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Anti-Competitive Practices in International Trade: Challenges to Fair Competition under the WTO Framework

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Anti-Competitive Practices in International Trade: Challenges to Fair Competition under the WTO Framework

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Abstract

The accelerated growth of international business activity through a liberal economic system has revolutionized the international market environment due to increased interactions between businesses across borders and heightened economic dependence between nations. Yet, along these changes, there has been a simultaneous rise in anti-competitive behaviors as a major threat to competitive fairness in international business activity. The use of cartels, abuse of dominant position, predatory pricing, exclusive deals, and government subsidies for industries is progressively becoming a hindrance to competitive fairness in international business. Although the World Trade Organization has been an important institution for regulating trade liberalization under its multilateral structure, there is a lack of legal instruments designed for ensuring proper control over the private anti-competitive activities at the international stage. Even though some of the current agreements, within the WTO regulate subsidies, dumping actions, and other issues connected with trade distortions, there are many problems left untouched in terms of addressing recent tendencies related to market concentration and competitive restraints in international business transactions. This study attempts to outline the main types of anti-competitive behavior in relation to international trade, analyze the problems with the current WTO regime in terms of regulating such behavior, and discuss the need for international competition regulation.

Keywords: *International Trade Law, Competition Law, World Trade Organization (WTO), Anti-Competitive Practices, Fair Competition, Global Markets*

1. Introduction

International trade has undergone a gradual development that is marked by constant improvements aimed at reducing impediments to international commerce and creating a reliable legal regime to govern international economic transactions.¹ This is something which can be seen reflected in the formation of the law of international

¹ John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 45 (MIT Press, Cambridge, 2nd ed., 1997).

economics since the signing of the General Agreement on Tariffs and Trade after the end of Second World War until the establishment of the World Trade Organization in 1995.² The main motive behind this system has always been creating an environment where there would be unrestricted flow of goods and services among the nations

However, despite all the developments, the opening up of trade has not necessarily led to healthy competition. With the interlinking of the international markets, anti-competitive behavior has become more widespread and sophisticated. The multinational companies, corporate business networks, and state-run businesses are increasingly restoring to activities that could be potentially anti-competitive across borders. The formation of cartels, abuse of economic dominance, predatory pricing, exclusive agreements, and subsidy-induced interference in the market can easily place small companies and developing nations at a disadvantage.

The link between competition laws and international trade laws is thus becoming increasingly relevant. While trade laws deal with state intervention in restricting trade, competition laws aim at regulating behavior that restricts competition. The merger becomes quite important when it comes to the influence that anti-competitive laws may have on international trade. However, the lack of robust competition law system at an international trade regulation lacks coherence, with national competition agencies being the only recourse for dealing with anti-competitive actions.

This paper will analyze the main forms of anti-competitive behaviors in international trade, considering legal drawbacks in the current legal mechanism established by the WTO, and discuss the need for further international collaboration on competition management.

2. Research Question

The research questions that will inform this research are as follows:

1. What are the main types of anti-competitive behavior that may influence international business transactions and distort healthy competition?
2. To what extent does the legal regime of the WTO provide for anti-competitive behavior and distorted competition within the international arena?³
3. In what way are there institutional and legal lacunas in the existing international regulatory system on cross-border anti-competitive behavior?
4. What changes should be made to improve the current international regime on competition?

² Marrakesh Agreement Establishing the World Trade Organization, 1994.

³ Working Group on the Interaction between Trade and Competition Policy, World Trade Organization, (1998).

3. Research Methodology

In conducting this research, doctrinal methodology is used in the legal research process. This method involves the analysis of legal concepts, legal doctrines, international treaties, legal literature, and institutions concerning the subject areas of competition and trade.⁴

This approach is adopted because of the nature of the legal issues discussed here. Which requires critical analysis of legal norms rather than an investigation on the ground. In conducting this research, one would need to engage in studying the relationship between international trade law and international regulatory framework analysis, particularly where anti-competitive actions are concerned.

Comparative analysis is used wherever necessary for assessing different methods of regulation of competition on an international scale.⁵ Comparative analysis helps gain insight into the limitations posed by the law and the structure regarding fair competition internationally.

4. Literature Review

The intersection of competition law and international business has attracted considerable scholarly attention in the field of law, especially with regard to the difficulties associated with cross-border anti-competitive behavior. Most authors agree that, without competition regulation, free trade cannot lead to fair competition. According to Edward M. Graham and J. David Richardson, the advent of globalization has led to a shift from viewing competition issues as domestic regulatory problems to viewing them as global economic policy problems.⁶

Likewise, Eleanor M. Fox highlights the impact of anti-competitive practices on developing countries due to restricted market entry and the exacerbation of inherent structural inequalities in international business. She supports increased international collaboration in competition management, especially within the WTO.⁷

Additionally, Bernard Hoekman and Kamal Saggi observe that poor international cooperation, diverging national interests, and enforcement inconsistencies persist as major obstacles in the formation of an effective multilateral competition policy regime.⁸

⁴ S.N. Jain, *Legal Research and Methodology* (LexisNexis, New Delhi, 2016).

⁵ Ian Dobinson & Francis Johns, *Qualitative Legal Research* (Hart Publishing, Oxford, 2007).

⁶ Edward M. Graham & J. David Richardson, *Global Competition Policy* 23 (Institute for International Economics, Washington D.C., 1997).

⁷ Eleanor M. Fox, "Toward World Antitrust and Market Access" 91 *Am. J. Int'l L.* 1 (1997).

⁸ Bernard Hoekman & Kamal Saggi, "Bindings and Bilateral Cooperation on Export Cartels," *Journal of International Economic Law* (2021).

In conclusion, it is clear from the existing literature that there is a general agreement on the need for international competition governance to address fair competition issues in international business.

5. Forms and Impact of Anti-Competitive Practices in International Trade

There are numerous forms of anti-competitive practices in international trade that have profound implications for efficiency, consumer benefit, and competition itself. Some of the most common include cartels, dominance abuse, predatory pricing, exclusive agreements, and distortion through government support. Anti-competitive behavior often crosses borders, thereby complicating its governance in a global economic environment.

Cartels formed between foreign nations continue to be one of the most damaging examples of anti-competitive activity.⁹ Cartel members are able to manipulate the price, restrict production capacity, divide markets among themselves, or rig bids to remove any element of true competition from their business operations. Such behavior leads to increased prices, lessened supply levels, and limited access to the marketplace by weaker competitors, especially those from developing countries where regulations are not always well-enforced.

Another key issue relates to the abuse of market dominance by multinational companies. While market dominance, in itself, is not an illegal practice, any exploitation of such market dominance power through predatory pricing, refusal to deal, discriminatory pricing, and exclusive dealing practices would greatly limit competition. The development of the digital economy in recent times has raised significant issues relating to market dominance.

Another instance where distortion is likely to occur is with respect to the provision of industrial subsidies by states, coupled with preferential treatments for home-based firms.¹⁰ Such a situation could potentially lead to a reduces cost of production as a result of excessive subsidies, thus causing overproduction and giving businesses a chance to compete globally under circumstances that are not normally available through fair play.

The combined impact of these practices is misalignment of competitive neutrality in the international business environment. Unequal competitive markets are created, entry options are limited for small enterprises, and the goal of fair competition inherent in the multilateral trading system becomes undermines.

⁹ Organization for Economic Co-operation and Development, OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation* (2005).

¹⁰ *Agreement on Subsidies and Countervailing Measures, Annex 1A, Marrakesh Agreement Establishing the World Trade Organization* (1994).

6. WTO Framework, Regulatory Gaps and International Competition Governance

The WTO remains highly significant in terms of the regulation of international commerce through the provision of rules that uphold the principles of non-discrimination, transparency, and market access.¹¹ Rules regarding subsidies, anti-dumping, safeguards, and state trading enterprises indirectly take into consideration some competition issues. Nevertheless, there is no system for a multilateral competition law under the WTO that would be able to regulate private anti-competitive activities like cartels, abuses of dominance, and exclusionary business practices in cross-border cases.

This results in a substantial regulatory vacuum. The competition laws continue to be domestic in nature, and their application is restricted by jurisdictional limitations, different legal frameworks, and institutional capabilities. With anti-competitive conduct becoming international, there is a need for a global regulatory regime that would guarantee fair competition in the international market environment.¹²

The attempts to integrate competition policy into the international trading system have always been politically and legally contested. National divergences, the question of sovereignty, and different levels of economic advancement have hindered the negotiation of any international regulations regarding competition law. However, the increasing trend of oligopoly in global markets, particularly within the technology-based industry, has revived the debate on international competition governance.

It is vital that there is an enhanced collaboration among national competition enforcement agencies, harmonized standards in regulation, and greater transparency in government assistance policies in order to deal with the existing governance deficiencies. It is now becoming more and more necessary for fair competition in international business to have an effective international approach.

¹¹ Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* 63 (Cambridge University Press, Cambridge, 4th edn., 2017).

¹² Bernard Hoekman & Kamal Saggi, "Multilateral Disciplines for Investment-Related Policies," *World Economy* (2004).

7. Conclusion and Recommendations

The rise of anti-competitive behavior has become a critical impediment to equitable competition in international business.¹³ The formation of cartels, abuse of market dominance, price predation, and government-induced distortions in markets have come to play a major role in shaping global trade dynamics, often leading to market imbalances that discriminate against small firms and emerging countries.

Despite the fact that there are certain aspects of trade distortion tackled by the World Trade Organization through its legal structure, there is no comprehensive framework that regulates anti-competitive behavior in the international arena.¹⁴ The above institutional deficiency poses challenges that have become more pronounced in the context of globalization and digitization.

¹³ D. Daniel Sokol, "The Future of International Antitrust," *Loyola University Chicago Law Journal* 457 (2012).

¹⁴ Bernard Hoekman, "Competition Policy and the Global Trading System," *World Bank Policy Research Working Paper No. 1735* (1997).

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