

Competition Framework at the WTO

A Right Initiative but Which Forum!

Competition policy is by no means a new issue on the world's economic proscenium. Neither is its occurrence in a multilateral context recent. As a matter of fact, it has been on the world-trade agenda since the aborted Havana Charter. It figured quite prominently in the Doha Development Agenda and has since been at the centre stage of the WTO discourse.

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 in the WTO ambit. The Agreements that have competition-related implications are, mainly: General Agreement on Trade in Services (GATS), Trade-Related Aspects of Intellectual Property Rights (TRIPs), Trade-Related Investment Measures (TRIMs) and Agreement on Implementation of Article VI of GATT 1994 (Anti-dumping Agreement). Further, consideration for a possible framework on competition policy (and investment) has been provided as a built-in agenda under the TRIMs.

A number of WTO members, including the EU, South Korea and Japan are supportive of a multilateral agreement on competition. However, there are others like India, Malaysia and developing countries in Africa and South America that have been opposed to such agreements. The US has been sitting on the fence but likely to move closer to the EU's position. Indeed many developing countries continue to remain unconvinced about the benefits of such agreement. Some Latin American countries are, however, quite sympathetic to the proposal.

A similar difference of views prevails within the civil society as well. Their opposition is not to competition policy per se, but to all new issues on the grounds that the WTO is already overloaded and there is hardly any equity in the system. There is a similar divide even among the world's business community.

I. The Doha Mandate

Para 23. Recognising the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.

Para 24. We recognise the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

Para 25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

II. Different Country Positions

The proposal put forward by the European Union (EU), the leading proponents of Multilateral Competition Agreement (MCA) at the WTO focuses on a framework that “could and should...establish a solid basis for dealing with basic competition policy issues”. However the EU adds that the MCA “would not require harmonisation of domestic competition laws [and] would be fully compatible with existing and future differences in national competition regimes”. But, at the same time, the domestic competition law of the Member states should be based on the core principles of non-discrimination, transparency and due process.

The approach to the core principles varies among countries with New Zealand calling for the principle of “comprehensiveness” to be added to the open-ended list of core principles. Recognising exceptions and exemptions to competition laws/policies, it stresses the need to implement these in a manner that would minimise economic distortions. Significantly it stresses ‘flexibility of approach’ that “would recognise the diversity of circumstances in WTO Member countries” and “does not put pressure on developing countries to drive towards particular competition policy outcomes, which may be inappropriate and/or premature.”

Thailand wants “special and differential treatment” to be the fourth proposed core principle for competition negotiations, calling firstly for exemption of developing countries from national and international export cartels (citing the small scale of developing country exporters and importers and the need to counter the bargaining power of larger buyers or sellers from industrialised countries). Secondly, it calls for a gradual introduction of greater transparency and due process

in the administration and enforcement of competition law. Thirdly, Thailand has also asked for mandatory cooperation, as against voluntary cooperation proposed by the EU.

Meanwhile, India considers it appropriate to adopt the concept of non-discrimination subject to differential treatment of different countries with different capacities (hence a waiver of the doctrine of national treatment, NT). Developing countries also have the need and responsibility to provide assistance, positive measures and affirmative action to local firms and institutions in order to ensure their viability, development, efficiency and competitiveness. The EU has clarified that, "what would be at issue would be the treatment accorded to firms pursuant to the terms of domestic competition laws as such, and not the treatment accorded to firms under a range of other policies". Thus, developing countries would be able to favour their domestic firms in many other ways. "We are not proposing that a competition agreement should seek to introduce an absolute standard of national treatment to be applied to any form of government law or regulation," it further clarified.

Subject to transparency and the rule of law, Switzerland is in favour of a modified interpretation of the NT principle, which, while not discriminating on grounds of nationality, allows in specific instances the use of industrial policy based on public benefits test as well as for other policy choices.

The US, though quite ambivalent on the issue, is strongly in favour of a peer review process. In its opinion, this can be an effective and important tool in enhancing national competition regimes, and by helping disseminate the culture of competition to all Members, it can benefit the world trading system as well. This is of course primarily because of the fact that the US does not want a decision of its national judiciary on a competition case to be reversed at the WTO dispute settlement body, a concern shared by many others. The EU, the main proponent of the agreement, also agrees that there will be no formal dispute settlement mechanism on this issue and periodic peer review will be sufficient in this regard. However, in a recent submission, the EU has indicated that binding core principles imply that "compliance with these principles is subject to dispute settlement".

III. The Current State of Play

There has not been much change on the ground since the Doha Ministerial as far as the position of countries are concerned. According to the Doha Declaration, the Working Group on Trade and Competition was to work further on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation etc. However, these remain as complex as before to many of the developing country members and other stakeholders.

The Declaration also talked about possible modalities, consensus on which was essential to launch negotiation on the issue. Frederic Jenny, Chairman of the WTO Working Group prepared a

"Note on Consultations on Modalities in the Area of Trade and Competition Policy" for consideration of the Members. Recognising the divergence of views among the Members, the note provided three options for a decision on competition policy. The first is to start negotiations on a binding multilateral agreement on competition. The second is to have a decision on modalities for a framework for cooperation in the WTO without any binding rules. The third is for the continuation of the clarification process in the Working Group.

The EU, Japan, Korea and Switzerland have floated a draft note on modalities on competition agreement at the WTO very recently. As expected, the draft preferred to adopt the first option proposed in Jenny's note. However, the draft hardly goes beyond on what has already been said in the Doha Declaration. Para 2 of the draft says that paras 45 through 51 of the Doha Declaration shall apply to the negotiations. Moreover, para 3 says the negotiating group on competition will have its first meeting within a month of the decision, and the Chair will conduct negotiations with a view to presenting a draft text by 30th June 2004, so as to complete negotiations by 1st January 2005.

This means that negotiations and outcome will be linked to the Doha Work Programme and will be part of a single undertaking. This is quite unreasonable as the negotiations on the Doha Work Programme started immediately after the Doha Ministerial, whereas the negotiations on competition are yet to begin. This seems to be quite unrealistic even in absolute term as there would barely be nine months to negotiate on such a complex issue. Expectedly, some developing countries have even refused to discuss the draft.

There remains wide divergence of views as before as can be seen from the wording of the draft Cancun Ministerial Declaration that is in circulation. For all the four Singapore issues, it envisages two scenarios. In the first scenario, the Members agree to commence negotiations on the basis of modalities set out in annexures. In the alternative scenario, the members recognise that the situation does not provide a basis for the commencement of negotiation in these areas. Nevertheless, India and some other developing countries have criticised it as the said annexures have not been discussed adequately. Neither they have been circulated to the members. Interestingly, China is one of the countries that have put their weight behind India on this issue.

IV. Conclusions

The recent suggestion by the US to unbundle the Singapore issues is quite significant as far as the progress on the issue of competition agreement is concerned. For many, even if a multilateral agreement on competition could bring some benefits, it would still not be acceptable as it is a part of the single undertaking that includes investment as well, against which there is a general apprehension. Interestingly, the demand for unbundling these issues was raised in several quarters who thought that progress on other issues might be good for the multilateral regime and hence should not be mortgaged to the progress on the controversial issue of investment. The US suggestion indicates that it would like to put the issue of investment on the backburner and progress on other Singapore issues. This might also weaken the EU proposal of linking Singapore issues with the Doha Work Programme. Thus, the possibility of some progress in launching negotiations on competition policy seems to have brightened.

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