Competition Clauses in Bilateral Trade Treaties: Analysing the Issues in the Context of India's Future Negotiating Strategy

Sanghamitra Sahu
&
Neha Gupta

ICRIER, New Delhi

About the Present Study

- The study seeks to draw relevant lessons from review of literature and some of the existing FTAs and Co-operation agreements to lay down recommendations that would maximize India's gains from bilateral agreements.

Presentation Outline

- Background
- Rationale of including competition provisions (CP) in trade agreements.
- Special competition provisions in trade agreements
- Case studies
- Trade impact
- Plan for further study

Background

- An increasing number of countries have entered into bilateral trade arrangements
- The number of trade agreements containing competition provisions reached at 141 (Cernat, 2005)
- Since mid-90's there has been an increase in the free trade agreements
- FTAs also include issues like intellectual property rights, technical assistance, government procurement or competition policy
- The failure to reach an agreement on competition policy in the WTO is considered an important factor for the recent proliferation of trade agreements with competition provisions

Rationale for incorporating competition provisions in trade agreements.

- Complements trade policy by prohibiting private anticompetitive practices
- Creates an awareness of the potential anti competitive practices that undermine the potential benefits of trade liberalisation
- Facilitates domestic policy reforms (Birdsall and Lawrence, 1999)

Competition Provisions in Trade Agreements: Insights from Literature

The literature (eg. OECD, 2005, Cernat, 2005, Silva,2004) suggest the following broad competition provisions in trade agreements

i. Provisions requiring adoption, maintenance or application of laws to enforce competition
ii. Provisions relating to cooperation and coordination
iii. Scope of application
iv. Provisions regarding non-discrimination and transparency
v. Provisions regarding dispute settlement

Case Studies (EU-Mexico)

EU-Mexico: Major competition provisions (Annex XV)

- Objective(Ar.1): (i) to eliminate anticompetitive activities by applying their respective anticompetitive laws

  (ii) to promote cooperation and coordination between the parties in application of their competition law
- Notification(Ar.3): each party will notify its counterpart abroad of its enforcement activity
- Exchange of information (Ar.4):to facilitate the effective implementation of competition policy
- Coordination(Ar.5): A competition authority may notify its willingness to coordinate enforcement activities
- Consultations (Ar.6): When important interests of one Party are adversely affected by enforcement/anticompetitive activity in the territory of the other Party.
- Avoidance of Conflicts (Ar.7): Take the important interests of the other Party into consideration to avoid conflicts
- Confidentiality (Ar.8): Information exchanged is subject to the confidentiality laws of both Parties
- Technical Cooperation (Ar.9): Both Parties shall provide each other technical assistance to take advantage of their respective experience and to strengthen the implementation of their competition laws and policies

Usefulness of the EU-Mexico Cooperation Mechanism

- There has been increased cooperation through notification obligation and information exchanges
- Mexicans have notified the EU of their enforcement activities on 31 occasions; EU to Mexico on one occasion
- EU has made 2 requests of consultation and 12 by Mexico
- Notification also helps in comparing notes about particular cases
- EU is expected to provide substantial technical assistance when Mexico revises its competition law

Limitations of the Cooperation Mechanism

- The obligations are of the soft law type and thus are not legally binding
- The parties have no recourse to the dispute settlement procedures
- The agreement does not allow the exchange of confidential information
- The agreement does not require or permit any information exchange that would otherwise not be accessible

Case of US-Singapore

CH. 12: Anticompetitive Business Conduct, Designated Monopolies and Government Enterprises

- Objective (Ar.12.1): to proscribe anti competitive conduct by implementing competition polices and engaging through cooperation.
- Anticompetitive business conduct (Ar. 12.2): requires each party to establish or maintain an authority responsible for the enforcement measures
- Designated monopolies and Government enterprises (Ar. 12.3): provides detailed rules on the treatment of government monopolies and government enterprises
- Cooperation (Ar.12.4): agree to cooperate on matters of enforcement and policy development
- Transparency and Information requests(12.5): each party shall make available public information concerning enforcement measures; government enterprises and state monopolies; and exemptions to enforcement measures.
- Consultations (12.6): Parties agree to consult upon request and principles of negative comity applies
- Dispute Settlement (Ar.12.7): Parties don't have recourse to dispute settlement mechanism for any matter arising under Article 12.2, 12.4 and 12.6.

Benefits and Limitations

Benefits

- It was binding for Singapore to legislate a comprehensive Competition law (January 2005)
- Specific reference is made to transparency which is not there in EU-Mexico FTA
- Some of the provisions like disciplining of designated monopolies and state enterprises are binding
- Exchange of information is mandatory

Limitations

- Certain articles such as cooperation, consultation are not subject to the dispute settlement mechanism
- Does not allow confidential information

Case of Japan-Singapore

CH. 12:Competition

- Anticompetitive activities (Ar. 103): adopt and improve laws to take appropriate measures against anti competitive activities
- Cooperation (Ar.104): Parties shall cooperate to control anti competitive activities
- The details of the cooperation mechanism is specified in Ch. 15 of the Implementing Mechanism
- Notification(Ar. 17): Each party has to notify the other of its enforcement activities, any amendment of competition laws and any adoption of new laws
- Exchange of information(Ar.18): Inform the other party regarding the enforcement activities or any other information relevant to the enforcement activities of the other party
- Technical assistance (Ar.19): Each party may render technical assistance to the other party for effective management and adoption of laws
- Further Cooperation(Ar.23): There is the a scope of review of this cooperation agreement to include principles of comity and coordination of enforcement activities
- Consultations (Ar.24): The Parties may hold consultations
- Dispute Settlement(Ar.105): These provisions are not subject to the dispute settlement procedures

Benefits and Limitations

Benefits

- Provides an important government to government policy statement i.e. the competition agencies should cooperate with one another
- The framework established can be reviewed to incorporate other sectors

Limitations

- The rules are not binding
- Does now allow to exchange confidential information
- Information can not be used in criminal proceedings carried out by a court or judge
- Provision of cooperation and exchange of information only apply to the sectors of telecommunications, electricity and gas
- Notification has to be done in writing through the diplomatic channel

Lessons

- Competition provisions dealing with anticompetitive practices span a wide spectrum, from clauses that prohibit very specific practices to broad language not specifying practices deemed anticompetitive
- Competition provision have been used in non competition specific chapters of FTAs. In particular US-Singapore FTA deals with competition issues in the treatment of telecom services
- Competition provisions in FTAs help in increasing awareness about anticompetitive practices through exchange of information and notification
- The benefits of free trade will be less likely to be undermined by private anti competitive due to the existence of laws and mutual cooperation
- However since the rules in most cases are not binding, its effectiveness highly depends on the goodwill of the parties

Competition Related Trade Impact

- Competition related trade impact can arise through

  (i) Anti-competitive practices that affect market access: import cartels, abuses of dominant position, certain forms of vertical agreements and anti-competitive distribution practices

  (ii) Anti-competitive practices with a similar impact on several markets or world markets: international cartels operating through the fixing of prices and/or quantities and the allocation of market shares

  (iii) Anti-competitive practices whose effect is primarily in a market different from that in which it was conceived: e.g. export cartels

- Competition Provisions In FTAs can help the countries to protect against these anti competitive practices through

  (i) co-operation between competition authorities, including both specific cases and more general co-operation and exchange of information; and

  (ii) technical assistance and capacity-building for the reinforcement of competition institutions in developing countries

Plan for Further Study

- Analyze M&A, Export Cartels, International Cartels and Joint Ventures
- Look at impact on exports, imports and employment
- Have analysed the following M&A
  - (i) Proctor & Gamble/Gillette
  - (ii) Blackstone/ Acetex

Case Studies on Trade Impact (M&A)

Proctor & Gamble/Gillette

- Procter & Gamble's largest acquisition in its history by acquiring Gillette for about $57 billion in 2005
- Free Trade Commission (FTC) and European commission (EC) investigated whether merger would increase the merged firm's ability, when acting as a "category manager," and exclude or disadvantage competitors in several brand categories. But cleared of anticompetitive charges
- However, U.S. regulators required Gillette Co. to sell the Right Guard and Rembrandt brands. European antitrust regulators required P&G to sell Spin Brush in EEA and grant a license for co-brands used on these toothbrushes.
- The deal will mean about 6,000 job cuts, or about 4 percent of the combined work force of 140,000 employees**.**

Blackstone/Acetex

- US based private equity firm Blackstone acquisition of the Canadian chemicals company Acetex in later month of 2005
- Celanese (company controlled by Blackstone) and Acetex has many horizontal overlaps principally in four chemical substances: acetic acid, VAM, acetic anhydride and PVOH.
- In its market analysis, the European Commission considered supply-demand balances, production capacity, anticipated capacity increases and the multi-sourcing behavior of customer.
- Commission concluded that adverse unilateral effects were unlikely , price rises or capacity reduction would not be successful and hence cleared acquisition.

Thank You