Global Competition Policy and Trade: Challenges for Developing Countries^{*}

BYUNG-IL CHOI

Graduate School of International Studies, Ewha Womans University

The developing countries should be equipped with three essential elements for their journey to sustainable growth: access to the global market, access to effective technology, and relying on incentive-compatible market mechanism. In this context, some important competition policy issues are identified and discussed in this paper. Among other things, replacement of anti-dumping rule with competition rule, negotiations of a global investment rule under the auspices of the WTO, searching for a multilateral formula to deal with the unilateral nature of some advanced countries' competition policies, and competition advocacy are all claimed as part of the pressing agenda for developing countries.

^{*} Originally presented at the International Conference, hosted by the Institute for International Trade and Cooperation, Ewha Womans University on May 29, 1998.

Direct all correspondence to Byung-il Choi, Associate Professor of International Trade and Negotiations, Graduate School of International Studies, Ewha Womans University, 11-1 Daehyun-dong, Seodaemun-gu, Seoul, 120-750, Korea.

1. INTRODUCTION

As the multilateral trading system marks its golden jubilee this year, there is a call for a new round of trade negotiations with an aim to achieve deeper economic integration on a global scale. A proposed agenda for this 'millennium round' includes issues on the environment, competition policy and a built-in agenda on the progressive liberalization of service and agriculture. At present, no emerging consensus on the exact agenda for the next round of multilateral trade negotiation exists, other than the built-in agenda as agreed upon at the conclusion of the Uruguay Round.

The case for a 'competition round' has a remarkable historical twist. After World War II, countries which envisioned launching the International Trade Organization (ITO) agreed to a multilateral rule on competition policy in its charter. With the abortion of the ITO, no such rule was ever carried out, while general trade principles and outcomes of tariff reductions were incorporated into the GATT. Ever since, there have been a series of attempts to deal with various aspects of competition policy at various international fora. Nevertheless, the multilateral trading system has not confronted the interface between competition policy and trade policy as a separate and specific agenda in the fifty years of its existence. As the scope of economic activities increasingly pushes past national boundaries, a stronger case for global competition policy can be built.

While the literature on competition policies is vast, a seldom explored avenue is that of how international competition policy rules might affect the economic fortunes of developing countries. While some of the advanced industrialized countries are developing their arguments for global competition policy, the prevailing attitude on the part of the developing countries is that this kind of discussion is premature. True, many developing countries are busy implementing their commitments to the Uruguay Round, not leaving much capacity for a competition round. Some developing countries may be obsessed with the notion that global competition policy may work only for the benefit of multinational and transnational corporations, mainly coming from the developed part of the world; another case of the North-South confrontation. A common dilemma faced by developing countries is how to put their economies on a course towards sustainable growth. As history has witnessed, import-substitution policy has failed to deliver.

The unfolding economic hardship in East Asia suggests that the days of successful export-led growth strategy will be numbered if not accompanied by some kind of pro-competition policy. The saga of the Asian tigers casts a new light on the typical mindset of policy makers from developing countries, who easily dismiss the case for global competition policy as a global conspiracy. As we are becoming more painfully aware, people respond to incentives. Government intervention creates all sorts of these unhealthy incentive mechanism which could prove detrimental in the long run. There appears to be no alternative but to follow an established path of market capitalism free and open trade, competitive markets, and a transparent and accountable government if a nation wants to build its capacity for sustained growth.

This paper is an attempt to analyze competition policy issues from the perspective of

developing countries in the context of a global trading system.¹ What constitutes a global competition rule is not an issue addressed in this paper. It is not because the issue is not interesting, but rather because the current state of understanding on competition policy is incomplete and lacks consensus in some important areas, as manifested by different policy approaches to mergers and acquisition in the EU and the US.

The paper is organized as follows. In section 2, the relationship between trade liberalization and competition policy is discussed with a view to responding to the question of the necessity of competition policy even with a complete trade liberalization. Section 3 traces the evolution of international discussions on competition policy dating back to period immediately after World War II. This note on history is extended in section 4 to the on-going discussion at the OECD and the activities of the recently established working group at the WTO, pursuant to the decision at the WTO Singapore Ministerial Conference. Section 4 is the major thrust of this paper. It identifies and discusses at some length, competition policy issues most relevant to developing countries. Anti-dumping, foreign direct investment, extraterritoriality and competition advocacy are highlighted in the context of trade and economic growth of developing countries. A summary of the major arguments of this paper is provided in the conclusion.

2. INTERFACE BETWEEN COMPETITION POLICY AND TRADE LIBERALIZATION²

The natural question that arises is how far the pro-competitive effects of international trade can go. Would free trade, coupled with free mobility of factors of production, ensure a sufficient degree of competition to render competition policies superfluous? This question is propelled by the presumption that any excessive profits created by the actions of firms would be competed away under a policy regime of free-trade and free factor mobility, due to competitive pressures in a unified world market.

Even if this argument were valid in principle, there would still be a need for competition policy in practice. First, there are a number of impediments to trade that are not caused by trade policy, such as physical transport costs and language barriers. Lack of information about local demand conditions and differences in product safety laws can also be considered. These trade barriers are also likely to remain into the foreseeable future. Such barriers tend to segment markets and thus create geographical market niches where firms can exercise market power. These niches may in some cases comprise whole countries, and in other instances, smaller geographical areas.

Secondly, there are a number of actions that firms can undertake in order to limit competition. These run the whole gamut from the choice of design of products (compatibility with other products, for instance), the design of contracts with distributors and retail-

¹ It needs to be recognized that there are disparities and possible conflicts among the developing countries, in particular between the advanced group of industrialized economies and the remaining developing countries. Whether these differences would give rise to a noticeable difference in the bargaining position among the developing countries is left for further research.

² This section draws on WTO (1997).

ers, advertising (e.g., creation of brand images), to contracts with consumers (such as brand loyalty bonuses). All of these actions may limit the scope and degree of competition that firms are exposed to.

Thirdly, there are also technological reasons why markets may be imperfectly competitive. For instance, the existence of pronounced economies of scale, economies of scope, as well as irreversibility in investments, may lead to market structures with only a limited number of firms even after trade liberalization. In these markets, firms are likely to exploit their monopoly power, and thus create inefficiencies that may call for some form of competition policy intervention. In the same vein, it may be viable for firms to form international cartels which would also require intervention.

Fourthly, while the importance of investment is ever increasing, an effective multilateral rule on investment is yet to be established. Recent years have witnessed a spectacular growth in foreign investment, outstripping growth in international trade. According to official statistics, the volume of world merchandise trade is sixteen times greater today than it was in 1950, as compared to a six-fold increase in the volume of world production. Furthermore, outflows of foreign direct investment have risen twenty-five fold during the last quarter century, from \$14 billion to \$350 billion per year. From the viewpoint of suppliers, investment is one of possible entry modes to foreign markets. We may use a narrow definition of investment as acquisition of controlling equities, purchasing physical capitals and real estates, or a broad definition of investment including portfolio investment solely for making profit. In either case, investment is an important strategy to reach customers located in foreign markets. In light of the global operation and sophistication of economic activities, trade and investment are increasingly becoming complementary.

From the efficiency point of view, prohibiting foreign investment and allowing trade as the only mode of market access leaves the world economy in a situation inferior compared to a situation where more modes of market access are available. Suppose both trade and investment are allowed as an entry mode for countries all over the world. If so, a company can divide its entire operation into several sub-activities and locate each sub-activity to a country pursuant to the logic of comparative advantage, and link all the sub-activities through trade. This would achieve the most efficient allocation of resources. Even if foreign investment becomes an allowed form of market access, the existence or absence of competition policy can make a significant difference. Lax implementation of competition policy, discriminatory application of competition policy, absence of effective competition safeguards, and lack of transparency in regulations, can lead to a situation where benefits of market access would be either impaired or nullified. A dispute settlement mechanism should be put in place to address such situations. It should be borne in mind that this dispute settlement mechanism would be a partial remedy, unless it is bolstered by effective *ex ante* competition safeguard with respect to the liberalization and protection of investment.

Fifth, practical experience also suggests that integration *per se* does not suffice. For instance, even large markets with small international trade barriers, such as the European Community and the US markets, still seem to require an active competition policy

despite their far-reaching state of integration.

Due to the above-mentioned reasons, there will be a need for some sort of competition policy for most countries, even if trade and investment liberalization is far-reaching. However, the pursuit of such policies at a national level will affect trading partners. Many of these effects will be positive. On the other hand, it is also likely that some decisions will negatively affect trading partners. Depending on the character of these latter spillovers, countries may end up in a prisoner's dilemma situation, posing a problem that may need an international agreement to be resolved. Some specific cases are discussed below where only national dimension of competition policy may prove inadequate, thereby calling for global cooperation.

National legislation has a number of practical shortcomings. It is designed to control only those practices which affect the domestic economy. It does not normally address practices of enterprises within its jurisdiction, which cause injury or impose costs on the economies of other countries. Furthermore, anti-competitive actions which affect residents in one country may occur in another country. For example, an enterprise may attempt to eliminate competition facing a subsidiary. The parent company may decide to supply the requirements of its subsidiary at an artificially low price, thus enabling the subsidiary to engage in predatory behavior in the market for its products. This problem is under review in the Competition Law and Policy Committee of the OECD. To deal with such practices in an effective fashion trading nations may have to take simultaneous action.

Restraints blocking market access are often beyond the reach of national jurisdictions and restraints in a foreign country, such as export cartels, cannot be adequately dealt with in national jurisdictions. Costs are incurred when the restraints or actions occur simultaneously in more than one country. These costs are problems of enforcement; the extent of these difficulties can be appreciated by considering an attempt to apply remedies which are used under domestic laws to deter persons from contravening to law and to compensate injured parties. These include measures such as injunctions, remedies involving prices, pecuniary penalties, damages, and divestiture of assets. Obviously, attempts to apply any of these traditional remedies beyond national borders are fraught with legal difficulties.

Another concern is the difficulty of obtaining information from producers located in another country and of enforcing any decision reached by a local legal authority outside its jurisdiction. For example, an enterprise in a particular country may call for international tender. As a result, members of an international cartel may collude and respond accordingly. All the members of the cartel may be located abroad without assets, subsidiaries, or affiliates in the country concerned; it may be difficult to prove that the bids are collusive. Transnational corporations have the means to avoid providing information; in particular, they could hide by keeping information related to their activities in other countries, which prohibit its transmission abroad.

3. INTERNATIONAL DISCUSSION ON COMPETITION POLICY

In the draft Havana Charter for the International Trade Organization (ITO), which emerged in the late 1940s, an entire chapter (Chapter V) was devoted to restrictive business practices. Subsequently, business practices that affect competition and have trade implications have received attention at the intergovernmental levels in the United Nations Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD), the United Nations Commission on Transnational Corporations (UNCITC), and the General Agreement on Tariffs and Trade (GATT).

The Havana Charter

Article 46 of Chapter V of the Havana Charter (1948) specifically stated that 'appropriate measures' were to be taken to deal with business practices on the part of private or public commercial enterprises, which restrain competition, limit access to markets, or foster monopolistic control. It is noted that such practices might have harmful effects on the expansion of production or trade, and interfere with the achievement of other objectives of the Charter. The measures addressed were defined as business practices that restrain competition, limit access to markets or foster monopolistic control. They included, among other things, price fixing, market sharing, production quotas, agreements to prevent the development of technology, and certain use of patents, trademarks and copyrights.

The Havana Charter aimed at finding satisfactory remedies to situations that arose from the harmful effects of restrictive business practices. This was to be accomplished by encouraging transparency, consultation, and conciliation between the governments concerned. While some provisions of the Havana Charter were incorporated into the text of the GATT, this was not the case for restrictive business practice provisions. The principles drafted for the International Trade Organization have, however, guided much of the subsequent discussions in international fora.

Certain governments viewed the omission of the provisions relating to restrictive business practices as a deficiency of the GATT system, and in 1954, suggestions were made to deal with matters relating to restrictive business practices in the GATT. In November 1958, GATT contracting parties recognized that the activities of international cartels and trusts might hamper the expansion of world trade and economic development of individual countries, and thereby interfere with the objectives of the GATT. Subsequently, a group of experts was appointed by the contracting parties to study and make recommendations on this issue. While the experts agreed that business practices might interfere with the objectives of the GATT, and that the GATT was an appropriate body to deal with such problems, important differences of opinion emerged concerning the appropriate nature of the GATT action. In the absence of agreement, no substantive provisions relating to restrictive business practices were incorporated into the GATT. An agreement reached in 1960 only provided for *ad hoc* notification and consultation procedures in

dealing with conflicts of interest between contracting parties on these practices. These procedures have never been invoked.

During the 1950s, there were efforts to deal with restrictive business practices at the United Nations Economic and Social Council (ECOSOC). The *ad hoc* Committee on Restrictive Business Practices to the ECOSOC proposed an international code based largely on the provisions of Chapter V of the Havana Charter. The proposal did not obtain sufficient support from member countries.

UNCTAD

Restrictive business practices have been on the UNCTAD agenda since the second UNCTAD Conference in New Delhi, 1969. At the fourth UNCTAD conference in Nairobi in 1976, it was agreed that restrictive business practices could adversely affect international trade and economic development, in particular, that of developing countries, and that action should be taken at the international level. This action included negotiations to formulate a set of principles and rules for the control of restrictive business practices. The subsequent UNCTAD work culminated in the adoption by the United Nations General Assembly of Resolution 35/63 (December 1980), which incorporated the "Set of Multilaterally Agreed equitable Principles and Rules for the Control of Restrictive Business Practices" (hereafter, referred to as the UN Principles and Rules; UNCTAD, 1985). The UN Principles and rules explicitly state that they are applicable to all transactions in both goods and services.

The UN Principles and Rules are not legally binding. They place a moral obligation on governments to introduce and strengthen legislation in the area of restrictive business practices and ensure that their enterprises, whether private or state owned, abide by the code. They also contain norms of behavior addressed to firms. The institutional machinery of the UN Principles and Rules is provided by the Intergovernmental Group of Experts on Restrictive Business Practices, which meet under the auspices of UNCTAD.¹

UNCTC

The UN Commission on Transnational Corporations (UNCTC) has attempted to develop a United Nations Code of Conduct on Transnational Corporations, which reinforces the UN Principles and Rules for governments, and contains provisions on restrictive business practices. While it has not been able to reach an agreement on a final document, a report by the UNCTC noted that, "many of the concluded provisions of the proposed Code are markedly relevant to trade issues, especially in the area of trade in services" and that "many of the issues involved in the Uruguay Round of multilateral trade negotiations have been for years under negotiation in the Code exercise, and that

¹ The Second United Nations Conference to review all aspects of the UN Principles and Rules (November 26–December 7, 1990) reviewed matters relating to transparency and the consultation mechanism of the UN Principles and Rules, and paid particular attention to restrictive business practices adversely affecting the interests of developing countries.

some degree of consensus has been reached on them," the implicit thought was that the Code, which represented some consensus, could be the basis of discussion in the Uruguay Round). For example, trade in services could be discussed. Similarly, an international Code of conduct on transfer of technology has been under negotiations for some time under UNCTAD auspices. The proposed Code lists, *inter alia*, the restrictive practices that should be eliminated or controlled with respect to the transfer of technology. Failure to reach agreement on a number of points has prevented the adoption of the Code.

OECD Competition Law and Policy Committee

As early as May 1982, OECD Ministers called for the examination of possible longer term approaches to developing an improved international framework to deal with problems arising at the interface of competition and trade policies. As a result, the Competition Law and Policy (CLP) Committee produced a series of monographs and round table papers, which develop a comprehensive view on competition policy.

Work has proceeded on various aspects of competition policy in the OECD committees, particularly in the CLP Committee, and more recently in conjunction with the OECD Trade Committee. This work lies at the origin of much of the current interest on further discussions about the international effects of anti-competitive business practices. The recent OECD work has been particularly constructive and has promoted convergence across countries on anti-trust law objectives and substantive rules, as well as transparency, information sharing, and cooperation. These trends reflect a rather different view about competition policy than that held by a number of participants in some of the earlier discussions mentioned above.

While the UN Principles and Rules, for example, was negotiated with a suspicious view about transnational corporations, there has been a marked change in the perceptions of transnational corporations and international competition by many government officials. Even the term 'restrictive business practices' has lost favor. The OECD Committee on Restrictive Business Practices was renamed the Competition Law and Policy Committee. Economists now speak less of 'anti-competitive practices' and more positively of 'fostering competitive practices'. They recognize that some (usually vertical) restrictions may well promote competition and trade. For example, a firm attempting to enter a new market might be offered an exclusive territory as an inducement to invest in creating a distribution network in a particular territory. In the same vein, the view of export cartels that has emerged from the CLP Committee discussions is that only 'hard core' cartels should be strictly prohibited. Export cooperation which might be characterized loosely as cartel activity may, in the view of the CLP Committee, be pro-competitive and trade enhancing; for example, when small firms join together to export when they could not do so individually.

The emphasis in the CLP Committee is the promotion of competition rather than the correction or elimination of anti-competitive practices. For example, it considers the concept of predatory pricing and its harmful effects on the degree of competition, rather

than the trade policy concept of dumping with its emphasis on injury to the other competitors. It includes mergers and restraints which give rise to reduced competition as well as market abuses through monopolization and cartel action, such as market sharing and price fixing. The OECD favors adequate or sound competition rules rather than rigid minimum standards of behavior. As it is unclear how many individual business practices affect market competition, the OECD favors an examination on a case-by-case basis. The Convergence Project of the CLP Committee has produced a comprehensive statement about what constitutes modern competition policy. An interim report published in connection with the 1994 OECD Ministerial Meeting outlines the status of this work in the OECD with respect to the areas of convergence in competition policy and law.

TABLE I. CHECKLIST OF ISSUES AT THE WTO WORKING GROUP ON
TRADE AND COMPETITION POLICY

-
- I. Relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy. Their relationship to development and economic growth.
 - II. Stock-taking and analysis of existing instruments, standards and activities regarding trade and competition policy, including experience regarding their application:
 - national competition policies, laws and instruments as they relate to trade;
 - existing WTO provisions;
 - bilateral, regional, plurilateral and multilateral agreements and initiatives.
 - III. Interaction between trade and competition policy:
 - impact of anti-competitive practices of enterprises and associations on international trade;
 - impact of state monopolies, exclusive rights, and regulatory policies on competition and international trade;
 - relationship between trade-related aspects of intellectual property rights and competition policy;
 - relationship between investment and competition policy;
 - impact of trade policy on competition.
 - IV. Identification of any areas that may merit further consideration in the WTO framework.
-

Source: WTO

WTO Working Group on the Interaction Between Trade and Competition Policy

The Singapore Ministerial Conference, the first WTO Ministerial held in December, 1996, established a Working Group on the Interaction Between Trade and Competition Policy (WGTCIP). The mandate of the working group, as stated in the Ministerial Declaration, is to study issues raised by WTO members related to the interaction between trade and competition policy, including anti-competitive practices, in order to identify areas that may merit further consideration in the WTO framework. Emphasis was given in the WTO press release that the issue was not whether the WTO should negotiate rules in this area but whether it should initiate an exploratory and analytical work program to identify areas requiring further attention in the WTO framework.

The working group convened three times since its establishment: September and November, 1996 and March, 1998. Two more meetings are scheduled for 1998. To facilitate the work of the group, the WGTCP adopted a checklist for the study. As evident in Table 1, the checklist is quite comprehensive. The working group is open to all WTO members. Upon completion of the activities of the working group, the group is expected to submit its work report to the forthcoming WTO Ministerial Conference which will decide whether to pursue the issue and in which manner. Even though repeated emphasis that the working group is not negotiating on the issue of competition policy and trade, it would be extremely naive to believe the face value of such a statement. In any negotiations, agenda setting is the first major step of the negotiations. If some countries fail to include their own items of interest on the negotiating agenda, they will be doomed.

4. GLOBAL COMPETITION POLICY ISSUES FOR DEVELOPING COUNTRIES

A common dilemma faced by the developing countries is how to put their economies on the course towards sustainable growth. When it comes to a growth strategy for developing countries, one size does not fit all; detailed prescriptions may differ significantly due to different levels of development. Nonetheless, in the light of accumulated experiences during this century and our improved understanding of growth and decline of nations, a formula for sustainable growth appears to be unambiguous. Access to the global market beyond the reach of domestic market, access to technology which can effectively transform limited input to output, and relying on an incentive compatible market mechanism for the allocations of scarce resources are three essential ingredients for sustainable growth. All three are indispensable; just two of the three would prove detrimental to the long-term growth of economies. Against this backdrop, this section explores the most pressing agenda for developing countries if a global competition rule is to be established.

4.1. DISCIPLINING THE ANTI-COMPETITIVE ABUSE OF ANTI-DUMPING

Anti-dumping is prevalent. Between January 1994 and July 1995, the 160 new anti-dumping cases brought up by 19 WTO members have led to 238 provisional or definitive anti-dumping measures. In June 1995, the 805 anti-dumping measures, which were related to cases initiated before 1994 were enforced. All the while, anti-dumping is epidemic. Anti-dumping offices are growing throughout the world. Developed countries, which have been the major users of anti-dumping, have been joined by an increasing number of developing countries. In the light of the Uruguay Round negotiations on anti-dumping, this trend is expected to continue: as of mid-1996, 49 WTO members from developing countries notified the legislation of domestic anti-dumping regulations, and

many more countries are preparing such regulations.

From the perspectives of developing countries, there are two important points on anti-dumping. First of all, despite increasing use of anti-dumping by developing countries, anti-dumping is still heavily used by developed countries. As shown in Table 2, the four most frequent users of anti-dumping measures (US, EU, Australia and Canada), reported 82 percent of all anti-dumping measures. The close scrutiny of past anti-dumping cases led many studies to conclude that in an overwhelmingly large number of cases no sign of predatory pricing or that of strategic dumping was found, which means that no dumping, which was justifiable in the eyes of economists, actually took place. A foreign predatory firm cuts its export prices in order to eliminate domestic competitors in the importing market. Once competitors disappear, it recoups its losses by increasing its prices to a monopolistic level. In the case of strategic dumping, foreign firms use the closedness of their home markets to fully reap scale economies that enable them to sell at low prices in export markets.

Table 3 shows the results of studies that have estimated the possibility of credible predation in EC and US dumping cases. It shows that the possibility of predation is ruled out in about 95 percent of the EC and US anti-dumping cases initiated during the 1980s, and the possibility of strategic dumping is ruled out in about 90 percent of the EC and US anti-dumping cases initiated during the 1980s. Past experience of enforcement revealed how often anti-dumping regulations and measures have been intrinsically and deeply biased against competition, and how often they have been used as devices for raising foreign rivals' costs. All the studies on anti-dumping lead to one conclusion; that anti-dumping regulations and measures create or sustain anti-competitive behavior, which competition policy aims to destroy.

Therefore, the unmistakable conclusion is that anti-dumping is the primary anti-competitive measure abused by developed countries to protect their allegedly inefficient domestic sector at the expense of their consumers, foreign countries, and ultimately, global efficiency. From the perspective of developing countries, it is imperative to replace anti-competitive anti-dumping rules with competition rule. It should be of the utmost priority on the negotiations agenda.⁴

⁴ Many forceful arguments are made on this point from a global perspective. For a detailed proposal, refer to Messerlin (1996).

TABLE 2. ANTIDUMPING CASES AND MEASURES
BY INITIATING COUNTRY, JAN 1994-JULY 1995

Initiating countries	New cases	Provisional measures	Definitive duties	Price undertaking (a)	Measures in force (b)
<i>Four major users</i>					
Australia	6	5	2	1	86
Canada	9	2	1	31	91
European Union	37	15	21	1	178
United States	30	44	48	3	305
Total	82	66	84	6	660
<i>New comers</i>					
Argentina	6	6	6	2	3
Brazil	12	2	0	0	18
Chile	2	2	3	0	2
Colombia	1	0	1	0	6
Korea	3	7	3	0	6
India	9	3	0	0	5
Japan	0	0	0	0	2
Mexico	18	19	15	0	42
New Zealand	9	0	1	0	22
Peru	4	1	0	0	NA
South Africa	9	0	1	NA	NA
Singapore	2	2	0	0	0
Thailand	0	0	1	0	1
Turkey	2	0	11	0	38
Venezuela	1	2	2	0	NA
Total	78	44	44	2	145
Total, all countries listed	160	110	128	8	805
Four major users' share of total	51.3	60.0	65.6	75.0	82.0

NA - Not Available

(a) The sum of this column can be larger than the figure in the new cases' column because measures can be firm-specific. Cases against non-WTO members are not reported.

(b) As of June 30, 1995.

Source: WTO Secretariat, Focus, No. 7, December 1995.

TABLE 3. ANTIDUMPING CASES EXHIBITING THE POSSIBILITY OF PREDATION OR STRATEGIC DUMPING FOR EC AND US, 1980-89

	EC	US
<i>Predatory pricing</i>		
Percentage of possible cases	2.5	5.7
Total number of cases with available information	281	282
<i>Strategic dumping</i>		
Percentage of possible cases	9.4	12.6
Total number of cases with available information	385	451

a. All percentages are computed with respect to the corresponding total number of cases considered.

b. Cases involving countries accused of dumping and having a GDP equaling more than 15 percent to the GDP of the country using anti-dumping measures.

Source: Messerlin (1996)

4.2. MULTILATERAL RULE ON INVESTMENT

Foreign direct investment has become an increasingly important way for companies to supply foreign markets—by UNCTAD estimates, it is now more important in this respect than cross-border trade—and is increasingly integrated with trade. Indeed, the WTO General Agreement on Trade in Services (GATS) treats the supply of services markets through the commercial presence of a foreign supplier as a form of international trade. The very rapid increase of foreign investment in recent years, both in total value and in the number of companies involved, gives rise to a number of issues in the application of competition law of importance from an international perspective.³

Some salient issues on investment and competition are discussed below. The following list is by no means exhaustive, but an illustration of interface between investment and competition.

a) Contestability of the market

For domestic consumers to reap the benefit of allowing foreign investment as an entry mode of foreign suppliers, the domestic market structure needs to be competitive. Simply allowing foreign investment to a domestic market with institutional entry barriers would only redistribute rent among the suppliers. It is hard to imagine the liberalization of foreign investment occurring under such situations, since it would face strong opposition from the incumbents. The political economy of market opening, predicts that liberalization of foreign investment will have the best chance to materialize when the domestic

³ UNCTAD estimates that there are now over 40,000 multinational companies, many of them based in developing countries.

market is competitive. In other words, fostering a competitive domestic market structure is a prerequisite for allowing foreign investment.

Many developing economies may find themselves in need of foreign investment in sectors where no effective domestic competition is taking place. Active inducement of foreign investment relying on incentives and distortion, without advocating and encouraging competition, will be short-lived, since other countries can easily emulate such policy measures.

b) Vertical restraints and competition safeguards

Vertical restraints can be used, either by a dominant incumbent or by collective actions of incumbents, to prevent the entry of foreign investors. The possibility of anti-competitive use of vertical restraints is more than a theoretical possibility in some cases. Foreclosing access to a distribution channel can either impair or nullify market access commitment, as seen in some major trade frictions. In the case of telecommunication services, monopoly ownership of a local telephone network may be used to deter or delay the entry of competitors in information and communications services, which rely on access to and use of the local network for provision of services.

When the possibility of anti-competitive abuse of vertical restraints exist, foreign investment is discouraged without effective competition safeguards in place, because *ex post* measures such as compensation through domestic adjudication process or international dispute settlement would be too late and costly. To effectively guard against the anti-competitive use of vertical restraints, competition authorities should make recourse to both *ex ante* and *ex post* safeguards. *Ex ante* safeguards include structural safeguards and non-structural safeguards.

The telecommunications service sector is rich with many different experiments in terms of approaches to safeguards. Typically, a local network was exclusively owned and hence monopolized by a company. This company provided both local and long distance call services. With technological progress, new companies entered the long distance call market. These new companies needed to interconnect to the local network, which was owned by the incumbent. An incumbent monopoly, facing competitive provision of long distance call service, had both the incentive and the means to abuse its local network monopoly so that new entrants would be disadvantaged. Competition authority could deal with this situation using *ex ante* safeguards. Structural safeguards take the form of divesting the incumbent monopoly into two companies: one local call company, and another long distance call company. Non-structural safeguards includes accounting separation between two different business units - local call operation and long distance call operation - of a company so that monopoly profit from local call operation would not subsidize long distance call operation, where there is competition with other suppliers. There is no universal and time-honored solution favoring one form of *ex ante* safeguard against another; the preference of a particular form of safeguard depends on market dynamics.

c) Regulatory regime on foreign investment

Foreign investment will flourish, *ceteris paribus*, in countries which have a predictable and stable business environment. A typical situation of foreign investment entails a regulatory review process. Regarding the regulatory screening, a transparent, reasonable, and impartial regulatory process is essential to ensure efficiency. A conventional form of investment controls, such as performance requirement and mandatory technology transfer, often proved ineffective and counterproductive. It is now a shared view among economists, that it will be better from the welfare's perspective to rely on competition policy to attain public policy goals such as effective technology and management know-how transfer.

d) Anti-competitive business practices by multinational companies

There is a likelihood of market concentration due to the exposure of the local market to foreign investment. This will be more likely in the case of a takeover, merger and acquisition by multinational corporations, which have global operations in a given industry. To fully realize the economic benefits of foreign investment, countries should have in place the legal means for addressing anti-competitive business practices by multinational companies. Such legal means would enhance the transparency and predictability of competition policy, thereby leading to efficiency gain.

e) International coordination in approving international M&A's

The duplication of competition law proceeding in different markets, often with substantially different notification and procedural requirements, application of different substantive competition law criteria, and different time frames, stand in the way of international mergers and acquisitions. Such duplication, and lack of effective coordination among regulatory and competition authorities could delay the process, while the burden eventually falls on the shoulders of consumers. Close coordination among competition authority with a view to minimizing duplication of regulatory proceedings is needed.

Competition policy can facilitate attracting foreign investment by removing obstacles to market entry for foreign investors. While vertical restraints can play a positive role in facilitating access for new entrants, they can also be used, either by a dominant existing firm, or by collective action on the part of existing firms, to prevent entry to the market for foreign investors. As observed in the trade friction between US-Japan, foreclosing access to distribution channels can either impair or nullify market access commitment. Thus, there is a synergy between investment liberalization and the effective application of competition policy similar to the relationship between market access for imports and competition policy.

The link between foreign investment and competition policy is implicit or explicit in a number of WTO provisions. GATS and TRIMs are major sources of dealing with this

issue. The WTO agreement as it currently stands is incomplete when it comes to the issue of investment and competition.⁶ It is natural and understandable, since the WTO agreement is not faced with the entire spectrum of issues related to investment to begin with. To develop meaningful and effective disciplines on investment and competition, the discussion needs to proceed with an entire set of investment-related disciplines in mind, which includes the definition of investment, the scope of investment agreement, liberalization measures, investment protection, and dispute settlement. Any discipline on investment and competition would be incomplete without dealing with the issues of market contestability, vertical restraints, regulatory regime, competition safeguards, international coordination on global M&A's, *inter alia*.

There are on-going negotiations on Multilateral Agreement on Investment (MAI) at the OECD. One needs to recognize that most investment flows among developed economies are already liberalized irrespective of the outcome of MAI negotiations. Also, most OECD economies actively pursue pro-competition policies. These observations tell that the value creation through the MAI at the OECD will be modest at best, unless the MAI becomes truly multilateralized at the WTO. It is the vast majority of the least developed and developing economies which are in need of a transparent and internationally acceptable rule in investment, coupled with pro-competition policy regime.

There is a danger of fragmentation of the global economy if the MAI fails to broaden its reach beyond the OECD. Many developing economies have difficulty in constructively engaging in the MAI negotiations at the OECD, despite an open invitation to join the negotiations. This is precisely because of the disparities between the level of commitments pursued at the MAI and the early stage of developing pro-competitive investment policies in many developing countries. Hence, it is fair to say that a mere extension of the MAI, even in the case of a successful outcome, to non-OECD economies will be neither practical nor feasible. It would be in the collective interest of both developed and developing countries to launch truly multilateral negotiations, reflecting on the stark disparities of all economies involved, with a view to crafting a pro-competitive global rule on investment at the WTO.

4.3. MULTILATERAL COOPERATION IN EXTRATERRITORIALITY⁷

The extraterritorial application of competition law is one means whereby countries may seek to prevent or remedy anti-competitive practices in another jurisdiction, which present adverse effects.⁸ This offers, in particular, an avenue by which a country can address enterprise practices abroad aimed at exerting market power in exports to its market; for example, through export cartels or mergers.

⁶ An analysis of the investment related aspect of the WTO agreement from the perspective of competition policy is developed in Choi (1998).

⁷ This section heavily draws on WTO (1997).

⁸ The extraterritorial application of a country's competition law is based on the "effects doctrine," which examines the ultimate impact of a specific policy measure to the fullest extreme, irrespective of territory, in which its jurisdiction is confined.

In reality, the scope for extraterritorial application by a country of its competition law, particularly in situations where the enterprises in question do not have a legal presence in its territory, is constrained by practical considerations. One is the difficulty of obtaining the information necessary to support a case when the information is not within the jurisdiction and the enterprises may not wish to cooperate. In some situations, the home governments of enterprises may be indisposed to cooperate themselves or see their enterprises cooperate. Some countries have "blocking statutes" to prevent their enterprises from disclosing information in such situations. A further practical difficulty may be the enforcement issue particularly, where the enterprise in question does not have a legal presence within a jurisdiction.

Extraterritorial application of competition laws has the potential to give rise to disputes between countries and difficulties for business, due to differing and possibly conflicting standards and procedures. This is particularly the case where countries have different perceptions of where their national interests lie. The Boeing-McDonnell Douglas merger illustrates the sensitivities that extraterritorial application can give rise to, even in a country which makes widespread use of the practice itself. Although the application of the "effects doctrine" as it relates to consumers is now quite common, it continues to be a source of considerable tension between countries. The extraterritorial application of competition law in cases where the issue has adverse effects on producers and exports has the potential, if it were to be exercised, to give rise to even greater difficulties in international relations. Such disadvantages in extraterritorial application are widely recognized by competition authorities, and are reasons why they have sought enhanced international cooperation between them, through the positive comity principle in particular.

Establishing an effective multilateral coordination mechanism to deal with the possible abuse of extraterritorial application of competition policy is a prime concern of developing countries. As economic growth of developing countries continues, the crash course is on the horizon. Developed countries' industries exposed to competition from developing countries want to influence the policies of their government with the goal of turning the situation to their advantage. Accusations of unfair competition is a common cry. Interestingly, the burden of proof falls on the shoulders of the accused parties, that is, developing countries, in this example. The process of accusation and counter-response biased to disfavor developing countries; relatively small and medium-sized companies from developing countries pay significant amount of their scarce resources to defend themselves. The ease to which developed countries can invoke such costly legal process, and the costly settlement process work against developing countries. In turn, developing countries could create barriers and deterrence, which would decrease the welfare of developing countries.

The global nature of economic activities calls for a sympathetic consideration on the principle of the effect test which goes beyond the jurisdiction of national boundaries. The problem lies in its unilateral aspect. In our globalizing world, where there is a rapidly growing number of transnational cartels, as well as mergers and acquisitions, the seriousness of the problems and the failure of existing mechanisms to resolve them, become

more and more evident. The business community in the U.S. suggests that U.S. competition policy be applied to business consolidations, such as mergers and acquisitions in foreign countries if they lead to disadvantages for U.S. companies. If all the nations take the same recourse to such a unilateral measure, the whole world will be pushed to competitive abuse of unilateral actions. If a credible and effective multilateral mechanism fails to emerge, unilateral instruments justified by a vague concept of fair trade will impair the very stability of the global trading system, which hinges a great deal on the concerted multilateral cooperation to resolve conflicts.

4.4. COMPETITION ADVOCACY

As can be seen in Table 4, more than forty developing and transition countries in the past two decades have adopted competition laws as an element of market-oriented development strategies. Typically, these laws provide remedies to deal with a range of anti-competitive practices, including price fixing and other cartel agreements, abuses of a dominant position or monopolization, mergers which stifle competition, and agreements between suppliers and distribution ("vertical agreements") that foreclose markets to new competitors.

TABLE 4. ADOPTION OF COMPETITION OR ANTI-MONOPOLY LEGISLATION IN DEVELOPING AND TRANSITION ECONOMIES*

Latin America and Caribbean	Africa	Asia and Pacific and Middle East	Central and Eastern Europe
Argentina (1980)	Algeria (1995)	China (1993)	Albania (1993)
Brazil (rev. 1994)	Cote d'Ivoire (1978)	Fiji (1993)	Belarus (1992)
Chile (1973, rev. 1980)	Gabon (1989)	India (1969)	Bulgaria (1991)
Colombia (1992)	Kenya (1994)	Pakistan (1970)	Croatia (1995)
Costa Rica (1992)	Mali (1992)	Republic of Korea (1980)	Czech Republic (1991)
Jamaica (1993)	South Africa (1955, amended 1980)	Sri Lanka (1987)	Estonia (1993)
Mexico (1992)	Zambia (1994)	Thailand (1979)	Georgia (1996)
Panama (1996)	Cameroon	Chinese Taipei (1992)	Hungary (1996)
Peru (1990)	Egypt	Jordan	Kazakhstan (1991)
Venezuela (1991)	Ghana	Malaysia	Kyrgyzstan (1994)
Bolivia	Madagascar	Philippines	Latvia (1991)
Dominican Republic	Malawi	Nepal	Poland (1990)
El Salvador	Morocco	Mongolia	Romania (1996)
Guatemala	Zimbabwe		Russian Federation (1991)
Honduras			Slovakia (1994)
Nicaragua			Slovenia (1993)
Paraguay			Tajikistan (1993)
Trinidad and Tobago			Ukraine (1992)
			Azerbaijan
			Turkmenistan

Despite the importance of competition law in ensuring the unrestricted operation of free markets, in practice, the extent to which individual companies have been able to restrict competition is insignificant in comparison to the extent to which governments have used their powers to restrict competition. Governments have chosen to do so for a variety of reasons. In some cases, it is to shield a government-owned business from competitive pressures. In other cases, it is to protect an industry from the misguided notion of destructive competition. In some cases, the restriction on competition is the side-effect of other regulations, such as the regulation for health and safety. Therefore, although the presence of an effective competition law is important, it is equally important to foster a culture of competition. Competition policy is the promotion of deregulation, competition and market-friendly regulatory solutions over traditional forms of regulation whenever possible. In this regard, there is an affirmative role to be played by the competition authority.

The competition authority frequently acts as the competition advocate in the government, seeking to identify laws, regulations and other policies, which harm the competitive process and reduce efficiency. The authority which engages in advocacy may appear explicitly in the legislation thereby establishing the competition authority, or the authority may simply engage in advocacy without specific legislative authorization. In either case, advocacy is, as the term implies, an effort to educate and persuade. Targets of competition advocacy include other ministries, independent regulatory agencies, parliaments, subnational levels of governments, and public opinion at large.

The dilemma faced by developing economies are two-fold: they have to overcome a strong internal resistance against a more open and competitive restructuring of their economies, and at the same time, they have to deal with the protectionist pressures from developed countries. Typically, the competition authority in developing economies is isolated within the government branches. The recent Asian economic crisis illustrates what a disastrous outcome can be brought about by the absence of across-the-board competition.

Unless driven by the vision to cultivate a pro-competitive regime, the competition authority may go astray in the midst of opposing vested interests at odds with pro-competition. Viewed from this perspective, competition advocacy is rather a domestic issue. However, history has shown that the existence of external forces can help break a domestic policy impasse. Competition advocacy is brought up in this context. A multilateral rule on competition under the WTO provides much needed assistance for competition authority in developing economies in its lonely crusade to propagate pro-competition philosophy.

5. CONCLUSION

Global competition policy issue is not a North-South issue. This paper argues that

* Year in parentheses indicates the year in which competition legislation was adopted. Note that the information in this table may not be complete or comprehensive, due to continuously evolving developments in this area.

developing countries should examine the issue of global competition policy in the broader context of sustainable economic growth. Developing countries should be equipped with the three essential elements for their journey towards sustainable growth: access to the global market beyond the reach of domestic market, access to technology which can effectively transform the limited input to output, and incentive-compatible market mechanism for the allocation of scarce resources. Important competition policy issues are identified and discussed in this paper in this context. Among other things, the replacement of anti-dumping rule with the competition rule, negotiations of investment under the auspices of the WTO, searching for a multilateral formula to deal with the unilateral nature of some advanced countries' competition policies, and competition advocacy are all a part of the pressing agenda for the developing countries.

There are some remaining questions which have not been addressed in this paper:

- (1) whether differences among developing countries would give rise to a noticeable difference in the bargaining position among them; and
- (2) the question of how to develop an effective bargaining strategy to deal with anti-competitive abuse of anti-dumping measures of developed countries, given their strong opposition to discuss the issue.

These issues are promising venues for future research.

REFERENCES

- Baker, D. L., A. N. Campbell, M. J. Reynolds, and J. W. Rowley. 1997. "The Harmonization of International Competition Law Enforcement." In *Competition Policy in the Global Economy: Modalities for Cooperation*, eds. Leonard Waverman, William S. Comanor and Akira Goto. London: Routledge.
- Bergsten, C. F., and M. Noland. 1993. "Reconcilable Differences? United States-Japan." In *Economic Conflict*. Washington, D.C.: Institute for International Economics.
- Bliss, C. 1996. "Trade and Competition Control." In *Fair Trade and Harmonization*, eds. J. Bhagwati and R. Hudec. Cambridge, Mass.: MIT Press.
- Brittan, L., and K. Van Miert. 1996. "Towards an International Framework of Competition Rules." *International Business Lawyer* 24(10): 454-457.
- Campbell, A. N., and M. J. Trebilcock. 1993. "International Merger Review: Problems of Multi-Jurisdictional Conflict." In *Competition Policy in an Interdependent World Economy*, eds. Scharra Kanzenbach and Leonard Waverman. Baden-Baden.
- Choi, Byung-il. 1998. "Investment and Competition Policy," Graduate School of International Studies, Ewha Womans University, Seoul, Korea, September. Mimeograph.
- Comanor, W., and P. Rey. 1997. "Competition Policy Towards Vertical Foreclosure in a Global Economy." In *Competition Policy in the Global Economy: Modalities for Cooperation*, eds. Leonard Waverman, William S. Comanor and Akira Goto. London: Routledge.
- European Commission. 1995. *Competition Policy in the New Trade Order: Strengthening International Co-operation and Rules*. Report of the Group of Experts. Brussels.
- Federal Trade Commission. 1996. *Anticipating the 21st Century: Competition Policy in the New*

- High Tech, Global Marketplace*. Washington, D.C.: US Government Printing Office.
- Finger, J. M., ed. 1993. *Antidumping: How It Works and Who Gets Hurt*. Ann Arbor, Mich.: University of Michigan Press.
- Fox, E. M. 1997. "Toward World Antitrust and Market Access." *The American Journal of International Law* 91(1): 1-25.
- Graham, E. M. 1995. *Competition Policies in the Dynamic Industrializing Economies: The Case of China, Korea and Chinese Taipei*. Paris: OECD Development Center.
- Graham, E. M., and J. D. Richardson, eds. 1997. *Global Competition Policy*. Washington, D.C.: Institute for International Economics.
- Hoekman, B. M., and P. C. Mavroidis. 1994. "Competition, Competition Policy and the GATT." *The World Economy*, vol. 17.
- Hoekman, B. M., and P. C. Mavroidis. 1996. "Dumping, Antidumping and Antitrust." *Journal of World Trade* 30(1): 5-17.
- Jacquemin, A. 1995. "Towards an Internationalisation of Competition Policy." *The World Economy* 18(1).
- Levinsohn, J. 1996. "Competition Policy and International Trade." In *Fair Trade and Harmonization*, eds. J. Bhagwati and R. Hudec. Cambridge, Mass.: MIT Press.
- Lipstein, R. 1997. "Using Antitrust Principles to Reform Antidumping Law." In *Competition Policy and the New Trade Agenda*, eds. E. Graham and J. Richardson. Washington, D.C.: Institute for International Economics.
- Lloyd, P. and G. Sampson. 1995. "Competition and Trade Policy: Identifying the Issues after the Uruguay Round." *The World Economy* 18(5).
- Maratto, A., and A. Subramanian. 1997. "Multilateral Rules on Competition Policy: A Possible Way Forward." *Journal of World Trade* 31(5): 95-115.
- Messerlin, P. A. 1996. "Competition Policy and Antidumping Reform: An Exercise in Transition." In *The World Trading System: Challenges Ahead*, ed. Jeffrey Schott. Washington, D.C.: Institute for International Economics.
- Neven, D., and P. Seabright. 1997. "Trade Liberalization and the Coordination of Competition of Competition Policy." In *Competition Policy in the Global Economy: Modalities for Cooperation*, eds. Leonard Waveman, William S. Comanor and Akira Goro. London: Routledge.
- OECD. 1994. *Trade and Competition Policies: Ministerial Report*. Paris.
- OECD. 1996a. *Strengthening the Coherence Between Trade and Competition Policies*. Joint Report by the Trade Committee and Committee on Competition Law and Policy. Paris.
- OECD. 1996b. *Market Access after the Uruguay Round: Investment, Competition and Technology Perspectives*. Paris.
- OECD. 1996c. *Antitrust and Market Access: The Scope and Coverage of Competition Law and Implications for Trade*. Paris.
- OECD. 1996d. *Trade and Competition: Friction after the Uruguay Round*. International Trade and Investment Division. Economics Department Working Papers, No.165. Paris.
- Petersmann, Ernst U. 1996. "International Competition Rules for Governments and for Private Business." *Journal of World Trade* 30(3): 5-35.
- Rowley, W. J. 1996. "Global Welfare: Competition Policy and Market Access." *International Business Lawyer* 24(10): 446-50.
- Scherer, F. M. 1994. *Competition Policies for an Integrated World Economy*. Washington D.C.: The Brookings Institution.
- Schott, J. J., ed. 1996. *The World Trading System: Challenges Ahead*. Washington D.C.: Institute for International Economics.
- Trebilcock, Michael J. 1996. "Competition Policy and Trade Policy: Mediating the Interface." *Journal of World Trade* 30(4): 71-106.

- UNCTAD. 1981. *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*. Geneva.
- UNCTAD. 1995a. *The Role of Competition Policy in Economic Reforms in Developing and Other Countries*. Geneva.
- UNCTAD. 1995b. *The Basic Objectives and Main Provisions of Competition Laws and Policies*. Study by the Secretariat. Geneva.
- UNCTAD. 1995c. *Draft Commentaries to Possible Elements for Articles of a Model Law of Laws* (TD/B/RBP/81/Rev.4). Geneva.
- UNCTAD. 1996a. *Competition Policy and Legislation*, Note by the Secretariat (TD/B/RPB/Inf.37). Geneva.
- UNCTAD. 1996b. *Strengthening the Implementation of the Set: The Scope, Coverage and Enforcement of Competition Laws and Policies and Analysis of the Provisions of the Uruguay Round Agreements Relevant to Competition Policy, Including their Implication for Developing and Other Countries*. Study by the Secretariat. Geneva.
- UNCTAD. 1997. *Competition and Public Utility Industries*. Geneva.
- Waverman, L., W. S. Comanor and A. Goto, eds. 1997. *Competition Policy in the Global Economy: Modalities for Cooperation*, Routledge Studies in the Modern World Economy. London: Routledge.
- Waverman, L. and Rong I. Wu. 1994. *Trade and Competition Policy in APEC*. PECC Trade Policy Forum, Chinese Taipei.
- WTO. 1997. *Annual Report*. Geneva.