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International cooperation in competition law enforcement – challenges for developing countries and best practices

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Executive summary

International cooperation between competition authorities has been widely discussed by the international community. At the request of member States gathered in the Intergovernmental Group of Experts on Competition Law and Policy (IGE) meetings, the UNCTAD secretariat has drafted several papers on the obstacles faced by the developing countries with regard to international cooperation for cross border anti-competitive practices which includes mergers and on possible ways forward. UNCTAD's latest developments regarding international cooperation correspond to the "Guiding Policies and Procedures under Section F of the UN Set on Competition" (GPP), adopted by Member States in the Eighth United Nations Review Conference of the Set on Competition, held under the auspices of UNCTAD in October 2020.

This paper highlights on the importance of international cooperation for competition law enforcement, especially with respect to developing countries. Firstly, this paper describes the theory and practice of international cooperation in competition law enforcement around the world. It draws its analysis from UNCTAD's previous studies on international cooperation in competition law enforcement to address the challenges faced by the developing countries in dealing with cross-border competition cases. Thereafter, this paper presents international instruments as well as best practices to respond to the abovementioned challenges, including UNCTAD's latest initiative of the GPP. Lastly, this paper outlines UNCTAD's ambitious potential for future projects in the field of international cooperation post-2020.

Key words: International cooperation, Competition law and policy, developing countries

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1 Introduction[1]

UNCTAD has been the focal point for work on competition law and policy within the United Nations system since 1980.[2] Its primary focus is to address the needs of developing countries as well, as economies in transition, in designing and implementing competition law and policy as an instrument to achieve inclusive economic growth and sustainable development. The mandate of UNCTAD in this field has been set by the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (UN Set). The objectives of the UN Set consist of promoting benefits which arise from competition law and policy and strengthening the enforcement against anticompetitive practices worldwide.[3] Among other provisions of the UN Set, Section F, on international measures, establishes a framework for cooperation at the international level in eliminating or dealing with anticompetitive practices.

BOX 1 – UN Set Section F. *"International measures*

Collaboration at the international level should aim at eliminating or effectively dealing with restrictive business practices, including those of transnational corporations, through strengthening and improving controls over restrictive business practices adversely affecting international trade, particularly that of developing countries, and the economic development of these countries. In this regard, action should include:
1. Work aimed at achieving common approaches in national policies relating to restrictive business practices compatible with the Set of Principles and Rules.
2. Communication annually to the Secretary-General of UNCTAD of appropriate information on steps taken by States and regional groupings to meet their commitment to the Set of Principles and Rules, and information on the adoption, development and application of legislation, regulations and policies concerning restrictive business practices.
(…)
4. Consultations: (a) Where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to an issue concerning control of restrictive business practices, it may request a consultation with those States with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities

[1] This paper gathers and reproduces the main points of previous UNCTAD research on this topic (as indicated in footnote 4), discussed in previous UNCTAD annual Intergovernmental Group of Experts on Competition law and policy meetings, and it refers to key work and instruments relevant to this topic adopted by the Organisation for Economic Co-operation and Development and by the International Competition Network as presented in Section B, 2, of part II. *Challenges faced by developing countries and instruments in international cooperation in competition law enforcement* of this paper. It also refers to related previous research, referenced, to present the background and framework and to introduce the "Guiding Policies and Procedures under Section F of the UN Set on Competition", a set of recommendations approved by consensus by the Eighth United Nations Review Conference of the Set on Competition, held under the auspices of UNCTAD in October 2020. Several UNCTAD and other documents were therefore the direct sources of the text of Part I and II of this paper.

[2] As per the United Nations General Assembly resolution 35/63, 5 December 1980, on "Restrictive Business Practices", which approved the UN Set, available at: https://unctad.org/system/files/official-document/tdrbpconf10r2.en.pdf.

[3] Namely, to ensure that anticompetitive practices do not impede or negate the realisation of benefits that should arise from the liberalisation of tariff and non-tariff barriers affecting world trade (paragraph 1 of the section A); to attain greater efficiency in international trade and development such as through the creation, encouragement and protection of competition (paragraph 2); to protect and promote social welfare in general and the interests of consumers (paragraph 3); to eliminate the disadvantages to trade and development which may result from anticompetitive practices and thus help to maximize benefits to international trade (paragraph 4); and to facilitate the adoption and strengthening of competition laws and policies at the national and regional levels (paragraph 5).

for such a consultation; (b) States should accord full consideration to requests for consultations and, upon agreement as to the subject of and the procedures for such a consultation, the consultation should take place at an appropriate time; (c) If the States involved so agree ,a joint report on the consultations and their results should be prepared by the States involved and, if they so wish, with the assistance of the UNCTAD secretariat, and be made available to the Secretary-General of UNCTAD for inclusion in the annual report on restrictive business practices.
(…)"

International cooperation remains important for member States in times of the COVID-19 crisis. Cross-border anticompetitive cases are still taking place, and competition authorities around the world are facing similar issues ranging from price fixing concerning health care products to abusive behaviour of online platforms. The unprecedented challenges faced by competition authorities calls for enhanced cooperation to prevent and deal with the crisis in an efficient and collaborative manner. Nevertheless, the current crisis has had a positive impact in fostering stronger cooperation at regional and international levels among competition authorities, which have shared best practices to respond to challenges coming out of this crisis. The crisis has demonstrated how useful regional cooperation is, and how international cooperation is much needed to deal with issues of common concern.

International cooperation between competition authorities has been a topic of discussion recurrently in the international competition community: UNCTAD has been very active in engaging in the discussion to foster international cooperation. Namely, the topic of international cooperation was extensively discussed at the level of the UNCTAD Intergovernmental Group of Experts (IGE) on Competition Law and Policy meetings from 2012 to 2017.[4] Following these discussions, in 2018, UNCTAD conducted an assessment of the obstacles faced by competition authorities through a survey of 54 competition authorities' respondents (see Box 2).[5]

UNCTAD's latest work regarding international cooperation led to the document entitled "Guiding Policies and Procedures under Section F of the UN Set" (GPP),[6] agreed by consensus by the Eighth United Nations Review Conference of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, held in October 2020. This set of recommendations to facilitate international cooperation to developing countries is the outcome of consultations launched at the fifteenth session of the IGE in 2016 after the Federal Antimonopoly Service of the Russian Federation (FAS) proposal of a toolkit on international cooperation to operationalise Section F of the UN Set. Due to the wide support received, in the

[4] UNCTAD (2012) "Cross-Border Anticompetitive Practices: The Challenges for Developing Countries and Economies in Transition", UNCTAD (2013) "Modalities and Procedures for International Cooperation in Competition Cases Involving More than One Country", UNCTAD (2014) "Informal Cooperation in Competition among Competition Agencies on Specific Cases", UNCTAD (2015) "International Cooperation in Merger Cases as a Tool for Effective Enforcement of Competition Law", and UNCTAD (2017) "Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases: Tools and Procedures".
[5] UNCTAD (2018) "Obstacles to International Cooperation in Specific Cases". It covered the following 54 competition authorities coming from: (1) **the Americas**: Argentina, Brazil, Costa Rica, Ecuador, El Salvador, Dominican Republic, Honduras, Mexico, Nicaragua, Panama, Peru; (2) **Africa**: Botswana, Democratic Republic of the Congo, Eswatini, Gambia, Kenya, Malawi, Mauritius, Seychelles, South Africa, Zambia, Zimbabwe; (3) **Asia and the Pacific**: Australia, Japan, Indonesia, India, Republic of Korea, Lao People's Democratic Republic, Malaysia, Philippines, Sri Lanka; (4) **CIS and Balkan:** Albania, Armenia, Belarus, Bulgaria, Croatia, Kazakhstan, Kyrgyzstan, Montenegro, Russian Federation, Serbia; (5) **Western/Central Europe/North America**: Austria, Canada, Germany, Netherlands, Hungary, Italy, Poland, Spain, Sweden, Switzerland, the United States Department of Justice, the United States Federal Trade Commission, United Kingdom. Out of these 54, 24 authorities started enforcing competition laws after the year 2000.
[6] UNCTAD Drafting Committee "Guiding Policies and Procedures under Section F of the UN Set on Competition", 13 June 2019, available at: https://unctad.org/meetings/en/SessionalDocuments/ccpb_comp1_%20Guiding_Policies_Procedures.pdf.

sixteenth session of the IGE 2017, an UNCTAD Discussion Group on International Cooperation (DGIC) was established with the aim of exploring ways and means to improve international cooperation among competition authorities, particularly between developed and developing countries' competition authorities. After the two-year discussion among member States, the GPP were drafted by participating Competition Authorities' representatives and agreed at the eighteenth session of the IGE in 2019.

This report addresses the current framework of international cooperation in competition law enforcement, especially taking into consideration developing countries. It observes the challenges which less-experienced competition authorities faced when dealing with cross-border competition infringements, and the actions undertaken to overcome those challenges which are carried out at national, regional, and international levels. Then it highlights persisting issues and bottlenecks in international cooperation which remain to be tackled, Finally, it suggests ways of strengthening cooperation, namely with an increased UNCTAD role, including through the dissemination and guidance provided by the GPP under the Section F of the UN Set, whose content will be then presented.

2 Challenges faced by developing countries and instruments in international cooperation in competition law enforcement

Based on UNCTAD's previous work and discussions on this field, section II describes the challenges faced by developing countries in eliminating or dealing with cross-border anticompetitive practices and cooperating with other competition authorities, and efforts by competition authorities to overcome those challenges.

2.1 Challenges in international cooperation

Box 2: UNCTAD's previous work on challenges in international cooperation

Challenges in international cooperation have been addressed in various UNCTAD's reports from 2015 to 2018. The list of reports is as follows:

- "International cooperation in merger cases as a tool for effective enforcement of competition law"[7] in 2015,
- "Enhancing international cooperation in the investigation of competition cross-border cases: tools and procedures"[8] in 2017
- and "Obstacles to International Cooperation in Specific Cases"[9] in 2018.

The UNCTAD survey conducted in 2018 highlights various challenges faced by competition authorities such as (i) a general lack of awareness of cooperation practices, (ii) a lack of national legal basis at the national level to facilitate and support cooperation with foreign authorities and (iii) an overall lack of trust to share information with other authorities. According

[7] UNCTAD (2015) "International cooperation in merger cases as a tool for effective enforcement of competition law".
[8] UNCTAD (2017) "Enhancing international cooperation in the investigation of competition cross-border cases: tools and procedures".
[9] Supra note 5.

to the assessment of critical obstacles to international cooperation carried out in the survey, the main obstacles relate to awareness, legal and practical factors. Member states raised concerns about the lack of awareness in relation to types of cooperation. This is in turn hinder cooperation for at least 33 respondents of the survey. The main obstacles that will be the focus of this research are the ones that have been highlighted by the member States: legal and practical factors. Concerns about legal factors can be summed up as follows: special restrictions on exchange of information and absence of international agreements which contain cooperation provisions. Regarding practical factors, the main obstacles faced by member States relate to lack of trust and the lack of contact with foreign authorities.

2.1.1. Legal factors

Differences among competition legal systems and institutional designs, including diverse procedural rules, hamper efficient coordination between competition authorities of different jurisdictions, namely regarding the standard of proof for competition law infringements under common law and civil law jurisdictions. These differences may also impact the effectiveness and relevance of leniency programmes. Convergence of competition laws is crucial to promote cooperation between competition authorities. The recently signed Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (MMAC)[10] seeks to reinforce competition enforcement efforts by sharing intelligence, case theories and investigative techniques to better coordinate investigations across international borders.[11] The shared legal culture and common jurisdictional approach played an important role in its inception. Overall, international cooperation relies upon the adherence to basic legal principles and on converging substantive as procedural issues.

(1) Difference in legal systems and jurisdictional issues, including in competition legal and institutional frameworks

One of the main issues hindering international cooperation comes from different national legal systems, diverse legal standards and if and how jurisdictions are allowed to apply competition law extraterritorially. Quoting the relevant commentaries of UNCTAD's Model Law on Competition "[u]nder the principles of public international law, it is generally acceptable for a State to exercise subject matter jurisdiction to regulate (a) conduct that is within its territory (the territoriality principle); or (b) conduct of its citizenry, which includes the activities of corporations domiciled or registered under their company/corporate laws (the principle of nationality). However, in the area of competition law, it is accepted today that the principle of territoriality does not prevent a State from having subject matter jurisdiction over acts that originate in foreign countries but which produce effects within the State's territory (extraterritorial application of competition law)".[12]

[10] Signed by the United States Department of Justice, the United States Federal Trade Commission, the United Kingdom Competition and Markets Authority, the New Zealand Commerce Commission, the Competition Bureau Canada and the Australian Competition and Consumer protection Commission.
[11] https://www.accc.gov.au/media-release/competition-agencies-to-coordinate-on-cross-border-investigations-0.
[12] UNCTAD (2017) Model Law on Competition (2017) - Revised chapter II, paragraphs 50 and 51 (TD/B/C.I/CLP/L.8).

Growing global consensus on the importance of combating anticompetitive practices has made possible jurisdiction conflict almost non-existent as jurisdictions are more willing to cooperate on cross-border law enforcement.

The qualification of competition law infringements can be divided into criminal and administrative infringements depending on the specific framework of competition law provisions. United States antitrust enforcement is well-known for its use of criminal sanctions against individuals, from fines to imprisonment. Since 2004, an individual who takes part in a cartel in the United States can be imprisoned for up to ten years under the Sherman Act. In 2011, some 35 to 40 individuals received an average prison sentence of 17 months in the United States for cartel activities.[13] By contrast, European Union competition law exclusively focuses on infringements of competition law by "undertakings" and the European Commission can only sanction undertakings.[14]

The protection of individuals' rights under criminal law may prevent international cooperation during competition cases' investigations since different jurisdictions may not be allowed to exchange information in these circumstances. Therefore, the variation in the standards of proof may interfere with cooperation during competition cases' investigations.

Divergences in competition law systems can hamper international cooperation and create hurdles in cooperation agreements. The international experiences gathered in Part 2 (commentaries) of UNCTAD Model Law on Competition classified the choices for structuring of competition authorities into three institutional models: the bifurcated judicial model, the bifurcated agency model and the integrated agency model.[15] In cases of similar institutional models, for instance, between Chile and South Africa, cooperation would be easier since both share similar institutional structures. For Peru and Colombia, which both have "umbrella" authorities with a wide range of competences and integrated models, it is also easier to conclude cooperation agreements. UNCTAD observations suggest that most competition authorities have been conferred administrative independence to ensure independence from political and private interferences, which may be particularly important in developing countries and countries in transition.[16] The adjudication techniques operates based on various factors that also affect the choice of a "model" for

[13] http://competitionlawblog.kluwercompetitionlaw.com/2013/04/25/individual-liability-for-cartel-infringements-in-the-eu-an-increasingly-dangerous-minefield/.
[14] Ibid.
[15] "(i) The bifurcated judicial model – the Authority is empowered to be investigative, and must bring enforcement actions before courts of general jurisdiction, with rights of appeal to general appellate courts. (ii) The bifurcated agency model – the Authority is empowered to be investigative, and must bring enforcement actions before specialized competition adjudicative authorities, with rights of appeal to further specialized appellate bodies or to general appellate courts. (iii) The integrated agency model – the Authority is empowered with both investigative and adjudicative functions, with rights of appeal to general or specialized appellate bodies". See UNCTAD (2010) Model Law on Competition, Chapter IX, available at: http://unctad.org/en/Docs/ciclpL2_en.pdf, at P. 2.
[16] Ibid., paragraph 8, at P. 4.

competition laws such as economic, legal and political views.[17] The phrase "politics of law and economics" signals that adjudicating competition cases considers not only on economics but an intricate puzzle of national laws and politics.[18] For instance, the Canadian Competition Policy has experienced a "pure political accountability" model whereby the competition authority became part of a Ministry to an "Independent Agency Model" and subsequently changed to a "Judicialized Tribunal Model".[19] Consequently, if there is a variety competition models then international cooperation might be limited since cooperation can be brought forward where there is convergence between the two authorities. In turn, the level of representation of competition bodies will be limited since it will depend on the model of each jurisdiction.

(2) Diversity in competition procedural rules

The proliferation of competition laws globally and the increased levels of enforcement by competition authorities with diverging procedural and substantive rules throughout the stages of investigation has heightened the risk of inconsistent and inappropriate outcomes. The diversity of procedural rules may interfere with cross-border enforcement cooperation. This may impair the exchange of information. Enforcement cooperation is often established in different stages of investigation: pre investigation, investigation, and adjudication. In all phases, competition authorities are bound to comply with procedural rules which ensure due process. Accordingly, competition authorities need to protect confidential information, and this will ensure that undertakings and individuals' rights will be abided. Procedural rules in competition proceedings are essential also to ensuring consistent, predictable, and fair decision making in competition law investigations. For instance, in early 2019 the Ukrainian parliament adopted a law introducing and enhancing new instruments available to the Antimonopoly Committee of Ukraine, such as an improved leniency policy, a settlement procedure in cartel cases, and the determination of time limits for AMC investigations. [20] Procedural safeguards not only protect parties' rights at the different stages of the investigation but also enhances the efficiency of competition authorities' law enforcement.

In some countries there are formal proceedings regarding meetings with