

A dual language in modern competition law? “efficiency approach” versus “development approach” and implications for developing countries

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Draft version (please do not cite)

“Every cultural mode of thought has its own concept of market, competition, economy in general (...). Unless we understand, and respect, those modes of thought, we are not entitled to superimpose our concept of market and competition, and our understanding of economy, belonging and efficient behavior upon other, non-Western, cultures. Doing so leads to cross cultural misuses, confusion, and strife”.

Wolfgang Fikentscher

Introduction

“Spoke people for developing countries often express the need for an antitrust paradigm different from that of the developed world. Spoke people for the developed world tend to argue for universal norms, which may apply differently when facts are different. Moreover, they commonly describe antitrust as ‘for efficiency’”². This statement by Professor Eleanor Fox showcases the tension between the developed and the developing world on how competition law is perceived and how it should be applied. “Universal norms” and uniform standards of application are not reconcilable with development goals that might require a different kind of competition law and a different way of enforcing it. These diverging approaches that this article aims to analyze are what we have termed “a dual language in modern competition law”.

Competition law and policy is relatively new in developing countries’ legal landscapes. It has been implemented through different channels. The converging efforts of international organizations such as the UNCTAD, the OECD, the World Bank, and the push toward more competition legislations by the European Union (EU)³ have contributed to the

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² See Eleonor M. Fox, *Economic Development, Poverty and Antitrust: The Other Path*, SW Journal of Law & Trade in the Americas, vol 13, at 213.

³ See, Eleonor. M. Fox, *The Central European Nations and the EU waiting room-why must the central European nations adopt the competition law of the European Union?*, Brooklyn Journal of International Law (BJIL), 1997-1998, at p. 351. The recent channel through which the EU try to push its competition law agenda is the Economic Partnership Agreements (EPAs) signed with some groups of developing countries. See, for instance the EC-CARIFORUM Economic Partnership Agreement which require CARICOM Member States to adopt competition rules. Available at:

http://www.sice.oas.org/Trade/CAR_EU_EPA_e/CAR_EU_e.asp#P2T4C2. Similar types of agreements are currently being negotiated with developing countries in the framework of the regional integration groups. This is the case of WAEMU, ECOWAS, SADC, CEMAC etc....

unprecedented development of competition laws in developing countries in the past recent years.

In the 1990's, the exposure of the harmful effects caused by international cartels in developing countries⁴, which did not have the legal tools to neither discover nor to sanction, convinced policy makers of the urgency to enact competition laws in the context of an ever increasing interaction of the economies; a result of globalization. Less and less considered as an external imposed policy, competition law started to gain support from developing countries' policy makers. The fall of the Berlin wall symbolizing the triumph of the market economy have, also, contributed a great deal to the development of competition law and policies⁵ since antitrust is central to the market oriented economy⁶.

One would have expected developing countries competition laws, in the definition of their goals and the formulation of their principles, to be different from developed countries competition legislations. Hence, the differences in their development level, in the structure of their respective markets, in their institutional capacities, would have dictated a different orientation of their competition law. This is not the case however. Hence, it is striking to notice how similar western competition legislations and developing countries competition laws are in the definition of their principles. The goals are formulated in the same way⁷; the prohibitions are defined in the same manner. However, the way these competition legislations are enforced might be different⁸.

The ICN report on *the objectives of unilateral conduct laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*⁹ reveals the convergence between developed and developing countries around the goals such as *ensuring an effective competitive process, enhancing efficiency and protecting consumer welfare*¹⁰.

With regard to the formulation of the prohibitions, one may content that antitrust, to a certain extent, can be considered a discipline which allows similarities in the formulation of its prohibitions¹¹ and the definition of the goals it pursues. Protecting competition as an institution as such, promoting consumer welfare, and enhancing efficiency are relevant in

⁴ See, Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implication for Competition Policy*, 71, Antitrust L.J., 813 (2004). Anticompetitive practices in developing countries do not only originate externally. See database on anticompetitive in developing countries, Simon Evenett.

⁵ See, David J. Gerber, *Global Competition: Law, Markets, and Globalization*, Oxford University Press (OUP), 2010, at. p.

⁶ Gerber, Fox

⁷ See, on the goals of competition in developing countries, compared to developed jurisdictions competition law goals, Mor Bakhom, *Reflections on the Goals of Competition Law in Developing Countries*, presentation at the 5th ASCOLA conference on "The Goals of Competition Law", forthcoming.

⁸ Professor Michal Gal makes the difference between convergence of *logic* and convergence of *application* which means that similarities of statutory provision does not necessarily lead to similarity of application. See, Michal S. Gal, *Convergence of Competition Law Prohibitions: Foundational Issues*, in J. Drexler, L. Idot, J. Monéger (eds.), *Economic theory and competition law*, Edward Elgar, 2009, pp. 175-190, s. p. 177.

⁹ The report was prepared by the Unilateral Conduct Working Group and was presented at the 6th Annual Conference of the ICN, Moscow, May 2007, available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf>.

¹⁰ Those goals are common to developed and developed jurisdictions competition authorities who answer the questionnaire. However they are not the only objective of unilateral conduct rules. As we will see additional goals characterize also developing some developing countries competition legislations. See *infra*.

¹¹ Professor Michal Gal point out that competition law consists of 'fit-all' formulations". See, Michal Gal,

every jurisdiction, regardless of whether it's developed or underdeveloped. A hard core cartel or an abuse of dominant position has the same effects on consumer welfare regardless of whether it takes place in a developed or in a developing jurisdiction, a small market economy or a large economy, in a national or regional market. Pursuing efficiency in its static and dynamic approach makes economical sense for a developed and a developing economy.

This similarity in theory, in the formulation of the substantive prohibitions, might lead to a convergence in practise; in competition law enforcement. In the international arena, we seem to be heading to a “new deal”¹² which could be summed up in the catchword “*convergence*”. Nowadays, “*convergence*”¹³ is advocated in many areas of competition law, under the leadership of the International Competition Network (ICN)¹⁴. Developing countries which are still at the learning stage in introducing and applying competition laws are not left behind in the converging process in competition law. Their competition law and policies should be in line with the “international standards”. Economic theory has been a driving factor of competition law enforcement in advanced jurisdictions. The focus in efficiency based analysis in competition law currently prevails the enforcement of competition rules in the EU and the US¹⁵. The so called “more economic approach” which dominates the competition law enforcement in the EU at the moment evidences the strong focus on economic theory in competition law¹⁶.

The trend to more convergence in competition law enforcement in the ICN could have the consequence of leading to the sole focus on efficiency considerations in antitrust application in developed and developing countries. The use of economics in dealing with antitrust cases with the focus on efficiency seems to constitute an uncontested approach in modern antitrust in developed jurisdictions¹⁷. The relevance and pertinence of this efficiency paradigm in the context of developing countries is however very questionable¹⁸.

Paralleled to this trend, and often overlooked in the scholarship on developing countries' competition policy, is the emergence of a **new antitrust language**, embodying different goals, orientation, perception and expectation from antitrust, which might make developing countries competition policies look different or be applied differently¹⁹. This can be seen when we look at some developing countries competition law goals. Beside revealing what

¹² The terms of such deal are crafted according to developed jurisdictions standards.

¹³ See, on “convergence” in competition law: David J. Gerber, *op. cit.* (note 4), pp. 273-292. Additional references on this point.

¹⁴ See, Eleonor Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, *The International Lawyer*, Vol. 43, n° 1, 2009, p. 151 et suiv.

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¹⁸ See Eleonor M. Fox, *Economic Development, Poverty and Antitrust: The Other Path*, *SW Journal of Law & Trade in the Americas*, vol 13, at pp. 212-213 highlighting the tension between “the spokespeople” for developing countries who advocate an antitrust paradigm adapted to their context and the spokespeople of the developed world who advocate a universalism in antitrust.

¹⁹ Substantial work on how developing countries context should be taken into account designing and enforcing their competition law: See, Kovacic, Singh,

we have termed **common goals of competition law**²⁰ (protection of competition, efficiency, consumer welfare), it results from the ICN report and a review of some developing countries competition legislation that “non economic goals” such as ensuring fairness and equality, reducing poverty, ensuring access to basic needs, increasing the economic opportunities of historically disadvantaged persons (S.A.), state security (China Antimonopoly Act) etc. may pop up as a goal of a given competition policy in developing countries²¹. These so called non economic goals would play a central role on how developing countries competition policies are applied. More importantly, taking account of them in the assessment of a case is not reconcilable with the efficiency enforcement approach advocated in developed jurisdictions.

In addition, the literature exploring competition as a potential legal tool to **fight poverty** and **to promote economic development** in general in its different aspects is gaining a growing audience. UNCTAD’s work on competition law in developing countries proves this orientation. This seems to constitute a **new antitrust language** specific to developing countries’ situation. We will closely look on that evolution.

With an efficiency approach, “non economic considerations” seem to be at odds with the theory and practice of modern antitrust. Does the diverging language and goals only express a mere need for developing countries to have “**a competition law language**” adapted to their environment? Is the emergence of a new antitrust language for developing countries real or apparent? Does this potential diverging language and goals express a deeper conflict between developed jurisdictions paradigms and developing countries orientations? This paper aims to wrestle with those questions.

Competition has become international so have antitrust cases. International undertakings seek certainty, non discriminatory and predictable application of antitrust law. Setting up uniform international enforcement standards based only on economic theory would be in their interest. It is therefore not surprising to notice how the evolution of the Chinese competition law is followed at the international level. The *Coca Cola* case has provoked vivid debates and raised suspicions of potential discrimination in the application of Chinese Antimonopoly Law.

Considered against the backdrop of the international framework, a potential diverging antitrust language in the practise (enforcement) of antitrust between developed and developing countries would certainly have a strong impact on a potential international framework on competition law. The issue is being debated, proposals are made but there is still no international framework on competition law. From Havana to Cancún, the prospect to reach an agreement on international competition law is at best uncertain. A dual language in modern competition law, if established, would certainly have an impact on a potential international framework on competition law. This study will closely look on that aspect.

²⁰ See, Mor Bakhom, *Reflections on the Goals of Competition Law in Developing Countries*, *op. cit.* (note 6).

²¹ *Ibid.* See also *infra*.

This paper is divided into four parts: Part I describes the trend towards convergence in the theory and practise of antitrust. Part II assesses the progressive emergence of a *new antitrust language* in developing countries. In Part III we shall analyse the significance and relevance of this phenomenon. Part IV of the study deals with the impact of this diverging orientation on a potential international framework on competition law.

I. The trend toward convergence in the theory and practice of competition law

1. Convergence in competition law: driving forces, forms and direction

Cross border antitrust issues involving cartels or mergers are common place in this globalized economy. Efforts to address those issues by an international agreement have not so far produced satisfactory results. “Convergence” seems to constitute the only viable and accepted solution to address cross-border competition issues that involve different national or regional markets and involving jurisdictions which do not apply the same enforcement standards. However, conflicts might arise despite converging competition policies. There have been many initiatives to find multilateral solution to cross-border competition issues. Yet, the absence of a multilateral framework on competition law characterizes the current situation. This absence of agreement on how to deal with cross border competition cases expresses a tension, and different visions, on how competition law is perceived and applied in different jurisdictions. Developed countries do not necessarily share the same antitrust vision, and developing countries are still in search of “their” competition policy.

From the earlier tentative to conclude a binding multilateral agreement with the Havana Charter of 1947, to failure of the European initiative on multilateral competition law at the WTO in Cancún²², the different tentative to reach an international agreement on competition law have failed. The historical opposition of the US to any binding multilateral agreement on competition law²³ and the distrust of developing countries to the EU proposal at the WTO compromise any hope of a multilateral agreement on competition law. The US is not ready to surrender its leadership and to compromise its antitrust vision by agreeing on an international framework on competition law. As observed by a commentator, “according to the US officials, global competition laws should be defined in Washington and in Washington only”²⁴.

Strategies to overcome reluctances to enter into a binding agreement are turned toward different channels. Bilateral agreements on competition law addressing specific issues and progressive convergence of national competition laws seem to constitute the only

²² On this evolution, see, Angela Wigger, *The Convergence Crusade: The Politics of Global Competition Laws and Practices*, Paper prepared for the 46th Annual ISA Convention, March 1-5, 2005, pp. 6-9, available at: <http://www.arccgor.nl/uploads/File/The%20Convergence%20Crusade.pdf>. For a historical perspective on the different tentative to have a multilateral agreement, see David J. Gerber, *op. cit.* (note...) at pp. 19-38.

²³ Angela Wigger, *op. cit.* (note 21), pp. 10-11. The US opposition to any binding multilateral agreement dates back to the Havana Charter in 1947. See also, in the US opposition, David J. Gerber, *op. cit.* (note...), p. 105.

²⁴ Angela Wigger, *Ibid*, p. 2. The author pointed out that “...the underlying reason for (the US) disapproval is rooted in a deeply held distrust with regard to the competition culture practiced elsewhere”.

mechanism that hold promises for transnational solutions on cross-border competition issues.

Substantial developments have been made on the concept of “convergence”²⁵. The objective of our analysis of this concept is not to repeat or summarize what has already been said. Rather, our analysis would be done from the particular angle of developing countries. What convergence would mean for developing countries and what would be the implications for their competition laws? To answer that question, it is necessary to analyze the dynamics of the convergence process, the methods used to converge, the driving forces behind convergence, and the directions towards which we are converging in competition law.

What are the driving forces of convergence? Competition law aims to control economic power. The way a given competition policy is designed, perceived and applied is embedded in a broader economic framework. Politics define economic visions and goals. Therefore, competition law is not independent from political economy. In this regard, competition law cannot be qualified as “neutral”²⁶ as such although the strong reliance on economics in competition law could lead to qualify competition law as neutral. In this regard, it is argued that *“there is no such thing as ‘ultimate’ competition laws and practices. Competition law and practices form part of a highly normative regime on how to organize public intervention in private market conduct and generally tend to be embedded in broader economic objectives. Each vision on how competition governance should be organized may be ingrained in a particular market-structure and serve particular socio-economic goals”*²⁷. Converging towards a particular type of competition law is a process primarily driven by countries with a specific competition law agenda; an agenda which naturally reflects their interests. In the current international context, the developed jurisdictions, especially the US and the EU are the driving forces of this convergence process. Convergence means for them, implementing their competition law vision and agenda. They are the *“‘chief socializers’ crafting a common understanding on competition principles around the world”*²⁸. Convergence certainly reduces the tensions and diverging views between the US and the EU competition regimes. These countries are politically and economically strong enough to determine the extent to which they wish to converge and on which aspects of competition law they want to have a common vision.

Convergence for developed jurisdictions does not mean agreeing on competition law standards that they do not want to follow or which are not conform to their economic interests. They are defining the substance of convergence, according to their own

²⁵ Angela Wigger define as follow the concept: “With regard to competition control, convergence tends to be distinguished on the basis of a substantive nature, according to which two or more jurisdictions adopt similar legal or regulatory devices in terms of scope and content, and on the basis of a procedural nature, which implies the adoption of similar practices in the investigation phase of antitrust cases”. *Ibid.* David J. Gerber refers to “convergence” as an independent choice by States. He defined the concept as a “ (...) movement from a state of difference to a state of similarity”. With regard to competition law, convergence refers to “an increase in characteristics shared by competition law regimes and a reduction in non-shared characteristics”. See, David J. Gerber, *op. cit.* (note ...), p. According to Eleanor Fox, *“Convergence implies universal standards, or at least universal norms implemented in common ways”*. See, Eleanor Fox, Eleonor M. Fox, *Economic Development, Poverty and Antitrust: The Other Path*, *op. cit.* (note 17), p. 214.

²⁶ Angela Wigger, *op. cit.* (note 21) p. 5.

²⁷ *Ibid.* p. 6.

²⁸ *Ibid.*

competition law vision. Assuming that developing countries have also engaged in the convergence movement and that their preoccupations are different from those of the developed world, a first point of tension emerges.

From the stand point of developing countries however the implications of convergence are different. Convergence would mean adopting competition law standards that are defined for them. Taking part to the process would basically mean following the competition law standards of the US and the EU.

How is convergence achieved? Convergence in competition law is nowadays associated with the ICN which is considered as the forum where “best practices” in competition law emanate²⁹. Resulting from a US initiative, the ICN is one of the most influential circles, if not the most influential, where competition law issues are discussed among competition authorities. The virtual character of ICN did not undermine its success in bringing competition authorities together and reducing the gap and divergences in the practice of competition law. As pointed out by Professor Eleanor Fox, ICN has by far reached its primary goal³⁰.

ICN’s work and functioning is not without raising questions on the very objective and methods of the network³¹. Although developed and developing jurisdictions are represented, the agenda of the ICN is defined by developed jurisdictions. For various reasons, developing countries do not have a strong voice within the ICN³². This has a consequence on the types of norm or practices that are qualified as “best”, and that members are encouraged to implement. Hence, the “rule” making process as well as the “rules” are primarily dictated by developed jurisdictions vision.

The diverging views surrounding the work and achievement of ICN reflects an underlying conflict, the diverging language, between advanced jurisdictions and developing jurisdictions. Depending on the standing point from which competition law is approached, ICN can be pictured as an angel, working for convergence in the practice of competition law, or the devil, a tool used by advanced jurisdictions to dictate their competition law principles to developing countries. Developing countries, for diverse reasons are not at all influential within the ICN. They seem to be mere followers, trying to become “good students” and be “accepted” in the global competition community.

In an era of globalization with ever increasing interactions of the economies, a minimum of convergence around some principles is necessary. This is particularly true with regard to merger procedure for instance. However, when convergence goes beyond closeness some undisputed principles and involves the orientation and substance of competition law³³,

²⁹ Ref. on the different publications of the ICN.

³⁰ Eleanor Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, *op. cit.* (...),

³¹ Professor Josef Drexler for instance qualifies ICN as “new universal church of modern competition law”. According to this commentator, “from its incipiency, “convergence” has become the supreme goal of ICN and its very “raison d’être”. See, Josef Drexler, *Competition Policy in Developing Countries - What Does it Make Different from the Developed World?*, presentation at the third annual competition conference, South Africa, 3 September 2009, available at: <http://www.compcom.co.za/presentations-third-annual-competition-conference/>.

³² Amongst obstacles that limit participation of developing countries, the following could be mentioned: Lack of resources, lack of knowledge on the issues discussed, language barrier etc...See on those aspects: Eleanor Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, *op. cit.* (note...) at p. 167-168. See also,

³³ Mention the contentious aspects that are addressed in ICN. See Fox.

especially for developing countries, it becomes problematic. Defining and influencing substantive competition rules of its member states seems to be where ICN is heading. Professor Fox has expressed the fear of ICN gaining power and influencing its member's competition policies³⁴. What developing countries and some developed countries have opposed in the WTO seems to be slowly and unnoticeably making its way through ICN. Convergence within the ICN is achieved essentially through soft law with the best practices that members are encouraged to implement. With a diffuse and very persuasive force, soft law tends to become hard law when adopted. ICN members are at the same time persuaded to adhere to ICN enforcement standards. If convergence is a voluntary adherence to given standards of competition law, in practice developing countries do not have a choice, but to follow what are being defined for them as being 'best' practices.

The recent initiative of the creation of an African Competition Forum (ACF)³⁵ which pursues the same objectives as the ICN, but limited to an African level, might express a starting of a split within the ICN. Such initiative might express the act that ICN does not take fully into account the interests of developing countries. However, under current leadership, ICN is very interested in hearing/inviting more voices. Maybe developing countries have not found it possible or high enough priority to speak en masse with a single voice in the ICN.

ICN is the more visible channel through which developed jurisdictions competition laws principles are introduced. However, bilateral agreements requiring trading partner to enact competition law is another convergence channel. In the EU for instance, candidate to the accession are required to polish their legal competition framework and make them conform to the EU competition law³⁶.

More recently, we have noticed an increased development of negotiation between the EU and some developing countries requiring the introduction of competition law. This is the case of the EU/CARIFORUM agreement. Ongoing negotiations between the EU and some ACP countries involve enactment of competition law model to the EU's.

Convergence on what kind of competition law? "Postulating the 'appropriate' scope and content of competition law control is in its very nature a political contested issue". "The discussion on convergence immediately poses the question of an envisaged reference point towards which entities tend, wish or then are pressured to move"³⁷.

Convergence towards western conceptions models automatically means that developing countries developmental concerns are not taken into account. The focus would be on efficiency and consumer welfare. Adherence to the ICN principles would mean for developing countries an exclusive focus of efficiency. At this point one might ask whether a competition policy focusing only on efficiency is suitable for developing countries. Are development goals and non economic considerations such as fairness and redistribution could be accommodated by an efficiency focused approach of competition law?

Substantive competition rules in developed and developing jurisdictions might look the same. And they are often similar. Banning cartels as harmful to consumer welfare,

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³⁵ *Infra*.

³⁶ See Eleanor Fox, *The Central European Nations and the EU waiting room-why must the central European nations adopt the competition law of the European Union?*, *op. cit.* (note 2).

³⁷ Angela Wigger, *op. cit.* (note...), p. 6.

pursuing efficiency and regulating merger could be achieved by using the same language as the developed jurisdiction's competition laws. In this vein, convergence of the substantive law would not raise issues. Competition can be considered a discipline that allows similarities in the formulation of the principles. However, goals and preoccupations that go beyond a mere consideration of efficiency could lead to clash when enforced. Taking into account notions of "public interest" and the objective to save "employments" when assessing a merger would create different standards in competition law enforcement. Tensions and conflicts between developed and developing jurisdictions are likely to happen at the enforcement stage of developing countries competition laws. Multinationals seek uniform standards and predictability in competition enforcement which is not guaranteed by a competition policy integrating non economic considerations. China's antimonopoly law on its face only takes into consideration economic perspective when assessing a merger. In practice however the reality might be completely different. The *Coca-Cola* case that the MOFCOM has decided has attracted lot of attention. The case raised suspicions of protectionism, double standards and industrial policy by the Chinese competition officials³⁸. However, there is however no convincing argument that the Chinese competition official undertook and analysis that departs from the streamline those western competition officials apply³⁹.

This case shows that, in line with the convergence policy advocated, the developed jurisdictions and companies expected that competition laws are applied in the same manner. An enforcement of a competition law which departs from the way the analysis is done would automatically become suspicious. This means that competition authorities are expected to apply competition law in the same way. This issue is not exclusive to the debate between developed and developing countries. The *GE/Honeywell*⁴⁰ case evidences that different enforcement standards may exist between advanced jurisdictions. The rapprochement of the EU to the US competition law and the bilateral cooperation agreements concluded between the two competition authorities reduce the gap between their enforcement standards and help avoid conflicts.

The picture is however different if we consider the western approach which is economic focused, and the fact that developing countries include non economic goals in their competition laws. Taking into account non economic goals, it is argued, would bring uncertainty and unpredictability that would prejudice the interest of multinational corporations. While the UE may be economically powerful enough to resist an eventual pressure from the US to apply certain standards of competition law, this is not the case for developing countries which may be easily pressured to implement and enforce best practices.

To sum up, we contend that convergence towards a certain kind of competition law would mean for developing countries to follow the type of competition law designed for them, following developed jurisdictions models and interests. Although a certain degree of convergence (in the protection of competition law as an institution at the international level) is in the interest of developing countries, the current trends towards a sole economic focus on competition law does not necessarily meet their interests.

³⁸ Wang, Mark, Gerber, Fox

³⁹ Xiaoe Wang,

⁴⁰ Background of the case and Gerber's comments.

2. Developing countries and convergence: mere followers or influential actors?

Are developing countries passive or active actors in the convergence process in competition law? In other words are their developmental preoccupations taken into account? Are they mere followers in the convergence process?

Developing countries do not have leading positions in decision making circles on how a “common competition law” should look like. It is mainly the western competition officials who are setting the agenda on convergence. This fact can be justified by a number of reasons. Competition law is relatively new in developing countries which are still in search of “their” model of competition law. One has to bear in mind that developing countries are among the “new players” in the competition law. Although some developing countries actually had well before competition legislations, it was in the 1990’s that they started adopting competition laws in line with the market principles. Developing countries were totally excluded from the early discussions on an international framework on competition law. The debate was mainly dominated by the competition law giants; the EU and the US. Only when the issue was brought in the WTO, developing countries started to have their voice heard. Their opposition to the EU proposal is fresh in the memories. The US opposition to a multilateral framework might have given a strong visibility to developing countries’ opposition. It would have certainly been different if the EU and the US had agreed on the shape and principles of an international agreement on competition law in the framework of the WTO. They would, maybe, have agreed to such agreement. The situation is different nowadays. It’s been only a couple of years since Cancún. However, developing countries have started to be aware of their role and the impact they could have on a potential framework on competition law. Developing countries have played a very marginal role in the past. At the current context however, no international framework on competition law is possible without their assent. In this vein, Professor Gerber point out that: “(...) it is difficult to imagine that these other states will willingly accept and actually implement a global competition law regime that does not represent their interest and in which they have no voice. ***These ‘other’ countries hold the key to the future development of competition law, and in order for a global competition law strategy to be effective, it will have to serve their ends as they understand them.*** If it does not, they will either not accept it or, if induced to accept it, they are not likely to give it support, in which case competition law would remain a “fantasy” in much of the world as it so often has been in the past”⁴¹.

Developing countries appear to be mere followers in the convergence process. However, this can change if they are better organized and able to speak with one single voice⁴².

⁴¹ Gerber, p. 269.

⁴² See *infra*.

II. The progressive emergence of a new competition law language? antitrust as a development tool

1. Questioning the EU competition law approach: Cancún and the failure of the European competition agenda

The 1990's have witnessed two important developments in competition law in the international arena. On the one hand developing countries have started to enact competition laws at a very fast speed. On the other hand, they rejected the European agenda for an international framework in the WTO⁴³. Although the US opposition⁴⁴ to the EU proposed agenda for an international competition law made a success of the EU's proposal unlikely, developing countries⁴⁵, by refusing to negotiate on Singapore issues at Cancún gave a strong signal. They were no longer willing to merely follow the EU's orientation on competition law. Having learned from their "experience" with the TRIPs agreement, developing countries were concerned that the proposed framework at the WTO would merely constitute an additional market access tool for European, US and Japanese enterprises⁴⁶. As can be seen, development concerns, and an international competition framework that takes duly account of their development needs were the underlying justification of their opposition. At this stage however, developing countries, under the leadership of India, merely oppose the EU proposal on the ground of their development concerns without clearly formulating how an international framework on competition law would help them reach their development goals. Without taking a proactive stand, developing criticisms on the EU proposal put forward no alternatives that could take duly in account their development concerns. Their opposition from a competition policy stand point⁴⁷, were merely defensive. What is important to notice for our analysis is that fact that developing countries' opposition to the EU agenda is a strong signal that the EU competition law approach is not necessarily in line with their interests. Questioning the suitability of the EU agenda to their development concerns, although limited at the international level⁴⁸, is a starting point of the progressive emergence of new approach of antitrust that do not merely follow the EU or the US models. The message was clear: antitrust principles they were willing to follow should be tailored to their developments needs. Although the enactment of competition laws in developing countries did not stop with the failure on a European agenda in Cancún, it does have an impact on how competition law is perceived and introduced there. The EU model didn't seem to be the best competition approach for them. The way competition legislations are drafted has started to change, influenced by the impetus of an emerging literature interfacing competition law and development⁴⁹. The time had come for developing countries to enact competition laws not only for the sake of having one, but with the specific objective of fostering economic development.

⁴³ Development in the framework of WTO, Gerber, p. 103-104,

⁴⁴ On the US opposition, see Gerber, at. P. 105-106.

⁴⁵ See Drexl, on Cancun, Gerber at p. 106-107, Fox,

⁴⁶ Gerber, p. 107.

⁴⁷ Their opposition were also justified by other trade issues. See Drexl on Cancún

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⁴⁹ A Singh

2. UNCTAD’s work and the emergence of a “development oriented competition law” scholarship

Following the criticisms concerning the EU proposal and with the aim to address developing countries’ concerns, some authors have started to make proposals on international antitrust principles that address the development concerns of developing countries. The discussion pertaining to an international framework is paralleled by a growing scholarship focusing on the situation of developing countries with regard to competition law⁵⁰. What seems to be agreed upon in the scholarship is the necessity to fully take into account the specificities of developing countries, not only in the international arena, but also when they draft their national competition laws. Those two aspects are not in fact stand alone issues since an international framework would certainly imply obligations on national competition policies. Two important aspects need to be highlighted in this development oriented debate of competition law. First the work of the UNCTAD. Second the main trends and ideas developed in the scholarship on how competition law should incorporate development concerns.

2.1. UNCTAD’s development oriented work on competition law

UNCTAD’s work on competition law and policy mainly focus on the situation of developing countries. It conducts studies and research and provides technical assistance to developing countries. As pointed out, UNCTAD “mandate focuses on the needs of developing countries and its agenda is driven largely by them”⁵¹. UNCTAD’s preoccupation of bettering developing countries economic situation and providing them a support on trade and development related domains is not new, even in competition law. Hence, the “Set of Principles and Rules on Competition” that was adapted in 1980 under the umbrella of UNCTAD constitute the first and important achievement toward the control of anticompetitive practices affecting developing countries and the recognition of the developmental dimension of competition law⁵². At this stage however, although the development dimension was recognized, there was still no clear guidance on how development concerns should be taken into account in developing countries’ competition legislations. The first idea was to control anticompetitive practices that affect developing countries.

Over the years, UNCTAD’s work on competition law in developing countries, with the impetus of scholars sensible to developing countries situation; have started to be more competition policy oriented in the sense that the focus has shifted on how competition law could be tailored to the development needs of developing countries. UNCTAD’s different publications on the nexus between competition law and development clearly indicate the aim to foster economic development through competition law⁵³. However, only stand alone issues pertaining to competition law and development are dealt with. No clear general approach on competition law should be applied in a consistent way; taking into account

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⁵¹ Gerber, p. 113.

⁵² *Ibid.* p. 114.

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development concerns is articulated yet. Let's turn now to the assessment of the scholarship on competition law and development.

2.2. The emergence of a development oriented competition law scholarship

Much has been written on the nexus between competition law and development. There seems to be an agreement among the authors that the socio-economic, political cultural and institutional context of developing countries should be taken into account when crafting and implementing their competition law and policies. “No one size fits all` is an oft-repeated mantra”⁵⁴ and “context matters in designing and applying competition law and its supporting institutions for developing countries”⁵⁵.

The principle that “context informs design”⁵⁶ in competition law seems to be accepted. But how to take duly account to the specific “context” of developing countries when designing their antitrust policies is a more challenging issue. This part of the study does not aim to summarize or compile all theories and approaches developed on how development concerns could be addressed by competition law. Instead, we will try instead to identify general features and leading orientations and ideas on how developing countries could incorporate development concerns in their competition legislations.

Redistribution, inclusion and competition law: Cartels and monopolistic practices originating from inside or from transnational companies⁵⁷, deficient institutional setting, systemic poverty, state involvement in the market and lack of economic opportunities for the majority of the population are amongst the competition related issues developing countries are dealing with. Looking at those general and shared features of developing countries markets and economic situation, Professor Eleanor Fox, in a very insightful article, argues that “antitrust for developing countries must be seen in a larger context. The canvas includes the dire economic conditions of developing countries and the treatment they receive from the world community”⁵⁸. As pointed out, an antitrust orientation that only focuses on aggregate wealth or welfare goal would not necessarily be welcome or suitable for developing countries. Access to basic needs and participation to the economy is no longer a big concern in developed countries. However, developing countries are still dealing with those basic concerns. To be meaningful, competition law in developing countries cannot afford to disregard distributional and inclusion concerns. The control of economic power is one aim of competition law. Although, globalization and free markets increase wealth and make more business opportunities available to many, they also make the stronger economic actors more powerful and the small businesses weaker⁵⁹. Disregarding distributional issues by only focusing on efficiency and aggregate wealth, or “enlarging the size of the pie”, would not suit the situation of developing countries. Professor Fox pointed out: “*To the extent that ‘efficiency’ as the goal of antitrust implies*

⁵⁴ Randolph W. Tritell, *International Antitrust Convergence: A Positive View*, Antitrust Magazine, Summer 2005, ABA Section of Antitrust Law, at p. 26, available at:

⁵⁵ Eleonor Fox, *Economic development, Poverty and Antitrust: the other path*, p. 212.

⁵⁶ Fox, *Antitrust and Institutions: design and changes*,

⁵⁷ Fox, pp. 224-226.

⁵⁸ *Ibid.* p. 215.

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*disregard of distributional values, it may not be the centerpiece that developing countries would choose*⁶⁰.

The author does not however question the power of market economy to fight poverty and foster development. She made the argument that market-freeing measures that address anticompetitive practices and firms rivalry in the market place are of paramount importance in the development process. The potential of the market based economy to secure development is widely acknowledged. This argument is not new since it is deeply rooted in the dominant antitrust view. In addition to a strong reliance to the market, professor Fox argues that control of economic power and distribution of wealth are *sine qua none* goal and it should be taken into account in an antitrust for developing countries. In this vein, she contended that “(...) *if policy is to be friendly to economic development, it must look poverty dire in the eye. This means not only harnessing markets forces to keeps prices competitive; it also means building a ladder of mobility from the lowest rung up to enable mobility, incentivize entrepreneurship, and stimulate innovation*”⁶¹.

It stems from Professor Fox’s argument that an antitrust policy which is not inclusive and which does not increase the business opportunities of the majority would not be suitable to developing countries. Market conditions in developing countries make inclusion and participation difficult. Hence, high market concentration, high entry barriers and strong State involvement in the economy limit business opportunities. What Professor Fox termed “*the mobility imperative*” could be for instance achieved by reducing state involvement and barriers to free market entry. The argument is sound. However, determining the nature and the extend to which State involvement could be tolerated and practically how to achieve inclusion are challenges to be overcome. This idea of inclusion and participation to the economy is not necessarily in line with a western conception of antitrust which only focuses on efficiency. The idea of inclusiveness reminds of the issue of fairness⁶² and the protection of SMEs and competition law. Hence, and often made argument is often made that developing countries’ infant industries should be protected from stiff competition by multinationals until they become strong enough to face competition from larger firms. This question is still much debated. It is worthy of note that Professor Fox does not argue for a discriminatory or “blind” protection of all businesses. According to her “protecting mobility and opportunity on the merits need not and should not imply protecting inefficient competitors from competition and handicapping efficient firms”⁶³. The idea of protecting mobility and ensuring participation can be analyzed as an expression of the protection of economic freedom in the context of developing countries⁶⁴. Redistribution concerns and fairness as we know is one of the main features of South African competition policy⁶⁵.

Some developing countries competition authorities seem to follow this inclusiveness approach of competition law. This is the case of a fairly new initiative, the African Competition Forum (ACF)⁶⁶ which is still in the process of being set up. The AFC would be built in a form of network similar to the ICN, focusing on experience sharing between African competition authorities and addressing African competition concerns. One of the

⁶⁰ Eleonor Fox, *Economic development, Poverty and Antitrust: the other path*, op. cit. (...) p. 224.

⁶¹ *Ibid.* p. 220.

⁶² Gerber on fairness and competition law

⁶³ *Ibid.* p. 223. Eleonor Fox, *Economic development, Poverty and Antitrust: the other path*, op. cit

⁶⁴ Mor, Bakhoun, *Reflections on the goals of competition law in developing countries*.

⁶⁵ Fox, on South Africa and Indonesia,

⁶⁶ See *infra* for more developments on the ACF

rationale and core objectives of the ACF is to “promote the adoption of competition principles in the implementation of national and regional economic policies of African countries, in order to *alleviate poverty* (emphasis added) and *enhance inclusive economic growth* (emphasis added), *development* (emphasis added) and consumer welfare by fostering competition in markets, and thereby increasing investment, productivity, innovation and entrepreneurship”⁶⁷. It stems from this statement that growth should be based on market oriented principles and include participation. This approach clearly shows a focus on the issues of development and inclusion in economic growth.

To sum up, inclusion, participation and ensuring more business opportunities should constitute a foundation of a suitable antitrust for developing countries. This language diverges from a sole efficiency oriented approach of competition law.

Optimal competition and development: What degree of competition is optimal for developing countries? Should developing countries protect the competition process as such, as an institution, without any intervention whatsoever from the State or should competition be kept to an optimal level and be combined with cooperation in order to achieve optimal economic performance? The question of the degree of competition that fosters economic performance still raises a great deal of controversy⁶⁸. Proponents of a competition focus approach consider any intervention in the market as undermining economic performance. As pointed out by Singh, “*economic orthodoxy posits a monotonic positive relationship between the two variables (competition and economic development) and suggest that the greater the intensity of competition the better economic performance*”⁶⁹. This position is however challenged, according to Singh, by modern economic analysis which “*suggests that maximum competition is not necessarily the optimal degree of competition for promoting either economic welfare in the static sense, or, more importantly, in the dynamic sense, maximizing the long-term trend-rate of growth of productivity in the economy*”⁷⁰.

In line with this approach, proponents of a development oriented approach of competition law argue that the protection of competition as such is not a suitable policy for developing countries. In other words, maximum competition would not be suitable for economic development. Singh, for instance argue that a competition law for developing countries should not promote competition as a good thing *per se*, rather it should be used as a tool to foster economic development. According to Singh, “*a developing country cannot (...) afford to have maximum competition; rather it must operate with an optimal degree of competition or with an appropriate blend of competition and cooperation to achieve its long term goals of faster and sustained economic growth*”⁷¹. The competition policy of Japan and Korea which combine competition and cooperation has been considered as more suitable for developing countries.

A policy combining competition and cooperation, which could lead to a discriminatory application of a given competition law, would not be easy to implement in this international context where multinational firms seek a non discriminatory application of

⁶⁷ See Thula Kaira,

⁶⁸ Singh, 2002, p. 7.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.* p. 16.

competition law. This issue of was hotly debated in the perspective of an international framework on competition law. One reason for developing countries' opposition to the EU's proposal lies in their desire to discriminate in favor of domestic companies when applying their national competition laws. This possibility would have been incompatible with the national treatment principle of the WTO. A competition policy does not need to be discriminatory in order to take into account cooperation development concerns. Competition law is flexible enough in term of exceptions to include such goals⁷². Setting up an optimal degree of competition involves to some extent state intervention in promoting or limiting competition when and where necessary. This raises the question of industrial policy and competition law⁷³.

Industrial policy and competition law: is industrial policy development friendly? (to be completed)

3. Diverging goals? The “development oriented goals” in developing countries competition laws

Goals of competition law inform the substantive rules, the enforcement orientation and institutional design. Pursuing *efficiency* and *consumer welfare* and *protecting free competition* constitute the most common goals of competition law in either developed or developing jurisdictions. Although the US and the EU competition policies had, at a time, integrated non economic goals such as fairness and protection of the SMEs⁷⁴, the current streamline objectives of developed countries competition laws focus on only economic goals with efficiency as a guiding principle. Developing countries competition law also pursuit those “common competition law goals”. In addition however, pursuant their development objectives, they integrate additional goals which are often qualified as non economic. Those so called non economic goals often reflect specific preoccupations and issue of the hosting jurisdictions. In South Africa for instance, the notion of “public interest”⁷⁵ is taken into consideration in merger cases. In addition, promoting employment, advancing social and economic welfare, ensuring to SMEs an equitable opportunity to participate in the economy and increasing the economic opportunities of historically disadvantaged persons are among guiding objectives of South Africa's competition law⁷⁶. It has been said about South African competition that it “*applies a limited measure of*

⁷² Heinemann, Pour un droit mondial de la concurrence.

⁷³ Argument often raised that developing countries should combine industrial policy and competition at their initial development stage.

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⁷⁵ See, D. Lewis, *The Role of Public Interest in Merger Evaluation*, ICN, September 2002, available at: <http://www.comptrib.co.za/Publications/Speeches/lewis5.pdf>.

⁷⁶ See Chapter 1 (2) of the South African Competition Act, available at: <http://www.compcom.co.za/assets/Files/pocket-book-2005-R.pdf>. The Competition Tribunal may for instance grant an exemption if the anticompetitive behavior challenged contributes to the “promotion of the ability of small businesses or firms controlled or owned by historically disadvantaged persons, to become competitive. (Chapter 2, part C, pt. 10). See also, Eleanor Fox, *Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia*, 41, Harvard International Law Journal, 2000, pp. 583-588.

*affirmative action*⁷⁷. Indonesian competition law's objectives are also concerned with equity issues⁷⁸.

In China the notions of “state security”, is a criteria that the MOFCOM could take into account when analyzing a merger case. Goals such as leveling the playing field for SMEs, promoting fairness and equality, promoting consumer choice, achieving market integration, facilitating privatization and market liberalization, promoting international competitiveness may pop up as a goal of a given competition law⁷⁹. Access to basic needs is protected by competition in Mexico and Costa Rica⁸⁰.

This trend enlarges the scope of the objectives assigned to competition law. Integrating non economic goals into developing countries competition laws contrasts with the narrow focus of developed jurisdictions' competition law on efficiency. Integrating non economic criterias in the competition analysis may create tension especially if international corporations are involved.

These diverging and conflicting goals pose unique enforcement challenges to developing countries competition authorities. How to tip a balance between efficiency and non economic goals is the dilemma young competition authorities of developing countries have to face. In other words, how development concerns could integrate an efficient approach. Developing countries need to apply the concept of efficiency in a particular manner.

4. Development oriented goals and efficiency: The need to achieve “*efficient development*”

A development oriented language of competition law which involves inclusiveness, combines cooperation/competition, integrates fairness; protects the weak against the stronger seems, at first sight, not to compatible with an efficiency⁸¹ focused enforcement of competition law if efficiency is approached as aggregate social welfare. This conclusion based on a single the assumption that there is one conception of efficiency is misleading. Hence, the concept of efficiency may have a different meaning and applied in a different way in developing countries. Striking a balance between efficiency and non economic goals is the challenge developing countries competition authorities would have to face. Taking into account development goals would require a different approach in the application of the concept of efficiency. Economics of competition law that take into account development concerns would look different. The concept of efficiency would have to be applied differently. In this vein, development preoccupations or non economic goals could be taken into account by *reinventing an approach to efficiency* that combine a sound economic analysis built into a larger framework of development concerns. This could be

⁷⁷ *Ibid.*, p. 587.

⁷⁸ *Ibid.*, pp. 588-594.

⁷⁹ See, The ICN report on *the objectives of unilateral conduct laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, *op. cit.* (note 9).

⁸⁰ T. Stewart, *Competition Law in Action*.

⁸¹ For a discussion on the concept of efficiency, see, U. Schwalbe, D. Zimmer, *Law and Economics in European Merger Control*, Oxford University Press, 2009, pp. 3-9; W. Kerber, *Should Competition Law Promote Efficiency? Some Reflections of an Economist on the normative Foundations of Competition Law*, in, *Economic Theory and Competition Law*, pp. 94-100. See also, M. Motta, *Competition Policy: Theory and Practice*, Cambridge University Press, 2004, pp. 39-64. For a discussion of the concept of efficiency with a focus on the small market economies, see M. Gal, *Competition Law in Small Market Economies*.

termed as an *efficient development*. An efficient development approach would suit the need of developing countries to achieve economic development built in an efficient framework. Developing countries seek *efficient development, and efficient development is inclusive development*. There is no one efficiency model. The concept of efficiency can be approached and applied differently depending on the context and the goals that a competition law wants to achieve. The developed world uses efficiency in a very particularized way. Efficiency preserves freedom of firms with power. Developing countries however seek an efficiency approach more inclusive. Efficiency would mean for them “efficient development”. This approach, as we will see later in this paper, would allow developing countries’ competition authorities to pursue efficiency, while taking into account development concerns and non-economic goals.

Non-economic goals are not always irreconcilable with efficiency. Hence, certain enhanced economic opportunities, certain imperative of access to basic needs are reconcilable with developmental efficiency. It is only in the cases where efficiency does not correspond with non-economic goals that the competition authority might want to consider whether competition law is the best instrument of whether it would require undesirable tradeoffs between efficiency and access to basic needs. Competition law can fully supply this approach. As to the objective of protecting jobs, it should be pursued only to the extent that it does not frustrate attempts to build or induce modern businesses and jobs.

5. An African competition forum (ACF) and its potential relationships with the ICN

A recent initiative, very unique by its goals and the context in which it is created, deserves some reflections as to its potentials in taking into account the interests of some developing countries in the current international framework. The mechanisms to set up the ACF were discussed at the African Stakeholder Workshop (ASW) held in Nairobi, Kenya in March 2010⁸². It was agreed during that meeting that the ACF would be run as a virtual network. This reminds of the ICN. Not less than 34 officials from the African competition authorities, the regional and international organizations, the consumers groups and the academia attended the workshop. A steering committee which has an interim mandate was tasked with the mission to draft the “*organization and governance structure, funding, and membership of the ACF*”. The Committee is also in charge of preparing “*a draft business and strategic plan to direct the ACF over the next 3-5 years, and identify and propose projects and activities to be undertaken*”.

The initiative is very recent and is still in a design stage to be fully analyzed as to its potentials on helping African countries agenda on competition law. However, the future design of the ACF, its rationale and objectives provides some hint on how this “kind of African ICN” would work.

The ACF which is “African driven” has the primary objective to help African countries “(...) *identify and address obstacles to fair competition*”⁸³. What fair competition means requires clarification. As to its potential, the ACF “(...) *would facilitate exchange of information, dissemination of knowledge and experience, building staff and institutional*

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83

capacities through provision of technical assistance, conducting various studies and related programs to promote the development and strengthening of competitive markets”⁸⁴. Foremost, the view was shared by the initiators of the ACF that the ACF, unlike other forums (reference was certainly made to the ICN without mentioning it), would give priority to “addressing issues impacting on poverty and economic development in African countries as against focusing on competition law and policy per se”⁸⁵.

As to its relationships with existing forums, the ACF aims at enhancing participation of member countries in various international forums “to represent and put forward ‘African’ points of view”⁸⁶. A program coordinator is to be hired and different working groups are to be created.

Is the ACF a reaction to the ICN’s orientation on competition law? Are African competition authorities only concerned with the objective of strengthening their competition policies and sharing experiences? A sound answer to those questions would be too early. However the mere fact of setting up such a forum in a time where there seems to be an “agreements” around ICN’s work on bringing worldwide competition authorities together is full with symbol and significance.

If African competition authorities felt the need to set up an ACF, it means that their developmental concerns and their vision of a *fair competition* were not fully taken into account within the ICN. This is evidenced by the objective of the ACF to put forward and support an African competition agenda in international organizations.

Could the creation of the ACF be considered a split of the ICN? The answer to this question would very much depend on the success of the initiative in the future. If the organization grows strong and influential by creating an African competition law agenda that takes into account their development needs, it would certainly undermine the “authority” and leadership of the ICN. However, the ACF would have to overcome a number of challenges to be successful. The network would need strong leadership. The presence of members of relatively advanced competition authorities in Africa, South Africa, Zambia, and Egypt in the steering committee is certainly a positive factor for the success of the initiative. After its establishment, the network would have to overcome the challenges of bringing all African competition authorities, academics and stakeholders together. This would require funding that the network would need to get.

Would the ACF work parallel to the ICN or would it constitute a means to strengthen African countries negotiation bargaining power in the international framework? The network could and should undertake those different functions. It can certainly help African countries foster their position within the ICN and others international negotiations frameworks.

⁸⁴ Thula Kaira, *The Possibility of Establishing an Africa Competition Forum, Presentation prepared for the Workshop on Competition Law and Policy in African Small States*, 26-27 July 2010, Windhoek, Namibia, at p. 14.

⁸⁵ *Ibid.* p. 15.

⁸⁶ *Ibid.*

III. Apparent diverging language or paradigm shift in the theory and practice of antitrust in developing countries?

Could the recent evolution related to competition law in developing countries lead to a conclusion of a dual and diverging language between the developed jurisdictions' competition policies and developing countries competition policies? This question may be answered differently, depending on the credits and weight given to the different above analyzed factors related to competition law in developing countries. The answer would also be bias, certainly. Proponents of a development paradigm of competition law would argue for a development language of competition law which is different from the economic language of developed jurisdictions competition laws. The facts are however constant. Development oriented competition law which suit the needs of developing countries would certainly be different from a western model. The visions of antitrust are different. Different visions produces tension if one model is pushed and a different and opposing model get off the ground. This is what is happening currently.

The difference would be less in the substance of the law than on how the law is applied. Whereas developed jurisdictions enforcement paradigms seems to be well established, this cannot be said about an enforcement of a development oriented antitrust law for developing countries. The law is still in its conceptual stage. And the enforcement mechanisms are not sophisticated in developing countries. The lack of resources of developing countries competition authorities and their deficient institutional setting have a negative impact on the enforcement of competition law⁸⁷.

The image of competition law in developing countries is still very murky. Developing countries are still in search of direction in competition law. Lack of consensus on how competition law should be designed is the point of convergence. There is no intellectual framework on how competition law in developing countries should be applied. The economic paradigm is still relevant. But how to associate efficiency with inclusion and fairness is not defined yet. At this stage we are still at the staring point which is questioning the adaptability to western principles to developing countries' economic situation..

What is clear at this stage is that the perception of antitrust in its potential role is different in developing countries. Antitrust is not only considered an efficiency based discipline which does not take into account present needs and aspirations. Developing countries expect from antitrust enforcement to solve their development issues. This view might be reflected in the way those competition laws are applied. Developing countries competition authorities could not afford to only take into account efficiency considerations when dealing with a competition case⁸⁸. The development dimension must be present. This is expressed through saving employment, reducing the price of basic needs, giving more business opportunities to peoples, reducing poverty. Those objectives would not necessarily fit with efficiency *per se* focused enforcement. However it is conceivable to build a framework where efficiency takes into account development concerns. An efficient development could help achieve this objective.

⁸⁷ On this aspect, see, Michal Gal, *The Ecology of Antitrust: Preconditions for Competition Law enforcement in Developing Countries*, in, UNCTAD, *Competition, Competitiveness and Development: Lessons from Developing Countries*, p. 21 et suiv., available at: http://www.unctad.org/en/docs/ditcclp20041_en.pdf.

⁸⁸ David Lewis

The case law in developing countries does not give a comprehensive analytical framework on how development objectives could be balanced with an economic analysis. What is however clear at this stage is that the integrating development oriented goals in dealing with competition case would make antitrust enforcement in developing countries different although the substantive law may look the same as western substantive competition rules.

IV. Diverging language and the impact on a potential framework on international antitrust

Given the alternatives routes that are currently explored with bilateral cooperation agreements and soft law (with convergence in the ICN), the likelihood of having a binding international framework on competition law in the near future is uncertain. The strong preference of the US for a soft law mechanism and its reluctance to enter into any kind of binding agreement which would undermine its freedom to apply and export its competition law according to its standards diminishes the likelihood of an international agreement. On the top, at an international scale, there is a stand still situation. On the periphery however, internationalization of antitrust is taking place essentially through closeness of national competition laws.

Is the current stand still situation, at the top, in the interest of developing countries? If we consider the fact that a binding agreement would put strong obligations on the shoulders of developed countries to protect international competition by binding export cartels and sharing discovery information with developing countries competition authorities for instance, it would be beneficial for developing countries to have a binding international agreement. The parallel initiatives to internationalize antitrust put obligation only on developing countries. Although some EPAs encompasses obligations for the EU, these would be difficult to enforce.

An international agreement is a multifaceted issue. If the application of the principle of non discrimination combined associated a requirement for developing countries to adopt binding competition law rules as proposed by the US at the WTO, an international competition law would only constitute another market access tool. Are developing countries better off with the current situation and the trend of introducing binding competition law principles through different channels? It is not sure that developing countries are better off. A couple of reasons would justify such an answer. Developing countries do not have any bargaining position when negotiating bilateral agreements embodying competition rules. The underline strategy of the bilateral agreements consists of harmonizing developing countries competition law in line with the EU model.

Given the wishful idea of an international framework on competition law, developing countries would better strengthen their negotiation position in the current international arena. This should first be done within the ICN, the EPAs and their regional competition policies.

V. Suggestions for strategies for developing countries

1. Regional integration: a “competition law voice for developing countries?”

The positive effects that regionalization of competition policies may have to developing countries in term of bargaining power in the international context is still to be proven. Theoretically regional competition policies hold a lot of potential for developing countries which justifies the interest it has attracted recently⁸⁹. The argument is often made is that regional competition policy would help developing countries fight international cartels and cross border anticompetitive practices taking place in a common market. It would help to better monitor the market if the resources were pulled together at the regional level instead of creating weak national competition authorities⁹⁰. Indeed these arguments hold true in theory. In practice, however, regional competition experiences in developing countries are not always successful. This is for diverse reasons⁹¹.

Common markets are large and attractive to multinational corporations. A sound regional competition law with a strong regional competition authority would certainly give more bargaining power to developing countries competition authorities in the international context. Moreover, a developing countries competition network could be more feasible starting with regional competition authorities. Given the fact that developing countries’ regional competition authorities do not necessarily have the resources and competence needed, this process should start by strengthening first regional competition authorities.

2. Following the current network or creating a network for developing countries?

It has been suggested that developing countries create their own network on competition law that addresses their own issues. This would take the form of a developing countries’ ICN. If such a network is strong with many members, and influential leadership it would be able to constitute another competition law voice beside the ICN. This is certainly the wish of the African competition network which is in the process of being set up. The idea of a network for developing countries is very appealing indeed. However its success would pretty much depend on the interest and the involvement of the members. As to the African competition network, it suffers from a congenital flaw on being continental, limited to Africa. Competition law, apart from South Africa of course, is still at a nascent stage of many African countries despite the wave of competition law in the recent years. A network following the path of the ICN, limited only to African members, is unlikely to compete with the ICN, although it could break the unilateralism of the ICN. To be successful, such a network should include all developing countries’ competition authorities.

The limited resources of developing countries constitute a potential limit for such an enterprise. Would developing countries have the necessary resources to undertake a similar work done within the ICN? Besides financial resources, the competences on identifying relevant issues and dealing with them in deep fashion could also become an issue.

⁸⁹ See UNCTAD, Bakhoun, Gal, and different regional integration groups with competition policies: WAEMU, ECOWAS, CEMAC, SADC etc...

⁹⁰ Gal,

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“Networking is the new world order”⁹². Developing country need to network too. Since the existing competition networks are dominated by developed jurisdictions, “a world-wide developing-country on competition law would be useful”⁹³. Would it be easy to set up a network for developing countries?

Creating a separate network would not be the best option for developing countries at this stage, unless all developing countries adhere to the initiative. Bringing all developing countries together around a network that is devoted to their interests is not easy. Developing countries themselves do not share the same competition characteristics and interests. They are diverse⁹⁴. As evidence by the ICN, a developing countries network on competition law would require leadership and resources. A commitment of advanced competition authorities of developing countries, such as South Africa, would be very helpful. David Lewis has been a strong voice within the ICN. Developing countries need such an influential voice to have their saying.

If there is a battle to fight, it should be within the ICN first. In the long run, when they are influential enough, they could part out, without the risk of being isolated, if their interests are not taken into account enough.

A couple of actions could help developing countries to have their voices heard. Since national and regional competition authorities do not have the necessary competences, they should be assisted by NGA sensible to their interests. The agenda of the ICN should also not only be set by the developed jurisdictions.

Conclusion

With convergence in competition law, we seem to be heading to a single antitrust language; a language of efficiency. The competition law language of developing countries that is emerging establishes a duality in modern antitrust language. Antitrust for developing countries mean an efficient development which is inclusive. In the future, the picture may be more complex and the reference points in antitrust multiple. Hence, the BRICs (Brazil, Russia India and China) may establish an antitrust policy different and specific to their own preoccupations, and some Asian countries might choose more industrial policy. This would go beyond a dual language, but a multifaceted language on antitrust. This is likely to happen. China for instance is slowly developing enforcing it Antimonopoly Law. The years to come would shed some light on the real Chinese perception and application of competition law. A new language might emerge.

Competition law is part of the developing countries legal landscapes. Enacting and enforcing competition law would develop in the future. What would be important is less how the law is drafted than how competition authorities enforce the law. As observed by Professor Gerber, “*in the future, the issue of whether a country has ‘some kind of competition law’ on its book will be far less important than the question ‘what kind of competition law does it have and how it is implemented’*”⁹⁵.

⁹² Fox, the other path. p. 235.

⁹³ *Ibid.*

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⁹⁵ Gerber