


**“Competition Law and Policy in Promoting
Development at a Regional Level: Stocktaking of the
UNCTAD/IDRC Project”**

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Competition Workshop
TRALAC – UNCTAD
with the support of IDRC
Cape Town, 4 October 2006



✓ **How can Competition Law and Policy (CLP) contribute to development?**

✓ **What development-friendly competition provisions need to be included in an RTA?**

OUTLINE

- ✓ Anti-Competitive practices and competition law and policy (CLP)
- ✓ Regional Trade Agreements (RTAs), efficiencies and development
- ✓ Competition-related provisions (CRPs) and RTAs
- ✓ Promoting cooperation in enforcement between agencies
- ✓ Way forward: development issues concerning bilateral and RTAs with CRPs
- ✓ The role of UNCTAD



**Anticompetitive practices:
role of CLP**

Barriers affecting Trade

A. Government Barriers: Tariffs

Non-Tariff barriers: quotas, customs valuation, customs formalities, standards, subsidies, anti-dumping actions, etc

B. Enterprise Barriers

**Cartels: allocating markets, fixing prices
fixing production/output quotas**

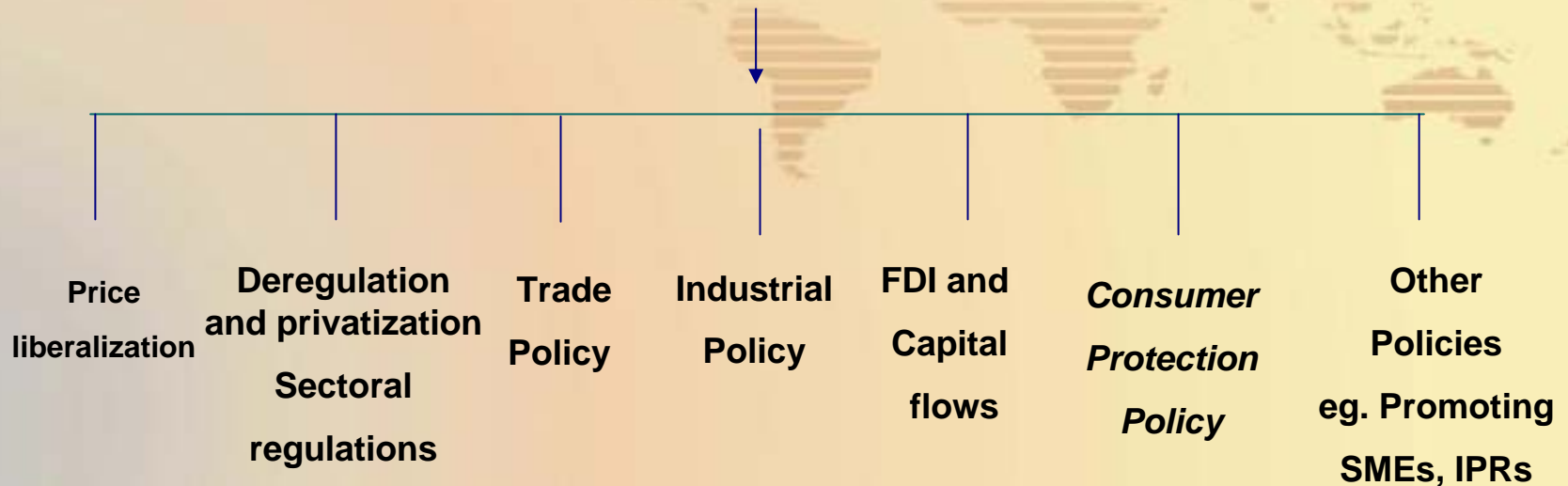
Other anti-competitive restraints

**dumping, boycotts (refusal to deal)
differential pricing, tied-selling, etc**

Anti-competitive Practices Affecting Development

- **Trade is an engine of Growth and Development**
 - Practices affecting trade affect development
 - **Anti-competitive practices affect**
 - Efficient allocation of resources
 - Level of prices
 - Quality & choice for consumers
 - Innovation and R&D efforts
- ⇒ **Not only final consumers are adversely affected, but also ENTERPRISES using anti-competitive output as intermediate inputs**
- ⇒ **Hence, losing COMPETITIVITY**

Market-oriented Policies



Link with:

Competition Law

For these reforms to have positive effects, it is essential to promote competition

Why Competition Law?

(Objectives)

Challenge anticompetitive practices in order to:

- ✓ **Improve economic efficiency**
- ✓ **Increase consumer welfare**
- ✓ **Optimal allocation of resources**
- ✓ **Promote innovation**

How to promote competition in free market economies?

Challenging anti-competitive practices by enterprises trying to distort competition

Cartels

- ✓ Price-fixing
- ✓ Market allocation
- ✓ Combating outsiders (exclusion of competitors)

and, especially damaging to government procurement

- ✓ Bid-rigging cartels (collusive tenders)

Types of Cartels

- ✓ Domestic Cartels
- ✓ Import Cartels *
- ✓ Export Cartels *
- ✓ International Cartels *

* Clearly affect trade flows

Vertical restraints

- ✓ Resale price maintenance
 - ✓ Refusals to deal
 - ✓ Exclusive dealing
 - ✓ Tied selling
 - ✓ Full line-forcing
 - ✓ Predatory pricing
- all can affect trade flows, in both import and export distribution networks

Merger control might lead to dominant firm or to monopoly

- ✓ Most mergers pose no anti-competitive problems
- ✓ Only those that create **DOMINANCE** should be challenged
- ✓ **Relevant Market: key definition**
(e.g. in an open market if the FTA is the relevant market, having a **SINGLE** national firm may not be anti-competitive as there are other players)



All these show that...

- ✓ Without a national law and competition authority, there is not much the harmed country can do
- ✓ Even with a competition authority, bilateral and international cooperation is necessary
- ✓ Regional competition rules can potentially reinforce the bargaining position of small developing economies challenging anticompetitive practices of international corporations.

A faint, stylized world map is visible in the background of the slide, rendered in a light yellow/gold color against a light orange background.

RTAs, efficiencies and development


Emerging issues in RTAs

- ✓ Increasingly cover not only trade in goods but also « behind the borders » areas, i.e. services, investment, competition policy, IPRs, government procurement, labour, environment and development cooperation .
- ✓ Can have trade creation and trade diversion effects
- ✓ Must also get rid of enterprise-level distortions:
 - Competition provisions in RTAs
 - Competition principles in sectoral regulations and IPRs
 - Common Competition Rules in RTAs (eg. COMESA, Andean Community)



RTAs aim at increasing efficiencies and
Development by:

- ✓ Increasing economies of scale
- ✓ Creating a larger market free of trade barriers
- ✓ Creating a more competitive setting



Competition provisions: key for the
success of SMEs, for Consumers

Competition Provisions in RTAs:

- ✓ Follow the logic that trade needs to be freed from enterprise-level distortions
- ✓ May contain a commitment for both parties to adopt (and enforce) competition legislation
- ✓ May provide for Special & Differential Treatment (S&D): safeguards interests of less-developed partners, exceptions to key sectors, transitional time periods, technical assistance
- ✓ For developing countries: non-reciprocal S&D
- ✓ Exchange of information subject to confidentiality rules



Common Regional Competition Rule usually involve:

- ✓ Common Supranational Competition Authority
- ✓ Principle of subsidiarity usually applies with respect to national competition authority in member countries (if they exist).
- ✓ A prohibition of cartels involving more than one member-country
- ✓ Control of abuse of dominance
- ✓ Region-wide merger control



**Competition Related Provisions (CRPs) and
Regional Trade Agreements
UNCTAD/IDRC Project**

Dissemination phase

Competition Provisions in Regional Trade Agreements (RTAs):



Seminars organized in:
Switzerland, Turkey, Korea,
South Africa and Brazil

- Reasons prompting the signature of agreements:
not sufficiently explored

- ✓ What are burdens involved in implementing those agreements?
- ✓ What are the development implications of those agreements?

⇒ Low degree of implementation

- ✓ Need to review these agreements and provisions bearing in mind their effective economic and development impact and the needs of developing countries?
 - ✓ Economic welfare: what are the gains for consumers?
 - ✓ Can bilateral and RTAs contribute to enhance productive capacities and contribute to poverty alleviation?
- ✓ Dissemination phase: propose new modalities of support to developing countries in negotiating agreements
Publication prepared with the support of IDRC, Canada and launched at the Fifth Conference to Review all Aspects of the UN Set on Competition (Antalya, Turkey, November 2005)

Which Regional Trade Agreements containing CRPs are we referring to?

Africa

- CEMAC, UEMOA/WAEMU
- COMESA, EAC
- SACU, SADC

Asia

- ASEAN
- SAARC
- APEC

Latin America and the Caribbean

- MERCOSUR
- Andean Community
- CARICOM
- NAFTA (+ US & Canada)
- Latin American FTAs (US-Peru, US- Colombia, US- Chile, CAFTA-DR-US)

Agreements with the EU

- EFTA
- Pre-accession agreements
- Euromed, EU-SA TDCA, EU-Mexico, EU-Chile
- EPAs?

Which agreements containing CRPs are we referring to? (Cont'd)

Proliferation of cooperation agreements other than formal integration agreements

- Agency-to-agency - ATAs or agreements of mutual legal assistance – MLATs
- Informal co-operation e.g. through the ICN
 - Seemingly more efficient and less burdensome than RTAs
 - Value added over spontaneous cooperation between agencies
 - Likely to assist the evolution of cooperation (including follow-on agreements)
- Technical cooperation without commitments (non-enforcement related cooperation)
 - Non-reciprocal facility
 - Provisions on Special and Differential Treatment

Agreements including competition provisions (*)		
	UE Style	NAFTA Style
Agreements included	<ul style="list-style-type: none"> •Chile with EU, EFTA, Korea •Mexico with con: EFTA, EU, Japan •<u>Others</u>: Costa Rica-Canada, Panama-Singapore 	<ul style="list-style-type: none"> •Chile with Canada, Central America, US, Mexico •Mexico with: Israel, Chile, Uruguay •Others: Central America - Panama, Panama-Taiwan, Peru-US, Colombia- US
Objetives	Commitment to apply laws as a way to avoid that anticompetitive practices hinder benefits resulting from liberalization. To promote cooperation and coordination	To adopt or maintain a legislation or ensure its enforcement; to promote trade and investment, to recognize the importance to cooperate and coordinate, to promote efficiency and consumer welfare included in some cases.
Basic contents	Detailed commitments to coordinate and cooperate including: notification, coordination on enforcement, consultations and technical assistance; eventually negative or positive comity.	References to monopolies and State enterprises. To promote cooperation, transparency and consultation. Agreements usually followed by ATAs.
Dispute Settlement Mechanism	Not aplicable to competition. Possible consultation.	Not aplicable to some provisions; basically addresses monopolies and State enterprises.

*Source: Silva & Alvarez: Cooperación en políticas de competencia y acuerdos comerciales de América Latina y el Caribe: desarrollo y perspectivas. ECLAC, 2006

RTAs and Competition Policy

Agreements including the US and Canada and Latin American partners

- **Agreements (FTAs) with the US**
 - **NAFTA (1994)**
 - **US-Chile (2003)**
 - **CAFTA-DR-US (2006 reference to competition in Telecoms)**
 - **US-Peru (2006) (...) pending ratification in both parliaments**
 - **US-Colombia (2006)**
- **Agreements with Canada**
 - **Canada-Chile (1996)**
 - **Canada-Costa Rica (2001)**
- **Agency to Agency agreements**
 - **Canada-Chile MOU (2001)**
- **MLATs (US-Brazil 1999)**

Japan: Cooperation with less experienced countries

- Enforcement cooperation should be more flexible and start from more elementary levels
- Nevertheless it is desirable to establish a certain degree of common understandings, such as:
 - Commitments to control anticompetitive activities
 - Commitments to ensure consistency with the core principles of non-discrimination, transparency and procedural fairness;
 - Commitments to cooperate in controlling anticompetitive activities in accordance with developmental level of each country.
- Technical assistance

Key for developing countries and regions

Source: Japan Fair Trade Commission (JFTC). UNCTAD/KFTC/IDRC Seminar

Agreements containing Competition Provisions involving the EU

- **Agreements signed with pre-accession countries (Turkey, Croatia, Macedonia)**
- **Agreements with non accession countries:**
 - **European Neighbourhood Policy (ENP)/Euro-Med countries (1995).**
 - **Other countries, e.g. South Africa TDCA (1999), Mexico (2000), Chile (2002)**
 - **Economic Partnership Agreements between the EU and ACP countries**

Dedicated cooperation agreements (inter-agency):

- **MoU (Korea) (2004),**
- **Enforcement cooperation agreements (United States(1991) , Canada, Japan)**

European Competition Network (ECN)

Competition rules in non pre-accession RTAs

Content of the Agreements:

- Main aim: to challenge anti-competitive practices and distortionary state aids that would be illegal under EU law

EU-South Africa(SA) TDCA (1999):

- Opportunities for securing market access in both directions.
- In merger cases in SA, *informal* cooperation has taken place, even though not covered by the TDCA.

EU-Mexico

- Large number of notification provisions, used predominantly by Mexico (31 as opposed to 1)

Euro-Med:

- More harmonization than EU-SA or EU-Mexico. Promise of end to use of countervailing duties if EU State aid rules applied

Evolving characteristics of competition provisions in EU FTA's

EU FTAs	Substance of competition policy				Reference to legislation				Technical cooperation
	Mergers & acquisitions	Abuse of dominant position	Concerted practices	Public (state-aid)	Mutual recognition of legislation	Sole reference to EU legislation	Ban on positive discrimination for commercial state monopolies	Ban on special an exclusive rights for (public) enterprises	
Algeria & Lebanon MED 1		✓	✓				✓	✓	
Israel MED 2		✓	✓	✓			✓	✓	
Morocco, Jordan, Palistinian authority & Tunisia MED 3		✓	✓	✓		✓	✓	✓	
South Africa		✓	✓	✓	✓				✓
Mexico	✓	✓	✓		✓				✓
Chile		✓	✓	✓	✓			✓	✓

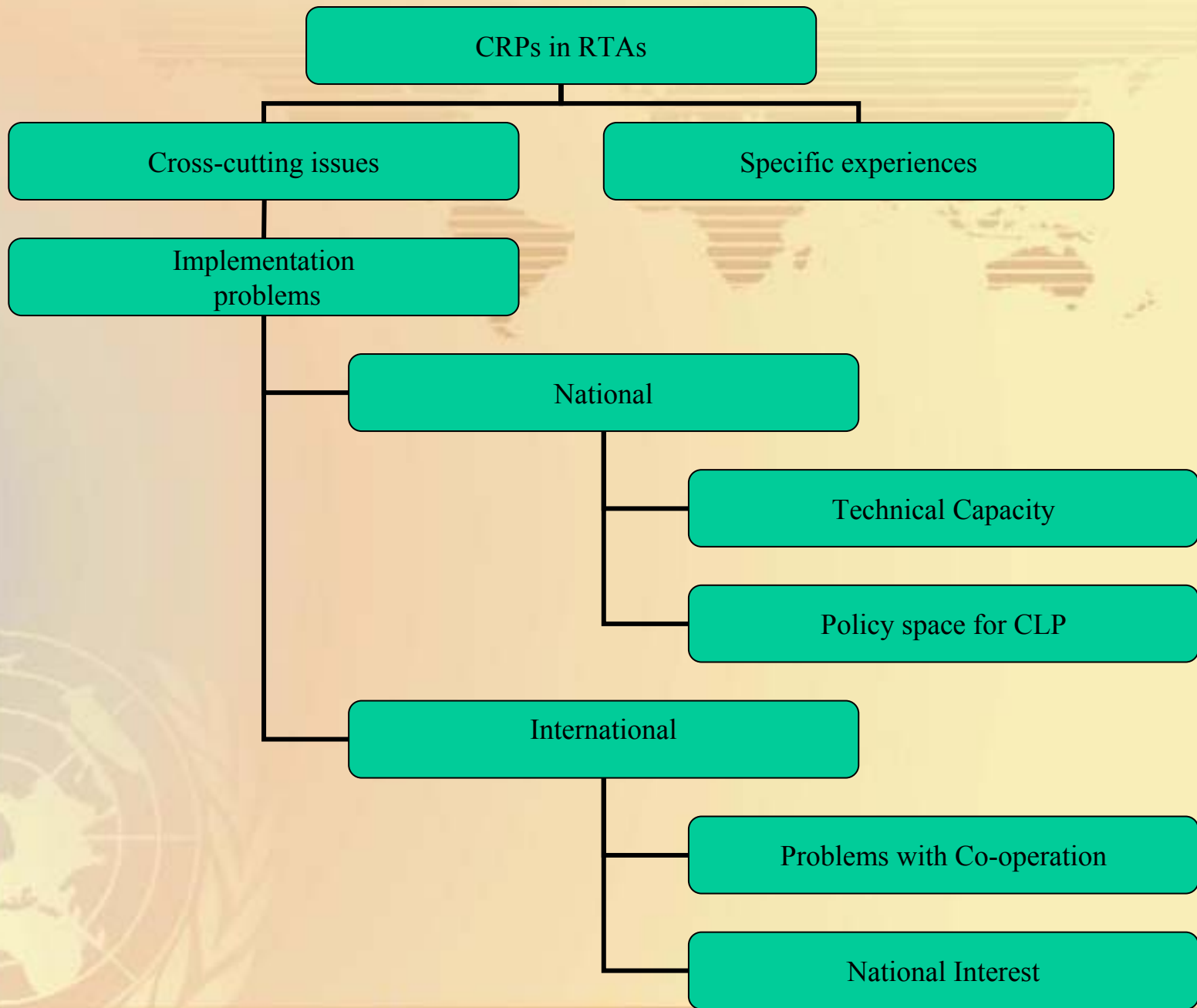
Szepesi, S. (2004) «Comparing EU free trade agreements, Competition Policy and State Aid » European Center for Development Policy Managment (ECDPM)

Competition Provisions in RTAs

Issues that merit further discussion (*dissemination phase*)

- RTAs have proliferated and sometimes, commitments overlap
- Burden and benefits of agreements: not always balanced
- If there is a lack of implementation of CRPs in RTAs, benefits are insufficiently clear and costs are high
 - Need to examine cross-cutting and specific experiences, national and international implementation problems
- **If stronger markets and inclusive growth are the key for economic development, need to examine:**
 - Economic and development impact of CLP and regional competition law and policies
 - What formulations of CLP are most friendly to poverty alleviation and efficient development?

Implementing Competition Provisions
in bilateral and RTAs



Competition Provisions in RTAs

Issues that merit further discussion (*dissemination phase*) cont'd

Questions related to the 'international' implications of competition provisions in RTAs include:

- In what ways, have competition provisions fostered cooperation between agencies on actual enforcement cases?
- What are the Pros and Cons of binding competition enforcement issues?
- What disputes have arisen on CLP between signatories of agreements? How were they solved?
- What is the relationship between cross-border mergers and acquisitions and implementation of CRPs in bilateral and RTAs?

Competition Provisions in RTAs

Issues that merit further discussion (*dissemination phase*) cont'd

Questions related to the 'National' implications of the implementation (or not) of agreements:

- To what extent have RTAs been used to bring forward the date of enactment of a competition law? How did the RTA existence or negotiation affect the political economy of competition law enactment and enforcement?
- In what ways, if at all, have competition provisions strengthened the deterrent effect of national laws?
- How can bilateral and RTAs contribute to strengthen the powers, budget and resources of competition agencies?



**Promoting Co-operation in enforcement
between agencies**

International cooperation

Anti-competitive practices are increasingly cross-border while CLP enforcement stops at the borders:

- International cartels
(e.g. export and import cartels and bid-rigging)
- Vertical restraints by dominant firms
(e.g. prohibition of resale price maintenance)
- Mega Mergers and Acquisitions take place abroad, may be authorised there but often have anti-competitive effects in third countries

Types of Cooperation Agreements

a) Bilateral Agreements (FTAs, others)

- ✓ Provide experience to participate in wider schemes
- ✓ Easier enforcement
- ✓ Imbalance of interest if large and small economies involved
- ✓ May be a risk of inconsistencies and vy burden in case of proliferation of bilateral and regional agreements

b) Regional Integration

- ✓ Some involve common competition rules as a longer-term objective (COMESA, CARICOM, Andean Community)
- ✓ Others aim at cooperation in the field of competition (SACU)
- ✓ burdensome; may duplicate efforts

How can cooperation strategies be deepened and widened?

Cooperation instruments

- NOTIFICATION
- CONSULTATIONS
- COOPERATION FOR ENFORCEMENT THROUGH INFORMATION
- EXCHANGE OF INFORMATION
- NEGATIVE COMITY
 - (RESPECT FOR INTEREST OF THE COUNTERPARTY)
- POSITIVE COMITY
 - (REQUESTS FOR ENFORCEMENT ACTIONS OF THE COUNTERPARTY)
- TECHNICAL ASSISTANCE

Are developing countries able to adopt these instruments?

Some limitations of cooperation agreements*

- Soft law obligations:
 - provisions have been described as ‘vague and imprecise’
 - each party effectively interprets the extent of its obligations
 - unenforceable in law between the parties
 - no dispute settlement procedures
- Restrictions on exchange of confidential business information:
 - the arrangements do not require or permit any information exchange that would otherwise not be permissible
 - this appears to be the *chief limitation* on cooperation
 - The *definition* of confidential information, as well as its potential *use* were identified as areas which need further study

*(Marsden, 2006)

Questions for further research

- How much co-operation is going on under formal provisions and how much informally?
- Are there examples of cases where cooperation, if it had been provided, might also have made a difference?
- What were the impediments to co-operation?

Some elements to appreciate the graduality and flexibility in the implementation of Competition Law and Policy

**Flexibility in the implementation/
case by case analysis**

Competition Bill: consensus, consultations with the Legislative Authority, civil society, adoption of the Law.
**Sensitizing at the level of economic actors (Competition culture).
Inventory of the Laws. Assessment of the socio-economic situation in each country**

Design of the institution in charge of implementing the Law

Training officers in charge of implementing the Law


Law enforcement: investigations, analysis, data collection

Enforcement of sanctions and remedies

**Cooperation on case solving
Adopting regional competition frameworks**

**Peer Review
Cooperation on competition provisions**

Cooperation on Competition Provisions: advanced stage



**Way Forward:
Development Issues concerning
RTAs with CRPs**

CRPs in bilateral and RTAs: impact on economic development and social impact

✓ One must not to forget the priorities for developing countries and most particularly LDCs!

✓ Is there a possible positive social impact?

Contribution to economic welfare, increase of productive capacities and poverty alleviation

✓ What formulations of CLP are most friendly to poverty alleviation and efficient development?

✓ Role of a regional or national competition body in directly targeting issues of social concern: a quest for a long-lasting competition culture

✓ CLP uses exceptions and exemptions to yield to other policies (SMEs, affirmative action, culture preservation)

What about the informal market (60% of the population)?

CRPs in RTAs: impact on economic development and social issues **cont'd**

- ✓ Linking CLP provisions to the other regulation mandated by the RTA and to existing domestic regulation
- ✓ What is the optimal mix as well as the most appropriate sequencing of reforms?
- ✓ How is balancing of national CLP objectives actually performed when they conflict?
- ✓ Proper balance between sector regulators and competition authorities
- ✓ CLP as a complement to Industrial Policy

Specific topics that merit further research

✓ Tackling poverty alleviation with CLP and consumer protection:

- CLP and privatised schooling, schooling support services, competition in schooling
- CLP in Public Health: pricing and availability of pharmaceuticals
- Impact of FDI, competition, cross-border anti-competitive practices on food distribution and prices
- Consumers and Competition Policies: food security and income generation
- Consumer protection and financial services for the poor: new approaches to regulation
- Competition Law for sustainable development, and consumer protection for sustainable consumption.

Specific topics that merit further research

✓ Specific Challenges for implementing CLP and Consumer Protection in a developing country setting

- Addressing the legacy of pervasive state intervention, rushed privatization and deregulation, highly concentrated industries and cooperative relationships between producers.

- What is the impact of inequality and a large informal sector on appropriate developing country CLP and consumer protection?

- Applying CLP and consumer protection in a developing country setting

Local history, data shortages, human resource constraints and other considerations

- Regional strategies for improved knowledge sharing and competition and consumer protection advocacy

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The Role of UNCTAD

Competition and Consumer Protection work in UNCTAD:

Ensuring consistency among the three pillars

Consensus building

Research

Technical cooperation



UNCTAD's interactive and mutually reinforcing pillars of work consist of international consensus-building, research and policy analysis, and technical cooperation.

The dissemination phase aims at ensuring the interconnexion between these three pillars



UNCTAD research activities and technical cooperation

To support efforts of developing countries in the field of
CLP and Consumer Protection

Sao Paulo Consensus (UNCTAD XI), June 2004

- ✓ Help ensure that anti-competitive practices do not impede or negate the realization of the benefits that should arise from liberalization in globalized markets, in particular for developing countries and LDCs
- ✓ UNCTAD should further strengthen analytical work and capacity building activities to assist developing countries on issues related to competition law and policies, including at a regional level.

UNCTAD mandates on Competition Law and Policies - Promoting regional competition law and policies -

Fifth UN Conference to Review all Aspects of the UN Set on Competition (Antalya, Turkey, november 2006)



launching of the publication

Intergovernmental Group on Experts on Competition Law and Policies – 31 October-2 November 2006



- International cooperation in investigating and prosecuting hard-core cartels affecting developing countries;
- Cooperation and dispute settlement mechanisms relating to competition policy in regional free trade agreements, taking into account issues of particular concern to small and developing countries

A large, stylized world map in the background, rendered in a light orange color with horizontal lines. The map shows the continents of North America, South America, Europe, Africa, and Asia.

Many thanks

For further information

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