CUTS International GENEVA

Note

Competition Policy at the WTO

A Snapshot

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Summary

The so-called “new issues”, which have been floating around for a long time, have now been but on the WTO agenda by trade ministers in Nairobi last year. As of early 2016, WTO members are now trying to figure out what precisely these “new issues” could be, and what are their own interests therein. Looking at recent trade agreements, possible new issues may include those “Singapore issues” which already have a history at the WTO like investment, government procurement and competition policy. This paper focuses on the latter, providing a historical overview of debates related to competition policy within the WTO.

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Introduction

The 1996 Singapore Ministerial Declaration mandated the establishment of working groups to analyse issues related to investment, competition policy, transparency in government procurement and trade facilitation. It instructed the Council for Trade in Goods to "undertake exploratory and analytical work […] on the simplification of trade procedures in order to assess the scope for WTO rules in this area" (Para.21)[1]. Many developing countries considered those issues as being of primary interest to developed economies. Much of the debate has been on whether issues that are not directly related to trade should be allowed to be negotiated as treaties in the WTO, given that the first three of these issues are strictly non-trade issues. The same issues in the debate on the agenda of the Doha Development Agenda (DDA) have been labelled as the "Singapore issues". In the Doha Round, the fundamental issue is what role the WTO should play in each of these policy areas:

- Investment (Trade and Investment, WGTI);
- Competition (Trade and Competition Policy, WGTCP);
- Transparency in government procurement (Transparency in Government Procurement, WGTHP);
- Trade facilitation.

Overall, the Singapore issues are not 'new issues', in each of these issues there is an existing patchwork of roles in multilateral, plurilateral and regional/bilateral agreements. Working groups have been assigned to each issue except in trade facilitation. This paper explores the historical context of the interaction between trade and competition policy in the WTO.

Interaction between Trade and Competition Policy

Competition policy has an important role to play in developing countries, both in promoting a competitive environment and in building and sustaining public support for a pro-competitive policy stance by the government. Liberal trade and investment policies are of vital importance in fostering competition, and priority should be given eliminating barriers to trade and FDI. However, in many sectors of the economy the threat of foreign competition will remain limited, and there is need to apply competition law to ensure that firms do not behave collusively and that market power is not exploited. Competition legislation is also required to allow countries to combat the possible anti-competitive implications of certain WTO agreements (i.e., TRIPS, and anti-dumping).

A working group (WGTCP) on the interaction between trade and competition policy was established at the Singapore Ministerial (1996). Most developing countries were reluctant or oppose to the establishment of a WTO agreement on competition policy, given that there is neither common understanding nor agreement among countries on what the competition concept and issue means in the WTO context, especially in terms of its 'interaction' with trade and its relationship with development.

As a result, the Doha Ministerial Declaration addressed the mandate to deal with the interaction between trade and competition policy in paragraphs

[1] See WT/MIN(96)/DEC).

23, 24, and 25. Paragraph 25 provides that: "…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".

Having recognised the complexity of the whole set of issues of competition, competition law and competition policy and their relation to trade and development, the dedicated working groups met several times to undertake exercises on Relationship between Trade and Investment (between June 1997 and June 2003), Interaction between Trade and Competition Policy (between July 1997 and May 2003) and Transparency in Government Procurement (between May 1997 and June 2003). The findings suggested that there are significant challenges in the approaches among WTO Members on these issues, in addition to disagreement and lack of clarity in regard to the substance, implications and rationale of prospective multilateral rules in these areas.

This has led to the decision adopted by the General Council on 1 August 2004 (referred to as the 2004 July Package), which contains the following provisions on the Singapore issues:

"Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round."(Page 3, WT/L/579)

Accordingly, if some Members want to pursue negotiations on these issues, they cannot do so unless there is consensus to overturn the July Package language. Although most Members have aknowledged the significant relationship between trade and competition, there is a great deal of differences on whether or not measures should be taken to create a multilateral set of rules governing competition regulation.

Members' Positions

Core Principles

In terms of the core principles of competition policy, New Zealand has requested adding 'comprehensiveness" (WT/WGTCP/W210), while Thailand has insisted on the inclusion of 'special and differential' treatment for developing countries to the core principles of competition policy (WT/WGTCP/W/215). India (WT/WGTCP/W/216) and Thailand (WT/WGTCP/W/21) have called for differentiation in treatment for domestic firms as opposed to big multinational companies, and several other members have proposed affirmative action to ensure the viability, development and efficiency of local firms and institutions in developing countries.

Switzerland has suggested an interpretation of the 'national treatment' principle subject to transparency and the rule of law, which could allow in specific instances the use of industrial policy based on a public benefits test

(WT/WGTCP/W/214), while India does not support unconditional and unqualified 'national treatment' citing the 'development dimension' as valid grounds for differential treatment for countries with different capacities. To respond to some of these concerns, the EU has suggested (WT/WGTCP/W/222) that the WTO should avoid a detailed definition of the substantive scope of domestic competition laws (excerpt for basing them on the core principles and banning hardcore cartels), and least-developed countries and smaller economies should be allowed to adopt any new WTO obligations regarding a domestic competition regime in a flexible and progressive manner.

Korea has recognised that the alleviation of regulation and technological developments have made competition possible in areas where corporations previously enjoyed a monopoly, it has also pointed out that many Members have exempted public services industries such as telecommunications from competition law obligations on the understanding that such sectors have inherently monopolistic aspects (WT/WGTCP/W189). Korea has also proposed MFN exemptions to be considered, especially in the context of regional trade agreements (WT/WGTCP/W212), while the EU is unhappy with dumping down the 'core principle' of non-discrimination (WT/WGTCP/W/222).

Cartels

With regard to hardcore cartels[2], the EU has supported a WTO agreement on competition policy banning such practice (WT/WGTCP/W/129&193) and submitted a proposal for cooperation on competition policy in the context of the WTO, while other developed countries (Australia, Canada, US) have supported a multilateral framework with reference to the development and implementation of the OECD Recommendation Against Hardcore Cartels (WT/WGTCP/W/198&201&203). Some Members such as Kenya has called for a clearer definition of hardcore cartels and the role of the WTO as a venue for international action on hardcore cartels (WT/WGTCP/W/238).

Cooperation

In the context of modalities for voluntary cooperation, Japan has proposed modalities for promoting international cooperation in the field of competition law and policy (WT/WGTCP/W/195). UNCTAD has proposed three possible elements to be included in a multilateral competition framework with respect to voluntary cooperation are as follows: 1) negative comity; 2) positive comity; and 3) rules for the protection of confidential information (WT/WGTCP/W/197). Concerns were raised by Hong Kong in response to that, first, its concerns of developing countries under a possible multilateral framework relating *inter alia* to voluntary cooperation.

Second, its concerns of Members without horizontal competition laws, and the role of flexibility (WT/WGTCP/W/224). Kenya has emphasised the need for clarify the cooperation tools that would be used and the nature of potential obligations, in particular how developing countries without competition law and competition authorities would benefit from voluntary cooperation arrangements at the multilateral level, and warned the danger that

[2] The definition of hardcore cartel provided by the OECD states that " an anti-competitive agreement, anti-competitive concerted practice or anti-competitive agreement by competitors to fix prices, make rigged bids (collusive tenders) establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce." (see OECD, Department of Trade and Industry (2001).

voluntary cooperation arrangements would become mandatory for developing countries and yet not guarantee appropriate cooperation by developed countries (WT/WGTCP/W/238). China has suggested that voluntary cooperation in the field of competition law and policy should encompass cooperation in the enforcement of competition law, technical assistance and the encouragement of competition culture (WT/WGTCP/W/241).

Technical Assistance

In the areas of technical assistance, the inclusion of technical assistance provisions in the Doha Declaration is one of the key elements that made it possible for many developing countries to accept potential WTO negotiations on competition policy, and both developed and developing countries have recognised the need for technical assistance in the post-Doha Working Group discussions. The US has shown interest in providing assistance on the development of sound domestic competition policies and institutions while Canada has proposed economic efficiency and the protection of competition and the competitive process as two principles of technical assistance. However, many countries including the US, Japan and Egypt have recognised that technical assistance should be tailored according to the diversity of needs and distinct national conditions. The EU has also recognised that certain aspects of transparency requirements would entail administrative costs and called for their progressive introduction while identifying them as a priority for technical assistance programmes (WT/WGTCP/W/222)[3].

Conclusion

In conclusion, it is fairly safe to say that the Singapore Issues will not go away and some developing countries are likely to avoid adding more issues to the agenda of the post-Nairobi session before existing ones can be resolved. The absence of a multilateral framework on governing competition regulation would have the bilateral or regional, plurilateral measures taken place to fill the gap. It is possible to argue that some developing countries may find it hard to resist pressure to conclude regional or bilateral agreement including the Singapore issues. The current generation of regional/bilateral agreements being negotiated by the US and EU all included these issues.

[3] See proposals and documents at http://docsonline.wto.org/underWT/WGTCP/

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This note is authored by Sumi Xing and Julian Mukiibi. CUTS' notes are to inform, educate and provoke debate on specific issues. Readers are encouraged to quote or reproduce material from this paper for their own use, provided due acknowledgement of the source is made.

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