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**Working Paper**

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

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Working Paper No. 204

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

**Sanghamitra Sahu  
Neha Gupta**

**February 2008**



**INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATIONS**

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## Foreword

Competition law is still in its infancy in India. As the Indian Corporate Sector grows in stature, size and ambition, it will try to use all possible and permissible methods to expand and consolidate its position in the market. This is entirely on expected lines. At the same time, residents in these partner countries also have similar objectives to expand their reach and market share globally. It is therefore important that Indian negotiators have a clear idea of regulatory provisions that are needed to ensure that competition forces do not become a victim of such corporate ambitions. It is in this context that ICRIER has undertaken this study which is sponsored by the Competition Commission of India. The study breaks new grounds in trying to identify some competitive market. I hope the practitioners in this field and Indian negotiators will find this study useful.



**(Rajiv Kumar)**

Director & Chief Executive

February 22, 2008

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

Sanghamitra Sahu

Neha Gupta

## **Abstract**

There is a recent trend towards trade agreements that include trade related competition provisions. However there are large differences across these trade agreements in terms of how the competition provisions are addressed. In this context, this research report tries to analyse the competition provisions in few selected FTAs and draw lessons for India, which is also following the path of entering into trade agreements. The analysis suggests that cooperation in implementing competition laws is immensely helpful. However, at this moment, India can follow the EU style of agreements with competition provisions such as cooperation, exchange of non-confidential information, technical assistance and consultation.

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  2. The views expressed in this study are those of the authors and do not necessarily reflect those of ICRIER or CCI

## Executive Summary

The motivation for including competition provisions in bilateral or regional trade agreements is to ensure that the gains from implementing such agreements are not undermined by anti-competitive private practices. However, the ability to draw firm inferences has been constrained due to the non availability of evidence on the operation of competition provisions in trade agreements. Also the analysis so far suggested that many forms of agreements on competition policies are possible. The trade agreements vary in terms of the kind of competition provisions included and implemented.

Notwithstanding these limitations, it is quite evident that competition policy plays a very important complementary role to trade policy. As mentioned before, sound and effective competition law enforcement can ensure that the benefits of trade liberalisation are not defeated by the imposition of private barriers to trade. Also it is found in the literature that there are two sets of competition provisions that can be found in RTAs. Provisions that provide for harmonization of competition rules of the contracting parties, and/or provisions that provide for cooperation on competition-related issues. EU bilateral agreements are the main examples of RTAs that provide for harmonization of competition rules of the contracting parties. In contrast, bilateral RTAs signed by the US and Canada include provisions that provide for cooperation on competition matters (Holmes *et al.*, 2005).

However, the analysis of various trade agreements and evidence from literature suggested that the harmonization clauses which require reduction of existing diversity in various domestic competition laws cannot be achieved. However the soft laws on cooperation, including any procedures for consultations, notification, or comity are found to be useful for enhancing cooperation among the competition agencies while dealing with anticompetitive practices.

With the above backdrop, the study suggests, India could also be benefited by including competition clauses in its future trade agreements. As discussed earlier, India's trade agreements don't include a separate chapter on competition clause though certain provision are present in other non competition specific chapters of some trade agreements. And in deciding about the type of provisions India should focus more on clauses related to cooperation such as notification, consultation and comity. The provision related to harmonization of competition laws should not be tried as many countries (at least in the developing world) don't yet have domestic competition laws. Also India's competition law itself was recently introduced and is yet to be judged about its efficacy in preventing anticompetitive practices.

However it is also recognized that differences which may arise in the regulation of anti-competitive conduct across borders can lead to distortions in the trading system. A policy solution to this is the extraterritorial application of competition laws by one country over firms in the jurisdiction of another country. Though this helps in curbing anticompetitive



practices, at the same time raises various legal, political and administrative difficulties. Therefore the success in extraterritorial application of competition laws is hard to achieve without having the cooperation of the foreign governments or the ability to access information relevant to the case. Therefore incorporating clauses related to cooperation and exchange of information can contribute to the realization of the benefits of trade liberalisation. In addition, the potential for trade disputes could be reduced through consultations. Greater attentions should be placed on the comity principles for resolving conflicts arising from the resulting overlaps in jurisdictions

Information sharing is very important when seeking a more effective regime for co-operation between countries regarding cross-border competition cases. However, in most trade agreements the exchange of information is restricted to non-confidential information. And this greatly limits the potential utility of these exchanges. Effective enforcement of competition laws would be facilitated by exchange of confidential information. Therefore appropriate mechanisms should be developed for sharing confidential information. Such mechanisms already exist in many other policy fields like money laundering and securities regulations. So India should focus on the sharing of confidential information in its future trade negotiations.

In order to enhance the prospects of success, India should work towards agreements that commit the signatories to adopt and implement competition laws having an international dimension and agreeing to the cooperation and information sharing protocols.

## **Guidelines in Inclusion of Competition Clauses in RTAs**

1. In setting out these guidelines two issues have been kept in mind. One, that the issue of competition clauses may vary depending on whether the RTA is with a developing or developed country. Given India's very limited experience with its own Competition Act, its approach in RTAs with developed countries would be necessarily defensive. Second, in RTAs with developing countries (which now dominate in numbers) a more aggressive approach might be recommended.
2. In general, competition clauses would stress on the need for cooperation, consultation, positive comity, transparency and dispute settlement.
3. Cooperation would entail obtaining information sharing in assessing any abuse of dominance of one country's entity in the other country.
4. Cooperation in the context of developed country RTAs should also include technical assistance ( in training of officials, workshops, experience sharing etc) for building up India's capacity in competition enforcement and advocacy and exchange of confidential information.
5. The focus of the agreements would be on preventing non-governmental hard core cartels and cooperation could extend to assessing the impacts (effects doctrine) of third party (especially developed country) export cartels. Here provision on consultation would be particularly useful.
6. Transparency clauses are useful in all RTAs. This should mainly relate to wide dissemination of information on all laws, rules and guidelines governing commerce in the RTA members.
7. Currently, WTO provision on national Treatment (NT) exists in most RTAs. But these generally apply only to goods trade. Given India's interest in service trade, current treatment of NT is of little use. Since the NT provisions in the proposed GATS are still under discussion, no NT provisions should be committed to in negotiations.
8. Specific provisions regarding competition in service trade can be taken from Article 7.12 and 7.13 of the CECA with Singapore.
9. In discussions in RTAs the application to government monopolies should be avoided.
10. Similarly, issues of competition policy regarding state aid should also be left alone.
11. In general, it is in India's interest to follow the EU model which focuses on cooperation rather than the US model which emphasizes substantive rules. In other words, excessive presence of competition provision via many, specific clauses should be avoided.

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

## **I. Introduction**

### **1. Background**

In recent years, countries across the globe have been engaging in trade agreements at bilateral and regional level to forge deeper economic relations. Conventional bilateral agreements focused on removal of tariff barriers and wider markets for goods. However, in recent years, there is a trend towards agreements that include a broader list of trade-related issues: trade in services, investment, intellectual property, trade facilitation, competition, and so on.<sup>1</sup> Competition policy and its related aspects have become relevant today because with the inflow of foreign products and companies there are new challenges such as anti-competitive behaviour by Multi-national Corporations (MNCs) and international cartels. In such a scenario, incorporating competition issues in bilateral agreements/ Free Trade Agreement (FTAs) ensures that anti-competitive business practices do not hinder market access and dilute the benefits of such bilateral agreements.<sup>2</sup>

India is also following the same path of entry into bilateral FTA/PTA as evidenced by Indo- Sri Lanka, Indo-Chile, Indo-Bhutan, Indo-Thai FTA and Singapore Comprehensive Economic Co-operation Agreement. Several more are in the making such as Indo-ASEAN, SAFTA, Indo-Gulf Co-operation Council, etc.<sup>3</sup> These agreements have focused on elimination of tariff barriers, co-operation in financial services, investment and other areas of economic co-operation to ensure greater market access for India's goods and services through preferential deals. India has been fairly cautious in excluding competition provisions in its bilateral treaties. However, increasingly there is a feeling that issues such as market domination and role of Competition Commission should also

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<sup>1</sup> NAFTA, MERCUSOR were some of the earliest trade agreements covering wide range of issues such as trade in goods and services, intellectual property, investment, government procurement, free movement of business people, competition, and a dispute settlement mechanism.

<sup>2</sup> In particular, of the around 300 bilateral and regional trade agreements (RTAs) in force or in negotiation, over 100 include competition-policy related provisions. UNCTAD (2005)

<sup>3</sup> This is not an exhaustive list. At present India has or is negotiating about 20 RTAs.

be included in these bilateral treaties. This is considered important for providing a level playing field for Indian firms either exporting or investing in the partner country markets. Thus at this juncture, while it is important to study the potential costs and benefits of entering into an FTA, it is also necessary that the competition clauses in bilateral trade be given a much closer examination to identify strengths, weaknesses, opportunities and threats arising from including competition policy in FTAs. In view of this further research and analysis on the role that competition law and policy plays in these agreements is warranted.

## **2. Objective and Approach of Study**

The aim of this study is to provide an assessment of the competition provisions incorporated in the free trade agreements and their relevance for India. It also seeks to assess the feasibility of including competition related provisions in India's future trade treaties.

In the course of the study it was found that existing literature only deals with the incorporation of competition provisions in trade agreements and there is very little empirical research on the effectiveness of competition provisions and their impact on trade. Therefore to understand the importance, effectiveness and impact of these provisions intensive discussions were held with academicians and key government officials from the Ministry of Commerce, Government of India, Ministry of Trade and Industry-Government of Singapore and Competition Commission of Singapore. In addition discussions were held with members from the American Chamber of Commerce in Singapore and Singapore Indian Chamber of Commerce and Industry. Singapore was chosen for the field study as it has incorporated competition provisions in its bilateral trade agreements.

## **3. Structure of the Study**

The structure of the study is as follows. Section II provides an overview of competition policy. Section III analyses the relationship between trade and competition policy.

Specific competition provisions in bilateral trade agreements are analysed in section IV. The FTA case studies are discussed in section V. Presence of competition provisions in the non-competition specific chapters are discussed in section VI. Some evidences of the enforcement of competition provisions are highlighted in section VII. The case for India is presented in section VIII. Section IX concludes the study.

## **II. Competition Policy Overview**

### **1. Concept and Definition**

The concept of “competition” can be traced back to Adam Smith’s book on *‘The Wealth of Nations’*. According to Smith, competition drives economies to produce best outcomes. An ADB report (2005) suggests that competition in product and factor markets is crucial to achieve high rates of economic growth and employment. Economic theory also suggests that competition is beneficial as it gives a wider choice to consumers and provides sellers with stronger incentive to minimize costs. Lewis (2004) says that competition is usually not intense and not equal for reasons of special interests, big government and citizen’s weak economic understanding. Also markets can not be competitive due to anti competitive practices of the firms where anti competitive or unfair business practices are those which limit other enterprises from entering a market or which regulate supply in a way that is deemed harmful either to other existing or potential producers and consumers. Such practices include predatory pricing behaviour, collusion, mergers and acquisitions etc.

Given the importance of competition to an economy’s growth and development, policies to promote competition have become an important element of policy formulation. Arguments have been put forward to adopt open market policies to increase competition. In the past many countries adopted economic reforms and reduced government intervention. Many reforms were undertaken in the form of reduction of trade barriers, privatisation et cetera to increase competition. It is however possible that, firms may try to eliminate competition by adopting anti competitive practices such as cartels. Hence there is a need for government intervention to protect competition by prohibiting

agreements and activities that undermine it. The government intervention in this case takes the form of a competition policy.

Competition policy generally refers to a set of government measures such as trade liberalisation policy, economic deregulation and privatisation and competition laws that affect the behavior of enterprises. It is seen as a set of laws and regulations to maintain a fair degree of competition by eliminating restrictive business practices of private enterprises (Milberg, 2002). Competition law is therefore seen as a subset of competition policy or an instrument of competition policy. It represents a code of conduct in the economic arena which is aimed at limiting excessive market power as manifested in cartels, restrictive business practices and abuse of market power.

## **2. Relevance of Competition Policy**

There have been some arguments against of the need for a domestic competition law. Harberger (1954) and Baual (1982) argued that economic inefficiency resulting from monopoly is very small and therefore adoption of competition policy is not required. Similarly Bhagawati (1965) presented a model in which a domestic monopolist loses all its market power when barriers to trade are relaxed and the economy trades with a perfectly competitive world market. This implies that international trade policy can act as a substitute for competition policy. However, this is only true even in the neo-classical trade theory framework for a small economy which cannot influence the world prices. In general large economies ( for example, India in some services and agricultural commodities) do influence world prices either as buyers or as sellers in the world market.

However over the years it was found that the economic welfare losses associated with monopoly and imperfections of competition may be greater than Harberger's estimates. And trade policy fails to act as a perfect substitute for competition policy as trade policy focuses on the removal of barriers to international trade through tariff reduction and cannot be effective in domestic markets which are not strongly influenced by international trade. It is also viewed that danger to competition may come from international trade itself. For example international cartels may divide up markets through

price fixing and on the basis of geographic market sharing. Therefore an increasing number of bilateral and multilateral trade agreements have demonstrated the need to reconcile national competition policies. Similarly, Anderson and Jenny (2003) feel that competition policy is more important for developing countries as they believe that less mature markets are more vulnerable to anticompetitive practices. The reasons they give are (i) high natural entry barriers due to inadequate business infrastructure and intrusive regulatory regimes; (ii) asymmetries of information in both product and credit markets; and (c) a greater proportion of local (non-tradable) markets. Therefore they suggest that developing countries need to be protected against cartels, monopoly abuses and the creation of new monopolies through mergers. Khemani and Dutz (1996) states that competition policy can help bring other related policy and legal reforms which are necessary for creating a healthy market economy. This requirement of an institutional mechanism in implementing even a perfectly competitive economy is now well recognized in the economic literature.

The competition laws were adopted for the first time by Canada (1889) and US (1890) in response to concerns about the excessive market power. These laws were formulated during a period of unprecedented corporate mergers and acquisitions activity and the formation of cartels (M Lee and C Morand, 2003). But now in an era of increasing economic reforms and globalization an effective competition law is becoming recognized as a critical element in strengthening market forces. Since 1985 almost 90 countries have now adopted national competition laws. While traditionally competition laws have been present only in developed countries, a large number of developing and emerging economies have now adopted domestic competition laws. Thus, since about 1990, almost 80 developing countries have implemented or are in the process of implementing competition laws ( see, Singh, Ajit 2002, "Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions." G-24 Discussion Paper Series, UNCTAD and Centre for International Development Harvard University, No. 18.) A survey of the national competition policies indicates that competition policies vary across the world. There is also a conflict between the working of a sectoral regulator ( in telecommunications. Power etc) and the overall regulator like the Competition Commissions in various countries. The resolution of this conflict is usually a function of the dominance of

consumer or producer interests in the political economy of a country. Thus, if in the US the focus is on the anti trust actions, in the EU competition policy tries to promote economic integration and the national policies of the individual countries. In Japan the competition policy is closely linked with the industrial policy. Therefore Milberg (2002) again suggests that a country should be able to regulate competition policy compatible with its long term development strategy.

In the literature it is suggested that the main goal of competition policy should be the promotion of economic efficiency. In this context, review of various competition laws indicate that they have been concerned with both private and government anticompetitive practices that affect the state of competition in markets. UNCTAD (2002) provides a list of firm's actions that may fall within the purview of competition law. Some of the important actions are thus:

- *Measures relating to agreements between firms in the same market to restrain competition.*
- *Measures relating to attempts by a large incumbent firm to independently exercise market power (sometimes referred as abuse of dominant position)*
- *Measure relating to firms that act collectively but in the absence of an explicit agreement between them, attempt to exercise market power (sometimes referred to collective dominance)*
- *Measures relating to attempts by a firm or firms to drive one more of their rivals out of market (e.g. by predatory price fixing)*
- *Measures relating to collaboration between firms for the purpose of research, development, testing, marketing and distribution of products.*

The list is not supposed to be an exhaustive one and some competition laws may include more actions. ADB (2005) also lists out four types of government interventions that fall outside of the competition laws such as:

- *Most consumer protection laws such as those relating to faulty product, warranties and misleading advertising;*



- *Trade laws such as laws on anti dumping and countervailing duties and measures to protect national industries against surge of imports;*
- *Government policies toward registration of new businesses and taxation and corporate governance oversight of existing businesses; and*
- *Most trade and FDI policies excluding policies towards mergers and acquisitions*

Domestic competition laws include / treat some of the above mentioned acts as anticompetitive practices. Again domestic competition laws do not cover all sectors of the economy. In some cases state owned firms are exempted by law from the fold of competition. In addition, many competition laws include provisions that allow a government or an independent agency to grant exemptions to firms and sectors after the competition law has been enacted.

### **III. Competition Policy and Trade**

#### **1. Link between Competition Policy and Trade**

It has been widely recognised that the ongoing growth of international trade is considerably driven by trade liberalisation. The lowering of trade barriers, developments in technology and communication have led to increasingly interdependent economies. In an environment where national trade barriers are falling, firms are trying to organise their operations in a global scale and in the process use some anticompetitive practices. It is generally believed that the reduction of governmental barriers in trade negotiations get replaced through the trade restrictions and distortions resulting from practices of private enterprises. With the increasing integration of the world economy, through trade liberalisation and expansion of Foreign Direct Investment (FDI), the anticompetitive activities of the firms acquire the transborder dimension affecting several countries and sometimes the whole world. This implies that effective competition law enforcement can ensure that the benefits of trade liberalisation don't get distorted through private anticompetitive practices.

However in case of the transnational effect of the anticompetitive activities (eg. export cartels) of the enterprises, it becomes almost impossible to undertake any enforcement activities against a foreign firm without the cooperation of the other country. The differences in competition law and policy among the countries in such situations make the implementation and enforcement of competition law and policy very difficult. As a result, there have been debates and discussions on international cooperation among trading nations relating to the implementation and enforcement of competition laws and policies. It is also argued by many (eg. Matsushita, 2003) that some degree of convergence and harmonisation of national laws is desirable for effective enforcement of competition laws. The next section deals with all the historical developments relating to the internationalization of competition laws.

## 2. Internationalization of Competition Laws: A brief History

Discussions on international cooperation in competition laws date back to the **Havana Charter** of the unsuccessful **International Trade Organisation (ITO)** in 1948. The Havana Charter included an entire chapter (**Chapter V**) on the subject of restrictive business practices and requires the members to control anti competitive practices of an international nature. The objective of **Chapter V** was to '*prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade...*'<sup>4</sup> The ITO was authorized to investigate any complaints which could not be resolved through consultation and was required to give recommendations for action.

However, these provisions could not be included in GATT 1947 due to opposition from the members. Since then there have been periodic efforts to revive the issue. In 1958, a *Group of Experts* was created to study the feasibility of including trade related competition provisions in the GATT framework. On the basis of the report of the *Group of Experts*, a **Decision on Arrangements for Consultations on Restrictive Business Practices** was adopted in 1960. **The Decision** recommends that, '*at the request of any contracting party, a contracting party should enter into consultations on restrictive business Practices on a bilateral or multilateral basis as appropriate and if it agrees that such harmful effects are present, it should take such measures as it deems appropriate to eliminate these effects*'.<sup>5</sup> These arrangements were invoked on three occasions in 1996, in regard to disputes submitted by the United States against Japan concerning the Kodak vs. Fuji case.<sup>6</sup>

The United Nations '**the Set**' (the Set of Multilaterally Agreed Equitable Principles and Rules for the control of Restrictive Business Practices, 1980) also refers to the need to '*ensure that restrictive business practices do not impede or negate the realization of*

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<sup>4</sup> <http://www.worldtradelaw.net/misc/havana.pdf>

<sup>5</sup> <http://www.worldtradelaw.net/misc/rbp1.pdf>

<sup>6</sup> Bilal S and M Olarreaga, 1998

*benefits that should arise from the liberalisation of tariff and non tariff barriers affecting international trade*<sup>7</sup> and also requires the countries to take action in ‘a mutually reinforcing’ manner at the national, regional and international level to eliminate or effectively deal with such practices affecting international trade.

The above discussion suggests that increased trade liberalisation and integration of global economy calls for international cooperation and coordination. There is the possibility of trade conflict due to incompetent national competition laws and policies. It was believed that strengthening of domestic anti trust policies and developing mutual trust through some common understanding of competition issues would promote greater world trade through the resolution of trade conflicts, the curbing of anti competitive practices and international cartels. Therefore in the 90s a growing number of countries are seeking to cooperate internationally either through regional, bilateral, plurilateral or multilateral frameworks.

### **3. Proposals on Competition Provisions in the WTO**

#### ***3.1: Introduction***

Against the above discussed historical developments, proposals were made to establish an international regime for competition policy and include competition provisions in the WTO framework. Therefore in 1996, at the **Singapore WTO Ministerial** meeting, it was decided to begin work on competition policy and the **Working Group on Interaction between Trade and Competition Policy (WGTCP)** was established to study the interaction between trade and competition policy. The Working Group was mandated to consider issues raised by members relating to the interaction between trade and competition policy and identify areas that might require further consideration in the WTO framework.

At the fourth Ministerial Conference in Doha in 2001, it was decided that the Working Group would focus on clarification of specific issues spelled out in the Doha Declaration on the interaction between trade and competition policy. The issues as mentioned in

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<sup>7</sup> [http://vi.unctad.org/temp/doc/principles\\_en.pdf](http://vi.unctad.org/temp/doc/principles_en.pdf)

paragraphs 23-25 of the Doha Declaration are (a) technical assistance and capacity building for developing countries; (b) core principles (non-discrimination, transparency and procedural fairness) in the enforcement of competition law; (c) provisions dealing with hard-core cartels; and (d) modalities for voluntary multilateral cooperation.

A number of rationales for inclusion of competition policy in the WTO have been put forward in the literature and by the work of the Working Group. According to Clarke and Evenett (2003) in the presence of an established relationship among enforcement agencies, public announcement of cartel actions in one country encourage enforcement efforts in the other countries. Also the information sharing among the countries facilitates the investigation and prosecution against international cartels. The Working Group suggests that cooperation at the multilateral level could be helpful in generating political support for the implementation of effective competition policies at the national level. It is also viewed that competition policy at the multilateral framework would strengthen the competition agencies of the developing countries and protect them from the impact of anti competitive practices.

**Box 1: Text of Doha Declaration**

“23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.” (WTO 2001)

However there have been major differences in the way both the developed and developing countries look at the developmental gains from a multilateral framework on competition policy. The developed countries are mostly concerned with the market access issues as they have got investment interests in the developing countries which do not yet have effective competition policy that can protect foreign companies from anticompetitive practices by the local firms. Therefore, a multilateral agreement on competition policy would guarantee the foreign investors fair competition in the domestic market. The developing countries on the other hand are more concerned about restrictive business practices of the foreign multinationals. These countries have very little outward investment and hence are too less concerned with market access issues.<sup>8</sup> So the developing countries are interested in a multilateral rule that would ban cross border restrictive business practices that harm their economies. Therefore the key focus of the work of the WTO Working Group has been on the scope and benefits of the new approaches to cooperation in competition law enforcement at the multilateral level.

### **3.2: Clarification of Issues (Doha Declaration)**

The Working Group report, 2002 analyses the four issues of the Doha Ministerial Declaration.

#### ***3.2.1: Core Principles***

The core principles of WTO include rules on transparency, non-discrimination and procedural fairness. According to the Working Group discussion, these principles are central to the credibility and effectiveness of competition policy. The inclusion of these principles in a WTO agreement on competition policy would establish a competition culture and assure traders and investors of a level playing field in competition there by contributing to enhanced trade and competition flows.

Looking further into the role and application of each of these principles, the report suggested that in the field of competition policy **a transparency commitment** would

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<sup>8</sup> This, however, is not true of countries like India and China especially in recent years.

refer to laws, regulations and guidelines of general applications as well as to sectoral exclusions and exemptions. The members would have to ensure the publication of such laws, regulations and guidelines in a comprehensive and timely manner and these documents should be made available to the public either in an official gazette or journal or in electronic form on a website. Also a commitment to transparency requires mandatory notification of these elements to the WTO.

The principle of **non-discrimination** refers to two components such as: most favoured nation (MFN) treatment and national treatment. The members agreed on the view that no competition law discriminates between companies of different nationalities on a *de jure* basis. Issues could arise with regard to the status of bilateral and regional trade agreements in competition policy. The view at WGTCP was that bilateral and regional agreements should be allowed to continue and the provision on non-discrimination should apply only to *de jure* discrimination i.e. to discrimination embodied in laws regulations and guidelines of general application and not to *de facto* instances of discrimination.

The principle of procedural fairness ensures that parties facing adverse decisions and sanctions are given adequate basic rights to defend their cases. The relevant rights are (a) firms be notified that a formal investigation is pending against them; (b) firms should have the opportunity to submit evidence and documents; and present their views to the authorities concerned either in writing or by participating in public hearings; (c) appeal before an independent judicial body; and (d) protection of confidential information submitted to the authorities.

In addition to these three main core principles, two more principles: special and differential treatment and comprehensiveness were proposed and discussed at the Working Group meeting. **Special and differential treatment** provides more favourable treatment to developing countries in meeting their WTO obligations. Possible dimensions of this principle include preferential market access, flexibility of commitments, safeguarding their development interests and granting transitional periods in complying with WTO obligations. **Comprehensiveness** is one of the four principles used in the

APEC<sup>9</sup> to enhance competition and regulatory reform. It advocates that exemptions and exclusions should be designed in such a way that they minimize distortion of the competition process and they would be subject to periodic re-examination within the context of an overall competition framework.

### ***3.2.2: National Submissions to Working Group on Core Principles***

A number of questions and concerns were raised through country submissions on the proposal to incorporate core principles in a multilateral framework. Many members like the USA raised concerns that disclosure requirements in transparency obligations may not be workable given the different legal, political and institutional environments of members. There were also worries that the disclosure clauses will impose heavy compliance costs particularly on developing countries. The submissions made by India, China and Thailand stress upon flexibility in the implementation of transparency provisions. Notwithstanding these observations submissions made by some countries like the European Community, Australia, Switzerland and Canada broadly supports the transparency provisions. These countries also suggest that ‘developing countries be given sufficient time and flexibility to progressively build transparency in the administration and enforcement of the competition law’<sup>10</sup>.

Non-discrimination probably is probably the most controversial principle to be discussed at WTGCP. Few country submissions like one made by Korea strongly supports the non-discrimination principle. Korea’s submission states that “...in principle there should be no problem applying national Treatment and most favoured Nation treatment in a straightforward way to competition policy” (Korea WT/WGTCP/W/212 2002). However submissions from countries like Thailand and India questioned the appropriateness of disciplines on non discrimination for developing countries as evidenced from the following Thai submission: “...developing countries should be allowed to exempt national and international export cartels. This is because most developing countries exporters or importers are mainly small scale and may need to bind together to counter the bargaining power of larger buyers or sellers from industrialized countries...”(Thailand

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<sup>9</sup> Accountability, transparency, non-discrimination and comprehensiveness

<sup>10</sup> WT/WGTCP/6



WT/WGTCP/W/213 2002). According to India's submission a competition policy which equally applies to all members will discriminate against firms in developing countries.

With regard to the principle of procedural fairness, there was no broad consensus on the meaning of procedural fairness in the context of competition law enforcement. There were concerns regarding the implications of the principle of procedural fairness to developing countries as it may require a Member to set up and maintain a judicial framework for handling appeal cases. Therefore submissions from Thailand, China and Hong Kong argued that each and every Member of the WTO should be allowed to design establish and maintain the procedural system that is suitable to national conditions and consistent with its level of development.

### ***3.2.3: Hard Core Cartels***

Hard core cartels refer to collusive practices through price or quantity fixing and market allocation. A World Bank study by Levenstein and Suslow (2001) indicated that international hard core cartels had a substantial detrimental impact on developing countries. The study found that cartel affected imports comprise of 6.7 percent of all developing countries imports in 1997, worth US\$81.1 billion in goods and services. The price mark up attributable to the cartels was as high as 45 to 50 percent implying the immense cost of imports of the developing countries. The WGTCP recognised that hard core cartels undermined the potential benefits of trade liberalisation and inflicted heavy losses particularly on developing countries. The report suggested that cartels tend to operate in countries with weak or non-existent enforcement of competition laws. The European Union proposed that a multilateral framework on competition policy should include (a) the introduction of national competition law in every member country with a provision prohibiting hard core cartels; and (b) a cooperative framework that would promote the exchange of information on cartels between WTO members.

### ***3.2.4: National Submissions on Hard Core cartel***

A number of submissions (eg. Thailand, Korea) to the Working Group noted the harmful impact of international cartels particularly to developing countries. However numerous

questions were raised on the definition and scope of hard core cartels. Also for many developing countries obligation to introduce competition law and put in place the related enforcement institutions could be very costly and burdensome. Moreover India argued for a ban on exemptions from national competition laws for export cartels. Thailand suggested that due to financial constraints in the developing countries “ competition agencies in the developing economies be financially compensated for delivering requested services and be allowed to cooperate to the extent possible subject to technical and financial constraints” (Thailand WT/WGTCP/W/205 2002). At the WGTCP the members were of the view that the Working Group should further discuss issues such as definition, exemptions and additional features such as reference to penalties in the provisions on hard core cartels in a multi lateral framework on competition policy.

#### ***3.2.5: Modalities for Voluntary Cooperation***

With regard to the need for multilateral cooperation in competition policy the Working Group expressed that with the globalisation of business activities, anticompetitive business practices occurred globally. Under such circumstances, it is difficult for a single country to correctly assess the effects of these practices and effectively prevent them. In the Working Group meeting two principal types of cooperation were analysed in a possible WTO framework on competition policy. The first one refers to the general exchange of experiences, views, knowledge etc among competition authorities; where as the other one refers to case specific cooperation. These modalities of cooperation would be non-binding in nature and would not be limited to the investigation of hard core cartels. These mechanisms could be used all cases of anti competitive practices including abuse of dominant position, vertical restraints and other practices.

#### ***3.2.6: National Submissions on Modalities for Voluntary Cooperation***

The submissions of WTO members with regard to voluntary cooperation are generally supportive of a multilateral framework in this area. The European Commission, Canada and Korea advocated for the establishment on a WTO competition policy committee structured in a way to monitor all notifications and transactions between separate member states. The EC’s detailed outline of the functions of the committee: experience exchange,

peer reviews and periodic reports on competition developments. Australia suggested a more formal system particularly in regard to the transfer of confidential information between nations. However Hong Kong and China pointed towards more information on this requirement before agreeing to any commitment.

### ***3.2.7: Capacity Building and Technical Assistance***

Capacity building and technical assistance generally refers to the assistance provided by industrialized countries in the creation and strengthening of competition policy infrastructure in developing countries. The WGTCP report suggested that WTO members agreed on the usefulness of capacity building and technical assistance to developing countries. Also they agreed upon long term assistance which should be tailored to the specific needs of member countries.

### ***3.2.8: National Submissions on Capacity Building and Technical Assistance***

The national submissions are supportive of capacity building and technical assistance. According to the submission made by the European Commission “the WTO can make as important contribution towards the development of a reinforced and better coordinated approach to technical assistance in the competition field” (EC WT/WGTCP/W/184 2002). The US suggested that technical assistance programmes must take into account the country and culture, local concerns and conditions, and the body of domestic law.

The work of the WGTCP helped to clarify many competition related issues and identify a number of areas in which there might be the scope for agreement. The WGTCP has discussed extensively the *‘relevance of fundamental WTO principles of national treatment, transparency and most favoured nation treatment to competition policy and vice versa’*<sup>11</sup>. The WGTCP focused on some modest provisions to be included at the WTO. The proposals didn’t aim at extensive harmonisation of national competition laws/policies rather focused on greater cooperation and introduction of best practices in competition policy. However, irrespective of the wide ranging examination of the relationship between these two issues by the WTO working group, no agreement could be

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<sup>11</sup> WT/WGTCP/7, 2003

reached on this issue at the WTO Ministerial Conference in Cancun, 2003 and hence discussions on competition policy have not taken place in the Doha Round. These proposals were resisted on the ground that national competition policies among the developed economies are diverse and many developing country members of the WTO do not have competition policy at all. The Developing countries also argued that introducing national competition policies will not be in their interest as it will restrict them in pursuing own industrial and development strategies. In addition, developing countries also argued that introduction of competition policies in WTO negotiations would imply expanding the agenda for developing countries which already had problems of implementing what was already on the agenda after 2001.

### ***3.3: Competition Provisions in the existing WTO agreements.***

Though no consensus could be reached on a competition policy framework in the WTO, there are number of provisions under GATT 1994 and other WTO agreements such as TRIPs and GATS could be classified as competition related provisions and they do have possible application in cases of anticompetitive practices affecting trade and market access. Article II of the GATT requires that if a monopoly is retained by a WTO member such a monopoly shall not 'operate so as to afford protection in excess of that provided for in schedules'. Article III (national Treatment) refers to equal treatment between domestic and national firms. However in GATS national treatment is not a general obligation rather it is tied to specific market access commitments that must be negotiated by the service sector. But the national treatment definition as proposed by European Union in the WGTCP is different from GATT and GATS. The EC proposal refers to the nationality of firms rather than that of products which implies that the principle of non-discrimination applies more to foreign investment than foreign trade. Also the discussion at WGTCP suggested that non-discrimination clause would be applied only on a *de jure* basis, i.e. discrimination embodied in the laws, regulations and guidelines of general application.

Similarly Article XI (General Elimination of Quantitative Restrictions) of GATT prohibits members from imposing quantitative restrictions other than duties and taxes on

import/export of products across border. However as stated by Article XVII (State Trading Enterprises) the focus of GATT anticompetitive provisions are on government actions, the application of non commercial criteria by state owned companies or companies that benefit from exclusive or special rights granted by government. Article XXIII of GATT provides the option of using existing GATT rules to address anticompetitive practices when a WTO member feels that the benefits achieved under this agreement is nullified by measures not violating any part of GATT. For example Article XXII on consultation of GATT can be used when the benefits of market access for a WTO member are nullified by the absence of competition in a target market.

The GATS agreement while dealing with regulatory issues, touches upon many issues on competition. According to Article II of the GATS, monopolies should not abuse the market power when competing in services outside their monopoly rights. The sector agreements in the GATS also include many elements of competition policy. The Understanding on Commitments in Financial Services requires monopoly rights to be listed and efforts should be made towards reducing them. The Reference Paper on Basic Telecommunications negotiated in 1997 prohibits cross subsidization.

The TRIPs agreement also contains elements of competition policy. Article 8 of TRIPs suggests that WTO members may take appropriate measures to prevent abuse of intellectual property rights having an adverse effect on competition in the relevant market. Article 40 allows competition authorities of the WTO members to control certain licensing agreements in case of an abuse of intellectual property rights having an adverse effect on competition in the relevant market.

Though these agreements contain a fair number of elements of competition law, most of the provisions are weak and members have seldom made use of these provisions. Also these provisions are limited in scope as they only target measures taken by the State and State owned business entities; but not by private business entities. This implies that private anti-competitive practices like cartels are not within the sphere of these rules. Also these provisions do not require the domestic rules and regulations to be in place to

protect or assure competition in the market. Owing to these limitations in the existing WTO rules, there were proposals for the inclusion of competition policy in the WTO framework.

#### **IV: Competition Provisions in Trade Agreements**

##### **1. Rationale**

The difficulties of concluding effective multilateral agreements on competition law enforcement have been recognised despite many attempts to keep the issue alive. Even the regional agreements except the European Agreement (has an effective harmonised competition policy regime) on competition law and policy are severely constrained in the scope and content by national sovereignty considerations (Spier, 1997). In order to improve cooperation in competition law and policy, countries have increasingly been establishing bilateral arrangements between competition agencies. There has also been another development of including competition provisions in a separate chapter in the bilateral and regional trade agreements.

There has been a significant increase in the number of trade agreements (regional & bilateral) since mid 1990s with almost all countries forming a part of one or more trade agreement. A survey of these trade agreements indicates that they are quite varied in nature. Agreements have been taking place between economically and geographically diverse members. This recent wave of economic integration also looks beyond the traditional trade measures such as tariff and non tariff border measures. The new age agreements look at across the border measures such as liberalisation of services, investments and government procurements, strengthening of technological and scientific cooperation, environment and competition related provisions. These provisions are found not only in agreements signed by developed countries but also in those between developed and developing countries. Some of the early agreements of this new regionalism were NAFTA and MERCOSUR.

In recent times the competition related provisions in trade agreements have become very important. According to Evenett (2003) due to the increasing incidents of international

mergers, existence of international cartels and their potentially negative impact on developing countries, all the countries should be equipped with tools needed to deal with the increased market power of the multinational companies and their anticompetitive practices. This suggests that though the government imposed trade barriers have gradually been getting removed, there is every chance trade related private anticompetitive practices will emerge to erode the benefits of trade. Cernat (2005) explains that since national competition polices are not equipped to deal with the cross border anti competitive practices and in the absence of a binding multilateral framework on competition policy, regional competition policies become very important. As a result of these developments, the number of trade agreements with competition related provisions has increased significantly in the last two decades. In addition some cooperation agreements have also been signed by the competition authorities (US-Brazil). According to WTO (2003) estimates there are now 141 trade agreements containing competition related provisions.

## **2. Overview of Competition Provisions in Trade Agreements**

Countries have been willing to include competition provisions in trade agreements with different levels of ambition and among countries at various levels of development. Agreements in the beginning followed the pattern of OECD recommendations providing for notification, exchange of information coordination and consultation<sup>12</sup>. In recent times however, a greater cooperative approach has been taken in the drafting of bilateral competition cooperation agreement. Also it has been found that competition provisions vary with agreements from simple adoption of national competition laws to cooperation on positive comity and even dispute settlement. Some trade agreements contain general obligations to take action against anti competitive business conduct such as an obligation to adopt a domestic competition law without setting out specific provisions where as others call for more extensive coordination of specific competition standards and rules potentially requiring common competition laws and procedures. Therefore, many

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<sup>12</sup> Ham A, 1993

attempts have been made to prepare taxonomy of competition provisions in trade agreements.

Bellis (1997) reviewed a number of bilateral and plurilateral RTAs to examine their competition provisions. Similarly Hoekman (1998) analysed the competition provisions in a number of plurilateral RTAs and their relationship with anti dumping measures. A recent study by OECD (2005) analysed the competition provisions of 86 regional trade agreements. The study categorized the competition provisions and examined which agreement includes what kind of provisions. Cernat (2005) also provided some insight into the suitability and availability of various competition provisions in trade agreements. Though the number and kind of competition provision vary with agreements, according to these studies competition provisions in trade agreements can be categorized as follows.

### **2.1. Adoption and Enforcement**

This is an important feature of the competition provisions in trade agreements. The specifications requiring the adoption and application vary among the agreements. Some agreements broadly mention that parties will adopt measures to prohibit anti competitive behaviour while other agreements require specific actions by parties regarding such as creating competition agencies as was in the case of US-Singapore. The agreement stipulated that Singapore should enact competition legislation by January 2005. Existence of a national competition law is very important for the inclusion of competition provisions in trade agreements. Otherwise there is no legal basis for a Party to take any action against the anticompetitive practices taking place in the Partner state whose effects are felt in its own territory.

### **2.2. Coordination and Cooperation**

Another important element of competition provisions is the clause related to cooperation in competition issues. The Parties recognize the importance of cooperation regarding issues such as notification of anti competitive practices, consultation and exchange of information required towards enforcement activities. Agreements like Japan-Mexico and



Chile-Korea have established detailed cooperation mechanisms for each of these agreements.

### **2.3. Anti Competitive Behaviour**

Though all the trade agreements having competition provisions generally refer to anti competitive practices, there are varying degrees of content and scope in these provisions. Some trade agreements have very broad and non binding language and don't define the kinds of practices to be considered anti competitive eg. Japan – Mexico. On the other hand there are trade agreements like CARICOM that directs the parties to prohibit very specific types of practices within their jurisdiction.

### **2.4. Non-discrimination**

While all the trade agreements have general non-discrimination clauses, only a few have competition specific non discrimination provisions. This provision requires the Parties to apply their competition laws and policies in a non-discriminatory manner.

### **2.5. Due Process and Transparency**

Transparency and due process are essential facilitating measures in most trade agreements. The terms of these provisions parallel quite closely corresponding WTO provisions, such as GATT Article X, to which several trade agreements refer explicitly. GATT 1994 Article X requires Members to publish promptly all laws, regulations, judicial decisions and administrative rulings affecting imports and exports, and all bilateral agreements affecting international trade policy, so as to enable traders to become acquainted with them. Such laws, regulations, and rulings should be administered in a uniform, impartial and reasonable manner.

Trade agreements also promote transparency through the collection and dissemination of all relevant information through centralized inquiry points, publications and display on-line. However very few agreements include due process provisions which address the rights to fair and equitable judicial processes, to be notified of the proceedings, etc. The clauses related to transparency in competition related issues are very specific in nature

and hence limited in their scope of application. According to OECD (2005) study, this only applies to regulations addressing state aid. In several trade agreements they are not stated explicitly but only implied as objectives to be achieved through the implementation of other principles.

## **2.6. Anti-dumping**

The link between anti-dumping and competition policy continues to be considered in the negotiation of new trade agreements and is an area where regional approaches may differ considerably from what is currently contemplated multilaterally and under the disciplines of the WTO. Anti-dumping duties were traditionally seen as a way of addressing the risk for the cases of monopolists in one country using their domestic market power to enable predatory pricing that is cutting prices in another market to drive local firms out of business and thus extending the dominant firm's monopoly. In some trade agreements the parties have agreed to abolish the use of anti dumping measures between members of the agreement (eg. Canada-Chile).

## **2.7. Dispute Settlement**

Majority of trade agreements exclude competition related provisions from the purview of formal dispute settlement mechanisms. However many EU agreements allow for dispute settlements and partial dispute settlement mechanism is also provided in the US – Singapore free trade agreements.

## **2.8. Special and Differential Treatment (S&D)**

This provision is generally extended to the developing and least developing countries. In the context of S&D treatment, the provisions like technical assistance, capacity building, and transition periods are especially very relevant elements of competition policy. These types of S&D treatment appeared in many trade agreements with different frequencies.

Some agreements use the form of flexibility commitments which includes non reciprocal provisions in general and especially exemptions and exceptions.

The above analysis suggests the possible types of competition provisions in trade agreements. However, it should be clear that all the provisions are not present in each agreement. The competition provisions vary from agreement to agreement.

## **V. Case Studies: Competition Provisions in Free Trade Agreements**

There has been a proliferation of bilateral agreements having competition related provisions. Therefore observing the potential effects of some of the bilateral agreements may provide some insights into the economic advantages of such agreement, giving policy makers some useful guidance. In this context, few trade agreements (EU-Mexico, Japan-Singapore, US-Singapore, Australia-New Zealand, NAFTA, and US-Korea) were selected for detailed analysis. While analysing the case studies, we look at the contents of the chapter, effectiveness of the chapter and the scope of the chapter.

### **1. EU-Mexico Free Trade Agreement**

#### **1.1. Rationale**

The agreement came into force on 1<sup>st</sup> July, 2000 and happens to be the first agreement to be negotiated between a Latin American country and the 15 member states of EU. This FTA offered the EU and its member states a preferential opening into the growing market of NAFTA which was not possible in the absence of free trade agreements with US or Canada. Similarly for Mexico the agreement opened up an expansive market of almost 500 million European consumers. The agreement covered many aspects of trade such as trade in goods; market access; government procurement; intellectual property rights; cooperation and competition policy. The FTA was aimed at achieving the long term goals of greater dynamism in commercial and economic activity, creation of employment, fostering of investment and increasing opportunities and possibilities for strategic alliances<sup>13</sup>.

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<sup>13</sup> Source: [www.economia.gob.mx](http://www.economia.gob.mx)

However, both parties recognized that the benefits of free trade may be distorted by private anti competitive behaviour. In order to ensure that the advantages of the free trade regime are not undermined by private barriers to trade such as through anti competitive business conduct, both the parties agreed to include provisions on competition policy and cooperation and coordination thereof in the trade agreement<sup>14</sup>. The more specific competition provisions of this agreement are presented in Annex XV to the agreement. In essence the objectives of the mechanism are as thus:

- (a) to promote *cooperation and coordination* between the parties regarding the application of their competition laws in their respective territories and to provide mutual assistance in any fields of competition policy they consider necessary;
- (b) to *eliminate anti competitive activities* by applying the appropriate legislation, in order to avoid adverse effects on trade and economic development, as well as the possible negative impact that such activities may have on the other Party's interests; and
- (c) to *promote cooperation* in order to clarify any differences in the application of their respective competitive laws.<sup>15</sup>

There has been no other agency to agency agreement between the competition authorities of the EU and Mexico though they are the principal enforcement agencies responsible for the operation of the competition sections of the FTA. Therefore, the provisions contained in the FTA must act as the principal guide for these agencies in the coordination of their competition law enforcement activities.

## **1.2. Main Competition Provisions (Cooperation and Coordination)**

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<sup>14</sup> See Article 1.1 of Annex XV of EU-Mexico FTA

<sup>15</sup> See Article 1.2 of Annex XV of EU-Mexico FTA

Chapter II of the Annex XV contains provisions related to cooperation and coordination as they apply to competition policy. The main provisions relating to this aspect of competition policy are analysed below.

#### *a Notification*

Article 3 of the Annex XV provides provisions relating to the process of notification. It suggests that each competition authority shall notify the competition authority of the other Party of an enforcement activity if:

- (a) it is relevant to enforcement activities of the other Party;
- (b) it may affect the other Party's important interests;
- (c) it relates to restrictions on competition which may affect the territory of the other Party
- (d) decisions may be adopted conditioning or prohibiting action in the territory of the other Party

According to this Article, notification should take place during the initial phase of investigation to enable the notified competition authority to express its opinion. However this requirement is applicable only if this is not contrary to the parties competition laws and does not adversely affect the investigation. The opinions received may be taken into consideration when taking decisions. It also require the notification to be detailed enough to permit an evaluation by the other party and shall include

- (a) a description of the restrictive effects of the transaction on competition and the applicable legal basis;
- (b) the relevant market for the product or service and its geographical scope, the characteristics of the economic sector concerned and data on the economic agents involved in the transaction; and
- (c) the estimated deadlines for resolution, in cases in which the procedure has been initiated, and to the extent possible an indication of its probable out-come, and of the measures which may be taken or provided for.

The Parties are also required to notify each other of any measures other than enforcement activities that could affect the other party's interest. The particular cases provided are as such

- (a) administrative or judicial proceedings; and
- (b) measures taken by other governmental agencies, including current or future regulatory bodies, which may have an impact to enhance competition in specific regulated sectors

### ***b. Exchange of Information***

Article 4 deals with the provision of exchange of information and specifies the following types of information to be exchanged by the competition authorities:

- (a) to the extent practicable, texts on legal theory, case-law or market studies in the public domain, or in the absence of such documents, non-confidential data or summaries;
- (b) information related to the application of competition legislation provided that it does not adversely affect the person providing such information, and for the sole purpose of helping to resolve the procedure; and
- (c) information concerning any known anticompetitive activities and any innovations introduced into the respective legal systems in order to improve the application of their respective competition laws.

Further the Article says, if circumstances require, then the competition authorities should help each other to collect data in their respective territories. However such information collection should not involve violation of either party's national laws. It also aims at promoting knowledge and understanding of each other's competition law and policy and state that the evaluation of cooperation mechanism is also to be achieved through both formal and informal meetings of representatives of each party.

### ***c. Coordination of Enforcement Activities***

Article 5 allows the competition authorities to coordinate their enforcement activities with specific cases and does not prevent either party from taking independent decisions.

In determining the extent of coordination the Parties should consider

- (a) the effective results which coordination could produce;
- (b) the additional information to be obtained;
- (c) the reduction in costs for the competition authorities and the economic agents involved; and
- (d) the applicable deadlines under their respective legislation

### ***d. Consultations***

Article 6 of the Annex XV provides for the use of consultation when important interests of one Party are adversely affected in the territory of the other Party. It allows the competition authority of one Party to transmit its views or request for consultation if it considers the proceedings and investigations being conducted by the competition authority of the other party may affect its interests. The competition authority so addressed should give full and systematic consideration to the views expressed by the

requesting competition authority i.e. application of negative comity. Also allows consultation in case of anticompetitive activity in the territory of the other party.

***e. Avoidance of Conflicts***

To avoid conflicts Article 7 states that each Party should wherever possible take important interests of the other Party into consideration when taking enforcement actions under its competition law. Also the Parties shall seek a mutually acceptable solution by considering

- (a) the importance of the measure and the impact which it has on the interests of one Party, by comparing the benefits to be obtained by the other Party;
- (b) the presence or absence, in the actions of the economic agents concerned, of the intention to affect consumers, suppliers or competitors;
- (c) the degree of any inconsistencies between the legislation of one Party and the measures to be applied by the other Party;
- (d) whether the economic agents involved will be subject to incompatible requests by both Parties;
- (e) the initiation of the procedure or the imposition of penalties or remedies;
- (f) the location of the assets of the economic agents involved; and
- (g) the importance of the penalty to be imposed in the territory of the other Party.

***f. Confidentiality***

Article 8 of the Annex XV suggests that any information exchanged under the agreement is subject to the confidentiality laws of both Parties. Any confidential information whose dissemination is expressly prohibited or whose dissemination could adversely affect the Parties, shall not be provided without the express consent of the source of the information. The competition authorities are to maintain the confidentiality of the information received and should oppose any disclosure of such information by a third party that is not authorized by the competition authority that supplied the information.

***g. Technical Cooperation***

According to Article 9 of the Annex, the Parties agree to provide each other the technical assistance so that they can both take advantage of their respective experience and strengthen the implementation of their competition laws and policies. Technical assistance will include; training of officials of both Parties, seminars in particular for civil servants, the administration of joint studies on competition laws and policies and utilisation of developments in communication and computer systems.

### **1.3. Scope of the Agreement on Competition Provisions**

The competition provisions of Chapter II given in Annex XV of the EU-Mexico FTA apply to anticompetitive activities as defined under the competition laws of a Party and which is subject to penalties and remedies. As per the respective competition laws these provisions then apply to anti competitive activities including restrictive agreements and concerted practices, abuse of a dominant position and mergers, acquisitions and full-function joint ventures which will ‘significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position’ in the EU. The law also prohibits certain types of aid to companies by member states such as state aid which ‘distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods’. The competition law of Mexico prohibits monopolistic practices that tend to diminish, harm, or impede competition and the freedom to produce, process, distribute or market goods and services. The practices include essentially horizontal agreements with the object or effect of price fixing, output restriction, market division or bid rigging. Even the vertical agreements like tied sales are also prohibited.

Further dealing with the scope the agreement states that the enforcement activities should be notified if it is relevant to the enforcement activities of the other Party. Again the notification clause can be used if the enforcement activities relate to restrictive practices affecting the territory of the other Party. The requirement also arises if there is need to prohibit actions in the territory of the other Party and involve the search for information located in the territory of the other Party. However the confidentiality clause and the lack of legally binding provisions, provide discretionary power to the contracting Parties to overlook the agreement if they consider their interests are adversely affected by following the provisions in the agreement (Papadopoulos, 2005).

The EU-Mexico FTA allows both parties to use WTO provisions for anti-dumping. During 1995-2004 Mexico brought three anti dumping actions against the EU and the EU brought one against Mexico (Holmes et al. 2005). This agreement also contains elaborate



provisions on dispute settlement that appear to cover competition. The clause on dispute settlement says that “Dispute settlement mechanism: binds for the parties and covers all aspects of the agreement”.<sup>16</sup> However the study by Marsden and Whelan (2005) suggest that the chances of sanction under the EU-Mexico FTA settlement for alleged violation of Annex XV is very remote and as a matter of interpretation, the dispute settlement procedures in question don’t apply to Annex XV.

Another important issue related to competition provisions in trade agreements is whether it involves substantive rule changes or only facilitates cooperation within the existing procedures. The EU-Mexico FTA does not have any provision requiring any change in the partner’s law which implies that there is no requirement towards harmonisation of competition policies. In particular Mexico (developing country) is not required to align or create own rules that are identical to the agreements provisions as that is one possible outcome of a bilateral trade between developed and developing countries. The chapter also does not have provisions regarding exemption of sectors from the purview of competition provisions.

#### **1.4. Effectiveness of the Provisions**

Azevedo (2005) suggests that the effectiveness of the competition provisions in an agreement depends on the channels to establish and exchange of information between competition authorities at various phases of investigation. In case of a developing country’s involvement, the most important competition provision has been that of technical cooperation and capacity building. As mentioned above the EU-Mexico FTA includes provisions for technical assistance as detailed under Article 9 of the Annex XV. However, many authors have suggested that the confidentiality clause on information exchange is the major limitation to the effectiveness of the agreement.

However, in reality there is very little information available on the enforcement of the competition provisions. The use of competition provisions by Parties is generally not

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<sup>16</sup> [http://ec.europa.eu/trade/issues/bilateral/countries/mexico/index\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/countries/mexico/index_en.htm)

published (Cernat, 2005). In such a situation Marsden and Whelan (2005) provides some information about the EU-Mexico information activities. According to their study, the Mexicans have notified the EU of their enforcement activity on 31 occasions and they have only been notified of EU enforcement activity only on 1 occasion. In the case of request for consultation, 2 have been made by EU and 12 by Mexico. This statistics lead Marsden and Whelan (2005) to suggest that *'It is unclear what conclusions can be drawn from these statistics, apart from the fact that the parties have been cooperating in a manner advocated by the cooperation mechanism i.e. through consultation and notifications'*.

## **2. US-Singapore Free Trade Agreement**

### **2.1. Rationale**

The US-Singapore FTA was signed on May 6, 2003 at Washington and came into force since January 1, 2004. This agreement is the United State's first FTA with an Asian nation. The U.S.-Singapore FTA covered aspects such as market access in goods, services, investment, government procurement, intellectual property, and provides for groundbreaking cooperation in promoting labor rights and the environment. In order to ensure that that anticompetitive business practices do not restrict the bilateral trade and investment, both Parties agreed to include competition provisions relating to prohibition, implementation and cooperation clauses as a separate chapter in the trade agreement<sup>17</sup>. The specific competition provisions of this agreement are presented in Chapter 12 of this agreement.

### **2.2. Main Competition Provisions**

Chapter 12 of the FTA contains very detailed but specific competition provisions relating to anticompetitive business conduct, monopolies and cooperation.

#### ***a. Anticompetitive Business Conduct***

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<sup>17</sup> Article 12.1 of Chapter 12 of US-Singapore FTA

Article 12.2 of Chapter 12 provides provisions for prohibiting anticompetitive business practices. It says

- (a) Each Party shall adopt or maintain measures to limit anti competitive business conduct in their jurisdiction and each establish or maintain an authority within their countries to enforce such measures<sup>18</sup>;
- (b) The objective is to promote economic efficiency and consumer welfare;
- (c) The enforcement policy directs the national authorities not to discriminate on the basis of the nationality of the subjects. Any person penalized for violation of such measures can seek review of the sanction in a domestic court or independent tribunal

***b. Designated Monopolies and Government Enterprises***

Article 12.3 specifies the provisions on designated monopolies and government enterprises.

***1. Designated Monopolies***

- (a) Does not prevent a Party from designating a monopoly
- (b) The Party which designates a monopoly and if the designation affects the interest of the other Party then the Party should introduce such conditions on the operation of the monopoly so as not to nullify or minimize the benefits of trade arising under chapter 2 (National Treatment and Market Access for Goods), 3 (Rules of Origin), 8 (Cross Border Trade in Services) and 16 (Intellectual Property Rights).
- (c) The Party shall provide written notification in advance wherever possible to the other Party of the designation and such conditions
- (d) Each Party shall ensure that
  - the designated monopoly acts in a manner that is not inconsistent with the Party's obligations under this agreement
  - Acts solely in accordance with commercial considerations in its purchase or sale of the monopoly of good or service in the relevant market
  - Does not engage in anti competitive practices in a non monopolized market in its territory that adversely affect covered investments

***2. Government Enterprises***

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<sup>18</sup> Singapore enacted its Competition Act in 2004 effective on January 1, 2005

- (a) Nothing in this agreement prevents a Party from establishing or maintaining a government enterprise
- (b) Each Party shall ensure that the government enterprise acts in a manner that is not inconsistent with the Party's obligations under this agreement
- (c) The US shall ensure that its government enterprise accords non-discriminatory treatment in the sale of its goods and services to covered investments.
- (d) In addition Singapore shall ensure that any government enterprise
  - acts solely on the basis of commercial considerations in the purchase and sale of goods or services
  - provides non-discriminatory treatment to covered investments, to goods of the United States and to service suppliers of the United States including with respect to its purchase or sales<sup>19</sup>,
  - does not either directly or indirectly enter into agreements among competitors that restrain competition on price or output or allocate customers without any plausible efficiency justification.
  - Does not engage in exclusionary practices that reduces competition in a market in Singapore to the detriment of consumers
- (e) Singapore shall not take any action directly or indirectly to influence or direct decisions of its government enterprises. However it may exercise its voting rights in government enterprises in a manner which is not inconsistent with the Agreement
- (f) Singapore to have goal to eventually eliminate aggregate ownership and other interests that confer effective influence in entities organised under laws of Singapore
- (g) Singapore also commits to a detailed consolidated annual report for such entities identifying the percentage of shares owned by the government, a description of special shares or voting rights, the name and title of any government official serving as an officer, and annual revenues and/or total assets

### *3. Price Discrimination*

- (a) Price discriminations based on normal commercial considerations is not inconsistent with this article

### *4. Government Procurement*

- (a) This article does not apply to government procurement

### *c. Cooperation*

Article 12.4 suggests that the Parties agree to cooperate and coordinate in competition matters so as to make the competition law and policy further effective in the free trade area.

### *d. Transparency and Information Requests*

Article 12.5 specifies the following provisions relating to transparency and information exchange:

- (a) The Parties commit to the value of transparency of their competition policies

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<sup>19</sup> The Parties recognize that shareholders do not oversee the day to day operations of enterprises

- (b) Parties commit to make publicly available information requested of each other regarding enforcement measures prohibiting anti competitive business conduct
- (c) Each Party at the request of the other Party shall make available public information concerning government enterprises and designated monopolies, both public and private.
- (d) Each Party at the request of the other Party shall make available public information concerning exemptions to measures proscribing anticompetitive business conduct

*e. Consultations*

Article 12.6 says that each Party at the request of the other Party enters into consultations regarding specific matters that arise under this chapter. The Party shall give full and sympathetic consideration to the concerns of the other party which implies the application of negative comity. In addition this clause requires Singapore to inform the United States in case of any anticompetitive conduct by its government enterprises of the steps it has taken or plans to take to examine the conduct at issue, about the enforcement proceedings and their results.

#### *f. Disputes*

Article 12.7 says that Parties don't have recourse to dispute settlement mechanism under this agreement for any matter arising under Article 12.2, 12.4, or 12.6 i.e. anticompetitive business conducts, cooperation and consultations respectively.

#### *g. Definitions*

Article 12.8 defines few terms like covered entity, investment etc used in the agreement and thus affects the scope of the arrangement accordingly.

### **2.3. Scope of the Agreement on Competition Provisions**

The competition clauses of Chapter 12 of the US-Singapore FTA apply to anticompetitive business conducts. However the anti competitive business conducts has not been defined in the agreement. The Parties are allowed to apply their own competition laws in their respective territories. Again no detailed list or elaboration of such measures is given. In this agreement the objective of prohibiting anti competitive practices has been to promote consumer welfare and economic efficiency rather relating it to trade. Both the parties agree to make the competition enforcement policy non-discriminatory on the basis of nationality.

A very detailed discussion on the establishment and conduct of the designated monopolies and government enterprises is done in this chapter. Though both the parties are to ensure that the designated monopolies and government enterprises act in a manner that is not inconsistent with the Party's obligations under the agreement, Singapore in addition is required to undertake some more measures. For example, Singapore undertakes to act solely on the basis of commercial considerations in purchases and sales of goods and services involving government enterprises; not to enter into exclusionary or competition restraining practices with competitors, not to use voting rights to influence decisions of government enterprises in non commercial ways, and to have as a goal to eventually eliminate the aggregate ownership as confers effective influence over such entities. Singapore also commits to a detailed consolidated annual report for such entities identifying the percentage of shares owned by the government, a description of special

shares or voting rights, the name and title of any government official serving as an officer, and annual revenues and/or assets. This may be due to the fact that Singapore didn't have a national competition law at the time of signing this FTA.

The scope of the article expands to the provisions of notification, consultation and exchange of information. The Parties are required to provide a written notification wherever possible of the designation of monopolies. The Parties at the request of each other make available public information concerning the enforcement measures, government enterprises, designated monopolies and exemptions to the measures prohibiting anticompetitive behaviour. The scope of the agreement is restricted as price discrimination as a business practice is not explicitly covered in this chapter. Government procurement also lies out of the purview of this chapter. This chapter allows for partial use of dispute settlement mechanism under this agreement. The legal nature of the competition provisions in the US - Singapore FTA indicates the presence of both soft and hard laws as some provisions like enacting general competition legislation by January 2005 were binding on the part of Singapore. However, though Singapore has enacted a national competition law, there are no provisions requiring harmonisation of competition provisions.

Chapter 12 of the US-Singapore FTA is a very detailed one and deals with many aspects competition of law. The provisions are included so that they not only prohibit private anticompetitive practices, but also limit the anticompetitive conducts of the government enterprises. The agreement leaves both Parties free to use WTO provisions on antidumping.

#### **2.4. Effectiveness of the Competition Provisions**

The agreement being a very recent one, an empirical analysis of its effectiveness is very difficult. Since there is no empirical data available, we tried to get this information by interviewing the trade and competition authorities of Singapore. From our discussion with them, it was known that these provisions have never been implemented. There has been no such complain against anticompetitive practices by either Party and hence no

enforcement measure has been taken till now. However, they are quite hopeful that in case of such a situation, there will be an increased level of cooperation and coordination given that these provisions are included in the agreement.

### **3. Singapore-Japan New Age Economic Partnership**

#### **3.1. Rationale**

This agreement came into force on 30<sup>th</sup> November 2002. This FTA was supposed to facilitate and promote liberalisation as well as provide a stable environment for economic activity. It aimed at strengthening the economic relation between the Parties through cooperation. The FTA covered many aspects of trade such as trade in goods, services, investment, intellectual property rights, government procurement and competition. The Chapter 12 of the Singapore – Japan New Age Economic Partnership which deals with the competition provisions is very brief. This may be due to the reason that Singapore didn't have the national competition law at the time of signing this agreement. The objective for including the competition provisions was to control anti competitive activities and promote cooperation in the field of anti competitive practices in order to facilitate trade and investment flows between the Parties and effective functioning of its markets<sup>20</sup>.

#### **3.2. Main Competition Provisions**

Chapter 12 of this agreement specifies various competition related provisions and the details and procedures of the cooperation provisions are analysed in Chapter 5 of the implementing agreement. The provisions are discussed below.

##### ***a Anti-competitive Activities***

Article 103 of the Chapter 12 allows each Party to take appropriate measures in accordance to their applicable laws and regulations against anticompetitive activities. The Parties are also free to review and improve or adopt laws and regulations to effectively control anticompetitive activities whenever necessary.

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<sup>20</sup> Article 103, Ch. 12 of Singapore-Japan New Age Economic Partnership



***b. Cooperation on Controlling Anti-competitive Activities***

Article 104 states that the Parties shall cooperate in controlling anticompetitive activities subject to their resource availability. The details of the procedures of cooperation are given in Chapter 5 of the Implementing Agreement. The purpose of this chapter is to implement the cooperation provisions mentioned in Article 104 of the basic agreement.

***c. Notification***

Article 17 of Chapter 5 deals with the notification process of the Parties. It states that

- (a) Each Party shall notify the other Party with respect to its enforcement activities if the notifying Party considers that the enforcement activities affect its important interests.
- (b) Notification should be detailed enough to enable the notified Party to make an initial evaluation of the impact
- (c) Each Party should notify the other about any amendment in the competition law or any adoption of new law
- (d) Each Party should provide copies of publicly released guidelines or policy statements issued in relation to competition laws of its country

***d. Exchange of Information***

Article 18 suggests that

- (a) Each Party should inform the other Party regarding enforcement activities regarding anticompetitive practices that may have an adverse effect on the territory of the other Party
- (b) Each Party should provide the other Party any significant information regarding anticompetitive activities that may warrant enforcement activities by the other party
- (c) Each Party should also provide the other Party upon request information under its possession which is relevant to the enforcement activities of the other Party

***e. Technical Assistance***

Article 19 says that each Party may render technical assistance to the other Party for the effective management and adoption of laws and regulations for controlling anticompetitive activities.

***f. Terms and Conditions on Provisions of Information***

Article 20 clearly spells out the terms and condition for the use of information. It directs that

- (a) Information should be strictly used by the receiving Party for the purpose of effective enforcement of the competition laws of its country and not to be communicated to a third party
- (b) The information should be kept as confidential unless the provider Party consents to the disclosure of such information
- (c) A Party can limit the information it communicates if the other Party fails to give the assurance of confidentiality
- (d) A Party is not required to communicate any information if it is prohibited by the laws and regulations or incompatible with its important interests

***g. Use of Information in Criminal Proceedings***

Article 20 states that information shall not be used by the receiving party in criminal proceedings carried out by a court or judge. In case of need the Party shall submit a request for such information to the Party that communicated the information through the diplomatic channel or other channel established in accordance with the laws of the requested Party.

***h. Scope of Chapter 5***

The scope of chapter 5 given in Article 22 is restricted to the extent that Article 17 (Notification) and Article 18 (Exchange of Information) shall only apply to the sectors of telecommunications, electricity and gas. However this scope was limited due to the fact that Singapore didn't have the competition law and these sectors were regulated by sectoral regulators. Therefore this Article had the provision of expanding the scope of cooperation through consultation when the Parties adopt new laws and regulation for controlling anticompetitive practices.

***i. Review and further Cooperation***

Article 23 requires the Parties to review the cooperation agreements in three years after the entry came into force. Upon such review the Parties may consider extending the cooperation mechanism to

- Co-ordination of enforcement activities
- Positive comity and
- Comity

It also says that any such extension shall be subject to the applicable national competition laws and regulations and available resources of the Parties.

#### *j. Consultations*

Article 24 allows the Parties to hold consultation on any matter which may arise under chapter 5.

#### *k. Communications*

Article 25 suggests that though communications under Article 17 and 18 can be directly carried out between the implementing authorities notification under Article 17 however shall be confirmed in writing through the diplomatic channel

### **3.3. Scope of the Agreement on Competition Provisions**

The competition provisions in Chapter 12 of the basic agreement and Chapter 5 of the implementing agreement apply to anticompetitive activities affecting trade and investment flows between Parties. However it fails to define the anticompetitive activities and hence this makes the enforcement very difficult. The scope of competition provisions relating to cooperation (notification and exchange of information) again becomes limited with the sectoral exemptions. These provisions only apply to the sectors of telecommunications, electricity and gas and all other sectors are exempted from their application.

As has been seen in case of the EU-Mexico FTA and Singapore-US FTA, the competition provisions included in the Singapore-Japan New Age Economic Partnership are also non-binding in nature. There is no scope for positive or negative comity. The agreement does not have any provision requiring the necessity of formulating a national competition law by Singapore or making any change in their laws to harmonise. The Parties have the discretionary power to adopt or change the laws and regulations whenever they feel the necessity to do so. Therefore, these nonbinding rules along with the confidentiality clause relating to the exchange of information give discretionary power to the Parties to overlook the agreement.

### **3.4. Effectiveness of the Competition Provisions**

Given the non-disclosure of data pertaining to the enforcement of competition provisions, it is very hard to assess the effectiveness of these provisions. However from

our interviews, we could gather that the chapter dealing with competition provisions is seen just as a facilitating chapter which helps in building the mechanism for cooperation. The provision requiring the revision of the cooperation pursuant in three years did not happen in time but took place on 19<sup>th</sup> March 2007. The Parties agreed for technical alternations to competition provisions. However the legal text of the agreement is not yet publicly available to assess the developments.

## **4. The North American Free Trade Agreement (NAFTA)**

### **4.1. Rationale**

The North American Free Trade Agreement (NAFTA) has been effective since January 1, 1994 and is comprised of the United States, Mexico, and Canada. The agreement included many aspects of trade such as market access, national treatment, government procurement, investment, services and competition policy. In the due time NAFTA has established a strong foundation for future growth and has set a valuable example of the benefits of trade liberalization. In order to prevent the benefits of free trade from being eliminated through (private) anticompetitive behavior the agreement included a chapter on competition policy<sup>21</sup>.

### **4.2. Main Competition Provisions**

Chapter 15 of the agreement contains five specific competition related provisions, which are discussed in detail below.

#### ***a. Competition Law***

Article 1501 of the Chapter 15 states the provisions relating to adoption and enforcement measures to proscribe anti competitive business conduct. This requires

- (a) Each Party to adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto without however prescribing specific competition standards or rules.
- (b) The Parties are also required to consult each other regarding the effectiveness of the measures undertaken by each Party
- (c) Recognising the importance of cooperation and coordination, the Parties agree to cooperate on issues of competition law enforcement policy. The cooperation can take place through mutual legal assistance, notification, consultation and

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<sup>21</sup> <http://www.dfait-maeci.gc.ca/nafta-alena/agree-en.asp#PartI>

exchange of information relating to the enforcement of competition laws and policies

- (d) Parties don't have recourse to dispute settlement mechanism

***b. Monopolies and State Enterprises***

Article 1502 of the Chapter 15 deals with provisions on monopolies and state enterprise. The provisions in the agreement don't prevent any Party from designating a monopoly. However it maintains that

- (a) The Party which designates a monopoly and if the designation affects the interest of the other Party then the Party should introduce such conditions on the operation of the monopoly so as to nullify or minimize the benefits in the sense of Annex 2004 (Nullification and Impairment)
- (b) The Party shall provide written notification in advance wherever possible to the other Party of the designation
- (c) Each Party shall ensure that
  - The designated monopoly acts in a manner that is not inconsistent with the Party's obligations under this agreement
  - Acts solely in accordance with commercial considerations in its purchase or sale of the monopoly of good or service in the relevant market
  - Does not engage in anti competitive practices in a non monopolized market in its territory that adversely affect investment of an investor of another Party
  - Provides non-discriminatory treatment to investments of investors, to goods and to service providers of another Party in its purchase or sale of the monopoly good or service in the relevant market
- (d) This provisions don't apply to government procurement of goods and services for governmental purposes

***c. State Enterprises***

Article 1503 in this chapter states about the provisions relating to maintaining and establishing state enterprises. The Parties are not prevented from establishing or maintaining state enterprises by the provisions in this agreement. However their actions are regulated through the following provisions.

- (a) Each Party should ensure that the state enterprise it maintains or establishes don't act in a manner that is inconsistent with the Party's obligations under chapters dealing with investment and financial services
- (b) The state enterprises should provide non-discriminatory treatment to the investors of another Party

#### ***d. Working Group on Trade and Competition***

Article 1504 states that the Commission shall establish a Working Group on Trade and Competition, which will make recommendations for further work on the issues concerning the relationship between competition laws and policies and trade in the free trade area.

#### ***e. Definitions***

Article 1505 defines some terms which affect the scope of the agreement.

### **4.3. Scope of the Agreement on Competition Provisions**

The competition provisions in NAFTA apply to the anticompetitive activities. But with the exception of provisions governing the behaviour of state monopolies, the agreement doesn't dictate substantive competition or antitrust rules. It only obliges the Parties to have such rules without specifying the measures.

As stated in Article 1502 of the Chapter 15 of this agreement, it appears that NAFTA parties are required not only to have such rules but also should ensure that these rules are enforced. There is scope for cooperation and consultation. There is provision for notification and exchange of information as well. Since the clause on exchange of information is not elaborated, it is unlikely that there is any binding on exchanging confidential information. NAFTA obligates the Parties to have competition laws and apply them without discrimination and does not impose new uniform competition laws on the Parties. In comparing the NAFTA with US-Singapore FTA, it can be seen that many provisions (like State Enterprises) present in NAFTA have been included in US-Singapore FTA.

### **4.4. Effectiveness of the Competition Provisions**

As discussed above, in general the content of the rules is not specified in the agreement and hence there can be wide variation among the substantive requirement of the national laws. And since NAFTA does not have uniform competition measures, national antitrust laws are used by the Parties without any reference to any competition law standard. And

with the lack of dispute settlement mechanism, the competition provisions in NAFTA provide a framework for the development of cooperative or collective competition policies.

## **5. Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)**

### **5.1. Rationale**

The Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA or the CER agreement) is the main instrument governing economic relations between the two countries and entered into force in January 1, 1983. ANZCERTA was built on a series of earlier preferential trade agreements between Australia and New Zealand, including the 1966 New Zealand and Australia Free Trade Agreement (NZAFTA).

The ANZCERTA or the CER agreement is more than a free trade agreement, covering almost all aspects of the Australia - New Zealand trade and economic relationship. As well as underpinning bilateral trade in goods and services, ANZCERTA is the main medium for close collaboration across quarantine, customs, transport, regulatory and product standards and business law issues. The main objective of Australia New Zealand CER is to expand free trade by eliminating barriers to trade and promoting fair competition. However like the previous discussed trade agreements the CER agreement does include competition provisions in a separate chapter but it has facilitated cooperation between Australia and New Zealand on this issue.

### **5.2. Main Competition Provisions**

There are few competition related provisions found in the CER agreement. These provisions are discussed below.

#### ***a. Quantitative Import restrictions and Tariff Quotas***

Article 5 of the agreement prohibits all tariffs and quantitative import restrictions on all goods originating in the territory of the other member states.

### ***b. Other Trade Distorting Factors***

Article 12 of the agreement deals with trade distorting issues. It suggests that the member states shall

- (a) Examine the scope for taking action to harmonize requirements relating to relating to such matters as standards, technical specifications and testing procedures, domestic labeling and restrictive trade practices
- (b) Where appropriate, encourage government bodies and other organizations and institutions to work towards the harmonization of such requirements.
- (c) The Member States shall consult at the written request of either with a view to resolving any problems which arise from differences between their two countries in requirements.

### ***c. Consultation and Review***

Article 22 of the agreement sets out the review and consultation mechanism to ensure the satisfactory implementation of the agreement. It includes

- (a) Ministers of the Member States shall meet annually or otherwise as appropriate to review the operation of the Agreement
- (b) At the written request of either parties, promptly enter into consultations with a view to seeking an equitable and mutually satisfactory solution if the Member State which requested the consultations considers that:
  - an obligation under this Agreement has not been or is not being fulfilled;
  - a benefit conferred upon it by this Agreement is being denied;
  - the achievement of any objective of this Agreement is being or may be frustrated; or
  - a case of difficulty has arisen or may arise

It was decided that the Member States should undertake a general review of the agreement in 1988. And in the review of ANZCERTA in 1988 a protocol on Acceleration of Free Trade on Goods was appended to the Agreement. As per the review Article 4 of the ANZCERTA was modified and reads as thus.

### ***d. Anti-dumping***

Article 4 of the revised ANZCERTA states that the member States ‘agree *that anti-dumping measures in respect of goods originating in the territory of the other Member States are not appropriate from time of achievement of both free trade in goods between*



*the Member States on 1 July 1990, and the application of their competition laws to relevant anticompetitive conduct affecting trans-Tasman trade in goods'. It further says that 'each member State shall take such actions as are appropriate to achieve the application of its competition law by 1 July, 1990 to anticompetitive conduct affecting trans-Tasman trade in a manner consistent with the principles and objectives of the agreement'.*

### **5.3. Scope of the Agreement on Competition Provisions**

The ANZCERTA or CER agreement is very important one because of its elimination of the anti-dumping clause. Analysis of the CER agreement suggests that both countries worked towards deep integration through harmonisation of various laws like business law. There is scope for consultation, exchange of information (subject to confidentiality clause) and notification in case of anticompetitive conduct. It also provides for extensive investigatory power. It was agreed by the Member States that nationals of one state could be made the subject of an enquiry by the competition authorities of the other state and be required to respond to requests for information. In 1994, the competition authorities concluded a bilateral Cooperation and Coordination Agreement to reduce the possibility for inconsistencies in the application of legislation in instances where this is not required by statutory provisions (WTO, 1996).

However the application of the antitrust remedies remains strictly national. The agreement also includes strong disciplines on subsidies as the 1988 protocol says 'bounties and subsidies providing long term support can no longer be regarded as a viable instrument of industrial policy'. Thus industry specific subsidies are banned along with the already banned export subsidies. The Closer Economic Relations (CER) Agreement between New Zealand and Australia has been even described by the WTO as the worlds' most comprehensive, effective and mutually compatible free trade agreements.

### **5.4. Effectiveness of the Competition Provisions**

In 1983, the competition regimes of the two countries differed significantly when Australia laws were closer to the US model and New Zealand's legislation followed the

UK model. In 1996, New Zealand enacted a new legislation which was much closer to the Australian system. Although, this was largely motivated by a desire to enhance competition in the economy, it also facilitated discussions between the two countries to eliminate anti dumping on bilateral trade flows. Consultation took place between Australia and New Zealand about ensuring the compatibility of Australian and New Zealand evidence law, especially in relation to business records and secondary evidence, in the context of enactment of new evidence legislation by Australia and examination of possible evidence reforms by the New Zealand Law Commission.

## **6. US-Korea Free Trade Agreement**

### **6.1. Rationale**

The U.S.-Korea Free Trade Agreement is a trade agreement between the US and the Republic of Korea. Negotiations were announced on February 2, 2006 and were concluded on April 1, 2007. The final text which has not yet been made public will soon be sent to Congress for legislative approval. The FTA includes many aspects such as trade in services, national treatment, government procurement, investment and competition policy. The objective of including competition related provisions was to promote economic efficiency and consumer welfare.

### **6.2. Main Competition Provisions**

Chapter 16 of the agreement deals with competition related matters relating to trade. The main provisions are as thus.

#### ***a. Competition Law and Anti Competition Business Conduct***

Article 16.1 of the Chapter 16 states that

- (a) Each Party shall maintain or adopt competition laws to proscribe anticompetitive business conduct.
- (b) Each Party shall maintain an authority or authorities responsible for the enforcement of its national competition laws. The enforcement policy of each Party's authorities should be non-discriminatory

- (c) The Parties recognize the importance of cooperation and coordination for effective competition law enforcement. Accordingly, the Parties shall cooperate in relation to their enforcement policies and in the enforcement of their respective competition laws, including through mutual assistance, notification, consultation and exchange of information.

***b. Designated Monopolies***

Article 16.2 deals with the issue of designated monopoly. Though it suggests that nothing in this agreement prevents any Party from designating monopoly, it adds that

- (a) Each Party shall ensure that any privately-owned /government monopoly designated after the date of entry into force of this Agreement
  - acts in a manner that is not inconsistent with the Party's obligations under this Agreement
  - acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market
  - provides non-discriminatory treatment to covered investments, to goods of the other Party, and to service suppliers of the other Party in its purchase or sale of the monopoly good or service in the relevant market and
  - does not use its monopoly position to engage, either directly or indirectly, in anticompetitive practices in a non-monopolized market in its territory, where such practices adversely affect covered investments.
- (b) This article however does not apply to government procurement

***c. State Enterprises***

Article 16.3 presents provisions related to state enterprises. The Parties are not prevented from establishing or maintaining state enterprises. However they should ensure that the enterprises

- (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement
- (b) accords non-discriminatory treatment in the sale of its goods or services to covered interests

***d. Differences in Pricing***

Article 16.4 suggests the scope of the operation of Article 16.2 and 16.3. It says that these provisions should not prevent the monopoly or state enterprise from charging different prices in the same or different markets if they are based on normal commercial considerations.

***e. Transparency***

The Parties recognise the value of transparency as mentioned under Article 16.5. The Parties on request are required to make available public information concerning

- (a) competition law enforcement activities;
- (b) state enterprises and government or privately-owned designated monopolies, at any level of government, provided that requests for such information shall indicate the entities involved, specify the particular products and markets concerned, and include some indicia that these entities may be engaging in practices that may hinder trade or investment between the Parties; and
- (c) exemptions and immunities to its competition laws, provided that requests for such information shall specify the particular goods and markets of concern, and include indicia that the exemptions and immunities may hinder trade or investment between the Parties
- (d) The Parties in addition should ensure that decisions and orders get published.

***f. Cross Border Consumer Protection***

Article 16.6 brings out the provisions related to consumer welfare. The specific provisions are

- (a) The Parties shall cooperate, in appropriate cases of mutual concern, in the enforcement of their consumer protection laws in order to enhance consumer welfare.
- (b) The Parties shall endeavor to strengthen cooperation between the U.S. Federal Trade Commission, and the Korea Ministry of Finance and Economy and the Korea Fair Trade Commission in areas of mutual concern relating to their respective consumer protection laws, including

- consulting in the fields of consumer policy and exchanging information related to the enactment and administration of their consumer protection laws;
  - strengthening cooperation to tackle the fraudulent and deceptive commercial practices against consumers;
  - consulting on ways to reduce consumer protection law violations that have significant cross-border dimensions; and
  - supporting the implementation of the *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders of 2003*.
- (c) Nothing in this Article may limit the discretion of an agency to decide whether to take action in response to a request by a counterpart agency of the other Party
- (d) Each Party shall endeavor to identify, and shall consider modifying its domestic framework to overcome such obstacles

***g. Consultations***

Article 16.7 states that to foster understanding between the Parties, or to address specific matters that arise under this Chapter

- (a) Each Party shall, on request of the other Party, enter into consultations regarding representations made by the other Party. The Party shall indicate, in the request, how the matter affects trade or investment between the Parties.
- (b) The Party to which a request for consultations has been addressed shall accord full and sympathetic consideration to the concerns raised by the other Party.
- (c) During the consultations under this Article, each Party shall endeavor to provide relevant non-confidential information to the other Party in order to facilitate the discussion aspects of the matter which is the subject of consultation.

***h. Dispute Settlement***

Article 16.8 defines that the Parties do not have recourse to dispute settlement under this Agreement for any matter arising under Articles 16.1, 16.6 or 16.7.

### *i. Definitions*

Article 16.9 provides the definitions of the terms used in this chapter which eventually affects the scope of the agreement.

### **6.3. Scope of the Agreement on Competition Provisions**

The Chapter 16 covers many competition related provisions. As found in the other bilateral trade agreements involving US, this agreement also includes provisions related to state enterprises, monopolies and transparency. The agreement allows for mutual assistance, consultation, notification and exchange of information in enforcement activities. However the scope again gets limited with only allowing publicly available information. This implies that any kind of confidential information can not be disclosed to the other Party. This is the only agreement studied so far in this report that includes competition provisions related to consumer welfare. Even there is sectoral application of dispute settlement mechanism to provisions related to state enterprises, government monopolies and transparency.

### **6.4. Effectiveness of the Competition Provisions**

The provisions are yet to get the legal review and hence have not been implemented till now.

## **7. Summary of the Case Studies**

All the bilateral agreements studied in this report generally include soft laws on the issue of competition implying that they are not compulsory on the contracting Parties to implement within their domestic laws. They include matters related to cooperation in enforcement, exchange of non-confidential information, notification of actions etc. The provisions don't require changes in the Parties domestic laws. One important feature was that there is a clear division of agreements falling into two categories. The agreements with US as one signatory include provisions related to state enterprises and monopolies where as agreements with EU emphasis more on issues related to cooperation and coordination of enforcement activities and technical assistance.

## **8. Pros and Cons of Competition Provisions in Trade Agreements**

The limited use of the competition provisions in the agreements makes the assessment about the potential benefits and limitations more difficult. Though the provisions are generally non-binding in nature; in the absence of any consensus among nations as to the objectives, forms and enforcement processes of competition laws; such an agreement helps in creating the framework for cooperation. According to Marsden and Whelan (2005) the EU-Mexico agreement has been successful in putting in place the mechanism for cooperation which can be used by the anti trust authorities of the parties to address any future anti competitive behaviour affecting important interests of either party. This seems to be the key reason for inclusion of competition provisions in trade agreements. It is expected that the need for cooperation and communication will lead to a deeper understanding of each others competition regimes.

It is again pointed out that provisions relating to notification are very important as they can send early warnings of anticompetitive activities .Marsden and Whelan (2005) feel ‘notification sends a clear signal to undertakings that competition authorities are both willing and able to communicate with one another and thus that national borders can no longer be relied upon as protection against enforcement activities’. Consultations between the competition agencies provide an opportunity to one agency to offer its support, advice and experience to its counterpart. Notification also helps the authorities to compare notes about particular cases and the provisions for technical assistance can be very helpful particularly for developing countries in capacity building.

As mentioned earlier, the competition provisions included in the trade agreements are soft law obligations which are not legally binding on the parties. The parties don’t suffer any legal sanction for refusal to comply with the provisions of the chapter. In most cases the Parties also do not have any recourse to the dispute settlement procedures of the FTA for an alleged violation of any of the competition provisions. It has therefore been argued that the absence of sanctions and dispute settlement procedures makes the competition provisions less effective. The other major limitation to the effectiveness of competition provisions is the constraint on the exchange of confidential information. As per the stated

provision on exchange of information, the Parties can only get the already available public information.

## **VI. Competition Provisions in other Chapters of FTAs**

It has been observed by many (eg. Anderson and Evenett, 2006) that some competition related provisions are there in the non-competition specific chapters of the trade agreements. Anderson and Evenett (2006) while analysing trade agreements of US-Chile, EC-Chile, Canada-Costa Rica, Caribbean Community-Caricom and US-Singapore, found that competition provisions are increasingly used in non-competition specific chapters, and in particular chapters on the general obligations of the Parties, on state enterprises and on regulated industries. Therefore they point out that ‘whether or not the trade agreement has a designated chapter dealing specifically with competition policy, is not necessarily a reliable guide as to potential impact of competition language codified in a trade agreement’. In this context, while analysing the FTAs we also found the following competition provisions in non-competition specific chapters.

### **1. Singapore-Japan New Age Economic Partnership**

Singapore-Japan New Age Economic Partnership deals with competition provisions in a specific Chapter i.e. Chapter 12. In addition to that some competition related provisions are also found in the non specific chapters like in Chapter 7 dealing with trade in services. Again it was observed that Annex IVB dealing with telecommunication Services do have certain competition provisions.

#### **1.1. Chapter 7 (Trade in Services)**

Article 65 dealing with monopolies and exclusive service suppliers states that the monopoly supplier of a service in its territory should not act in a manner inconsistent with the Party’s specific commitments. It further says where a Party’s monopoly supplier competes in the supply of a service outside the scope of its monopoly rights, the Party shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.



Article 66 on business practices has provisions on consultations, negative comity and exchange of information. It states that

- (a) The Parties recognize that certain business practices of service suppliers, other than those falling under Article 65 above, may restrain competition and thereby restrict trade in services.
- (b) A Party shall, at the request of the other Party, enter into consultations with a view to eliminating practices referred to in paragraph 1 above. The Party addressed shall accord full and sympathetic consideration to such a request and shall co-operate through the supply of publicly available non confidential information of relevance to the matter in question.

### **1.2. Annex IVB (Telecommunications Services)**

The clauses on competitive safeguards deal with anticompetitive practices in the telecommunication sector. It suggests that

- (a) Each Party shall maintain appropriate measures for the purpose of preventing suppliers, who alone or together are a major supplier, from engaging in or continuing anti-competitive practices.
- (b) The anti-competitive practices referred to in paragraph 1 above shall include in particular
  - Engaging in anti-competitive cross-subsidization or pricing services in a manner that gives rise to unfair competition;
  - Discriminating unfairly in providing telecommunications services;
  - Using information obtained from competitors with anticompetitive results; and
  - Not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.
- (c) Each Party may, in accordance with its laws and regulations, determine the appropriate level of regulation required to promote fair competition

This implies that the competition provisions included in the FTA are soft laws as the Parties have the discretionary power to formulate and implement laws on their own. Any failing on the part of the Parties in promoting fair competition does not invoke legal action.

## **2. US –Singapore FTA**

The US-Singapore FTA includes competition provisions in a specific chapter i.e. Chapter 12 to deal with the anticompetitive conducts of firms. In addition to this the following competition provisions were found in the non competitive chapters.

### **2.1. Chapter 9 (Telecommunications)**

Article 9.4 provides the competitive safeguards relating to the conduct of major suppliers. It states that

- (a) Each Party shall maintain appropriate measures for the purpose of preventing suppliers of public telecommunications services who, alone or together, are a major supplier in its territory from engaging in or continuing anti-competitive practices.
- (b) For purposes of above paragraph, anti-competitive practices include:
  - Engaging in anti-competitive cross-subsidization;
  - Using information obtained from competitors with anti-competitive results; and
  - Not making available, on a timely basis, to suppliers of public telecommunications services, technical information about essential facilities and commercially relevant information that is necessary for them to provide public telecommunications

### **2.2. Chapter 15 (Investment)**

Article 15.14 has provisions on consultation and negotiation. It suggests that

- (a) In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party procedures.

The above analysis suggests the presence of competition provisions in non competition specific chapters. However it is observed that the competition specific chapters are more advanced in their provisions to foster cooperation between competition agencies in the enforcement activities. Moreover as pointed out by Anderson and Evenett (2006), the competition specific chapters are structured in a certain way so as to strengthen the competition agencies by providing technical assistance.

## VII. Evidence of Competition Enforcement

There has been a general feeling that the competition provisions in trade agreements don't have much importance or value as the competition law enforcement officials don't make use of them. The objective of this section is to review some cases where the competition clauses have been applied. UNCTAD (2006) stated "By examining the cooperation experience, the aim is to evaluate to what extent:

- a) The existence of competition provisions in International agreements has been crucial to foster cooperation between agencies on actual enforcement cases
- b) It is important that the competition provisions are duly designed and phrased in such a way those they indeed allow cooperation to take place, when desired and/or requested.
- c) Informal cooperation can play a role
- d) Whether having binding enforcement provisions would have changed the outcome of the cooperation.
- e) Positive outcomes resulted from the cooperation

In this context we have looked at one case in Republic of Korea. Republic of Korea possesses a relatively young national competition authority but has most experience of cooperating with foreign jurisdictions for cracking international cartels. The case in which Korea Fair Trade Commission (KFTC) reports prosecution after receiving international cooperation is the international graphite electrode cartel.

### *The Graphite Electrode Cartel*

In the international graphite electrodes cartel, the main graphite manufactures from countries like the US, Germany and Japan collaborated and implemented price fixing practices during 1992-98. Graphite electrodes are used primarily in the production of steel in electric arc furnaces. These leading companies had over 80% of the market share and could manage to maintain the cartel for six years from 1992 to 1998. As a result of this cartel, the world prices of graphite electrodes increased by more than 50 percent.

KFTC faced many problems in starting the investigation and securing substantial information as the cartel companies didn't hold affiliates or overseas branches in Korea

which is mandatory for investigating international cartels. Therefore the KFTC investigation heavily depended on the information provided voluntarily by the cartel participants located overseas. Again during this time KFTC didn't have any bilateral agreement of cooperation with a foreign competition authority. However the US and the EU provided informal cooperation in the form of providing their publicly available data and it is believed that they cooperated to the full extent permitted under their national laws. However the publicly available information was not of significant help in carrying out investigations. Though KFTC was successful in concluding this investigation and in March 2002 convicted six graphite electrode manufacturers from the United States, Germany and Japan, to overcome the problems in cooperation, the KFTC started to build cooperative relationships with foreign competition authorities. In September 2002, the KFTC made bilateral agreement with Australian Competition and Consumer Commission (ACCC) which includes cooperation provisions on enforcement activities, notification etc. In February 2003, Korea-Chile FTA was signed and cooperation provisions on competition policy were included in it. Since then it has concluded FTAs with the US and has a chapter on cooperation provisions in competition related issues.

The above discussion implies that though informal cooperation is possible in case of need, there is a requirement for cooperation agreements or agreements should also focus on cooperation in competition provisions.

## **VII. Case for India**

Recently most countries of the world have intensified the formation of free trade agreements (FTAs) with other countries including India. India now has agreements with Sri Lanka, Bhutan, Chile, Singapore and Myanmar. Negotiations are going on for agreements with ASEAN, GCC, China, MERCOSUR etc. These FTAs in general emphasise on goods with some (for example, the CECA with Singapore) including the services sector as well. The more substantial FTA is called the Comprehensive Economic Cooperation Agreement (CECA), such as the one with Singapore. Though the FTAs vary in sectors covered in each of them, none of the FTAs signed by India include competition provisions. Even the CECA with Singapore which covers many sectors like trade in

goods, services, investment and government procurement, does not include trade related competition provisions.

This section therefore explores the case for India to include competition provisions in the future trade agreements as India has been able to formulate its national competition law. The Competition Act, 2002 was framed with the objective of preventing anticompetitive practices and promoting competition in the market. The Act contains exhaustive provisions related to prohibition of anticompetitive agreements, abuse of dominant position and regulation of combinations. Therefore it is important to see if it is beneficial to have competition provisions in the future trade agreements and if so then what kind of provisions should be included.

### **1. Position on Trade and Competition at WTO**

In the multilateral context India has submitted few papers to the WTO Working Group on Trade and Competition Policy. The most recent position paper (WT/WGTCP/W/216) objects to the application of National Treatment (NT), transparency and procedural fairness. However the paper put down some conditions under which it would subscribe to a multilateral competition agreement. The paper stated that *'until such time as developed countries are willing to consider the impact of mergers on consumers in foreign countries, to rescind the exemption of export cartels in their competition laws, to give serious consideration to enforcing the UNCTAD Set of measures to control RBPs and to extend the benefits of "positive comity" in competition law enforcement to developing countries, the latter will have to retain the right to challenge foreign mergers and RBPs that have an effect on domestic consumers'*<sup>22</sup>.

The main concern of India's viewpoint was applying National Treatment (NT) to competition policy. The paper pointed out that *'a competition policy that ostensibly applies to all members equally is likely in practice to discriminate against firms in developing countries. Since prosecuting RBPs perpetrated by firms based abroad is going to be extremely difficult for countries with limited resources, domestic producers*

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<sup>22</sup> WT/WGTCP/W/216, paragraph 4, 26 September, 2006

*will in practice bear the brunt of competition law that enshrines the NT principle, while allowing foreign producers to get away with similar infractions*<sup>23</sup>.

Though India recognises the importance of transparency and procedural fairness in international trade, it is skeptical about their application in the context of competition policy. According to India's view, transparency in terms of single interpretation of the rules in every country is not possible. Also it is very difficult for the enforcing agencies to get vital information from firms having foreign bases and protected by their governments in the name of commercial confidentiality. In such a situation maintaining transparency and procedural fairness becomes difficult.

## **2. Additional Commitments: Reference Paper on Telecommunications**

In the telecommunications sector, GATS annexed a special agreement providing more specific rights and obligations for that sector. In addition the Reference Paper spelled out a detailed set of competition rules for prevention of anticompetitive practices in the telecommunications sector. It acknowledged that

- Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.
- The anti-competitive practices referred to above shall include in particular:
  - (a) engaging in anti-competitive cross-subsidization;
  - (b) using information obtained from competitors with anti-competitive results; and
  - (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

While majority of the WTO members accepted it entirely, India has accepted partially and also with certain modifications. Text of India's revised offer states

- (a) Appropriate measures shall be maintained for the purpose of preventing service suppliers from engaging in or continuing in anti-competitive practices of the following type:

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<sup>23</sup> WT/WGTCP/W/216, paragraph 8, 26 September, 2006

- using information obtained from competitors with anti-competitive results; and
- not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

This shows that India has not given a general commitment not to engage in anti-competitive cross subsidization. It has been observed that there is reluctance on the part of India for a multilateral framework on competition provisions. India's submission also seems to indicate a desire to restrict general application of competition laws to the service sector.

### **3. Competition Related Provisions in India's FTA**

As we have observed in case of US-Singapore and Japan-Singapore FTAs, some competition elements are also included in chapters not dealing with competition provisions. In this context we have analysed few FTAs of India to see if they include competition related provisions.

#### **3.1. India-Singapore CECA**

India-Singapore CECA was successfully concluded and was signed on 29 June 2005. This agreement is India's first ever CECA and Singapore's first comprehensive bilateral economic agreement with a South Asian economy. The Agreement encompasses trade in goods, trade in services, investment protection and other features. Also it has co-operation clauses in several sectors such as economic co-operation in areas like education, science, technology, air services and intellectual property. However, the agreement doesn't contain any specific chapter on competition provisions.

The India-Singapore CECA however, includes articles on transparency, notification, consultation, cooperation and exchange of information in other sectors. A detailed discussion on these issues is carried out to find the link to competition laws.

##### **a. Main Provisions (*Chapter 7- Trade in Services*)**

Article 7.12 dealing with monopolies and exclusive service suppliers states that where a Party's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Party's Schedule of specific commitments, the Party shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.

Article 7.13 on business practices relates to anti competitive business practice and consultations. It states that

- The Parties recognize that certain business practices of service suppliers, other than those falling under Article 7.12, may restrain competition and thereby restrict trade in services.
- A Party shall, at the request of the other Party, enter into consultations with a view to eliminating practices referred to in paragraph one.

Article 7.15 deals with issues on subsidies and suggests that,

- In the event that either Party considers that its interests have been adversely affected by a subsidy or grant provided by the other Party, upon request, the other Party shall enter into consultations with a view to resolving the matter
- The provisions of Chapter 15 ( Dispute Settlement) of this Agreement shall not apply to any requests made or consultations held under the provisions of this subsidy article or to any disputes that may arise between the Parties out of, or under, the provisions of this article.

In the E-Commerce sector both sides commit to ensuring transparency by making publicly available all relevant laws and regulations affecting electronic commerce. Though clause of transparency and exchange of information are cited in the agreement but their nature is general and not specifically pertaining to competition.

### **3.2. India-Sri Lanka FTA**

India-Sri Lanka FTA has been operational since March 1, 2000. The agreement included mechanisms for review and consultations.

#### ***a. Main Provisions***



Article I says that the objective of the FTA is to provide fair conditions of competition for trade between India and Sri Lanka. Article VIII- Safeguard Measures elaborate the point of consultation when any imported product from the other Party threatens to cause serious injury to contracting party. In case action needs to be taken, it shall be simultaneously notified to the other Contracting Party and the Joint Committee established in terms of Article XI. The Committee shall enter into consultations with the concerned Contracting Party and endeavour to reach mutually acceptable agreement to remedy the situation. If the consultations in the Committee fail to resolve the issue within sixty days, the party affected by such action shall have the right to withdraw the preferential treatment.

Article XI states that the Committee shall accord adequate opportunities for consultation on representations made by any Contracting Party with respect to any matter affecting the implementation of the Agreement. Article XII on Consultations states that the Party can consult with respect to any matter affecting the operation of this Agreement.

### **3.3. India-Korea CEPA**

South Korea hopes to wrap up a Comprehensive Economic Partnership Agreement (CEPA) with India by December 2007. At least six rounds of negotiations have been held between the two sides. The Indo-Korea Joint Study Group (JSG) has recommended that India and Korea should enter into a Comprehensive Economic Partnership Agreement (CEPA) covering, trade in goods, services; promotion, facilitation and liberalization of investment flow etc.

The JSG recommends that Korea and India should:

- Ensure *transparency in related laws and regulations* in their countries and regularly exchange information between the customs authorities of both countries (Para 5.13.)
- Facilitate *exchange of information and maintenance of transparency* on their respective technical trade measures and regulations, technical standards and assessment procedures related to health and safety.
- The financial services authorities of both sides could enter into mutual consultation with a view to increasing cooperation in these areas. (Para 3.36)

The above discussion suggests the presence of competition related provisions relating to cooperation and consultation.

#### **4. Incorporating Competition Provisions in FTAs**

India like many other developing countries is not in favour of a multilateral agreement on competition policy. However as discussed in the previous sections, it was found that many countries though not in favour of the multilateral framework, have embarked upon bilateral and regional agreements on competition policy.

The literature (Alvarez et. al, 2005) suggests that the inclusion of competition provisions in trade agreements has been beneficial for developing countries as they stand to lose more from anticompetitive practices of MNCs. In general developing countries benefit mainly from two types of competition provisions such as cooperation in enforcement activities and technical assistance. Brazil has been greatly benefited from the bilateral cooperation through its agreement with the US. Technical assistance through an agreement with a developed country can help the developing country by increasing their expertise in the field of competition laws and policy.

The analysis of India's submissions to WTO suggests that though India is interested in a global mechanism which would discipline restrictive business practices that might affect it, it is concerned about the application of national treatment provisions. But the application of national treatment to a competition law does not automatically establish a right to market access. Market access is controlled by tariff commitments (GATT) and specific commitments (GATS). The Article II of the GATT agreement provides Members the means of domestic protection by the use of tariff duties. Also to ensure that domestic protection is not distorted by internal laws, GATT national treatment is a general obligation which applies to all domestic laws, regulations and requirements that affect the internal sale, offering for sale, distribution etc of imported goods. Hence the GATT principle of national treatment also applies to the domestic competition law. However the existing national treatment (based on EC proposal) in trade agreements on

competition policy suggests an obligation to prevent discrimination between firms and not products on the basis of nationality. Thus the application of national treatment provision would no longer be limited to trade related issues. The scope of national treatments thus raises India's concerns and this has been shared by many counterparts. The national treatment provisions would require the law to treat all India and foreign firms equally. However the MNCs coming to India have got more advantages than the domestic players in terms of capacity to invest and lower capital cost. Hence the domestic players need to be given some incentives to compete against the MNCs. Also there was no consensus at the WTO Working Group discussions on the national treatment provision in competition policy. In this context, India should desist from negotiating on a national treatment provision under competition policy in its future trade agreements. In the analysis of trade agreements on competition policy it was found that only few agreements like US-Chile have got very broad non-discrimination provisions.

The next issue in a competition policy framework is transparency. As discussed at the WTO Working Group and implemented by other trade agreements, the focus is primarily on *de jure* transparency which applies to laws, rules and guidelines of general application. The transparency principle already exists in some WTO agreements like GATS. However the transparency used in most trade agreements is very limited in scope and applies generally to the provision of state aid. So including transparency provision in a competition policy framework should not be an issue for India. The other important provision is principles of cooperation. Cooperation in the form of information sharing, technical assistance, positive comity would be helpful in investigation against anticompetitive practices like international cartel. However, as evidenced from other trade agreements, only provisions related to exchange of non-confidential information should be negotiated. The provisions relating to collecting data and materials pertaining to a particular anticompetitive practice would be burdensome in terms of cost. So it is advisable to negotiate for compensation while negotiating with a developed country. From India's point of view, provisions on technical assistance in an agreement with a developed country would be very useful. Technical assistance in the form of providing training to the officials, work shops, sharing of experience would be valuable for India.

The help in terms of technical assistance through a trade agreement would help in improving the enforcement capacity of India's national competition law.

The other substantive issues of competition policy are providing state aid and regulation of government monopolies. Given that all the sectors in India have not been fully liberalized and many sectors are still subsidized, it may not be feasible for India to give any commitments on state aid and government monopoly.

The above analysis implies that India should focus on including competition provisions related to transparency, cooperation, consultation and technical assistance. Some of these provisions (eg. consultation) are already present in other chapters (e.g. trade in services, India-Singapore CECA) of India's FTAs. The case studies and literature survey had suggested that the trade agreements while including competition policy either follow the EU model (importance on cooperation, technical assistance) or the US model (focus on substantive rules, state enterprises, monopolies). Therefore it would be viable for India to follow an EU style agreement while negotiating competition related provisions in bilateral trade treaties.

## **5. Role of National Competition Policy and CCI in India**

In the post reform era in India, one important issue is to ensure and manage competition in the market to derive benefits from the process of economic liberalisation. In order to achieve the goal of maintaining competition and prohibiting anti-competitive practices in the economy, the Competition Act of 2002 (with some amendments in 2007) was formulated and Competition Commission of India was entrusted with the task of ensuring its implementation. The overall goal of the competition law in India is to maintain the competition process and ensure effective competition in the market. Therefore the Competition Act 2002 prohibits anti competitive agreements, abuse of dominance position and regulates combinations having an adverse impact on competition. The achievement of this goal would act as a catalyst for the achievement of the economy's economic well being through increased competition, innovation, increasing consumer choice etc. However, since the policies of central government, state governments and

local bodies affect the competition structure of the economy, there is a need for a National Competition Policy to ensure competition in the market. In this context the mid-term appraisal of 9<sup>th</sup> five year plan states that ‘there is an urgent need of articulating National Competition Policy in India to bring about a spirit and culture of competition among enterprises and economic enterprises to maximize economic efficiency and to protect and to promote consumer’s interest and society’s welfare and improve our international competitiveness’. Therefore, the proposed National Competition Policy in India has the additional objectives to

- Promote competition so as to achieve economic efficiency and maximize consumer welfare
- Promote competition culture through competition advocacy
- Facilitate harmonisation of laws and policies of central and state governments relating to competition
- Ensure competition in the regulated sectors

The National Competition Policy should aim at increasing the local economy competitiveness. In the process it is thought that the competition policy would significantly contribute to the economic development of the economy.

### ***5.1. Role of National Competition Policy***

One important tenet of competition policy is to support the pro competitive reform agenda of the economy. Therefore one of the challenges of the National Competition Policy in establishing the market competition would be to interact with other economic policies affecting the liberalisation process in India. The related policies may include those relating to ‘infrastructure, international trade, FDI, investment, intellectual property rights, financial markets and privatisation’.<sup>24</sup>

In the corporate structure in India, restructuring has mainly taken place through consolidation. In the consolidation process there is quite active presence of MNCs in the merger acquisition process. At this moment the MNCs seem to have undue advantage over domestic firms due to higher investment capacity and relatively cheaper access to

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<sup>24</sup> Basant R and S Morris (2000)

capital. In such a situation there is the every possibility of MNCs engaging in unfair trade practices prohibited in other countries with competition legislation. Similarly the MNCs could try predatory pricing to eliminate competition from the domestic market and in the later stage that will have negative impact on consumer welfare. This requires a proper application of competition policy to reap the benefits of liberalisation. Also in India though privatisation was the principal task of economic reform in early 1990s, still the state retains substantial interests in many sectors. The state owned entities get special government aid and hence distort competition. Therefore, when developing the state aid policy, the relevance of competition law and policy should be taken into consideration.

There are certain other economic policies such as trade, foreign investment regional regulation, which may have implications which are not favourable for enhancement of market competition. One such policy is antidumping rules, the implementation of which can have anticompetitive effect. But since antidumping also includes a series of trade provisions that aim at helping domestic industries to cope with import competition, these rules generally don't clash with competition provisions. However, anti dumping duties do militate against domestic consumers. On the other hand, anti dumping duties are meant to help domestic companies against the long term anti-competitive behaviour of foreign companies/countries. A general regulator like the Competition Commission is supposed to balance the interests of consumers and producers but give special attention to the former. However, given the present status of anti-dumping duties in India, it is unlikely that inclusion of anti dumping activities in the purview of the Competition Commission ( or RTAs) would be considered politically acceptable.

In a period of free trade and globalisation, the Central and State governments of India have the power to put restrictions on movement of goods, services and capital among different states of India in the public interest. There are layers of taxation policy to be followed in case of internal trade. This reduces the level of competition in the market. The abuse of intellectual property rights should be another important sphere of competition policy.

The above discussed anti competitive practices adversely affect the economic development of an economy. Therefore the National competition Policy should try to address the anticompetitive practices and harmonise all other economic policies to foster competition. The Working Group Report on Competition Policy<sup>25</sup> suggests that the goals of Eleventh Five Year Plan could be achieved by promoting and strengthening competition in the following sectors:

- Agriculture
- Industry/Manufacturing: Labour Market, SSI Reservation, Infrastructure (Power), Transport, Education and Drinking Water

The development of National Competition Policy should try to raise the awareness about protecting and fostering competition. The policy should describe the principles contained in the law, the advantages of implementing it and about the role of the competition authority in implementing it. Also any deviations from the competition principles should be notified. This would increase transparency and bring accountability to the system.

### ***5.2. Role of Competition Authority***

The Competition Commission of India is required to ensure the effective implementation of the competition law which aims to prohibit practices having adverse impact on competition and in addition should undertake competition advocacy to create public awareness of the benefits of competition. Also as discussed earlier, there has been growing evidence/interest in including competition related provisions in bilateral and regional trade agreements. In this context, the competition commission would assist the government bodies assigned with the implementation of these agreements in interpreting and applying these provisions. There have also been instances of cooperation agreements among competition authorities (US- Brazil), which enable the countries to cooperate in case of anticompetitive practices affecting their trade.

## **IX. Conclusions**

In recent times competition related provisions in bilateral/regional trade agreements have emerged as the most intensely debated subject. The failure to include competition

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<sup>25</sup> [http://planningcommission.nic.in/aboutus/committee/wrkgrp11/wg11\\_cpolicy.pdf](http://planningcommission.nic.in/aboutus/committee/wrkgrp11/wg11_cpolicy.pdf)

provisions at the WTO multilateral framework provided the scope for including their inclusion at bilateral/regional level. The rationale behind their inclusion has been to prevent the deterioration of the benefits of free trade by private anticompetitive activities. There are almost 143 trade agreements which include competition provisions.

This study analyses the specific competition provisions in bilateral free trade agreements focusing on the type, scope and effectiveness. This was analysed in the context of drawing lessons for India, in negotiating future trade agreements. The analysis suggests that the trade agreements generally fall into either of the two broad categories of EU style and the US style agreements. The EU style agreements put more importance on cooperation mechanism for enforcement activities and technical assistance. However the US style agreements are oriented towards substantive rules on transparency, monopolies, state enterprises and dispute settlement.

Another feature of the trade agreements suggests that the competition provisions included belong to the category of soft laws. These are not legally binding and are in general out of the purview of the WTO dispute settlement mechanism. The scope of incorporating competition provisions is greater than generally observed, as many non competition specific chapters of some trade agreements (US-Singapore) also include competition related provisions.

The major difficulty is encountered while analysing the effectiveness of these competition provisions. Given that some of the agreements are very recent and the lack of publicly available data along with the limited empirical research on the implementation of competition provisions, it is difficult to quantify the success rate relating to implementation. Notwithstanding this, many signatories (e.g. Brazil, Korea) find the provisions related to cooperation and technical assistance quite useful.

India has been reluctant in formulating a multilateral framework on competition laws. In general, the objection are related to the unwillingness to overload an already overburdened WTO agenda in the Doha round. More specifically, India's concerns are related to the provisions on National Treatment (NT), transparency and procedural fairness. As



we have seen from the case studies, these provisions are generally not included in EU style trade agreements. Therefore, India should consider including competition provisions related to cooperation and technical assistance in its future negotiating strategy for RTAs.

In including Competition provisions in RTAs the main problem lies in setting up a dispute settlement mechanism. By definition, provisions of the Competition laws of countries are applicable to firms so that the standard dispute settlement mechanism of the WTO is not relevant: only governments can be parties in the dispute settlement mechanism of the WTO. On the other hand, countries are unwilling to give up their national jurisdiction over companies even in regional trading arrangements. It is unlikely that this will change much in the immediate future.

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