

# **CRITICAL ANALYSIS OF THE ANTI-TRUST LAWS UNDER WTO AND THE PROVISIONS THERE UNDER**

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## **Philosophy common to Competition Law and the WTO**

Both competition policy and the World Trade Organization (“WTO”) aim to promote and maintain a free and open trading system. The WTO’s task is to establish an international trading system based on a free and open market, and competition policy that covers both domestic and international markets.

A striking similarity exists between the objectives of the WTO and those of competition policy. The key concepts common to both are, *inter alia*, promotion of an open market, provision of fair and equal business opportunities to every participant in the market, transparency and fairness in the regulatory process, the promotion of efficiency, and the maximization of consumer welfare.

## **Basic Principles of the WTO**

### **1. National Treatment**

National treatment is regarded as one of the corner stones of the WTO. It is provided under Article III of GATT, Article XVII of GATS, Article 3 of TRIPS and in TBT and SPS Agreement. The principle of national treatment is meant to maintain a competitive equality between domestic products and enterprises, on the one hand, and those of other Members, on the other.

The scope of “laws, regulations and requirements” in Article III.4 of the GATT 1994 has been interpreted broadly to include any laws and regulations which might adversely modify the conditions of competition between domestic and imported products in the internal market.

Article VIII of the GATS requires Members to ensure that any monopoly supplier of a service in its territory, in the supply of the monopoly service in the relevant market, neither acts in a manner

inconsistent with that member's specific commitments nor abuses its monopoly position to act in other markets in a manner inconsistent with commitments. This provision is somewhat similar to "abuse control" exercised by domestic competition law authorities in some countries.

## 2. Most Favoured Nation Treatment

The Most Favored Nation ("MFN") principle requires that a Member accord goods and services of another Member treatment no less favourable than that it accords to goods and services of all other Members. This principle is designed to guarantee equal competitive conditions between goods and services of different foreign members. MFN treatment is provided for in Article I of the GATT 1994, Article II of the GATS and Article 4 of the TRIPs Agreement.

## 3. Transparency

It imposes obligation on Members of the WTO to publish or make publicly available all relevant regulations before application, the requirement of impartial administration of such Regulations, the right to review decisions taken under them and also give notice of governmental actions to the WTO and other Members. It is provided under Article X of GATT, Article III of GATS, Article 63 of TRIPS and other Agreements in Annex 1A.

## 4. Due Process of Law

The procedural due process principle is present in the WTO's dispute settlement procedures. The procedures for dispute settlement at the WTO are provided for in the Understanding on the Rules and Procedures Governing the Settlement of Disputes ("DSU").

All of these principles of the WTO discussed above are designed to establish and maintain conditions conducive to competition among enterprises of different members of the WTO in trade in goods, services, and intellectual property, and to ensure that the rule of law prevails in the enforcement of trade rules.

### **Provisions in the WTO Agreements closely related to Competition Policy**

A number of provisions in WTO Agreements are closely related to competition policy. Examples can be found in GATS, TRIPs, the Agreement on Trade- Related Investment Measures (“TRIMs Agreement”), the Anti-Dumping Agreement, the Agreement on Technical Barriers to Trade (“TBT Agreement”) and the Agreement on Safeguards. They are scattered around in different WTO Agreements without being integrated into a coherent body of competition rules. Due to the lack of this lack of integration, those provisions have not been effectively utilized to date.

Article 11 on Agreement on Safeguards prohibits members from directing or encouraging private exporters from engaging in restrictive activities. Article 8 of TBT Agreement prohibits members encouraging private trade organisation engaged in product testing and certification to exercise discriminatory restrictions inconsistent with WTO disciplines.

Article II of the GATT requires that if a monopoly is retained by a WTO member, such a monopoly shall not ‘operate so as to afford protection in excess of that provided for in schedules. The use of so-called non-violation cases under Article XXIII of the GATT provides the option of using existing GATT rules to address anti-competitive practices. This provision can be used when a WTO Member believes that benefits accruing to it under the agreement are being nullified or impaired by measures that do not violate any part of the GATT.

### **Case laws in WTO Dispute Settlement having bearing on Competition**

#### **1. Photographic Film Case (Kodak/Fuji)**

In this case, US failed to prove that the creation of exclusive distributorship of the Fuji Films was attributable to the Japanese government. This case revealed that the WTO was ineffective in dealing with private restrains of trade.

#### **2. United States- Anti Dumping Act of 1916 case**

European Communities and Japan claimed that the U.S. Anti-Dumping Act of 1916 which authorises criminal prosecution and treble damages by private parties, as a violation of U.S. obligations under the WTO Agreements. The Panel and AB held that the US Anti-Dumping laws

has to conform to the requirements of Article VI of GATT. The Article provides only anti-dumping duty as a measure, therefore the Act is inconsistent with GATT.

### 3. Canada Dairy II Case

Under this subsidy regime, the Canadian government established a price support system for milk sold for domestic uses that kept domestic prices at a high level. The Appellate Body stated that this new scheme could constitute a subsidy inconsistent with the WTO Agreements if producers of fresh milk sold it to producers of dairy products at a price below cost. However, the Appellate Body could not decide whether there was a below cost sale or not, because of the lack of fact finding on the part of the Panel.

### **Activities of WTO Working Group on Trade and Competition**

The idea of introducing competition law and policy into the trade arena was conceived by the framers of the Havana Charter, the predecessor of the GATT 1947. Chapter V of the Havana Charter was devoted to competition law and policy. The idea of international competition policy has been debated in many international fora, including the United Nations, the GATT 1947, the United Nations Conference on Trade and Development (“UNCTAD”) and the Organisation for Economic Co-operation and Development (“OECD”).

The Ministerial Conference of the WTO held in 1997 in Singapore decided to establish a group to study the relationship between competition policy and trade (the “Working Group on the Interaction between Trade and Competition Policy”) with a view towards introducing competition policy into the WTO. The reports of the Working Group reveal that there is general agreement among Members of the WTO that the WTO and competition policy share common objectives, i.e. the promotion of the free market, consumer welfare, and efficiency. There is also a consensus that private anticompetitive practices, such as international cartels dividing up the international market and fixing prices, are harmful to the WTO system.

### **Competition Policy in Doha Ministerial Declaration**

Paragraph 23 recognises the need for a multilateral framework to enhance contribution of competition policy to international trade development and negotiations for the same will take place by explicit consensus. Paragraph 24 requires to take into consideration the needs of developing and least developed countries for the same. Paragraph 25 declares that the Working Group should discuss core principles, including transparency, non-discrimination, procedural fairness, hardcore cartels and other related matters.

### **Suggestions**

- 1) WTO declares, in the form of a Ministerial Declaration, that competition policy is an integral part of the WTO regime.
- 2) A plurilateral agreement on competition policy within the framework of the WTO with a two-stage implementation. In the first stage, there would be binding rules, which would prohibit such private anti-competitive conduct that directly injures the objectives of the WTO, such as international cartels, import cartels, and export cartels. In the second stage, the WTO would consider the introduction of an international agreement on competition policy which would cover a wider area, including vertical restraints and mergers and acquisitions.
- 3) Establishing a multilateral framework for cooperation in competition policy among Members of the WTO. The provisions in this agreement would be hortatory or exhortative rather than binding, as opposed to “the Covered Agreements” that are binding on WTO Members. This agreement would not be legally binding; thus, a violation of its provisions would not be met with action based on the DSU or with economic retaliation determined by the DSB.