

Discussion Paper No. 9807

July 1998

**Competition Policy and International
Rules and Disciplines**

by

*Florian A. Alburo**

*Professor, School of Economics,
University of the Philippines

Note: UPSE Discussion Papers are preliminary versions circulated privately to elicit critical comment. They are protected by the Copyright Law (PD No. 49) and not for quotation or reprinting without prior approval.

U48800
5.10

Abstract

There are now talks of, if not calls for multilateral competition policy agreement. There is now a proposal for a "fair trade commission" in the Philippines. Yet the actual issues need clarification especially distinguishing between anti-trust laws and competition policy. The paper argues that it is too early to consider international rules and disciplines involving developing countries.

Competition Policy and International Rules and Disciplines

Florian A. Alburo

I. Are We Asking the Right Question?

After the successful completion of the Uruguay Round Agreement, the establishment of the WTO, and its first Ministerial Meeting, there are now talks of, if not calls for, second generation agreements that include a multilateral competition policy agreement or some plurilateral treaty. This is not a new set of issues. Depending upon the distinction given between competition law (meaning anti-trust rules that refer to firm behavior and practices which are anticompetitive such as collusion, abuse of dominant market position, market restraints, creation of market dominance through mergers and acquisitions etc.) and competition policy (meaning a broader set of measures governments implement to enhance competition), they have been on the agenda of the original International Trade Organization (Havana Charter Chapter V) or the subject of some proposed codes of conduct. Of course no accessions have been given to these and therefore they are largely unenforceable. The point is that there is some experience at the multilateral level in generating the issues for discussions and possible common concerns for some kind of understanding if not agreement.

It is quite late and unproductive to go back to history to find out why previous attempts to forge an international agreement on competition policy did not materialize. What may be useful is to examine whether the circumstances around global trade policies are conducive enough for reinstituting if not formulating new international rules and disciplines on competition policy.

The experience on competition policy is unfortunately confined to developed countries and along the narrower area of competition law. For some developing countries, the experience has been more recent. Perhaps in this sense, the question "is competition policy ripe for international rules and disciplines?" is appropriate. In fact, for other developing countries, their more recent economic history shows an explicit policy preference for concentration in selected markets, creation of monopolies, and entry restrictions, among others, under the philosophy that competition has the undesirable side effects of resource waste even if such resources are privately owned.

It is thus important that we ask the right question when it comes to proposals for international rules and disciplines in competition policy. The ultimate test is really whether the current international economic environment is sufficiently geared up for global codes on competition that encompass competition law and competition policy.

II. Options on the Table

The rediscovery of the market by many developing countries, the transformation of most centrally planned economies to market systems, and the formation of free-trade areas have renewed calls for international codes for competition. The proposals from both academic and official circles have ranged from a global competition code to the status quo (i.e. no international rules). What is apparent from these options is the absence of consensus for any preference. Just on this basis alone, the journey to international codes promises to be a long one.

There is the notion of a limited International Antitrust Code to be administered by an International Antitrust Authority. Being narrowly antitrust, this code is expectedly heavy on prohibitions of vertical and horizontal restraints, and investigations. The implied institutional structure here is supra-national even if this may be a plurilateral treaty and effective only among contracting parties that affix their signatures.

Less circumscribing than this would be the specification of minimum standards such as specific restrictive business practices that impede trade, export and import cartels, and merger approval procedures, among others. This need not require a heavy international institution and would rely on national competition authorities to implement and investigate. Still, this will require a plurilateral treaty.

Then there is the option of incorporating competition principles into existing GATT/WTO articles and rules. For example, the introduction of the principles in antidumping actions i.e. contesting antidumping based on antitrust issues. A concrete illustration would be that an antidumping investigation would be conditional on a finding by home market antitrust authorities that the firms that are charged with dumping are in markets with significant entry barriers. Some of the current GATT/WTO articles already contain elements of competition principles. In the agreement on standards there is a provision that technical regulations are not more trade-restrictive than necessary and that international standards be used. These kinds of principles reduce possible circumvention of trade liberalizing moves.

Along the same line, there is the notion that the implementation of WTO-consistent trade policy measures be contested on the basis of competition policy factors and considerations. Under GATT Article XXIII:1 (b) (Nullification or Impairment), for example, a WTO member can challenge an action by a trading partner government which may not be WTO-illegal but nullify or impair the concessions received in trade negotiations. The classic illustration here in recent times is the Fuji-Kodak case which has been brought into WTO based on anti-trust considerations which is more than just market access. There may be legal nuances once this option is clearly specified yet it provides a window by which WTO articles can be made competition-policy friendly.

There is the notion of creating a WTO Committee on Trade and Competition confined to research, analysis, exchange of views, and a forum for understanding the interaction between trade and competition. While this may appear to be toothless,

there are several reasons why this may be more fruitful than what it appears to be. First, this would be WTO-wide and multilateral in membership. Second, the substance of the studies would reveal the analytical foundations of competition policies. Third, the Committee's work can include trade policy reviews of WTO members and the impact of antitrust enforcement on trade. Subsequently, this may form the basis for explicit international codes of competition policy.

These different options constitute alternatives for the content of a Trade-Related Antitrust Principles (TRAPs). Whichever notion one takes, some international agreement must somehow be forged short of international rules and disciplines. For example, the introduction of competition principles into existing GATT/WTO rules require some agreement over and beyond the declared understandings. Even the notion of committee creation and work will eventually require some common agreement among WTO members.

The end reason for TRAPs is really to assure the contestability of markets for international firms. Which of the options on the table give this reason maximum potential depends on a defined criteria. What is clear is that where the emphasis is on anti-trust law, there may be other practices which have anti-competitive effects yet not really anti-trust. On the other hand, the integration of competition principles in WTO articles may solve problems on a case by case basis brought into it but not the root cause of anti-competitive practices.

The test of these various options is in the record of experience. The ideal option is of course complete harmonization through a global code. Since this is yet to be seen, the next best is in the experiences of free trade areas. Here empirical evidence is limited.

In the EU competition rules, the Free Trade Agreement of the Americas (FTAA), NAFTA, and the inclusion of a Central and Eastern European Countries in EU, there remains protection reflected in the fact that many entry barriers are due to government policies which are not on the negotiating table. More importantly, antidumping remains as part of instruments dictating internal trade flows within free trade areas. And we are fully aware that antidumping is one of the most pervasive anti-competition measures related to trade. Only in the case of the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) has the antidumping option been removed and rest on the harmonization of policies of the two countries.

In summary, though the various options have both positive and negative sides to them, the actual experience is not too promising. If even smaller number of countries in free-trade areas (except in the case of ANZCERTA) do not really have a "global code" on competition the task for international rules and disciplines for WTO-wide consideration appears formidable. What then about developing countries?

III. Developing Country Perspective

Many if not most developing countries do not have strong anti-trust laws. Whether the institution of anti-trust measures (implemented through the creation of a law or integrated into WTO rules) will improve the contestability of their markets or not is what is important to foreign firms. Given the options that have been put on the table, it seems that anti-trust measures would not do the job for a number of reasons. For one, the magnitude of trade restrictions and investment regulations is far more binding than can be addressed by a blanket anti-trust law. For another, anti-trust laws may not be applicable in many cases especially in areas where the government itself behaves in anti-competitive ways. Finally, it seems that prior problems related to deregulation and privatization have to be addressed before any anti-trust measures.

This does not mean that developing countries avoid the task of instituting competition policies. Indeed some countries have created fair-trade commissions or competition agencies. But invariably, as in the case of South Korea, the initial task has been to reduce if not eliminate anti-competitive policies and practices of government itself and then proceeding to market vigilance and consumer protection. From the point of view of the developing countries' trade, the anti-trust enforcement in developed countries is sufficiently strong such that none of the options is as yet relevant for them. Rather the overriding goal is access to export markets.

From a developing country perspective, proposals for TRAPs or some variant appear to be premature for several reasons. First of all, the multilateral composition of WTO has to be completed to cover all trading nations. Some important trading nations (e.g. China) have yet to become members which guarantee their continuous adherence to WTO principles. And among the developing country members, the first stages of trade reforms have yet to be completed including deregulation, removal of NTBs, privatization, etc. The removal of trade and investment restrictions is more important and needs to be tackled first before embarking on anti-trust measures. Where the extent of these first-stage reforms implementation is not uniform, it also means anti-trust measures can not be applied across the board.

Secondly, there does not seem to be a clear option that earns the consensus of governments from among those placed on the table. What might be immediately feasible is to convene a WTO Committee on Trade and Competition to map out firm analytical bases for the options being considered. This would be far from arriving at international rules and disciplines for competition policy.

Thirdly, we need to have a concrete sense of the experience in regional codes of competition, rules and disciplines that have been instituted. Here the evidence is yet too limited, the time frame of their implementation too short, and the cases too thin. This does not mean the developing countries need to wait for the final verdict. We

must have a sense however of the processes that went into the promulgation of and agreement on the rules and disciplines, the kinds of domestic policy trade-offs to consider, and their impact on the overall economies.

Fourth, there may be strong political reasons for retaining some anti-competitive measures in the books. For example, there is a strong political reason for keeping the supposedly premier anti-competitive trade instrument, anti-dumping. As more developing countries join free-trade areas and as they accede to more WTO trade agreements, it would make sense for them to retain the option of a threat of an anti-dumping measure in their trade policy arsenal addressed to "unfair trade" practices. For one, as developing countries experience more import competition, it makes political sense to assure domestic industries they have safeguards in the form of anti-dumping and related actions even if governments in turn make them more stringent. For another, it appears there is a culture in a safeguard that makes freer trade seem tolerable especially to entrenched local industries.

Finally, the developing countries can agree to some elements of competition policy to be subject to international rules such as minimum standards or incorporation into existing GATT/WTO articles. The point of this is to gradually instill competition laws into broad trade liberalization moves without calling them such. What is important is to break into the developing countries trading environment a WTO system that begins to look into competition rules. Their continuous participation in strengthening some articles such as safeguards, technical barriers to trade, nullification and impairment, among others can lead to more awareness of matching trade measures with competition policies. Ultimately, as both competition and trade policies are harmonized within countries, these become prerequisites for considering international rules and disciplines.

IV. A Conclusion

When the developing countries (especially in Asia) began their economic growth drive, there was really no "invisible hand" in the Smithian sense of the term. Rather, the hand was quite visible, erecting entry barriers, creating monopolies, guiding industries etc. even if at the same time they actively participated in the freer international trading system. When these countries began to embrace the tenets of free market mechanisms, it is only understandable that they have had to face a vast array of institutionalized anti-competitive measures that need to be dismantled. In a number of countries, the last vestiges have yet to be removed.

Thus while these countries trade in fairly competitive markets (especially in developed countries which have a long tradition of anti-trust laws and prohibition against restrictive business practices), their own markets need to be reformed and be fully competitive. Because of the juxtaposition of a liberalizing trade regime and less-than-competitive markets, it is important to seriously consider the appropriateness of subscribing to international rules and disciplines on competition policy. There are

timing and sequencing problems that need to be resolved. After attending to this, It will then be useful to accede to a global code on competition policy.

It is not a question of whether competition policy is ripe for international rules and disciplines. It is rather whether the circumstances and the environment in developing countries are ripe enough for a global competition policy code. They are not.