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Using Competition Policy to Regulate MNC Behaviour in Namibia

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Competition policy has become one of the most important economic regulatory instruments in international, regional and national trade arrangements. Namibia, together with other small member states of SACU, i.e. Botswana, Lesotho and Swaziland, is in the process of evolving and implementing national competition legislations. Different members have however, achieved varying degrees of progress in this process.

This briefing paper seeks to explore ways in which the Namibian competition regime can be effective in controlling unfavourable behaviours of multinational corporations (MNCs) operating in Namibia. It outlines three relevant provisions that might be useful in this regard; and looks at recent anti-competitive practices by MNCs in the cement sector. Along with conclusions it brings to the fore certain interesting areas for further research.

1. Introduction

Standard economic theory teaches us that market mechanisms work better and deliver desirable outcomes in markets that are not characterised by distortions, which lead to market failures. While development literature of 1980s and early 1990s emphasised the importance of privatisation and deregulation as key policy approaches in market economies, recent theoretical and empirical analysis have found effective regulation to be imperative in ensuring proper functioning of markets. One of such regulations is competition policy, which refers to a set of measures and instruments used by Governments to determine the conditions of competition in the economy. For the purposes of this paper, competition policy is defined to include both the policy and legislation, which are usually implemented by "*competition institutions*". For Namibia, competition institutions refer to the Competition Commission only, whereas for some countries, this would include a competition council, a tribunal and other related institutions.

Competition policy has become one of the most important economic regulatory instruments in international, regional and national trade arrangements. At the international level, competition policy was first recognised as one of major development policy tools during 1996 when it was put on the agenda of the Singapore Ministerial meeting as part of the review of the relationship between trade and investment, under the World Trade Organisation (WTO) framework. The importance of competition policy was further signified as it becomes one of the four key policy issues that were included in WTO's Doha Declaration of Ministers in 2001. These policy issues, referred to as *"Singapore issues*", were investment, competition policy, trade facilitation and Government procurement. Singapore issues are bitterly contested between developing and developed countries at the multilateral level, with the main reasons that the former lacks experience in implementing such policies, or in most instances, have not established these policies at the national or regional levels.

It takes about 10 years for countries to acquire the necessary expertise and experience to implement these policies effectively (Singh, 2002). Singapore issues were eventually removed from the Doha Agenda after the 2003 WTO Ministerial meeting in Cancun, Mexico. The Singapore issues have expectedly been found to be indispensable to trade negotiation processes as they have been again brought up in the Economic Partnership Agreements (EPAs) being negotiated between the European Union (EU) and regional groups of African, Caribbean and Pacific (ACP) countries. It is important for the EU to negotiate trade packs in which markets are sufficiently regulated, but once again resistance from

ACP countries (all of which are developing countries, though at different states of advancement) has become prominent.

This is mainly from the considerations that very few of the ACP countries have competition laws and institutions and accepting these issues on the agenda would firstly put a heavy strain on the already limited negotiating capacity in the field. Secondly, ACP countries also fear that their regional and sub-regional integration efforts will be undermined if they commit on these issues at the international level before instituting them at national and regional levels. The structure and recent performance of the Namibian economy suggests that the economy ranks well behind the group of emerging markets such China, India, Brazil and South Africa.

Although Namibia gained its independence in 1990, its economy ranks high amongst developing countries. With annual per capita income of around U$2,000, Namibia is classified as a Low Middle Income Country. Before independence, Namibia was governed under South African laws, some of which are still applied today, e.g. laws regulating financial services etc. The fact that Namibia is located in close proximity to the South African economy, helps its economy in terms of making necessary services available and in keeping up with modern technological requirements. However, the big neighbour also poses developmental challenges as it tends to spur more polarisation rather than industrial development.

2. MNCs in Namibia

Most of medium and large sized firms operating in Namibia are multinationals, either with headquarters in South Africa or with regional branches located there. The Southern African Customs Union (SACU), to which both Namibia and South Africa are members, is still evolving in terms of establishing or harmonising economic policies. South Africa, which accounts for more than 90 percent of SACU GDP, and having its big corporations dominant in the SACU region and beyond, has a functioning competition regime that includes a competition commission, a council and a tribunal, with enabling policy and legislation. Namibia and other member states of SACU, i.e. Botswana, Lesotho and Swaziland, are all in the process of establishing and operationalising a competition regime.

This briefing paper seeks to point out areas in which the Namibian competition regime can be effective in controlling unfavourable behaviours of multinational corporations (MNCs) operating in Namibia, or whose business has significant impact on the Namibian business activity. It outlines three relevant provisions for MNCs in Namibia and SACU competition policies and looks at recent anti-competitive practices in the cement sector of the country.

3. Evolving Competition Regime in Namibia

Competition is a necessary policy instrument in modern economies, which are characterised by globalisation, trade liberalisation and the huge international merger movement (Singh 2002, Cernat 2004 and Hartzenberg 2002).

Box 1: Competition Policy for Developing Countries

Singh (2002) iterates that developing countries do not necessarily need the type of competition policies adopted by developed countries, and further advises that a competition policy suitable for a developing country must at least be able to: (a) restrain anti-competitive behaviour by domestic privatised large firms; (b) limit abuses of monopoly power by mega-corporations created by the international merger movement that shaped the world economy during the last decade; and (c) promote development.

South Africa, which administered Namibia before 1990, was isolated from the world economy due to its apartheid system. What happened in Namibia after independence was the commercialisation of the operations of Government departments whereby the management of services, such as electricity, postal services, telecommunication and water affairs was done by private managers on business-like conditions; while Government retained some ownership and control of those corporations. Competition is applicable to these State-Owned Enterprises (SOEs) in a similar fashion as it would be applied to privatised corporations; but under certain conditions the SOEs sector might warrant for exemptions from the enforcement of competition rules.

Hartzenberg (2002) iterates further that trade liberalisation alone may not independently guarantee outcomes that are efficient or in the public interest. A limited number of countries in Southern Africa have adopted competition policies. The most known to have functioning competition policies are South Africa, Tanzania, Zambia and Zimbabwe. This phenomenon is most understandable in the context of colonial history of most states in the region and early economic systems adopted by these states after gaining political independence. Ajit Singh (2002) noted that the reason why most developing countries did not have formal competition policies is not because these policies were not important, but simply because most developing countries had their economies regulated under laws of their colonial powers, and upon gaining independence, there was a considerable state control over economic activity, rendering competition

policy to be un-needed. As it is already indicated, the two reasons fit in well for Namibia.

Prior to Namibia's independence, competition issues in the country were regulated by the Regulation of Monopolistic Conditions Amendment Act of 1955 (Act No. 24 of 1955, as amended in 1958, 1975 and 1976), a South African law. This law has for long been repealed in South Africa. One area of competition that has raised concerns around the world, is the market distorting impact of international cartels. A cartel is a form of anti-competitive arrangement that occurs when a group of firms agree to fix prices, share geographic markets between themselves or jointly determine other market conditions. When one talks of a cartel, most people would think of the trade arrangements in the international oil markets. Recent cartel investigations have found that most cartel activities go unnoticed especially those in developing countries.

Box 2: International Cartels

Yu (2003) used regression models to estimate the strength and welfare effects of private international cartelisation in the *seamless steel tubes* market. The key findings from this investigation reveal that developing countries lost US$1.4bn between 1990 and 1995 due to this cartel. This study also pointed out that cartels hurt both consumers who have to pay high prices, and producers who are usually barred from exporting to the markets belonging to the cartel members. While advanced countries have developed tools to detect and punish cartels, the activities of cartels go unnoticed and unpunished in developing countries and that is where cartels are most harmful.

Recent thinking about deterrence of international cartels has culminated into tangible proposals. The fact that international cartels harm consumers in both developed and developing countries; but developed countries fine such cartels to compensate only their consumers has been raised in a recent discussion paper released by International Network for Civil Society Organisations on Competition (INCSOC). The paper proposes the establishment of an International Competition Fund (ICF) that would help developing country consumers get compensated, thereby filling up the existing legal and institutional vacuum. The proposed ICF could be funded (as one source) from fines imposed on detected cartels. This would not only be fair to developing countries who are affected by cartel activities, but not compensated when such cartels are fined, but it would also be an effective way of deterring international cartels that harm all economies.

4. Provisions for MNCs Regulation

The process of formulating the Namibian competition law started around 1996 with the drafting of a competition bill. The Namibia Competition Act (Act No. 2 of 2003) was finally passed by the Parliament in April 2003 and repealed the Regulation of Monopolistic Conditions Amendment Act together with its further amendments. The Namibia Competition Act, which is still due for enforcement established the Namibia Competition Commission ("*the commission*") to implement the Act. To date, the commission has most of its members appointed, and is waiting for the Act to come into force to commence their functions. The Namibian Competition Act ("*the Act*") will apply to all economic activities within Namibia and those with an effect on Namibia, but with some exemptions. Exempted activities are:

- Collective bargaining agreements in terms of the national labour law;
- Concerted conduct designed to achieve a non-commercial socio-economic objective; and
- Goods and services which the Minister of Trade & Industry, with concurrence of the Commission, may decide to exempt.

The Act has empowered the Commission to search premises, take evidence and to co-operate with similar institutions in other countries. The Act also covers the major elements of competition, including prohibition of Restrictive Business Practices (RBPs); prohibition of the abuse of dominant position; and control of mergers and acquisitions (M&As). The most apparent reason for the delay in implementing the Act is the institutional weakness from the side of the responsible Ministry. The responsible directorate in the Ministry is understaffed and measures to address this human resource backlog are not clearly visible.

In the SACU region, the old SACU agreement dated back to 1969 was renegotiated and replaced by a new agreement in 2002. The renegotiation was necessary to recognise the fact that the region is now made up of independent and democratic member states. Before the new agreement, Namibia was not recognised as an independent state and was therefore a *de facto* member. Further, most of the decisions were made by South Africa on behalf of all other member states. All these are different now. Articles 40 and 41 of the 2002 SACU agreement are on competition policy and unfair trade practices respectively. The agreement encourages member states to implement national competition policies and to co-operate with respect to the enforcement of competition laws and regulations. The SACU council is also entrusted with the responsibility to develop policies and instruments to address unfair trade practices

between member states. It has come to light that SACU is not going to develop a regional competition policy, but a co-operation mechanism on competition between members.

The envisaged SACU competition framework would therefore enable member states to consult and work together in deterring cross-border anti-competitive practices. The current stumbling block to the development of such a mechanism is the fact that only South Africa has a functioning competition law, while Botswana, Lesotho, Namibia and Swaziland (BLNS) are still being reminded that they are required (by the SACU agreement) to develop national competition regimes. This is rather urgent because in the SACU context, it is the BLNS that needs to safeguard their economies from possible anti-competitive practices by South African corporations.

5. Anti-Competitive Practices by MNCs: *The Case of Cement Sector*

It has been realised that in an economy without the relevant policy and legal instruments, it is difficult to assess if a certain business practice constitutes some form of anti-competitive practices. That is because exact measures of what constitutes anti-competitive practices in the economy are not available.

It is therefore strongly believed that the implementation of the Namibian competition law would give the Namibian society a voice and an opportunity to analyse the competition scenarios in the economy. Also, the competition legislation would empower policy makers to access details about operational activities of firms suspected to be involved in anti-competitive behaviours. This analysis uses international measures as well as provisions contained in the Namibian Competition Act as the base in extracting various business activities believed to constitute anti-competitive practices.

An example of a recent anti-competitive practice by an MNC in Namibia is from the cement industry. It should be noted that the cost structure of cement production has led to high market concentration in the sector world-wide (a small number of firms makes up the sector) and thus makes the cement sector prone to cartels. For a developing country like Namibia, which is in the process of availing necessary infrastructure for investment attraction, trade facilitation, education, health, provision of housing, etc., cement is a very important input for almost every sector of the economy. Namibia's development and budgetary policies clearly prioritise the need for infrastructure development and notable projects have been undertaken in this regard over the last 18 years of independence.

Box 3: Price War between Cement Suppliers in Namibia

From early 1990s, Namibia has various cement suppliers in the country, including a cement manufacturing factory operated by African Portland Cement. The biggest of the suppliers was Alpha Cement, a South Africa based corporation that later merged with Holcim Cement (South Africa). All other firms in the sector terminated their operations in Namibia over the late 1990s, leaving Holcim to be the only operator importing cement from South Africa. There is no sufficient analysis regarding the reason for closure of smaller suppliers, but declining demand for construction was generally cited as one of them. In 2005, Cheetah Cement, a joint venture between Whale Rock Cement (Namibia) and CP Cimento e Participacoes (Brazil) entered the sector by importing cement from Brazil, with a plan to set up a cement manufacturing factory in Namibia.

At the time when Cheetah Cement entered the local market, the existing unit price of cement was US$8 per 50-kg bag. In accordance with their production and import costs, Cheetah Cement was prepared to supply its product at US$4.5 per 50-kg bag. The price war between the incumbent supplier (Holcim Cement) and Cheetah Cement intensified and by 2006, cement was trading at US$3.5 per 50-kg bag. This represented a whopping 57 percent reduction in price. As is the case now, there was no competition framework or any regulation on fair trade in Namibia and nothing was done about this price war. Allegations of exclusive dealing agreements with retailers were raised, but could not be objectively verified due to the lack of necessary legal instruments.

Given that Holcim Cement is a company within SACU, and there are actually no trade borders between member states in a customs union, there was practically nothing the Namibian policy makers could do to save the situation. There were claims that if Cheetah Cement had established a local plant early on, measures could have been explored to protect it in line with SACU agreement, mainly under infant industry protection provisions. The plan for the erection of a local plant by Cheetah Cement included an investment in the range of US$70mn, which would enable the company to produce up to 600,000 tonnes of cement per year for a period of 45 years, with direct employment of 500 workers and indirect jobs for 4,000 people. Other benefits of the plant included the planned mining of limestone near the location of the plant for use in the production of cement and future plans to export cement to neighbouring countries. Towards the end of 2006 Cheetah Cement finally could not sustain under the excessive price war and terminated its operations in Namibia.

After the closure of Cheetah Cement, the unit price cent was raised by Holcim Cement dramatically to reach a price of over US$9.5 per 50-kg bag.

The above developments illustrate the case of predatory pricing where the incumbent operator with a dominant market position prices its product at less than profitable levels with an intention to drive the competitor out of the market, and then raised the prices to highly profitable levels in order to recover losses once the competitor is out of the way. Practically, the only option that Namibia had is intervention at the highest political level (at Cabinet or Parliament level), firstly, by deciding that the situation should be analysed quickly and some kind of temporary regulatory measures should be undertaken. It is exactly in sectors with one or very few operators where Government regulation is necessary; such measures are imperative, given the importance of sectors like cement to the economy.

Theories of markets employ assumptions of perfect competition where there are a large number of operators and none has a significant market power to dictate the market conditions. This is clearly not the case in the Namibian cement sector and the market alone cannot be expected to deliver good results. It should also be borne in mind that the firms' targeted with predatory pricing and similar restrictive trade practices are usually the new and/or vulnerable ones who are chased out of the market. Therefore, whether there is competition law or not, actions to rectify these situations need to be quickened. For Cheetah Cement to undertake an investment that is expected to start delivering after three years, given that it could not operate profitably under its importing of cement meant that there would have been a big market risk even after the start of *in situ* cement production.

The main stumbling block was therefore the fact that the firm could not profit from its existing operations and possibly support the development of the plant in part. Although consumers of cement benefited from rock-bottom prices during the price-war, they had to overcompensate for those temporary benefits in the long-term in form of much higher prices. It is a well-known fact that a private-owned monopoly is usually more harmful than a public-owned monopoly because the motive of the former is purely profiteering. Although necessary data to quantify the impact of having a sole supplier in the cement industry as compared to a couple of suppliers is not readily available, it is logical to believe that the former increased the costs of construction and retarded the affordability of buildings, especially basic houses for the needy.

The developments in the cement industry could have been investigated and resolved as per part II of Chapter 3 of the Namibian Competition Act, had it been operational. Sections 24 and 25 of this Act (under part II of Chapter 3) are on the determination of dominant position.

It is therefore critical that Namibia urgently starts implementation of competition law to ensure that implementing institutions have gained knowledge and experience in these areas before the wave of economic policy lock-in with developed and other developing countries happen, as is likely in the near future. Economic policy lock-in refers to the conclusion of trade, development and cooperation agreements that Namibia is aiming to undertake with other countries. These include EPAs being negotiated between the EU and various groupings of ACP to which Namibia is a member; ongoing negotiations on trade, investment and development cooperation agreement between SACU and the US; the SACU-India Preferential Trade Agreement (PTA) negotiations; the Customs Union for the Southern African Development Community (SADC) planned for the year 2010 and many such agreements. Allowing these agreements to be concluded without having functioning competition regime might be detrimental to Namibia.

Over the last three years (2005-08) when the CUTS project on competition policy was implemented in seven countries of the Southern and Eastern African countries (Namibia included), the momentum was high and it appeared clear that Namibia would have the competition law and the commission functional. This is still not the case as institutional weaknesses are evident. By international standards, the Ministry of Trade and Industry has too little resources (staffing and national budget share) when compared to corresponding ministries in other countries, to take the competition agenda forward. This however, does not fully justify the lack of economic policy and legislation faced by Namibia at the moment.

6. Conclusions

This paper used the analysis of recent competition developments in the cement sector of Namibia as a case study to illustrate how competition policy could be used to regulate MNC behaviour, especially in the interest of domestic economy and consumers. First, the article pointed to international consensus on the necessity of competition policy as a developmental tool in modern economies. The scope and design of competition policies for developed and developing countries does not need to be the same as development challenges differ conclusively. Competition policies in Namibia (the Competition Act) and in SACU (provision of 2002 SACU agreement) are found to be generally sufficient, but lack of implementation of competition regimes in BLNS countries is worrisome as the processes of regional integration and trade liberalisation have progressed fast. Policy implementers need experience before they can tackle complicated competition cases, and Namibia seems to be running out of time.

The analysis of recent competition-related developments as has been attempted here (in the cement sector) indicates that Namibia stands to lose in terms of reduced national welfare due to absence of competition regime and related economic policies. Potential investors look at a set of national economic policies as a security for their investments. Firms will avoid competition if they can, because lack of competition can produce maximum benefits for a monopoly firm. In that context, responsible regulators have a duty to preserve national welfare, and implemention of the Namibia Competition Act will go a long way in accomplishing that. The effects of persistent rises in interest rates that pushes up costs of housing could also be moderated by ensuring competition in the cement sector, thereby enabling construction of more houses (at lower cost) and reduce the demand-supply gap.

7. Areas of Further Analysis

It would be interesting to sample a few Government ministries which undertake a lot of construction work and look at their cement input as a proportion of all other inputs for constructing a standard school, a bridge etc., and then estimate additional costs that come about as a result of unwarranted price increases in cement due to a monopoly. This would involve calculation of cement inputs using what would be a competitive price (based on costs of production and an average profit margin) and cement inputs using the prevailing unit price. It is well known that cement is one of the most important inputs in various structures and price distortions in the sector constitute substantial welfare losses.

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