International Cooperation and the Interests of the Developing Countries: a Flexible Approach

Gesner Oliveira
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Introduction

The objective of this paper is to argue that the dissemination of competition laws is positive for the world economy. However, the benefits derived depend crucially on adequate enforcement and institutional building in the various jurisdictions for which international cooperation within WTO and in other fora is crucial.

The paper addresses three issues. Section 1 underlines a few aspects of the increasing importance of competition policy in the developing world. Section 2 discusses the relationship between competition law enforcement and foreign direct investment (FDI). Finally, the last section provides a few suggestions for the international cooperation agenda.

1. The Increasing Importance of Competition Policy for the Developing World

1.1 The Dissemination of National Competition Laws

The last decade has been characterized by the dissemination of competition laws throughout various jurisdictions, specially in developing countries, as Table 1 shows. According to the 1997 Unctad World Investment Report, more than seventy nations have now competition laws, in contrast with less than forty in the eighties. In the second quarter of 1999, 83 countries had competition laws in force and 23 were developing new laws in the area.

Table 2 illustrates that a new wave of competition laws is taking place in the nineties, involving a larger number of countries than in the previous ones of the turn of the last century and of the immediate postwar period.

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2 Part of this section is based on Oliveira (1998).
3 This information has been kindly provided by a US competition enforcer based on various sources and direct contact with the countries involved.
Table 1: Number of Countries with Competition Laws

![Chart showing the number of countries with competition laws from 1971 to 1995 for Developed Countries, Developing Countries, and Central and Eastern Europe.]

*Source: CNUCED, World Investment Report 1997, p.189*

Table 2: National Competition Laws

<table>
<thead>
<tr>
<th>PERIOD</th>
<th>COUNTRIES</th>
</tr>
</thead>
<tbody>
<tr>
<td>1890-II World War</td>
<td>United States, Canada and Australia.</td>
</tr>
<tr>
<td>After II World War</td>
<td>Germany, European Union, United Kingdom, Japan, Swedwn, France, Brazil (1962), Argentina, Spain, Chile, Colombia, Thailand, India, South Africa and Pakistan.</td>
</tr>
<tr>
<td>1990...</td>
<td>Russian Federation, Peru, Venezuela, Mexico, Jamaica, Czech Republic, Slovakia, Côte d'Ivoire, Bulgaria, Kazaqistan, Poland and initiatives in many other countries.</td>
</tr>
</tbody>
</table>

1.2 Competition Policy and Economic Reform

At least two aspects are noteworthy in this rather impressive wave of competition laws in the developing world:

i) different from the early period of antitrust in the US, the rise of competition policy in developing countries is associated with the change in the role of the State in the direction of less intervention and less traditional regulation.

Indeed, the recent waves of structural reforms and preferential trade agreements have transformed the developing countries’economies, bringing about large-scale privatization in both infrastructure and the manufacturing sectors, substantial deregulation and decentralization of economic activity.

Competition law and policy is both a product of economic reform and a catalyst of the recent transformations.

It is a product of economic reform in the sense that as a result of privatization, deregulation and trade liberalization, there is, in principle, a case for the repression and prevention of the abuse of economic power. Ten to fifteen years ago one would not hear about market regulation in Latin America or in Eastern Europe because there was no fully developed market.

It is a factor, or a catalyst, of economic reform in the sense that the good implementation of competition policy – especially in its competition-advocacy dimension – represents an important factor for the continuation of the liberalization process.

ii) in many instances the enactment of the competition law comes in a package of policy change. It does not correspond to a social movement in favor of competition or against “big business”.

1.3 Different Stages of Institutional Development of the National Competition Policies

The implementation of competition policy requires time, cultural change and investment in adequate institutions. Therefore it is not surprising that competition laws and enforcement vary widely across countries.

Despite this historical nature of competition policy, it is useful, for analytical purposes, to identify a sequence of evolutionary stages which could serve as a reference for comparisons among different countries.
There are two extreme positions to be avoided in implementing competition policy in emerging economies. The first one is to do it so slowly that the necessary changes do not occur. Indeed, lack of competition can make other reforms less effective, such as privatization and deregulation, besides posing difficulties for subregional integration.

The second one is to try to implement it too quickly and without the necessary attention to the peculiarities of the country, and most importantly, to the limited budgetary resources. Overactive and underfunded competition agencies might end up creating additional transaction costs to the private sector rather than helping the market.

The above considerations show the importance of defining priorities and setting a plan for institutional building. Table 3 contains a useful timetable to serve as a reference for governments.

Table 3: Timetable for Implementation of Competition Policy

<table>
<thead>
<tr>
<th>STAGES</th>
<th>Ⅰ</th>
<th>Ⅱ</th>
<th>Ⅲ</th>
<th>Institutional Maturity Ⅳ</th>
</tr>
</thead>
<tbody>
<tr>
<td>NATIONAL</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Technical Assistance</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MERCOSUR</td>
<td>Harmonization Agenda</td>
<td>Competition perspective into antidumping analysis</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WTO</td>
<td></td>
<td></td>
<td>General Guidelines</td>
<td></td>
</tr>
</tbody>
</table>

The sequencing proposed is based on a simple idea inspired by Khemani and Dutz (1995). Given its limited resources, the agency should start with the actions which most likely benefit the market. Gradually it would introduce measures which require more sophisticated cost/benefit analysis.
The Stages of Institutional Development

It is possible to identify nine lines of action distributed in four stages of implementation of competition policy.

Stage I:
At the beginning the competition agency should focus on three lines of action:

i) competition advocacy, including the support for procompetitive regulation in sectors which require regulation and deregulation or re-regulation.

ii) horizontal agreements with emphasis on price cartels.

iii) technical assistance from other agencies and multilateral organizations.

Stage II:
In addition to the lines of action of Stage I, the following points should be introduced:

iv) merger review system

v) control over vertical arrangements

Both require careful examination because they usually involve costs and benefits. The impact upon social welfare is not easily calculated.

In the case of merger control, small economies should consider the possibility of introducing it at the regional level rather than at the national level. Regarding vertical restraints, their relative importance for developing countries might be greater due to the imperfection of capital markets and the lack of a more adequate infra-structure.

Stage III

In addition to the previous ones, two lines of action should be introduced, both requiring a great effort in terms of inter-institutional coordination.

vi) cooperation with the regulatory authorities;
vii) cooperation with competition agencies of other countries.

The competition advocacy of i) of Stage I would already include the concern with procompetitive regulation, as mentioned before. However, at a certain point, the competition agency has to allocate its scarce resources to concrete tasks in the field of regulation.

The difference between points vii) and iii) is that at later stages of institutional development there should be a greater concern with harmonization of practices and conceptual framework on a more bilateral basis as opposed to the mere technical assistance of Stage I.

Stage IV

Institutional maturity is achieved when, in addition to the previous lines of action:

viii) the agency is able to coordinate with agencies of other national jurisdictions in order to enforce extraterritoriality clauses or supranational agreements.

ix) the culture of competition is sufficiently disseminated that it is possible to implement a proactive competition advocacy.

The difference between ix) and i) is that at the earlier stages, competition advocacy should focus on less ambitious tasks such as the mere explanation to the private community of the elementary characteristics of competition law and the need to change attitude towards antitrust matters. This is particularly important for regions which have had a lasting experience of state intervention such as Eastern Europe and Latin America.

In contrast, proactive competition advocacy includes a more pervasive role of the competition agency in giving opinions about competitive impacts of various types of legislation. Similar to what happens with the environmental issues in many jurisdictions, one would expect competition matters to be taken into consideration in an increasing number of areas.

The stages suggested in Table 3 are organized according to the degree of difficulty authorities face in undertaking cost/benefit analysis of the impact of competition measures on social welfare. Merger review comes after conduct control due to the fact that the welfare effect of a merger might
be less clear than that of a price cartel, the latter being unequivocally welfare reducing.

However, it might well be the case that legally sound repression of price cartels turns out to be more difficult than the implementation of a merger review system. In fact, it is generally easy to assess the microeconomic impact of a cartel but it is hard to fulfill the requirements for an acceptable standard of proof for the courts. Therefore, the actual plan should take into account not only the difficulty in assessing the welfare impact of a particular antitrust illicit, but also the expected return on each dollar spent on the particular line of action, given the relative probabilities of success of alternative public policies.

Practical Application

When one looks at the actual situation of competition policy in the different jurisdictions, the diversity is apparent and one has to accommodate for the continuum of national realities. Table 4 describes seven stages identified in a sample of 66 countries for which it was possible to have sufficient information about FDI inflows and the competition legal framework.

Table 4: Stages of Institutional Development: Concrete Application

<table>
<thead>
<tr>
<th>STAGE</th>
<th>LEVEL OF INSTITUTIONAL DEVELOPMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>No competition law</td>
</tr>
<tr>
<td>2</td>
<td>Competition Advocacy + Horizontal Agreements + Technical Assistance</td>
</tr>
<tr>
<td>3</td>
<td>2 + Vertical Agreements and/or Beginning of Merger Control</td>
</tr>
<tr>
<td>4</td>
<td>2 + Vertical Agreements and Merger Control</td>
</tr>
<tr>
<td>5</td>
<td>4 + No Formal Agreements of International and/or Regulation (or implementation)</td>
</tr>
<tr>
<td>6</td>
<td>4 + Cooperation Agreements and/or Regulation Already Implemented</td>
</tr>
<tr>
<td>7</td>
<td>Institutional Maturity</td>
</tr>
</tbody>
</table>
Table 5 shows the composition of the sample according to the classification of Table 4.

Table 5: Distribution of the Sample Countries According to Institutional Development

2. Competition Policy and Foreign Direct Investment: the Need for Adequate Institutions

It is legitimate to ask whether the enforcement of competition law and policy would help or else would hamper foreign direct investment. This is an important question since it allows one to gauge the relevance of the dissemination of competition policy to the integration of developing countries into the increasing global investment flows.

For the foreign investor the dissemination of competition laws is, in principle, good news. But one has to assure that the newly-enacted legislations are not misused and the right type of institutions are developed. Well implemented, the competition legislations can
represent an important factor in maintaining and deepening the liberalization process.

There are three approaches to the relationship between competition policy and investment liberalisation. A first approach is to consider that liberalisation policies, including investment liberalisation, are sufficient to assure an adequate environment for business. Any additional regulation in the area of competition policy is neither necessary nor sufficient for investment liberalisation. It would be either superfluous or could even represent a disincentive to investment. Investors would rather face some market failures instead of having to deal with additional government intervention and the possibility of state failures. There would be a negative relation between FDI and competition.

In contrast, a second approach presumes a positive relation between competition and FDI. The faster the enactment of competition laws the greater the increase in investment.

A third approach assumes that the relationship between competition policy and investment liberalisation is not a simple one. According to this third view, it seems plausible to assume two interrelated factors:

i) in the absence of competition provisions, there could be a replacement of state restrictions by private restrictions, making investment liberalisation ineffective.

ii) investors themselves would prefer to locate their undertakings in markets for which rules are clear and firmly enforced. This would occur either because they value legal certainty or because they fear being discriminated against, or both.

Thus, there would not be a clear pattern indicating that countries with competition law are more or less attractive to foreign investment. Emphasis should be placed on the actual enforcement of competition law and, in particular, on the stability and transparency of the rules. The mere enactment of competition provisions would not be a sufficient condition for contributing to investment liberalisation. Competition policy would constitute a positive factor only if implemented in a transparent and non-
discriminatory way and with the permanent concern in reducing transaction costs.

**Some Preliminary Evidence About the Relation between FDI and Competition Policy**

Given the different stages of institutional development of competition law and policy in various countries as indicated in Table 3 and illustrated in Tables 4 and 5, it is possible to search for a relationship between the degree of implementation of competition policy and the amount of FDI inflows. The preliminary evidence of Table 6 seems consistent with the third approach presented before. **There does not seem to exist a clear pattern that would indicate a simple relationship between competition policy implementation and the degree to which countries are capable of attracting FDI.**

Indeed, at each stage of development, there seems to be a number of possible outcomes in terms of countries' ability to absorb FDI inflows. Qualitative evidence would suggest that the ability to attract FDI depends on the existence of an appropriate environment for business which requires legal certainty.

**Table 6: FDI Inflows as Percentage of GNP (%)**

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4 The preliminary results presented in this section are part of a special research project financed by the Research Project Center of Getulio Vargas Foundation.
3. The International Cooperation Agenda

Although only preliminary, the above evidence suggests the need to focus on the quality of competition law enforcement rather than on the mere enactment of the legislation. This implies that effective international cooperation in the area of competition policy has to beyond standard forms coping with the challenge of institutional building.

3.1 The Major Lines of Action for International Cooperation

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

- combat hard-core cartels;
- reduce the transaction costs of merger control;
- promote institutional building and disseminate competition culture.

3.2 The Need for Coordination among Competition Agencies

As pointed out in BRAZIL (1998), two factors explain the importance of international cooperation for the first two areas:

i) different from the jurisprudence of the sixties and seventies, there are more and more cases which not only present the same characteristics in several markets; they constitute in reality cross-border mergers or generalized conducts. Therefore, the potential for inconsistent decisions among different national agencies is high.

ii) the frequency of cross-border transactions poses the problem of transaction costs firms incur when they have to comply with so many applications and bureaucratic timetables. Efforts to harmonize particular requirements (e.g., for merger review) could be useful even without a more profound convergence in the legislation.

Brazil provides a good illustration. 17% of the merger cases analysed in 1998 represent transactions which were generated by global strategies on the part of foreign groups. In many instances the operations were reviewed by several other national agencies besides CADE.
3.3 Institutional Underinvestment and Lack of Competition Culture

Although it is hard to overstate the importance of the first two areas indicated above, it is the third area that merits particular attention when one is concerned about international cooperation.

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

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

- resources are extremely scarce
- lack of professional expertise
- lack of jurisprudence
- frail academic infrastructure
- weak professional associations and consumer groups
- inadequate judicial systems
- bad reputation of the public sector: excessive bureaucracy, lack of transparency and corruption
- political and bureaucratic resistance

The competition official in the mature jurisdictions has to apply competition principles given a stable and adequate pre-existing environment. The competition official in a developing country has to help create such an environment for effective application of competition law.
Moreover, note that there are economies of scale and economies of learning for the implementation of competition laws; at earlier stages one would need more resources and not less. The problem is attenuated by the fact that learning from the pioneers in the field has been made a lot easier and less costly due to Internet and other media. The telecommunications revolution has made available technical papers and decisions which are very useful for the competition official, as well as the possibility for fast exchange of ideas and opinions.

Therefore, there should be a permanent concern to incorporate the world best practices in competition policy, for which benchmarking exercises are particularly important.

The increasing globalization of firms is also changing the private sector’s view on the matter. At times, international firms have put pressure on local governments to set stable and transparent rules. National firms are also changing their views on the usefulness of a modern regulatory framework.

### 3.4 The Cooperation Agenda and the Stages of Institutional Development

The focus of international cooperation will depend upon the stage of institutional development of each national jurisdiction, as summarized in Table 7.

#### Table 7: Stages of Institutional Development and the Cooperation Agenda

<table>
<thead>
<tr>
<th>Stages</th>
<th>Cooperation Agenda</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>I and II</td>
<td>Technical assistance</td>
<td>Training and drafting of legislation and procedures in line with due process</td>
</tr>
<tr>
<td>III</td>
<td>Simple cooperation agreements</td>
<td>Cooperation in selected cases with exchange of public information</td>
</tr>
<tr>
<td>IV</td>
<td>Advanced Cooperation Agreements</td>
<td>Systematic cooperation with exchange of confidential information</td>
</tr>
</tbody>
</table>
At Stages I and II of Table 3, technical assistance seems to be more appropriate. It will occur most likely between a developed country and a developing one. Technical assistance from countries in intermediary positions should be stimulated since the institutional environments might be similar and useful in terms of adopting new strategies for the implementation of competition law.

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

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

3.5 The Cooperation Agenda at the Regional and Multilateral Levels

The Regional Level

The agenda of the regional blocks have usually dealt with two issues. First, the harmonization of the national competition laws, which includes the creation of a new legal framework in certain countries as in the case of some of the Eastern European nations.

Second, the member states have to negotiate the convergence of the antidumping rules into competition ones. This is not trivial theoretically or politically, but it is a question which has to be coped with in order to stimulate trade within the block.

The Multilateral Level

A worldwide transformation of the antidumping rules into competition rules does not seem to be realistic in the near future. Any kind of international code or legislation in competition seems to be premature given the great diversity of experiences and stages of development of the members of WTO.

The definition of general principles in regard to the prerequisites that a national law has to have to provide legal certainty to private agents seems to
be the relevant agenda at the multilateral level. Although not comprehensive, the WTO principles of most-favored nation, national treatment and transparency are of particular relevance for the building of solid competition institutions in the developing world\(^5\).

In addition to such definition, a number of actions could be undertaken:

- elaboration of standards for bilateral and plurilateral agreements;
- incentive for benchmarking exercises such as voluntary country reviews;
- greater coordination and funding for technical assistance;
- regular reports on world competition policy.

**Conclusion**

Technical assistance and technical cooperation are crucial for institutional building in competition policy. Of course one has to be very careful in order to select from the foreign experience the appropriate lessons for one’s own legal and cultural environment. But the important point is that cooperation has to be understood in the context of the educational role of multilateral organizations more than in a result-oriented approach.

**References**


\(^5\) The importance of the last two has been emphasized in BRAZIL (1998).
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