REGULATION OF INTERNATIONAL TRADE THROUGH COMPETITION POLICIES

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Abstract

Competition law and international trade law have sailed under different flags. Competition laws sanction business conduct that is deemed to harm the competitive process-in particular, collusive or exclusionary agreements among competitors, anti-competitive mergers and abuses of monopoly power. Trade laws; in contrast generally impose specific limitations on business transactions that cross national boundaries. There is a recent trend towards trade agreements that include trade related competition provisions, however there are large differences across trade agreements in terms of how the competition provisions and to what extent they are addressed. The benefits of trade liberalisation are magnified by competition law rules that lower the incidence of consumer welfare-reducing restrictions on the competitive process. As of date, efforts to establish a general agreement on competition policy in the framework of the international trading system have been unsuccessful. Nonetheless, provisions relating to competition policies are incorporated in the WTO General Agreement on Tariffs and Trade (GATT) General Agreement on Trade and Services (GATS); Agreement on Trade Related Investment Measures Property Rights (TRIPS's). Also regional and bilateral trade liberalisation compacts (NAFTA, EU-US Agreement etc.) have been a force for increasing welfare by extending the geographic extent and scope of trading and investment opportunities. This paper reviews and reflects upon the competition policies in the international trade agreements and how these policies affect the scope and frequency of trade within countries. This essay has taken into account the recent policies and agreements and also has used reports by various institutions like WTO and OECD for understanding the need to synergise competition policies with the international trade. It proceeds from the premises that important synergies exist between trade and competition policy and that it is reasonable to acknowledge this. Further this paper as suggested a few additional steps that are desirable to ensure that there is full realisation of the relevant synergies.

Keywords:

Competition Law, International Trade Law, Anti-competitive, WTO agreements, GATT, OECD

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INTRODUCTION

The concept of "competition" can be traced back to Adam Smith's book on 'The Wealth of Nations'. Economic theory suggests that competition is beneficial as it gives a wider choice to consumers and provides sellers with stronger incentives to minimize costs. Competition policy today is a vital element of the legal and institutional framework for the global economy. "Whereas decades ago, anti-competitive practises tended to be viewed principally as a domestic phenomenon, most facets of competition law enforcement now have an important international dimension"[1]. 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 behaviour of the enterprises. The principal function of competition policy is to keep markets open and undistorted by monopolistic practises, thereby satisfying 3 fundamental goals: fostering and allocation of resources that best satisfies consumer demands, sustaining pressure on business enterprises to run a taut ship and innovate, and permitting market participants to pursue the opportunities that maximise their individual productive and creative potential. Competition Laws were adopted for the first time by Canada (1889) and US (1890) in response to concerns about the excessive market power. The significance of competition policies has been increasingly recognized, especially in developing countries. "Until recently, many developing countries followed industrial policies that deliberately limited the competition by restricting imports and thereby the entry of new firms"[2]. This was achieved by policies such as import duties and import licensing, reservation of certain areas for the public sector, investment licensing for the private sector, and restrictions on foreign direct investment. "With market competition thus restricted, competition policy was required to prevent the collusive behaviour and abuse of dominance by those firms that were allowed to function, both publicly and privately. In the recent years, although the nearly universal trend towards liberalization of markets should itself promote competition, this may not follow automatically and competition policy takes on new importance"[3]. It has been widely recognised that the ongoing growth of international trade is considerably driven by trade liberalisation. Lowering of trade barriers, developments in technology and communication have led to increasingly interdependent economies. With the increasing integration of world economy, through trade liberalisation and expansion of FDI, the anti-competitive activities of the firms acquire the trans-border dimension affecting many countries and sometimes the whole world. Meaning thereby, that effective competition law enforcement can ensure the benefits of trade

[1] Robert D Anderson, Competition Policy, trade and the global economy, WTO Working Paper(Oct.2018), https://www.wto.org/english/res_e/reser_e/ersd201812_e.htm

[2] Aditya Bhattacharjea, Trade and Competition Policy, ICRIER Working Paper (Nov.2004), https://icrier.org/pdf/wp146.pdf

[3] *Id.*

liberalisation don't get distorted through private anticompetitive practises. However in case of transnational effect of the anti-competitive activities of the enterprises, it becomes almost impossible to undertake any enforcement activities against a foreign firm without the cooperation of the other country. In the liberal post Uruguay Round at Geneva in December 1993 in the terms of trading system, the effective application of competition law becomes an important contributor to creating and maintaining open and accessible markets, and thus to enhancing the stability of the system, there are as yet no binding rules relating to the practises of private firms at the multilateral level.

INTERNATIONALISATION OF COMPETITION LAWS

As international trade and investment have grown, so has the acceptance by the world's nation of active competition policies, national and international. At the end of World War II, only 1 nation-the United States had a pro-competition policy that was enforced assiduously. More important step occurred with the formation of European common Market. "As tariff barriers were reduced within the Common Market, anti-dumping mechanisms were phased out beginning in the 1970"[4]. The treaty of Rome included a strong language declaring inconsistent with the common market inter-firm agreements and concerted practises likely to affect trade between member states. Also prohibited were abuses of dominant market positions affecting trade between member states. "Further in time to mitigate the hostility that extraterritorial cases can provoke and to increase the effectiveness of domestic competition policies toward international business activities, individual nations and trading blocs have negotiated agreements to cooperate in the mutual pursuit of competition policy actions". Such international cooperation in competition laws dates back to the Havana Charter of the International Trade Organisation (ITO) in 1948. The charter included an entire chapter on the subject of restrictive business practises and requires members to control anti-competitive practises of an international nature. In 195, a group of experts was created to study the feasibility of including trade related competition provisions in the GATT Framework. "A decision by such group was adopted in 1960 which recommended 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".[5] The 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

[4] Frederic M. Schere, Intl Trade and Competition Strategy, ZEW Discussion Paper (Jun 1996), http://ftp.zew.de/pub/zew-docs/dp/dp9618.pdf

[5] 'Restrictive Business Practices: Arrangements for Consultations' (World Trade Law, 18 November 1960). <http://www.worldtradelaw.net/document.php?id=misc/rbp1.pdf>accessed 3 January 2020.

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, curbing of anti-competitive practises and international cartels. Therefore in the 90's a number of countries seeked to cooperate internationally either through regional, bilateral, plurilateral or multilateral frameworks.

COMPETITION POLICY IN THE WTO

Proposals were made to establish an international regime as against the tits and bits of historical developments. The regime was to include competition provisions in the WTO Framework. In 1996, at the Singapore WTO Ministerial meeting, it was decided to begin work on "competition policy and the Working Group on Interactions between Trade and Competition Policy (WGTCP) was established to study the interaction between trade and competition policy"[6]. Though no consensus could be reached on a completion policy framework in the WTO, there are number of provisions under GATT 1994 and WTO Agreements such as TRIP's and GATS which would be later discussed. These can be classified as competition related provisions and they do not have possible application in cases of anticompetitive practises affecting trade and market access.

[6] International Bar Association, A Canadian policy of trade and competition, McCarthy(Sept.30,2012), https://www.mccarthy.ca/en/insights/articles/trade-and-competition-policy-canadian-policy

- **GATT (General Agreement on Tariffs and Trade)**

Signed in 1947, became the principal multilateral instrument governing international trade from 194 until the WTO was formally established as its successor. Unlike, the Havana Charter, the GATT didn't embody a dedicated section on anti-competitive business practises as such. It incorporates provisions that manifest a concern with competition policy issues. GATT doesn't contain explicit binding rules on restrictive business practises. "GATT recognises that governments may choose to participate in international commerce in competition with private firms, but it doesn't leave the governments with a free hand as to how to carry out their trading operations"[7]. GATT doesn't address whether import monopolies or exclusive/special rights should be maintained in a certain sector, and doesn't explicitly make their existence subject to negotiations.

Article II 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 on taxes and regulations. According to Section 4 of the Article "*The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national*

[7] *Supra* at n.4.

origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use”[8]. 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), which was limited to goods, to be applied to “services and service providers of any other member”, the focus of GATT anti-competitive 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 the government. Article XXIII of GATT provides the option of using existing GATT rules to address anticompetitive practises when a WTO member feels that the benefits achieved under this agreement is nullifies by measures not violating any part of GATT.

- **GATS (General Agreement on Trade Services)**

GATS is a very significant element of the multilateral trade agreements that incorporates specific competition policy provisions.

According to Article II of the GATS, monopolies shouldn’t abuse the market power when competing in services outside their monopoly rights. Basic obligation under Article VIII requires that each member ensure that any service supplier to which it has granted a monopoly should not act in a manner that would infringe the member’s specific GATS commitments, or abuse its power in areas outside the scope of legal monopoly. Article IX, deals with restrictive business practises, requires members to enter into consultations solely at the request of any other member with a view to eliminating such practises. Article XVII requires National Treatment, which to be applied to services and service providers of any other member.

The GATS incorporates the separate annex on telecommunications, which was designed as a competition-related safeguard in this sector.

- **TRIPS (Trade-Related Aspects of Intellectual Property Rights)**

The TRIPS Agreement is another important example of the express recognition within a multilateral trade agreement of the role of competition policy.[9] The TRIPS Agreement provisions on competition policy result from the demands of developing countries during the TRIPS negotiations, and more generally the recognized role of competition policy in balancing the exercise of IPR’s in jurisdictions around the globe.

Article 8 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.

[8] Robert Anderson, Competition Policy and Intellectual Property in WTO, WTO Discussion Paper(Jan. 2008), https://www.researchgate.net/publication/228795672_Competition_Policy_and_Intellectual_Property_in_the_WTO_More_Guidance_Needed

[9] Robert D. Anderson, ‘Competition Policy and Intellectual Property in the WTO’ (2008) EE 18.

Article 31 lays down conditions under which governments may allow compulsory licensing of a patent that is, its use by parties other than the owner on payment of reasonable royalties to the latter. Among these conditions are that the proposed user should have tried unsuccessfully to obtain a normal commercial license from the owner, should use the compulsory license primarily for supplying the domestic market of the member granting the license and should pay "adequate remuneration" to the right holder. These 2 conditions are waived by Article 31(k) in cases where the use of the patent is permitted "to remedy a practise determined by judicial or administrative process to be anti-competitive". "Article 40 allows the competition authorities of WTO members to control specific licensing agreements in case of an abuse of intellectual property rights having an adverse effect on competition in the relevant market"[10].

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. As yet, the only complaint that has been settled against a member involving competition policy has been the 2004 Telmex case, in which a Dispute Settlement Panel held that the Reference Paper on telecommunications required Mexico to take action against a cartel of its telecommunications firms. 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 the competition policy in the WTO Framework.

COMPETITION PROVISIONS IN TRADE AGREEMENTS

Agreements in beginning followed the pattern of OECD recommendations providing for notification, exchange of information coordination and consultation. It has been studied that competition provisions vary with agreements from simple adoption of national competition laws to cooperation 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 provision whereas others call for more extensive coordination of specific competition standards and rules potentially requiring common competition laws and procedures. For e.g. "Generally, NAFTA-inspired RTA's (Regional Trade Agreements) not only contain the requirement to adopt or maintain competition laws that prescribe anti-competitive business conducts, but also require the parties to take appropriate action with respect to such conduct".[11]

Though the number and kind of competition provision vary with agreements, according to these studies competition provisions in trade agreements and are discussed as follow:

[10] *Supra* at n.2

[11] Robert D. Anderson 'Competition Policy, Trade and the Global Economy' [2018] ERSD 12, 19 https://www.wto.org/english/res_e/reser_e/ersd201812_e.pdf accessed 8 January 2020.

1. Adoption and Enforcement: 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 in the case of US-Singapore RTA.

2. Coordination and Cooperation: Parties recognise the importance of cooperation regarding issues such as notification of anti-competitive practises, exchange and consultation of information required towards enforcement activities.

3. Anti-Competitive Behaviour: Some trade agreements have very broad and non-binding language and don't define the kinds of practises to be considered anti-competitive. Whereas on the other hand there are trade agreements like CARICOM that directs the parties to prohibit very specific types of practises within their jurisdiction.

4. Anti-Dumping: Such duties were traditionally seen as a way of addressing the risk for the cases of monopolists in 1 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.

5. Due- Process and transparency: Article X of GATT requires members to publish promptly all "laws and regulations, judicial decisions and administrative rulings affecting imports and exports, so as to enable traders to become acquainted with them". Trade agreements also promote transparency through the collection and dissemination of all relevant information through centralized inquiry points, publications and display online.

Example: The North American Free Trade Agreement (NAFTA)

Has been effective since January 1, 1994 and is comprised of US, Mexico and Canada. The agreement included many aspects of trade such as market access, national treatment, government procurement, investment, services and competition policy. In order to prevent the benefits of free trade from being eliminated through (Private) anti-competitive behaviour the agreement included a separate segment on competition policy.

Chapter 15 of the agreement contains 5 specific provisions related to competition that are are:

1. Article 1501 states the provisions relating to adoption and enforcement measures to prescribe anti-competitive business conduct.

2. Article 1502 deals with provisions of monopolies and state enterprises, the provisions don't apply to government procurement of goods and services for governmental purposes.

3. Article 1503 deals with maintaining and establishing state enterprises and provide that such should provide non-

discriminatory treatment to the investors of another party.

The competition provisions in NAFTA apply to anticompetitive activities. But with exception of provisions governing the behaviour of state monopolies, the agreement doesn't dictate substantive competition or antitrust rules.

Example: "*Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)*"

The main instrument governing economic relations between the 2 countries and entered into force in January 1, 1983. "The main objective of Australia New Zealand CER is to *expand free trade by eliminating barriers to trade and promoting fair competition. However the CER Agreement does include competition provisions in a separate chapter but it has facilitated cooperation between Australia and New Zealand on this issue*".[12]

There are few competition related provisions found in CER Agreement.

1. Quantitative Import Restrictions and Tariff Quotes: Article 5 prohibits on all goods originating in the territory of the other member states.
2. Other trading Distorting Factors: Article 12 of the agreement deals with trade distorting issues and suggests that member states shall examine the scope for taking action to harmonize requirements relating to matters like standards, technical specifications and testing procedures, domestic labelling.
3. Anti-Dumping: Article 4 states that member states agree that anti-dumping measures in respect of goods originating in the territory of the other member states aren't appropriate from time of achievement of both free trade in goods between the member states and the application of their competition laws to relevant anti-competitive conduct affecting trans-tasman trade in goods.

The CER Agreement is very important because of its eliminations of the anti-dumping clause. The agreement also includes strong disciplines on subsidies. The industry specific subsidies are banned along with the already banned export subsidies.

CURRENT CHALLENGES FOR COMPETITION POLICY MAKERS

Competition law enforcement today is a pervasively international phenomenon.[13] Different situations raise concerns not only for jurisdictions which are essentially consumers of the relevant product or service but also for jurisdictions whose producers/suppliers may be adversely affected by anti-competitive behaviour or by the creation of an individual or collective position of dominance on the world or regional market.

1. Cross-Border Mergers

[12] FIRB, International Investment issues, Australia, FIRB Annual Report (Jun.2016), https://cdn.tspace.gov.au/uploads/sites/79/2016/01/FIRB-Annual-Report-2004-05_Chapter_4.doc

[13] Richard Wilsh and David Bailey, Competition Law (Oxford, 8th Edition, 2015), p. 4.

Create scope for conflicting decisions between competition authorities which can give rise to substantial costs to the businesses concerned. Firstly, substantive differences may arise directly from the law, such as when different evaluation criteria are embodied in legislation. Conflicting decisions may also, at times, stem from different goals or priorities of competition law enforcement in different economies. "In US competition policy intervention is focussed exclusively to ensure that competition thrives, prevent companies from achieving monopoly positions, while in Europe, competition policy aims at the need to ensure market integration between EU Member states".[14] Secondly, market situations and conditions of competition like customer behaviour, existence of complements in the market and various other circumstances with an impact on competitive forces in the market vary across economies. In furtherance international mergers may affect different stages of multinational supply chain in different jurisdictions.[15] Thirdly, Conflicting decisions can occur as the assessment, during any merger review, of facts relating to and market effects of the merger may simply be complex and a clear view cannot be easily identified.[16]

2. International Cartels

International Cartels and market sharing agreements between firms in two or more countries are akin in their effects to horizontal price-fixing and other collusive agreements within a single country. In both cases, competition is limited, prices are raised, output is restricted, and/or markets are allocated for the private benefits of the firm. "Some evidence suggests that such cartels are a recurring feature of markets that lack effective competition rules and institutions, and that appropriate enforcement actions by developed countries, while of vital importance, do not adequately protect the interests of developing countries".[17]

There exists the 'effects doctrine', under this principle, domestic competition laws are applicable to firms and arrangements based outside of the domestic market when they have effects that are felt within the domestic territory. Nonetheless, the extraterritorial reach of competition law is a sensitive issue and jurisdictional conflicts may arise. Even where international cartel activity can be tackled effectively by national competition laws, inefficiencies may occur with regard to the investigation of international cartels and lead to under-enforcement of competition policy and laws.

3. Anti- Competitive Practise in Digital Markets

While digitalization can have important pro-competitive effects, it also brings with it the

[14] Reiter v. Sonotone, [1979] 442 US 330.

[15] OECD, 'International Cooperation in Competition Law Enforcement' (6-7 May 2014). <https://www.oecd.org/mcm/C-MIN(2014)17-ENG.pdf.>Accessed 8 January 2020.

[16] Ibid 37.

[17] Ibid 5

potential for limiting competition through exclusionary or collusive impacts.[18]

Digitalization has enabled the erosion of geographic market boundaries by facilitating the entry and growth of internet-based suppliers and retailers. This, in turn has in a way contributed to increased competition through expanding Global Value Chains (GVC's) and enabling competition in the provision of new types of services and goods.[19]. "Competition in digital markets is influenced by 3 significant forces that are largely absent in conventional markets, namely networks effects, scale without mass and switching costs".[20] In addition, collusive effects may arise in cases of big data processing. Big data analytics can result in reactive algorithmic pricing that produces effects similar to the explicit coordination without an actual agreement to collude. Overall the nature of competition in digital markets differs from that in conventional/traditional markets as it tends to be based first and foremost on innovation rather than on pricing, in which new players successively replace incumbent firms through innovation and successful deployment of new technology.[21] OECD identifies following characteristics as being critical to competition law enforcement and competition advocacy in digital markets (i) emergence of data as a new primary competitive asset; (ii) privacy as an important component of analysis during merger reviews and (iii) increased difficulties in defining the relevant market.[22]

INDIAN COMPETITION POLICY IN RELATION TO INTERNATIONAL DEBATE ON TRADE

Recently most countries of the world have intensified the formation of free trade agreements (FTA's) with other countries including India; none of the FTA's signed by India include competition provisions. Even the CECA (more substantial FTA is called the Comprehensive Economic Cooperation Agreement) like the one with Singapore, covers many sectors like trade in goods, services, investment and government procurement and doesn't include trade related competition provisions[23]. The competition Act, 2002 was framed with the objective of preventing anticompetitive practises and promoting competition in the market. The act contains exhaustive provisions related to prohibition of anti-competitive agreements, abuse of dominant position and regulation of combinations. Although Section 32 of the Competition Act provides for jurisdiction over parties located outside India and actions taking place outside India that have an "appreciable

[18] WTO Report, *Transformative Impact of Digital Technologies on Trade* (wtr no 3 of 18).
[19] OECD, Key Issues for Digital Transformation in the G20, (OECD, 12 January 2017) <https://www.oecd.org/g20/key-issues-for-digital-transformation-in-the-g20.pdf> accessed on 9 January 2020.
[20] David S. Evans & Richard Schmalensee, *Issues in Competition Law and Policy*(Vol.1, chapter 2, 2008).
[21] OECD (n 10).
[22] OECD, The Role and Measurement of Quality in Competition Analysis (OECD, 2 October 2013) <http://www.oecd.org/daf/competition/Quality-in-competition-analysis-2013.pdf>accessed on 10 January 2020.
[23] Sanghamitra Sahu, *Competiion Clauses in Bilateral Trade Treaties*(CCI,ICRIER,Nov 2007).

adverse effect on competition" in the relevant market in India. This is an explicit assertion of the "effects doctrine" as discussed above in the paper. Also section 3(5)(ii) exempts anti-competitive agreements to the extent they relate exclusively to exports.

The situation is made worse by 2 deviations from international practise in the Indian Competition Act. Firstly, Section 3(3) of the Act singles out the so-called hard core cartel agreements.[24] For special treatment, but stops short of making them offences per se. it only makes them presumptively anti-competitive, with the presumption being rebuttable if special beneficial effects listed in Section 19(3) can be proved. Secondly, the act is deficient in its treatment of abuse of dominance because it doesn't require a test for anti-competitive effects and covers both "exploitative as well as exclusionary abuses"[25]

Another interesting divergence in the Competition Act 2002 is that all the competition offences are civil in nature and only failure to comply with orders of CCI can attract prison terms. This makes it doubtful that whether India can follow the international trend and practises to make participation in a cartel a criminal offence.

A WAY FORWARD WITH REFORMS

Notwithstanding the clear and significant progress that is being made in important respects, the foregoing developments also bring into the light the question as to what additional forms of international cooperation may be needed in order to ensure an appropriately transparent and non-discriminatory framework for application of competition policy in today's global economy.

- At the outset what is proposed is to setup a comprehensive, user-friendly database summarizing competition provisions in the FTA's to provide stakeholders with easily accessible guidance for negotiating competition-related FTA provisions. Such can be ideally maintained by WTO as it already keeps an exhaustive database of existing FTA's or can be made outside the WTO Framework altogether, perhaps under the aegis of UNCTAD, which is perceived as more friendly to developing countries and also has a great record in analysing multinational corporations and their activities. Also a parallel process seem to have started in the OECD, for several years it has been inviting non-members to meetings of its Global Forum on competition.
- Creation of central-clearing house for dissemination of information on anti-cartel investigations and non-confidential case materials, perhaps requiring countries to notify the relevant cases to this clearing house.
- The relaxed standards of Anti-Dumping, though with much greater justification could be applied to foreign cartels. Since

[24] Aditya Bhattacharjea, *Trade, Development & Competition Law (*TRADE L. & DEV. 43 ,2013). <http://www.tradelawdevelopment.com/index.php> accessed 10 January 2020.

[25] ibid

Anti-dumping agreements allow much greater latitude for countries to address dumping than do standard competition law approaches to discriminatory or predatory pricing.

- "To identify major areas of competition policy that model chapter should include and the parties could rather easily agree upon. To facilitate adoption by countries with less experience in competition law enforcement and/or ensure special and differential treatment"[26]. Inclusion of provisions in the FTA's like Commonly Prohibited Practises, Merger Provisions, competition enforcement principles, Dispute Settlement mechanism for competition related conflicts and lastly the impact assessment.[27]

CONCLUSION

In recent times competition related provisions in bilateral/regional trade agreements have emerged as the most intensely debated subject. The failure to include competition 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 detoriation of the benefits of free trade by private anti-competitive activities. "The scope of incorporating competition provisions is greater than generally observed, as many non-competition specific chapters of some trade agreements also include competition related provisions. The major difficulty is encountered while analysing the effectiveness of these competition provisions". India has been reluctant in formulating a multilateral framework on competition laws. In general, the objection is related to the unwillingness to overload an already over- burdened WTO. India's concerns are related to provisions on National Treatment, transparency and procedural fairness. In including competition a provision in RTA's 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.

[26] Burcu Can, Competition Policies within context of Free Trade Agreements, E15(Sept. 2016), http://e15initiative.org/publications/competition-policy-within-the-context-of-free-trade-agreements/.
[27] OECD (n 6) 43.