COMMON EXTERNAL TARIFF, COMPETITION POLICY& COMPETITIVENESS: POLICY PAPER

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POLICY ISSUES AND RISKS ASSOCIATED WITH THE TREATMENT OF MONOPOLY PROVIDERS UNDER THE COMMON EXTRNAL TARIFF

Policy issues regarding protection of a monopoly supplier under the Common External Tariff (CET) may be subsumed under the following, namely competition policy, enforcement of competition law, consumer harm, and possible solutions.

COMEPETITION POLICY: ISSUES AND RISKS FOR SMALL ECONOMIES

Competition policy refers to the 'full array of government policy measures that influence competition in domestic markets'.[1] These include instruments of trade policy such as tariffs but also effective implementation and enforcement of competition law.[2] A common external tariff (CET) is one means by which a government within a regional trading arrangement may pursue competition policy broadly defined.

Maintenance of a CET satisfies multilateral obligations for the requirement of a customs union under Article XXIV: 8 of the General Agreement on Tariffs and Trade 1994, (GATT), but also provides preferential treatment to firms within a regional trading arrangement which thereby benefit from lower tariff rates for their goods than for those competing firms that are external to the regional trading arrangement. Such preferential arrangement is, on the one hand, beneficial from the standpoint of selecting national or regional champions whose protection under a CET may provide a competitive advantage against firms external to the regional trading arrangement. On the other hand, protection under a CET absent inadequate or ineffective competition law and

[1] See paper by Hassan, Qaqaya, Competition Policy and its Relevance to Trade and Development, Regional Seminar on Trade and Competition: Prospects and Future Challenges for Latin America and the Caribbean, Caracas, Venezuela, 20 - 21 April 2009
[2] Ibid.

enforcement thereof carries the risk of a protected supplier taking advantage of or abusing its monopoly position.

Moreover, protective tariffs as a competition policy tool for developing countries need not support the major goals of competition policy being, economic efficiency, consumer welfare and economic development. Protective tariffs make it more profitable to pursue some domestic industries than would otherwise be the case because of consumers subsidizing of the domestic industry by paying higher prices whereby the allocation of such resources need not be the most efficient. Protective tariffs also increase cost on domestic consumers by transferring resources from consumers to domestic producers.

Also, as the World Trade Organization's (WTO) Working Group on Trade and Competition Policy has noted, economic development as a major goal of competition policy may be thwarted by protective tariffs as domestic producers benefiting from such protection do not necessarily develop the productive structure and capability to compete internationally than would otherwise be the case.[3] This is often due to wastage of monopoly profits on continuing inefficiencies within firms, but also the fact that the absence of domestic competition does not provide the best stimulus for competition abroad because, through domestic competition, firms develop expertise in cutting costs and becoming more efficient and customer oriented.[4]

On the basis of the foregoing, the issues and risks for small economies like Jamaica may be observed not only from the standpoint of selecting the appropriate policy options in giving effect to competition policy, but what considerations ought to bear on the competition policy chosen. The following examines some of these considerations under two main headings, namely enforcement of competition law and consumer harm.

ENFORCMENT OF COMPETITION LAW

In Jamaica, for example, competition law enforcement suffers from several weaknesses. The Voluntary Peer Review on Competition Policy of Jamaica conducted by the United Nations

[3] WT/WGTCP/W/228, P.22.
[4] WT/WGTCP/W/228, P.23.

Conference on Trade and Development (UNCTAD) in 2005 identified three essential elements of competition law, namely merger provisions, conspiracy provisions, and abuse of dominance provisions. Some of the weaknesses identified with respect to these elements of competition law include:

- Absence of law on mergers and acquisitions;
- Exemption from the Fair Competition Act (FCA) of otherwise restrictive agreements that relate to the use of intellectual property rights;
- Absence of provisions permitting abuse of dominance claims regarding two separate firms.
- Issues regarding the constitutional validity of the structure of the Fair Trading Commission (FTC).

The importance of merger review provisions arises from the fact that mergers reduce the number of competitors in a market thereby enhancing monopoly power of the merged entity, and increase the likelihood of collusive anti-competitive behaviour among the fewer remaining competitors in the given market. The omission of merger control in the legislation is compounded by the absence of behavioural and structural remedies to effectively curb an abuse of a dominant position by an enterprise as both complement and supplement each other.

Exempting agreements that relate to the enjoyment of intellectual property rights will likely result in a monopoly supplier being able to avoid a claim of abusing its dominant position by reference to that agreement in its defence.

The enumerated shortcomings have resulted in whole sectors being excluded from the operation of the FCA on the basis that specific legislation regulating a sector takes precedence to the FCA.

In addition, these shortcomings are compounded by the fact that the provisions of Chapter VIII of the Revised Treaty of Chaguaramas that concerns the enforcement of competition law and policy in the Community reflect some of the very weaknesses identified by the 2005 UNCTAD Peer Review.

CONSUMER HARM

With these shortcomings the risk of consumer harm is heightened. Consumer harm in the form of fewer product choices and higher prices would likely result from protection of a monopoly supplier of cement under the CET regime in the absence of an effective competition enforcement regime. The FTC's Study on '*The Impact of Waiving Safeguard Measures on the Monopoly Producer of Cement in Jamaica*'[5] indicate, for example, that protective tariffs on cement lead to higher prices for consumers and fewer product choices.

Additionally, given the rulings of our local courts that sector specific legislation takes precedence to the FCA, an antidumping or other duty imposed pursuant to an investigation conducted by, for example, the Antidumping and Subsidies Commission (ADSC), and which would be in addition to the CET tariff rate could not be challenged under the FCA as giving rise to an abuse of dominance by the monopoly cement supplier. Maintenance of a CET in circumstances where the ADSC can conduct trade remedy investigations and have duties imposed in addition to the CET will likely increase consumer harm.

POSSIBLE SOLUTIONS

The possible solutions should include medium and short term options. For example, it is advisable to contemplate revision of Chapter 8 of the Revised Treaty on Competition Policy and Consumer Protection to include merger control provisions.

Additionally, or alternatively, consideration should be given to review of the CET by COTED under Article 83(5) of the Revised Treaty.

Other options identified as possible solutions in *Cabinet Submission: The Suspension of the Tariff on Cement*.

1. Cease all duty free importation of cement as at September 10, 2009 'while ensuring that the import tariff is reduced from 40% to 15% CET';

[5] Paper prepared by the Competition Bureau of the FTC, March 2009.

2. Apply for a suspension of 130,000 tonnes (representing 15% of the market) under Article 83(2) of the Revised Treaty for one year;
3. Cease duty free importation and use the applied rate of 15% but apply to COTED for a one year suspension in the amount of 130.000 tonnes;
4. Allow 15% of the market for cement to enter as duty free imports for specific investment projects under the conditional duty exemption regime.

To the extent that option three is preferred in *Cabinet Submission: Importation of Cement*. This option will permit duty free entry of cement approximating 15% of the Jamaican market. However, maintenance of the 15% applied rate for extra-regional imports in excess of that threshold will not necessarily reduce consumer harm if an anti-dumping or other duty is applied in addition to the 15% applied rate during the period for which suspension is granted. Option three may, therefore, be pursued, but flexibility may require recourse to Article 83(3) of the Revised Treaty of Chaguaramas (RTC) as an alternative or additional option. The provision provides as follows:

'*The authority referred to in paragraph 2 to suspend the Common External Tariff may be exercised by the Secretary General on behalf of COTED during any period between meetings of COTED. Any exercise of such authority by the Secretary General shall be reported to the next meeting of COTED*'.

This option can be pursued in the event that the imposition of an antidumping or other duty in addition to the CET limits the quantity of cement in the Jamaican market and it is required that an application be made to the Secretary General before the next scheduled COTED meeting to alleviate shortages during the period of the grant of a suspension.