

Workshop Report – Competition Provisions in Regional Trade Agreements

4 October 2006 | The President Hotel, Bantry Bay, Cape Town, South Africa

On 4 October 2006, tralac, UNCTAD and IDRC jointly convened a workshop with the objective of furthering discussion and research around the competition provisions found in different types of RTAs in order to support and guide policy makers on the negotiation and implementation of RTAs with respect to competition policies, with particular reference to the RTAs of southern and east Africa.

Trudi Hartzenberg (tralac Executive Director) gave the welcome speech that set the tone for the workshop. She placed emphasis on what competition can do for the region. The complexity in the estimation of economic benefits from competition provisions in RTAs was also noted. The importance of regional competition provisions to act as a major complement to the current efforts to develop an open, rules-based, predictable, non-discriminatory trading system, with a fair distribution of benefits for all developing countries was also highlighted.

Ana Maria Alvares (UNCTAD) in her opening speech spoke on the role of UNCTAD in developing countries. She noted that discussion of RTAs is increasing in the world and developing countries should take part in these discussions more referring to the “Ad Hoc Expert Group on Competition Law and Policy” to be held on October 30 in Geneva. She also gave a brief overview of the recently published book on “**Competition Provisions in Regional Trade Agreements: How to Assure Development Gains**,” which was published in October 2005. The message that filtered from the articles in the publication is that there is link between competition and trade and there is need to support initiatives of developing countries.

Judge Dennis Davis (Cape High Court) gave the key note speech. He noted that developing countries are often double targets that were encouraged to follow developed countries’ model in trying to increase their growth and efficiency, while on the other hand there is call to develop home grown, demand driven national strategies.

The current trade configuration has benefited developed countries, while developing countries have suffered and many people living below the poverty line. He made reference to the Doha round which acknowledge the need for developing countries to have access not only to their domestic markets but global markets as well.

On competition an observation made was that competition law (CL) exists, but the current international trade environment is skewed and inherently unfair and anticompetitive, thus undermining domestic competition policies.

The following points were highlighted on how CL can play a role both at the national and regional level:

- procurement if subjected to competition provisions, this can promote distributional objectives;
- Four competition regimes operating in the region, but regimes on their own can promote a competitive environment in their constituencies and hence the need for the establishment of these in the rest of the region;
- Establish a rational transparent manner that promotes competition and trade in developing countries;
- On a regional level, resource consolidation can solve some of the problems that affect developing countries; and
- CL in SA on a regional level can be vital in promoting competition in the region.

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The workshop had three main sessions which were focussing on different issues related to competition and regionalism. Closing of the workshop was preceded by a half hour discussion platform that focussed on the way forward.

Session I was on “Competition Issues in Southern and East Africa” and comprised of five experts.

Ana Maria Alvares (UNCTAD) made a presentation on “Promoting development through Competition Law and Policy at a Regional Level: Stocktaking of UNCTAD/ IDRC project.” The presentation covered issues on how competition law and policy (CLP) can contribute to development, barriers to trade and anticompetitive practices affecting development. It also made reference to emerging issues in RTAs, which increasingly cover not only trade in goods but also behind the border issues and how common regional competition rules usually involve a common supranational competition Authority.

Colin McCarthy’s (tralac Associate) presentation was titled, “Motivation of regionalism in Southern and Eastern Africa.” What is the rationale and architecture of regional integration in Southern and Eastern Africa? He focussed on two models:

- FTA on intra-regional trade in goods
- CU which a common external tariff exists

Benefits of regionalism were raised including the conventional argument on trade creation, access to larger markets and commensurate economies of scale and increased dynamic benefits. He noted that the normal argument is that RI encourages investment, both local and foreign but also promotes the improvement in policy credibility and opportunities to revise the tariff structure.

The costs involve trade diversion, loss in policy sovereignty and agglomerate economies that could increase regional inequality.

He argued that countries only participate in RI when they perceive that the costs are outweighed by the benefits and posed a question, “How do we deal with the potential conflicts of SA’s economic dominance?”

Omu Kakujaha-Matundu (Namibian Competition Commission) gave a case study on “Competition and Infant Industry Protection (IIP) in SACU: The Case of UHT Milk in Namibia.” His presentation raised the following conclusions:

1. Asymmetry poses threat to competition
 - Protection on sectoral basis without comprehensive industrial policy no solution
2. Article 26, no solution WITHOUT
 - Implementation of Article 38
 - Proposed annexure on competition law and regulations
3. Article 40 is a function of Article 38

He recommended the need to speed the drafting of common industrial development policies for SACU (Art. 38), accelerate drafting of annex to explain the concept of ‘common industrial policies’ and speed up ongoing efforts of annexure on competition to Agreement.

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Thulani Kunene (SA Competition Commission) gave an overview of the SA Competition Commission and went further to discuss on anticompetitive practices in South Africa: Possible consequences for Southern and East Africa. He noted that the Commission allows export cartels to operate in other countries, and gave the example of citrus companies in the USA. He also made reference to the abuse of dominance, by local companies such as Telkom, SABMiller (97%),

Nkonzo Hlatshwayo (Webber Wentzel Bowens) focussed attention on “Merger approvals in Africa: A Practitioner’s Experience.” He made an observation that notification provisions vary from country to country and they were differences in the analytical framework. He noted that SA employs the substantial lessening of competition test; others employ the dominance test; while some seek to employ both tests, but in small markets, the dominance test is likely to catch many players.

In his concluding remarks, he noted that, many of the issues are being tackled under the ICN, and it is unclear whether African authorities are willing to accept and implement the ICN initiatives. There is room for an African Competition Network and harmonisation of the substantive provisions of the law and investigation procedures may be called for.

Session II: the theme was “Regional Approaches to Competition Law and Policy.”

Anna Maria & Laurence Wilse-Samson (Both from UNCTAD) gave a presentation on “Competition provisions in RTAs: assuring development outcomes through cooperation, research and assistance.” The issues raised include the fact that priorities for developing countries and most particularly LDCs should not be overlooked; contribution to economic welfare, increase of productive capacities and poverty alleviation can have possible positive social impact. The role of a regional or national competition body in directly targeting issues of social concern must be a quest for a long-lasting competition culture and the flexibility of CLP in providing exceptions and exemptions in order to yield to other policies (SMEs, affirmative action, culture preservation).

Robert Wilson (tralac) spoke on “The regional competition law architecture relating to Southern and East Africa.” He noted that COMESA and EAC have similar provisions with regards to competition, but unlike COMESA, EAC makes specific development exemptions. He also observed that COMESA is fundamentally about trade and that SACU has no mention of common CLP.

He questioned what will happen to the members of SADC 7 who refuse to accede to the EU TDCA and also highlighted the lack of political will in Southern and East Africa to provide competition provisions in a regional context. Sacrifices have to be made when pushing regionalism and trade offs need to be made. He noted that narrow interest lobby have been able to hold governments hostage and there was need to recognise the variable geometry that exists. There was need to consider whether domestic restraints can actually create development and need to examine relationship between competition and industrial policy.

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Ozgur Kayali (University of Manchester and Yeditepe University) presented on “National implications of competition related provisions (CRPs) in RTAs.” His presentation is part of the project on trade and competition issues at the regional level which envisage that countries face implementation problems at national level that needs to be tackled. The presentation focussed on the political and socio-economic situation, the legal framework provided by the CRPs, and presented evidence from case studies.

Session III: “The development and potential social impact of CLP”

Barbara Rosenberg (Getulio Vargas Foundation) spoke on “Competition law, intellectual property and compulsory licensing: experience from Brazil.” She made the observation that generic competition is important as indicated by price decreases making health care more affordable, WTO Members were required to accept the minimum requirements of the TRIPS agreement with the except of LDCs and that TRIPS has flexibilities that promote competition. IPRs have been strengthened in TRIPS and then in RTAs. Competition authorities should participate in the negotiation of RTAs and, from a local perspective, prevent IPR abuses that damage competition. The need to avoid IP interests to undermine competition through monopoly conduct, horizontal agreements and vertical restraints.

Jonathan Berger (AIDS Law Centre) gave a presentation on “Sub-Saharan African regional groupings, TRIPS flexibilities and competition law.” He noted that in South African context, is about excessive pricing and sustainable supply. There was a shift in government policy regarding HIV after resolution of dispute by settlement in 2003. There is no commonality in laws between CL and IP and a well resource civil society can make a lot of contribution.

Hunter Nottage (ACWL) gave a presentation on exceptions and exemptions in CL.

The way forward session was moderated by Trudi Hartzenberg (tralac) and the following key point were made:

- Relationship between industrial policy and competition policy
- Relationship between sectoral regulation and competition policy
- Stakeholders are important to engage in meaningful policy formulation
- Private sector will judge the policies developed by governments, so they need to be engaged fully
- Private sectors sees CLP as rather dull instrument to promote development
- Article 40 of SACU agreement should be investigated
- Competition law only is not the only focus
- Competition is not only for the private sector but consumers are also important
- What kind of competition provision you can have in a north-south arrangement
- SADC should look at how to incorporate industrial policy in the SADC protocol
- Overlapping membership – what is it that needs to be done.
- The case of SACU, where SA has made unilateral decision, so how do we take the process further?