Competition Law, Developing Countries, and Regional Agreements: Tearing Down Silos and Building Up Scaffolds

By:

Eleanor Fox

August 13, 2021

Introduction

At the recent turn of the century, developing countries were poised to control poverty, empower entrepreneurs, infuse business, and advance along the trajectory of a healthy integration into the world economy. Events have conspired against them, with a wave of autocratic nationalism and then the Covid pandemic. More needed than ever, the countries are developing their market systems, safeguarded by competition law and policy. Given the small size of many developing countries, their lack of resources and expertise, and the promise of regional economies of scale, regional free trade agreements and common markets are regarded as the best hope for restoring an upward development trajectory.

There are numerous regional agreements among developing countries. They aim to tear down the trade and investment barriers between and among their members. Moreover, they adopt competition policy and free movement policy to free their internal markets of private and state restraints to achieve market integration, efficiency, opportunity, competitiveness, and a higher standard of living. But most of these regional arrangements do not live up to their potential. Competition policy lags. Why? Reasons commonly given include asymmetry of the member states and their interests, lack of funding and sources for it, large informal markets, governance not sympathetic to competition, and corrupt leadership of nations set on retaining power and privilege. But two critical elements are virtually always overlooked, and unless they are recognized and prioritized, the hope of the regional agreements will never be realized.

What are these overlooked phenomena? 1) The regional arrangements fail to appreciate and control hybrid (public/private) border restraints, and 2) The regional agreements and their leadership fail to take a community-wide "vision from the top," consequently not grasping the holistic picture and not adapting policy to it. Ignoring these elements is a product of myopic vision, path dependency, and silo thinking. It is the product of a technocratic and overspecialized world in which we are taught reductionist economics and bounded thinking. This essay argues that both elements need to inform the institutional development of regional agreements, and it suggests how this larger/deeper vision will pour life into regional agreements and make meaningful economic integration possible.

I. The Problem of Hybrid Restraints

Hybrid restraints are restraints that are both public and private. They could be state measures in the interests of ordinary governance, but these are exactly what we do not challenge. They can also be government officials' conspiracies with vested interests to keep out rivals, such as procurement bid rigs co-opting state officials to "grease the wheels," or customs officials' acts (compensated in one way or another) to please national producers by holding up rivals' goods at the border. They can also be more sophisticated inter-twinings of private restraints with government decrees to keep out foreigners or to cloak nationals with the immunity of the state. We give some examples. Some are international but can be notionally reconfigured as regional. The point is that these hybrid restraints recur; they fall below the radar screen of both trade law and competition law; the two sides of the coin are uncoordinated. Incentives are in place for them to frequently recur because the actors get big payoffs. Unless a law is put into place to allow enforcers to see and meet the problem holistically, these trade-and-competition restraints will deeply undermine the promise of regional agreements.

Here are four examples:

1. The garden variety mentioned above – bid rigs and border payoffs; often corrupt.
2. The WTO Mexican Telecoms case. Mexico commanded the Mexican telecoms companies to each raise its price of terminating international telephone calls in Mexico to the monopoly price charged by telecom monopolist TelMex (owned by powerful industrialist and patron of presidents Carlos Slim). When called to account for the infamously high price of calls to Mexico – which seriously handicapped the tens of thousands of poor Mexicans who worked across the border to support their families, the Mexican telecom firms said Mexico "did it" (restrained trade). Mexico said the private firms "did it" (price-fixed). Fortunately for trade and competition, Mexico had signed the GATS Telecom Reference Paper, which required Mexico to maintain and enforce competition laws. A WTO panel heard the case and connected the dots. It held that Mexico violated its Reference Paper obligation. Mexico's ordering the cartel was the virtual equivalent of not enforcing its competition law (See E. Fox, WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition). Thus, the trade-and-competition offense was caught, but only because of the uniqueness of the Reference Paper and the resolve of the WTO panel not to condone a sophistical evasion. But the Telecoms Reference Paper is the only obligation of its kind. NAFTA, the regional agreement among the US, Canada, and Mexico, was a paper tiger, as is its successor, USMCA.
3. The Chinese vitamin C export cartel case. The Chinese vitamin C makers had an export cartel into the US, raising prices by as much as 80%. When sued in the United States by a US buyer, the Chinese manufacturers said China made them do it, that China had ordered the export cartel. China affirmed to the US court that it had done so. But in a related case, China

told the WTO that it never ordered an export cartel (which may have violated its WTO accession commitments); it said that the Chinese exporters voluntarily price-fixed. A US jury found that China did not order the cartel and condemned the price-fixing, but the appellate court reversed, holding that comity prevented the trial court from second-guessing China's word to the US court. The US Supreme Court has remanded the case, and a decision is pending[1]. Will China succeed in excusing its own firms from the US rule, which is the internationally accepted rule, against price-fixing? Must trade and competition retreat to their own silos when only their interaction can produce a satisfactory answer?

4. In the late 1980s, Eastman Kodak, then the flagship amateur photography firm, could not pierce the Japanese market. Fuji Film, its biggest international competitor, had allegedly required all established Japanese distributors to refuse to carry Kodak film. Japanese laws disallowed discounts and premium gifts, and the Japanese Big Retail Store Law effectively barred Kodak from opening its own retail stores. The synergistic trade-and-competition combination meant that Kodak could not construct a sales system to sell in Japan. The United States complained to the Japan Fair Trade Commission about the private restraint and to the WTO about the state restraint. The artificially forced separation of the synergistic public-private acts was the death knell of the complaint. See Japan - Measures Affecting Consumer Photographic Film and Paper, Report of the Panel, WT/DS44/R31 March 1998.

The garden variety restraints (example 1) are the trade-and-competition restraints that deserve the most attention in the short term. However, the larger systemic problem of separate silos is looming and should not slip off the radar screen. Anecdotal evidence indicates that the garden variety restraints are rampant at the borders of neighboring nations in developing countries[2], and ignoring them could defeat the project of regional integration. Consequently, strong structures are needed in regional agreements to incentivize the trade (internal market) officials and the competition officials to get and share information of common interest and to prosecute.

II. The Problem of Myopic Vision

The companion issue is myopic vision. We need a vision from above. When the effects of acts or transactions pass many national borders, as they commonly do today, we need enforcers and policy-thinkers with a vision of the whole problem. Two categories test this capability today: megamergers and Big Tech.

A. Megamergers

Mergers of multinationals pose regional if not global problems. The current practice of nations is for each jurisdiction to examine a global merger through a national lens. The developed nations do what they think is good for their nation, ordering spinoffs and clearing the deal. The burden then falls on each developing country that may suffer anticompetitive harms, even though developing countries are more likely to suffer the anticompetitive consequences and are least likely to have the power to allay them. Regional authorities in common markets are charged with regional assessment. This function should be a serious one, but thus far, the regionals are not meeting the challenge.

The megamergers of Holcim/Lafarge (cement) and Bayer/Monsanto (seeds, fertilizers, and chemicals) are examples. The developed country authorities cleared both mergers with spinoffs and conditions to protect only their own consumers. Both mergers threatened particular harm to developing countries. Yet, both mergers were cleared by the COMESA Competition Commission, with the Mauritius effects of Holcim Lafarge referred to Mauritius because the merger would create a merger to monopoly in Mauritius. The COMESA Commission observed that these two cement companies did not compete in other COMESA member states' markets. Cement is the most cartelized commodity in the world, through time and space. The local markets are highly concentrated. Can it be that these two companies were not the most important potential competitors of one another across the borders? Why did they not compete across the borders? Theory suggests that this ultimate consolidation removed thorns in the side of Big Cement. (See E. Fox and Mor Bakhoum, MAKING MARKETS WORK FOR AFRICA, pp. 136-39 (2019). The time has come for anticompetitive megamergers to be enjoined rather than cleared with spinoffs, and for the developed world to take this responsibility seriously. A coalition of EU, US, and (the future) African Continental Competition Commission, viewing the merger from a world vantage, probably would have enjoined the Big Cement merger.

B. Big Tech

Big Tech also calls for regional, if not global, vision. The leading Big Tech/Big Data firms are bigger than nations. Their business is global. Developed countries have moved ahead to control the abuses of Big Tech. Developed jurisdictions have brought antitrust lawsuits and are en route to adopting regulatory rules – albeit not well coordinated with one another. South Africa, for one developing country, has launched investigations and proposed rules. The issue of Big Tech abuse needs to be raised to a higher than national level. Regional agreements are a fitting home for doing so within the region, and neighboring regionals should be positioned to coordinate with one another to get a vantage from (nearer to) the top.

III. Working Towards Solutions

We are at the cusp of an opportunity to craft an activist role for regional agreements of developing countries – FTAs and common markets. While the trade (free movement) and competition functions have traditionally been separated, there is a need and opportunity to tear down the silos. The regional agreements of the future should feature a trade-and-competition (hybrid) violation. Short of that, they should create a structure that induces the internal market officials and competition officials to work seamlessly together to control the combined restraints.

In addition to hybrid restraints, there is a real need for a vision from the top. For any given transaction or course of conduct that affects a significant set of nations within the region, there is a need to take a holistic view of the benefits and harms and to confront the problems with boldness. If in the future we should develop a set of well-functioning regional organizations, the regional agreements can be the scaffolding for a higher vision and can be a voice for economic development at the table with the developed world[3].

The European Treaties provide a helpful reference point. The treaties condemn undue state as well as private restraints, and include a hybrid violation[4]. Not even in the EU do the competition and internal market officials work as closely together as suggested in this essay. Developing countries within regional groupings need to go the extra step to meet the promise of an integrated community.

---

[1] *Animal Science Products, Inc. v Hebei Welcome Pharmaceutical Co*., 585 U.S. -- (2018). See Eleanor Fox, Antitrust and the Clash of Sovereigns, Nov 29, Concurrences Journal No. 4 - 2019; available on SSRN,

[2] See Mark Burke, Tamara Paremoer, Thando Vilakazi, and Tatenda Zengeni, Building institutions for competition enforcement and regional integration in southern Africa, in Competition and Regulation for Inclusive Growth in Southern Africa (J. Klareen, S. Roberts and I. Valodia, eds., 2019), pp. 487, 490-92 (suggesting wide-spread cross-border cartelization; this is relatively unlikely to happen without complicity of facilitating government officials). Common Market for Eastern and Southern Africa.

[3] See E. Fox, Integrating Africa through Competition Policy, forthcoming, Review of Industrial organization, available on SSRN

[4] Articles 28-37, 101, 102 and 106 of the Treaty on the Functioning of the European Union, combined with Article 4(3) of the Treaty on European Union.

View online: Competition Law, Developing Countries, and Regional Agreements: Tearing Down Silos and Building Up Scaffolds