

# Competition Policy in Bilateral Trade Arrangements in the Context of Developing Country Economic Reform

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(Views expressed herein are solely attributable to the author and do not necessarily represent the views of the FTC or of any FTC Commissioner.)

# Introduction

- I am delighted to be here today in beautiful Bali.
- Commissioner Kovacic sends his sincerest regrets.
- I cannot replicate his unique style.
- But, in addressing this important topic, I will endeavor to make key points I believe he would have raised.

# Competition Chapters in FTAs and EPAs

- An increasing number of countries have entered into bilateral trade arrangements – FTAs & EPAs.
- I will refer to all such arrangements using the shorthand term “FTA.”
- Competition chapters in FTAs can be useful ways to bolster domestic support for competition policy in countries where it is not part of the economic tradition, or where efforts are being made to create a culture of competition.

# Value Added by Competition Chapters

- With respect to sections dealing with anticompetitive business conduct, competition chapters may also add value.
- In particular, they may be a means of mutually articulating shared values and expectations.
- They may also affirm existing practices and procedures that are broadly accepted as welfare-promoting.

# Competition Chapters: Cautionary Notes

- Competition chapters in FTAs, however, are not what fuels beneficial day to day cooperation between competition authorities.
- The foundations for that kind of cooperation lie in a history of working together, regular communications, and mutual trust and respect.

## Cautionary Notes, continued

- Sometimes that kind of real cooperation finds articulation in bilateral antitrust cooperation agreements, such as those the U.S. has with Japan, Australia, the EC, and other jurisdictions.
- It does not, however, depend on formal articulation.
- The U.S. has very real and effective cooperation with many countries with which it has no formal agreement.

# FTA State Monopoly Provisions

- Provisions in FTAs dealing with designated monopolies and state enterprises are included to address government distortions of competition.
- As a general matter, state supported monopolies may be particularly prone to anticompetitive abuses, to the extent their governmental ties grant them special privileges or shield them from constraints faced by private parties.
- In particular, state-supported monopolies may use their special privileges to subsidize entry into new markets, thereby distorting competition.

# Different Roles for Different Sorts of FTAs

- Distinction in the role of competition chapters in FTAs that seek to promote real economic integration among the parties (e.g., EC, Andean Pact, ASEAN) versus FTAs that merely seek to reduce barriers to trade without such integration.
- All of the FTAs involving the U.S.A. fall into the latter category (e.g., NAFTA, US-Singapore, US-Australia), and my comments reflect that fact.



# Studies of FTA Competition Provisions

- The OECD has studied FTA competition clauses.
- FTA provisions dealing with anticompetitive practices span a wide spectrum, from clauses that prohibit very specific practices to broad language not specifying practices deemed anticompetitive.
- Given this diversity with regard to specifics, I believe it is most fruitful to focus briefly on the broad goal such FTA clauses seek to advance, namely, the promotion of the competitive process.

# FTAs: Competition Policy Building Blocks

- The FTAs entered into by the U.S. containing competition clauses have common elements.
- They all provide that parties shall
  - Have competition agencies.
  - Take appropriate measures to promote competition.
  - Take appropriate action re anticompetitive conduct.
- These three “building blocks” are key.
- But how do you implement those elements to promote economic development and growth?

## What is Most Needed

- Having competition laws and agencies is a start, but only a start.
- Key principle in all competition FTA chapters is need to take appropriate action to curb anticompetitive conduct.
- As we all know, that's the hard part.
- It is the part on which I would like to focus the remainder of my remarks.

# Competition Policy and Development

- Scholarly research (Michael Porter, McKinsey) indicates a competitive environment promotes economic growth, competitiveness, development.
- This can be advanced through competition policy; rule of law, freedom of contract, and property rights protections also are key underpinnings.
- OECD consensus: consumer welfare, economic efficiency are key goals of competition policy.
- In light of those goals, what aspects of competition policy should a developing country emphasize at first?

# Focus on Cartels

- One place to start might be cartel enforcement.
- Attacks on cartel conduct – classic price fixing and market division – yield high returns to consumers and efficiency.
- Effective regional cooperation (e.g., ASEAN) may be helpful in attacking cross-border cartels.
- Cartel workshops and capacity building assistance may be available.
- Cartel cases do not require extensive economic analysis.
- Political will to tackle special interests is important.

# Promoting Competition in Procurement

- Cost-efficient infrastructure development is a key to economic growth in developing countries.
- Attacking collusion (e.g., bid rigging) in public procurement may be a cost effective way of promoting infrastructure improvements.
- Such enforcement may also invigorate local industries (“everyone has a fair shake”) and promote public support for antitrust.
- U.S. prosecuted many construction bid riggings.

# Improving Public Procurement

- Related government actions may complement prosecution of bid-rigging in procurement.
- Specifically, improvement of methodologies for doing public tenders could support goal of cost-effective, efficient public contracting.
- Technical assistance in both antitrust enforcement and government contracting could help.
- Such reforms might resonate with public.

# Role of Merger Enforcement

- Successful cartel prosecution may have little impact if anticompetitive mergers are allowed.
- This may be a particularly important and sensitive issue if merging partners are former cartelists.
- Thus a new antitrust authority may wish to focus merger review efforts on “home” industries.
- When it develops resources and sophistication, antitrust agency may be able to turn to more complicated mergers/joint ventures.



# Anti-Monopoly Enforcement

- The most pernicious monopolies may be current or former state-owned or supported entities.
- Potential competitors may be deterred from entry given such monopolists' state support.
- Public enforcement against such monopolies' anticompetitive acts, if allowed by national law, could be quite beneficial.
- Monopolies not necessarily "bad," antitrust must assess conduct and shape appropriate remedies.

## Other Antitrust Issues

- These are not the full set of antitrust actions, but they are particularly important to development.
- To advance goal of achieving greatest good from limited resources, government antitrust enforcer may wish to emphasize areas highlighted above.
- Non-cartel agreements among firms may entail subtle efficiency/anticompetitive effects, should probably not be emphasized by new agency.

## Antitrust “Don’ts”

- New agency should not target discounting.
- Discounting and price-cutting by retailers is beneficial to consumers and almost always procompetitive, rather than anticompetitive.
- In particular, enforcers should view skeptically complaints about discounting by competitors.
- Notably, FTC Chairman Majoras called for repeal of a 1930’s “price discrimination” law that helps inefficient small businesses but harms consumers.

# Competition Advocacy

- Government laws may impede competition and counteract benefits of antitrust – e.g., laws limiting entry, barring discounts, restricting trade.
- U.S. antitrust agencies (especially FTC) have filed comments with legislators and agencies arguing against anticompetitive laws and regulations.
- Chairman Majoras stressed benefits of such “competition advocacy” in a major speech.
- Such advocacy may improve competitive conditions, be another fruitful activity for new competition agencies.

# Conclusion

- Competition Provisions in FTAs may play a useful role in promoting broad competition goals.
- Today I have sought to explore how those broad goals may be made concrete by a new competition agency in ways that advance development goals.
- I recommend keeping an eye on policies that advance consumer welfare and economic growth.
- Thank you for your time and attention.