

COMMUNICATION FROM EGYPT

The following is the final text of a paper received from the Permanent Mission of Egypt which was circulated as an advance copy for the Working Group's meeting of 22-23 April 2002.

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- Item (A):** Support for progressive reinforcement of competition institutions in developing countries through capacity building as contained in paragraph 25 of the Doha Ministerial Declaration;
- Item (B):** Technical assistance and capacity building, as called for by paragraph 24 of the Doha Ministerial Declaration.

I. INTRODUCTION

Paragraph 25 of the Doha Declaration lays out the work program, established by Ministers, for the Working Group on the Interaction between Trade and Competition Policy (WGTCP) in the run-up to the 5th Ministerial Conference in 2003. The Doha Declaration mandates the WGTCP, to focus among other things, on the clarification of: modalities of support for the progressive reinforcement of competition institutions in developing countries through capacity building, while ensuring that appropriate flexibility be provided to address the needs of developing and least-developing countries. Reinforcement of competition institutions in developing countries through capacity building should respond to the developing countries' long-term concerns. The scope of the assistance could range from drafting a competition law through the establishment of competent authorities and training of their staff, up to the implementation and enforcement of such law. It should be noted that developing countries are at different stages in the development of domestic competition legislation; therefore realistically capacity building needs differ from one developing country to another and, therefore, a one-size-fits-all approach is not appropriate, if the aim is to deliver a concrete outcome that would benefit the whole range of developed and developing country members alike.

We envisage that capacity-building programs would be conducted with the view that competition authorities are established, then are able to deal with all the anti-competitive practices of international, as well as of national dimensions. This would therefore, require - beforehand - conducting a "needs assessment" for each country, so that the Working Group is in a position to know from where to start and how to deliver.

Capacity building activities in developing countries should aim at reinforcing the competition authorities for the better application of national legislation to bring them up to the level to benefit from international cooperation to combat the restrictive business practices that would go against their economic development objectives.

II. MAIN PROBLEMS FACING DEVELOPING COUNTRIES IN THE FIELD OF COMPETITION POLICY AND LAW:

Developing countries are faced by various problems among which are the following:

First is the problem of drafting local legislation. Many countries - particularly the developing and the least developed among them - do not have the experience or the qualified personnel that have the skills necessary to enable them to draft national competition legislation.

A second set of problems has to do with the establishment of the competition authority that would shoulder the implementation and enforcement of the local competition legislation. This includes scarcity of resources and the difficulty to develop and maintain the necessary expertise, as well as the lack of the necessary infrastructure (financial, physical etc.) to function in an effective manner.

Third is the problem of the high costs associated with the implementation/enforcement of a domestic competition law. Many countries prefer not to enact competition legislation, just because its costs of implementation are much higher than its economic benefits.

Fourth is the lack of competition advocacy and culture. Stakeholders such as consumer organizations, private sectors, media and other relevant groups, who are not familiar with the notion and the benefits of the proper implementation of the national competition legislation would, unavoidably, exert domestic political pressures in order to prevent the enactment of the competition legislation within their homeland.

III. PROPOSED CAPACITY BUILDING ACTIVITIES TO ADDRESS THE INSTITUTIONAL DEVELOPMENT NEEDS OF DEVELOPING COUNTRIES:

Having outlined some of the main problems that developing countries face in the field of drafting and implementing their national competition legislation, the following is an attempt to highlight the possible means for the progressive reinforcement of competition institutions in developing countries. This section is divided into two sub-sections; the first draws from the previously prescribed problems, while the second spotlights capacity building needs with respect to the main elements of competition law. As mentioned earlier in this paper, it should be noted that this is not meant to be a one size fits all proposal.

1. Capacity building to address the problems facing developing countries:

1 (a) : in the field of drafting national competition legislation:

Developing countries could seek capacity building activities that would end up having the skilled staff and personnel who are able to draft their country's national competition legislation. Technical advice, training, assistance and cooperation from international organizations and countries that have mature, experienced competition authorities are good instruments to use in this regard. This in addition to: the exchange of copies of national competition legislation; the provision of technical and legal assistance and advice with respect to the identification of the statutory structure and major elements that should be included in the legislation, including administrative, criminal and civil actions and penalties; identification of the administrative and judicial fora of legal actions; and procedures for information exchange.

1 (b) : in the field of establishing the competition authority:

Countries with mature competition authorities can assist developing countries by: providing

for training, scholarships for advanced studies for the staff of the developing country's newly established authority; securing sufficient budgetary support for the ongoing work of the established body; equipping the national authority with the most up-to-date machinery (computers, faxes); constructing an easily searchable database of competition related materials. The aim should be to ensure that the competition authority is staffed and managed by competent personnel, and that it acquires the appropriate infrastructure.

1 (c) : in the field of the high costs of implementing the competition law:

Means should be explored to ensure that the benefits of implementing a national competition law are much higher than the costs associated with such implementation. In this regard, it should be stressed that competition law:

- Will not benefit certain groups of the economy to the detriment of others.
- Aims at maximizing the welfare of both the consumers and the producers.
- Contributes to achieving the optimal allocation of resources.

1(d) : in the field of competition culture and advocacy:

Competition institutions in developing countries should have the responsibility of educating the relevant stakeholders about the benefits and drawbacks of a national competition legislation. In this regard, capacity-building activities should raise the competition authorities ability to:

- Consult with the relevant groups of stakeholders.
- Conduct training and educational programs within universities and other relevant governmental and private institutions.
- Establish a consultancy center which mandate is to provide advice and expertise and training courses to the businessmen, lawyers and judges. This center could also be a think tank that governments use while investigating anti-competitive cases.
- Produce information materials for public dissemination.

2. Capacity building with respect to the main elements of competition law:

Developing country Members may seek assistance and institutional capacity building with respect to the enforcement of their national competition legislation. Basically, competition legislation addresses three main elements covering most of the anti-competitive practices which – in themselves – could form basis for a structured, progressive capacity building activities. The following are the main areas of institutional capacity building needs in that regard:

- Horizontal Arrangements: Programs should help developing countries' institutions to combat the detrimental effects of implicit and explicit agreements through building their capacities to be able to:
 - Mobilize resources to detect, investigate and prosecute cartel agreements that are international in scope.
 - Minimize the scope for tacit collusion through economic policies that facilitate competitive entry into market.

- Abuses of dominant position are considered to be anti-competitive and would act to the detriment of developing countries economies. It would therefore be appropriate that developing countries' institutions are able to assess:
 - Whether the firm(s) involved has sufficient market power to engage in predatory conduct.
 - Whether there is a clear pattern involving multiple instances of abuse or just an isolated instance.
 - Whether there are plausible alternative explanations of the conduct involved that suggest it may have served a legitimate business purpose.
- Mergers: Developing countries institutions may seek assistance and capacity building that would allow them to:
 - Evaluate mergers and assess whether a proposed transaction would substantially increase the ability to exercise market power.
 - Evaluate the efficiency effects flowing from the merger to the extent that this is permitted under the relevant national laws and examine the factors that would create market power including the degree of market concentration, existence of barriers to entry, lack of substitutes for the product under examination, reduce quality or lack of innovation.

As a general provision, two principles should be considered in the course of providing support for the progressive reinforcement of competition institutions in developing countries through capacity building. First: flexibility in the sense that a "one size fits all approach" is not appropriate since each country should have the chance to choose how to apply a competition regime in a way that reflects its economic situation and achieves its development objectives. Second: progressivity by allowing developing countries to undertake a phased approach to the discussion, introduction and implementation of competition legislation.

IV. CAPACITY BUILDING FOR EFFECTIVE IMPLEMENTATION OF COMPETITION POLICY

In the 1996 Ministerial Conference held in Singapore, Ministers decided to set up a working group to look more generally at the relationship between trade and competition policy. Yet at that time, the Ministers had made it clear that the working group's tasks are analytical and exploratory, and that any discussions cannot develop into negotiations without a clear consensus decision.

Five years later, Ministers have mandated the WGTCP to focus its further work on the clarification of specific issues with respect to the interaction between trade and competition policy. Paragraph 24 of the Doha Declaration recognizes the importance of technical assistance and capacity building needs of developing and least developed countries "so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development". Moreover, paragraph 24 names certain elements of those needs - without limiting them - such as "policy analysis and development" in which technical assistance and capacity building could be sought.

The Need for Technical Assistance and Capacity Building

Based on the wording of paragraph 24 of the Doha Declaration, one can conceive that technical assistance and building the capacity of Member states are prerequisites that may lead to a

consensus on the adoption and effective implementation of a multilateral framework of cooperation in the field of competition policy.

Defining Capacity Building

The issue of capacity building is crucial for any developing or least-developed country. It goes hand in hand with economic reform programs. Thus, the most important task confronting the governments in such countries is to set up administrative systems that are able to translate the policies adopted into social programs suited to the needs of a modern economy. Accordingly, it is of a great importance to reach a definition of capacity building in order to have a more general view of all its aspects.

Capacity building may be defined as "the ability to perform appropriate tasks effectively, efficiently and sustainably". This would require strengthening the targeted human resources in particular institutions and providing those institutions with the means whereby these resources can be marshaled and sustained effectively to perform planning, policy formulation, and implementation tasks on any priority topic.

In the light of the above definition, capacity building encompasses two main elements: building human capacity and analytical skills on the one hand, and building institutional capacity on the other. Human capacity has to do with personnel who carry out the enforcement of any adopted policy. Hence, any increase in the capacity of the individual in the civil service context should contribute to the increase of the capacity of the institution to which he is attached. Building human capacity may be achieved through: clear and accurate job description, special education systems relevant to the job description, internal and external training programs, and professional deepening of skills. On the other hand, the building of institutional capacity can be sustained through obtaining adequate office resources, designing the procedures that describe how the institution will function internally and with external bodies, creating an institutional memory that contains relevant laws, regulations, organizational data, policy statements, and operational protocols.

With regard to competition legislation, policy makers in emerging economies face several common difficulties with respect to formulating a competition policy and introducing a competition law. Enforcement issues represent the main difficulty in introducing competition law as it is counterproductive to introduce a sophisticated piece of legislation that is difficult or impossible to implement by the existing competition agency.

Establishing an efficient competition agency is considered an integral part of introducing competition policy. It is this agency which conducts investigations into suspected competition violations, issues rulings, assesses penalties, monitors the market and studies prevailing conditions in the search for price irregularities. It also advises the government on the sale of state-owned enterprises, and on the overall soundness of the competition environment. Given its pivotal role, the establishment of an efficient agency is imperative if competition law is to be introduced, as it is the enforcement policy that will determine the practical impact of the legislation.

To do all these, a competition agency must enjoy: (i) a transparent, independent and impartial administrative structure; (ii) qualified staff that include managers, technical staff, lawyers and others who will be engaged in the daily activities of the agency; and (iii) adequate resources to attract qualified staff and to ward off corruption.

The above elements represent some of the prerequisites for the establishment of a competition agency.

Competition Policy and Capacity Building Needs of Egypt

Like many other developing countries, Egypt has undergone a comprehensive Economic Reform and Structural Adjustment Program since 1991. This reform program has been supported by a stand-by arrangement from the IMF and a structural adjustment loan from the World Bank, in addition to the bilateral debt forgiveness/debt service relief of the Paris Club. The primary objective of the reform program is summarized by the IMF (1991) as: "to create, over the medium term, a decentralized market-based, outward-oriented economy where private sector's activity will be encouraged by a free, competitive, and stable environment with autonomy from government intervention". In this view, the adoption of a national competition law is considered one of the essential requirements to put the reform program into action.

In fact, Egypt has not until now enacted a competition law. It has never had comprehensive competition legislation, although various provisions in different legislation address basic anti-competitive behavior. However, there is a draft under discussion.

The draft law has a provision for the establishment of a Competition Commission and specifies its structure, staff requirements and authority. It also outlines the rights and proceedings of the Competition Commission to apply the law, including penalties and legal sanctions. One should bear in mind, however, that providing in the law for the establishment of a Competition Commission does not mean that it will function efficiently and effectively. Therefore, Egypt is in need for technical assistance and capacity building with respect to all the elements outlined in section one of this paper. Special focus should be on training the staff, specialists, and expertise who would carry out the enforcement of the law, as well for supplying the Competition Commission with all the office facilities and equipment required for its proper functioning.

V. CONCLUSION

National competition laws are important for developing countries to promote their development objectives since the anti-competitive practices that affect them are being engaged in on a global scale. However, policy makers in these countries face several difficulties in respect of formulating a competition policy and establishing an effective enforcement mechanism. Thus, a key objective of any proposed framework would be to ensure that developing and in particular least-developed countries receive enhanced and better-coordinated assistance in regard to capacity building in this area. It would be of a great help if assistance with capacity building can be provided on country-by-country basis in order to ensure that it meets the real needs of individual countries.
