CUTS-ARC
Policy Briefs

कट्स CUTS
1984 to 2003 Twenty Years of Social Change
Consumer Unity
& Trust Society
AFRICA RESOURCE CENTRE
No.3/2002

WTO AND COMPETITION POLICY: A COMESA PERSPECTIVE

Introduction

Five years after the issue of competition first entered into the World Trade Organisation (WTO) arena, members have finally agreed to launch negotiations on competition after the Fifth Ministerial on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. A multilateral approach to competition is not a new idea. It has been on the agenda since the aborted Havana Charter, which, by and large, formed the basis of General Agreement on Tariffs and Trade (GATT). Although the issue of trade and competition policy is very much present in many of the existing WTO agreements, it has not, as yet, been systematically addressed. Similarly, while several agreements under the WTO relate to investment issues, there is no multilateral accord.

A number of countries, including the European Union (EU), Korea and Japan are supporting multilateral agreements in these areas and others, including India, Malaysia and Egypt, are vigorously opposing them. The US was initially opposed to it, but has now, more or less, reconciled to the idea.

The issues pertaining to competition and the measures to deal with restrictive business practices were raised in the Uruguay Round negotiations. Although there is no multilateral agreement on trade and competition policy, the issue is very much present in many of the provisions of the existing WTO Agreements. The agreements that refer to competition issues are:

- General Agreement on Trade in Services (GATS);
- Trade Related Aspects of Intellectual Property Rights (TRIPs); and
- Trade Related Investment Measures (TRIMs).

Moreover, the Agreement on Safeguards, Article XVII of GATT 1994, and some other provisions also deal with certain competition issues. Although the WTO Agreements touch on a number of competition issues, both directly and indirectly, the same have not been systematically addressed and developed into anything substantial.

Multilateral Competition Agreement: Issues at Stake

As a consequence of greater global concentration of ownership, consumers worldwide, especially in developing countries, have become more vulnerable to anti-competitive abuses by corporations. National competition laws are seriously limited when it comes to dealing with many cross-border competition cases. It is also not possible for a single country to control the abusive practices perpetrated by global monopolies, unless it has a large market like that of the US or the EU. This is a serious problem with the developing, more specifically the least developed, countries due to their weak enforcement capabilities. Very often, they become the targets of anti-competitive and unfair practices perpetrated by corporations operating from other countries. The ability of these countries to take adequate protective measures is severely restricted by the small size of their markets, which means not many companies are interested in these markets, leading to very low market contestability. This calls for a stronger competition policy, not only at the national level but also at regional and multilateral levels.

Potential Benefits

The main potential benefits of a WTO Competition agreement are as follows:

- A reinforcement of the commitment by WTO members to transparent and non-discriminatory domestic competition policies, including a commitment to dealing with "hard-core cartels" as a serious breach of domestic competition laws and other cross-border issues. By supporting effective domestic competition institutions, a WTO agreement would contribute towards ensuring that the benefits of the process of trade and investment liberalisation are not negated or distorted by anti-competitive business practices.

- The establishment of an effective framework for co-operation among competition authorities to better address anti-competitive practices which impact on international trade. In view of the growth of domestic competition regimes and the global nature of an increasing number of competition cases, it is essential to establish a framework that facilitates both case-specific co-operation and a more general exchange of information and experiences among the competition authorities of WTO members. Bilateral and regional agreements, while useful, are too limited in membership and scope to provide a sufficient response to the internationalisation of competition policies.

- Reducing the scope for conflicts arising from the application of domestic competition laws to international transactions. Agreement on core principles and the establishment of co-operative relationships among competition authorities would go a long way towards reinforcing mutual trust, which is the essential requirement to ensure that divergences in substantive law, or on the analysis of a case, can be managed in a way that avoids potential conflicts.

- Promoting a more coherent approach in WTO to competition policy issues, which currently are only addressed in a limited manner and at the sectoral level, notably, in the context, of GATS and TRIPS. In addition, a horizontal agreement on competition, within the WTO system, would contribute towards enhanced co-operation between trade and competition authorities. This is of increasing importance in light of the internationalisation of competition policies, the increased WTO focus on regulatory issues and important synergies between competition policies and policies relating to foreign investment and intellectual property rights.

Such benefits can be best achieved through a WTO agreement on competition policy based on core principles, co-operation modalities and support for the progressive reinforcement of competition laws and institutions in developing countries. The main objective of such an agreement would be to strengthen the ability of WTO members to address anti-competitive practices of an international dimension which impact on trade. A WTO agreement on Competition would not imply harmonisation of the laws of the member countries; it would accommodate and respect diversity of national regimes in terms of policy, law and enforcement. The agreement would, instead, contribute towards gradual convergence and enhanced international co-operation.

The Concerns of Developing Countries

Although there is scepticism among the developing countries on the issue, it is by no means the case that they do not recognise the potential benefits. Indeed, during the Uruguay Round of negotiations, the demand for multilateral rules on restrictive business practices came first from the developing countries. However, it is ironical to see that the developing countries, which once promoted the idea of converting the United Nations Conference on Trade and Development (UNCTAD) Set to binding instruments, are now not so enthusiastic about the idea of a multilateral competition framework within the WTO. This is in spite of the fact that they are likely to benefit most if such a framework is developed and enforced in a fair manner. Their scepticism, however, is not without reason. The following are their main concerns:

- They perceive the objective of major developed countries in bringing competition policy into the folds of the WTO as an aim to ensure free and unhindered operation of their firms in developing countries, which may be adverse to the interest of developing countries.

- The Third World Network (TWN), in its Briefing Paper dated 1st August 2001 summarised the concerns of developing countries with regard to a multilateral agreement on competition. "An agreement on competition is likely to curb the role of the developing countries in guiding the entry and operation of foreign trading firms. This may: (i) expose their domestic firms to competition with powerful multinational firms, and (ii) put constraints on governments' discretion to give preference to domestic firms. Obviously, this will have adverse effect on the emergence, operation and growth of the domestic firms."

- The Paper also points out that "the proposal for negotiations in this area appears to be aimed at having a uniform minimum standard of competition policy in different countries. Competition policy standards in a large number of developing countries may not be similar to those in the major developed countries. An appropriate competition policy for a developing country should be able to help its process of development. It should encourage the operation and growth of firms and, at the same time, bring benefits to the consumers. Furthermore, a developing country should continue to be able to choose and adopt the competition policy suited to its conditions and development objectives. Thus, drawing up some uniform multilateral standards does not appear necessary. It may, in fact, curtail the options of the developing countries in evolving their own appropriate competition policies".

- For developing countries, there is always the need for caution when negotiating and concluding these types of agreements. It is important for developing countries to decide on the new issues, based on their assessment of the gain and loss. It is important that they examine whether there is anything of benefit for them in these proposed negotiations, and also the possible risks.

- It is evident that the concerns of developing countries were not fully addressed at Doha. Instead, the Doha Ministerial declaration adopted on 14th November 2001 set up a WTO programme on interaction between Trade and Competition Policy. In fact, it has identified some new constraints, like the lack of institutional capacities. The developing countries need assistance in drafting domestic competition legislation and related implementation. Such countries also need assistance in strengthening the capacity of competition authorities, where they exist, by addressing both financial and human resources.

Multilateral Versus Regional Approach

The main proponent of the competition agreement at the WTO is the EU, which has a long history of dealing with a competition policy at the regional level. Most of its member states also have had competition laws for quite some time. When the EU adopted a regional competition framework, it was perceived that such a framework would facilitate

regional integration and promote efficiency and welfare for the region as a whole. And, their experience with the regional framework on competition policy has been quite satisfactory. This has encouraged them to push for a multilateral competition agreement.

The situation in the Common Market for Eastern and Southern Africa (COMESA) region, however, is just the reverse. In the COMESA region, only four member states – Kenya, Malawi, Zambia and Zimbabwe – have national laws, while only three – Kenya, Zambia and Zimbabwe – have functional competition authorities. It should be noted that, at the time the Treaty establishing the COMESA was signed, competition policy was not widely considered to be an important policy tool and, during the 1980s and 1990s, it continued to attract only minor attention.

However, greater regional integration within the COMESA has led to an increase in competition cases with an international/regional dimension. Some competition agencies in the region have, in recent years, dealt with cases involving regional cartel activity, with the target firms being located in four or five different countries in the COMESA region. For instance, a large proportion of merger and take-over investigations involve a foreign party or assets or information located abroad.

Keeping these in view, the COMESA has come up with a regional framework of rules and principles, which will ensure that such co-operation can be effectively sustained. This will contribute towards the spread of a "competition culture" and to the reduction of unnecessary costs to business, arising from the application of different competition laws to the same regional transactions.

The COMESA regional competition law and policy would focus on exploring the possibility of developing common approaches to better address the above types of anti-competitive practices. In this regard, a number of options are to be explored, including: common rules in relation to cartels; common criteria for assessment in relation to other practices; foreclosing access to a market; and principles necessary to foster co-operation in relation to multi-jurisdictional mergers and export cartels, which can be modulated to take into account the degree of possible convergence.

Now, the question that arises is why the members of the COMESA who are so vehemently opposed to an agreement on competition at the WTO, especially on the ground that they lack sufficient experience and inadequate negotiating capability, are so keen to have a regional competition framework? There are several reasons for this. As already mentioned before, the EU, the main proponent of competition at the WTO, has a long and successful experience with a regional framework, which has prompted it to seek for a multilateral framework. The situation for COMESA countries is quite different. Moreover, a regional competition framework on competition has its own reasons.

One of the objectives behind the formation of the COMESA was to enhance co-operation in the creation of an enabling environment for foreign, cross-border and domestic investments. However, it has been recognised that lack of competition in domestic markets, and at the regional level, not only discourages the entry of new investors but may also reduce the positive impact of foreign direct investment on the economy.

Anti-competitive practices are not only detrimental to the welfare of the country, where they take place, but are also a matter of legitimate concern to other trading partners. For example, national players can organise themselves into import or market-sharing cartels to keep new foreign competitors out of their market. Exclusive distribution practices can also, sometimes, be a formidable obstacle for the companies trying to gain a foothold in foreign markets. In such circumstances, the only appropriate and effective remedy lies in a policy of active competition law enforcement by a country, with primary jurisdiction. Attempts to address such "market access" cases through extra-territorial competition law enforcement can antagonise other countries. They can also prove ineffective, because vital evidence is often located abroad.

In order to avoid jurisdictional conflicts, co-operation has become essential in promoting an effective enforcement of competition law in a number of countries. There is, therefore, a need for a regional framework of co-operation, which should meet the needs of countries at different stages of development.

There is considerable merit in developing within COMESA modalities for regional co-operation geared towards the following two objectives:

- Co-operation in support of the progressive reinforcement of the domestic competition law framework, including enhanced and better co-ordinated technical assistance. This could include a framework for the exchange of experiences and information on competition law and it's enforcement, voluntary peer reviews and the possibility of periodic reports on global trends in competition law and policy.

- Co-operation in relation to cases affecting the interests of several COMESA members. Anti-competitive practices with an impact on regional trade and investment affect the interests of several countries.

In the COMESA framework, there is also a need to focus attention on those anti-competitive practices that have a significant impact on regional trade and investment. Particular priority could be given to the so-called "hard-core cartels", which are agreements among actual or potential competitors, involving price-fixing, bid-rigging, output restrictions or allocation and market division. Such horizontal agreements have a clear trade-distorting effect.

The analysis undertaken by competition authorities shows several examples of how different types of anti-competitive practices can have a negative impact on the COMESA market-opening objectives such as those which:

- foreclose access of goods, services or investment to a third country market, for example, import cartels, certain vertical agreements or abuses of dominant position;
- have an impact on several markets, for instance, regional cartels, multi-jurisdictional mergers; and
- have an impact in a different market from that in which it was conceived, for example, export cartels and certain types of mergers or abuse of dominant position.

Last, but not the least, there are some fundamental differences between the WTO and COMESA. The members of the WTO are highly unequal, whereas the inequality among the members of COMESA is much less. The WTO is a power-based organisation, where the key principle that works is 'bargaining', whereas the same for COMESA is 'co-operation'.

Conclusions

Nobody can deny the need for a multilateral competition framework. On account of the fast pace of globalisation, co-operation among national competition authorities is key to counter the anti competitive practices, especially those of a cross border nature. However, from the perspective of developing countries, the time is not yet ripe, least of all at the WTO level. Meanwhile, COMESA members need to engage in dialogue and exchange of experiences and expertise by addressing the:

- need to establish and strengthen regional competition networks and fora;
- need for identification and promotion of bilateral and regional co-operation between the competition authorities of developing countries; and
- need for participation in the work of other relevant international organisations, including the WTO, the Organisation for Economic Cooperation and Development (OECD), the UNCTAD, etc.

At the regional level, the focus of the work should be on practices with a significant impact on regional trade and investment. Meanwhile, domestic competition laws, wherever they exist, will continue to apply regardless of whether or not an anti-competitive practice has an impact on regional trade. However, dispute settlement modalities will need to be further considered, once there is greater clarity about the scope of the commitments to be assumed under a COMESA competition agreement, so that they are well-adapted to the specifics of competition law.

The regional competition regime will only focus on those cases in which an anti-competitive practice has a regional dimension. Hence, member countries should also consider adopting a national competition law as early as possible. Developed countries and the intergovernmental organisations should provide generous assistance to these countries in drafting domestic competition legislation and related implementation legislation in developing countries and strengthen the capacity of competition authorities, where they already exist.

Addressing the lack of both financial and human resources to enable developing countries to participate effectively in multilateral negotiations and co-operation is of paramount importance. The Doha declaration, for instance, recognises the needs of the developing and least developed countries and pledges enhanced support for technical assistance and capacity-building in this area. It includes policy analysis and development, so that they may better evaluate the implications of multilateral co-operation for their development policies and objectives and human and institutional development.

It must be kept in mind that the existing agreements at the WTO, although unequal and unfair to developing and least developed countries in many respects, can also protect their interests in many ways. However, the poor countries are not capable of taking full advantage of such provisions, due to their weak capabilities. They lack the expertise and resources to challenge the trade policies of industrialised countries that harm their export interests, even if those policies are in violation of their commitments at the WTO. They are also not able to defend themselves effectively against complaints, due to their lack of access to eminent lawyers who could argue their case. Thus, signing a multilateral agreement on competition will not serve any purpose of developing countries, even if the developed countries generously take care of their interests, unless their capacity is built first.

This Policy Brief is researched and written by Mr. George K. Lipimile, Executive Director, Zambia Competition Commission for CUTS Africa Resource Centre, 4th Floor, Main Post Office Building, P.O. Box 37113, Cairo Road, Lusaka, Zambia, Ph: 260.1.22 4992, Fx: 260.1.22 5220, E-mail: cutsarc@zamnet.zm, and printed by Jaipur Printers Pvt. Ltd., Jaipur 302 001, India. The views expressed in this brief are those of the author and do not necessarily reflect those of Zambia Competition Commission or CUTS Africa Resource Centre.

Head office: D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India. Ph: 91.141.220 7482, Fx: 91.141.220 7486, E-mail: cuts@cuts.org, Web Site: www.cuts.org