“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
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✓ 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
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.
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
Competition Provisions in Regional Trade Agreements (RTAs):

• 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

Publications 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)

Seminars organized in:
Switzerland, Turkey, Korea, South Africa and Brazil
Which Regional Trade Agreements containing CRPs are we referring to?

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

**Asia**
- ASEAN
- SAARC
- APEC
- MERCOSUR
- Andean Community

**Latin America and the Caribbean**
- 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
<table>
<thead>
<tr>
<th>Agreements including competition provisions (*)</th>
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<td><strong>Agreements included</strong></td>
<td><strong>UE Style</strong></td>
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| • Chile with EU, EFTA, Korea  
• Mexico with con: EFTA, EU, Japan  
• Others: Costa Rica-Canada, Panama-Singapore | **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)
  • CAFTA-DR-US (2006 reference to competition in Telecoms)
  • US-Peru (2006) (…) pending ratification in both parliaments

• 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:
  - 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

<table>
<thead>
<tr>
<th>EU FTAs</th>
<th>Substance of competition policy</th>
<th>Reference to legislation</th>
<th>Technical cooperation</th>
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<tr>
<td></td>
<td>Mergers &amp; acquisitions</td>
<td>Abuse of dominant position</td>
<td>Concerted practices</td>
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<tr>
<td>Algeria &amp; Lebanon MED 1</td>
<td>✓</td>
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<td>Israel MED 2</td>
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<td>Morocco, Jordan, Palastinian authority &amp; Tunisia MED 3</td>
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<td>South Africa</td>
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<td>Mexico</td>
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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?
CRPs in RTAs

Cross-cutting issues

Specific experiences

Implementation problems

National

Technical Capacity

Policy space for CLP

International

Problems with Co-operation

National Interest
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 Adquisitions 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, CARÏCOM, 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:

- Sensitizing at the level of economic actors (Competition culture).
- Inventory of the Laws. Assessment of the socio-economic situation in each country.
- Competition Bill: consensus, consultations with the Legislative Authority, civil society, adoption of the Law.
- 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.
- Peer Review
  - Cooperation on competition provisions
  - Cooperation on case solving
  - Adopting regional competition frameworks.

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 co-operative 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
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

• 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
Many thanks

For further information

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