Consumers International

The TPP Agreement: Chapter on Competition Policy

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Introduction

Competition provisions have become increasingly popular in regional trade agreements (RTAs) and free trade agreements (FTAs) (hereinafter commonly referred to as “FTAs”) recently concluded. The push for competition provisions to be included in FTAs is particularly strong in those negotiations led by the United States (US) or those agreements to which the US is a signatory party, such as the case of the Trans-Pacific Partnership (TPP) Agreement.

The TPP Agreement is essentially built on an agreement which began to be negotiated in 2006 between New Zealand, Singapore, Chile and Brunei (P4) that aimed to facilitate trade amongst the P4 partners through tariff elimination and the promotion of cooperation on customs procedures, intellectual property and competition policy. After the US Government (USG) announced that it would join the P4 in September 2008, the governments of Australia, Canada, Malaysia, Mexico, Peru and Vietnam were quick to follow suit. Till date, the Agreement has undergone 16 rounds of negotiations, with the latest one being in Singapore in March 2013, and the next round in Lima, Peru in May.

This is a very comprehensive agreement, with 26 chapters under negotiation[2], broadly covering the following issues:

1) Comprehensive market access, including the elimination of tariffs and other trade and investment barriers between TPP countries;
2) Trade facilitation and supply chain development amongst TPP members;
3) ‘Cross-cutting’ issues, such as ensuring regulatory coherence between TPP countries and ensuring a competitive business environment;
4) Emerging challenges especially from new technologies; and
5) Provisions which enable TPP members to update the agreement to address new issues as they arise.

As such, this agreement goes much beyond “conventional” trade issues (only 2 out of 26 current chapters deal with “trade” directly) to include behind-the-border (‘cross-cutting’, ‘emerging’, ‘new’) trade-related matters, competition being one such area. The TPP is also name-tagged as “the most secretive and least transparent trade negotiations in history”. There is no draft agreement chapter being made officially public for widespread consultation, only leak texts, for example those on intellectual property rights (IPRs), or investment. Naturally, very little information is available about the content of the chapter on competition policy of this agreement. For all we know:

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[1] This is one of three research papers commissioned by Consumers International by members and independent experts for release at the 17th round of the Trans-Pacific Partnership Agreement negotiations in Lima. The opinions expressed are those of the author.

[2] It is notable here that the TPP Agreement is being negotiated as a single undertaking, which means ‘virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately. In other words, nothing is agreed until everything is agreed’. (World Trade Organization, *How the negotiations are organized* – Principles, available at <http://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm >)

"*The competition text will promote a competitive business environment, protect consumers, and ensure a level playing field for TPP companies. Negotiators have made significant progress on the text, which includes commitments on the establishment and maintenance of competition laws and authorities, procedural fairness in competition law enforcement, transparency, consumer protection, private rights of action and technical cooperation.*"[3]

Based on this and other public releases, it is being speculated by several parties that the competition policy related commitments contained in the US-Singapore FTA and the US-Korea FTA are being used as "benchmarks/points of departure" in framing the TPP talks.

Rationale for including competition matters in FTAs

Competition has been considered a new-generation FTA issue for quite some time. According to statistics calculated by the United Nations Conference on Trade and Development (UNCTAD), "of the around 300 bilateral and regional trade agreements in force or in negotiation, over 100 include competition-policy related provisions"[4]. Thirty (30) per cent is not a small proportion. And this figure does indeed indicate some sort of preference by several parties to include competition provisions in FTAs. A most often quoted objective for these provisions is that they are needed so that the benefits of trade and investment liberalization are not compromised by cross-border anti-competitive practices, and state-constructed trade barriers are not substituted by other forms of private restrictive practices (such as for instance market-sharing or price-fixing agreements, or market foreclosing or exclusionary tactics)[5].

Other reasons include to create region-wide competition policies and institutions that seek greater levels of integration. For example, a regional grouping as loosely integrated as the ASEAN also has competition policy in its agenda towards building an Economic Community. Or another aim is to help protect developing countries without a national competition law or strong competition regime against anticompetitive practices originating outside their national borders such as international cartels, or cross-border anticompetitive mergers and acquisitions, etc.

Popular as it may seem, FTA competition provisions vary widely in their spectrum of potential obligations. Some FTAs simply have 'best endeavours' measures to adopt, maintain and apply competition law. The language used in some other FTAs might also be more legally binding than 'best endeavours'. Either language can apply to non-discrimination, due process or transparency in the statement and/or application of competition law. There may also be provisions for cooperation or coordination of activities by competition law enforcement bodies: either on the basis of "positive comity" or "negative comity". At the deeper end of obligations, there can be an independent dispute resolution or consultation mechanism, or a supra-national authority that can apply competition law directly on private entities within the free trade area, a most popular example being the European Union.

Whatever the substantive provisions, the issues that are most important to developing countries as negotiating partners are: whether there are special and differential (S&D) treatments to address their development needs – the S&D treatments may include: (i) provisions that safeguard the interests of less-developed partners, (ii) exceptions and exemptions from some obligations, (iii) transitional time periods, and (iv) technical assistance; and whether there is policy space left for nurturing national champions and accommodating other industrial policy considerations.

Possible contents of the TPP competition text

As mentioned above, no information has been leaked about the competition policy chapter of the TPP yet, so we do not know for sure yet exactly what obligations are in place for negotiating members, or whether developing-country members would be entitled to any form of S&D treatment. What we do know for sure, based on the public releases so far, is only the general objective of that chapter and the following contents which would constitute parts of the text:

Outlines of the Trans-Pacific Partnership Agreement: <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>

[4] *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, United Nations 2005

[5] *Ibid.*

- Members to maintain & adopt competition laws that proscribe anticompetitive practices;
- Members to maintain authorities responsible for the enforcement of its national competition laws ('competition authorities');
- Members to ensure procedural due process[6] in the enforcement of their competition laws;
- Members to adhere to the principle of competitive neutrality[7] in the treatment of their state-owned enterprises, government enterprises and designated monopolies[8];
- Members to recognize the value of transparency in relations to their competition law enforcement activities, and to make available to the public information such as exceptions and immunities to their respective competition laws; and information about state enterprises and designated monopolies; etc
- Member to cooperate in the enforcement of their consumer protection laws;
- Member to provide for private right of action in the enforcement of their competition laws[9]; and
- Technical cooperation between TPP Members.

Most (90%) of these contents were covered in the KORUS (the Korea-US FTA) and/or the Singapore-US FTA. For the benefits of stakeholders, some most outstanding and relevant provisions in these two FTAs would be quoted below as the 'departure points' for the TPP:

- ***Objective:***

  "*Recognizing that the conduct subject to this Chapter has the potential to restrict […] trade and investment, the Parties believe proscribing such conduct, implementing economically sound competition policies, and engaging in cooperation will help secure the benefits of this Agreement*" (Singapore-US FTA, Art. 12-1)

- ***Adoption of competition law:***

  "*Each Party shall adopt or maintain measures to proscribe anticompetitive business conduct with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct*" (Singapore-US FTA, Art. 12-2(1))

- ***Establishment of competition authority:***

  "*Each Party shall establish or maintain an authority responsible for the enforcement of its measures to proscribe anticompetitive business conduct*" (Singapore-US FTA, Art. 12-2(2))

- ***Due process:***

  "- *Each Party shall ensure that a respondent in an administrative hearing convened to determine whether conduct violates its competition laws or what administrative sanctions or remedies should be ordered for violation of such laws is afforded the opportunity to present evidence in its defense and to be heard in the hearing. In particular, each Party shall ensure that the respondent has a reasonable opportunity to cross-examine any witnesses or other persons who testify in the*

[6] Procedural due process in antitrust/competition law enforcement guarantees alleged parties such rights as to be heard in hearings, to present evidence in their defense, and to seek review in a court of law, etc. For reference purpose and further reading, the *ASEAN Regional Guidelines on Competition Policy*, for example, has a whole chapter addressing this topic – chapter 7. This Guidelines is downloadable from <http://www.asean.org/archive/publications/ASEANRegionalGudelinesonCompetitionPolicy.pdf >.

[7] Competitive neutrality can be understood as a regulatory framework (i) within which public and private enterprises face the same set of rules; and (ii) where no contact with the State brings competitive advantage to any market participant. (OECD, *State-owned Enterprises and the Principle of Competitive Neutrality*, DAF/COMP(2009)37) With regard to competition policy and law, this principle could be understood narrowly as that competition rules should apply equally to both private and state enterprises, subject to very limited exceptions. In the case of the Singapore-US FTA, it is especially noted that '*Singapore shall enact a general competition legislation by January 2005, and shall not exclude enterprises from that legislation on the basis of their status as government enterprises*'. (1st Footnote to Chapter 12 of the Singapore-US FTA on Anticompetitive Business Conduct, Designated Monopolies, and Government Enterprises)

[8] Even though the subject of treatment of State/government enterprises and designated monopolies was not explicitly mentioned amongst the TPP competition texts being negotiated, several parties speculate that this is one important content, which is usually emphasized upon by the USG in all FTA negotiations it is a party to. This could also be one interpretation of the objective of "ensuring a level playing field for TPP companies".

[9] This generally means any individual whose business or property is injured by reason of anticompetitive practices or other practices forbidden by the competition laws (e.g. other restraints of trade) could bring proceedings before a relevant court for remedy and compensation of damages. Private enforcement of competition laws has had a long history in the US, starting with the Sherman Act of 1890.

hearing and to review and rebut the evidence and any other collected information on which the determination may be based.
- Each Party shall provide persons subject to the imposition of a sanction or remedy for violation of its competition laws with the opportunity to seek review of the sanction or remedy in a court of that Party.
- Each Party shall provide its authorities responsible for the enforcement of its national competition laws with the authority to resolve their administrative or civil enforcement actions by mutual agreement with the subject of the enforcement action. A Party may provide for such agreements to be subject to judicial approval.
- Each Party shall publish rules of procedure for administrative hearings convened to determine whether conduct violates its competition laws or what administrative sanctions or remedies should be ordered for violation of such laws. These rules shall include procedures for introducing evidence in such proceedings, which shall apply equally to all parties to the proceeding."
(KORUS, Art. 16-1 (3-6))

- ***Competitive neutrality:***

Designated Monopolies – "*Each Party shall ensure that any privately-owned monopoly that it designates after the date this Agreement enters into force and any government monopoly that it designates or has designated:*

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees, or other charges;

(b) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d);

(c) 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

(d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect covered investments." (KORUS, Art. 16-2)

State Enterprises – "*Each Party shall ensure that any state enterprise that it establishes or maintains:*

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges; and

(b) accords non-discriminatory treatment in the sale of its goods or services to covered investments." (KORUS, Art. 16-3)

- ***Transparency:***

"*1. The Parties recognize the value of transparency in their competition enforcement policies.*
2. On request of a Party, each Party shall make available to the other Party public information concerning its:

(a) competition law enforcement activities;

(b) state enterprises and designated monopolies, public or private, at any level of government, provided that the request indicates the entities involved, specifies the particular goods or services and markets concerned, and includes 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 the request specifies the particular goods or services and markets of concern, and includes indicia that the exemption or immunity may hinder trade or investment between the Parties.*

3. Each Party shall ensure that all final administrative decisions finding a violation of its competition laws are in writing and set out any relevant findings of fact and the reasoning and legal analysis on which the decision is based. Each Party shall further ensure that the decisions and any orders implementing them are published or, where publication is not practicable, otherwise made available to the public in such a manner as to enable interested persons and the other Party to become acquainted with them. The version of the decisions or orders that the Party makes available to the public may omit business confidential information or other information that is protected by its law from public disclosure." (KORUS, Art. 16-5)

- ***Cross-border consumer protection***[10]:

"*1. The Parties recognize the importance of cooperation on matters related to their consumer protection laws in order to enhance the welfare of their consumers. Accordingly, the Parties shall cooperate, in appropriate cases of mutual concern, in the enforcement of their consumer protection laws.*

2. The Parties shall endeavor to strengthen cooperation […] in areas of mutual concern relating to their respective consumer protection laws, including by:

(a) *consulting on consumer protection policies and exchanging information related to the enactment and administration of their consumer protection laws;*

(b) *strengthening cooperation in detecting and preventing fraudulent and deceptive commercial practices against consumers;*

(c) *consulting on ways to reduce consumer protection law violations that have significant cross-border dimensions; and*

(d) *supporting implementation of the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders (2003).*

3. Nothing in this Article shall limit the discretion of an agency referred to in paragraph 2 to decide whether to take action in response to a request by a counterpart agency of the other Party, nor shall it preclude any of those agencies from taking action with respect to any particular matter.

4. Each Party shall endeavor to identify, in areas of mutual concern and consistent with its own important interests, obstacles to effective cooperation with the other Party in the enforcement of its consumer protection laws, and shall consider modifying its domestic legal framework to reduce such obstacles." (KORUS Art. 16-6)

- ***Cooperation:***

"*The Parties recognize the importance of cooperation and coordination to further effective competition law and policy development in the free trade area and agree to cooperate on these matters*." (Singapore-US FTA, Art. 12-4)

Why should we care?

As already elaborated above, there are good reasons for including competition provisions in FTAs in general, which should also apply for the case of the TPP, of course with the caveat that the distinct situations in developing economies and their needs should be adequately and appropriately addressed. The inclusion of such a chapter in this ambitious, 21st-century trade agreement would also naturally mean opportunities and obligations for negotiating members. For example, as a result of the conclusion of the TPP, a country without a competition law and policy so far such as Brunei Darussalam might soon have to adopt one and properly enforce it. Whether this country, with all its distinct features, actually needs a comprehensive, far-fetching competition law policy or not is outside the scope of discussion here. Or a country with very high level of government intervention into market functions through State-owned enterprises and monopolies like Vietnam might find it extremely difficult to ensure competitive neutrality aspects. Or several negotiating Members do not have a tradition of allowing antitrust private right of action and might have to amend their competition laws as a result. On the other hand, the Members might benefit from the technical cooperation available under the Agreement, or consultations and information exchange, etc. Or the inclusion of such a chapter will help to guarantee that the benefits that might accrue as a result of this trade pact are not negated by behind-the-border restrictive business practices or government distortions of competition. A question, however, remains:

[10] It should be noted hereby that the Singapore-US FTA does not include provisions on cross-border consumer protection.

Why should consumers, as stakeholders, care about this chapter of the TPP on competition matters?

It is a universal presumption that ensuring the maintenance of competition on markets will ultimately benefit consumer welfare. Competition laws seek to protect the process of free market competition in order to ensure efficient allocation of scarce economic resources. Presumably, when economic efficiency is maximized, these efficiencies will ultimately create benefits for the consumer, including improvements and innovations in i) lower costs and prices; ii) higher quality; iii) availability of choice; and iv) better services. In this way, competition as such will eventually benefit consumer welfare. However, the relationship between competition law enforcement (which is what the TPP chapter on competition might talk about) and consumer welfare is not always as straightforward as it may seem. Besides, there is always the danger that 'consumer welfare' is being looked at too narrowly, if only from the perspective of a 'competitive market'. There are other relevant issues, for example, the continued availability and affordability of essential/public goods which are probably being provided by State enterprises or designated monopolies. Or many competition statutes provide for compulsory licensing or parallel importation in the case of anticompetitive use/abuse of IPRs, which would facilitate public use/access to certain copyrighted materials or patented goods. Or many competition authorities took actions to promote generic competition in the pharmaceutical market within the framework of their national competition laws. Or what is the legal standing of consumers and consumer organizations in competition cases, how the consumers could be compensated for the damages done to their economic interests by anticompetitive practices (for example with regards to international cartels and monopolies). It is not at all clear how all these issues would play out in this chapter of the TPP or how they are to be interpreted together with the contents of other relevant chapters.

Many see consumer protection as a separate, though complementary field of law to competition law. Competition law keeps the options open through the maintenance of competition in markets, while consumer protection law protects the ability of consumers to make informed choices between those options. These two types of policy thus have one shared goal which is "consumer welfare". This might be the reason why cross-border consumer protection is being added as part of the TPP competition chapter. This could be appreciated as highlighting and enhancing the importance of consumer protection worldwide and facilitating the harmonization of consumer protection laws. However, one should never forget that this content was included in the KORUS but later on dropped from the Singapore-US FTA. And even in the KORUS, consumer protection is only being added as an extra item, not subject to dispute settlement[11]. This time with the TPP, it might as well be just a 'public relation' item on the negotiating agenda to divert our concerns from other areas where the consumers' interests will surely be negatively affected.

[11] See the KORUS, Art. 16-8