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Does the Competition Chapter Promote Competition?

We have looked at the very detailed provisions of the NAFTA 2.0 SOE chapter. That chapter gets into the nitty-gritty of such practices as non-commercial lending.

Now let's look at the NAFTA 2.0 chapter on competition policy.

Competition? Where?

The chapter's opening statement is that the parties have to have laws prohibiting "anticompetitive business conduct." And we never see the word "anticompetitive" again. It isn't defined, or elaborated, or otherwise explained.

You might reasonably ask what's in a competition policy chapter if there are no contours around what it means to be anticompetitive.

The answer: due process for merger candidates. Ten paragraphs on "procedural fairness in competition law enforcement." (Article 21.2). The whole chapter is just over five pages, and "procedural fairness" takes up more than a third.

Procedural fairness is important, of course. But the fact that the "competition chapter" is principally devoted to protecting those who may stand accused of frustrating competition is just another example of how these agreements are designed first and foremost to protect the interests of business. In this case, big business that aspires to be bigger. We cannot possibly be surprised that people believe the system is rigged in favor of corporate interests – and we cannot say they're wrong.

The most controversial issue is the text's memorialization of the consumer welfare standard, a juridical construct that has come under fire as the movement to revitalize antitrust enforcement gains momentum. This is another example of the potential for trade agreements to go too far in constraining domestic policy space.

Going Backwards

Indeed, we seem to be moving *away* from an effort to address actual anticompetitive behavior. The KORUS competition chapter, for example, has an article on "Competition Law and Anticompetitive Business Conduct." But we've somehow stripped that out of the parallel article in the new NAFTA. Now it's just "Competition Law and Authorities." On the bright side, it's a more honest reflection of what's actually in there.

The NAFTA text does indicate that fraudulent and deceptive commercial activities are bad, and should be prohibited, because that's in the "public interest." (Article 21.4). Is specifying, and fighting, anticompetitive behavior not in the public interest?

What's particularly interesting about the KORUS competition chapter is that it *includes* provisions on state enterprises, instead of moving them into a separate chapter. (Article 16.2) In other words, KORUS recognizes that the issues with state enterprises are simply a subset of competition more generally, and not a separate matter altogether. Which is what the previous blog explained.

The Architects of the Multilateral Trading System Were Way Ahead of Us

Despite what the WTO would have you believe, competition is *not* a "so-called 'new issue'." Competition policy was supposed to be part of the multilateral trading system as of its inception. As this article explains, the GATT itself was meant to be temporary, to be superseded by the Havana Charter. The Havana Charter had *an entire chapter* on "Restrictive Business Practices."

The drafters were not squeamish. They didn't like monopolistic behavior, whether public or private:

> Each Member shall take appropriate measures and shall co-operate with the Organization 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** and interfere with the achievement of any of the other objectives act forth in Article 1. (emphasis added)

They even set up an investigatory mechanism with a list of triggers:

(a) Price fixing
(b) Divvying up markets
(c) Discrimination
(d) Quotas
(e) Collusion to hinder development or application of technology, whether patented or not
(f) Extending intellectual property rights to areas beyond the scope of the grant

This language got bumped off by … monopolists. Charter opponents were "huge corporations, which were associated with German cartels before the war, and which are now under indictment for violations of the Sherman Antitrust Act." (Don Johnson, Wealth of a Nation, at 419, quoting the Christian Science Monitor.)

Well by all means, let's allow those associated with the German war machine to design the global trading system by eliminating restrictions on business. If you think that's consistent with what Adam Smith was preaching, this passage from Wealth of Nations should clarify matters:

> But the mean rapacity, the monopolizing spirit of merchants and manufacturers, who neither are, nor ought to be, the rulers of mankind, though it cannot perhaps be corrected may very easily be prevented from disturbing the tranquillity of anybody but themselves.

Let's go back to the new NAFTA, which doesn't put any contours around "anticompetitive behavior." It's almost as though it were drafted by monopolists and would-be monopolists. So we don't define "anticompetitive business conduct;" we only care about regulating *designated* monopolies and *state-owned* enterprises; and any investigatory procedures are designed to make sure companies' due process rights are guaranteed. The Chamber exposes its real concern here:

- What can or should be done to address the misuse of competition enforcement to advance non-competition policy objectives and industrial policy.

This refers principally to China's abuse of its competition law as just another tool in its toolkit to manage access to its market.

Why Don't We Do Something Useful

The irony is that the Chamber's effort to preserve its monopolization options domestically means the only way we intend to address competition policy internationally is by making the world safe for mergers.

But what if we actually address anticompetitive behavior itself? We've talked about the Vitamin C case before, where Chinese producers cornered the U.S. market and then jacked up prices – at the instruction of the Chinese government. While the lower court was pinheaded, the Supreme Court was less easily manipulated by the silly notion that "comity" requires us to let the Chinese government predate our market.

Instead, we have an entire SOE chapter devoted to practices the Chinese government can dodge by fooling around with ownership structures. And in the competition chapter, instead of focusing on how to protect our own workers and companies from anticompetitive, predatory behavior by hostile authoritarian powers, we're focused on how to make it easier for American companies to merge with Chinese companies.

We'd be well served to go back to the KORUS structure, where the disciplines involving SOEs were recognized as a subset of competition issues more generally. And then we can get serious about dealing with anticompetitive behavior, not just abuse of competition law.

After all, as the OECD said:

> In a challenging time for global trade, there is growing interest in updating the international trade rule-book to better address concerns about fair competition in the global economy.

Fair competition in the global economy.