to be taken into account;

(*f*) Enacting appropriate legislation and addressing the need for more competition will facilitate privatization. Competition should be cited as a specific objective of privatization. In Zambia, the Privatization Act clearly specifies that during the privatization of State enterprises, the Privatization Agency shall ensure that monopolies are not created in the process. Consequently, the Agency is compelled to take into account competition considerations, and the competition authority is consulted throughout the privatization process;

(*g*) No political interference in the programme should be allowed. The role of the implementing agency has to be defined. The role of politicians in the process should also be defined and must be limited. The programme should be carried out by competent professionals with no vested interest. The privatization agency should be empowered with the necessary power, independence and resources, and should have the legal status and sufficient authority to initiate, negotiate and conclude transactions.

In general, the economic benefits of privatization are now widely accepted, and include:

(i) Improving enterprise efficiency and performance;

(ii) Developing a competitive industry;

(iii) Accessing capital, know-how and markets, which accelerate growth;

(iv) Achieving effective corporate governance;

(v) Development of well-functioning capital markets; and

(vi) Securing optional price for the sale.

These factors determine the institutional framework and approach of the whole privatization programme. At each point, the keynote is political transparency. Transparency maximizes popular perception of fairness and strengthens support for privatization. I am confident that most of the developing countries, especially those in sub-Saharan Africa, will move on the right path to complete their own custom-made privatization programmes.

Competition, intellectual property rights and the transfer of technology: issues for further discussions in view of UNCTAD X

Hanns Ullrich

University of Munich, Germany

Introduction

Setting up and enforcing adequate international rules on technology transfer to developing and newly industrializing countries is a problem of long standing. It has its roots in a dilemma that is inherent in the exploitation of technological innovation: innovation is a costly and risky exercise. Enterprises engage in innovative activities in the expectation that the innovation, by opening up new or by bringing diversity into old markets, will yield extra-competitive prices at least during a certain lead time (be this merely factual or be it legally protected). Technology transfer means sharing this temporary monopoly (or, mostly, quasi-monopoly) with others. Sharing with competitors is not attractive. Consequently, in order to make technology transfer actually occur, the innovator must be allowed to keep the transferee at some distance and to maintain his control over the technology as a source of extra income. This, however, may frustrate the interests of the transferee who seeks enabling technology with a profit potential.

Developing countries first attempted to impose a balance of interests by direct regulation of technology transfer. Subsequently, they liberalized regulation or replaced it by antitrust control over restrictive covenants in technology transfer agreements. The yardstick for judging acceptable and unacceptable practices was intended to be set internationally by the United Nations Draft International Code of Conduct on the Transfer of Technology.[1] This code, however, has never been definitely adopted.[2] The reasons for this failure are manifold: divergences from the antitrust law concepts of major industrialized nations as regards restrictive exploitation of intellectual property; general trends to liberalize not only markets but also antitrust as a form of market regulation; the decline of the bargaining position of developing countries; the technology transfer to mechanisms other than licensing; and a complete change of perception with regard to intellectual property. The latter, rather than being conceived of as a barrier to trade and as a burden on free competition that has to be accepted for the sake of innovation, has come to be considered as a means of enhancing competitiveness, that is, the absence or the insufficiency of protection has come to be considered as an obstacle to fair trade and as a distortion of competition. Thus, all international energy was consumed by the negotiation and adoption, at the conclusion of the Uruguay Round, of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement), to promote "effective and adequate protection" of such rights.

The technology transfer dilemma, however, has not disappeared. The TRIPs Agreement itself recognizes its existence by providing that its rules do not stand in the way of measures "to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology" (article 8 (II)). Article 40 (I) even states "that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology". But the reach of these provisions is unclear and their practical application uncertain at best. In addition, circumstances have changed again. In many cases it is not the restrictive nature of a technology transfer agreement which causes concern, but the outright refusal to transfer technology at all or its embedment in broader agreements to which developing countries enterprises' have no access. Moreover, two developments need to be taken into consideration. On the one hand, restrictive practices relating to high technology, in particular information technology, have become a matter of concern of antitrust authorities even in industrialized countries, but the approaches to control are still uncertain.[3] On the other hand, the TRIPs rules of antitrust law stand isolated by comparison with ongoing efforts to integrate a multilateral or at least a plurilateral antitrust code into WTO.[4] The question is whether technology transfer issues could not be dealt with more appropriately in such a broader agreement.

---

[1] Reprinted in Fikentscher et al., *The Draft International Code of Conduct on the Transfer of Technology* (Weinheim, 1980), p. 151.

[2] UNCTAD, *Negotiations on an International Code of Conduct on the Transfer of Technology* (TD/Code TOT/60, Geneva, 6 September 1995).

[3] H. Ullrich, "Antitrust law relating to high technology industries: a case for or against international rules?" *Towards WTO-Competition Rules* in Zäch, ed., (Bern, 1999), p. 261.

[4] *WTO, Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council* (WT/WGTCP/2);. Janow, "International Competition Policy and the WTO", in *The Uruguay Round and Beyond*, Bhagwati, Hirsch, ed., (New York, 1998), p. 279.

My purpose is to discuss, first, the reach and appropriateness of the antitrust rules of TRIPS, and, second, some problems of substantive law that have recently attracted much interest in antitrust law enforcement vis-à-vis market-dominating enterprises, namely refusals to license and the attempts to extend market power by conditioning the sale or supply of software (i.e. information processing programmes, on the acceptance of complementary software). The interest of these problems is that they are directly related to technology transfer, but raise even more difficult questions of substantive law.

The TRIPS Agreement and technology transfer

Antitrust rules of the TRIPS Agreement

It is certainly not the purpose of this policy paper to enter into a discussion on the proper legal meaning of specific provisions of the TRIPS Agreement. The basic question, however, is whether the Agreement provides a suitable framework not only for the protection of technology that may be transferred—this is the very purpose and objective of the Agreement—but also for the adequacy of the process of the transfer of technology. In this respect, it should, first, be noted that the TRIPS Agreement specifically addresses technology transfer as a separate issue in both article 8 (II) and article 40.[5] In doing so, it clearly distinguishes between restraints of trade and impediments to the transfer of technology. Second, both article 8 (II) and article 40, rather than establishing an international framework, basically refer the matter of technology transfer regulation back to national law. All they do, as a matter of convention law, is to indicate some overriding principles: the requirement of consistency with the provisions of the Agreement; the acknowledgement of the existence of restrictive conduct; the distinction between unilateral abuses and concerted practices; the limitation of control to "particular cases" (article 40 (II.1)); and the obligation of a minimum of bilateral cooperation in the enforcement of national law (article 40 (III) and (IV)). Third, article 8 (II) recognizes the authority of States to control restrictive conduct as a matter of principle. The principle is important as it is a basic one, but it is a principle only. The implementing provision is article 40, which, however, is of limited scope. On the one hand, it addresses licensing practices only (not cooperation, joint ventures, etc.). On the other hand, as already stated, except for a number of illustrative—and merely illustrative—examples (exclusive grant-backs, no-challenge clauses, coercive package licensing), it leaves the determination of unlawful practices to States.

The question that immediately comes to mind is whether such referral to national law represents no more than a reservation made in favour of State sovereignty or whether it also indicates a purposeful abstention from any international regulation of technology transfer. At the time of the TRIPS negotiations the draft code on technology transfer was still on the table, but certainly was not to the taste of the promoters of a TRIPS Agreement. Clearly also, an internationally agreed-upon set of rules could make up for the weakness of the bargaining position of most developing countries in the matter. The question may easily become controversial. For the time being, all I want to point out is that article 8 (II) and article 40 of the TRIPS Agreement hold out little hope for the revival of a discussion on international rules on technology transfer, whether as a separate instrument, a WTO-antitrust code, or simply the further implementation of the TRIPS Agreement. First, the very existence of article 8 (II) and article 40 may serve as an excuse not to re-reopen discussions. Second, it is no accident that article 8 (II) and article 40 do not give any clear and detailed guidance: not only did the TRIPS negotiators have other preoccupations, but there was and there is no basic general agreement on what the rules might be, since the very understanding of the interrelationship between competition and intellectual property still varies widely.

However, this lack of guidance (the "abstention principle") does have a substantive meaning of its own: parties to the TRIPS Agreement may autonomously determine the kind or type of practices which they consider may impede (article 40) or adversely affect (article 8 (II)) the transfer of technology. This results not only from the very fact that these articles refer the matter back to national law, but also from the merely illustrative character of the examples of misconduct given in article 40 (I). The parties may even define these practices with a view to their needs of technological development. However, they may not simply return to what has been called the "development test" by comparison to the "competition test" in the discussions on the draft code on the transfer of technology.[6] Article 40 (I) expressly provides that whatever licensing practices a party to the Agreement considers to be abusive, these may be held to be abusive only according to the circumstances of the particular case. The provision also establishes a link between the adverse effects an agreement may have on technology transfer and its restrictive effects on competition: it is only because the Agreement restrains competition that it may be considered to impede technology transfer. In addition, section 8 of part II of the Agreement indicates that the provision only envisions anti-competitive practices.

The underlying rationale of this competition approach is fairly obvious: technology transfer is a matter of free-enterprise decision. Competition between potential transferors and potential transferees will guarantee the most efficient transfer, and it will probably prevent any anti-competitive (i.e. inefficient) conduct (note that the TRIPS Agreement was negotiated at a time when the antitrust question was conceived of mainly in terms of the Chicago School approach to it). It is only if, in a particular case, unduly restrictive terms are negotiated by parties or imposed on one of them that antitrust law has to be invoked. The idea that transferees in developing countries may not be in a position, economically or politically, to freely choose the best transferor is alien to the thinking that underlies the TRIPS Agreement. While I disagree with

---

[5] For a discussion see UNCTAD, *The TRIPS Agreement and Developing Countries* (Geneva, 1996), pp. 53 et seq.

[6] See Fikentscher, loc.cit. at pp. 52 et seq.; Kuruk, "Controls on Technology Transfer: An Analysis of the Southern Response to Northern Technological Protectionism", 13 MD.J. Int'l.L. Tr. 301, 312 et seq. (1989); Cabanellas, *Antitrust and Direct Regulation of International Transfer of Technology Transactions*, (Weinheim, 1984), pp. 47 et seq.; Stoll, *Technologietransfer.: Internationalisierungs- und Nationalisierungstendenzen* (Berlin, 1994), pp. 121 et. seq.

these basic tenets, I believe that article 40 gives sufficient leeway for States to control technology transfer agreements according to their competitive merits.[7] The weakness of article 40 is not the competition approach, as this is a sufficiently broad concept, but the fact that it leaves all control to national enforcement by States, which may be too weak individually to bring their views to bear on the matter in general. Unless their markets are very attractive, national antitrust authorities are in a poor position to strike down technology transfer agreements on the grounds of anti-competitive terms.

Even more intriguing questions are raised by the requirement for consistency. Both article 8 (II) and article 40 state that measures for controlling anti-competitive practices may only be taken consistently with the other provisions of the Agreement. If interpreted narrowly, this requirement simply means that antitrust laws may not be used as a means to undermine the protection afforded by the Agreement (e.g. the protection of trade secrets would be undercut if a licensee could not be held to a confidentiality requirement even after termination of the licence). Read more broadly, the consistency requirement will be understood as a safeguard against antitrust rules that affect the reward rationale of agreements on intellectual property rights: whenever a restrictive clause is subject to antitrust analysis, the question will be raised as to whether the restriction is justified in the reward interest of the holder of the intellectual property rights (i.e. territorial or field-of-use restrictions, quantity restrictions, requirements of sufficient exploitation and even tie-ins). In view of the dilemma of technology transfer agreements mentioned above, such objections are likely to be raised in almost every case. The result thereof is that the consistency requirement could amount to reintroducing the traditional view that restrictions that are inherent in the exclusivity of intellectual property rights or that may be justified as a reasonable reward for the owner of the rights are excluded from antitrust scrutiny. This is the more likely as, on the one hand, the philosophy of the TRIPS Agreement is to ensure the effective and adequate protection of intellectual property rights, and, on the other, the juxtaposition of the consistency requirement to the control of anti-competitive practices implies precisely the existence of that potential of conflict between exclusive intellectual property rights and competition that is at the basis of the inherency and reward doctrines. All this, in turn, would lead us back to the divergence of views on the proper determination of the interface between intellectual property rights and antitrust matters.[8]

A discussion of these diverging views, with a view to finding an international consensus, may be unavoidable. However, achievement of a consensus is very unlikely unless agreement is reached at least on the starting points for the discussion. One starting point follows directly from the abstention principle of article 8 (II) and article 40: the referral to national law means that it is up to States to determine their own concepts of competition policy. Consequently, divergent policies must be accepted and tolerated. This also means that divergent treatment of restraints on competition that are based on intellectual property rights, must be accepted.

The other starting point should be that intellectual property may not be dealt with under the antitrust laws differently from any other piece or form of property.[9] Rather, any intellectual property-related restraint should be analysed according to its own merits and in view of the general objectives and policies of a given antitrust law system. The reason for this simply derives from modern analysis of the economic characteristics of the intangible subject matter of intellectual property and of the function that the legal exclusivity is intended to perform in view of these characteristics. This subject matter, however diverse, is always a form of information: a technical instruction in the case of inventions; an aesthetic or emotional appeal or a way of presenting a human, political, philosophical or scientific idea in the case of literary or artistic works; a message on the origin or quality of goods and services in the case of trade marks or service marks, etc. Modern economic theory[10] has pointed out the specific economic features of information, namely the risk involved in its production, the total or relative absence of natural appropriability, and non-rivalry of and non-consumption by use. As a result it needs to be artificially transformed into an appropriable, scarce “good” that may be valued according to market rules. Indeed, in the absence of an artificial transformation that allows the information to be used individually to the exclusion of third parties, if it is created at all, it will not be created according to demand and at competitive costs. It is the exclusivity conferred by intellectual property protection that brings about such a transformation into an economic good. This means that by virtue of the law, intellectual property establishes the protected subject matter as an economic good. But that is all it does. Contrary to a very common, but rather misleading conception, it is not the granting of an intellectual property right that represents an incentive for the creation of its subject matter or promises a reward, although these considerations are generally used to justify restrictive intellectual property exploitation. The exclusivity is a hollow right only. As such it is perfectly neutral vis-à-vis the forces of the market, and takes on value only in accordance with competition. Indeed, it is competition alone that provides the incentives and determines the value of the subject matter and the reward for its creation in accordance with the demand that may be met by the subject matter. The only—but very important—function the exclusivity has in this respect is an

---

[7] Compare also UNCTAD, TRIPS Agreement, loc. cit. at Nos. 267 et seq., 270 et seq.

[8] For a discussion see UNCTAD, TRIPS Agreement, loc.cit. at Nos. 272 et seq.; Ullrich, “Intellectual Property, Access to Information and Antitrust: Harmony, Disharmony, and International Harmonization”, in *Intellectual Products Novel Claims to Protection and their Boundaries*, Dreyfuss, ed., (London, 1999) (forthcoming).

[9] For this proposition see United States Department of Justice, Federal Trade Commission, *Antitrust Guidelines for Licensing of Intellectual Property*, 4 Tr. Reg. Rep. (CCH) 13.162, sub. 2.1.

[10] See for a general discussion Audretsch, “Intellectual Property Rights: New Research Directions”, in *Intellectual Property Rights and Global Competition*, Albach, Rosenkranz, eds., (Berlin, 1995), pp. 35 et. seq.; Besen, Raskind, “An Introduction to the Law and Economics of Intellectual Property”, 5 J. Ec. Persp. 3 (1991); Dasgupta, “The Welfare Economics of Knowledge Production”, 4 (4) Oxford Rev. Ec. Poly.1 (1988); David, “Intellectual Property Institutions and the Panda’s Thumb: Patents, Copyrights and Trade Secrets in Economic Theory and History”, in *Global Dimensions of Intellectual Property Rights in Science and Technology*, Wallerstein, ed., (Washington, 1999), p. 19.

intermediate one: that of attributing the opportunities for a reward (the incentives) and the actually available reward to the owner of the right, that is to the creator (inventor, author) or his successor in title. Consequently, competition is a prerequisite for the well-functioning of the intellectual property system which, in its absence, has no purpose. Intellectual property, indeed, represents nothing other than a means of competition, an opportunity to act in competition according to the market rules of profit maximization. It grants protection *for* competition, not *from* competition.[11]

This analysis in no way detracts from the importance of intellectual property, but simply puts it into the appropriate perspective. As an institutional arrangement for the proper operation of markets for intangible subject matter, it is exempt from antitrust control. In this sense, intellectual property law represents a framework regulation for markets and competition. As a piece of individual property, however, intellectual property is fully subject to general antitrust principles, because what it conveys to its owner is precisely that autonomy of decision in competition and freedom of contracting according to individual preferences that results from any private property, and that is the object of, and the connecting factor between restraints on competition. Indeed, this freedom of decision and contracting is no different from general freedom of contract; nor is it based on any different rationale,—it too is based on the recognition by law of the legitimacy of pursuing individual profit-maximizing interests through contract transactions. It is this autonomy that, just as in the case of any restrictive contract, is used and perverted by restrictive intellectual property exploitation. Therefore, antitrust control must and does apply to intellectual property-related restraints in the same way as it applies to any other restraint. General rules and principles or objectives of antitrust law, not intellectual property, determine whether and which "vertical" or other intellectual property-related restraints of competition are acceptable or not. If antitrust law tolerates intra-brand restraints for the sake of inter-brand competition, then such restraints must be tolerated in licensing agreements as well. If, however, in the interest of consumer choice, free trade or market access, vertical restraints are subject to limits set by antitrust law, then these limits must equally apply to licence restrictions. The exclusivity may not be used as an excuse for restrictive covenants. Conversely, the approach advocated here explains why licence restrictions that are not directly related to the legally recognized purpose of intellectual property, such as quality control, supply exclusivities or improvement exchanges, are accepted as well and on the basis of the same criteria, namely, on the basis of those that follow from general antitrust law principles of furthering innovative competition.

[11] For a more detailed discussion see Ullrich in Dreyfuss, ed., loc. cit. sub. II.A.2; *idem*, Gewerblicher Rechsschutz und Urheberrecht in Immenga, Mestmäcker, eds., EG-Wettbewerbsrecht (Munich, 1997), pp. 1229 et seq.

Beyond TRIPS

The context of technology transfer

The problems of article 8 (II) and, more particularly, of article 40 go beyond questions of interpretation of the reach of the provisions. While article 8 (II) addresses any "abuse of intellectual property rights by right holders" (not only restrictive practices which adversely affect international technology transfer), article 40 has a much narrower focus on licensing practices. But one should neither construe the consistency requirement with respect only to licensing—its meaning must be different when it is applied to the possibly abusive exercise of intellectual property by market-dominating enterprises—nor should technology transfer be reduced to the granting of licences. It was precisely the shift of technology transfer from pure licensing transactions to joint research and development carried out within broader frameworks of inter-firm co-operation or of strategic alliances which contributed to UNCTAD's final abandonment of the draft code project. Similarly, foreign direct investment via the establishment of subsidiaries or the creation of joint ventures makes technology transfer occur as a collateral activity that cannot reasonably be assessed in terms of intellectual property-licensing, even though licensing agreements may be concluded as an integrated part of the broader overall transaction.[12] General antitrust law will, indeed, never limit its analysis to the licensing agreement alone (even though it will be examined specifically), but will put it into its transactional context both as regards its purpose and its effects (see, for example, as regards joint ventures, article 5 (II), Reg. 240/96).[13] Article 40 of the TRIPS Agreement may not limit the analysis, either in general or on the basis of the consistency requirement. It simply is inapplicable to these kinds of transactions and, consequently, fails to control a major part of technology transfer transactions. A broader set of antitrust law rules is required.

As a matter of fact, it is not only in this regard that, by sticking to traditional concepts of technology transfer, article 8 (II) and article 40 fail to provide an adequate approach to restrictive terms of technology transfer transactions. It is, of course, true that technology transfer still occurs frequently in the form of traditional licensing arrangements. The chemical and the engineering industries may provide examples. But in other industries new problems have arisen. On the one hand, software licensing in the information industries has developed new forms of contracting which tend to both reinforce existing copyright protection or to compensate for inadequate protection.[14] In this industry, licensing really is a way of supplying services, and restrictive licensing terms may

[12] Compare UNCTAD, *World Investment Report 1997—Transnational Corporations, Market Structure and Competition Policy* (Geneva, 1997), pp. 12 et seq.,; 203 et seq., Altin-Sieber, *Joint Ventures, Technologietransfer und –schutz* (Heidelberg, 1996), pp. 283 et seq.

[13] See Altin-Sieber, loc. cit. at pp. 253 et seq.; Gutterman, *Innovation and Competition Policy: A Comparative Study of the Regulation of Patent Licensing and Collaborative Research and Development in the United States and the European Community* (London, 1997), pp. 327 et seq.

[14] For more detail see Konrad Ullrich, in *Der internationale Softwarevertrag*, Ullrich, Körner (Heidelberg, 1995), pp. 272 et seq.

simply be a way of determining the scope of the service rendered (e.g. the scope of use of the computer program or database). In the telecommunications industry, licensing operations may be at the basis of granting network access rather than access to technology, and the applicable law may not be antitrust, but liberalized telecommunications regulation which takes little account of intellectual property concerns (e.g. open network requirements).[15]

On the other hand, the opportunities for technology transfer have changed considerably. This is not only due to the aforementioned shift to inter-firm cooperation, strategic alliances and direct foreign investment, which, either de facto or *de jure*, limit access to technology. Additional difficulties result from the way in which new technologies are protected, namely by copyright or *sui generis* rights (for databases)[16] rather than by patents. Copyright protection transforms informational subject matter into absolutely protected trade secrets, that is, it provides both secrecy and legal exclusivity. In addition, as it is not registered, it contributes to the lack of transparency of the market, and as it attaches to any trivial work, it creates broad interdependencies where the protected subject matter is used in systemic or modular form. Industrialized countries are not alone in suffering from these problems[17] (see, for example, problems over the scope of patent protection in biotechnology, in particular in gene technology).[18] Finally, public science is no longer as public as it used to be. Both in the United States and in Europe, public research institutions are required to protect and to commercially exploit their useful new knowledge, and they mostly must do so by exclusive contracting (or else they would not find a licensee).[19] All this, of course, is not a matter of restrictive conduct. On the contrary, it is the result of fierce competition between enterprises and between the industrialized nations. It has developed as a result of the emergence of new revolutionary technologies, the dependence of the modern welfare State on economic growth (which, in turn, depends on technological progress), and national rivalries and hegemonic aspirations and challenges. The resulting climate certainly is not conducive to generous technology transfer.

Relationship with WTO antitrust

This seminar is held in the perspective of UNCTAD X, which itself will be held in the perspective of the development of world trade and of its organization by WTO, in particular in the perspective of the establishment of a WTO antitrust code. It is not my purpose to discuss the political utility and feasibility of such a code.[20] I expect it to come at least in the form of a few minimum rules outlawing some commonly disapproved antitrust violations (so-called "consensus wrongs", such as horizontal price-fixing, bid-rigging or group boycotts), of an obligation of WTO members to provide, as a matter of domestic law, for adequate and effective antitrust law rules and enforcement, and of a mutual obligation to cooperate in extraterritorial antitrust enforcement, however loosely (see article 40 (III) and (IV) of the TRIPS Agreement).[21] In addition, or alternatively, there may be a plurilateral agreement on some more specific rules, probably also only on trade-related antitrust violations (price discrimination, market access). What is the relationship of article 8 (II) and article 40 with such developments?

One thing is clear. As article 8 (II) and article 40 only reserve the State's authority to legislate domestically on abusive and restrictive conduct relating to the exploitation of intellectual property, they in no way anticipate or block whatever international antitrust law harmonization may be brought about by WTO. The questions are rather: first, should the principles underlying the TRIPS Agreement (particularly, article 8 (II) and article 40), be transposed to the general WTO level (i.e. should a "consistency requirement" of some sort be written into a WTO antitrust code and, if so, what should be its content)? And, second, how may UNCTAD and its members prepare for the negotiation of any WTO antitrust code?

The first question implies another one, namely whether a WTO antitrust code should contain any specific rules on intellectual property-related restraints of trade at all. My answer to both questions would be no. Specific rules on intellectual property-related restraints of trade traditionally and necessarily relate to licensing agreements only. Licensing agreements, however, are no longer the only nor the typical agreements on exploitation of intellectual property, and they are not representative of technology transfer either. Therefore, they would cover only part (though by no means a negligible part) of intellectual property exploitation. In addition, I am not convinced that any of the existing rules—and certainly not the German one—could serve as a model.[22] A proper approach should carefully concretize the application of general antitrust rules, as is done by the United States Guidelines on Intellectual Property Licensing[23] and by European Union

---

[15] Compare generally Commission, Notice on the application of the competition rules to access agreements in the telecommunications sector, O.J.E.C. 1998 C 265, 2; *idem.*, Guidelines for the application of the competition rules in the telecommunications sector, O.J.E.C. 1991, C 233, 2.

[16] See articles 7 et seq. Directive 96/9 EC by the European Parliament and the Council of 11 March 1996 on the legal protections of databases, O.J.E.C. 1996 L 77, 28; Gaster, La protection juridique des bases de données dans l'Union européenne, *Rev. Marché Unique Européen*, 1996 (4) 55; Lehmann, *The European Database Directive and Its Implementation into German Law*, 29 II C 776 (1998).

[17] Compare Samuelson, Davis, Kapor, Reichmann, "A Manifesto Concerning the Legal Protection of Computer Programs", 94 Col. L. Rev. 2308 (1994) and the contribution, ibid. at pp. 2559–2677 to the Symposium "Toward a Third Intellectual Property Paradigm".

[18] See Barton, "Patent Scope in Biotechnology", 26 II C 605 (1995); Looney, "Should Genes be Patented? The Gene Patenting Controversy: Legal, Ethical and Political Foundations of an International Agreement", 26 L. Pol'y. Int'l. Bus. 231 (1994); Eisenberg, "Genes, Patents, and Product Development", 257 Science 903 (1992); Heller, Eisenberg, "Can Patents Deter Innovation? The Anticommons in Biomedical Research", 280 Science 698 (1998).

[19] See EU Commission, ed., Report of the ETAN Group, "Strategic Dimensions of Intellectual Property Rights in the Context of Science and Technology Policy" (Brussels, 1999), sub. 5.

[20] See *supra* No. 4; van Miert, "Building on the Singapore Ministerial Meeting: Trade, Investment and Competition", in Bhagwati, Hirsch, eds., loc. cit. at p. 265; for the various approaches Ullrich, "International Harmonisation of Competition Law: Making Diversity a Workable Concept", in Ullrich, ed., *Comparative Competition Law: Approaching an International System of Antitrust Law* (Baden-Baden, 1998), p. 43.

[21] See EU Commission, The Competition Policy of the European Community, XXVIII Report on Competition Policy 1998 (Brussels, 1999), Introduction van Miert, at pp. 6 et seq.

[22] See sub. A.2.b; Ullrich in Immenga, Mestmäcker, loc. cit. at pp. 1223 et seq.

[23] *Supra* No. 9.

Regulation 240/96,[24] both, of course, showing different results. But the approaches are the same, namely a flexible one of specifying the application of general rules to intellectual property in accordance with the overall objectives of a given competition policy.

The introduction of some sort of consistency requirement could result in repeating the search for a proper approach to intellectual property-related antitrust matters. Consistency of intellectual property-related antitrust law enforcement, however, will mean very different things in different contexts of the exploitation of intellectual property (e.g. the unilateral exercise of market power, licensing, territorial assignments). Generally it tends to foreclose careful analysis of the circumstances of individual cases by abstract intellectual-property considerations. A typical example is the neglect of licensor restrictions even in the newly revised German Act against Restraints of Trade (sections 17 and 18). Licensing restrictions are not a matter of concern for the licensee only, but the result of a negotiated transaction where both sides give and take. It is difficult to see how the balance of interests they strike (possibly at the expense of third parties and of competition) may properly be analysed by reference to pre-established, abstract criteria of intellectual property-based exclusivities rather than by reference to the actual commercial and competitive stakes the parties have in the agreement.

The abstention from including intellectual property-specific rules in a WTO antitrust code does not mean that members of UNCTAD should not prepare themselves for the negotiations on such a code even as regards matters relating to intellectual property rights. Rather, following on from what has been said on the effects of article 8 (II) and article 40, they must define their own antitrust rules on intellectual property-related restraints of trade in view of their own domestic competition policy, and they must do so urgently. It is only on the basis of a well-defined domestic antitrust enforcement policy that an international code can be negotiated advantageously. Such an approach is more promising than renewed attempts to define international guidelines on the transfer of technology which will not be accepted by parties other than UNCTAD members themselves, and it is more convincing than complaints that article 8 (II) and article 40 have not produced the expected results. Other parties will do so only if States activate the provisions by taking the antitrust enforcement initiative which article 8 (II) and article 40 reserve for them. This may not always be easy. However, in establishing their own competition policies, members of UNCTAD may draw on and further develop the valuable work UNCTAD has done in drafting and negotiating fundamental rules such as the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.[25] Moreover, UNCTAD will certainly be ready to coordinate member States' antitrust activities,[26] to give them technical assistance, and to help them to enter into bilateral or multilateral enforcement cooperation agreements.[27] If technology transfer is really adversely affected by some or, worse, by widespread restrictive practices, self-help rather than reliance on some future international agreement is the remedy—all the more so as any such international mechanism will be cumbersome, will focus only on the most obvious and worst practices (see article 40 (II) of the TRIPS Agreement), and will satisfy developing countries' interests[28] only if they can bring some weight to the negotiating table.

Some issues of substantive law related to technology transfer

Antitrust and information markets

In view of the general theme of this seminar, I would like to draw attention to some issues of substantive law which are closely related to technology transfer and which have global dimensions. The common denominator is that they relate to information markets and that they touch on the dilemma between promoting dynamic competition for innovation and controlling the resulting market power in the interest of continuing competition.

Information markets are not global by nature.[29] The fact that information is ubiquitous does not mean that there is a demand for it everywhere—this is a question of the nature of the information and of its value for users. However, the means of transportation of information and of communication tend to be global (telecommunication and computer networks, the Internet). These means of transportation are subject to different legal rules; telecommunications are mostly subject to some form of national regulation, while the Internet is largely self-governing. International conflicts of regulation may become rather serious not only because telecommunications and the Internet operate across the borders of States, but because their value increases the more they are used nationally and

---

[24] Commission Regulation 240/96 on the application of article 85, paragraph 3, of the Treaty to categories of technology transfer agreements, O.J.E.C. 1996 L 31, 2.

[25] Reprinted in 19 Int'l. Leg. Mat. 813 (1980); UNCTAD's work has gone on since, see UNCTAD Secretariat, *Review of All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices—Strengthening the Implementation of the Set* (TD/RBP/Conf. 4/8 of 4 September 1995).

[26] For efforts of developing countries to coordinate their competition policies see Tavares de Avanjo, Tineo, "Harmonization of Competition Policies Among Mercosur Countries", XLIII Antitrust Bull. 45 (1998).

[27] See for the antitrust enforcement agreements that have been concluded between industrialized States (US-EU, US-Germany, US-Canada, etc.) Hachigian, "Essential Mutual Assistance in International Antitrust Enforcement", 29 Int'l. Lawyer 117 (1995); Romano, "First Assessment of the Agreement Between the European Union and the USA Concerning the Application of Their Competition Rules", Rev. dr. aff. int. 1997, 491; Laudoit, Friedbacher, "Trading Secrets–The International Antitrust Enforcement Assistance Act", 16 N.W.J. Int'l. L Bus. 478 (1996); EU Commission, *The Competition Policy of the European Community 1998*, loc. cit. at pp. 101 et seq.

[28] See Correa, "Competition Law and Development Policies", in Zäch, ed., loc. cit. 361 sub. III.

[29] Antitrust enforcement agencies, however, tend to define geographically relevant R & D and/or innovations markets globally, see Gutterman, loc. cit. at p. 406; Ross, *Principles of Antitrust Law* (New York, 1993), pp. 214 et seq.; Monopolkommission, Hauptgutachten VIII (1988/1989).

internationally. These so-called network effects[30] tend to increase both demand by users and market power on the supply side, that is, the power of the operator of the network and the power of the supplier of communication tools (e.g. software developers).

The case in point is, of course, the Microsoft case.[31] It concerns the bundling of the supply of the market-dominating Microsoft operating system with the supply of a computer application program, the Microsoft Internet browser. The case not only raises a tie-in issue—the question of leverage power and of product complementarity—but also the issue of the combination of some network effects (those of the Internet and those resulting from the consumer's interest in having identical browsers as a matter of convenience) with innovation. Microsoft's own browser is an innovation, but its acceptance will be extraordinarily enhanced if, as a result of being bundled together with the operating system of Microsoft, it passes the network threshold more easily, because then it will be rapidly on the way to market dominance in its own right. At the same time, the value of Microsoft's operating system will be increased. The antitrust issue then is to ensure that Microsoft's browser makes its market entry and success only upon the basis of its own merits. The ease of use of Microsoft's browser as combined with Microsoft's operating system may be both a part of the innovative merits of the browser and of the starting help the browser unduly obtains due to the market dominance of Microsoft's operating system. Enjoining Microsoft from using coercion or explicit tie-in practices will not solve the problem, but it is the only antitrust remedy. Conversely, the preservation of Microsoft's monopoly for operating systems will benefit from the acceptance by consumers of the integrated browser simply as a matter of convenience, and again all antitrust law can do is to inhibit coercive or artificial bundling. The crucial point is that, whether or not the United States Department of Justice is able to prove undue bundling or some other predatory practice (e.g. aggressive pricing of the not yet dominant product on the basis of monopoly income), even if it wins, its success may not be enough. First, due to the network effect, the monopolist may not really be stopped on its way to a broader monopoly (the market may even have tipped already towards such a broad monopoly). Second, due to the network effect, enjoining coercive practices with respect to one territorial market alone, even if it is a very large market, will never be sufficient. Unless the antitrust authorities of all markets concerned successfully take similar action, the network effect will help the monopolist to spread the effects of unlawful action in one market to other markets. Put differently: States cannot rely on antitrust enforcement by other States, but must become active themselves.

The problem of substantive law of these and similar cases[32] is that once a firm has obtained a dominant position due to innovation it may be tempted to make and to introduce further innovations not so much with a view towards gaining new markets but with a view towards preserving its existing position. This, of course, it cannot do by innovations that have no merits at all. Therefore, it is very difficult to separate monopoly-enhancing or predatory innovation from meritorious innovation. The art of antitrust then may be rather to refrain from intervention than killing the wheat by fighting the weed.

Similar conflicts of antitrust law enforcement may easily arise in cases where competitors are granted access to information held by a monopolist. These cases have become well known due to the European Court of Justice's decision of 6 April 1995 in the case of RTE and ITV *v.* the Commission,[33] which granted such access regardless of copyright protection for the information at issue, and with little (not to say poor) analysis of the circumstances.[34] The importance of the judgement (and of similar case law in Germany and in the United States)[35] is that, *inter alia*, it opens a way to information on computer program interfaces which may be necessary for the development of complementary products or services. The doctrine frequently relied upon in support of access to information is the "essential facilities" doctrine that originated in United States antitrust practice.[36] This doctrine, however, provides only a rather vague formula for giving competitors access to markets that are situated upstream or downstream of the market dominated by a monopolist's "essential facility", which might be a railway bridge or a telecommunications network. The crucial question always is whether the essential facility really constitutes a barrier to market entry which the competitor may not reasonably duplicate. This test may never be made in terms of static competition, but only in terms of dynamic competition for innovation. In the information and in the telecommunication industry in particular, many "essential facilities" have proved to be duplicable by innovation (e.g. fixed and mobile networks, proprietary standards, blocking patents or copyrights, etc.).

Other issues of current interest

Providing access to information is always a form of technology transfer. Providing compulsory access to

[30] See Sheremata, "Barriers to Innovation: A Monopoly, Network Externalities, and the Speed of Innovation", *XLII Antitrust Bull. 937* (1997); Rubinfeld, "Antitrust Enforcement in Dynamic Network Industries", *XLIII Antitrust Bull. 859* (1998); Balto, Pitofsky, "Antitrust and High Tech Industries: The New Challenge", *XLIII Antitrust Bull.* 583 et seq. (1998); Lemley, McGowan, "Legal Implications of Network Economic Effects", 86 Cal. L. Rev. 481 (1998).

[31] See United States *v.* Microsoft, 1998-2 Tr. Cases (CCH) P. 72.261 (D.D.C. 1998); Software Publishers Association, "Competition in the Network Market: The Microsoft Challenge", 27 Computer L. Rep. 967 (1998); Meier-Wahl, Wrobel, "Wettbewerbsregulierung in einem dynamischen Markt", WuW 1999, 28; see also extensively Meese, "Monopoly Bundling in Cyberspace: How Many Products Does Microsoft Sell?" *XLIV Antitrust Bull.* 65 (1999), and Lemley, McGowan, loc. cit. 86 Cal. L. Rev. pp. 500 et seq. 1998 (also with respect to former attacks on Microsoft).

[32] See Lemley, McGowan, loc. cit. 86 Cal. L. Rev. 507 et seq. (1998); Ullrich, in Zäch, ed., loc. cit. sub. II.4.b, with references. Note that typically network effects arise in physical networks (energy transportation, railways), but show similar characteristics in virtual networks (information, mobile telecommunication, etc.).

[33] Rep. 1995 I 743.

[34] For a detailed critique see Ullrich, in Dreyfuss, loc. cit. sub. II.B.2; generally Cotter, "Intellectual Property and the Essential Facilities Doctrine", *XLIV Antitrust Bull*. 211 (1999), both with references.

[35] See references *supra* No. 34.

[36] See Venit, Kallaugher, "Essential Facilities: A Comparative Law Approach", in 1994 Fordh. Corp. L. Inst. 314 (B. Hawk, ed., 1995); Cotter, loc. cit. *XLIV Antitrust Bull*. 211 (1999); Donahey, "Terminal Railroad Revisited: Using the Essential Facilities Doctrine to Ensure Accessability to Internet Software Standards", 25 AIPLA Qu. J. 277 (1997).

information is a particularly strong intervention in the market place because the information necessarily becomes non-proprietary, that is, its use may no longer be controlled. In addition, the effects of such intervention tend to be extraterritorial, because once the information is available somewhere it is likely to become known everywhere. This is part of the problem of so-called predisclosure remedies of antitrust law, which require market-dominating enterprises to disclose their innovation plans prior to actual innovation to competing enterprises on related (after-) markets (e.g. to manufacturers of spare parts or of peripheral products, to suppliers of maintenance services, etc.).[37] United States and European Union antitrust authorities have taken different views on this matter.[38] The problem with this divergence of view is that the controversy is always at the expense of the innovating monopolist, because if such a remedy is available under the laws of one State, other States neither need to care for it any more nor may they successfully oppose disclosure. The information is made available.

Another important issue, which I cannot deal with in detail here, is standardization. Again, it has arisen particularly in the information and telecommunication industries, where interface compatibility may be a matter of access to markets that can best be solved by standardization. However, standards may also retard innovation, they may be the result of collective concertation or they may convey market power when, due to network effects, an innovating firm has succeeded in making its product configuration a de facto standard. On all these accounts, standardization may raise antitrust law concerns, and these concerns may become particularly troublesome when standardized interfaces are either covered by intellectual property or when they exclude the exploitation of the most advanced intellectual property-based innovation.[39]

The last, but by far not the least, problem that needs to be mentioned is that of the acceptance or non-acceptance of the principle of international exhaustion of intellectual property rights. The problem is that its general recognition still comes up against the stumbling block of the principle of territoriality. But the issue has become important again due to divergent attitudes even among industrialized nations.[40] Neither regional integration nor the guarantee of global intellectual property protection given by the TRIPS Agreement seem to favour international exhaustion, even though it really is a minimum requirement of free trade.[41] This issue has become a matter not so much of trade policy, but of political belief and international power, where even the most reasonable legal reasoning will not be persuasive. Probably the best advice to be given to any country is to follow article 6 of the TRIPS Agreement, that is, to handle the matter individually and according to what a country thinks is in its national interest.[42]

Conclusion

It is time for the establishment of a truly international system of competition law. Intellectual property is exploited internationally, and my last examples have pointed to the conflicts that may arise if antitrust law is enforced on a territorial basis only. The establishment of such an international competition law system should be based on an agreement resulting from voluntary consensus rather than from a bargain of trade concessions or from the threat of trade sanctions. Already the TRIPS Agreement was not a good example of how to establish an international economic order. An international antitrust code will never be a success if it is imposed rather than voluntarily accepted. There are technical reasons for this, since antitrust may not itself be framed in the form of a trade concession. Its operation may not be defined by reference to particular industries but must be and is determined by reference to the economy as a whole. Also, its reach is not determined by reference to national markets, but by reference to relevant geographic markets, particularly global markets. Finally, antitrust may not be fashioned or applied so as to serve purposes of retaliation against foreign measures that distort trade, because this would hurt domestic industry as well. Consequently, bargaining antitrust for trade will work only one-way, and it will tend to result in lock-in situations once it has been introduced or modified as a matter of trade concessions.

---

[37] See Berkey Photo *v.* Eastman Kodak, 603 F 2d 263, 279 et seq. (2d Cir. 1979); ICL Peripherals *v.* IBM, 458 F Supp. 423 (N.D. Cal 1978).

[38] See as to the IBM-case Commission, *15th Rep. Competition Policy 1984*, sub. No. 95 et seq. (Luxembourg, 1985); Lomholt, "The 1984 IBM Undertaking–Commission's monitoring and practical effects", 1998 (3), *Competition Policy Letter* 7 (European Commission, ed.) and for the terms of the settlement (1984) 3 C.M.L.R. 147; regarding the United States see Fox, "Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness", 61 Notre Dame L. Rev. 1981, pp. 1011 et seq. (1986).

[39] See Dixon, "The ETSI Complaint and the European Commission's Communication on Standards", in Hansen, ed., *International Intellectual Property Law and Policy* (London, 1996), 369; Bekkers, Liotard, "European Standards for Mobile Communications: The Tense Relationship between Standards and Intellectual Property Rights", Eur. Int. Prop. Rev. 1999, 110.

[40] See notably C.J.E.C. of 16 July 1998, case C-355/96, Silhouette International Schmied/Hartlauer, Rep. 1998 I 4799; EFTA—Court of 3 December 1997, case E-2/97, Mag. Instrument/California Trading, GRUR Int. 1998, 309 (German) = Mitt. Pat. Anw. 1998, 188 annot. Ullrich (English); Alexander, "Exhaustion of Trade Mark Rights in the European Economic Area", 24 Eur. L. Rev. 56 (1999); Baudenbacher, "Trademark Law and Parallel Imports in a Globalized World—Recent Developments in Europe with Special Regard to the Legal Situation in the US", 22 Fordh. Int'l L.J. 645 (1999).

[41] Literature is abundant, see Verma, "Exhaustion of Intellectual Property Rights and Free Trade—Article 6 of the TRIPS Agreement", 29 IIC 534 (1998); Bronckers, "The Exhaustion of Patent Rights under WTO Law", 32 J. World Trade 137 (1998); Stack, "TRIPS, Patent Exhaustion and Parallel Imports", J. World Int. Prop. 1998, 657; for a general discussion see Abbott, "First Report (Final) to the Committee on International Trade Law of the International Law Association on the Subject of Parallel Importation", J. Int'l. Ec. L. 1998, 607; Rothnie, "Parallel Imports—Smokescreen or Brushfire Smoke"? In *International Intellectual Property Law and Policy*, Hansen, ed., (London, 1996), p. 311.

[42] See Ullrich, "Technology Protection According to TRIPS: Principles and Problems", in *From GATT to TRIPS*, Beier, Schricker eds., (Weinheim, 1996), 357, 384 et seq.; *idem*, "TRIPS, Adequate Protection, Inadequate Trade, Adequate Competition Policy", 4 Pac. Rim. L. Pol'y J. pp. 153, 186 et seq. (= Haley, Iyori, *Antitrust—A New Trade Remedy*, (Seattle, Washington, 1996), 153, 186 et seq.); *idem*, "International Exhaustion of Intellectual Property Rights: Lessons from European Integration", in *Mélanges* …, (Brussels, 1999) (forthcoming).

More importantly, and contrary to a view that is widely held, in particular by economists, antitrust is not simply a tool to be shaped and used to achieve predetermined economic objectives. It is true that competition law, by outlawing restrictive conduct, is guided by economic goals, in particular the safeguard of competitive efficiency, but it is intended to do so in a rule-oriented, non-specific and non-instrumentalist way. All it does is to negatively control anti-competitive practices. Therefore, it is a non-interventionist framework for the regulation of markets. As such it should not be tinkered with according to specific trade interests. Moreover, the law against restraints of competition does or at least may serve more than just one objective. Maintaining the free enterprise system, protecting consumer choice and limiting political power by controlling economic domination are equally well recognized objectives. The competition system of a country represents part of its "constitution of freedom", certainly part of its constitution of economic freedom. The way in which abuses of market power are defined, the kind of restraints that are tolerated or outlawed, the scope and nature of exemptions that are admitted, and the thresholds that are set for mergers are all evidence of the economic, political and cultural implications of antitrust law. The competition system, therefore, is not suited to a quid pro quo bargain. Rather, it is a common good which, as such, may be conceived of and applied differently by States, but which will operate properly only if it is dealt with as such both on the national and on the international level.

Competition, intellectual property rights and the transfer of technology: the exhaustion of intellectual property rights and the interests of the developing countries

Proposals for an UNCTAD research agenda

Frederick M. Abbott

Professor of Law, Chicago-Kent College of Law, United States

Introduction

In his introductory remarks to this seminar, the Secretary-General of UNCTAD identified the key elements of the intellectual property rights equation for the developing countries: they include the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), which was designed to substantially raise intellectual property rights (IPRs) standards and enforcement practices on a worldwide basis. This was done to protect the technology- and expression-based assets of enterprises from OECD countries, and will almost certainly result in a higher level of rent transfers from the developing to the industrialized countries. This flows from the fact that industrial technologies and commercially valuable expression are largely originating in and owned by enterprises from the industrialized countries. The broad question for UNCTAD and the developing countries is how they may best take advantage of the TRIPS Agreement and its consequences, and how they may avoid its potential negative consequences. The systemic implications of the TRIPS Agreement for the developing countries are a proper subject for a separate seminar, and I do not intend to address this general subject today. I refer you to the recent publication of a special issue of the *Journal of International Economic Law* in which this subject is considered.[1]

Parallel imports

The narrow issue I will focus on is the relationship between the WTO rules that are intended to facilitate trade and provide market access, and the claims of IPR holders to inhibit the movement of goods and services based on a territorial system of IPR= grants. This is the so-called "exhaustion of intellectual property rights", "parallel imports" or "parallel trade" question.

The principal aim of the TRIPS Agreement was to ensure that the rights of intellectual property developers were recognized: that trade-mark counterfeiting was prohibited, copyright piracy stopped, and patents granted to protect investments in invention. Parallel trade does *not* involve counterfeiting, piracy or failure to grant and recognize patents. It relates to trade in goods and services which are placed on world markets by producers or their licensees. It involves the issue of whether producers may invoke parallel intellectual property rights to block the import or export of legitimately produced goods or services.

In a very direct sense, this is a competition question as much as a trade question—and it has at various times been addressed as such by, for example, the United States Supreme Court and the European Court of Justice.[2]

Since the outset of my own research in this area, I have viewed this mainly as a developmental issue, although this is at the moment an important issue within both the European Union and the United States (both at the regulatory level and at the level of the judiciary). There has been a series of recent court decisions in the United States, Japan, Switzerland, the European Free Trade Association and the United Kingdom which went in favour of markets being open to parallel trade, but the European Court of Justice has limited market access in trademarked products to the intra-Union context (a decision that is being reviewed by the European Council, the European Commission and European Union member States from a policy standpoint).[3]

I wish here to avoid focusing on the debate at the intra-OECD level, and focus on the interests of the developing countries and countries in transition, because this is where the rules may have their greatest overall impact. The interests and issues at stake for the developing countries may differ from the interests and issues for the OECD countries.

I have generally taken the view that the developing countries are harmed by rules that inhibit parallel trade, and this for two reasons:

---

[1] *Journal of International Economic Law*, Issue 4 (1998), Special Issue on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

[2] See *Quality King Distributors* v. *L'anza Research International*, United States Supreme Court, 1998 US LEXIS 1606 (1998), in which the Supreme Court discusses parallel trade in terms of unjustifiable price discrimination between markets, and *Consten and Grundig* v. *Commission*, cases 56, 58/64, [1966] ECR 299, in which the European Court of Justice initially decided a parallel trade question on the basis of competition law principles.

[3] For details concerning these decisions, see F.M. Abbott, "Second Report (preliminary) to the International Trade Law Committee of the International Law Association on the Subject of the Exhaustion of Intellectual Property Rights and Parallel Importation", presented in Geneva on 25 June 1995 [symbol/publisher, etc.].

(1) Developing-country producers—whether affiliates of multinational enterprises (MNEs) or locally-owned licensees of foreign trade marks, copyrights and patents—will often be the low-cost producers of goods and services. These producers—in order to develop into world-class suppliers—need access for their products to a worldwide market. It is not adequate, for example, to only supply the market of Colombia or South Africa or Thailand. Today's successful world-class producer must operate on a global scale;

(2) If holders of parallel trade marks, copyrights and patents can block the importation of goods and services, this may inhibit the achievement of economies of scale and efficiency in developing countries. This will inhibit local capital formation used for investment in licence or franchise businesses, and even limit the scale and development of affiliates of large-scale MNEs, with effects on employment opportunities, foreign direct investment (FDI) flows, and long-term economic growth.

I have advocated a general rule of international exhaustion of IPRs that would assure that goods and services legitimately produced in developing countries could be sold in developing-country markets—that is, that goods and services once placed on the market with the consent of the IPR-holder could then be freely traded throughout the world. I have suggested certain exceptions to this general rule to accommodate a few individual cases.[4]

This perspective was not greeted with enthusiasm by many OECD producer-owners of intellectual property—the pharmaceutical industries, copyright industries and trade-mark holder groups. Initially, negative reactions were vaguely formulated—claims that international exhaustion of IPRs would undermine the value of intellectual property and retard economic growth in OECD. I replied that it was difficult to react to essentially inchoate claims, and that this set of issues should be approached as a matter of economic and social science. In this regard there has been some development; the industry side has prepared more analytical papers, a few economic studies have been initiated, and in November 1998 a meeting was held here in Geneva on this subject.[5]

One of the main arguments from the industry side is that developing countries benefit from rules restricting parallel trade because they allow OECD producers to sell in their markets at low prices—that is, to discriminate between markets on the basis of price. The producers maintain high prices in OECD and low prices in the developing countries, and if you do not allow producers to block parallel exports back to OECD countries they will respond by raising prices in developing-country markets.

This argument raises several empirical and policy questions:

(*a*) Are the prices of goods and services lower in the developing countries than in OECD countries? If so, why;

(*b*) Will MNEs in fact change their global pricing strategies in response to changes in parallel trade rules;

(*c*) Most importantly, how much, if at all, do price discrimination strategies benefit the developing countries?

Consider, for example, the situation of an entrepreneur contemplating starting a new business in a developing country. If a foreign MNE is selling its products in the developing market at its low marginal cost price, can the local entrepreneur even hope to compete, or would that entrepreneur concede the market in advance? Are developing markets better off in fact if their markets are supplied with low-price OECD products, or would they be better off with world market prices which allow the creation of local comparatively-advantaged industries and infrastructures?

My own working hypothesis is that, as a general rule, it is not beneficial for developing countries to be subject to persistent price discrimination. Recall, again, that industries from the OECD countries say there is a trade-off or bargain that must take place for favourable price discrimination to occur: developing-country industries must not be allowed to sell to OECD countries; developing countries must live with low prices in the local market, but not export to OECD countries.

There are both empirical and policy dimensions to the issue of price discrimination, and I have not even touched upon the systemic implications for the world trading system as a whole—which in my view faces a considerable risk from hard rules prohibiting the free movement of goods and services between markets based on IPRs. I do not agree that this necessarily promotes inter-brand competition and therefore is beneficial. From the viewpoint of competition law, I think that rules restricting parallel imports create a substantial risk of horizontal price collusion as to national and regional markets.

The following two special cases are presented by the industry side:

1. Pharmaceutical companies argue that they will not be able to sell drugs at low prices in developing countries if these drugs can be exported back to OECD countries. This is a very important issue that needs to be faced by the World Health Organization and other international organizations. I have suggested two tentative answers to this dilemma:

(i) Some developing countries, such as India, may gain more from having access to world markets than they gain from low-cost OECD imports. India produces drugs at low prices and has a well-developed pharmaceutical industry today. It is doubtful whether India would gain from inhibition of parallel trade;

(ii) Some developing countries will not be in a position to create their own pharmaceutical industries for the near to medium term. It may be desirable to apply rules that would allow these countries to restrict parallel trade in low-price pharmaceuticals sold there. This does not, however, require a general rule favouring restrictions on parallel trade. Such rules may be justified under provisions in the General Agreement on Tariffs and Trade (GATT) or in the TRIPS Agreement in favour of meas-

---

[4] See F.M. Abbott, "First Report (Final) to the International Trade Law Committee of the International Law Association on the Subject of Parallel Importation", *Journal of International Economic Law* 607 (1998): page nos.

[5] For a description of the results of this meeting, see F.M. Abbott, "Second Report . . ." in footnote 3.

ures adopted to promote public policy or health objectives;

2. Book publishers from OECD countries argue that they allow low-cost foreign editions of their copyrighted works to be produced and sold in developing countries, with authors and the publishers receiving reduced royalties from these publications. They argue that they would not allow this to continue if printing houses in developing countries were allowed to export to OECD.

This argument raises the following empirical questions:

a. Are the low-cost editions produced and sold in developing countries of a quality (e.g. in bindings, cover materials and designs) that would constitute a threat in OECD markets? Are they in the same language(s)?

b. Could publishers from OECD countries limit their low-cost licences to local-language publications? Can developing-country licensees otherwise be required to differentiate their products so that they will not be as attractive as those produced in OECD countries?

It also raises the following questions on a policy level:

(i) If developing-country publishing houses are able to produce books of a comparable quality to those produced by publishing houses in OECD countries, why should the production function not be transferred to the place of comparative advantage (i.e. to the developing countries)? If widely-read authors live in OECD countries and editorial functions are also carried out there, will not the publishing houses in OECD countries continue to profit from such arrangements?

(ii) Although it may not be an ideal solution to create a number of exceptions to a general rule regarding parallel trade, it may nevertheless be possible in the copyright industry to create certain preferences in favour of the supply of low-cost educational materials to the developing countries. In fact, the Berne Convention already provides certain special rules in favour of the developing countries.

We cannot resolve these questions here and now. However, these questions are sufficiently important to deserve a place within the UNCTAD research agenda.

Competition approach

It is sometimes suggested that the exhaustion of IPR issues can be addressed by use of competition law. For example, article 4 of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices dealing with abuses of dominant position is addressed, *inter alia*, at restrictions on parallel trade.

I do not believe that competition law is at present adequate to deal with this question. Restrictions on parallel trade involve micro-behaviours that may not rise to the level of abuse of dominant position. Smaller-scale restrictions may not mobilize government competition authorities to act. Competition law actions are costly and lengthy, and the transaction costs of such actions may be too high to justify them in the potential multitude of parallel trade restriction cases.

It has been suggested that if article 6 of the TRIPS Agreement precludes parallel trade restrictions from being addressed as an exhaustion issue, such restrictions may nevertheless be addressed from a competition standpoint under article 40 of the Agreement. Several Governments have already raised parallel trade issues within the WTO Trade and Competition Working Group, and perhaps more attention should be paid to this area.

Conclusion

In the final analysis, the exhaustion of the IPR question is one to which the developing countries themselves must supply answers. I would stress that this is not an easy question. As I have indicated, there are coherent positions and counter-positions. It is an area in which the developing countries might work together productively to develop a sound analytical and empirical approach.

B. THE ROLE OF BUSINESS AND CONSUMERS IN PROMOTING COMPETITIVE MARKETS SUPPORTIVE OF SUSTAINABLE DEVELOPMENT

Ensuring consumer benefits from competition in globalizing markets and creating a competition culture supportive of development

Geraldine Foster

Special Advisor to CARICOM, Jamaica

The need for competition legislation

Over the past 20 years, the world has witnessed a trend towards economic liberalization. Many developed and developing countries have begun to emphasize decentralized competition rather than centralized State direction as a means of determining the production and distribution of goods and services. It has become widely accepted that the adoption of a free market system holds the best prospect for Jamaica's economic development and improvement in the welfare of its citizens. This recognition led the Jamaican Government to introduce a number of policy measures popularly associated with such terms as liberalization, deregulation, divestment, etc. A similar outlook may have precipitated the move to formulate competition legislation in other countries too.

What the Government of Jamaica hopes to achieve is the promotion of a free market economy with the attendant benefits, namely: (*a*) the efficiency which results from competition between firms; (*b*) lower prices and more choices for the consumer; (*c*) better products and services; and (*d*) increasing opportunities for existing and new businesses.

It has also been recognized that the gains from the operation of a free market can be subverted if care is not taken to ensure that certain controls are put in place. The passing of the Fair Competition Act in 1993 and the establishment of its administrative body, the Fair Trading Commission, demonstrate a clear understanding of this reality. The Fair Competition Act was put in place to ensure competition in the conduct of business in Jamaica. All legitimate business enterprises must have an equal opportunity to participate in the Jamaican economy. Additionally, the consumer ought to have the benefit of adequate and relevant information, and be afforded meaningful choice.

In Jamaica, benefits have clearly been recognized. More importantly, however, those involved in the enforcement of the Fair Trading Act have seen at first hand that in a developing economy, certain complaints predominate, hence rendering particular provisions in the law more applicable than others. This paper will attempt to address, *inter alia*:

(i) The complaints in question and the provisions which render them actionable; and

(ii) The approach which should be taken by developed nations towards small island economies in a multilateral trading context in the light of certain economic realities.

However, to ensure a proper understanding of the issues, it would be useful to discuss the Act itself and the functions of its administrative agency, the Fair Trading Commission.

The Fair Competition Act

The Fair Competition Act was enacted on 9 March 1993 and came into effect on 9 September 1993. The legislation establishes an agency known as the Fair Trading Commission that is empowered to enforce the provisions of the Act. The Act's primary objective is to provide for the maintenance and encouragement of competition in the conduct of trade and business and in the supply of services in Jamaica with a view to providing consumers with competitive prices and product choices. The Act applies to all activity in relation to the conduct of business in Jamaica. However, there are certain exceptions. These may be itemized as follows:

(*a*) Collective bargaining;

(*b*) Patents/trade-marks;

(*c*) Conduct authorized by the Commission;

(*d*) Activities expressly approved or required under any treaty or agreement to which Jamaica is a party; and

(*e*) Any activity exempted by the minister responsible and thereafter ratified by parliament.

Conduct prohibited by the Act

(i) *Price fixing*—by contract or other agreement or arrangement;

(ii) *Bid-rigging*—it is unlawful for two or more persons to enter into an agreement whereby the persons attempt to influence the outcome of the bid by either deciding amongst themselves that one should not participate in the bid or agreeing amongst themselves on the dollar amount to be bid;

(iii) *Misleading representations*—a person may not make a representation to the public that is false or misleading in a material respect. The representation may be oral or written and there is no requirement that the person making the representation should be intending to mislead. This breach appears most frequently in matters relating to advertising;

(iv) *Double ticketing*—persons shall not supply any article at a price that exceeds the lowest of two or more prices clearly expressed by them on the article;

(v) *Sale at bargain price without adequate stock*;

(vi) *Sale above advertised price*;

(vii) *Conspiracy*—any practice whereby one person combines, agrees or arranges with another to limit unduly the manufacture, transport or supply of any goods or services or to enhance the price of same or to restrain or injure competition unduly;

(viii) *Exclusive dealing*—any practice whereby suppliers of goods require that their customers interact exclusively with them as a condition precedent to the supply of the goods, which in effect protects the suppliers from competitors;

(ix) *Tied selling*—any practice whereby the supplier of an article, as a condition of supplying the article, requires a customer to, at the same time, purchase any other item;

(x) *Market restriction*—any practice whereby the supplier of goods requires that a customer supplies goods only in a defined market, or extracts a penalty of any kind from the customer if the latter supplies any goods outside the defined market.

However, it should be noted that anti-competitive business practices may be authorized if the Commission is satisfied that the particular practice provides some overwhelming social benefit.

The "structure versus conduct" dilemma

One of the critical aspects of competition law worldwide is how the competition legislation purports to deal with economic concentrations namely, mergers, acquisitions, joint ventures and the like. Jurisdictions must make a policy decision as to whether their economy is such that they would wish to prohibit certain economic concentrations as opposed to focusing on the behaviour of existing entities. This has been known as the "structure versus conduct" dilemma. For example in the United States, with one of the largest economies in the world, the stress is on prohibiting conduct prior to its practice.

Jamaica has chosen the opposite approach. Its legislation is activated only after a business has engaged in prohibited conduct. Economic concentrations are analysed under the Fair Competition Act in terms of dominance. In other words, this is conduct-based legislation. The Act defines a dominant company as one which "occupies such a position of strength in the market as will enable it to operate in the market without effective constraints from its competitors or potential competitors". However, it is important to point out that simply being dominant does not constitute a breach of the Act. An enterprise must be found to have abused its dominant position and that such abuse has had or is likely to have the effect of lessening competition substantially in the market place.

The Act states that the enterprise "abuses its dominant position if it impedes the maintenance or development of effective competition in a market". It goes on to outline, specifically, conduct which would be considered evidence of an enterprise's abuse of its dominant position. The list in the Act is illustrative only.

The relationship between the Fair Trading Commission and other statutory agencies

Section 54 of the Fair Competition Act states that "this Act binds the Crown". However the Fair Trading Commission has interpreted this to mean that its power does not extend to the Government when the latter acts in its executive capacity. Conversely, the Commission holds the view that the Government is regulated to the extent that it engages in trade.

For the most part, the Commission has enjoyed amicable working relationships with other statutory organizations. However, there have been instances where some regulatory bodies have resisted the Commission's intervention as it is viewed as an encroachment on their turf.

Public education programme

The success of any competition legislation is intricately linked to the provision of adequate information to promote an understanding of such legislation. Public education has therefore, become the vehicle by which such information is disseminated. The Fair Trading Commission has, since its inception, embarked on an aggressive education programme aimed at informing both businesses and consumers of the provisions of the law and how they may be affected by them.

In order to effectively propagate the information it produces, the Commission has utilized a variety of channels. It has promulgated press releases, advisory opinions and policy papers on several industries operating in the Jamaican market place. The automobile, insurance, banking and real-estate industries are among those reviewed. The Commission also produces an annual report outlining the work carried out by the Commission for the year. These reports are sent to a number of institutions, and are readily available at the offices of the Commission.

The Commission has also utilized the electronic media to transmit its education programme: members have appeared on various talk shows and granted interviews. Presentations are also made at various types of gatherings, such as corporate meetings, meetings of citizens' associations, seminars, exhibitions, and lectures at educational institutions.

The ongoing education programme of the Commission has seen a marked change in the responses and attitude of target groups and indeed, the general “psyche” of the Jamaican market place.

General achievements of the Fair Trading Commission

The Commission’s achievements have undoubtedly emanated from its active and continuing educational programme, its resolve to enforce the law, its willingness to provide guidance on how businesses should operate within a free market system, and its facilitation of redress for the injured parties.

Since its inception, the Commission, as the regulator of business practices and conduct within the free market, has created a more sensitized and inquiring business community. This is evidenced by the numerous opinions and advice sought by businesses operating in the Jamaican market place.

The Commission has been particularly successful in teaching businesses that the provision of material information concerning purchases is vital to the consumer’s ultimate purchasing decision. As a result of this, businesses have taken the time to convey information by way of clearly worded signs placed at conspicuous points in stores as well as on sales receipts.

Consumers have also become more vigilant and are now demanding information about purchases, refusing to purchase from stores where they are not adequately informed, and notifying the Commission if they believe the practices of these entities run afoul of the law.

Perhaps the major accomplishment of the Commission lies in the area of complaint resolution by way of settlements or through legal proceedings. Statistics for the period September 1993 to December 1995 indicate that of a total of 1,547 complaints, 1,230 have been resolved. This represents a resolution of 80 per cent of all complaints lodged for that period. Some of the more celebrated cases are those involving Air Jamaica, Caribbean Cement Company, Telecommunications of Jamaica and John Crook (see below for details).

The Commission has also forged a successful working relationship with a variety of interest groups. Of note is the Commission’s continued dialogue with Courts Jamaica Limited (the island’s largest retailer of furniture and appliances) and the Petroleum Marketing Companies. Such relationships have contributed to a more healthy business environment through constant dialogue and cooperation.

A similar relationship has been forged with consumer groups. The Commission provides assistance by way of advice, policy papers and guidelines with regard to complaints or likely complaints. This liaison has seen an increase in consumer vigilance and a deepening of the recognition of their rights and responsibilities and the recourse available to them under the Fair Competition Act.

Summary of cases brought before the Fair Trading Commission

Telecommunications of Jamaica Limited (TOJ)

Following negotiations between TOJ and the Commission, an agreement was reached whereby TOJ’s residential customers were allowed to connect certain compatible equipment to the TW network for a reasonable price. Prior to the Commission’s intervention, this had not been the case. The consumer was required to purchase all equipment from TOJ and if TOJ did not have the item in stock and it had to purchase elsewhere, the customer was still required to pay a rental charge to TOJ. The Commission took the position that TOJ’s conduct constituted an abuse of dominant position in the market for telecommunication services. TOJ agreed to interconnection without admitting liability.

Caribbean Cement Company

A complaint was made against the company charging that its practice of constantly raising prices was an abuse of its dominant position. The Commission retained an outside consultant to examine the company’s business practices in order to ascertain whether or not the price increases resulted from inefficiency or were otherwise justifiable.

The Consultant opined that there was an underutilization of assets and that the company was not taking advantage of modern technology available in the market place which could substantially increase its efficiency. He further advised that major capital expenditure would be required to improve productivity, which would hopefully lower costs in the long run. The result would be a lower price to the consumer.

The company did not completely agree with the consultant’s findings but overall was amenable to reviewing its operations. Given that undertaking, the Commission decided to suspend its investigation but to continue to monitor the company’s operations. So far, the company has reduced its prices twice in the last six months.

Jamaica Stock Exchange

Subsequent to the Commission’s filing a complaint against the Exchange for abuse of dominance, the Exchange filed its own suit claiming, *inter alia*, that the Commission lacked jurisdiction. The Exchange contends that it should only be regulated by the Securities Commission. For its part, the Commission claims concurrent jurisdiction with the Securities Commission. The trial commenced on 3 June 1996. It was adjourned and was expected to reconvene later in 1996.

National Water Commission

The Commission’s staff investigated this State corporation in order to determine whether the company was abusing its dominant position by passing on its inefficiencies to the consumers in the form of increased rates. Evidence of abuse was found by the staff. Eventually, the staff and the company arrived at an agreement, wherein the company agreed to the continuous monitoring of the company. Additionally, the company agreed to provide the Commission with quarterly reports on the implementation and progress of certain programmes in the many areas of weakness that were identified, namely, meter replacement, leak detection and repair, revenue enhancement, collections, operational strategies (including the billing cycle and standpipes), preventative maintenance and plant improvement, and cost reduction strategies.

The baking industry

The Commission initiated an investigation, *sua aponte*, to determine whether the industry members were engaged in price-fixing. While investigations revealed no evidence of concerted action, it was somewhat disturbing to note that prices tended to be uniform. One explanation is the country's history. In other words, against the backdrop of Jamaica having been subject to a centrally planned economy for most of its history, most manufacturers set their prices by simply following the prices that the industry leaders charge. This phenomenon is known as price leadership. The Commission determined that a periodic review of this industry was necessary because although there is no direct evidence of conspiracy, the Commission would like to encourage members to behave in a more individualistic fashion and thereby stimulate competition within the industry.

Petroleum Corporation of Jamaica

This State monopoly was investigated because it was alleged that the company was engaged in unfair pricing. The Commission's investigation revealed, however, that although the company was indeed a monopoly (it being the only oil refinery in the country) it was not "dominant" as that term is defined by the Fair Competition Act, given that potential competition from existing marketing companies constrains its conduct. In other words, the present company is mindful that if prices are raised beyond a certain level, others will enter the market. That forces them to keep their own prices competitive.

General Legal Council (GLC) v. *Fair Trading Commission*

The General Legal Council v. *Fair Trading Commission* case is one of the matters which has been adjudicated in the Supreme Court since the enactment of the Fair Competition Act. In July 1995, the GLC took the Commission to court. It wanted the court to determine whether or not the Legal Profession Act had been repealed by the Fair Competition Act. The court declared that in performing its statutory functions and duties under the Legal Profession Act, the GLC was not amenable or subject to the jurisdiction of the Commission established under the Fair Competition Act. Additionally, it declared that the Legal Profession (Canons of Professional Ethics) Rules, being subsidiary legislation or statutory rules made under the Legal Profession Act were not governed by the Fair Competition Act. The court also declared that the provisions of the Legal Profession Act and the Legal Profession (Canons of Professional Ethics) Rules made thereunder were not repealed, amended or modified by the provisions of the later-enacted Fair Competition Act.

An amendment of the Act is now being sought so that all professional services are subject to regulation.

The banking industry

The Commission reached an agreement with the Bankers Association of Jamaica. This agreement was brokered as a result of allegations that documents signed by clients were often not written in "reader-friendly language" so that the average consumer did not understand what he or she was signing. The agreement sought to cover the areas of:

(1) *Clarity in banking documents*: it was agreed that a fact sheet in plain language would be attached to all loan documents for individual consumers. The fact sheet would contain information that the average person would consider material, detailing, at the very least, the effective interest rate, whether or not there were prepayment penalties and the total amount of the loan;

(2) *The posting of the exchange rate*: the banks would indicate whether or not these rates were opening rates only. In other words, the consumer should be put on notice if the rate stated might vary throughout the day. If that indication is not given, the consumer is entitled to assume that the rate given is the set rate and should be given foreign exchange at that rate;

(3) *The advertising of interest rates*: where "add-on" rates are used, they will be designated as such. However, it was generally agreed that it would be more useful to state the effective rate of interest when advertising, as the add-on rate is deceptively lower. This will minimize confusion and the average consumer will be better able to compare rates among banks.

The Bankers Association of Jamaica and the Commission plan to continue with their dialogue as there are other issues which need to be addressed. These issues involve the use of panels of professionals and tied arrangements which are allegedly the practice of most banks. The Commission and the Association have agreed to notify the public as to the outcome of its discussions on those matters.

Media Association of Jamaica

The Commission and the Media Association of Jamaica have reached a settlement concerning that Association's "recognition agreement". Prior to the advent of the Fair Competition Act, media houses, by means of the recognition agreement, would pay a fixed commission and extend credit only to "recognized" agents. To be recognized, an agent had to apply to the Association and satisfy it as to certain billing and other structural capabilities. Having been duly satisfied, the Association would then pay a fixed commission of 18 per cent to that agency in addition to extending it a credit period for advertisements placed in the various media. Should the agency fail to pay its bills on time to even one media house, all media houses would deny that agency credit.

It was the view of the Commission that the Fair Competition Act made those specific parts of the agreement illegal, and that the getting-together of the media houses to fix the amount of the commission constituted both a conspiracy to restrain competition and price-fixing. Additionally, it was thought that media houses which act in concert against an agency are behaving in a cartel-like fashion, which also constituted a conspiracy against competition and thus ran counter to a free market system.

The unequal treatment of the unrecognized agents also invited scrutiny, for while the Association can certainly put in place reasonable standards for recognition, it is anti-competitive to penalize media houses who choose to extend credit and pay commissions to those agents who happen not to meet those standards. Commercial entities must not be deprived of their ability to engage in independent decision-making vis-à-vis trading partners. In the light of this scrutiny, the Association entered into negotiations with a view to arriving at a form of agreement which would not violate the terms of the Fair Competition Act. The parties developed a recognition agreement which conforms to the terms and spirit of the Act.

The Association has agreed, as part of the settlement with the Commission, to institute a 90-day period for the processing of applications for recognition and an appeal procedure under which, should an application be denied, an appeal can be made to a panel consisting of three persons who are unconnected to the media.

Additionally, there is the possibility of provisional recognition where an agency that is new to the market place may nonetheless be afforded the legal benefits of a recognized agency. Provisional recognition automatically expires at the end of one year, at which point the agency may apply for full recognition.

John Crook Limited

Acting on complaints that John Crook sold 1989 Ladas to the public as 1993 vehicles, and 1993 Subaru Justys as 1994 models, the Commission was able to broker a settlement in favour of the complainants. The settlement package arrived at saw the company paying out approximately $4 million to individual complainants who had purchased the automobiles in question.

Air Jamaica Limited

Several individuals complained to the Commission regarding what they alleged to be Air Jamaica's non-disclosure of additional charges for its "Love-A-Fare" package. A particular fare was advertised, but when customers arrived to purchase a ticket, they were made aware of additional charges. The Commission viewed that practice as misleading advertising. In the settlement arrived at with the company, it was agreed that passengers who could prove that they had travelled within the particular period (14 February-10 March 1995) would be given special upgrades. The offer remained open until 31 July 1996.

Issues generally peculiar to a developing economy

General information

A newly-formed competition agency should develop a close relationship with other domestic and international bodies which can provide assistance with the gathering of necessary information. Staff participation in the various internship and externship programmes offered by international competition agencies may facilitate the development of greater technical expertise in this specialized field. It will also expand basic information concerning particular industries.

Drafting the legislation

The drafters of the Jamaican Fair Competition Act extracted portions of existing legislation from the jurisdictions of, primarily, New Zealand, Australia and the European Union. This allowed them to consider a variety of styles and approaches to the enforcement of competition law. The Jamaican experience, however, has shown that it can be dangerous to adopt legislation on a piecemeal basis. The section of the Act which prohibits a company's abuse of its dominant position in the market place, for example, suffers from certain philosophical inconsistencies which have come about because that particular section is an amalgamation of sections of the New Zealand Commerce Act and article 86 of the European Union's Treaty of Rome.

The United States of America has been engaged in competition law since the late nineteenth century and has earned the reputation of being an expert in this field. The Jamaican Fair Trading Commission has, quite understandably, drawn on the expertise, policies and internal procedures of the United States, in formulating its own. Notwithstanding the shared common-law jurisprudence of the Commonwealth and American jurisdictions, it may be difficult to reconcile the written legislation of Commonwealth jurisdictions with the American policy perspective. There is a basic difference in United States administrative law and that of Commonwealth countries.

Additionally, in the light of the Commission's approach in playing different roles (to be discussed in more detail below), the drafters would be well advised to define carefully the roles of the Commissioners vis-à-vis the staff, and to ensure the consistent use of terminology throughout their competition legislation. This will facilitate the efficient application of the Act.

One should also consider the role that parliament wants competition law to play in one's economy. That cannot be decided without considering the state of a country's economic development and its plans for future growth. Perhaps one of the most important questions that should be asked and answered before the statute is actually drafted, is whether the legislation should form the basis for the country's economic constitution. This will force parliament and the public to give due consideration for the principles and policies which are intended to underpin the legislation itself. For this very reason, it is essential to properly document each stage of the parliamentary and drafting process. This will provide generations to come with information on the genesis of the law and its intended application.

Operating procedures of the Fair Trading Commission

The Commission was established to administer and enforce the provisions of the Fair Competition Act. To enable the exercise of this function, it has been empowered under section 5 (1) of the Act to "carry out at its own initiative or at the request of any person such investigations in relations to the conduct of business in Jamaica as will enable it to determine whether any enterprise is engaging in practices in contravention of this Act …". In carrying out its statutory functions, the Commission, as a law enforcement agency, performs the multiple, but distinct roles of complainant, investigator and adjudicator, thus wearing many hats, so to speak. Therefore the three separate and seemingly conflicting functions of investigation, prosecution and decision-making are fused together in one entity, with combined functions requiring separate procedures, thereby creating what one court has described as "statutory schizophrenia".[1]

While this may appear to be inherently inconsistent, other jurisdictions with similar competition tribunals have found that this does not violate the principles of natural justice.[2]

While it is also the Commission's view that this fusion of multiple roles does not impair the principles of fairness, it is aware of the possible perceptions of injustice and has put in place procedural safeguards. Some of these are:

a. On those occasions when the Commissioners act in a judicial capacity, the Executive Director never participates as a Commissioner, although the Executive Director is identified as an "ex officio Commissioner" in the FCA; and

b. Once a complaint has been laid before the Commissioners, there can be no *ex parte* communications with them by the staff.

It should be noted that under section 52 of the Act, the Commission may, with the approval of the minister, make regulations prescribing the procedure to be followed in carrying out the provisions of the Act. To date, the Commission has not promulgated regulations. However, procedural guidelines have been formulated which are comprehensive in scope and which exhibit the observance of the principles of natural justice. Briefly, these procedures cover the examination of witnesses, the production of documents, applications for authorization, commencement of proceedings where the Commission is authorized to make a finding, pre-hearing procedures, and the procedures for appeal of the staff findings.

Economic guidelines

Although competition agencies are primarily concerned with the enforcement of competition legislation, this task is not exclusively legal in nature. As stated above, the role of economics is of supreme importance. Thus careful consideration should be given to the needs of both departments.

It is also advisable that economic guidelines should be formulated at the outset as these guidelines would create a standard procedure for the assessment of various breaches under the Act. The Jamaican Fair Trading Commission has formulated such guidelines, and these are available to all who wish to see them.

---

[1] *Fisher & Paykel Ltd.* v. *Commerce Commission & Ors* (1990) 3 NZBLC, 101,660, wherein it was noted that amendments to New Zealand's competition legislation led to the combining of investigative and adjudicative functions.

[2] *Fair Trading Commission* v. *Cinderella Carrer & Finishing Schools*, 404 F2d 1308 (D.C. Cir. 1968), wherein it was held that for the Federal Trade Commission to consider recommendation of subordinates, issue a complaint and a press release and later to decide the case, did not violate due process; see too, *Sharpe* v. *The Jamaica Racing Commission* (1974) 12 JLR, 1319, discussing how bodies that serve combined functions do not violate natural justice principles in so doing.

C. *THE ROLE OF COMPETITION POLICY IN PROVIDING A MORE EQUITABLE PLAYING FIELD FOR DEVELOPMENT IN GLOBALIZING MARKETS: A CHALLENGE FOR GOVERNMENTS AND MULTILATERAL ORGANIZATIONS*

Ernst U. Petersmann

Professor of Law at the University of Geneva and the
Geneva Graduate Institute of International Studies
Switzerland

Objectives of competition policy

Is equity an objective of competition policy?

Most antitrust lawyers in constitutional democracies with a long tradition of competition law and policy (notably in the United States) would argue today that "equity" and an "equitable playing field for development in globalizing markets" should not be among the objectives of antitrust law and policy. According to the 1988 Antitrust Enforcement Guidelines for International Operations of the United States Department of Justice, "the Department is concerned only with adverse effects on competition that would harm United States consumers by reducing output or raising prices".[1] Apart from this focus on consumer welfare, section 5 of the Federal Trade Commission Act also declares unlawful "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce".[2] In a communication of April 1995, the United States Department of Justice has further recognized the interests of export industries as part of the United States competition policy objectives: "our antitrust laws also serve to protect American exporters from anticompetitive restraints imposed by foreign firms in foreign markets".[3] Equity is, however, not mentioned as a policy objective, either in United States antitrust laws or in the competition laws of the European Community (EC). In view of the decentralized enforcement of United States and EC competition rules (e.g. by national courts), many antitrust lawyers would even argue that vague notions such as "equity" run counter to the competition policy objective of enhancing legal security and decentralized enforceability of competition rules by use of precise and predictable terms and criteria.

[1] United States Department of Justice, "*Antitrust Enforcement Guidelines for International Operations*, 1988" (reprinted in: *Antitrust & Trade Regulation Reporter*, BNA No. 1391: S. 21).

[2] 15 USC para. 45 (1988 & Supp. 1993).

[3] United States Department of Justice. "Opening markets and protecting competition for America's businesses and consumer", 7 April 1995: 1.

Economic efficiency and consumer welfare as competition policy objectives

There is broad agreement today that the basic goal of competition policy is to enhance inter-firm rivalry in markets, by means of limiting anti-competitive private "market failures" as well as governmental market distortions, so as to promote economic efficiency (including "productive efficiency" of firms, "allocative" and "dynamic" efficiency of markets), consumer welfare and economic development. Yet, even where competition policies claim to focus on "efficiency" (as in the United States), competition laws and policies sometimes do not specify whether "efficiency" is defined in terms of "consumers' surplus", "total surplus" or "total welfare";[4] there is thus "no consistent approach to efficiency",[5] and the interpretation of the typically vague antitrust concepts (such as restraint of competition, unfair competition, monopolization, abuse of a dominant market position) can vary considerably depending on the policy objective and efficiency concept applied by enforcement agencies. A "total surplus" or "total welfare" approach, for instance, implies value decisions (such as the redistribution of income from consumers to a few producers) that cannot be derived from economics alone. In view of the impossibility of calculating consumer welfare (which can be defined as the sum of the utility of all consumers) in a comprehensive

[4] P.S, Crampton, "Alternative approaches to competition law", in: *World Competition 1997.* 55. *Consumers' surplus* describes the difference between what consumers in a market collectively pay for a product and what each consumer would be willing to pay over and above the actual price. *Producers' surplus* denotes the difference between the price that producers in a market collectively receive for their products and the sum of those producers' respective marginal costs (including normal profit). *Total surplus* is the sum of consumers' surplus and producers' surplus. *Total welfare* also includes efficiencies likely to be brought about (e.g. by a marger) in markets other thn the relevant market. On the notions of *allocative efficiency* (concerning the allocation of productive resources among the various lines of industry), *productive efficiency* (if an industry produces a maximum of output with a minimum of input and lowest costs) and the "consumer welfare model", see e.g. R.H. Bork, *The Antitrust Paradox*, 1978, chapters 4 and 5.

[5] Ibid. p. 55.

manner, most antitrust economists focus on "consumer surplus" (i.e. the excess of social valuation of a product over the price actually paid) and on the absence of output and price limitations.

By limiting private and governmental distortions and promoting an efficient allocation of resources and consumer welfare, competition policy also promotes economic development and sets incentives for domestic investments and the attraction of foreign investments for the benefit of producers and consumers.

Legal and other non-efficiency goals of competition policy

The efficiency-oriented perception of competition policy sometimes claims that non-efficiency objectives suffer from subjective value judgements and cannot be applied (e.g. by courts) in a consistent manner. The simplifying, unidimensional economic definition of consumer welfare in terms of price reductions and non-restriction of output does not take into account the non-efficiency values of, say, a freedom-based approach.[6] Yet competition policy must not ignore the constitutional law framework in which it operates. Human rights and constitutional law require Governments to promote the "public interest" of their citizens as legally defined by their equal human rights and the constitutional law and legal system of the country concerned. In conformity with this multi-dimensional public interest objective, most Governments take into account non-efficiency goals (such as fairness, opportunities for small businesses, market integration, pluralism, technological development and employment) in the conduct of their domestic competition policies.

Until the 1970s, the United States Supreme Court emphasized that "antitrust laws … are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental freedoms".[7] The United States Sherman Act of 1890, and some of the later United States antitrust laws (such as the 1936 Robinson Patman Act), had been introduced in order to complement the common law protection of "freedom of contract" vis-à-vis "unreasonably" restrictive agreements and coercive conspiracies by additional legislative safeguards for consumers, the "right to sell" of small producers, and the "Jeffersonian model of small dealers and competitors, notwithstanding some possible costs in society in terms of reduced efficiency."[8] Since the 1980s, under the influence of the "Chicago school" of economics, conflicts between the legal goals of antitrust policy (e.g. protection of contractual freedom, consumer freedom, and the right of smaller operators to compete) and its economic objectives were increasingly decided by United States courts on the basis of economic efficiency criteria rather than legal arguments or the "reasonableness" of restraints. Only in some areas, such as franchise antitrust case law, do United States courts continue to apply a "civil rights" approach in which the claims of, say, individual franchisees to be free of undue franchisor control remain paramount.[9] There is broad agreement among United States antitrust lawyers today that United States antitrust laws should be construed to protect competition and consumer welfare rather than competitors (such as competition among distributors, or a right of small operators to compete).[10] Yet, this focus on consumer welfare is also due to the fact that the non-efficiency values of competition law (such as economic freedom and non-discriminatory conditions of competition) are already effectively protected under United States constitutional and economic law and that a competition policy focus on protection of producers might entail discrimination and unnecessary losses of consumer welfare.

In Europe, most countries introduced competition laws only after the Second World War with a view to promoting not only economic efficiency, but also economic freedom, separation and diffusion of private and political power, and deregulation of their traditionally more protected economies.[11] The more recent move in Europe, for instance in the review of vertical restraints, towards more economic analysis seems to be motivated—as in the United States—by the fact that the non-efficiency goals of competition policy are sufficiently protected inside the EC, so that the protection of producer interests at the expense of consumer welfare no longer seems justified.

The majority of developing countries have not so far introduced national competition laws and lack the competition culture and comparative legal advantages resulting from competition laws and constitutional democracy. In those developing countries which have introduced such laws, competition laws and policies do not appear to be exclusively focused on economic efficiency.[12] As long as the preconditions for an efficient market economy are not fully established in developing countries, or in countries with economies in transition, competition policy may be legitimately perceived in a broader perspective taking into account also regulatory policy objectives (e.g. of restructuring, deregulating and privatizing industries) and the social adjustment problems of such policies. The pro-

---

[6] A Sen., "Markets and freedoms: achievements and limitations of the market mechanism in promoting individual freedom". In: *Oxford Economic Papers* 43, 1993: 519-541. "The freedom-based approach can encourage a shift in the perspective of technical economic analysis in a direction that has considerable ethical and political importance" (p. 538). The concept of Pareto efficiency is based on individual autonomy and consensus as bases of an exchange economy. On the consistency of freedom-oriented goals and efficiency-oriented goals see e.g. R.D. Cooter, "Liberty, efficiency and law" in: *Law and Contemporary Problems* 1987: 141-163.

[7] *United States* v. *Topco*, 405 United States 595, 610 (1972).

[8] J. H. Shenfield and I.M. Stelzer, *The Antitrust Laws*, 3rd ed., 1998, p. 11; G. Amato, *Antitrust and the Bounds of Power*, 1997, chapters 1 and 7.

[9] *The United States Antitrust Review*—A Global Competition review special report, 1998: 24.

[10] For proposals to take into account other criteria (such as innovation, product quality, diversity of consumer choice) for determining consumer welfare see e.g. E. Fox, "The modernation of antitrust: a new equilibrium". In: *Cornell Law Review*, 66 1980: 1140-1173. On the consititutional functions of competition rules see: E.U. Petersmann, "Legal, economic and political objectives of national and international competition policies". In: *New England Law Review*, 1999 (forthcoming).

[11] See e.g. D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, 1998; G. Amato, note 9, chapter 3.

[12] G. Castaneda, title in: C.D. Ehlermann and L.L. Laudati, eds, *European Competition Law Annual* 1997: "Objectives of Competition Policy", 1998, at pp. 41-52.

posed elaboration of international competition rules (e.g. in a “millennium round” of multilateral trade negotiations) must remain flexible enough to allow divergent national competition laws and policies and “competition among rules”, which may promote convergence of competition rules and policies in the long run (as in Europe and North America).

Need for a broad concept of competition policy

Constitutional law thus requires that non-efficiency values be taken into account in the interpretation and application of competition laws. The historic goal of United States antitrust law has been to protect economic freedom (e.g. of independent producers, traders without market power) and consumer choice, and effective competition in open markets with many rivals by means of limitation and dispersion of power. EC competition law likewise pursues non-efficiency values, such as market integration in the EC and the protection of small and medium-sized enterprises. The trend in constitutional democracies towards narrowing competition law objectives in the direction of a more efficiency-oriented economic analysis contributes to legal certainty. But non-efficiency values are likely to remain of importance especially for developing countries introducing new competition laws as a means of opening and deregulating domestic markets.

Competition rules—due to their focus on non-discriminatory conditions of competition, consumer welfare, equal individual rights, independence of competition authorities, and access to courts—tend to be more equitable (e.g. in terms of non-discriminatory treatment and due process of law) than many other economic laws and policies influenced by rent-seeking so as to redistribute income for the benefit of powerful interest groups. In the trade policy field, for instance, anti-dumping and other trade protection laws often suffer from a one-sided producer bias, power-oriented procedures and the treatment of consumers as mere objects without individual rights (e.g. to challenge protectionist violations of WTO guarantees of freedom of trade before domestic courts). It may even be argued that, without competition rules to safeguard non-discriminatory competition and protect individual consumer preferences and consumer choices, Governments can neither know the true preferences of their citizens nor maximize consumer welfare; hence, without competition rules, consumers risk being exploited by private and governmental abuses of power.

Constitutional law also suggests a broad concept of competition policy in view of the fact that the liberalization of governmental market-access barriers (e.g. on imports) and governmental market distortions (e.g. by means of subsidies, regulated industries or State monopolies) continues to be more important for promoting competition and consumer welfare in many countries (notably developing countries) than antitrust laws and policies focusing on private restraints of competition. Yet even though human rights and constitutional law require Governments to promote non-discriminatory conditions of competition and consumer welfare in all policy areas—and liberal trade policies are thus a necessary component of any efficient competition policy—it also remains true that antitrust laws and policies may not be optimal policy instruments for correcting all market failures (such as environmental pollution) and supplying public goods that are not spontaneously supplied in private markets (such as monetary stability, or full employment under conditions of social security).

The challenge of introducing worldwide and national competition rules

Need for competition-oriented reforms of the world trading system

From a democratic perspective of citizens interested in maximizing their freedom, equal rights and consumer welfare—and also from the trade policy perspective of promoting non-discriminatory conditions of competition and the rule of law across frontiers—competition policy must be defined broadly. As long as trade authorities restrict and distort import and export competition, and competition authorities exempt export cartels and regulated industries from the scope of national antitrust laws, Governments cannot claim to have a consistent non-discriminatory competition policy to maximize consumer welfare. Since trade liberalization and competition policies serve complementary functions, trade and competition rules should be mutually consistent; as in European integration law, they should be integral parts of a coherent legal framework aimed at maximizing non-discriminatory conditions of competition, equal citizen rights and consumer welfare. This calls for competition-oriented reforms of the WTO world trade and legal system so as to render trade and competition policies more coherent and, thereby, enhance economic freedom, non-discriminatory conditions of competition and consumer welfare within and among nations.

The WTO Working Group on the Interaction between Trade and Competition Policy

The Working Group on the Interaction between Trade and Competition Policy was established by a decision at the WTO Ministerial Conference in December 1996 with the mandate “to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework”. The 125 or more written contributions by WTO members during the nine meetings of the Working Group held up to July 1999, and the introduction or substantial revision of competition laws in more than 35 developing countries and countries with economies in transition since 1990, are illustrative of the increasing interest among the 134 WTO member countries in competition law and policies and their interaction with the world trading system.

The 1998 Report of the Working Group to the WTO General Council[13], and the more focused discussions of the Group in 1999 on the relevance of fundamental WTO principles (national treatment, most-favoured-nation treatment, transparency) to competition policy and the contribution of competition policy to achieving the objectives of WTO, have revealed a surprising degree of agreement among most WTO members on, *inter alia*:

[13] WT/WGTCP/2, 8 December 1998.

(*a*) The complementarity of trade liberalization and competition policy for promoting competition, economic development and regulatory reforms (e.g. privatization, monitoring of capital markets, other financial sector reforms in countries hit by the Asian financial crisis) by reducing governmental and private market-access barriers and market distortions;[14]

(*b*) The importance of competition advocacy and competition policy (as distinct from national competition laws) for enhancing open markets, a competition culture, economic efficiency and consumer welfare;[15]

(*c*) The frequent distortion of trade and competition not only by private practices affecting market access for imports (e.g. import cartels, exclusionary vertical market restraints, discriminatory standard-setting activities) but also by business practices affecting international markets with essentially similar effects for different countries (e.g. in case of transnational cartels, certain mergers or abuses of dominant positions), or with different effects on national markets (e.g. in case of export cartels and some mergers);[16]

(*d*) The importance of deregulation and competition policy for limiting the harmful effects of State monopolies and of exclusive rights (including intellectual property rights) on market access and competition;[17]

(*e*) The mutually reinforcing nature of open policies towards foreign direct investment, which can make markets more contestable and enhance the competitiveness of domestic firms, and competition policies ensuring the proper functioning of markets (e.g. by reviewing possible anti-competitive effects of mergers and preventing abuses of market power by foreign investors);[18]

(*f*) The possibly trade- and competition-distorting, welfare-reducing effects of trade protection measures, such as discriminatory anti-dumping duties which protect import-competing producers rather than competition and consumer welfare in the importing country;[19]

(*g*) The relevance of fundamental WTO principles of national treatment, most-favoured-nation treatment and transparency to competition policy, and vice versa, since competition laws should be administered in a transparent manner and without discrimination based on the nationality of the parties;[20]

(*h*) The existence of a number of fundamental principles of competition policy (defined broadly), notwithstanding their lack of codification in any worldwide treaty;[21] and

[14] Ibid., paras. 19-43.

[15] Ibid., e.g. paras. 45, 51 and 53.

[16] Ibid., paras. 83-96.

[17] Ibid., paras. 99-122.

[18] Ibid., paras. 124-134.

[19] Ibid., paras. 136-152.

[20] WTO, “The fundamental WTO principles of national treatment, most-favoured-nation treatment and transparency”. In: WT/WGTCP/114, 14 April 1999.

[21] WTO, “Fundamental principles of competition policy”. In: WT/WGTCP/W/127, 7 June 1999.

(i) The possibility, emphasized especially by a number of developing countries, that multilateral competition rules and financial and technical assistance can help less-developed countries (including countries currently negotiating their WTO membership such as China) to overcome domestic political opposition to the introduction of national or regional competition laws (the latter may be more appropriate for small developing countries e.g. in West Africa), and to their effective enforcement vis-à-vis protectionist interests inside these countries and international cartels (e.g. shipping cartels discriminating against less developed countries).

The 1999 EC proposals for WTO negotiations on a worldwide agreement on competition rules

On 8 July 1999, the EC Commission adopted a proposal for the EC Council to initiate, at the 1999 WTO Ministerial Conference, negotiations in the context of a new WTO round for a legally binding WTO agreement on competition based on the following elements:[22]

> “(*a*) Core principles and common rules relating to the adoption of a competition law (i.e. commitment to adopt a comprehensive competition law, limits on sectoral exclusions, application of principles of transparency and non-discrimination, rights of firms) and its enforcement (i.e. a combination of an active enforcement policy by competition authorities with well defined powers and enforcement through private action in national courts).
>
> “(*b*) Common approaches on anticompetitive practices with a significant impact on international trade and investment (i.e. hard-core cartels, criteria for assessment of vertical restrictions or abuses of dominance with a foreclosure effect, principles for cooperation on export cartels and international mergers).
>
> “(*c*) Provisions on international cooperation, which could include provisions on notification, consultation and surveillance in relation to anticompetitive practices with an international dimension as well as exchanges of non-confidential information. It could also incorporate concepts of negative and positive comity, while not imposing a binding obligation to investigate on behalf of another country.
>
> “(*d*) The basic function of dispute settlement would be to ensure that domestic competition law and enforcement structures are in accordance with the provisions agreed multilaterally. Dispute settlement modalities will have to be further considered in the light of the scope and nature of the commitments to be assumed, and need to be well adapted to the specifics of competition law. In any event, there should be no review of individual decisions.”

The EC communication further emphasizes that the “development dimension must also be at the centre of the considerations of a multilateral framework of competition

[22] Communication from the Commission to the Council and to the European Parliament: *The EU Approach to the WTO Millennium Round*, EC Commission, 8 July 1999.

rules in the WTO. Transitional periods and flexibility in the rules would need to be considered. Beyond this, it would be important to give specific attention to means of ensuring that developing country administrations can derive maximum benefits from modalities of international cooperation, as well as to promoting enhanced and better coordinated technical assistance".

Several points suggested in earlier EC submissions appear to be left open in the communication of July 1999. For instance, while an earlier EC communication to the WTO General Council on the "EC approach to trade and competition" for the 1999 Ministerial Conference had emphasized the "need to consider a more horizontal approach" for the numerous existing competition-related disciplines in a number of WTO agreements,[23] the communication of July 1999 does not specify to what extent the proposed framework principles for competition policy could also lead to competition-oriented reforms of existing WTO provisions on trade protection (e.g. in the WTO agreements on anti-dumping and safeguards). The earlier EC proposal[24] for adoption by all WTO members of a commitment to introduce progressively a comprehensive competition law and effective enforcement structure is also not mentioned in the July 1999 communication. The communication no longer refers to harmonization or minimum standards of competition law, but only to common approaches, with priority given to hard-core cartels. As regards dispute settlement procedures, the concerns voiced by the United States Department of Justice have prompted the EC to emphasize that WTO dispute settlement bodies should not review court judgements or other individual cases.

The "WTO approach" proposed by Hong Kong, China

In a large number of submissions to the WTO Working Group on the Interaction between Trade and Competition Policy, Hong Kong, China has emphasized the need to define competition policy broadly to comprise all governmental and private restraints or distortions of competition. According to representatives of Hong Kong, China, governmental market-access barriers and market distortions (e.g. in trade with agricultural products, textiles and steel) continue to pose more important problems for many WTO members than private restrictive business practices addressed in national competition laws. Also WTO should therefore continue to give priority to the liberalization of governmental market-access barriers and market distortions. The interrelationships between governmental and private distortions of competition were already addressed in numerous WTO provisions, yet often in an imperfect manner (e.g. in articles VI and XVII of GATT, article 9 of the Agreement on Trade-Related Investment Measures, articles VIII and IX of the General Agreement on Trade in Services (GATS), and articles 8 and 40 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). WTO should focus, as recognized in the mandate of the Working Group, on these interaction problems of governmental and private restraints of competition.

As an example of the complementary functions of trade and competition rules, the representatives of Hong Kong, China, suggested that exporting countries should be exempted from anti-dumping investigations if the exporting country had accepted free trade and competition commitments for the exported goods concerned which rendered market segmentation and predatory pricing practices impossible and provided for cooperation among trade and competition authorities in exporting and importing countries in case of complaints of unfair trade. While not objecting to WTO rules on private restrictive practices, national competition laws and cooperation among national competition authorities, the representatives of Hong Kong, China, suggested that priority should be given to competition-oriented reforms of existing WTO rules and of their frequent producer bias for the protection of import-competing producers without adequate regard to domestic competition and consumer welfare (e.g. in the WTO agreements on anti-dumping and safeguards). National and international trade and competition rules should be made mutually more consistent by linking the WTO rules on non-discriminatory market access (e.g. GATT articles I-III, XIII and XVII) and on safeguard measures (e.g. GATT articles VI and XIX) with corresponding competition law principles so as to make trade and competition rules more effective and deepen the liberalization and integration of markets among WTO members. For instance:

(*a*) Similar to the obligations already set out in article 46 of the 1948 Havana Charter for an International Trade Organization (e.g. "to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control"), the GATT and GATS market-access commitments could be extended to agreed private market-access barriers that tend to exclude or discriminate against imports or distort exports;

(*b*) The WTO national treatment commitments could be extended to requirements to apply national competition laws in a non-discriminatory manner also vis-à-vis export and import cartels;

(*c*) WTO disciplines for public undertakings and monopolies (e.g. in GATT article XVII and GATS article VIII) could be given more precision by linking them to competition rules (e.g. on the model of article 90 of the Treaty of Rome);

(*d*) The producer bias of the WTO safeguard rules should be balanced by requirements to take into account consumer welfare and competition law principles (e.g. on predatory pricing practices), possibly in cooperation with the competition authorities in the exporting country where allegedly unfair exports originate;

(*e*) The provisions in the TRIPS Agreement on preventing the abuse of intellectual property rights (article 8) and anti-competitive practices in contractual licences (article 40) could be defined more precisely by reference to competition law principles.

[23] WTO, "EC approach to trade and competition". In: WT/GC/W/191, 2 June 1999.

[24] "Towards an international framework of competition rules". Communication submitted by Sir Leon Brittan and Karel van Miert, EC 1996: 14.

Policy options for negotiating international competition rules

The various proposals and policy options for dealing with competition problems in the WTO context can be grouped under three headings: (1) competition law approaches; (2) integration law approaches; and (3) sectoral approaches.

Competition law approaches

A worldwide agreement on the harmonization of domestic competition laws and the setting-up of an international competition authority, as suggested in a private academic initiative for an international antitrust code in 1993,[25] has not been proposed by any Government. Yet the opposing view, defended by, among others, the United States Assistant Attorney-General for Antitrust, Joel Klein, that the unilateral application of domestic antitrust laws to transnational restraints of competition, supplemented by bilateral cooperation among competition authorities, are to be preferred to multilateral competition rules in the WTO, is increasingly criticized for a number of reasons:

(*a*) It ignores the need to assist more effectively the 100 or so countries without national competition laws in introducing such rules in the face of resistance from powerful interest groups. Just as trade liberalization is politically easier on the basis of reciprocal international commitments rather than on a unilateral basis, the introduction of national competition laws and policies is politically easier in a framework of reciprocal international rules. Even in western Europe, most countries introduced national competition laws only after they had previously accepted international competition rules (e.g. in the Treaty of Rome or in free trade agreements concluded with the EC);

(*b*) It likewise ignores the need for making trade and competition rules mutually consistent. It has long been recognized in GATT and WTO practice that GATT and WTO rules serve the objective of non-discriminatory conditions of competition. Trade liberalization is a necessary component of a liberal competition policy, just as competition policy and competition-oriented reforms of trade protection rules are necessary for the full achievement of the WTO objective of non-discriminatory conditions of competition. More generally, human rights and constitutional law require Governments in all policy areas, including trade policy, to maximize consumer welfare and the equal rights of domestic citizens by promoting economic freedoms and non-discrimination and by limiting abuses of power;

(*c*) Proposals for unilateralism and bilateralism further ignore the historical experience from the thousands of bilateral trade and investment agreements that, in an interdependent world composed of around 200 sovereign States, bilateralism entails legal insecurity, conflicts and high transaction costs and is clearly less efficient than multilateralism. Multilateral minimum standards can be reconciled with the benefits from decentralized "competition among rules" and "common law approaches" to the progressive improvement of multilateral principles;

(*d*) Joel Klein's distrust of producer-driven trade negotiations, and his fear of adverse repercussions on consumer-driven competition policies and on the independence of United States antitrust authorities,[26] are no reason for leaving WTO negotiations to trade politicians. Just as the Uruguay Round negotiations on the TRIPS Agreement were led by intellectual property experts from national ministries of justice, WTO negotiations on multilateral competition rules will have to be led by representatives from national competition authorities. Experience with OECD negotiations in the competition and investment policy areas confirms that it is only in the WTO context that domestic political support from export industries tends to be strong enough to enable Governments to conclude legally binding worldwide agreements;

(*e*) Joel Klein's other favourite quotation (e.g. at the Berlin Cartel Conference on 11 May 1999)—"if it ain't broke don't fix it"—fails to mention that most national competition laws suffer from protectionist exemptions (e.g. in favour of export cartels and regulated industries), and that more than half of the mergers reviewed by the United States Federal Trade Commission now involve non-United States parties and information located beyond the borders of the United States, with the risk of mutually conflicting decisions by competition authorities from other countries. Moreover, while United States antitrust authorities are powerful enough to solicit cooperation from foreign Governments, competition authorities in developing countries often complain that developing countries' interests are not adequately taken into account in the competition policies of industrialized countries (e.g. if a total national welfare approach allows national producer efficiencies in developed countries to offset consumer costs and other welfare losses in less developed countries). One of the objectives of the EC proposal for WTO negotiations on multilateral competition rules is, rightly, to limit protectionist exceptions and sectoral exclusions in national competition laws and policies, and to strengthen and extend bilateral cooperation among competition authorities.

The United States Trade Representative, C. Barshefsky, seems to support competition advocacy in WTO and in WTO negotiations on the liberalization of anti-competitive practices and unnecessary regulation. An increasing number of other developed countries (e.g. Canada and Japan) and less developed countries (e.g. Brazil and the

[25] The private "International Antitrust Code Working Group" was composed of J. Drexl, W. Fikentscher, E. M. Fox, A. Fuchs, A. Heinemann, U. Immenga, H. P. Kunz-Hallstein, E. U. Petersmann, W. R. Schluep, A. Shoda, S. J. Soltysinski and L. A. Sullivan. The text, introductory explanation and detailed comments on this code are published in: *World Trade Materials*, September 1995: 126-196; *BNA Antitrust & Trade Regulation Report*, vol. 64, Special Supplement No. 1628, 19 August 1993; Hauser/Petersmann, EU, eds., "International competition rules in the GATT/WTO system", special issue of the *Swiss Review of International Economic Relations* 1994: 310-325; W. Fikentscher and U. Immenga, eds., *Draft International Antitrust Code*, 1995.

[26] At the Ninth International Cartel Conference organized by the German Federal Cartel Office on 10-11 May 1999 in Berlin, Joel Klein expressed these fears by saying: "Fools rush in where wise men fear to treat." The response by this author at the conference was: It would be irresponsible for "competition policy angels" to leave international negotiations on competition rules to the "trade policy fools" criticized by Joel Klein.

Republic of Korea) have emphasized in the Working Group the advantages of WTO negotiations on competition rules in view of the important role of competition law as a complement to the process of trade liberalization. The WTO agreements on trade in goods (e.g. on anti-dumping measures, safeguards, subsidies, public undertakings, technical barriers to trade, pre-shipment inspection and government procurement), trade in services, trade-related intellectual property rights and investment measures already include a large number of competition rules. Hence, as stated in the WTO's Annual Report of 1997: "The issue is not whether competition policy questions will be dealt with in the WTO context, but how and, in particular, how coherent will the framework [will] be within which this will be done."[27]

Between the over-ambitious proposal for worldwide harmonization of competition law standards and the power-oriented proposal to continue unilateralism and bilateralism dominated by United States interests, a wide array of policy options exists for enhancing the mutual complementarity of liberal trade and competition rules and policies on substantive standards, cooperation procedures and enforcement mechanisms. The TRIPS Agreement offers one possible model for combining substantive minimum standards, cooperation procedures, technical assistance for developing countries, private substantive and procedural rights (e.g. of access to national courts), international surveillance and WTO remedies. Recourse to rules of reason (rather than per se prohibitions) could protect national sovereignty to decide on the substantive national rules, and induce WTO dispute settlement bodies to exercise deference vis-à-vis the balancing of pro-competitive and anti-competitive effects in individual countries. Non-discrimination requirements could limit parochial exemptions that favour domestic economic activity and impose significant costs on other countries.

Integration law approaches

The above-mentioned "WTO approach" reflects a systemic concern for competition-oriented reforms in all four "pillars" of the WTO legal system:[28] GATT (e.g. articles VI, XVI, XVII, XIX and XXIII as regards non-violation complaints) and the multilateral agreements on trade in goods (e.g. the agreements on technical barriers to trade, pre-shipment inspection and trade-related investment measures); GATS (e.g. articles VIII, IX and XVII) and the various protocols to GATS (e.g. those on financial services and telecommunications services); the TRIPS Agreement (e.g. articles 6, 8, 40 and 64 as regards non-violation complaints); the plurilateral trade agreements (e.g. on government procurement and trade in civil aircraft) and any additional agreements to be negotiated in a new round of trade negotiations (e.g. on investment incentives, investment protection and obligations of foreign investors). Following the model of European integration law, the overall consistency of trade and competition rules could be enhanced by horizontal competition rules applicable to all areas of WTO law, for instance by a general recognition (similar to article 3 (*g*) of the Treaty of Rome) that the objectives of non-discriminatory conditions of competition and consumer welfare should be pursued in all areas of the WTO agreements by means of legal limitations on governmental as well as private market-access barriers and market distortions. Competition-oriented reforms of the WTO rules on discriminatory protection of import-competing producers would enhance not only non-discriminatory competition and consumer welfare, but also the non-efficiency values of the world trading system (such as freedom and non-discrimination). More coherent trade and competition policies will also increase the credibility and legitimacy of Governments and offer additional export opportunities and welfare gains, especially for less-developed countries. It is therefore to be welcomed that an increasing number of WTO members emphasize the advantages of competition-oriented reforms of WTO law, notwithstanding the continuing opposition from protectionist interests.

Sectoral approaches

The Fourth Protocol to the General Agreement on Trade in Services, on basic telecommunications, signed in February 1997, and in force since 5 February 1998, currently includes commitments of 77 WTO members on market access, non-discrimination, transparency and domestic regulation for services such as voice telephony, data transmission, telex, telegraph, facsimile and other telecommunications services. Most Governments included commitments on regulatory disciplines based on a reference paper which defines competition safeguards, interconnection guarantees, licensing criteria, independence of regulators from operators, and other principles for the regulatory framework for basic telecommunications services. Since telecommunications industries were dominated by national monopolies in most countries until recently, effective liberalization requires specific competition safeguards for users, essential facilities and dominant suppliers, in addition to the general GATS obligations for monopolies and exclusive service suppliers (article VIII of GATS) and restrictive business practices (article IX of GATS).

The GATS protocol on telecommunications includes detailed sector-specific competition rules such as: prohibitions of anti-competitive cross-subsidization, of the use of information obtained from competitors with anti-competitive results, and of not making available to other service suppliers on a timely basis technical information about essential facilities which are necessary to provide services; interconnection guarantees for non-discriminatory, timely and cost-oriented access to public telecommunications transport networks; independence of regulatory bodies and their separation from suppliers of basic telecommunications services. Sector-specific competition rules could also be used for the future liberalization of other regulated industries and service trade sectors, such as air and maritime transport, which have been distorted by cartelization and market-sharing arrangements for a long time. Sectoral approaches are, however, also exposed to the risk of regulatory capture by vested interests and may lead to mutually contradictory sectoral exceptions. The experience with European integration law confirms that competition law principles should be applicable to all economic sectors.

---

[27] *WTO Annual Report* 1997, vol. I: 32.

[28] E.U. Petersmann, *The Need for Integrating Trade and Competition Rules in the WTO World Trade and Legal System*, 1996.

Policy problems requiring particular attention

Regardless of whether competition law approaches, a broader integration law approach or limited sectoral approaches are pursued in a future elaboration of multilateral competition rules in WTO, numerous policy issues remain to be clarified before political consensus on a multilateral legal framework for more effective trade and competition policies appears possible.

Need for linking WTO principles and competition principles

The integration law approach rightly emphasizes that competition-oriented reforms of WTO rules can promote efficiency gains and non-efficiency values in all areas of trade and competition laws (e.g. freedom of market access and price formation, non-discriminatory treatment of economic agents, private rights to petition competition authorities and courts for review of anti-competitive administrative decisions, and due-process guarantees in enforcement proceedings). The WTO principles of national treatment, most-favoured-nation treatment and transparency reinforce the competition law objective of protecting competition as a process without regard to the nationality of competitors. The proposals (e.g. by the EC) for negotiating WTO minimum standards for national competition rules and competition authorities offer important systemic advantages:

(*a*) They could render the WTO rules on market access and market distortions more effective by protecting them from being undermined or circumvented by private market-access barriers and market distortions;

(*b*) An integrated concept for public and private restraints of competition could help to progressively limit anti-competitive exceptions in trade laws (notably for anti-dumping and other safeguard measures designed to protect import-competing producers rather than undistorted competition) as well as in competition laws (such as exemptions for export cartels and regulated industries);

(*c*) By promoting cooperation among domestic competition authorities (e.g. based on positive comity and negative comity), international minimum standards could contribute to avoiding conflicts in the extraterritorial application of domestic competition laws to transnational restraints of competition and international mergers;

(*d*) International competition rules could also protect the general interest of citizens in liberal trade and competition by helping Governments in the 100 or so countries without national competition laws to overcome the protectionist resistance to the introduction of such laws;

(*e*) The focus of competition laws on general consumer welfare, individual rights and their judicial protection could enhance the democratic legitimacy of WTO law and its political acceptance by civil society.

However, many WTO members have emphasized the need to clarify and adapt the non-discrimination principles of WTO rules with regard to competition laws and policies, as has been done for services in GATS and for intellectual property rights in the TRIPS Agreement. For instance, how can the inevitable limits of case-specific bilateral assistance in the enforcement of competition laws (e.g. due to limited resources of national competition authorities) be reconciled with most-favoured-nation obligations in the field of competition policy? To what extent do articles III, XI and XVII of GATT, and the WTO Agreement on Safeguards already prohibit governmental and private discrimination between domestic and export markets?

Consensus- and constituency-building: the need for a package deal with obvious benefits for developing countries and safeguards against protectionist capture

The progressive elaboration of more coherent trade and competition rules in the WTO context requires clarification of numerous questions. For example: what procedural and substantive reforms of existing WTO rules are called for in order to make trade and competition policies more complementary? How can protection-biased WTO rules be adapted to the competition values of maximizing consumer welfare through non-discriminatory conditions of competition? How can a political constituency be built that supports competition-oriented reforms of WTO rules in view of the fact that trade policies tend to be producer-driven and are often unduly influenced by protectionist lobbies and self-interested bureaucracies? Are institutionalized competition advocacy in WTO and linking principles (e.g. concerning the market access and non-discrimination requirements of trade and competition rules) necessary for generating political support for competition-oriented reforms of WTO rules? Should WTO negotiations therefore initially focus on the market-opening functions of competition rules, rather than on their regulatory functions (e.g. as regards merger control laws), so as to attract support from export industries? Would the strengthening of procedural and substantive private rights help to build countervailing powers in support of open markets? What changes of national competition laws and policies are desirable (e.g. as regards definition of national welfare, export cartels and other exemptions from competition laws without regard to harm caused abroad)? How can bilateral and multilateral cooperation on competition matters (e.g. assistance for the introduction of competition laws and the establishment of competition authorities in developing countries, case-specific bilateral cooperation, agreement on multilateral criteria for the control of mergers involving several countries) be promoted?

During the preparation of the 1986 “Punta-del-Este Declaration” launching the Uruguay Round of multilateral trade negotiations in GATT, the proposals by developing countries for multilateral negotiations on competition rules foundered on the resistance by protectionist interest groups in the United States Congress and administration. The analytical work of the WTO Working Group on the Interaction between Trade and Competition Policy, and the 1999 EC initiative for negotiating multilateral competition rules in the next round of trade negotiations, offer a new occasion for competition-oriented reforms of the world trading system for the benefit of all WTO member countries. Seizing this political opportunity will require a comprehensive package deal at the Third WTO Ministerial Conference, to be held in Seattle towards the end of 1999, with obvious benefits especially for the less developed members of WTO (e.g. in terms of generous financial and technical assistance from the World Bank Group, UNCTAD, WTO and the EC for competition-oriented reforms of trade and competition laws in developing countries).

In addition, legitimate concerns (e.g. by United States antitrust authorities vis-à-vis adverse repercussions of WTO negotiations, WTO principles, or WTO dispute settlement proceedings on the autonomy of United States competition authorities and on their interpretation and enforcement of United States antitrust laws) should be addressed in a constructive manner. For example, it should be made clear that WTO negotiations on competition rules must not weaken existing competition law safeguards, just as the Uruguay Round negotiations on the TRIPS Agreement did not weaken existing intellectual property laws; and the inappropriateness of trade sanctions as a means to achieve competition policy objectives should be recognized. Having assisted in elaborating the 1995 EC expert group proposals for multilateral competition rules in WTO,[29] and having advised developing-country representatives on the systemic advantages of a WTO approach for competition-oriented reforms of existing WTO rules, this author remains convinced of the need for a pragmatic synthesis between narrow competition law approaches and over-ambitious integration law approaches so as to enable WTO members to begin progressive competition-oriented reforms of the world trading system in order to better protect consumer welfare and the equal rights of their citizens.

---

[29] European Commission, *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*. The expert group was composed of three external experts (U. Immenga, F. Jenny, and E.U. Petersmann) and six EC Commission officials acting in a personal capacity (C. D. Ehlermann, J. F. Pons, R. Abbott, F. Lamoureux, J. F. Marchipont, and A. Jacquemin). See also E. U. Petersmann, "The international competition policy of the EC and the need for an EC initiative for a Plurilateral Agreement on Competition and Trade." In: F. Snyder, ed., *Constitutional Dimensions of European Integration*, 1996: 289-336.

The views expressed in this note are solely those of the author and should not be ascribed to the organizations above. The note draws on the author's publication Global Public Policy: Governing without Government? Brookings Institution Press, 1998.

D. *TRILATERAL NETWORKS OF GOVERNMENTS, BUSINESS AND CIVIL SOCIETY: THE ROLE OF INTERNATIONAL ORGANIZATIONS IN GLOBAL PUBLIC POLICY*

Wolfgang H. Reinicke

Senior Partner in the Corporate Strategy Group,
The World Bank, Washington, United States*

Introduction

Few would doubt that what was initially characterized as the Asian financial crisis rapidly took on a global dimension both as far as causes and consequences are concerned. Ultimately more important, however, will be the longer-term implications of the crisis, which have reached far beyond the realm of global finance and economics but have affected political, social and thus development dynamics around the world. This has fuelled an intense debate about the benefits and drawbacks of globalization and the ability of existing structures of governance—including the multilaterals—to prevent future crises.

Considering the current linkages of global production and consumption, and the emergence of cross-border societal and identity networks, it is difficult to imagine how we could ever return to the status quo ante, short of a major economic, political or social crisis. Indeed, the private sector, civil society and individuals continue to adapt to these new and still changing circumstances. But learning to operate in and identify with such a non-hierarchical, highly dynamic and increasingly non-territorial environment, and to cope with the many pressures it generates, has turned out to be a bigger challenge than many would have predicted in the immediate aftermath of the cold war. To the contrary, there is a growing recognition that the central challenge for public policy in the twenty-first century will be to ensure that the period of post-interdependence remains sustainable, from a social, political, environmental and thus developmental perspective.

Despite the widespread use of the term "globalization" and a recognition of its growing importance not just in foreign but also domestic policy-making, it is surprising how elusive the concept has remained. In many cases globalization continues to be characterized as a continuous increase of cross-border financial and economic activities leading to higher degrees of economic interdependence. Essentially, interdependence and globalization are used interchangeably. And yet, if we can capture the current shift in mere quantitative terms, there may be little need or incentive for Governments to reassess, in the light of globalization, either their own role or that of the multilateral institutions and principles that have governed the world economy since the end of the Second World War II. On the other hand, if we are in the midst of a truly qualitative transformation, then it becomes necessary to draw a more formal distinction between economic interdependence and globalization, in order to help us assess not only the need but also the appropriate direction for change.

What is that key distinction?

Contrary to economic interdependence, which narrowed the distance between sovereign nations and necessitated closer macroeconomic cooperation among public-sector actors (i.e. Governments), the principal drivers of globalization are microeconomic actors, requiring us to reconsider traditional forms of international cooperation that were suitable for managing economic interdependence. Globalization is a corporate-level phenomenon. It commenced during the mid-1980s as companies responded to the heightened competition brought about by deregulation and liberalization during the era of economic interdependence. Thus, globalization represents the integration of a cross-national dimension into the very nature of the organizational structure and strategic behaviour of individual companies. The growing amount of cross-border movement of increasingly intangible capital, such as finance, technology, information and the ownership and control of assets, allows companies to enhance their competitiveness and creates a cross-border web of interconnected nodes in which value and wealth are being generated.

Multiple issues of UNCTAD's *World Investment Report*, which have tracked data on corporate activity over many years, substantiate the emergence of such global corporate networks and signal a truly qualitative transformation. In the 1960s and 1970s, for example, foreign direct investment grew in close correlation with tangibles such as world output and trade. But from 1985 to 1997, foreign direct investment expanded at an annual rate of 20.7 per cent compared to 2 per cent and 5.2 per cent for output and trade, respectively. Most of this additional investment was concentrated in the OECD countries and a

* The views expressed in this note are solely those of the author and should not be ascribed to the organizations above. The note draws on the author's publication, *Global Public Policy: Governing without Government*? (Brookings Institution Press, 1998).

few select developing countries, and consisted of mergers and acquisitions in R & D-intensive industries. After allowance has been made for the opening of both China and the former Soviet bloc, which attracted almost no investment prior to 1985, the share of foreign direct investment going to the developing world has actually dropped. This picture is confirmed by the pattern of corporate alliances and collaborative agreements, which have grown dramatically during the past decade.

International trade is also undergoing a qualitative transformation, restructured by foreign direct investment and international alliances. The OECD estimates that about 70 per cent of world trade is intra-industry and intra-firm trade. In the financial world, the advent of securitization meant a qualitative transformation facilitating global corporate strategies that gave foreign debtors and creditors access to domestic financial markets. In particular, the market for derivative instruments has led to the greater growth and volatility of international capital flows, evidenced by the fact that in 1997 the combined annual value of global trade and foreign direct investment was equal to only five days of turnover on the global foreign exchange markets.

What all of this indicates is that a growing share of international economic activity during the past decade reflects the internal but cross-border restructuring of corporate activities. In many cases, corporations absorb foreign capital stock, internalizing economic activities that were once conducted on the open market. Alliances such as long-term supplier agreements, licensing or franchising contracts are not fully exposed to market forces. As far as the growing importance of mergers and acquisitions is concerned, which according to UNCTAD in 1997 amounted to 58 per cent of all foreign direct investment inflows, OECD reminds us that "even the largest single investment in any given year may represent nothing more than the change of ownership, with no effect on resource allocation between two countries".

Turning to trade, reasonable data exist only for the United States, but in 1996 close to 40 per cent of total United States trade was accounted for by intra-firm trade—or as the OECD calls it, off-market trade. Governments continue to register these internal transfers of corporations not because they are traded but because they cut across multiple political spaces. Thus we should be more careful in automatically equating globalization with the emergence of a global market economy, unless we can ensure that there is an appropriate infrastructure in place, a global public space, within which these corporate networks can compete, freely but also fairly. No doubt a global framework for competition policy will be one of the core pillars of such an infrastructure.

By no means does this imply that macroeconomic performance and management are no longer important. To the contrary, interdependence and the need for closer macroeconomic cooperation was an important precursor to globalization and remains the most critical factor in sustaining it. It led to the creation of international regimes and institutions like the General Agreement on Tariffs and Trade, the International Monetary Fund and the World Bank, and it was an important causal factor in encouraging globalization. Along with technological innovation, this liberalization of cross-border economic activity created an environment that not only permitted but compelled companies to adopt global strategies. And yet the growing importance of non-tariff barriers to trade and the need to focus our attention on global competition policies are but two examples indicating that the microeconomic dimension needs greater attention. Indeed, nowhere has the importance of the structural, institutional and legal dimension of a market economy—at the global and local levels—become more apparent than in the recent global financial crisis. Not surprisingly, many of the responses to the crisis will have to focus on this structural and institutional aspect of market economies. Before considering some of those responses, it is useful to provide a short analytical framework to examine the political economy of globalization.

Defining the challenge

What kind of challenge does globalization present to Governments and how—if at all—does that challenge differ from interdependence? Does globalization challenge sovereignty? The intuitive answer is yes—but then so does interdependence, and so once again we must differentiate. To do so, some crucial distinctions must be made. First, neither interdependence nor globalization can challenge the legal sovereignty of a State—only other States can. If anything, these forces challenge the operational sovereignty of a Government (i.e. the ability of a Government to conduct public policy). Second, the concept of sovereignty has two dimensions—an internal and an external one. The internal dimension depicts the relationship between the State and civil society. Paraphrasing the sociologist Max Weber, a Government is internally sovereign if it enjoys a monopoly of the legitimate power over a range of social activities within a given territory. With respect to the economy, Governments operationalize their internal sovereignty when they collect taxes, regulate private-sector activities and safeguard an appropriate environment for competition.

The external dimension of sovereignty refers to relationships among States in the international system. For example, countries exercise external economic sovereignty when they collect tariffs and alter their exchange rates. Economic interdependence is considered a challenge to the external dimension of sovereignty. Responding to this challenge, Governments have followed the principles and norms of liberal economic internationalism, endorsing the gradual, but reciprocal, reduction of their external economic sovereignty by lowering tariff barriers and capital controls in the context of international regimes.

Globalization does not challenge the external sovereignty of a country, but it does challenge the internal sovereignty of a Government by altering the spatial relationship between the private and public sectors. This phenomenon has become evident in a number of social settings, most clearly in the domain of economics. Since globalization induces corporations to fuse national markets into a single whole, they operate in an economic space that now subsumes multiple political spaces. As a result, a Government no longer has a monopoly of the legitimate power over the territory within which corporations organize themselves, undermining its internal sovereignty. The rising incidence of regulatory and tax arbitrage is a telling indicator that this monopoly is waning. This by no means implies that private-sector actors always make a deliberate effort to undermine internal sovereignty. Rather they follow a fundamentally different organizational logic than States, which are boundary-maintaining systems. Indeed, States' legitimacy derives from their ability to maintain boundaries. Markets, however, do not depend on the presence of boundaries. Thus, at the very same time that globalization integrates markets, it also fragments politics.

And while it is true that this threat is only to the operational dimension of internal sovereignty, we should not underestimate the challenge. Why? Because a threat to a Government's ability to exercise internal sovereignty implies a threat to the effectiveness of democracy. Although individuals may exercise their legal right to vote, the actual power of that vote in shaping public policy decreases with the decline in internal sovereignty. A persistent weakness in internal sovereignty will cast doubt on democratic institutions. And while this dynamic is not the only explanation for the declining trust in institutions of governance in many countries, it is an important contributing factor. Governments, which see their legitimacy, their very *raison d'être* undermined, have no choice but to respond.

Responses to globalization

To date, these responses to globalization for the most part have been reactive and fall into two camps, both variants of what are essentially interventionist strategies. Those who consider globalization a threat call for *defensive* intervention, advocating such economic measures as tariffs, non-tariff barriers, capital controls and other territorially defined limitations that force companies and private actors in general to reorganize along national or regional lines. Though this phenomenon was already observable before the global financial crisis, it is likely to increase in its aftermath. If *economic* nationalism fails to arouse broad popular support, its *political* counterpart may be more successful. Increasing calls for greater regional independence not just with respect to economic but also foreign policy or even territorial secession and partition in the hope of regaining internal sovereignty are a political strategy that has gained in popularity around the world during the past decade.

Others have called on policy makers to intervene offensively with investment incentives and competitive deregulation. Under these circumstances, States themselves become global competitors, seeking to entice corporations to operate within their own territory. Again if this does not succeed, offensive intervention has also become popular as a political tool, as some countries attempt to broaden the reach of their internal sovereignty to match the economic geography of global corporate networks. Two of the more prominent examples are California's attempt to tax resident companies on a global basis and the Helms-Burton Act.

None of these responses bode well for the future of international relations or for our economies. Protectionism by a country or a region leads to retaliation and puts the world economy on a path of disintegration. Subsidizing an industry with the sole purpose of gaining (a temporary) competitive advantage will not advance integration but rather divert scarce public funds from important public policy goals. Competitive deregulation may not lead to disintegration, but it defeats the original purpose of the policy; a fully deregulated market further reduces a Government's internal sovereignty. This is not to question the importance of structural reforms. Rather, it is a reminder that a narrow focus on competitiveness among nations in the absence of an overarching framework for competition, will lead to a win-lose situation and strengthen those political forces that favour economic nationalism (i.e. defensive intervention), making structural adjustment even more difficult.

Extraterritoriality, as in the case of the Helms-Burton Act, is no friend of deeper integration either. Other States will retaliate against such a dictate. Finally, redefining political geography through partition only gives the appearance of greater control of policy. Partitioning a country focuses exclusively on the external dimension of sovereignty. In no way does it insulate Governments from the challenges of globalization. If anything, it makes them more vulnerable.

Note that all of these responses re-emphasize territoriality as an ordering principle of international relations, a condition that interdependence has tried to overcome. All are at odds with globalization and will succeed only if the achievements of the post-war era are reversed. To some this possibility seems remote, but one cannot fail to point out that the popularity of these policies has increased considerably in recent years. In many countries, political opportunists have taken advantage of the public's fear concerning the declining effectiveness of internal sovereignty and are advocating greater economic nationalism and/or closed regionalism. Unless we find a better alternative, Governments will soon be forced to rely on these interventions to halt the loss of internal sovereignty and the further erosion of confidence in our democratic institutions.

Towards global public policy

What are the broad contours of such an alternative? If Governments want to shape globalization rather than react to it, they will have to operationalize internal sovereignty in a non-territorial context. Forming a global government is one response, but it is unrealistic—it would require States to abdicate their sovereignty not only in daily affairs but in a formal sense as well. It is also undesirable for reasons of accountability and legitimacy. And while global government may be a technocrat's answer to the shortcomings of territorially-based approaches to public policy, it could not possibly match the dynamism of global economic and social networks; nor is there any reason to believe that a global government would be in any way better equipped to deal with the technical complexities of public policy at the end of the twentieth century than its national counterparts.

A more promising strategy builds on the earlier differentiation between operational and formal sovereignty. Governance, a social function crucial for the operation of any market economy—whether national, regional or global—does not have to be equated with government. Accordingly, a global public policy would de-link the operational elements of internal sovereignty (governance) from its formal territorial foundation (the nation State) and institutional environment (the Government).

To implement such a strategy, policy makers would invoke the principle of subsidiarity but use the concept in a much broader sense than we know from the European Union, the Tenth Amendment to the United States Constitution or other federalist structures. The “sub” in subsidiarity is used in a functional sense and refers to any actor or institution that is well positioned to support the operationalization of internal sovereignty in the global context. We can further distinguish between two forms of subsidiarity. Vertical subsidiarity delegates public policy-making to other public-sector actors. As far as globalization is concerned, this refers mainly to multilateral institutions. Though little acknowledged, the changing roles and mandates of the OECD, WTO, IMF and the World Bank—now dealing with corruption, financial regulation, competition policies and environmental standards—suggest that they are in fact becoming increasingly involved in matters of internal sovereignty.

This enhanced role of multilateral institutions will only succeed, however, if national bureaucracies establish permanent channels of communication and interact on a regular basis to facilitate the exchange of information in the open, transparent fashion necessary for informed global public policy. In the domain of global finance this has become evident at the institutional level in cases such as the collapse of Barings or the problems at Daiwa. At the systemic level, the financial crisis in Asia has alerted policy makers that these linkages are long overdue. There should be no doubt, however, that cross-national bureaucratic alliances need to reach far beyond the domain of global capital markets and cover a broad range of policy issues, including the growing number of non-tariff barriers to trade that WTO, OECD and other multilateral institutions have begun to address.

The establishment of cross-national bureaucratic collaboration is an important and necessary first step in establishing a global public space, but it is not sufficient. These bureaucratic networks will not be able to eliminate all the disparities mentioned. Such venues would continue to lack the dynamism, agility, and knowledge base that characterizes global economic and social networks. Nor would they even approach the level of participation and accountability that any public policy-making structure—whether it is local, national, regional or global—would want to generate in order to ensure its credibility and thus sustainability. Adaptive, intelligent and legitimate public policy systems can only arise if public policy is prepared to make extensive use of *horizontal subsidiarity*, that is if they delegate or outsource aspects of public policy-making to non-State actors such as business, non-governmental organizations, foundations and other interested civil society participants who are at ease with moving beyond territorial boundaries and thus the confines of national sovereignty.

The purpose of these global public policy networks is to fill an organizational deficit or vacuum to create “bridges” between Governments, the private sector and civil society that currently do not exist but are sorely needed. As such they reflect the changing distribution of power among these actors in the international system. They allow participants to pull diverse resources together and they address issues that no group can any longer resolve by itself or in the context of a sovereign territory. As such and notwithstanding the fact each sector (public, for-profit and non-profit) has a direct stake in the outcome of public policy, they help to generate a trisectoral stakeholder perspective, that transcends the participating organizations’ values and visions, creating a forum for defining best practices, standards and norms that critical stakeholders identify with and commit to their implementation.

Equally important is the fact that the range of activity of the private-sector participants in these networks is not constrained by political boundaries. In addition, better information, knowledge and understanding on the part of these actors of increasingly complex, technology-driven and fast-changing public policy issues will not only generate greater acceptability and legitimacy of global public policy; these network-based public-private partnerships, which are in effect what horizontal subsidiarity creates, will also produce a more efficient and effective policy process. Finally, by building bridges across civil societies, horizontal subsidiarity creates a real international community, a true global civil society by encouraging mutual learning systems and openness to change among public policy. With regard to global financial regulation, environmental protection, social protection, the fight against transnational crime and many other global policy issues that include competition policy, horizontal subsidiarity would become one important mechanism to succeed in global public policy.

Critics of such an idea will question the wisdom of placing private and public interests under the direction of the same institution, charging that the public’s interest is likely to be neglected. And indeed, the limited experience of mixed regulation supports these sceptics to some degree. But rather than abandoning global public policy, the current shortcomings of mixed regulation should be adressed. First, greater transparency is necessary. Strict principles of disclosure-based regulation guaranteeing other groups sufficient access to ensure that their interests are adequately represented would raise confidence in such a structure. Second, corporations must facilitate public-private partnerships by improving their own internal control and management structures. Independent audits and incentive-and-reward structures that discourage excessive risk-taking are examples of measures readily available to them. The greater the focus on corporate governance, the lower the risk of market failure and the need for outside regulation. Those with doubts about public-private partnerships and global public policy should consider the danger in the alternatives.

A second source of criticism is that global public policy networks will suffer from a democratic deficit, a term familiar to observers of European integration. In other words, decoupling public policy formulation and implementation from its territorial base, may provide a technical answer to the challenge of sustaining globalization, but it cannot provide a political solution - to the contrary, by separating the public policy process from its territorial base its legitimacy and democratic character is undermined even further. This requires that we make a concerted effort to conceptualize democratic theory and the concept of pluralism no longer solely in the context of the territorially-defined polity. Given the difficulty of operationalizing representative democracy in the global context in the foreseeable future, a greater emphasis on participatory and deliberative models of democracy, relying on the public-private partnerships outlined here, seems a promising first step. Nevertheless, it is here that global public policy will face its greatest challenge, and much analytical and operational work lies ahead.

Finally, to reiterate, for now, formal sovereignty remains in the hands of the public sector. Horizontal subsidiarity merely permits policy makers to create a more flexible and dynamic, but also more effective and efficient, public policy structure that can respond to the demands of a global economy and allow Governments to regain their legitimacy as the principal providers of public goods.

Multilateral institutions and the changing demands on international security

If globalization is to be sustained, it will no longer suffice for the architects of international relations to view international security along traditional lines. Note that external sovereignty depends on the ability to exclude others (here, of course, the bipolar conflict was the most vivid example). However, internal sovereignty, as we have learned, depends on the ability to *include*: to create a sense of community and belonging; it is at the root of citizenship, and it shapes our identities. But if we take a closer look at the data on foreign direct investment and corporate alliances that were cited previously, we see that large parts of the world economy and its participants remain excluded from globalization. If globalization continues and, in response, the maintenance of internal sovereignty becomes a core theme of the global political economy, then inclusion will become one of the central themes of international security in the years to come, placing multilateral institutions at the centre of international security.

A strategic and proactive posture on behalf of international financial and development institutions would thus focus on establishing and sustaining global public policy networks. Two roles for multilaterals in particular stand out:

First, and derived from the need for more inclusiveness in global decision-making, multilaterals should be charged with creating an enabling environment that: (*a*) permits these countries to participate in the establishment of global public policy networks; and (*b*) enables them to implement and enforce the decisions made in these networks in their own domestic institutional and policy context. This includes, among other things, a focus on capacity-building, the widespread dissemination of information, and establishment of a knowledge base that empowers all parties involved to contribute to the debate over a particular public policy issue.

Such a strategic posture by multilaterals not only takes a proactive stance in a rapidly changing global environment, it also acknowledges the fact that private-sector financial flows to developing countries now dwarf public sources. And while private-sector capital flows remain quite concentrated and continue to be subject to cyclical fluctuations, the sheer magnitude of the numbers indicates that the bulk of capital for economic growth and poverty reduction in the developing world will have come from the private sector. Development institutions will have little choice but to focus on those activities where other actors are less likely to commit resources. It is therefore critical that they leverage their resources in the way described above. Sound and responsible public policies that recognize the opportunities and risks of globalization will complement private-sector activities and create important synergies. This not only permits greater selectivity, but allows policy makers to scale up their development effort in a significant way as private-sector capital flows stabilize and broaden their geographic reach.

Second, in addition to enabling developing countries to participate in global public policy networks, multilateral institutions are in a good position to provide a platform for convening global public policy networks. Contrary to individual countries, the private sector, non-governmental organizations, and other stakeholders participating in such a network, they do not represent a particularistic interest. Rather, their mandate rests with the need to promote the deeper integration of the world economy *and* to ensure that this can be achieved on politically, socially and environmentally sustainable terms. To provide such a platform, multilaterals would first take on a leading role in promoting the identification of public policy issues that require a global commitment. Second, they would have to provide an institutional umbrella for policy

formulation by mediating between the various stakeholders and offering to support the establishment of appropriate institutional mechanisms. This process must assure access, transparency and top-quality knowledge management. Third, multilateral institutions, which then would now have a major stake in the success of global public policy, would in some form take an active role in monitoring the application of global public policy and, if necessary, supporting its broad enforcement. It is worth noting that a number of global public policy networks have emerged in recent years. The partnership between the World Conservation Union and the World Bank in establishing the World Commission on Dams or the participation of UNCTAD and the World Bank in a multisector alliance to stabilize commodity prices are just two examples.

To garner credibility and eventually success, global public policy networks must also be embedded in an international legal framework. Here too change is under way. The international system has begun to opt increasingly for non-binding international legal agreements, which are not only more flexible, but also open to non-State parties, reflecting the need to involve non-State actors to reduce the growing information asymmetries brought about by globalization. Notwithstanding the fact that these agreements are characterized as soft international law, compliance is surprisingly high, and nothing prevents those agreements from evolving into hard law. OECD in particular has argued that non-binding "common approaches" in the domain of global competition policy are a useful and politically feasible approach in a world where economic and political geographies are moving further and further apart.

Some are likely to reject an agenda as ambitious as the one laid out here. They might argue that the formation of global public policy networks transfers too much power to multilateral institutions and that this transfer undermines the sovereignty of nation States. Such a posture highlights a dangerous fallacy that is heard with growing frequency in political circles, that to charge multilateral institutions with providing platforms for global public policy networks to ensure that globalization proceeds on a sustainable path leads to a loss of sovereignty. To the contrary, as has been shown, nation States have already lost sovereignty, and the establishment of global public policy networks is a collective way of regaining it while avoiding the economic and social repercussions of defensive intervention. Moreover, this does not mean that local actors may not play an important role in enforcing and monitoring globally agreed rules and standards. By ensuring these networks are based on partnerships with civil society and the private sector, they provide practical meaning and guidance to the oft-quoted line, "think globally—act locally".

Others would remind us that establishment and administration of such networks will be impossible given the difficulty of rationalizing foreign aid after the cold war and the variety of political interests involved. But resource transfers that support the establishment of and broad participation in public policy networks that promote international financial stability, protect the global environment, fight transnational crime and provide other global or regional public goods are in truth neither "foreign" nor "aid", but rather an investment that generates a return, one that is shared by all. Finally, by investing in global public policy networks, multilateral institutions do not question their mandate—poverty reduction. What they do is reposition themselves in a changed external environment in order to maximize their specific contribution toward that purpose, recognizing the complementary role they can play and the leverage this role provides.

Conclusion

Global public policy networks do not contest internal sovereignty as an organizing principle of political and social life, but they do contest its organization along traditional territorial lines. This requires political leadership and institutional change. But it also requires the willingness and close cooperation of private and non-governmental actors to share responsibility in exercising public policy. In particular, the degree to which the global corporate community is ready and able to take on some public policy functions in conjunction with other non-State actors will be decisive in determining success.

Finally, global public policy is not some distant goal—the time to start taking practical steps is now. There is a tendency to perceive globalization as something inevitable, as something that cannot be reversed, or even as the end of history. But it is not. The world economy experienced similar levels of integration from 1870 to 1913, a period often referred to as the golden age of international economy. It ended differently. Today, interdependence risks becoming the victim of its own success. The current structural discrepancies between private and public forms of social organization are not sustainable. The interventionist strategies outlined above should not be dismissed as inapplicable. To the contrary, their popularity is on the rise and has entered the mainstream of the political debate.

The prospects for global public policy may not be as remote as they appear. Under conditions of globalization, anarchy is no longer just the outcome but also the cause of State interests in the international system, questioning conventional theories of international cooperation. Whether and for how long the institutions of governance are centred on States should be of lesser concern. The administration of sovereignty has changed many times over the centuries; the nation State is a relatively recent form of governance and it has no claim to perpetuity. While the territorial State may eventually become redundant, the principles and values that govern democracies should not. Steps should be taken now to support the notion of global public policy so that international institutions can contribute their share towards sustaining globalization.