

WORLD TRADE ORGANIZATION

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**Working Group on the Interaction
between Trade and Competition Policy**

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COMMUNICATION FROM THE REPUBLIC OF SOUTH AFRICA

The following communication, dated 10 September 1999, was received from the Permanent Mission of the Republic of South Africa with the request that it be circulated to Members.

A. INTRODUCTORY REMARKS

1. The Republic of South Africa wishes to draw attention to the new Competition Act (Act No. 89 of 1998) that came into effect on 1 September 1999. The Maintenance and Promotion of Competition Act (Act No. 96 of 1979) was repealed and on 31 August 1999 the Competition Board ceased to exist.

2. The new Competition Act provides for the establishment of three institutions for the administration of the Act, namely the Competition Commission, the Competition Tribunal and the Competition Appeal Court.

3. The Competition Commission and the Competition Tribunal commenced operations on 1 September 1999.

4. The Competition Act has extensive application, covering horizontal and vertical restrictive practices, mergers and acquisitions as well as abuses of dominance.

5. Details can be found on the Competition Commission's website (<http://www.compcom.co.za>) or obtained by contacting the Competition Commission directly: Tel. +27 (12) 482 90 01 and Fax +27 (12) 482 90 03.

B. PREPARATIONS FOR THE THIRD MINISTERIAL CONFERENCE TO BE HELD IN SEATTLE, NOVEMBER 1999

1. The Republic of South Africa would like to advocate the contribution made to the WGTCP by Zimbabwe on behalf of the WTO African Group (WT/WGTCP/W/126, dated 31 May 1999). This contribution stated that:

"...the strengths and weaknesses of multilateral rules need further study and analysis. The group is determined to join in this analysis and to work with and seek the assistance of all organisations in this area, including UNCTAD and the World Bank, in determining the dividends and added value that would accrue to Members, if any, from multilateral rules on competition law and policy"; and

"International cooperation, including but not limited to technical cooperation, has an important role to play in helping developing countries to meet these challenges. Flexibility is the key in designing laws and policies that address anti-competitive practices that threaten development without preventing firms from achieving beneficial economies of scale and other efficiencies".

2. Further, recognizing the challenges that developing countries face in developing and administering national competition laws and the plethora of issues due for multilateral negotiation in the WTO, South Africa proposes a thorough pre-negotiating educative process.

3. In this process the following notions should be recognized:

- (a) Globalization processes are leading to increasingly international or multi-market effects of Restrictive Business Practices.
- (b) Private barriers to the gains from trade and investment liberalization remain as public barriers are eroded. Liberalization of trade and investment are therefore *necessary* but not *sufficient* conditions for market contestability.
- (c) Developing countries suffer from the restrictive business practices of, *inter alia*, multinationals and foreign companies in general.
- (d) Curbing of these practices is hampered by differences in substantive measures contained in country-specific competition laws and could be improved by cooperation, including information-sharing, and possibly by harmonization of competition laws or multilateral competition rules. This area requires further research with specific reference made to the developmental dimension.
- (e) In particular, it should be recognized that competition laws in developing countries are part of a specific policy framework, often including explicit public interest considerations.
- (f) The implications of universal competition standards for developing countries must therefore be the subject of thorough research before negotiations on multilateral competition rules can commence.
- (g) The developmental dimension should be taken into explicit consideration.

4. Developing countries are part of the world trade system and have embraced the rules-based WTO. In this respect, the following should be noted:

- (a) It is recognized that the analytical demands placed on developing countries regarding the preparations of the next Round of negotiations are huge. However, exempting ourselves at this stage from certain subjects of the next Round would imply acceptance of some rules, but not of others and suggest free-riding on the disciplines imposed on other countries. This clearly defies the purpose of a rules-based trading system. The debate is therefore no longer one of whether or not it is politically and economically opportune to participate in the debate on competition rules. The main issue lies in defining how South Africa and the developing countries in general will participate.
- (b) Concretely, certain pre-negotiating conditions should be established.

- (i) The first condition should address the realization that developing countries have not had the same opportunity to prepare for multilateral competition negotiations. Developing countries are therefore not in a level playing field and cannot be expected to present a well-researched position. In particular, the African Group of the WTO calls for further analysis of the strengths and weaknesses of multilateral rules, and urges UNCTAD and the World Bank to assist. This technical assistance should venture beyond the traditional support to competition agencies in terms of development of competition laws and their enforcement, and include scrupulous assessment of the expected outcomes and the implications for developing countries of multilateral competition rules.
- (ii) A necessary condition for negotiating multilateral rules should therefore be the conclusion of a thorough educative process for developing countries for which an adequate amount of time should be allowed. In order to truly "level the playing field", developing countries should initiate a process of in-depth technical assistance prior to the intensive negotiations.
- (iii) This process should take explicit consideration of the developmental dimension and the competition challenges that are unique to developing countries. The multilateral institutions (such as UNCTAD and the WTO) involved will therefore have to redefine their roles and find new and improved ways of assisting in the preparation for these negotiations, for example by hosting fora and concentrating on capacity building. Only once this condition has been met will developing countries be able to enter the negotiations as equals. The Seattle Ministerial should therefore initiate the process of negotiations on multilateral competition rules yet specify the consideration given to developing countries in order to allow for meaningful participation of developing countries. The Seattle negotiating mandate should include explicit mention of the study of the development dimension and of the initial educative process.
- (iv) Secondly, special and differential treatment for developing countries should be guaranteed. Developing country-specific concerns should be awarded a prominent place on the agenda. This process can only be successful if the first condition has been met successfully and developing countries have received support in the derivation of proposals, in particular in deriving proposals that do justice to the development dimension, for instance by incorporating elements of asymmetry.

5. This process should lead to an informed position on many of the issues relevant to multilateral rules, such as:

- (a) The format: should the agreement include binding rules or be limited to a framework agreement?
- (b) The requirements: should competition laws be harmonized or should countries be committed to the mere adoption and enforcement of domestic competition laws?
- (c) The inclusion of WTO principles, or the definition of competition-specific principles.
- (d) Positive comity.

- (e) Enforcement and sanctions of this agreement.
 - (f) The developmental dimension, *inter alia*:
 - (i) Special and differential treatment for developing countries and countries in transition.
 - (ii) The scope for flexible approaches to substantive criteria in competition laws of developing countries.
 - (iii) Application of the principle of progressivity in the agreement.
 - (iv) The economic rationale behind export cartels of developing countries.
 - (v) Extended implementation and transition periods for developing countries.
 - (vi) Cooperation agreements.
 - (vii) Flexible application of MFN and national treatment principles for specific industrial policies of developing countries.
 - (viii) Consideration for the limited capacity of developing countries in enforcement.
6. The following sequencing of this process is proposed:
- (a) The pre-negotiating educative process should allow for substantial further research and be projected to span up to two years. The role of UNCTAD and the WTO in this process should be defined during this period. Furthermore, in this pre-negotiating phase, resources should be made available to developing countries to assist them in the derivation of positions and to ensure meaningful participation of these countries in the formal negotiations.
 - (b) The Government remains committed to the initiation of conditional negotiations at the Seattle Ministerial Conference; however the formal negotiations are to start only upon completion of the aforementioned educative process.
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