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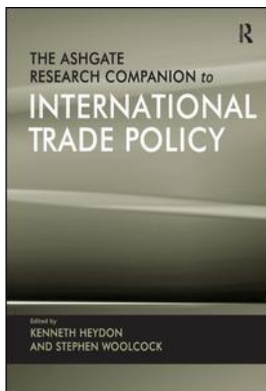

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Trade and Competition Policy

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12 ASHGATE RESEARCH COMPANION

Trade and Competition Policy

Kamala Dawar and Peter Holmes

Introduction

As governments open up markets to foreign trade through reducing or eliminating tariff barriers at the borders of countries, it is widely understood that the persistence of domestic market failures behind the border can work to undermine the efficiency and growth effects associated with liberalization (Bhagwati et al. 1971). Competition can be obstructed for a variety of structural and behavioural reasons and governments address the different restrictions of competition through different policies and legal instruments because, as this chapter notes, competition policy can also be used to promote a range of different trade and social policy objectives.

The first section of this chapter defines competition, competition policy and competition law, and the relevant economic and legal concepts related to competition before introducing a discussion of the nature of anticompetitive practices in the second section. The third section provides an overview of the development of different domestic competition policies and laws, drawing on the existing body of literature that is concerned with the legal rather than economic aspects of competition policy. The fourth section examines the issue of competition policy at the international level, identifying the various perspectives and the positions of developed and developing countries.

The chapter concludes by noting that the existence of multiple objectives in national competition laws prevents harmonization of competition policy at a multilateral level. For despite a strong economic rationale for multilateral agreements to deal with the increase in cross-border anticompetitive practices that have not been eradicated by, and in some cases may be facilitated by, global trade liberalization, most governments continue to express ambivalence about negotiating such a legal instrument.

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Definitions and Terminology

What is Competition?

Competition is the dynamic force created by firms attempting to gain advantage over their market rivals (OECD 1993). In a competitive market, firms seek to be market leaders by striving to produce superior products in terms of price, choice, quality and service with the aim of consumer satisfaction. A competitive market is contestable;[1] in the event that market prices (and therefore profits) rise above normal levels, there are no barriers to the entry into the market of new suppliers (Graham 1999). Contestable markets create opportunities for new businesses to enter a lucrative market, putting pressure on existing firms to innovate and be more efficient in order to maintain their market position.

Governments face difficulties when trying to create and maintain competitive markets for a variety of reasons. As discussed in the next section, some obstacles to competition are structural, for example, the existence of so-called 'natural monopolies' such as the transmission of electricity or water, while some obstacles are behavioural, as with the deliberate attempts of firms to make greater profits through restrictive business practices such as by creating barriers to new entry. These attempts are considered to be 'unfair' or 'anticompetitive' because the objective of a firm is to gain advantage by limiting competition in order to increase profits. Anticompetitive behaviour is generally considered detrimental to the welfare of other firms (unless they are part of a cartel too), to consumers, and to economic efficiency by contributing to the misallocation of resources (Hoekman and Holmes 1999; Levenstein and Suslow 2001; OECD 2002a). There is a strong body of economic analysis to suggest that competition allows the benefits of trade reform, deregulation and privatization to be realized, which in turn creates a better commercial environment and attracts greater foreign direct investment (FDI). Further, promoting inter-firm rivalry enhances dynamic economic performance, promoting economic growth and development (Jenny 2005; Lipimile 2004; OECD 2000).

Competition Policy

Competition policy comprises the entire set of measures and instruments used by governments to regulate or determine the conditions of competition and the contestability of markets (Hoekman and Holmes 1999). The scope of competition policy includes both private and public markets. Competition policy is related to industrial, investment and trade policy because they all aim to promote national

[1] Contestability is a measure of the extent to which a market is open to new entry. William Baumol argued that the threat posed by the possibility of new firms entering the market is taken to be a key determinant of the behaviour of existing firms.

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economic growth. Competition policy can therefore encompass privatization and deregulation measures, cutting firm-specific subsidy programmes, reducing discrimination against foreign business activities, in addition to regulating the behaviour of businesses. Despite agreement on what competition is and its desirability, domestic competition policies vary because different governments do not treat the same types of business practices similarly. What is considered to be an anticompetitive or restrictive business practice not only varies in different jurisdictions but on a case-by-case basis within countries. One frequently cited objective of competition policy is to maximize economic welfare through achieving allocative efficiency (Kolasky and Dick 2003).

Allocative efficiency is achieved by ensuring that the competitive process is not distorted or impeded by the restrictive business practices of firms that have a detrimental effect on economic welfare. This notion of welfare sidesteps the issue of income distribution, and economists usually argue that the distribution of income is best addressed through direct measures. That is, while the aim of redistributing opportunities towards, for example, small businesses or traditionally disadvantaged groups may be a legitimate objective for a domestic government, using competition laws to achieve such a goal may detract from achieving overall allocative efficiency. As discussed later in the chapter, countries vary in the emphasis that is placed on efficiency. Many domestic competition laws also include 'fairness considerations' or social objectives (Kerber 2008). Nevertheless, the decision to prioritize distributive or sectoral goals of competition policy such as fairness and justice, the protection of small- and medium-sized firms, or the promotion of national champions, are commonly viewed critically by economists (for example Motta 2004: 18).

This is not to say, however, that the pursuit of competition cannot be tempered by other considerations. Competition policies recognize that specific agreements between firms that may reduce competition can occasionally be efficiency enhancing, and consequently competition laws make allowance for such agreements. Similarly, some competition policies choose to design competition laws to ensure that environmental standards are not relaxed for economic efficiency concerns. Article 174 of the Treaty of the European Communities, (now Article 191 of the Treaty on the Functioning of the European Union) for example, states that environmental factors may also be taken into account in competition law enforcement. This Article allowed for the European Commission to permit an agreement between European washing machine producers to discontinue manufacturing the least energy efficient washing machines, which also happened to be the cheapest. As Motta points out, in this case the Commission felt the producer agreement would benefit society environmentally because it would reduce energy consumption and individual consumers cannot be relied upon to factor these environmental externalities into their purchasing decisions (Motta 2004: 26).

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Competition and Consumer Welfare

A tension arises between competition considerations and trade law when the former are just seen as driven by the rights of producers to be protected from unfair competition or exclusion. If foreign firms are not seen as having such rights, their ability to exercise countervailing power may be constrained.

Competition and consumer policies and laws are complementary because while the former addresses the supply of competition by removing structural obstacles and preventing the restrictive behaviour of businesses, consumer policies address the ability of the individual customer to demand competition. There is a body of research that suggests that consumer laws and competition policies need to act together to enhance the competitive environment, enabling consumers to make appropriate choices and send the correct market signals to producers about their needs and preferences (Dawar 2007). As a result, some competition laws explicitly reference consumer policy and others, such as in Australia, also create competition bodies where consumer policy and law is given an equivalent status to competition law.[2]

Competition Law

The term competition law used throughout this chapter refers to the set of legal instruments created and maintained by governments to regulate the behaviour of firms that restrict competition in the market. Domestic competition law systems differ because they operate under different and often short-term economic and political pressures. This reflects the fact that competition decisions can directly shape the strategic and tactical choices of businesses as well as national economic interests. Competition laws may be applied on the basis of the effects of conduct as well as on the basis of its physical location, which means that several national laws may be applicable to the same conduct. This 'extraterritorial' effect of competition laws brings them into contact with different legal systems. Despite the variety of competition laws, they typically tend to address the following business practices (OECD Framework for Competition Law; UNCTAD 2002).

- Measures relating to agreements between firms in the same market to restrain competition. These measures can include provisions banning cartels as well as provisions allowing cartels under certain circumstances.
- Measures relating to attempts by a large incumbent firm to independently exercise market power by raising prices or artificially creating barriers to market entry (sometimes referred to as an abuse of a dominant position).

[2] Review of Australia's Consumer Policy Framework Inquiry 2008. [Online] Available at: www.pc.gov.au/projects/inquiry/consumer/docs/finalreport [accessed: 27 March 2011].

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- Measures relating to firms that, acting collectively but in the absence of an explicit agreement between them, attempt to exercise market power. These measures are sometimes referred to as measures against collective dominance.
- Measures relating to attempts by a firm or firms to drive one or more of their rivals out of a market. Laws prohibiting predatory pricing are an example of such measures.
- Measures relating to collaboration between firms for the purposes of research, development, testing, marketing and distribution of products.
- Mergers and acquisitions which may reduce competition.

The different anticompetitive practices that competition laws are designed to prevent are now examined in more detail. A further aim included in EU competition policy is the control of distortionary state aids, but in the international context this is generally dealt with in separate rules, for example the GATT Subsidies code.

The Nature of Anticompetitive Practices

Agreements Among Firms – Collusion

There are two main categories of collusion between firms that are defined as horizontal and vertical agreements. Generally speaking,[3] horizontal restraints on competition primarily entail other competitors in the market while vertical restraints tend to entail supplier–distributor relationships.

Collusion or cartels are often viewed as the worst types of anticompetitive conduct because they rarely offer any economic or social benefit to justify their negative effects. Research into the cartels prosecuted by the United States Department of Justice (USDOJ) has shown that cartels tend to form across all sectors and industries and that they raise prices by a conservative estimate of 10–25 per cent (Levenstein and Suslow 2001). The ready mix concrete cartel in Germany generated damages of 112 million Euros, the hydropower electricity case in Norway led to damages of 140 million Euros and the hotel association cartel in Spain caused 180 million Euros in estimated harm (OECD 2002a). The OECD Recommendations relating to hardcore cartels[4] consider them unacceptable and recommend that they

[3] The OECD Glossary (1993) points out that the distinction between horizontal and vertical restraints on competition is not always clear-cut and practices of one type may impact on the other.

[4] The OECD defines hardcore cartels in its Recommendations as ‘An anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating consumers, suppliers, territories, or lines of commerce’ (OECD 2002b).

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be actionable; indeed, as discussed later in the chapter, in some jurisdictions they fall under the scope of criminal law.[5]

The existence of international cartels with anticompetitive effects in several markets brings greater regulatory problems because there are limits to the effectiveness of national enforcement efforts against international hardcore cartels, notably when action and the evidence of it is in one jurisdiction and the impact in another. One estimate puts the value of total imports by developing countries of 16 cartelized products at over $80 billion. This is equivalent to 6.7 per cent of all imports by developing countries and to 1.2 per cent of their combined gross domestic product (GDP). The cartels controlling the markets for vitamins, heavy electrical equipment and graphite electrodes used in steel were seen to have a significant impact on some developing countries (Levenstein and Suslow 2001).

National competition authorities have difficulties enforcing the law prohibiting international cartels because of the challenges involved in collecting evidence abroad, interviewing witnesses overseas, and extraditing persons from other jurisdictions. Furthermore, national corporate leniency programmes[6] become less attractive due to the possibility that applications for leniency in one jurisdiction result in the company being exposed to investigations and potential punishments in other jurisdictions. Further, fines for cartelization are a function only of the cartel's effects within a jurisdiction. Most competition laws do not penalize anticompetitive behaviour affecting foreigners and do not allow evidence to be handed over to other countries (Evenett 2002).

Vertical restraints seem more esoteric but they pose problems for trade when firms try to use them to segment markets or to create import bottlenecks. Differences in approaches across jurisdictions have made international agreement harder in this area, particularly with the EU holding market integration as an objective, while the United States stresses efficiency.

The fourth section of this chapter examines the debate surrounding the reasons why international competition laws to address international hardcore cartels have not emerged, despite the powerful economic evidence in favour of action.

The Deliberate Anticompetitive Actions of a Single Firm: Monopoly and Abuse of Dominance

Monopoly is the ability of a firm to act without fearing the response of rivals, notably to raise and maintain prices above the level that would normally prevail

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[5] In the United States, Section One of the Sherman Act of 1890 criminalizes 'Hard-core cartel activity, price-fixing, bid-rigging and market allocation agreements'.

[6] Leniency programmes are sophisticated fine schemes which grant total or partial immunity from fines to firms that collaborate with the authorities. They are based on the principle that those who break the law might report their illegal activities if the proper incentives are created. See Motta (2004: 192–202) on ex post competition policies against collusion.

under a situation of competition. The origin of the term refers to a seller with 100 per cent of its market. The term is more widely, if not consistently, used to refer to firms with unassailable market power. Monopoly as such is rarely illegal but abuses are. The exercise of market power by a monopoly firm leads to reduced output and loss of economic welfare, unless the markets are highly contestable. Without the dynamic of competition, a monopoly firm is able to charge higher prices while being less innovative, less productive and less responsive to consumer preferences. In such a situation, income (and wealth) are transferred from consumers to the monopoly firm. Increasingly, competition authorities pay attention to entry conditions (contestability) rather than profit margins as evidence of monopolistic abuse.

There is no universal definition of abuse of dominance; different governments view the exercise of market power differently. As noted later in the chapter, in some jurisdictions, a firm that charges unreasonably high prices may be seen to be in violation of an abuse of dominance law, while in others this is viewed as an essential market-based incentive. Most jurisdictions focus on issues such as price discrimination, predatory pricing, price squeezing by integrated firms, a firm's refusal to deal or sell its product or the opposite – tied-selling or product-bundling – and pre-emption of facilities (Schmidt 1983: 417–60).

Structural Factors Preventing Competition

In addition to regulating the behaviour of firms operating in the market, competition policy can also address structural features that emerge in a market to hinder the competitive dynamic. Such features not only include aforementioned natural monopolies but also include the creation of commercial entities through the merging of firms that have sufficient market power and intent to prevent fair competition. This again will lead to higher prices, lower quality and less innovation and a transfer of income from the consumer to the commercial entity. Most competition law thus includes merger-control assessment tests. This test involves characterizing competing products and firms, along with their market strength with respect to the product markets and scope for entry, including by foreign firms. Merger control includes notification requirements that allow for an investigation of market conditions and barriers to new entry.

The degree to which merger laws allow acquisitions by foreign firms varies widely from country to country. A recent comparative study of the EU and the United States argued that since 2004 the two regimes have converged significantly, but that there are still differences. The EU is less likely than the United States to accept an efficiency defence but, where it does act against a merger, the EU is more likely to accept weak rather than strong remedies (Bergman et al. 2010).

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Domestic Competition Law

Both governments and economists have a long tradition of denouncing the anticompetitive behaviour of firms.[7] Adam Smith is noted for his prescience about the harmful effects of monopolies and collusion among businesses. He feared that 'people of the same trade seldom meet together even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices' (Smith 1904 [1776]). Yet, despite the contribution of economists as far back as Smith, it has taken several centuries for the widespread enactment of domestic competition laws, the latest greatest surge taking place in the 1990s. For many years there was a dissenting current within economics based on Schumpeter's argument that large monopolistic firms were necessary to generate the profits needed for research and development (R&D). Other economists argued that the pressure of competition was the best way to promote innovation. This debate crystallized at the international regulatory level in the controversial Trade Related Aspects of Intellectual Property Rights (TRIPs) agreement which forced countries at all stages of development to adopt US/EU-style patent and copyright rules, albeit with scope for these to be amended in the case where patents were used to create monopolistic abuses (Nguyen 2008: 558–86).

The evolution of national competition policy has produced domestic competition systems which differ in their legal responses to particular problems. This section examines the main models operating in the United States and in Europe, before discussing the domestic legal systems that are emerging in other parts of the world, particularly in developing countries.

US Antitrust Law

Although not the first,[8] US antitrust law is usually considered to be the pioneer of competition law (Gerber 2006). The Sherman Act (1890) was introduced in the United States at a time when state acquisition laws were being liberalized, allowing for an increase in firm size to capture economies of scale and scope[9] in growing US markets. During the second half of the nineteenth century, price instability and price wars led some of these firms to try to make agreements and trusts with rivals

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7 Braithwaite and Drahos (2000: 185), for example, cite Emperor Zeno's edict to the Praetorian Prefect of Constantinople in 483 AD: 'We command that no one may presume to exercise a monopoly of any kind of clothing, fish, or of any other thing serving for food or for any other use … Nor may any persons combine or agree in unlawful meetings, that different kinds of merchandise may not be sold at a less price than they have agreed upon among themselves'.

8 Canada introduced antitrust legislation in 1889.

9 Economies of scale occur when unit costs of production fall with the quantity produced, economies of scope emerge when unit costs fall because two or more goods are produced jointly.

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to fix prices and maintain profit margins. The growing negative effect of these cartels and trusts on consumers, small firms and small farmers was sufficient to produce a strong lobby in favour of introducing antitrust laws (Motta 2004: 3–9).

Motta provides a history of the development of the Sherman Act which indicates that antitrust in the United States has been primarily enacted with the aim of promoting economic efficiency. By the 1990s, Gerber (2010) notes that many legal policymakers viewed US economic success as a confirmation of the superiority of US economic policy. US antitrust has been closely associated with 'US-style capitalism', which is typically critical of government intervention in the economy and with business. The United States has signed a number of bilateral agreements on competition policy but generally prefers the freedom of manoeuvre of being able to act unilaterally.

European Competition Law

The competition law of the EU is based on a general framework provided since 1957 by the EU Treaty which applies to matters that affect cross-border trade among the member states. Article 102 of the Lisbon Treaty prohibits abuse of dominance while Article 101 prohibits decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction, or distortion of competition within the common market. There is an efficiency defence permitted in Article 101 – exemptions can be given if such agreements contribute to improving the economic environment, while allowing consumers a fair share of the resulting benefit. Article 101 TFEU (earlier Article 81 TEC) was extensively used by the Commission to promote integration by preventing agreements between firms for market sharing or exclusionary purposes within the Common Market.

In 2004, major reforms were introduced that, *inter alia*, required that EU competition law generally be applied in all cases other than those whose effects are limited to one state. Restrictive trade practice issues come within the jurisdiction of the European Commission; individual member states are not permitted to apply rules that deviate from EU law. However, European member states are permitted to apply the law of their national statutes with respect to abuse of dominance if that law is more restrictive than that of the EU.[10] Domestic member state law also controls private rights of action. Thus, despite the harmonizing impact of EU competition law, domestic regimes retain domestic policy concerns and characteristics.

As the EU became a more integrated market it became anomalous to allow different principles to apply for domestic and cross-border practices, hence the more harmonized approach since 2004. As we shall see, the EU's experience in promoting intra-European trade via competition policy has influenced its attitude

[10] Council Regulation 1/2003 of 16 December 2002, regarding the implementation of competition rules laid down in Articles 81 and 82 of the EC Treaty, Article 3(2), 2003 O.J. (L1) 1,8.

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to the global system. The European Commission has long considered its powers to address private barriers to entry, which results in distorting trade between member states, a vital counterpart to the Treaty-based prohibitions on government measures and has seen the removal of trade barriers at the WTO a necessary but not sufficient condition for freeing trade.

Competition Policy in Developing Countries

Singh (2002) has characterized the structure of markets in developing countries as generally having limited competition, due to high barriers to entry and low contestability, and the tendency for a small number of firms to have large concentrations of market power. Many of the conditions in developing countries allow anticompetitive practices to thrive, and can provide a safe haven for international cartels (Evenett et al. 2001; Levenstein and Suslow 2004). This has led policymakers in these countries to 'recognise the importance of implementing an effective competition policy and law, to achieve the maximum benefit from the process of liberalisation' (CUTS 2003: 17). A body of opinion now exists which supports implementing competition law in developing countries because 'strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies' (Stiglitz 2001). There is no empirical evidence to show that restraining competition strengthens developing countries' firms (UNCTAD 2004). This is reflected in the number of developing countries that are in the process of establishing competition laws. Until 1990 only 16 developing countries had a formal competition policy, yet 50 countries completed legislation for competition laws in the 1990s and, by 2002, another 27 were in the process of doing so (Singh 2002 cited in UNCTAD 2004).

Despite the growing number of developing countries with competition policies and laws, a significant number still have not enacted any form of competition law. There are development analysts who argue that competition law may be less relevant in developing countries which might not have the resources to set up an effective competition regime and where the economy tends to be characterized by small- and medium-sized enterprises, many operating outside the formal sector, limiting the ability of formal laws and institutions to regulate their behaviour. Effective competition laws and policies rely on the prior existence of strong and stable institutions and institutional powers if they are to avoid creating greater market failures. It has also been argued that when the institutions designed to promote competition policy are weak, corruption can flourish (Pope 2000).

Gal (2003) notes that while for many developing countries the enactment of a competition law has been seen as one of the cornerstones of their liberalization and pro-market reforms, such enactment requires some important preconditions to be effective. She argues that developing countries' low level of economic development, which is often accompanied by institutional design problems and complex government regulation and bureaucracy, must be addressed before the successful implementation of an antitrust regime. Several developing countries

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have had antitrust laws for several decades, but until recently none appears to have been regularly enforced to further the aims generally associated with competition law.

In light of the lack of a fertile institutional and ideological environment for competition law in some developing countries, there are analysts who argue that for smaller economies, open trade and FDI policies are enough to ensure sufficient domestic competition at this stage of their economic development (Graham 1999: 418; see also Kronthaler et al. 2005; OECD 2003, 2004). Hylton and Deng's (2007) analysis of whether the presence of a competition law has an impact on the intensity of competition in a country's economy suggested that the effects were ambiguous or not significant enough to have an economic impact. Liu (2004) too has noted in the case of Asia, that fostering competition is harder than enacting competition laws. He argues that calling these 'fair trade laws' causes immediate confusion because 'fairness can mean many things and anything but efficiency, the dominant goal of antitrust laws'. Much of the problem lies in the transplantation of competition laws from other jurisdictions, without the accompanying ideological environment, as Gal has noted. As a result, competition laws are not prioritized in the political arena and competition authorities are not respected. Governments are not always able to provide sufficient legislative push to enact or implement an effective competition law. This observation has led, on the one hand, to proposals for an international agreement on competition, increased competition advocacy and capacity-building from international bodies such as the OECD, International Competition Network (ICN),[11] WTO and World Bank, and, on the other hand, a commensurate increase in opposition to such proposals from various non-governmental organizations.

The next section will look at the proposals for and against a multilateral competition agreement, along with the various organizations and actors engaged in this debate.

International Competition Rules and Cooperation

The protracted debate surrounding the need to introduce international competition laws has a longer history than most domestic competition laws. Competition disciplines were included in the draft constitution of the International Trade Organization (ITO) after the Second World War. This included provisions to address 'restrictions imposed by private combines and cartels' on the grounds that private agreements that divided markets undermined any trade liberalizing

[11] The ICN aims to provide competition authorities with an informal structure for maintaining regular contacts and addressing practical competition concerns. This should serve to build consensus and convergence towards sound competition policy principles across the global antitrust community. The ICN is unique in being as yet the only international body devoted exclusively to competition law enforcement. See: www.internationalcompetitionnetwork.org.

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measures governments were implementing. Chapter V of the Havana Charter set out to specifically address restrictive business practices with a requirement that governments police anticompetitive practices with an international dimension (Anderson and Holmes 2002: 536). Due to opposition from the US Congress the Charter was not ratified and its replacement, the General Agreement on Tariffs and Trade (GATT 1947), omitted Chapter V. Yet the relevance of international provisions to address restrictive business practices remained.

UNCTAD subsequently became a focus for the issue of competition in developing countries. In 1980, after nearly a decade of negotiating, an agreement was reached and adopted by the UN General Assembly on a nonbinding code of conduct relating to competition and international trade, commonly known as 'The UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices'. Since 1994, the Asia Pacific Economic Cooperation (APEC) forum's Collective Action Plan has been developed in order for member economies to 'consider developing non-binding principles on competition policy and/or laws in APEC'.[12]

At the OECD, the Competition Law and Policy Committee has investigated a number of aspects of national competition law and policy and the convergence of such national laws and policies. As regards developed countries, the OECD Council has adopted a number of Recommendations relating to the international dimensions of competition law, including a series of Recommendations from 1967 relating to bilateral cooperation in competition law enforcement and the adoption in 1998 of the Recommendations Concerning Effective Action Against Hard Core Cartels. The OECD Joint Group on Trade and Competition has also investigated the interaction between trade and competition policies, and an annual Global Forum has been established to further outreach and promote cooperation and understanding between and among developing and developed country competition authorities.

Work at the OECD developed the concepts of negative and positive comity, which are essentially a formal commitment to take others' interests into account when one applies one's own laws. Positive comity is sometimes incorporated into bilateral or regional competition agreements. Under such agreements, when the anticompetitive business effects of a cartel or boycott cut across the boundaries of more than one jurisdiction, the country affected may request the competition authority in which the cartel or boycott originates to take action vis-à-vis this cartel in its territory. However, the effectiveness of positive comity often is limited to instances when the anticompetitive effects of conduct affect both the requesting state and requested state; otherwise, the requested party has little capacity to prohibit the conduct, perhaps even the reverse may be the case if the party permits export cartels.[13] There are cases of effective positive comity, such as when the

[12] The objective was a part of the response to the Bogor Declaration committing all APEC member economies to free trade and investment by 2010 for the developed economy members or 2020 for the developing economy members.

[13] For example, the US Webb Pomerene Act, 15 USC, 61–6 (1994) and the Japanese Export and Import Transactions Law, Law No. 299 of 1952 as amended.

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US and Canadian authorities successfully cooperated in their investigation of a Japanese fax paper cartel to bring criminal charges against the cartel. However, Japan was not the requested party in this example. Nevertheless, despite the limited effects of positive comity currently (Marsden 2010), it is argued that a positive comity approach ultimately may prompt the parties to push forward the eventual harmonization of most, if not all, of their respective competition laws (Matsushita 1999: 463).

Negative comity occurs when a party to the agreement refrains from applying its competition law to the conduct of an enterprise if such application conflicts with governmental policy of the other party. This can happen if one state applies its competition laws to prohibit an international merger that is permitted by the government of another state, resulting in conflicting jurisdictions. Under negative comity, the former state would refrain from applying its competition law to that merger out of respect for the governmental policy of the latter state. Again, this is an interesting approach but with limited effects to date.

And in addition to the establishment of soft competition law in the form of recommendations and guidelines by different intergovernmental organizations, the issue of a multilateral competition agreement in the WTO has continued to bubble under the negotiating table, acting as a reference point for those for and against binding multilateral competition laws.

A Multilateral Competition Regime?

In December 1996, during the first Ministerial meeting of the WTO in Singapore, a decision was taken to establish a working group to study the interaction between trade and competition policy, including anticompetitive business practices. The Ministerial Declaration stated that any future negotiations regarding multilateral disciplines in this area would take place only after an 'explicit consensus decision' was reached by WTO members. This mandate was confirmed at the Doha Ministerial in 2001. As with the ITO, a lack of consensus has prevented the negotiation of any type of multilateral competition agreement in the WTO. The July 2004 Framework Agreement formally dropped the issue of trade and competition policy from the Work Programmes of the Doha Round. This was primarily due to the consistent opposition of most developing countries and the opposition of the United States to the proposals pushed by the European Union.

The EU sought a general commitment to a competition law by every WTO member, but was seemingly unwilling to commit itself to disciplining the behaviour of its own firms in the rest of the world. The resource-short developing world saw little interest in it for them and suspected a hidden market access agenda. The United States meanwhile was quite content with the extraterritorial reach of its own laws and proclaimed the sufficiency of its own voluntary offers of assistance to other partners.

Bhattacharjea (2006) argues that developing countries objected to the EU proposal – that would at a minimum prohibit hardcore cartels and require members to enact

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competition laws incorporating the fundamental principles of non-discrimination, national treatment and transparency – for a variety of reasons. While developing countries acknowledged the harm caused by international cartels, they emphasized the need to respect their diversity in terms of stages of development, socioeconomic circumstances, legal frameworks and cultural norms. There was vocal opposition from many NGOs, such as Third World Network and ActionAid, to a so-called 'one size fits all' agreement, transplanting a foreign competition policy framework into environments lacking in experience, expertise and institutional memory. Yet no other proposals were tabled and the 'no new issues' campaign ultimately dominated the WTO negotiating agenda. This suggests that many developing countries had policy objectives that were seen as more important than promoting efficiency and competition. Nevertheless, somewhat paradoxically, many of these same dissenting developing countries have entered into bilateral and regional trade agreements – where arguably they have less bargaining strength than in the multilateral setting of the WTO – that include competition provisions, although such provisions are rarely binding (Bourgeois et al. 2008).

But before focusing on bilateral and regional competition provisions, it is worth briefly mentioning the view that multilateral or preferential agreements on competition policy could in practice provide a means to reduce the use of antidumping. In reality however, antidumping duties are not systematically targeted at monopolistic predatory pricing (Bourgeois and Messerlin 1998) and there is little connection between these policy instruments. Hoekman (1998) has argued that there is no correlation between inclusion of competition provisions in preferential trade agreements (PTAs) and provisions to limit antidumping.

There are nevertheless a number of PTAs in which signatories have agreed to use domestic competition policy – instead of antidumping sanctions – to address concerns about dumping. This applies for example to the Canada–Chile FTA, the Australia–New Zealand agreement and most agreements involving European Free Trade Association (EFTA) countries. Nordstrom (2009) recently argued that the EU should include competition instruments in its PTAs and preclude antidumping. But it would be unrealistic to assume that this notion could significantly reduce resort to antidumping action.

Bilateral and Regional Competition Provisions

The ongoing rejection of any sort of competition framework within the WTO coincides with the increasing negotiation of competition provisions in bilateral and regional trading agreements, as a halfway house or stepping stone towards an agreement at the international level. This development has not been unanimously welcomed, partly because of the costs of negotiating and implementing the bilateral or regional competition provisions when the economic and welfare effects of such regimes are as yet inconclusive. The alternative option of negotiating a Mutual Legal Assistance Treaty (MLAT) is preferable to some commentators. MLATs set

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the terms for competition authorities in the two countries assisting one another in securing and sharing evidence that is not readily obtainable.

Clearly, improving interagency relationships and cooperation mechanisms will facilitate greater coordination of competition investigations and prosecutions. However, MLATs cannot be applied to jurisdictions without competition agencies, and are less effective among agencies with different levels of expertise, resources and enforcement mechanisms.

The more comprehensive PTA competition regimes negotiated can potentially overcome some of these challenges and discrepancies. In principle, the economic benefit of including competition law and provisions within PTAs is to ensure that liberalization will not be undermined by anticompetitive business practices within the member countries, to the disadvantage of consumers and firms. Beyond this rule of thumb, there is little evidence to make definitive conclusions about the economic benefits of the different types of competition-related provisions found in PTAs. However, the inclusion of competition provisions in trade agreements is potentially beneficial, particularly for developing countries who tend to lose more from the anticompetitive practices of multinational corporations, which have especially detrimental consequences in a context of economic scarcity.

In regional groupings like MERCOSUR, the Andean Pact and COMESA (Common Market for Eastern and Southern Africa), where the individual Members of the agreement are at very different states of economic development – some without a competition law or a functioning enforcement agency and with different approaches to sovereignty pooling – there are benefits to establishing a strong regional enforcement mechanism. MERCOSUR is an example of an intergovernmental ministerial approach to regional competition law that has not been implemented effectively. This failure is usually attributed to the unwillingness of some of the member states to pass national laws or domestic regimes giving effect to external regional obligations. The lack of effective regional competition remedies has contributed to a degrading of the free trade schedules for this common market. And while some MERCOSUR members have developed competition law and policy, without an effective domestic law in all members of the agreement there can be no legal basis for a member to take any action against practices organized in another member state in respect of the effects upon its own territory. The reasons for the poor implementation of regional competition provisions are both institutional and behavioural, however, due to a lack of competition culture or political will to promote implementation domestically. A well designed regional competition agreement needs to takes account of these local realities and act as a policy tool to create the national structural and behavioural environment necessary to benefit from regional competition provisions.

North–South agreements have greater development benefits and better implementation records when the more developed party offers appropriate technical assistance and capacity-building, and therefore increases the ability of the less developed regional partner to benefit from the provisions. For those members with nascent or non-existent competition regimes, technical assistance provisions should aim to impart the necessary expertise and experience over the

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long term. This promotes the behavioural changes necessary for a competition culture. Indeed, while PTA competition provisions can offer the legislative push and policy lock-in necessary for sustained reform, it can be more beneficial initially to focus on establishing a culture that values competition at the national or sub-regional level in the region. The provisions can focus primarily on the exchange of information, technical assistance and capacity-building. Subsequent negotiations can expand the agreement. More general commitments should only be implemented after the necessary expertise and cooperation mechanisms have been developed. Provisions could be included that oblige members, over a specified period of time, to adopt competition laws that can address the full range of private and state-created anticompetitive practices and outcomes. Regional laws can act as a temporary alternative to the expense of establishing and implementing domestic competition laws.

Conclusion

This chapter has aimed to provide an introduction to the main features of competition law and policy, and the policy context in which they are framed. Competition law and policy are now seen as important tools to underpin trade liberalization and ensure that the benefits of open markets are not undermined by the restriction of competition between firms in developing as well as developed countries.

At a domestic level, not only have governments increasingly addressed the restriction of competition through different policies and legal instruments, they have also used competition law to promote a variety of other trade and social policy objectives. The result is that there is very little uniformity in domestic competition laws, and very little consensus on how best to tackle cross-border anticompetitive business practices collectively. This divergence has been gradually eroding over time, but not enough to secure agreement on an international framework. Such a framework seems likely to remain elusive for the foreseeable future. Developing countries have been sceptical of EU motives in advocating it. They are backed by the United States, which prefers its own unilateral and selective bilateral approaches. But there are signs that the ground is not entirely frozen. The willingness of developing countries to agree to include competition provisions in bilateral agreements is in marked contrast to the refusal to allow trade and competition discussions to proceed after the Cancun WTO Ministerial. As practical cooperation evolves and custom and practice emerge, we may eventually see a codification at the WTO of best practice as it materializes in bilateral agreements and in fora such as the International Competition Network.

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