



The Role of International Cooperation in Building an Effective Competition Regime

Introduction

Although competition policy has a long history in Canada and the United States (US) (they adopted their competition laws in 1889 and 1890 respectively), it took many years for countries outside North America to adopt competition law. In 1970, there were only about 20 countries with a competition law. The decade of the 1990s saw considerable changes in the priority given to competition law in many jurisdictions. Perhaps, the single biggest change is in the number of countries that have enacted such laws. Although counts vary, all point to the fact that many countries have adopted competition laws for the first time. The principal finding is that about 40 jurisdictions adopted some type of competition law since 1990, taking the total number of jurisdictions with such laws to above 80. Also of interest is that about 75 percent of the 40-odd jurisdictions were developing countries.

Lack of Competition Culture

Enacting a competition law may not necessarily translate into an effective competition regime. It came out very clearly in the 7-Up project that competition regimes in most of the countries selected therein are quite ineffective. The lack of financial and human resources affect the implementation of competition law in most of these countries. In general, the problem is more pronounced in the Asian than in the African countries. For example, the budgetary resources in the three Asian countries were much below those in South Africa and Zambia, two of the African countries chosen (CUTS, 2003a).

Indeed, the central problem is that of political “market failure”. In each national jurisdiction, there is a tendency for institutional underinvestment. There are not necessarily enough national constituencies who support independent competition law enforcement. Although the problem is not peculiar to developing countries, it becomes more acute in jurisdictions that are at early stages of institutional development and where competition culture is not widespread.

Developing countries usually start implementing competition laws under very unfavourable circumstances. Kovacic (1997) gives a list of factors that make competition law enforcement a difficult task for developing countries’ authorities, to which one could add a few more elements in order to get the following set of obstacles:

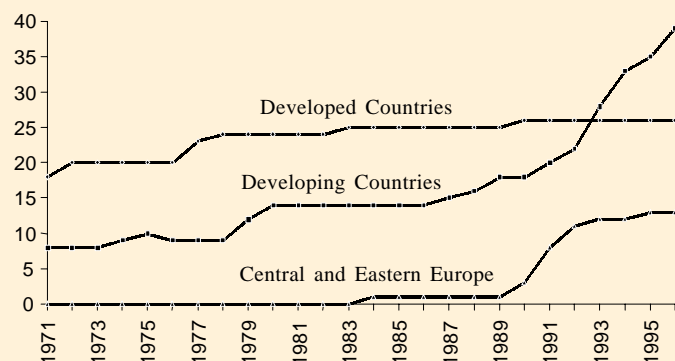
- Resources are extremely scarce;
- Professional expertise is lacking;
- Jurisprudence is inadequate;
- Academic infrastructure is weak;
- Professional associations and consumer groups are not active enough;

- Judicial systems are deficient;
- The public sector suffers from a bad reputation (excessive bureaucracy, lack of transparency and corruption); and
- Political and bureaucratic resistance to reform is high.

In mature jurisdictions, competition officials operate in a stable and adequate policy environment. Their developing-country counterparts, on the other hand, do not have such an environment. Hence, they have to strive to create such an environment.

Moreover, it should be noted that there are economies of scale and economies of learning in the implementation of competition laws. At earlier stages one would need more resources and not less. But the initial investments fetch significant, replicable gains, once the competition-policy mechanism is firmly entrenched in the market system. Besides, the problem of potentially high initial resource requirement is attenuated by the

Figure 1: Number of Countries with Competition Laws



SOURCE: UNCTAD, World Investment Report 1997, p.189

fact that learning from the pioneers in the field has become a lot easier and less costly due to the Internet and other media. The telecommunications revolution has made technical knowledge easily accessible and the possibility for a quick exchange of ideas possible.

There should be a regular endeavour to incorporate the international best practices in competition policy, for which benchmarking exercises are particularly important. The increasing globalisation of firms is changing the private sector's view on competition policy. While international firms have been putting pressure on local governments to set stable and transparent rules, national firms are also changing their views on the usefulness of a modern regulatory framework.

Moreover, the international dimensions of regulatory challenges are becoming more prominent day by day. As trade and investment regimes are liberalised in most developing countries, the inflow of foreign products and companies creates new challenges. While governments regulate domestic markets through various measures including a competition regime, there is hardly any mechanism for regulating the international market. Added to this complexity may be the fact that very few people in developed and developing countries appreciate the international dimension of competition policy and its integral relationship with trade, consumer welfare and economic development.

However, it must be recognised that the implementation of competition policy requires time, investment in adequate institutions and a change in the market culture of the country in question. It is not surprising that competition law enforcement varies widely across countries. Developing countries who have recently enacted competition can learn a lot from jurisdictions that have longer experience of implementing such laws. Moreover, as most of the jurisdictions with a longer experience of competition policy are those of developed countries, they might consider cooperation on competition policy implementation as a part of their overall development cooperation with developing countries.

Stages of Institutional Development

The above considerations show the importance of defining priorities and setting a plan for institution building, as this will have an important bearing on the cooperation agenda of the countries involved. It is useful, for analytical purposes, to identify a sequence of evolutionary stages that could serve as a reference for comparisons among different countries. Table 1 contains a useful time-table to serve as a reference.

The sequencing proposed is based on a simple idea inspired by Khemani and Dutz (1995) and Oliveira (2003) and modified by CUTS (2003). Given its limited resources, the agency should start with the actions that would most likely benefit the market. Gradually, it would introduce measures requiring more sophisticated cost/benefit analysis. Merger review comes after conduct control due to the fact that the welfare effect of a merger might be less clear than that of a price cartel, the latter being unequivocally welfare reducing.

The stages suggested are organised according to the degree of difficulty authorities face in undertaking cost/benefit analysis of the impact of competition measures on social welfare. However, it might well be the case that legally sound repression of price cartels turns out to be more difficult than the implementation of a merger review system. In fact, it is generally easy to assess the micro-economic impact of a cartel but it is hard to fulfil the requirements of an acceptable standard of proof for the courts. Therefore, the actual plan should take into account not only the difficulty in assessing the welfare impact of a particular antitrust case, but also the expected return on each dollar spent on the particular line of action, given the relative probabilities of success of alternative public policies.

Stages of Institutional Development and the Cooperation Agenda

The above discussion presses, though only in a preliminary way, the need to focus on the quality of competition law enforcement rather than on the mere enactment of the legislation. For this, effective international cooperation in the area of competition policy must go beyond the standard forms to effectively meet the challenge of institutional building.

There are two major areas for which international cooperation is needed and they are both of great interest for developed and developing countries:

- Promoting institutional building and disseminating a competition culture; and
- Dealing with competition problems with international dimensions.

Cooperation has a variety of forms and meanings. The literature identifies four basic elements:

- Information sharing (public domain) and technical assistance (weak);
- A positive-comity basis (semi-strong);
- Positive comity and sharing of confidential information (strong); and
- Negative comity and mutual recognition and enforcement of laws (virtual integration) [See Box 1]

These are ranked in terms of the level of implied participation by countries. The elements listed in the first two bullets can come under the "first-generation cooperation agreements" while the elements listed thereafter can be covered in the "second-generation cooperation agreements". There is another issue in cooperation, which relates to "cooperation between whom?" In the area of competition policy, we have two

Table 1: Stages of Institutional Development of Competition Regimes

I. START	II. ENHANCEMENT	III. ADVANCEMENT	IV. MATURITY
1. Competition advocacy + 2. Control of horizontal restraints + 3. Checking abuse of dominance + 4. Technical assistance	I + 5. Merger control + 6. Control of vertical restraints + 7. Effects Doctrine	II + 8. Regulation + 9. International cooperation agreements	III + 10. Second generation cooperation agreements + 11. Proactive competition advocacy

sets of authorities, judicial and executive. The nature of cooperation between agencies differs. Cooperation between judicial agencies is well established and has long precedents.

The focus of international cooperation would depend upon the stage of institutional development of each national jurisdiction, as summarized in Table 1.

At Stages I and II of Table 2, technical assistance seems to be more appropriate. Most typically, a developing country will be the recipient and a developed country the provider. Technical assistance from countries in intermediary positions should be stimulated since the institutional environments might be similar to those at the beginning and useful in terms of adopting new strategies for the implementation of competition law.

At Stage III, when the agency has already built in some internal experience, simple cooperation agreements including exchange of public information can be helpful. However, one should be realistic regarding two aspects: i) the limited resource endowment would not permit joint action in all cases; ii) sharing of confidential information would face serious legal constraints.

More advanced agreements, including exchange of confidential information, would require institutional maturity and greater homogeneity and integration among the participants.

The Existing Agreements and Initiatives

Bilateral and tripartite tracks

The US, the European Union (EU) and Canada have signed a number of bilateral agreements with other countries to cooperate in the area of competition law. While the US has agreements with Australia, Brazil, Canada, Germany, Israel, Japan and Mexico, the EU has such an agreement with Canada. Similarly, Canada has signed bilateral agreements with Chile and Mexico. It has also entered into a tripartite cooperation agreement with Australia and New Zealand. Similarly, there is a tripartite agreement between Denmark, Norway and Iceland. France has an agreement with Germany. China has bilateral agreements with Russia and Kazakhstan. Taiwan has such agreements with Australia and New Zealand. Papua New Guinea has an agreement with Australia, which makes a lot of sense, as it is heavily dependent on its trade with Australia. Competition issues however have been included in many bilateral trade agreements as well (See Box 3).

Some of the developing countries having little expertise and resources, have immensely benefited from bilateral and tripartite agreements with the Organisation for Economic Co-operation and Development (OECD) countries. For example, when the vitamin cartel was busted in the US and the EU, most developing countries could not prosecute the cartel due to lack of substantive evidence owing to their resource and capacity constraints. However, since Brazil had a bilateral agreement with the US, it was able to take action.

Regional Approach

A comprehensive regional approach to competition policy was first adopted by the EU and subsequently by the Caribbean Community (CARICOM). While the primary objective of adopting a regional competition policy within the EU was to use it as a vehicle to further integrate the common market, the main objective of CARICOM regional competition policy is to apply competition rules in respect of cross-border anti-

competitive business conduct, promote competition in the Community; and coordinate the implementation of the Community Competition Policy. Such an approach is at various stages of discussion/adoption in many other regional groupings like Common Market of the South (MERCOSUR), also known as Southern Cone, Common Market for Eastern and Southern Africa (COMESA), Southern African Development Community (SADC), East African Community (EAC), Economic and Monetary Community of Central Africa (CEMAC) etc. All of them need to accelerate their efforts in this regard.

The typical agenda of these regional blocks has usually dealt with two issues. First, national competition laws have to be harmonised, which includes the creation of a new legal framework in certain countries as in the case of some eastern European nations. Second, the member states have to negotiate the convergence of antidumping rules with competition rules. This is not trivial theoretically or politically. As a matter of fact, these issues have to be grappled with in order to stimulate trade within a typical block.

Global Initiatives

Over the last few years, several global initiatives have been taken up to deal with competition problems, especially those having international dimensions. Some are by government or government agencies while others are at non-governmental level. None of them, of course, aims to seal competition-related international disputes, but to promote cooperation. If cooperation and coordination could be promoted in an appropriate manner, then international competition disputes could be avoided and even resolved.

United Nations Conference on Trade and Development (UNCTAD)

The issue of control of Restrictive Business Practices (RBPs) figured on the agenda of UNCTAD II, and again at UNCTAD IV, where a decision was made for starting a work programme at the international level, which led to negotiations under the auspices of UNCTAD. In December 1980, the UN General Assembly adopted by resolution a "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices." (Popularly called as the Set).

The importance of the Set and the UNCTAD in this area of work should not be underestimated. The adoption of the Set was an extremely far-sighted move by the UNCTAD members and has

Table 2: Stages of Institutional Development and the Cooperation Agenda

Stages	Cooperation Agenda	Content
I and II	Technical assistance (see Box 2)	Training and drafting of legislation and procedures in line with due process
III	Simple cooperation agreements	Cooperation in selected cases with exchange of public information
IV	Advanced Cooperation Agreements	Systematic cooperation with exchange of confidential information

stood the body in good stead in helping developing countries establish comprehensive competition policies. The 1990 review conference indicated a high degree of consensus on the contributions of the Set and on UNCTAD's role. UNCTAD has become very active in providing technical assistance to developing countries.

The Set is particularly important for a number of reasons:

- **Involvement:** it has been developed in consultation between developed and developing countries;
- **Legitimacy:** the involvement of both, countries of the North and the South has given the Set legitimacy in both camps. This is important when developed countries, the USA in particular, as well as the International Monetary Fund (IMF) and World Bank put pressure on developing countries to adopt specific competition policies; and
- **Neutrality:** the Set gives developing countries a viable route towards the development of competition law that is not tainted by the charge of interference by developed nations in question with sovereign power.

World Trade Organisation (WTO)

Competition policy is not a new issue in the GATT/WTO framework. The issues pertaining to competition were raised in the Uruguay Round negotiations. Although no agreement on trade and competition policy was signed, the issue is very much present in many of the provisions of the existing WTO Agreements. The Agreements that refer to competition issues are:

- General Agreement on Trade in Services (GATS);
- Trade-Related Aspects of Intellectual Property Rights (TRIPs); and
- Trade-Related Investment Measures (TRIMs).

Although the WTO Agreements touch on a number of competition issues, both directly and indirectly, nothing substantial has emerged on these issues through negotiations.

Consideration for a possible framework on competition policy (and investment policy) has been provided as a built-in agenda under the agreement on Trade-Related Investment Measures (TRIMs).

The current WTO proposal under the Doha Development Agenda is a statement of core principles on transparency, non-discrimination, procedural fairness and recognition of the ills of hardcore cartels. It also includes development of flexible cooperation modalities and technical cooperation. The 4th Ministerial Conference of the WTO to be held at Cancun, Mexico in September 2003 will decide whether, and on what terms, negotiations on a potential multilateral framework on competition policy should take place.

OECD's Global Forum

The OECD is an influential organisation with 30 member states, the rich countries of the world. It has a Standing Committee on Competition Policy and Law, which has all member countries as members, other than five observers, Argentina, Brazil, Israel, Lithuania and Russia.

The OECD has been regularly cooperating with a variety of non-OECD countries to provide capacity building support. With the advent of the OECD's Global Forum on Competition, it claims, its cooperation with non-OECD countries will extend beyond capacity building to include high-level policy dialogues to build mutual understanding, identify 'best practices', and provide informal advice and feedback on the entire range of competition-policy issues. The forum can also be used to promote cooperation among countries. In this regard, the OECD needs to reinforce its interface with developing countries, which at present is at a minimum.

International Competition Network

The concept of the International Competition Network (ICN) has evolved since the recommendations of the International

Box 1: Positive and Negative Comities

Positive Comity

According to OECD (1999), positive comity means, "the principle that a country should:

- give full and sympathetic consideration to another country's request that it opens or expand (emphasis added) a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country's interest; and
- take whatever remedial action (emphasis added) it deems appropriate on a voluntary basis and in considering its legitimate interests".

Practical experience with positive comity is limited. A case regarding the investigation into practices of AC Nielsen Company, a provider of retail tracking services, demonstrates how positive comity is expected to work in practice. Both the European Commission (EC) and the Department of Justice (DOJ) received complaint from IRI that Nielson was abusing its dominant position in Europe and thus prevented IRI from establishing a competitive presence there. As the complaint was primarily addressed to contractual practices implemented in Europe and had its greatest impact within Europe, the DOJ let the EC take the lead once it was confident that it had a firm intention to act. The EC conducted negotiations with Nielsen to arrive at an acceptable solution

ensuring that competition was not distorted. At every stage of negotiations, the DOJ was informed of progress and given an opportunity to comment on the undertakings from Nielsen, the DOJ was able to conclude that the practices it had been investigating would not continue, and thus it closed its investigation.

Negative Comity

Negative comity means, "that each Party will at all stages in its enforcement activities, take into account the important interests of the other Party."

Negative comity involves stronger commitment and hence practical experience with it is even more limited. The Boeing/McDonnell Douglas case shows how this principle can be applied. On 26 June 1998, the EC requested the US authorities to take into consideration the EU's important interest, i.e., the maintenance of competition on the market for large commercial jet aircraft, and the US government drew the EC's attention to some of its concerns, including US interests in the field of defence. Consideration of these issues played an important role in consultation, which subsequently took place between the EU and US regarding the case. After intensive consultation with the US authorities, and following the acceptance by Boeing of undertakings, which addressed the EC competition concerns, the EC cleared the merger.

Sources: OECD (1999) & EC (1999)

Competition Policy Advisory Committee (ICPAC), a group formed in 1997 by the US Antitrust Division. ICN is intended to encourage the dissemination of competition experience and best practices, promote the advocacy role of competition agencies and seek to facilitate international cooperation. ICN is not intended to replace or coordinate the work of other organisations. Nor will it exercise any rule-making function. However, it can work as an informal platform for promoting cooperation and exchange of information among competition authorities.

ICN has agreed to adopt a common set of guiding principles for merger notification and review. A study group of the ICN has already identified the possible set of principles and there is almost a consensus on the set, except on the principle of non-discrimination. Similar initiatives are likely to be taken in other area of competition enforcement. ICN also played a catalytic role in the US and EU agreeing to simultaneous review of mergers when officials from both sides of the Atlantic met at the sidelines of the First Annual Conference of the ICN held at Naples, Italy, on September 28-29, 2002.

Track-II Initiatives

In most jurisdictions, consumer organisations are nearly absent in competition policy discourse or its implementation, despite the fact that the primary objective of competition law in all jurisdictions is to protect and promote consumer interests. Other civil society organisations (CSOs) have not been too enthusiastic about competition issues either.

However, recently there has been much curiosity on the issue among the CSOs, due to its inclusion in the WTO discussions. A beginning has been made at the level of CSOs by way of a network formed recently called International Network of Civil Society Organisations on Competition (INCSOC). INCSOC brings together consumer organisations and other CSOs interested in economic issues, in general and competition issues,

in particular. INCSOC intends to work in coordination with ICN, Global Competition Forum (GCF) and other relevant international bodies.

The Network is working mainly through working groups. All committees and working groups have balanced representation from the North and the South and among various regional blocks. Initially, greater emphasis is being put on capacity building and advocacy on competition issues. There already exists a GCF of the competition lawyers under the auspices of the International Bar Association.

Conclusion

Whether to deal with anti-competitive practices that occur at national level or those that have international dimensions, having a strong and well-oiled competition regime is an essential prerequisite. This requires that competition authorities in developing countries have adequate funds, and competition law enforcement officials be technically competent. But, unfortunately, both funds and competence are in extremely short supply in these countries.

One alternative frequently suggested to overcome such shortcomings is to adopt a regional approach to competition enforcement. Pooling of resources can indeed be beneficial in this regard. Such an approach for the small countries has been recognised even in the UNCTAD Set. In this regard, the example of CARICOM arrangements is frequently quoted as a model to follow. This approach can also be of immense help in tackling cross-border competition problems, as very often they are more pronounced among neighbouring countries. The case for a regional competition authority or at least adequate measures to cross-border anti-competitive practices within a region has been recognised in most regional economic integration arrangements. However, in most regions, no substantive progress has been made.

Box 2: Technical Assistance in South Africa

South Africa received technical assistance, including financial assistance from Norway and the US for the formulation of its new Competition Act and its implementation. While the Norwegian assistance programme was implemented through bilateral arrangement between the Government of the Republic of South Africa and the Kingdom of Norway, for the US assistance programme, the Competition Commission and Competition Tribunal concluded arrangements with USAID and the Antitrust Division of the US - Department of Justice (DOJ) and Federal Trade Commission (FTC) as well as the OECD.

The Norwegian assistance programme included the establishment of the Competition Authorities (Competition Commission and Competition Tribunal), building of capacity of the staff of the Commission and in the SADC Region, conclusion of co-operation agreement with the Norwegian Competition Authority and the establishment of a Regional Competition Forum for Competition Authorities in the SADC Region.

The US sponsored technical assistance programme was implemented in phases. The first phase of the technical assistance programmes was to assist the Department of Trade and Industry in the drafting of its competition legislation. "Experts" from the US-DOJ and FTC were invited to provide inputs into the drafting of competition legislation. Furthermore, consultants from the

DOJ and FTC were seconded to the Competition Commission (CC) after its establishment for short to long term periods (two weeks to six months) to provide mentoring and advice to investigators and staff of the Commission. They were also able to guide the investigators through cases and assist in developing procedures and guidelines with the divisions.

The second phase focussed on capacity-building programmes done in conjunction with the OECD for the staff of the Commission and those of Competition Authorities or government departments of the SADC region. "Case-study" seminars, seminars on Competition Policy and Regulation and policy advice and co-operation planning trips have been held with experts from the OECD who have facilitated these workshops and seminars.

The Competition Tribunal has also held workshops for Tribunal members, Competition Appeal Court Judges and participants from other SADC countries focusing on adjudicating competition cases. Following the last workshop held in June 2002, three judges of the Competition Appeal Court attended the Fordham Conference and undertook a five-day study visit to Washington where they were hosted by the DOJ/FTC. The costs for the latter were shared with USAID from funds separate from the technical assistance programme.

Box 3: Cooperation between South Africa and the EU

South Africa's Free Trade Agreement ("EU/SA-FTA"), concluded with the EU in 1999, has provisions concerning cooperation in the context of competition. The provisions on cooperation are modest but have the possibility of requesting each other to take enforcement action, and each signatory must take into account each others important interests in the course of their enforcement activities. However cooperation between the EC and the South African competition authorities has not taken place as a result of the EU/SA-FTA, but has instead been voluntary.

The South African competition authorities obtained extensive cooperation from the EU in the international merger of SmithKline Beecham PLC and Glaxo Wellcome PLC. In its judgement the Tribunal specifically stated that its decision was largely based on the decision of the EC. The EC found that the merger would negatively affect competition in the same areas as was identified by the South African Competition Commission. Finally, the EC approved the merger subject to the merging parties' out-licensing some of the products in the identified areas to reduce their market share post-merger, as was done in South Africa.

Source: Case Study Report on GlaxoWellcome PLC-SmithKline Beecham PLC Merger in South Africa (7-Up Project), CUTS.

Such cooperation and pooling of resources becomes all the more important, if smaller economies would like to be able to tackle the mighty Transnational Corporations (TNCs) or global mega-cartels. Small countries are not adequately capable on their own to take action in such situations. If countries with a small market want to take action against the big TNCs, they might blackmail by threatening to pull out of the small country or market. This also happens because each competition authority has to conduct its own investigation to detect and prove the violation of the relevant laws and calculate the extent of damage. Resource-constrained small economies cannot do this alone.

However, a strong competition regime at national levels may not be enough to tackle cross-border anti-competitive practices that are affecting developing countries. Indeed, it would be a good idea to have provisions for extra-territorial jurisdiction on the basis of the "effects doctrine" to legally empower competition authorities to deal with such cases. However, most of the developing countries do not have enough muscle to actually enforce such provisions. Therefore, there are some *prima-facie* arguments to suggest that multilateral discipline can help weaker nations too. In this context, the setting up of a global competition agency could possibly be the best solution. However, this may be a utopian idea, given the existing geo-political situation.

The need for a multilateral approach to competition policy was recognised even in the Havana Charter, which unsuccessfully tried to set up an International Trade Organisation just after the World War II. As of now, of course, the WTO is the only forum that is seriously discussing a possible multilateral framework on competition. Many countries are still sceptical about the benefits of and rationale for such an agreement. The main objection of developing countries in this regard is that they do not have adequate experience.

There is, thus, much uncertainty regarding the final adoption of a multilateral instrument on competition policy at the WTO. People also question whether the proposed agreement will have the desired effectiveness should it be finally signed; firstly, because there is no proposal to have binding global rules and the proposed commitment for cooperation is only voluntary; secondly, even if the agreement is signed, it will be an outcome of power politics and may lack the basis of mutual trust among nations that is the

primary requirement for any meaningful international cooperation. Thus parallel initiatives are urgently required to curb anti-competitive practices of international dimensions irrespective of whether a multilateral framework at the WTO evolves or not.

As we have seen before, there is no dearth of existing forums at multilateral level. However, there is a need to make them more effective. Given that there are a number of forums at global level, proper coordination among them is essential. Failure to do so may create confusion and may even add to the problems surrounding competition issues with international dimensions. However, it may be noted that multiple forums are not necessarily bad as collectively they might bring a balance in the system.

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