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‘International Cooperation and Competition Policy’

Address by

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Globalisation has been on the march, and in spite of the setbacks in the recent years it is certainly on the way forward. As trade, investment and other areas of cooperation increase and bring the world closer, competition law cooperation also come to the forefront.

The need for International Cooperation at the Agency-to-Agency level has been well recognised. It facilitates cross border investigations. It improves techniques and tools of cooperation. Such agency-to-agency cooperation also reduces multiplicity of work and save precious resources – both human and financial. Alignment of processes across countries increases certainty in application of rules and reduced costs for business. International cooperation has also been noticed to minimize risks of divergent outcomes, outcomes that may work at cross purposes.

India’s experience on international cooperation with BRICS Countries has been very positive. Specific instances of international cooperation with BRICS authorities include, in the area of Combinations (Brazil – Bayer/ Monsanto / FMC-Dupont; Russia – Bayer/ Monsanto; China – Agrium Potash; South Africa – Bayer / Monsanto).

Cooperation has helped both in competition assessment and in designing appropriate remedies. In Mergers, cooperation helps in design of remedy, consistency in the business to be divested, and also in appointment of common trustees / monitoring agency.

However, the process of cooperation is not without substantive challenges. At the practical level the challenges include: (a) Resource requirement (b) Differences in laws and legislations; (c) Geopolitical barriers. While practical challenges could be addressed over a period of time, the substantive challenges need more serious attention.

It has been noticed that any cooperation in Competition Law has to be preceded by convergence of interests, much more than what is required in terms of trade and investment. While trade and investment, or even IPRs affect different segments of economy and commerce, competition law and policy transcend such boundaries and affect the internal laws, regulations and policies so as to provide a level playing field to enterprises, irrespective of nationality, irrespective of public or private ownership, and irrespective of any other narrow considerations. That is why in regional trade agreements competition policy provisions are present only to a limited extent. It has naturally been noticed that convergence of economic interests are much more essential for competition policy cooperation as compared to trade or investment cooperation. Depth of integration in trade and investment determines the extent of cooperation in Competition Law and Policy.

Thus, in the absence of a reasonably comprehensive trade agreement, cooperation on competition policy could at best be minimal. When there is a higher level of economic integration involving Free Trade Agreement or Customs Union, the extent of competition policy provision start figuring in such agreements. Once the agreement at the bilateral or regional level is of the nature of Customs Union or Economic Community or Economic Union, the depth in cooperation on competition is more and deeper.

Studies after studies have brought out that there is a direct correlation between economic integration and competition law provisions in bilateral or regional trade agreements.

The various elements of cooperation on competition could be on the following lines: Enactment of Competition Law by the Countries (EU Proposal in WTO); Notification and consultation – Enforcement / Advocacy; Exchange of information and confidentiality of information; Cooperation of Enforcement Authorities; Addressing the issue of designated monopolies and Government Enterprises and price

discrimination; Dispute Settlement; Review and further cooperation (India's FTAs); Addressing the issue of quantitative restrictions and other trade distorting measures; and Addressing issues of Anti-dumping and Countervailing Duties. ANZCERTA and Canada-Chile Agreements, for example, decided to abolish use of Anti-dumping measures.

Where does BRICS fall in this type of a set up?

The UN Set has been providing a platform under the UNCTAD for better understanding of competition laws and facilitating gradual convergence of law among countries.

- Thus the Inter-Governmental Group of Experts under UNCTAD has been working on a Model Law, which have continued to be a Work in Progress.
- Section F of the Set envisages promotion of Inter-Governmental cooperation.

While underlining the need for and the importance of cooperation among countries in general and among BRICS Countries in particular, I would like to highlight some issues that need to be addressed:

- ✓ While BRICS Countries account for 14.5% of goods and 12.4% of service trade globally, the Intra BRICS trade is only about 9.5%. There is no trade agreement between BRICS Countries. At this level of economic interaction, the scope for substantial cooperation in Competition Policy among BRICS Countries appear slightly distant.
- ✓ Information sharing of a nature which is confidential, requires development of capacity among agencies to maintain confidentiality.
- ✓ The laws and regulations of each country have to be supportive of such sharing or information.
- ✓ Cooperation has to build on what is already in the Free Trade/Regional Trade Agreements of BRICS countries.

- ✓ RCEP (Regional Comprehensive Economic Cooperation), ASEAN Plus – higher levels of cooperation, involving negative comity appears beyond the Group at this stage.
- ✓ However, BRICS can be a catalyst in promoting regional cooperation in competition law in their respective regions. Thus, MERCOSUR, SACU, EAEU, CIS, SAARC groupings can concentrate on promoting regional cooperation on Competition Law, for the time being.
- ✓ In the SAARC (South Asian Association for Regional Cooperation), India, Sri Lanka, Pakistan have well-functioning Competition Laws and Authorities. Bangladesh recently started enforcement. Other countries like Afghanistan, Nepal, Bhutan and Maldives needs ‘hand holding’ at their request.

What is the way forward? I find the following possibilities:

- ✓ Memoranda of Understanding / Bilateral Treaties / Regional Agreements
- ✓ Domestic Competition Laws can have more elaborate provisions enabling International Cooperation
- ✓ Take the Regional Trade Agreement route
- ✓ Build on the progress in existing Agreements
- ✓ Bridge the differences in the provisions in the Regional Trade Agreements of BRICS countries
- ✓ Take step by step approach: skipping the economic integration route to Competition Policy cooperation may eventually stall the process itself
- ✓ In the meanwhile, the Memorandum of Understanding would need to be allowed to work

- ✓ Agency-to-agency cooperation, including sharing of information both ‘non-confidential’ and ‘confidential’ keeping in view the domestic laws and regulations needs to be strengthened
- ✓ Joining hands in ‘advocacy’ and capacity building, and also in a limited way in enforcement is the way forward in the short run

Institutionalizing and formalising any cooperation structure among BRICS countries on competition law and policy appears pre-mature at this stage.

I thank the host country for the excellent arrangements and the hospitality.

Thank you.