EMERGING ECONOMIES TRANSITION

Trade and Competition

FROM DOHA TO CANCÚN

OECD

Trade and Competition

FROM DOHA TO CANCÚN

OECD

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed:

- to achieve the highest sustainable economic growth and employment and a rising standard of living in member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- to contribute to sound economic expansion in member as well as non-member countries in the process of economic development; and
- to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

The original member countries of the OECD are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The following countries became members subsequently through accession at the dates indicated hereafter: Japan (28th April 1964), Finland (28th January 1969), Australia (7th June 1971), New Zealand (29th May 1973), Mexico (18th May 1994), the Czech Republic (21st December 1995), Hungary (7th May 1996), Poland (22nd November 1996), Korea (12th December 1996) and the Slovak Republic (14h December 2000). The Commission of the European Communities takes part in the work of the OECD (Article 13 of the OECD Convention).

OECD CENTRE FOR CO-OPERATION WITH NON-MEMBERS

The OECD Centre for Co-operation with Non-members (CCNM) promotes and co-ordinates OECD's policy dialogue and co-operation with economies outside the OECD area. The OECD currently maintains policy co-operation with approximately 70 non-member economies.

The essence of CCNM co-operative programmes with non-members is to make the rich and varied assets of the OECD available beyond its current membership to interested non-members. For example, the OECD's unique co-operative working methods that have been developed over many years; a stock of best practices across all areas of public policy experiences among members; on-going policy dialogue among senior representatives from capitals, reinforced by reciprocal peer pressure; and the capacity to address interdisciplinary issues. All of this is supported by a rich historical database and strong analytical capacity within the Secretariat. Likewise, member countries benefit from the exchange of experience with experts and officials from non-member economies.

The CCNM's programmes cover the major policy areas of OECD expertise that are of mutual interest to non-members. These include: economic monitoring, statistics, structural adjustment through sectoral policies, trade policy, international investment, financial sector reform, international taxation, environment, agriculture, labour market, education and social policy, as well as innovation and technological policy development

© OECD 2003

Permission to reproduce a portion of this work for non-commercial purposes or classroom use should be obtained through the Centre français d'exploitation du droit de copie (CFC), 20, rue des Grands-Augustins, 75006 Paris, France, tel. (33-1) 44 07 47 70, fax (33-1) 46 34 67 19, for every country except the United States. In the United States permission should be obtained through the Copyright Clearance Center, Customer Service, (508)750-8400, 222 Rosewood Drive, Danvers, MA 01923 USA, or CCC Online: *www.copyright.com*. All other applications for permission to reproduce or translate all or part of this book should be made to OECD Publications, 2, rue André-Pascal, 75775 Paris Cedex 16, France.

Foreword

The relationship between trade policy and competition policy is now firmly on the agenda of the Doha Development Round of trade negotiations. The OECD Joint Group on Trade and Competition has contributed to clarify many issues that arise at the interface of these two domains.

The Joint Global Forum on Trade and Competition, held in Paris in May 2003, under the auspices of the OECD's Centre for Co-operation with Non-Members (CCNM), brought together participants from over 70 economies, international organisations, and non-governmental organisations to dialogue and move forward the debate. In order to assist policy-makers in evaluating the implications of closer multilateral relations in this field, this event was particularly timely, taking place just a few months before the fifth WTO Ministerial meeting in Cancún.

The Forum was presided over by the co-chairs of the OECD Joint Group on Trade and Competition, Stefan Amarasinha (European Commission) and Allan Fels (outgoing Chairman of the Australian Competition and Consumer Commission). The individual sessions were chaired by a series of trade and competition representatives including Ambassador Hilale (Ambassador of Morocco to the WTO), Mr. Ueno (Japan's Fair Trade Commission) and Mr. Pardede (Indonesia's Business Competition Supervisory Commission). The Forum was closed by Professor Frederic Jenny (France, Chairman of the OECD Competition Committee and Chairman of the WTO Working Group on the Interaction between Trade and Competition Policy).

Forum participants exchanged views on the following key themes: the core principles referred to in the trade and competition paragraphs of the WTO Doha Declaration, fighting hard core cartels, voluntary co-operation between competition authorities, capacity building and reinforcement of competition institutions and options for compliance mechanisms in the trade and competition context. The importance of incorporating flexibility and progressivity for developing countries into the multilateral initiative on trade and competition was an overriding theme for all five sessions.

This publication, published on the responsibility of the Secretary-General of the OECD, contains three elements. First, it provides a synthesis of recent work undertaken by the OECD Joint Group on Trade and Competition, work which relates to and

explores in depth the themes discussed at the Forum. Second, it contains the Rapporteur's summary of the Forum discussions, prepared by Dr. Simon Evenett of the World Trade Institute, one of the leading experts in this area. Third, it includes concluding remarks made at the Forum by Frédéric Jenny in his personal capacity.

H. Schlögl
Deputy Secretary-General

Table of Contents

ISSUES FOR TRADE AND COMPETITION IN THE GLOBAL CONTEXT: SYNTHESIS NOTE 7

1. Core Principles of Non-Discrimination, Transparency and Procedural Fairness in a Multilateral Framework on Competition.....8
2. Effective Action against Hard Core Cartels 15
3. Special and Differential Treatment 22
4. Voluntary Co-operation in Competition Law Enforcement 27
5. Peer Review and other Possible Compliance Mechanisms in the Trade and Competition Context 34
6. Capacity Building and Progressive Reinforcement of Competition Institutions.....44

REPORT OF THE RAPPORTEUR
Simon J. Evenett 55

Session I. Clarification of Core Principles.....57
Session II. Hard Core Cartels.....59
Session III. Voluntary Co-operation in Competition Law.....61
Session IV. Capacity Building and Progressive Reinforcement of Competition Institutions.....62
Session V. Peer Review and other Compliance Mechanisms 63

CLOSING REMARKS
Frédéric Jenny.....67

Issues for Trade and Competition in the Global Context

Synthesis Note[1]

The Declaration by WTO Ministers following their meeting at Doha, Qatar on 9-13 November 2001 recognised "the case for a multilateral framework to enhance the contribution of competition policy to international trade and development."[2] The declaration explicitly took note of "the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral co-operation for their development policies and objectives, and human and institutional development."[3] It then outlined the work programme for the Organisation leading up to the Fifth Ministerial Conference, which will be held in Cancún, Mexico on 10-14 September 2003:

In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary co-operation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.[4]

The WTO Working Group has addressed these issues since the Doha meeting, but work has been going on in other forums as well, including the OECD Joint Group on Trade and Competition. In this connection the OECD is sponsoring a Joint Global Forum on Trade and Competition, to be held in Paris on 15-16 May 2003. Approximately 65 economies will participate, including both OECD members and non-members. The discussions will focus on the topics suggested in the Doha Declaration, specifically:

- core principles of non-discrimination, transparency and procedural fairness
- effective action against hard core cartels

- special and differential treatment/flexibility and progressivity
- voluntary co-operation in competition law
- peer review and other possible compliance mechanisms: merits and approaches in a trade and competition context
- capacity building and progressive reinforcement of competition institutions.

This paper presents a synthesis of the work that has been done on each of these topics by the OECD Joint Group on Trade and Competition and the Competition Committee.

1. Core Principles of Non-Discrimination, Transparency and Procedural Fairness in a Multilateral Framework on Competition

The Doha Ministerial Declaration called for an examination of the application of the three "core principles" of non-discrimination, transparency and procedural fairness in the context of the interaction between trade and competition policy. Below is a brief discussion of these principles, first as they appear in the WTO agreements and then in relation to competition law enforcement. Finally some possible approaches for their inclusion in a multilateral framework on competition are outlined.[5]

1.1 Non-discrimination

There are two components to the core principle of non-discrimination as they are embodied in the multilateral trading system: national treatment and most-favoured-nation treatment (MFN). National treatment requires that a WTO member not put the goods, services or persons of other WTO members at a competitive disadvantage vis-à-vis its own goods, services or nationals. MFN requires that any advantage conferred by one member upon the goods, services or persons of another member shall be automatically granted to all other members.

1.2 National treatment

National treatment is set out in the following provisions of the three main WTO agreements: GATT Article III; GATS Article XVII; and TRIPS Article 3. GATT Article III(4), for example, provides: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." GATS applies the same "no less favourable" standard to "services and service suppliers of any other Member in respect of all measures affecting the supply of services,"[6] with regard to sectors for which

specific commitments have been recorded in national schedules that form part of the Agreement[7]. TRIPS applies it to "nationals of other Members . . . with regard to the protection of intellectual property."[8]

There are many situations in which discrimination issues could arise in the course of competition law enforcement. An oft-quoted phrase embodies non-discrimination in competition enforcement: “Competition law protects competition, not competitors.” If this principle were applied rigorously and impartially, there could be little in the way of discrimination. It is not easy to move from the general to the specific in this instance, however.

Violations of the national treatment principle could be classified as either *de jure* or *de facto*. *De jure* discrimination would exist when competition laws, or ancillary laws such as those creating exemptions, draw an express distinction on the basis of national origin which places foreign firms at a competitive disadvantage. *De facto* discrimination could be said to exist in the case of laws or law enforcement policies, neutral on their face, that in application discriminate against foreign firms. One type of *de facto* discrimination is “case-by-case” discrimination. In a given case, or as between cases, a competition enforcement agency might apply different standards to domestic and foreign firms. A merger of two domestic firms might be approved, for example, while a similar one involving two foreign firms (having effects in the domestic market) might be prohibited. The difficulty with discerning discrimination in the case-by-case context, however, is that each case, and the circumstances of each party within a case, are unique. Differences in facts may bring about different outcomes. Such a result is not discrimination.

There is another type of discrimination, however, that has both *de facto* and *de jure* characteristics. A law or regulation, neutral on its face, might be written in such a way as to affect domestic and foreign firms differently in application. These could include provisions articulating various forms of industrial policy, which inherently favours domestic firms over foreign ones. A law or regulation dealing with consideration of efficiencies in merger and rule of reason analyses might specify that only efficiencies that are to be realised domestically are relevant in that analysis. Laws favouring small and medium sized businesses, which would tend to be domestic and not foreign firms, or promoting other socially desirable ends, such as full participation in the domestic economy by "historically disadvantaged persons" in the case of South Africa, are other examples.

Exemptions, exceptions and exclusions from competition laws also raise issues of discrimination. The concept is a complex one, if only because the terminology can be confusing. For purposes of this paper the term “exclusions/exemptions” will be used to refer to laws that result in less than full application of the competition law to specified sectors (e.g., banking), types of conduct (e.g., crisis cartels) or economic entities (e.g., state-owned enterprises). For purposes of this discussion relating to non-discrimination, it is important to keep in mind that the relevant issue is not whether

exclusions/exemptions are beneficial or harmful from the competition policy standpoint, but whether those that do exist discriminate against foreign enterprises. In that regard, there could be both *de jure* and *de facto* discrimination in the granting of exemptions, just as in enforcement of the competition law itself.

Export cartels are a form of exclusion/exemption. In general, export cartel laws exclude from the application of a competition law agreements among competitors that solely affect exports. There is ongoing debate about the propriety of such laws and about how they should be treated in the multilateral context. Again, however, the issue presented here is not whether they are on balance harmful but whether they are, or can be, discriminatory.

The question is, therefore, how to approach these several national treatment issues in the context of a multilateral framework on competition. There seems to be agreement that *de jure* discrimination should be included within the principle; thus, competition laws, regulations and guidelines, as well as ancillary laws such as those creating exclusions/exemptions, that by their terms are discriminatory would contravene the principle. *De facto* discrimination is more difficult to deal with. Case-by-case *de facto* discrimination is so difficult to discern, as discussed above, that most experts conclude that it should not be covered by the principle. The "hybrid" type of discrimination discussed above, such as laws implementing industrial or other types of public policy, presents special problems in connection with national treatment. One solution suggested would be to exclude these laws specifically from the application of the principle.

1.3 Most favoured nation

Most favoured nation is fully a part of the non-discrimination principle in the WTO agreements. The MFN provision in GATS, for example, states: "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."[9]

It seems that MFN raises fewer issues in the competition law enforcement context than national treatment. By its terms MFN would apply to the process of international co-operation in competition law enforcement, however. That is, MFN would require a country that has entered into a co-operative relationship with one other country, perhaps through a bilateral agreement, to extend the same privileges to all other countries. It is well known, of course, that countries enter into closer co-operative relationships with some countries than with others. These relationships evolve over time, between countries that have developed mutual trust and a close working relationship. They may involve the exchange of confidential information, which requires mutual confidence that the information will be protected from disclosure. It would clearly be difficult to apply MFN to international co-operation in a multilateral framework on competition, and some commentators recommend that it not be done.[10]

1.4 Transparency

The core principle of transparency in the multilateral trading system has two component parts: (i) the obligation to publish, or at least make publicly available, all relevant laws, regulations, and decisions; and (ii) provisions on the notification of various forms of governmental action to the WTO and to members.

1.4.1 Publication

The WTO agreements impose broad, generally worded publication obligations. GATT Article X requires publication of "laws, regulations, judicial decisions and administrative rulings of general application . . . pertaining to [various requirements and procedures affecting trade in goods]." These materials must be published "promptly in such a manner as to enable governments and traders to become acquainted with them." TRIPS Article 63 employs almost identical language. GATS Article III(1) requires Members to "publish promptly, and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement."

Competition law must be implemented in a clear and transparent manner. Transparency is a basic requirement for enforcement of any body of law but it is particularly important for competition law, as such laws are often written in general, framework form and are applied in a technical manner on a case-by-case basis. Thus, while it is necessary that the competition law itself and all implementing regulations be published and readily available, genuine transparency in competition law enforcement requires much more — that the competition agency disclose both the substantive basis for its decisions and the procedures by which it arrives at those decisions. Its disclosures should be made in a variety of forms so as to be accessible and understandable to all interested parties.

Competition law enforcement has different constituencies. They include the business community, potential victims of anticompetitive practices, and the public at large. A person or enterprise may be a member of more than one of these communities at any given time, of course. Each of the groups has distinct requirements for transparency in competition law enforcement, however. As potential respondents or subjects of competition law enforcement proceedings, businesses have a need to know the technical aspects of the law – what it proscribes and what it permits – and also how the law is enforced. They should have access to the law and implementing regulations and guidelines and to case decisions of the competition agency and courts, and they require knowledge of the procedures and methodologies employed by the competition agency in enforcing the law.

Potential victims or complainants must have an understanding of how the competition law protects them and how to pursue a remedy or make a complaint. The public at large is a diverse group, and includes businesses, consumers, academics and

government and regulatory officials. Collectively this group forms the constituency for an effective – or ineffective – competition law. Thus, the public at large needs a basic understanding of how competitive markets are essential to the operation of an effective market economy and how competition contributes to consumer welfare.

Applying the publication obligation to a multilateral framework on competition presents several issues, many of them related to burdens that the obligation could impose. It is generally agreed that the obligation would require publication of all competition laws and implementing regulations and guidelines. Most agree that important decisions by competition agencies and courts in competition cases should also be published, but because of differing procedures across countries it would be difficult to fashion a generally applicable rule in this regard. In some countries, for example, the competition agency provides its reasons for all final decisions, including those in which no enforcement action is taken. In others, there are no formal explanations of decisions not to take action. One formulation of the publication obligation would require publication of (i) final decisions by national competition agencies declaring conduct unlawful under the competition act or requiring a sanction or remedy for such conduct, or to ask a court to do so, stating the rationale for the agency's decision, and (ii) final decisions by the highest court or tribunal in which a case is heard in a case initiated by the national competition agency. These publications should be made in a timely fashion, and it has been suggested that, to the extent practicable, the information should be placed on an Internet site.

It is agreed that the publication obligation should not require the disclosure of confidential information. GATT,[11] GATS[12] and TRIPS[13] employ identical language in this regard, which seems to be appropriate in the competition context. Thus, countries would not be required to disclose "confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private."

Exclusions/exemptions pose special problems with regard to transparency. There is general agreement that whether or not exclusions/exemptions from a competition law are subject to the non-discrimination principle, they should be subject to the transparency principle. Fashioning a rule that would fairly apply the transparency principle in this context presents some problems, however, because exclusions/exemptions are numerous in many countries and they can exist in several forms.[14] Most common are statutory exclusions/exemptions – created explicitly in laws, including the competition law. Others are created by regulation or by administrative action, and others may be the *de facto* result of enforcement policies by competition agencies. Still others are judicially-created in common law countries. It would seem that the transparency principle could apply to *de jure*, statutory exclusions/exemptions. It might also apply to those formally established in regulations or administrative instruments. Presumably these need merely be published in their original form. Publishing information about less formal exclusions/exemptions, however, including judicially-created ones, is more problematic, because these are more subjective. A brief, generally-worded description might be sufficient.

1.4.2 Notification

The notification obligations in the WTO agreements are many and diverse. GATS Article III(3) is instructive for our purposes: "Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement." TRIPS Article 63(1) employs similar language. A similar notification obligation could apply to a multilateral framework on competition. A member could be required to provide annual notification to a WTO body of information that would be essentially coterminous with the publication obligation. Thus, the notification would include information on changes to competition laws, implementing regulations, enforcement guidelines and commentaries, on changes to exclusions/exemptions and on administrative and judicial decisions as described in the publication obligation.

1.5 Procedural fairness

The WTO agreements contain provisions relating to procedural fairness, but they are for the most part specifically related to the subject matter of each agreement – customs and charges on imports in the case of GATT,[15] qualification and licensing of service suppliers in the case of GATS,[16] and acquisition and enforcement of intellectual property rights in the case of TRIPS.[17] Procedural fairness issues are highly specific to competition law enforcement as well.

As with transparency, the different constituencies of competition law enforcement have somewhat different interests in procedural fairness. Respondents or subjects of investigations and proceedings face possible sanctions for violating the law, and they have strong “due process” interests. In the investigation stage they require notice of the investigation, of the grounds for possible enforcement action and of the underlying factual basis for it and access to the enforcement agency to present arguments and facts in their behalf. If there is an enforcement proceeding they again should have rights to information supporting the allegations, to present evidence in their defence, to evidentiary standards that conform to national norms in litigation and to a written final decision that includes the relevant legal and factual findings. Respondents should also have the right to a timely appeal from an adverse decision to an independent authority.

Victims of anticompetitive conduct and private claimants should have rights to petition the competition agency to ask the agency to undertake an investigation of the allegedly harmful practice and to present evidence supporting the petition, and to pursue, either through the agency or independently in court, remedies for unlawful conduct, in a manner that does not unduly interfere with the mission of the competition agency or the need to protect against baseless or vexatious lawsuits. Other interested third parties, which include third party witnesses and public interest and consumer groups, have need for access to the competition agency to submit complaints, for confidentiality

protections and for access to the public record in investigations and proceedings, consistent with the protection of confidential information.

The difficulty with fashioning standards relating to procedural fairness is that administrative and judicial procedures vary substantially across countries. The fundamental question relating to articulation of procedural fairness rules across countries is the level of detail that is required. If timely review of a decision is a necessary element of procedural fairness, for example, how does one define "timely"? If a respondent is entitled to information about the competition agency's concerns about its conduct, how much information must it receive? Here the WTO agreements can provide some guidance. They employ concepts relating to procedural fairness that are appropriate to competition law enforcement, even though they apply to other substantive areas in those agreements. They include such terms as "prompt review," "independent tribunals," "appropriate remedies," "fair and equitable procedures," and so forth. These concepts might be employed in an MFC in the same spirit and with the same effect as they apply in the existing agreements.

Protection of confidential information from unwarranted disclosure is a fundamental part of procedural fairness. Businesses have a strong interest in protecting "business secrets" or other proprietary information that, if disclosed to a competitor, could cause harm to the owner of the information in the marketplace. An informant who secretly provides information to investigators in a competition investigation might be physically or economically harmed if his or her identity were disclosed. Public policies exist in every country protecting against disclosure of certain classes of communications, such as deliberative process communications within government agencies and between attorney and client.

The problem comes, as it does with all the issues discussed above, in articulating a suitable, generic rule relating to confidential information for a multilateral framework on competition. While confidentiality rules are fundamentally the same across countries – business confidential information is protected virtually everywhere, for example – some information at the margin is treated differently. Here again, as with the transparency principle, the most practical course would seem to be to employ the language and concepts that are already found in other WTO agreements. Thus, procedural fairness for the protection of confidential information would require reasonable protections against disclosure of "confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private."[18]

1.6 Issues for developing countries[19]

Developing countries may face several issues relating to these three core principles that are unique to their situation. Some are outlined below, and there may be others. This topic would benefit from further inquiry and especially from input by developing countries themselves.

1.6.1 Non-discrimination

As discussed more fully above, laws implementing various aspects of industrial or other public policy can have discriminatory effect. The same may be true of exclusions/exemptions from competition laws. Every country has such laws, of course, but developing countries may consider it necessary to have relatively more of them. The issues noted above relating to how to treat such laws under the non-discrimination principle may be more acute for developing countries.

1.6.2 Transparency

Developing countries may not have in place the procedures for publishing the information on competition laws, procedures and decisions that the transparency principle would require. It could be useful to consider the additional burdens that the principle would place on these countries. If they would be significant, this might be an area that would be appropriate for the application of the progressivity concept, which is discussed below in the section on special and differential treatment.

1.6.3 Procedural fairness

The issues for developing countries in this area are similar to those in transparency. The required institutions and procedures may not exist in these countries, and creating and staffing them may impose special burdens. Developing countries might require, at a minimum, extra time to meet the requirements of this principle. It is worth asking, however, whether given the necessary time it might in some ways be relatively easier for those countries designing their competition enforcement regimes *de novo* to incorporate the necessary procedures from the outset.

2. Effective Action against Hard Core Cartels

2.1 Introduction

Hard core cartels, or agreements among competitors to fix prices, restrict output, submit collusive tenders or share markets, are the most serious and harmful form of anti-competitive conduct. It is now widely recognised that such conduct merits condemnation because it generally is not associated with any legitimate economic or social benefits that would justify the harm it causes. As a result, in recent years, countries have become increasingly aware of the need to combat this conduct. A prohibition against hard core cartels is found in almost every national competition law. The OECD has played a leading role in contributing to a greater understanding of hard core cartels and to the growing consensus that they must be detected, punished and deterred. Most recently, it has published a comprehensive report on hard core cartels and a publication entitled *Hard Core Cartels: Recent Progress and Challenges Ahead*.[20]

2.2 Harm caused by cartels

Hard core cartels cause significant economic harm. For example, they injure consumers and businesses who purchase cartelised products by raising prices and restricting supply. As a result, some purchasers elect not to purchase the product at the higher price, or they may purchase less of it. Purchasers pay more for that quantity that they do purchase, thereby unknowingly transferring wealth to the cartel operators. Moreover, cartels create waste and inefficiency. They shelter their members from full exposure to market forces, reducing pressure to control costs and to innovate, which among other things leads to the lessening of international competitiveness of a nation's economy. Buying side hard core cartels have pernicious effects too, but instead of increasing prices they decrease prices, i.e., the prices paid by cartel members to innocent sellers, below levels that otherwise would be paid for the products. In the developing world, this can have a particularly devastating effect on small businesses and farmers.

Quantifying the precise harm from cartels is difficult, however. Data collected in a recent OECD survey provide some additional information on the magnitude of cartels' harm. This survey addressed cases investigated by competition agencies in OECD Member countries and in 20 non-member countries between 1996 and 2000, in an attempt to learn more about the harm from cartels. The responding countries described a total of 145 cases, but in many of these it was not possible to estimate harm. Still, the amount of commerce affected by just 16 large cartel cases reported in the OECD survey exceeded an estimated USD 55 billion world-wide. The survey showed that the cartel mark-up above a competitive price can vary significantly across cases, and that in some it can be very large, as much as 50% or more. Thus, it is clear that the magnitude of harm from cartels is many billions of dollars annually.

Cartel operators know that their conduct is harmful, and they may go to great lengths to conceal it in countries where cartels are unlawful. The OECD survey disclosed examples of such conduct. In one case, two men, with the approval of their superior, loaded two automobiles with bid files and took them to the countryside, where it took a full day to burn them in "four huge bonfires." In another, the conspirators went to great lengths to keep track of and destroy incriminating documents, but when it was felt necessary to keep certain spreadsheets showing allocations of business among the conspirators, the files were copied onto computer disks and hidden in the eaves of one employee's grandmother's house. The survey also showed how cartel operators devise secret schemes to enforce their agreement and to punish those who deviate from it. In one case, an elaborate hearing system was devised; those who were accused of cheating – exceeding their quotas – were called to defend themselves at a meeting of high level managers, and if punished they could appeal to an even higher level.

2.3 The 1998 OECD Recommendation

On 25 March 1998, the OECD Council approved a *Recommendation Concerning Effective Action Against Hard Core Cartels*. The Recommendation's preamble condemns hard core cartels as the most egregious violation of competition law. The preamble notes that further action to enhance the effectiveness of anti-cartel enforcement is particularly important to the global economy, since cartels severely distort world trade and create waste and inefficiency. It also notes that success in the anti-cartel effort is especially dependent upon international co-operation, because cartels operate in secret and important evidence may be located abroad.

The Recommendation calls upon countries to take two sorts of actions. First, countries are urged to ensure that their competition laws effectively halt and deter hard core cartel conduct. This requires that sanctions and investigative powers are adequate and that exclusions and authorisations of what would otherwise be hard core cartels are both necessary and no broader than necessary to achieve their overriding policy objectives. Second, the Recommendation urges countries to co-operate with one another in enforcing their laws against cartels. It then sets forth several principles and practices that contribute to effective co-operation in the anti-cartel effort.

2.4 Issues of implementation

2.4.1 Defining hard core cartels

There is a consensus that competition laws should prohibit hard core cartels, but there is also agreement that it is difficult to define hard core cartel conduct in terms that are not over-inclusive. As noted above, hard core cartels are considered to include agreements among competitors to fix prices, restrict output, submit collusive tenders or share markets. Not all agreements among competitors having these effects are competitively harmful, however. For example, two competitors may co-operate for the purpose of creating a joint venture through integration of a part of their operations. The joint venture could provide efficiencies that the partners could not achieve independently, the result of which is to enhance competition. To achieve the pro-competitive benefits of the venture it may be necessary for the partners to agree, in an appropriately limited fashion, on the prices for the venture's output. Such an agreement, though it involves a form of "price fixing," would be legitimate.

The OECD Recommendation recognises this issue. The Recommendation does not attempt to define "hard core cartels" precisely. It lists the types of agreements that are traditionally considered to constitute hard core cartel conduct, but it excludes from the concept agreements "that are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies." (Paragraph I.A.2.). As noted above, the types of agreements generally considered to constitute hard core cartel conduct include agreements which have as their primary object the fixing of prices, rigging of bids

(collusive tenders), establishment of output restrictions or quotas and the sharing/division of markets by allocating customers, suppliers, territories or lines of commerce. Agreements that do not have these types of conduct as their primary object, but which simply have ancillary adverse effects on prices, output, customers, suppliers, territories or lines of commerce, may or may not be anti-competitive and therefore should not be condemned *ex ante*.

There is another definitional issue that is recognised in the Recommendation: countries may, for reasons of national policy, provide for exclusions of certain types of agreements from laws against hard core cartels, or for the authorisation of such agreements. The Recommendation states that hard core cartel conduct does not include agreements so excluded or authorised, but it urges that such exclusions or authorisations be transparent and that countries review them periodically to ensure that they are both necessary and no broader than necessary to achieve their overriding policy objectives.

2.4.2 Investigative tools

Cartels are usually conducted in secret. Their members generally know that their conduct is unlawful, and so they attempt to conceal it from their customers, the competition agency and the public. This characteristic of cartels requires that competition agencies have at their disposal special tools for discovering this conduct. The OECD's Competition Committee has studied this subject in some detail. In their fight against cartels, competition agencies must have, among other things, the ability to acquire quickly and with the element of surprise documentary and electronic evidence (computer files) that may contain evidence of an unlawful agreement. Competition agencies have found the "dawn raid," whereby investigators conduct a surprise visit to the offices of suspected cartel operators, to be an effective tool in this regard. Less well developed in many countries is the ability to obtain oral testimony or statements from cartel participants who would not otherwise co-operate with the investigation. This tool becomes more important as cartel operators become more sophisticated, and eliminate "paper trails" of their agreement.

A new and dramatically successful investigative tool against cartels is the "leniency programme." Such a programme promises amnesty from sanctions to the first cartel participant (and only the first) who comes forward to offer co-operation with the competition agency. These programmes may also offer some form of leniency short of full amnesty to other cartel participants who subsequently offer their co-operation to the competition agency. The possibility of leniency creates uncertainty within the cartel, and can provide a powerful incentive for its members to defect from the agreement. Indeed, leniency programmes have had spectacular success in some countries, bringing about substantial increases in the number of cartels uncovered and prosecuted and in the average level of fines in these cases. Leniency programmes do not work, however, unless there is: (i) a high degree of certainty regarding the nature of the leniency that will be granted, and (ii) a credible threat of strong sanctions for those who do not co-operate.

2.4.3 Sanctions

Strong sanctions against hard core cartels are a necessary component of an effective leniency programme, but they have an even more important purpose: deterrence against future activity of that kind. At a minimum, an effective deterrent should take away the prospect of gain from the cartel activity. Thus, cartel operators should face the prospect of heavy fines if their agreement is detected and prosecuted. The fines should at least equal the amount of the unlawful gain that the cartel members realised from their conspiracy. Many experts believe that the fines should exceed the gain, to take into account the fact that not all cartels are detected and punished. Studies have shown that as few as one in three cartels, or even one in six, are prosecuted and punished. Thus, the fines against those that are prosecuted should be at least three times the gain, to reflect the fact that potential cartel participants will tend to discount the expected costs of penalties by some factor that represents their view on the likelihood of detection and punishment.

The OECD has conducted a study of sanctions imposed by Member and observer countries against cartels. The competition laws of most countries provide for the imposition of large fines against cartels, and some countries have imposed fines in excess of the equivalent of USD one million, or even 10 million. In three OECD countries, the largest fines imposed in the period 1996-2000 were in excess of USD 100 million. These countries are a minority, however. Most countries have not yet begun to impose such large fines. Moreover, even the largest fines in most cases have not reached what many experts think is the optimum level of three times the unlawful gain, to achieve effective deterrence. Part of the difficulty has been that courts have been reluctant to impose fines at or near the maximum levels permitted under domestic laws. To address this issue, efforts have been made in some jurisdictions to educate courts on the importance of large fines in achieving deterrence, and to signal to courts the desirability of imposing higher fines.

Sanctions against natural persons for their participation in the conspiracy can also be highly useful in the fight against cartels. These sanctions can take the form of substantial fines or, in a few countries, the criminal sanction of imprisonment. Sanctions against individuals can serve as an important supplement to organisational fines, especially in situations where it is not possible to impose the optimal fine against the business because, for example, the fine would bankrupt it. The prospect of individual liability can add an important level of deterrence, and individual sanctions also have another beneficial effect – they create an incentive for culpable individuals to defect from the cartel and to co-operate with the investigation, in order to avoid punishment. Currently only a few countries regularly sanction individuals for cartel conduct, however.

A third type of sanction that can also provide additional deterrence is the recovery of money damages from cartel operators by the victims of their unlawful conduct. While the laws of several countries provide for the recovery of such damages by private

parties, the sanction is regularly employed in only a few countries. Thus, the basic conclusion of the OECD study on sanctions is that they are not yet at optimal levels in most countries.

2.4.4 International Co-operation

As noted above, the OECD Recommendation calls for enhanced international co-operation in the fight against hard core cartels. The number of cartels that have cross-border effects is growing. National competition agencies often find it difficult to prosecute such agreements, because some or all of the cartel participants, as well as important evidence, may be located abroad, not subject to a country's jurisdiction. It may not be possible for any single national competition agency to successfully prosecute such a conspiracy without co-operation from one or more other countries. It is proving difficult for countries to engage in meaningful co-operation against international cartels, however. This topic is explored more fully elsewhere in this paper, in the discussion on international co-operation.

2.4.5 Recent developments

There has been some significant progress in the fight against cartels since the OECD issued its recommendation. Several countries have enacted new competition laws, providing for higher maximum fines in cartels cases; they have authorised the use of new investigative tools in cartel investigations and have introduced leniency programmes; they have entered into new bilateral and plurilateral co-operation agreements, which promote international co-operation in competition cases; some countries are considering classifying cartel conduct as a crime, which would permit the imposition of stronger sanctions; and most importantly, many countries are now more aggressively targeting and prosecuting cartels – the number of cartel cases is on the rise. As heartening as this progress is, however, it is clear that it is only a beginning. Moreover, it seems that most of this progress is occurring in developed countries – those that have been actively enforcing a competition law for a period of time. Thus, there is much more to be done across all countries to develop the will and the means to prevent and prosecute this conduct.

2.5 Issues for developing countries

2.5.1 International cartels

In recent years a great deal of attention has focused on international cartels – those that affect more than one country, perhaps even the entire world, and whose members are located in different countries. The phenomenon of international cartels is a growing one; globalisation has brought about markets that are larger than national borders, and cartels operating in those markets have expanded geographically as well.[21] International cartels affect all countries, developed and developing alike. They harm consumers in

developing countries by raising the prices of products that those countries import. One study of international cartels found that in one year, 1997, developing countries imported goods valued at approximately USD 81 billion from industries in which there had been a price fixing conspiracy in the 1990s.[22] International cartels can also have another, equally pernicious effect on developing economies: by a variety of means they can inhibit new entry, by both foreign and domestic firms, into the cartelised markets.[23]

Developing countries that do not have competition laws have no power to prevent or punish these international cartels. But it is difficult even for those that do have competition laws to take action against international cartels for the reasons outlined above – much if not all of the cartel conduct has occurred in other countries; the cartel operators and evidence of their conduct are located abroad, outside the reach of domestic laws; and investigating these agreements requires resources that are not available to most competition agencies in developing countries.

If developing countries are to successfully prosecute international cartels they must co-operate with other countries. But as noted above, international co-operation is difficult in these cases. The OECD has studied international co-operation in connection with the prosecution of two well-known international cartels – those involving vitamins and graphite electrodes. It found that while those conspiracies had effects world-wide, they were prosecuted in only a few jurisdictions, all of them OECD countries.[24] It proved to be difficult for countries seeking evidence about the cartels to obtain it from those who first prosecuted the conduct. Almost without exception the cartels were prosecuted successfully only by those countries that benefited from voluntary co-operation from one or more cartel participants, usually pursuant to a leniency programme.

The international competition community faces a challenge in finding ways to deal effectively with international cartels. Unless more countries are able to prosecute them, it may be that it will not be possible to provide an effective deterrent against the conduct. That is, the sanctions imposed by a relatively few countries, even if optimal for those countries, may not be sufficient to offset the gains that accrue to a cartel elsewhere, thus permitting the cartel ultimately to be profitable even after prosecution. Consumers in countries that do not prosecute these cartels are not compensated, either through fines collected by their governments or through private damage recoveries, for the harm that they are caused. (They do receive one significant benefit in those cases that are prosecuted elsewhere, however: the cartel conduct is stopped – presumably – at no cost to the non-prosecuting country.) The proponents of a multilateral framework on competition point out that such an agreement would provide for strengthened co-operation to combat hard core cartels.

2.5.2 Domestic cartels

While international cartels are harmful to developing countries, a greater harm to those countries may come from domestic or local cartels – those that operate entirely

within a single country or perhaps within a few neighbouring countries. Evidence of the extent of cartel activity in developing countries is sparse, but it is highly likely that such cartels are numerous. Many developing countries do not have an effective anti-cartel programme – some have no competition law at all – and the tendency of business people to collude when they can get away with it is strong.

The evidence on domestic cartels from the OECD survey is striking. Most of the 145 cases reported in the survey were domestic cartels. Some of these had lasted for decades, had involved dozens, or even hundreds, of participants and had affected commerce valued in the billions of national currency. The OECD report established that these cartels occurred in all economic sectors, but were more common in some, including construction, construction materials, sales to government institutions, bulk food, electrical equipment, the services sector particularly local transport, professional services and health care. These sectors are important for both developed and developing economies. In addition to the direct harm that these cartels have on local consumers and businesses, they undermine the ability of an economy to compete in regional and global markets. If there is a lesson for developing countries from these findings, it is that they should concentrate on effective action against cartels occurring within their borders, which cause a great deal of damage and over which they have relatively greater control.

2.5.3 Building a consensus against cartels

A successful anti-cartel effort requires broad support within a country – support from government, from the public and from the business community. Businesses are consumers too. Cartels force them to pay higher prices for inputs, which in turn can severely undermine their ability to compete internationally, within their region and sometimes even domestically. Building support for an anti-cartel policy requires more than just a public relations campaign, though it requires that as well. The competition law and accompanying regulations should be carefully drafted; the competition enforcement agency should be given adequate resources – money, people and effective enforcement tools; and there should be a close look at exclusions and exemptions from the anti-cartel provisions of a competition law. As noted in the OECD Recommendation, such exclusions should be necessary to achieve legitimate public goals and drafted to have minimum impact on competitive markets. These topics are explored further elsewhere in this paper and in separate discussions in this Global Forum.

3. Special and Differential Treatment

The concept of special and differential treatment relates to special rules that apply to developing countries to enable them to become fully integrated into a given international environment. It is well established in the trade context, and the question that is presented is the extent to which it should apply in the trade and competition context as well, and specifically, how it should be incorporated into a possible multilateral framework on trade and competition.[25]

3.1 The origins and evolution of special and differential treatment in the GATT

When GATT was established in 1947, 11 of the original 23 signatories were developing countries. There was no formal recognition of this status, however, and there were no special provisions or exceptions relating to these countries. Thus, special and differential treatment did not exist at the outset. By the time of the 1954-55 GATT review session, however, developing countries had recognised that they faced special challenges that interfered with their full participation in international trade, and they began to push for these concerns to be addressed. In the 25 years that followed, several provisions implementing special and differential treatment were incorporated into the agreement.[26] These rules were formed around two basic concepts: non-reciprocity and preferential market access. Non-reciprocity was intended to permit developing countries to protect domestic industries through higher tariffs or other trade barriers that were not available to developed countries. That is, developed countries agreed not to demand of developing countries reciprocity for commitments to lower these barriers. Preferential market access, on the other hand, was directed toward exports of developing countries, providing for preferential tariff treatment for these exports in developed countries.

By the 1980s, however, it was becoming clear that these measures had not adequately addressed the marginalisation of developing countries from the international trading system. Evidence was mounting that protection of domestic industries by means of higher tariffs had not resulted in their becoming competitive internationally. Further, preferential market access provisions had not had their intended effect for a variety of reasons, including the use of contingency measures by developed countries, the erosion of preferences through periodic reductions of MFN tariffs and the exclusion from the GATT of products from key sectors for developing countries, such as agriculture. Thus, the focus shifted from protectionism and preferential market access to procedural measures – providing special rules to permit developing countries to adjust more easily to their WTO obligations.

The WTO agreements feature no less than 145 S&D provisions. The WTO has classified them under five main headings[27]:

1. *Provisions aimed at increasing trade opportunities through market access*. The pre-1980 measures on enhanced market access were not abandoned. Several of these provisions were carried forward into GATT 1994.

2. *Provisions requiring WTO members to safeguard the interests of developing countries.* These are mostly of a general nature, expressed in broad hortatory ("best endeavours") terminology, urging members to "take fully into account," "give particular attention to", and take "special regard" of the needs of developing countries when implementing the agreements.

3. *Provisions providing greater flexibility of commitments.* The non-reciprocity provisions were continued, but were augmented by additional provisions authorising greater flexibility to developing countries in implementing rules applying to market access, exemptions or subsidies. Flexibility now accounts for 48 of the 145 S&D provisions, and thus has emerged as one of the most important instruments of S&D under the WTO.

4. *Provisions allowing for longer transitional time periods.* For example, the TRIPS Agreement granted developing countries a delay of up to five years, and least developed countries[28] a delay of up to eleven years, to conform their legislation to the Agreement, with a few exceptions. The TRIMS Agreement gave least developed countries, developing countries and developed countries seven, five and two years, respectively, to phase out their inconsistent trade-related investment measures.

5. *Provisions providing for technical assistance.* These provisions addressed the growing awareness that successful implementation of the agreements in developing countries required an adequate legal and institutional framework, and called for assistance to developing countries in that regard.

3.2 Special and differential treatment in a trade and competition context

As many as 50 of the 142 WTO members do not yet have competition regimes, and many of those that do have had one for 10 years or less. Moreover, there are special challenges in establishing effective competition laws and policies. A country new to competition policy may not yet have developed a “competition culture;” its markets may be characterised by high concentration and a history of state intervention; the competition agency may lack effective resources and enforcement capabilities; and there may be a lack of political will to enforce the competition law against powerful interests. It would seem that in this context the application of the special and differential treatment concept in some form should be considered.

There are different possible formulations for the application of S&D in a competition context. Some that have been noted are:

- *Applying the GATS formulation of S&D.* Under GATS market access and national treatment are negotiated concessions relating to a particular service sector or subsector. That is, WTO members can choose the sectors in which they liberalise trade (“positive listing”) and can place conditions and limits upon that liberalisation, provided those limits are scheduled ("negative listing"). This approach might be applied in the competition context, permitting members to apply a competition policy in

a gradual way to their economy.

- *A broad framework agreement with exceptions/exemptions.* This is essentially the multilateral framework approach, which is explored more fully below.

- *A plurilateral approach.* If a multilateral consensus could not be reached on trade and competition, it might be possible to do so plurilaterally, through bilateral and regional agreements. Indeed, the multilateral and plurilateral approaches are not necessarily mutually exclusive.

- *Providing distinctions between different categories of developing countries.* Every country is at a unique place in its development of a competition policy. In this context, one size does not fit all. This fundamental fact could be taken into account by means of structuring S&D to apply differently to different categories of countries according to their level of development and their progress in constructing a market economy.

- *Providing for transition periods and technical assistance.* These are fundamental aspects of S&D that would probably be a part of any programme to which the concept is applied.

3.3 Special and differential treatment in a possible multilateral framework on competition

Of the five types of S&D provisions listed above, two – "flexibility" (type 3 above) and "progressivity" (type 4) – have come to be considered as most synonymous with the S&D concept as it applies to trade and competition. While the other types of provisions are also clearly part of S&D, flexibility and progressivity have more precise meanings, and are often used together and in place of the broader "special and differential treatment" term. In this context, flexibility generally refers to the substance of a competition law and to the ability of a developing country to choose from a menu of options in structuring its competition law. A small developing country that is open to trade might decide, for example, not to provide for merger control in its competition law. Alternatively, a developing country might exclude certain sectors, types of conduct or economic entities from the coverage of the law. Progressivity generally refers to the timing and means of implementation of a competition regime. Just as some of the existing WTO agreements accorded developing countries more time to implement their provisions, institutional and resource constraints in developing countries may dictate the need for extended periods for these countries to fully implement a competition law enforcement regime.[29]

A threshold question when considering special and differential treatment in the competition context is whether it should be considered as a core principle, as with non-discrimination, transparency and procedural fairness. There are differing views on this point. A number of developing countries urge that it should be a core principle.[30] While paragraph 25 of the Doha Declaration does not specifically refer to S&D as a core principle, it does state: "Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them." The best way to do that, it is said, is to consider it as a core principle. A counterargument to this position, however, is that S&D should be thought of as a key element of operationalising the agreement, but not as a core principle within it. Core principles, it is argued, apply to all aspects of implementation of the agreement and, one assumes, throughout the life of an agreement. Inherent in S&D, one could say, is the expectation that if it is implemented successfully there will someday no longer be a need for it. In any case, regardless of whether or not S&D is denoted as a core principle, there would appear to be little doubt that flexibility, including progressivity, for developing countries will be a key element in any new agreement that is negotiated pursuant to the Doha Round.

Thus, the overriding question is how the concept of S&D, or flexibility and progressivity, could be implemented in such a framework. It is worth noting in this context that a limited agreement, all else being equal, imposes fewer obligations on all countries, including developing countries than does a comprehensive one. A framework that does not include merger control, for example, obviates the need to decide whether developing countries should exercise that power. This type of compromise on the scope of eventual obligations, made in the stages of designing the agreement, takes into account the needs and particular situations of developing countries. In this regard most proposals for an MFC describe one of limited scope. The European Union, an early proponent of an MFC, suggests that its operative provisions include, only the three core principles of non-discrimination, transparency and procedural fairness, a commitment to treat hard core cartels as a serious breach of domestic competition law and modalities on voluntary co-operation and capacity-building.

There would be many S&D issues raised by a relatively limited framework as is being put forward by the proponents, however. The core principle provisions would implicate both flexibility and progressivity. Flexibility implies, for example, that developing countries have latitude to implement various industrial policies that would affect the application of their competition law, including especially the creation of exclusions/exemptions from the competition law. As discussed above in the section on core principles, the application of these policies could result in discrimination against foreign enterprises, possibly in violation of the core principle of non-discrimination. Flexibility also impacts the core principle of transparency, which would require that flexibility measures be made fully transparent.

Progressivity is also highly relevant to implementation of the three core principles. Putting in place transparency procedures, as discussed above, could be difficult for

developing countries where such procedures are not now the norm. Progressivity could be even more important for the core principle of procedural fairness. Developing countries may not have the institutions and procedures that would be necessary to ensure procedural fairness in competition law enforcement, and it could take time and resources to create them. S&D would seem to require that they be given this additional time, as compared to developed countries.

Whether or not a prohibition of hard core cartels is the only substantive provision of an MFC, flexibility, and specifically the ability of developing countries to create exclusions/exemptions from their competition laws for S&D reasons, presents some key questions. Of course, every country, developed and developing, that has a competition law also has created exclusions/exemptions from it of one sort or another. It is argued, however, that developing countries have special requirements in this area – that they should be permitted to create exclusions/exemptions necessary for the development of domestic industries and enterprises. Here is where the argument is joined, however. There is a body of evidence that S&D, and specifically in this context exclusions/exemptions from competition laws, do not contribute to industrial development and international competitiveness and that they may, in fact, be harmful in this regard.[31] There is no consensus in this regard, however, and one could expect that this aspect of flexibility – the ability of developing countries to create exclusions/exemptions – would be a part of any special and differential treatment component of an MFC.

4. Voluntary Co-operation in Competition Law Enforcement

Promoting international co-operation in government and economic policy is a hallmark of the OECD, and the OECD's work in this field extends to competition law enforcement. This section provides an overview of OECD work in this area and of the topic of co-operation in general. It also highlights certain issues on co-operation that are particularly relevant to developing countries.[32]

The term “voluntary co-operation” is broad, encompassing an entire range of actions by which countries may work with one another. There can be at least two general types of international co-operation in competition law enforcement. The first includes exchanges of information and experiences on a variety of matters at the policy level, including content and form of competition laws and regulations, institutional design of a competition agency, analysis of competition issues, case handling techniques and the like. That type of co-operation might be called “institutional co-operation.” The second is case-specific co-operation, in which information is exchanged and assistance rendered in specific competition cases or investigations in which two or more countries have an interest. This paper will deal briefly with the first type and in greater detail with the second.

4.1 Institutional co-operation

This type of co-operation takes many forms. Generally it includes communications between competition agencies, often at high levels, in bilateral, plurilateral and multilateral settings, on policy level issues relating to competition law enforcement. It can include the modalities of peer review and technical assistance, both of which are explored elsewhere in this paper. It includes much of the activities of the OECD Competition Committee. In the Committee's meetings, member and observer countries explore issues of analysis and enforcement policy in depth, often in "roundtable" discussions lasting two hours or more. Delegations provide written contributions for these discussions, and their contributions, an analytical paper by the secretariat and a summary of the discussion are compiled, published and posted on the OECD Internet site, where they are available to everyone.

Of course, the OECD Competition Committee is not the only place where co-operation of this kind occurs. It occurs in other international organisations, including UNCTAD and the WTO. It occurs in regional settings, in organisations such as the European Union, APEC, NAFTA, COMESA, and CARICOM. It also occurs at various times at the bilateral level, between countries that, because they are neighbours or close trading partners, have developed close working relationships.

The benefits of institutional co-operation, in the OECD Competition Committee and elsewhere, are well known. At the most general level, they help to build working relationships among competition enforcement officials and between national competition agencies. They also help to build consensus on best practices in competition law enforcement, and over time they bring about convergence in competition policy across countries.

4.2 Case-specific co-operation

This type of co-operation is becoming more important, and more common. Business practices increasingly have cross border effects, and voluntary co-operation among national competition agencies is effectively the only way that countries can deal collectively with such conduct. There are important limitations on the ability of national competition agencies to engage in case-specific co-operation, which are explored more fully below, but the trend toward such co-operation is clear.

4.2.1 The OECD Recommendation

Since 1967 there has existed a Recommendation of the OECD Council on international co-operation in competition law enforcement. The Recommendation was revised most recently in 1995.[33] It recommends that member countries co-operate in three ways: 1) by notifying one another of investigations or proceedings that "may affect important interests" in another country;[34] 2) by exchanging "relevant information on

anti-competitive practices as their legitimate interests permit them to disclose," subject to appropriate safeguards, including those relating to protecting confidential information;[35] and 3) by co-ordinating their actions "when two or more Member countries proceed against an anti-competitive practice in international trade."[36]

An appendix to the Recommendation spells out in greater detail how countries might co-operate in these ways. It describes circumstances that would give rise to the notification obligation, the recommended content of the notification and the means by which notifications can be made. In that regard it instructs the Competition Committee to maintain a list of contacts in member countries for such notifications. The appendix also elaborates the means by which two or more countries can co-ordinate investigations. Among other things they can share information about applicable time periods, share factual information (again subject to important limits on disclosing confidential information), assist one another in obtaining information voluntarily from subjects or third parties, and co-ordinate discussions or negotiations concerning remedial actions.

The appendix also suggests procedures by which a country can provide assistance to another in an investigation or proceeding that the assisted country has undertaken. The assisting country can provide relevant information from its own files, from the public domain, from third parties on a voluntary basis or from third parties by means of compulsory process. All of these procedures are subject to national laws governing protection of confidential information and the use of compulsory process. Further, the Recommendation contains a "positive comity" provision. It recommends that a country should (1) give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests, and (2) take whatever remedial action it deems appropriate on a voluntary basis and in considering its legitimate interests.[37]

Finally, the Recommendation contains a procedure for consultation and conciliation. When differences arise between countries relating to an investigation or proceeding undertaken by one country that affects another, or relating to a positive comity request, countries are invited to consult about such differences, and if they cannot be resolved to engage the Competition Committee as a conciliator. The appendix to the Recommendation sets out procedures for such consultation and conciliation. To date, however, the conciliation procedures have not been invoked.

4.2.2 Co-operation agreements

An important and growing phenomenon in international co-operation in competition law enforcement is the creation of formal co-operation agreements between countries. Most are bilateral agreements, between countries that have important trade or geopolitical ties. Some are plurilateral, however. They may exist as a part of regional free trade agreements, such as NAFTA or MERCOSUR. There are now dozens of such

agreements, and more are created each year. They involve OECD and non-OECD countries alike. Many of these agreements have roughly the same form and content, which resembles that of the OECD Recommendation. They provide for notification of investigations or proceedings affecting the other party, for exchange of information, for co-ordination of investigations and proceedings, for positive comity and for consultations. They may provide for technical co-operation, especially if one of the parties is a developing country, and for periodic meetings between senior enforcement officials of the contracting parties. Most of these agreements do not require that a country provide information that it considers confidential, however.

4.2.3 Competition Committee studies of international co-operation

The Competition Committee has recently conducted studies of international co-operation in two types of investigations and cases – transnational mergers and international cartels. Both studies were based on responses to questionnaires issued to member country delegations and to non-member invitees to a Global Forum on Competition.

4.2.4 Transnational mergers

It is widely perceived that the incidence of transnational (or "cross-border") mergers – mergers that have effects in more than one country – has increased significantly in the past decade, though it is difficult to quantify this trend. As trade barriers have fallen, the geographic scope of markets has expanded. Enterprises have expanded correspondingly, often by merger and acquisition, in an effort to serve these broader markets.

There are now as many as 60 countries with merger control laws. The parties to transnational mergers may have to notify, and be subject to investigations by, the competition agencies of at least two and perhaps many competition agencies simultaneously. Apart from the financial burdens and delays associated with such multiple reviews, the merging parties run a risk of being subject to inconsistent and sometimes conflicting results in different countries. The competition agencies, for their part, face equally difficult conditions in such mergers. One or both of the merging companies may be foreign; the assets or operations that impact the domestic market may be located elsewhere; important information relevant to the competition analysis may, for jurisdictional reasons, not be accessible to the domestic agency; two agencies investigating a transaction in ignorance of each other's involvement may work at cross purposes, or at a minimum may duplicate their efforts unnecessarily. The benefits of international co-operation among competition agencies in such situations are obvious, and it is occurring with increasing frequency.

Co-operation between countries interested in a transaction may begin as soon as there is awareness that a sister agency is conducting an investigation. Competition

officials have described the co-operation process as an informal, collaborative dialogue, usually between the case handlers in the participating agencies. Their collaboration may depend substantially on the degree to which the merging parties have granted the relevant competition agencies the authority to exchange confidential information, a topic that is discussed further below. Whether or not they can discuss confidential information, however, they do not consider themselves constrained from exchanging "deliberative process" information – analysis and conclusions about market definition or competitive effects, for example. Such information is non-public, but it does not contain business confidential information. Co-operating agencies may also share information on the investigative process, such as the timing, and what documents and information have been requested.

Co-operation in the remedy phase has been especially fruitful. The benefits of co-ordination in this area are manifest in situations where the merger in question has anticompetitive effects in more than one country, ensuring that a remedy imposed by one country does not adversely affect the ability of another also to obtain effective relief. International co-operation has not reached the level of formal participation by one country in the enforcement phase in another country, however. Countries continue to conduct their own investigations and reach their own enforcement decisions in every case.

As noted above, the constraints on disclosing confidential business information that apply to virtually every national competition agency can substantially inhibit the ability of the agencies to co-operate. Experience has shown that substantial co-operation among competition agencies is possible in most cases only with the consent of the merging parties. Merging parties have been granting waivers of confidentiality with increasing frequency. They recognise that it can be in their interest to do so, to accelerate the investigation process and to make it more efficient, and to help ensure that countries reviewing their transaction do not reach inconsistent results. The business community still approaches confidentiality waivers with caution, however, citing concerns about improper "downstream" disclosure of business sensitive information.

The OECD survey disclosed another significant aspect of international co-operation in transnational merger investigations: it is uneven across countries. While respondents indicated that they have an interest in expanding their co-operative relationships, experience to date has been that they tend to develop between countries that more frequently investigate the same merger and that otherwise share important common interests. Such relationships currently exist between the United States and Canada and between the U.S. and the European Commission, between EU Member states and between Australia and New Zealand, for example. This phenomenon raises issues for those countries that are not parties to such arrangements, which are discussed further below.

4.2.5 International cartels

The Competition Committee's study of co-operation in investigations of international cartels reveals a similar but by no means identical situation to that relating to transnational mergers. Co-operation in cartel investigations is growing; it most often takes the form of "informal" co-operation – exchanges of deliberative process information among case handlers, such as case theories, affected markets and witness evaluations; and it occurs most frequently between countries that have developed close working relationships over time. The cartel and merger contexts differ in one important respect, however: the willingness of the subjects of an investigation to facilitate the exchange of confidential information. They almost never do so in cartel investigations, unless they are simultaneously participating in leniency programmes in two or more countries. It is obvious that their incentives to facilitate such information exchanges are quite different as between merger and cartel investigations.

The result is, as discussed above in section 2, that meaningful co-operation in these investigations has been limited. The challenge facing competition agencies in this situation is to find ways to co-operate effectively in law enforcement investigations, which may be facilitated by exchange of confidential information in the absence of consent by the parties who provide it, taking care to provide adequate safeguards for protecting its confidentiality. There are numerous situations in which such exchanges are possible. For example, some agencies can exchange confidential information through mutual legal assistance treaties (MLATs) and other assistance agreements. The European Commission and EU Member states can engage in such exchanges, as can the United States and Australia, pursuant to a special agreement between those two countries. The US has reported a number of successful instances of co-operation in obtaining and exchanging information with Canada, the EU and its Member states, and Japan. Denmark, Iceland and Norway recently entered into an agreement permitting the exchange of confidential information, and some other countries, e.g. France, Ireland and the United Kingdom, have recently liberalised their laws to permit exchanges of confidential information in some instances, even in the absence of a bilateral agreement. These recent developments signal an incipient trend, and meaningful co-operation, including exchange of confidential information, among competition agencies in cartel investigations, while not always possible, is no longer unusual.

The business community expresses strong views on the need for the protection of confidential information. They are properly concerned about protecting business sensitive information from unauthorised disclosure, and about the protection of rights of due process. They urge, among other things, that countries exchanging confidential information have comparable substantive laws, procedural protections and confidentiality protections; that information be exchanged only when there is a possible violation of the competition law of the requesting country and the requesting country has jurisdiction over the parties in the matter; that legal privileges not be eroded in the course of an information exchange; that information exchanges not affect the integrity

and viability of leniency programmes; and that when an exchange of confidential information is contemplated, affected persons should receive prior notice of the proposal and have the ability to contest the disclosure before an independent arbiter.

The competition enforcement community is sympathetic to many of these positions, but it feels that some are too strict, in particular the proposed requirement for prior notice. The Competition Committee is engaged in ongoing discussions with the business community on these issues, through the Business and Industry Advisory Committee.

Finally, there is another issue that affects the ability of countries to exchange information in cartel investigations – the strict confidentiality requirement that applies to information provided by leniency applicants. (Leniency programmes are discussed above in Section 2.) All successful leniency programmes provide for such confidentiality, for without it, cartel participants would be reluctant to offer their co-operation to the investigators. Thus, while this confidentiality protection contributes substantially to successful cartel prosecutions in countries with leniency programmes, it inhibits the ability of those countries to co-operate with others. The Competition Committee is studying this issue, with a view toward encouraging more international co-ordination of leniency programmes.

4.3 Issues for developing countries

It is clear that participation by developing countries in case-specific international co-operation is limited. The result is, as noted above, that they are less likely to successfully prosecute international cartels, and less likely to benefit from confidentiality waivers by parties to a transnational merger. Addressing this problem is not easy. It requires the attention of all countries.

It hardly needs to be said that a country that does not have a competition law cannot fully benefit from co-operation with those that do. Thus, enacting a sound competition law is an indispensable step toward participation in international co-operation. Practically, however, more is required of the developing country. It must acquire a reputation for fair and effective enforcement of its law. It must also have in place effective procedures for protecting confidential information, which conform to international standards. Both private parties and foreign competition agencies are more willing to share non-public information with agencies in which they have confidence in these areas.

The burden does not fall solely on developing countries, however. Developed countries must explore ways to broaden their co-operative efforts with their foreign counterparts, both developed and developing countries. There are ongoing discussions about how to accomplish this. In connection with current discussions in the WTO on a possible multilateral framework on competition it has been proposed that such a framework include provisions relating to voluntary co-operation.[38] The OECD

Competition Committee is working on “best practices” in international co-operation, and it is considering incorporating the results into OECD Council Recommendations, which would be available to all.

It is important to keep the topic of case-specific international co-operation in perspective, however. As noted above, the incidence of case-specific co-operation is growing but it is still limited, even among developed countries. In the short run, therefore, developing countries might focus more on domestic competitive restraints, which are almost certainly causing as much or more harm to local consumers as are those that originate abroad. In this regard, the importance for developing countries of the first type of co-operation, called institutional co-operation for purposes of this paper, should not be overlooked. This type of information exchange and capacity building will have more immediate benefits for countries new to competition law enforcement. It will assist in developing sound competition laws and regulations and in creating an effective competition authority and judiciary, which will achieve significant benefits for domestic consumers immediately, while simultaneously enhancing the agency’s ability to co-operate with foreign counterparts when it is necessary.

5. Peer Review and other Possible Compliance Mechanisms in the Trade and Competition Context

Any consideration of a multilateral framework on competition must take into account the compliance mechanism that would apply to it. The choice of mechanism will depend upon the objective(s) that it is to serve and the types of compliance issues that it will be required to address. The role that the existing WTO dispute resolution mechanism might play with regard to compliance issues for an MFC is a key question in this discussion. Negotiations on a multilateral framework on competition await the "explicit consensus" referred to in paragraph 23 of the Doha Ministerial Declaration, only after which the content and modalities for multilateral rules will be known. However, it is useful at this stage to canvass a range of compliance mechanisms that may be appropriate in the context of an MFC.

Compliance and/or dispute settlement mechanisms such as consultation, good offices, conciliation and arbitration often feature in Regional Trade Agreements and are suggested below as possible options for an MFC. These various methods are used in contexts quite different from that of the WTO; for example, they may apply in disputes between private parties and/or States and private parties. While noting these differences, it is still worth considering whether these mechanisms can be adapted or transposed into a multilateral set of rules negotiated within the WTO. Given that the Dispute Settlement Body (DSB) of the WTO has exclusive jurisdiction for matters arising from the multilateral agreements in the WTO system, the possibility of the Dispute Settlement Body carrying out a de jure compliance function under an MFC has also been put forward. These mechanisms are not necessarily mutually exclusive; indeed a combination of two or more methods may be desirable.

Peer review is a specialised form of co-operation that many feel can be particularly useful in the context of international competition law enforcement. Thus, it has been proposed that a multilateral framework on competition have as one of its elements a procedure for peer review of the competition law enforcement regimes of member countries. Below is a brief treatment of that topic. First, an overview of other possible compliance mechanisms and their implications for a multilateral framework on competition is provided. Then the concept of peer review is explored in depth. The concept is described and its advantages for competition policy are outlined. Peer review procedures currently in place in different contexts are described, in particular the use of the procedure in competition policy in the OECD. Finally, some issues relevant to the employment of the process in the trade and competition context are identified.[39]

5.1 An overview of compliance mechanisms in the trade and competition context

5.1.1 Consultation, mediation and conciliation mechanisms

These mechanisms employ voluntary, non-coercive means of resolving disputes. Consultation involves direct communications between disputants with a view toward resolving their differences voluntarily. Consultations are almost always the first step in any alternative dispute mechanism. Consultation procedures are widely employed in the WTO agreements. The WTO Dispute Settlement Understanding (DSU) requires that consultations occur before a panel is established.[40] There are also special consultation procedures provided in other instruments containing competition-related provisions.[41] Various regional trade agreements also provide for consultation procedures in the competition context. These can be found in NAFTA, APEC, and the EEA.[42]

"Mediation" and "conciliation" both refer to the intervention of a mutually-agreed neutral third party to assist in reconciling a dispute. Conciliation is sometimes considered to refer to a more formalised or mandated form of mediation. The conciliator may play a more proactive role than in simple mediation. Generally, mediators and conciliators have no decision-making authority, and their role is simply to help parties to reach an agreement. The settlement of a dispute is voluntary, but in some circumstances may be made enforceable through registration of the agreement with a court or formalisation in a contract. The OECD Revised Recommendation of the Council concerning Co-operation between member Countries on Anti-competitive Practices affecting International Trade contains a consultation and conciliation procedure. Where consultation does not lead to a satisfactory conclusion, the members may agree to resort to the good offices of the Competition Committee for conciliation.[43] These procedures have never been invoked, however.

5.1.2 Arbitration

Arbitration is a formal adjudicative process by which parties to a dispute submit the matter to an impartial third person or panel selected by the parties. Arbitral decisions are usually enforceable. The rules of procedure for the arbitration are generally prescribed by law or by an arbitral body, although the parties may modify them. An alternative to litigation in court systems, arbitration is widely used in private international commercial disputes. More than 130 countries are signatories to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Various other multilateral and bilateral arbitration conventions also exist. As a result, arbitral awards receive a greater degree of international recognition than judgements of national courts. Arbitration is generally quicker and less expensive than court litigation.

Arbitration clauses for the settlement of disputes exist in a number of bilateral and plurilateral free trade agreements,[44] and the process is explicitly envisaged by the WTO DSU. Article 25 of the DSU provides that resort to arbitration is possible, subject to mutual agreement and sufficient advance notice to all members. Arbitral awards are to be notified to the Dispute Settlement Body (DSB), the Council and the relevant WTO Committee.

5.1.3 The WTO Dispute Settlement Understanding

The DSU is an obvious possible compliance mechanism for a multilateral framework on competition. WTO members have recourse to the dispute settlement mechanism in cases where they consider that a benefit that should accrue to it under a WTO agreement is being nullified or impaired or that the attainment of any objectives of an agreement is being impeded. The DSU provides for the establishment of a panel of experts to resolve disputes where consultations have proved unsuccessful. A system of strict time periods is imposed so that the dispute can be resolved in a timely manner. Panel decisions are binding and there is the possibility of appeal of decisions. The DSU also provides for compensation and the suspension of concessions in cases of non-compliance with decisions of the DSB.

Using the DSU in the competition context presents several issues. On the one hand, it could be argued that the mechanism should apply to all WTO agreements, and to exclude one, in this case a competition framework, would create a fundamental inconsistency in the system. On the other hand, it is urged that competition law enforcement is a highly specialised field and that the members of the usual DSB would not be qualified to decide such cases, and certainly not those involving de facto enforcement issues, although only de jure compliance is envisaged by the proponents of an MFC. There are also issues related to sanctions for non-compliance with the decision of a panel or appellate body. Under current rules compensation is awarded to the complaining party or the party can impose retaliatory trade measures. Specialised

measures may be more appropriate in the competition context, which itself would introduce an inconsistency in DSU procedures.

5.2 The concept of peer review in the competition context

The key issues that would arise in designing a Competition Policy Review Mechanism (CPRM) are set out below. In this context, the term "CPRM" is simply shorthand for a peer review system in a multilateral framework on competition and is not intended to imply a particular model.

Peer review in the public policy context typically involves the examination of a particular governmental activity by a peer group – a committee of experts from other countries or independent organisations. All peer review programmes share some basic characteristics. They use a secretariat, but its role may vary depending on the process. At a minimum, it organises meetings and provides continuity between individual reviews. The members of the international organisation under whose auspices the review takes place are the countries belonging to that organisation. They set the review criteria - the standards used to measure performance of those under review. These may include policy recommendations and guidelines, specific indicators and benchmarks and legal norms.

There are usually several stages in the peer review process. The first is the investigation stage, in which one or more experts representing the review committee collect information about the activity under review. If the review is being conducted by an international organisation, such as the OECD or the WTO, the investigation may be conducted by one or more members of the organisation's secretariat. The investigators typically go on one or more missions to the country under review for this purpose. They then prepare an investigation report, based on the information that they have acquired and employing review criteria that have been articulated in advance. Next is the examination stage. Here the committee of experts, usually sitting in plenary session, holds discussions with the party under review, the basis for which is the investigation report. The committee may appoint a few individuals as examiners, who are responsible for conducting most of the examination. The other members of the committee also participate at some point in the examination, however. After the examination a final report is prepared, usually by the examiners or the Secretariat. The final report is usually submitted to the party under examination for review. The examined party submits comments and corrections, especially of a factual nature, and from these a modified final report is prepared, which is usually published.

Peer reviews can be an effective tool in the public policy context, for several reasons. Most directly, they foster improved policy-making. The party under review is subject to a searching investigation and analysis, the result of which may be the issuance of a report containing specific conclusions and recommendations. These reviews inform both the party under review and the public at large in that country about international best practices in the relevant field, and they help to prompt reform from within. There

are other, more general benefits from peer reviews as well. They contribute to transparency. Government policies previously not well understood by the public at large are made more transparent by the peer review and resulting report. They are a mechanism for sharing information and experiences, the beneficiaries of which include not only the party or country under review but also the other participants in the process. Peer reviews can be an effective tool for technical assistance and capacity building, when the party or country under review is a developing country. Finally, the peer review process can, over time, help to bring about convergence in law and policy across countries.

There are certain disadvantages to the peer review process. One is that there are no enforcement or compliance mechanisms associated with the process. The party or country under review is not obliged to accept the results of the review or to implement the recommendations. Of course, this voluntary aspect of the process is in some ways also an advantage. It permits the exchange of views on a less formal, non-confrontational basis, which in the longer run may foster more progress in the country under review than if the results were compelled. An important disadvantage to peer reviews is that they are resource-intensive. Each review takes significant time and money to conduct. The result is that the reviewing body is limited in the number that it can conduct, and a given country is likely to be reviewed infrequently.

5.3 Peer reviews in international organisations – a summary of approaches

5.3.1 WTO Trade Policy Review Mechanism

The Trade Policy Review Mechanism (TPRM), which is conducted by the WTO, was established in 1989. Its objectives are "to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members."[45] The TPRM is required to review the trade policies and practices of all WTO members. The procedures provide that the four members accounting for the largest share of world trade (currently the European Communities, the United States, Japan and Canada) are to be reviewed every two years. The next 16 are reviewed every four years and the remainder every six years. By the end of 2002 the TPRM had conducted a total of approximately 170 reviews, covering more than 100 countries.

The process begins with the issuance of a detailed questionnaire by the WTO Secretariat to the country under review and a mission by the Secretariat to the capital for fact-finding purposes. The Secretariat then prepares a report, which normally contains a "Summary of Observations" and four chapters, which cover specific aspects of the country's economy and trade. The draft report is submitted to the member under review

for verification of factual content. The Secretariat revises the report based on the comments and completes it under its own authority. The Summary of Observations is not submitted to the member for review, thus preserving the independence of the process. The member separately submits a "policy statement," which together with the Secretariat report provide the basis for the formal review.

At a meeting of the TPRM, which is open to all WTO members, the representatives of the member under review first make a statement, which is followed by comments from two discussants chosen from the membership. Then all other members are offered the opportunity to make comments. At the end of the discussion the Chair makes concluding, summary remarks. Following the meeting the Secretariat report and the policy statement by the member are published, along with the minutes of the meeting and the summary by the Chair. Notably, while the Secretariat report contains independent observations, as noted above, the procedures do not provide for formal recommendations to be made to the member under review.

The comprehensiveness of the TPRM process fosters convergence and transparency. The reviews are considered to be useful for technical assistance and capacity building, especially since the organisation began placing more emphasis on the review of developing countries. The reports have over time become more analytical and critical, which enhances their effect on convergence and policy making. The lack of formal recommendations limits the value of the reports in this last regard, however. It has also been noted that there has been less than optimal attendance and participation by the membership at TPRM meetings, probably because there are so many. Finally, the TPRM process is capacity constrained. It has been calculated that the average Secretariat report requires the expenditure of 1.87 person years, of which 1.25 years is by economists. These high costs, coupled with the large number of WTO members, means that the frequency of review is low.

5.3.2 OECD EDRC Economic Surveys

The OECD Economic Development and Review Committee (EDRC) conducts an economic survey of each of the 30 OECD member countries every 12 to 18 months. The main objectives of the surveys are to promote better understanding of the economic situation in and key challenges facing the country under review, to enrich the policy debate, both domestically and internationally, and to issue policy recommendations to improve the country's economic performance. The EDRC review process shares many of the characteristics of the WTO TPRM process. The OECD Secretariat issues a detailed questionnaire to the country under review, which is followed by an on-site, fact-gathering visit to the member. The Secretariat then prepares a draft investigation report (draft survey), which forms the basis for the review in a meeting of the EDRC. In the meeting a delegation from the country under review responds to questions from the examiners and from the other members. After the meeting the draft survey is revised and the final survey is published.

EDRC surveys are well regarded by members. The surveys receive notice in capitals and by domestic media, and thus are thought to have real influence on economic policies in member countries, though that impact is difficult to assess. A strength of the surveys is the analysis and recommendations that they contain. The frequency of reviews is relatively high, and the reviews include an analysis of how the member reacted to previous recommendations. These factors enhance the rigor of the process and help to promote progress over time. Like the TPRM reviews, however, EDRC reviews are expensive. It is estimated that each review requires 2.75 person years, of which 1.75 is by economists.

5.3.3 Other peer reviews by international organisations – IMF, World Bank, OECD and APEC

The International Monetary Fund (IMF) continuously monitors the economic and financial policies of its 184 members by means of annual consultations with each member. They employ, like those peer review mechanisms described above, missions by the IMF staff, consultations with officials of the country under review and the creation of an analytical report, which in this case is reviewed by the IMF's 24-member Executive Board. There is no formal oral examination of representatives of the member, however. Also, the IMF and the World Bank jointly conduct the Financial Sector Assessment Program (FSAP), which was begun in 1999. Its objective is to help member countries strengthen their financial systems, including financial institutions, financial markets and payments systems. Participation is voluntary. The FSAP employs most of the procedures outlined above with respect to other programmes. Peer review programmes are also conducted by the OECD in connection with its Bribery Convention and by the Asia-Pacific Economic Co-operation (APEC) for evaluation of members' trade and investment policies. The OECD process is mandatory under the Bribery Convention, while the APEC programme is voluntary.

5.4 OECD reviews of competition policy

Beginning in 1998 the OECD undertook a comprehensive Regulatory Reform programme, in which member countries are reviewed on a variety of factors affecting their "regulatory quality." Each report is structured in the same way: there are four thematic chapters, two sectoral chapters and a concluding chapter containing 70 to 80 specific recommendations for the country under review. One of the thematic chapters is a review of competition policy and enforcement. Participation in the programme is voluntary. By the end of 2003 there will have been reviews of 20 member countries.

The competition policy reviews are conducted in much the same manner as the other peer review programmes described above. A Secretariat expert is appointed to conduct the investigation and draft a written report. The process begins with a comprehensive questionnaire to the country under review, which is followed by an on-site visit by the expert.

The expert then prepares a draft report, which is in six parts:

- "Competition policy foundations." This section explores the context and history of competition policy in the country, including the policy goals that are incorporated into the competition law.

- "Substantive issues, including the content of the competition law." This section describes the enforcement in the country under review of the usual substantive elements of a competition law – horizontal and vertical restrictive agreements, abuse of dominance or monopolisation, and merger control. The section typically includes brief descriptions of actual cases conducted by the competition agency.

- "Institutional issues: enforcement structures and practices." This section deals with the structure and practices of the competition agency in the country under review, including its investigative and enforcement powers, its case load, its resources and its practices that have an international dimension.

- "Limits of competition policy: exemptions and special regulatory regimes." As the title indicates, this section describes general exemptions from the competition law and sector-specific regimes that apply special or different competition rules.

- "Competition advocacy and policy studies." This section describes the activities of the competition agency in promoting competition-based decision making in other aspects of government policy.

- "Assessment and policy options." This final section contains conclusions drawn by the expert from the factual material in the previous sections and seven to ten recommendations for improvement in specific areas.

The draft report forms the basis for an in-depth examination of the country under review in a regular meeting of the Competition Committee. Following the examination the Secretariat revises the report as necessary, and the report is then published under the Secretariat's responsibility. The country under review has no right of veto over its contents.

A strength of the competition policy peer review is the candid, analytical nature of the report, including particularly the final section containing assessments and recommendations. The oral examinations are thorough and searching, and there is good participation by the Competition Committee members. Countries that have been reviewed say that they value the reviews, and that the reports are useful in capitals in promoting needed reforms. The competition reviews are resource intensive, however, though on average they require fewer resources than some of the other peer review

processes described above – about three senior staff months each. Unlike some of the other review processes, however, there has been no systematic follow up procedure.

In 2003, the Competition Committee conducted its first peer reviews of non-member competition agencies. South Africa was reviewed in a meeting of the Global Forum on Competition in February 2003, and Chile was reviewed in a conference jointly sponsored by the OECD and the Inter American Development Bank in April 2003. Russia and Israel have volunteered to be reviewed in the future. These reviews of non-members are subject to resource constraints, however. Currently they must be funded from outside sources.

5.5 Peer review in a multilateral framework on competition

Peer review could be an important component of a multilateral framework on competition. Whether or not such a framework would include a more formal compliance mechanism, the peer review process could have a distinctly positive effect in bringing about "soft" convergence, and it could be highly useful as a form of technical assistance when the country under review is a developing country. There are several issues that would have to be resolved in formulating the process in the trade and competition context, however. They include:

- Frequency of reviews. A higher frequency is obviously better than a lower one, but there are significant resource constraints that come into play. Is the TPRM model useful, that is, that some countries are reviewed more frequently than others, based on certain predetermined criteria?

- Review criteria/subject matter. The OECD competition reviews may provide a good model in this regard, but there may be additional criteria relevant in the trade and competition context. The following criteria could be included:

  – Substantive issues – the content of the competition law. This could include whether the country has adopted basic elements of competition law such as provisions controlling horizontal and vertical agreements, abuse of dominance and mergers. Of course, the scope of this criterion could depend upon the scope of the MFC itself – if the MFC extended only to provisions against hard core cartels then it would be an open question as to whether this review criterion should be more comprehensive.

  – Institutional issues - enforcement structures and practices. This could include review of the independence of the authority; its enforcement powers, processes and activities; the reviewing courts; human and financial resources.

- Consistency of national competition laws with core WTO principles. These principles would probably include transparency, procedural fairness and non-discrimination (national treatment and most-favoured-nation treatment).

- Exclusions from competition law – Including exclusions as a review criterion would increase their transparency, facilitate discussion of their impact on international trade, and encourage appropriate narrowing in their focus and reduction in their incidence.[46]

- Co-operation arrangements between the national competition authority and foreign competition authorities. This could include examining co-operation through bilateral and multilateral agreements as well as case-specific co-operation. Specifically, notification and consultation procedures and the application of comity principles could be examined.

- Anti-competitive business practices that reduce both consumer welfare and market access.

- Advocacy for pro-competitive reform. This includes non-enforcement activities by the competition authority that advance competition objectives, such as speeches, public education and testimony before legislative committees. Including them as a review criterion might provide a useful learning tool for competition authorities on the most effective forms of advocacy.

- Consistency and coherence of competition measures with the member's stated policy objectives. This is a neutral criterion permitting members to choose their own competition strategies.

- Prescriptive nature of reviews – appropriateness of specific conclusions and recommendations. Are pointed suggestions and criticisms appropriate, and what control, if any, should the country under review have over them? Should there be different standards for developed and developing countries? Should a system of quantitative assessments be adopted?

- Composition of the peer group. Should it include both competition and trade officials? Should elements of civil society, including NGOs, be permitted to participate in the process in some fashion?

- Should reviews of members be voluntary or compulsory?

- Integration into existing mechanisms. A separate CPRM from the TPRM would allow the mechanism to operate with different processes and methods, catering for the different needs of the two subject areas. On the other hand, to the extent that a CPRM were focused on the trade effects of members' competition policies, it could be integrated within the TPRM framework. This could create a coherent and unified system of policy review and increase the visibility of links between members' trade and competition policies.

6. Capacity Building and Progressive Reinforcement of Competition Institutions

In paragraph 24 of the Doha Declaration the Ministers recognised the "needs of developing and least-developed countries for enhanced support for technical assistance and capacity building" in competition policy. Paragraph 25 expressed "support for progressive reinforcement of competition institutions in developing countries through capacity building." This section of the paper explores the related topics of capacity building and technical assistance. It will briefly deal with the relationship between competition policy and development, then with the components of an effective competition policy, and finally it will discuss the modalities of technical assistance in competition policy and describe the results of a recent OECD survey of provider and receiving countries on technical assistance.[47]

6.1 Competition policy and development

There are strong links between competition policy and economic development. There is persuasive evidence that rising levels of competition have been unambiguously associated with increased economic growth, productivity, investment and higher living standards. A comprehensive OECD study showed that regulatory reforms, which involve eliminating unnecessary and inefficient regulation, liberalising markets and fostering competition, "increase productivity, lower prices, eliminate shortages . . . while stimulating innovation and consumer choice . . . and ultimately boosting GDP."[48] A more recent OECD study identified "an empirical connection between strong competition in markets for goods and services and better productivity and employment outcomes." The study found that stronger competition leads to gains in static, productive and dynamic efficiencies. Further, "[s]tronger product market competition will increase real wages . . . and improve the functioning of the labour market. . . ."[49] Also, submissions to the WTO Working Group on the Interaction between Trade and Competition Policy have urged that an effective competition policy promotes efficiency and enhances consumer welfare.[50]

A competition law and policy is an important and, most would say, indispensable element of the process of economic reform for developing countries. It is not created in isolation, but rather it is interrelated with other important reforms, and is necessary for

their ultimate success. A successful privatisation programme, for example, would founder if public monopolies were replaced by private ones, or by cartels. A regulatory reform programme that lifted unnecessary government intervention would fail if those artificial restraints were supplanted by private restraints. In this way the various elements of a comprehensive reform package are mutually reinforcing. An effective competition policy has other benefits for developing countries. It can enhance the development of trade – foreign exporters are more willing to do business in a country where there is an effective and transparent competition policy – and it can assist in attracting direct foreign investment.[51] Finally, an effective competition policy can ensure access for domestic businesses to competitively priced inputs, thereby enabling them to better compete against foreign rivals internationally and at home.

6.2 Building an effective competition policy

There are three broad components to building an effective competition policy for developing countries: 1) creating a competition culture, 2) remedying structural and institutional distortions, and 3) putting in place an effective mechanism for dealing with private anticompetitive conduct.

6.2.1 A competition culture

Key stakeholders in an economy must understand the benefits of competition and be willing to support it. These stakeholders include politicians, government officials, the business, labour and legal communities, sectoral and other regulators, academics and the press. Without the support of any of these groups the process of transitioning to competitive markets will be less certain, and marked by periods of regression. Elements of the business community may be entrenched and unwilling to support changes that would make their positions less secure. It can be shown, however, that competition enhances the competitiveness of business and prepares domestic firms for globalisation. Moreover, businesses are themselves the victims of anticompetitive conduct, perhaps disproportionately so. Labour will rightly fear displacement of workers caused by liberalising markets. To meet these concerns it should be shown that open markets will create more jobs than are eliminated. Programmes should be put in place providing for temporary assistance and training, to facilitate labour mobility.

6.2.2 Remedying structural and institutional distortions

It is true in all countries, and certainly in developing countries, that various sectors in the economy will be characterised by highly concentrated, non-competitive structures, perhaps dominated by state-owned enterprises, and inappropriate and inefficient regulation. These structural and regulatory problems must be addressed in order to permit competition to flourish. Privatisation is of course a necessary step in countries where large components of an economy are state-owned. It is well recognised that

privatisation should be accomplished in a way that creates an optimal structure for competition. This may require breaking up former state-owned monopolies if strong competition from other sources is not likely to occur in the near term. Further, some sectors, including network infrastructure industries such as transportation, telecommunications and energy, and financial services and professional services, may suffer from a legacy of such regulation.

As noted above, the OECD's work in regulatory reform has demonstrated how such reforms provide measurable economic benefits.[52] Another body that has addressed the subject generally is the Asia Pacific Economic Co-operation (APEC). It has developed the APEC *Principles to Enhance Competition and Regulatory Reform*.[53] These principles encourage APEC economies to view competition as providing "a unified framework within which to assess and revise existing policies as well as develop future policies".[54] A key focus in this regard is "minimizing the extent to which regulations and other state-imposed or sanctioned measures distort competition in the pursuit of other legitimate public interest objectives".[55] The competition agency has an important role in this restructuring process, that of competition advocate. It should press for the introduction of sound competition principles in all aspects of regulation and reform.

6.2.3 Addressing private anticompetitive conduct

The principal means of achieving this objective, of course, is through effective competition law enforcement. Some have argued that a competition law is unnecessary where barriers to external and internal trade are eliminated, but the prevailing view, which was confirmed in discussions in an OECD Global Forum on Competition held in February 2003, is that openness to trade is not enough. Many markets are local in nature, and imports are not a factor. Moreover, liberalisation initiatives alone cannot address exclusionary conduct by local dominant firms, mergers to create monopolies, or anticompetitive behaviour by international cartels.

There are many aspects to a successful competition law enforcement regime, involving both substance and procedure. The competition law must employ logical, predictable and economically sound standards. The law must be enforced by an independent competition agency, which enjoys support within the government and has adequate resources. The agency's procedures must be transparent and fair to all interested parties. The agency must exercise sound judgement and it must make its decisions in a timely fashion. Its decisions must be subject to review in the courts or by an independent tribunal.

Achieving this level of performance is not easy for any competition agency, and developing countries face particularly difficult obstacles in this regard. As recognised by the WTO Ministers in Doha, the provision of technical assistance by countries with more experience in the field and by international organisations is an important element in this process.

6.3 Technical assistance/capacity building

There are many forms of technical assistance and capacity building in competition policy. They include large conferences involving senior officials and policy-makers from many countries; smaller seminars and workshops, often on a regional basis and lasting three to five days, attended by case workers and supervisors from competition agencies; resident advisors from provider countries who spend weeks or months working in the receiving country's ("beneficiary country") competition agency; internships, whereby one or a few enforcement officials from a beneficiary country work in a provider country's competition agency for a period of time; bilateral, short term consultations involving officials from provider and beneficiary countries; peer reviews; and written materials and "best practice" manuals.

The OECD Secretariat has long been active in providing technical assistance in competition policy. Its programme began in earnest in 1991 after the break-up of the Soviet Union. In the early years it was concentrated in the transition countries of Eastern and Central Europe and Central Asia, but now the programme is world-wide. Most of the OECD's capacity building advice is delivered in the form of seminars and workshops. The "case study seminar" has been a hallmark of the OECD's capacity building programme. In these seminars the participants from beneficiary countries and experts from OECD countries discuss actual cases from beneficiary countries, using them as the means for illustrating aspects of competition analysis. The popular Vienna Case Study Seminar, begun in 1992, is the prototype for these events. Enforcement officials from as many as 18 beneficiary countries and seven or eight OECD countries and the Secretariat participate in this two-week event. The Secretariat also employs other forms of capacity building delivery mechanisms, including short-term visits and consultations with officials in beneficiary countries on drafting competition laws and regulations. A growing practice is the conduct of peer reviews and in-depth studies of competition policy in selected countries.

In 2001, the OECD conducted a survey of both its members and a group of beneficiary countries on technical assistance, which yielded interesting results. A survey questionnaire requested information about the technical assistance given or received by each country and it sought the views of respondents on the needs for technical assistance, the types of assistance considered most helpful and necessary qualifications for technical assistance providers.

The survey disclosed that technical assistance in competition policy is truly dynamic. Within just a two-year period there were scores of conferences, seminars, long- and short-term visits, internships and consultations, reaching more than 70 beneficiary countries. Each type of technical assistance was considered to have specific advantages and disadvantages. Large, high-profile conferences involving senior officials from several countries are a useful and cost-effective way to deliver the fundamental message outlined above – the importance and benefits of competition and the need for structural reform and for a strong competition law enforcement regime.

Seminars and workshops are effective in addressing technical issues in competition law enforcement, and these too are relatively efficient, in that officials from several countries can attend.

Beneficiary countries particularly valued longer-term resident assistance, whereby one or more experts from provider countries work in the beneficiary's competition office for an extended period. The expert gains a useful, working knowledge of the enforcement context in the beneficiary country, rendering his or her advice more relevant. All members of the beneficiary agency benefit from contact with the expert, rather than just one or a few who might attend a seminar in another country. This type of assistance is expensive for the provider country, however, and it benefits only one country at a time. Finally, written materials, such as "best practice" manuals, are a cost-effective means of technical assistance. Their advantages are that they can be made available to anyone simply for the cost of reproduction, and, compared to the sometimes transitory impact of "person to person" forms of assistance, they produce benefits over the long term. Obviously these materials are most useful when available in the language of the beneficiary country, however, and translating them adds to their cost.

The survey asked for opinions about the necessary qualifications of technical assistance providers. Providers should have experience both in competition law enforcement and, if possible, in providing assistance to a country whose economy, culture and legal system differ from those of the provider country. Competition experts without outreach experience may give logical but inappropriate interpretations to the laws, cases, statements and questions that they encounter. In general, officials from competition agencies in provider countries are considered more qualified than private sector experts who have not had enforcement experience, though the private sector adds important resources to those of the competition agencies, and it can also provide expertise in specific areas that some competition officials may not have. Beneficiary countries expressed their view that providers should tailor their advice to the specific situation in each beneficiary country, and should avoid trying to impose their system on a beneficiary without fully taking the local context into account.

The study also included an assessment of international co-operation in providing technical assistance. The survey indicated that co-operation among provider countries is limited. National competition agencies often provide experts to serve on panels in conferences or seminars sponsored by international organisations, however. There is relatively more co-operation among international organisations that provide technical assistance and capacity building advice, which include the OECD, UNCTAD, the WTO and the World Bank, as well as various regional organisations such as APEC and regional development banks. These organisations keep one another informed about their programmes and their scheduled events, and they jointly sponsor and participate in some of them. Provider countries and organisations expressed interest in enhancing co-ordination in this field, to assist in avoiding duplication and to make the most efficient use of available resources. There are various models for increasing such co-ordination, some of which would require more central planning, which could be difficult to

implement. At a minimum it might be possible to engage in a more regularised system of information exchange about the activities of the several providers.

While there is an active exchange of technical assistance across countries, beneficiary countries have expressed a need for even more. Countries now drafting competition laws indicated a need for assistance in that task. Interestingly, a few more experienced countries also desired such assistance, as they undertake amendments to their law or write secondary legislation. Some countries, again predominantly those new to competition enforcement, seek assistance in designing their enforcement institutions. Competition advocacy was listed by some countries as an area of importance to them. The responding countries all emphasised their need for assistance in law enforcement. They stated that their needs are more in the practical realm – case handling and analysis – and less in the theoretical – economic theory and comparative law.

Providers face resource constraints in this regard, however. Technical assistance in competition policy often competes for funding with other development projects. The survey responses suggested that competition agencies and others interested in this field can and should do more to educate policy-makers in their governments about the importance of assistance in competition policy. Beyond efforts to generate more funds for this activity, of course, it is incumbent upon providers to use the resources that are available in the most efficient manner. Again, this points to enhanced co-ordination among providers.

NOTES

1. This study was prepared for the OECD Joint Group on Trade and Competition. It was drafted by John Clark, working in the Competition Division of the Directorate of Financial, Fiscal and Enterprise Affairs, with contributions from the Trade Policy Linkages Division of the Trade Directorate. It presents a synthesis of the work that has been done on issues identified in paragraphs 24 and 25 of the Doha Ministerial Declaration with the aim of bringing information to a wider audience, including for the Joint Global Forum on Trade and Competition on 15-16 May 2003. The Secretary-General has agreed to declassify the document under his responsibility as recommended by the Joint Group on Trade and Competition.

   The study, which is also available in French, can be found on the following websites:

   http://www.oecd.org/competition or http://www.oecd.org/trade

2. Paragraph 23.

3. Paragraph 24.

4. Paragraph 25.

5. For a more complete treatment of these issues, see, OECD, *"Core Principles" in a Trade and Competition Context*, (COM/DAFFE/TD(2002)49/FINAL); OECD, *Core Principles of Non-discrimination, Transparency and Procedural Fairness in a Multilateral Framework on Competition* (COM/DAFFE/TD(2003)7/FINAL)**.**

6. Article XVII(1).

7. Members may maintain limitations on national treatment with regard to scheduled sectors, providing that such limitations are indicated in the schedule

8. Article 3(1).

9. Article II(1).

10. See, WT/WGTCP/W/222(2002), at para. 17.

11. Article X(1).

12. Article III*bis.*

13. Article 63(4).

14. See, OECD, *Antitrust and Market Access: The Scope and Coverage of Competition Laws and Implications for Trade* ("The Hawk Report"), 1996; WTO, *Exceptions, Exemptions and Exclusions Contained in Members' National Competition Legislation*

(WT/WGTCP/W172), 2001; Khemani, *Application of Competition Law: Exemptions and Exceptions*, UNCTAD/DITC/CLP/misc.25, 2002.

15. See, e.g., Article X(3).

16. See, e.g., Article VI.

17. See, e.g., Articles 41, 42 and 62. See generally, COM/DAFFE/TD(2002)81, Annex A part 4.1.

18. GATT Article X(1); GATS Article IIIbis; TRIPS Article 63(4).

19. In this paper the term "developing countries" includes those countries that are in transition from centrally managed economies, except where clearly not indicated by the context.

20. OECD, *Implementation of the Council Recommendation Concerning Effective Action against Hard Core Cartels: Second Report by the Competition Committee*, 2003 (C(2003)31*)*. Publication: *Hard Core Cartels – Recent Progress and Challenges Ahead*, OECD, 2003.

21. One form of international cartel is the so-called "export cartel," which can be defined as agreements among competitors that solely affect exports and which are excluded from the application of a competition law by means of a specific law or regulation. There are different views regarding the effect of these agreements (see paragraph 11 above). In any event, none of the international cartels that have been the subject of recent prosecutions were export cartels as defined above. That is, none of them were authorised under a country's export cartel law, and all were subject to prosecution in the country or countries in which they were formed. It is apparent that the non-export cartel is by far the more significant and more harmful within the general category of international cartels:

22. Levenstein, Suslow (2001) *Background Paper for the World Bank's World Development Report 2001 "Private International Cartels and Their Effect on Developing Countries."* These cartels were relatively few in number, and included only those that had been detected and prosecuted. Without doubt there were other, undetected cartels that had similar effects.

23. Ibid. But they can also have an offsetting effect, that of providing a price "umbrella" that would attract new entrants.

24. The European Commission prosecuted these cartels on behalf of all EU Member states.

25. For a more comprehensive treatment of these issues see, OECD, *The Role of Special and Differential Treatment at the Trade, Competition and Developments Interface* (COM/TD/DAFE/CLP(2001)21/FINAL).

26. There was not then, nor is there today in the WTO, an official definition of what constitutes a "developing country." Contracting parties can self select their designation. Other members can challenge the proclamation as a developing country, which is then resolved in negotiations. The status of countries that have joined the WTO since its establishment in 1995 is taken up in the accession negotiations.

27. Additional provisions within these five groups relate specifically to the least-developed countries: WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, Note by the Secretariat, 2000, WT/COMTD/W/77/REV1.

28. The WTO designates least developed countries (LDCs) in accordance with the United Nation's official list of LDCs, which currently totals 49 countries of which 29 are WTO members.

29. See, WTO, Communication from Trinidad and Tobago, *Progressivity and Flexibility in Developing a Competition Regime*, 10 September 2001 (WT/WGTCP/W/179).

30. They include Thailand, South Africa, Morocco, Indonesia and Cuba.

31. See, e.g., OECD (2001), *The Development Dimensions of Trade.*

32. For a more complete treatment of some of these issues, see, OECD, *Modalities for Voluntary Co-operation* (2002), submitted to the WTO Working Group on the Interaction between Trade and Competition Policy (WT/WGTCP/W/208); OECD, *Implementation of the Council Recommendation Concerning Effective Action against Hard Core Cartels: Second Report by the Competition Committee*, 2003 (C(2003)31*).*

33. *Revised Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade* (C(95)130/FINAL).

34. Paragraph A(1).

35. Paragraph A(3).

36. Paragraph A(2).

37. The Competition Committee has separately studied the topic of positive comity and issued a report on the subject in 1999. OECD, *CLP Report on Positive Comity*, 1999 (DAFFE/CLP(99)19).

38. See, e.g., WTO, Modalities for Voluntary Co-operation, Background Note by the Secretariat, WT/WGTCP/W/192 (2002).

39. For a more complete treatment of these issues, see, OECD, *An Overview of Possible Compliance Mechanisms in a Multilateral Framework on Competition* (COM/DAFFE/TD(2003)2/FINAL); OECD, *Peer Review: Merits and approaches in a Trade and Competition Context*, (COM/TD/DAFFE/COMP(2002)4/FINAL); OECD, *Practical Modalities of Peer Review in a Multilateral Framework on Competition*, COM/DAFFE/TD(2003)82/FINAL.

40. WTO Understanding on rules and procedures governing the settlement of disputes, article 5.

41. E.g., GATS article IX and TRIPS article 40(3).

42. OECD, *Regional Trade Agreements and the Multilateral Trading System*, Chapter 4, Paris, 2002 (TD/TC(2002)8/FINAL).

43. C(95)130/FINAL, 27-28 July 1995, Part 1B and Annex para. 12.

44. E.g., NAFTA chapter 11 and the EEA (article 111(4) and Protocol 33).

45. Marrakesh Agreement, Annex 3.

46. Bercero, I. & Amarasinha, S. (2001), "Moving the Trade and Competition Debate Forward", Journal of International Economic Law, p. 493.

47. For a more complete treatment of these issues, see OECD, *Capacity Building for Effective Competition Policy in Developing and Transitioning Economies*, submission to the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy in 2002; OECD, *Review of Technical Assistance Programmes by OECD member Countries and the OECD Secretariat, 2002* submission to the WTO Working Group on the Interaction Between Trade and Competition.

48. OECD, *The OECD Report on Regulatory Reform: Synthesis* (1997).

49. OECD, *OECD Economic Outlook*, vol. 2002/2 No. 72, Ch. VI.

50. WTO, *Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth*, 1998 (WT/WGTCP/W/80).

51. Ibid.

52. The OECD's web site contains a comprehensive description of its regulatory reform project, including the many reports that it has issued on the subject, at http://www.oecd.org/EN/home/0,,EN-home-2-nodirectorate-no-no--2,00.html.

53. Available at http://www.dfait-maeci.gc.ca/trade/canada-apec/principles-e.asp.

54. Supra, note 6, at 5.

55. Id., at 6.

Report of the Rapporteur

by
Simon J. Evenett

Director, Economic Research
World Trade Institute, University of Bern

Under the co-chairmanship of Professor Allan Fels and Mr. Stefan Amarasinha (Australia and the European Commission, respectively), the Joint Global Forum on Trade and Competition was held on 15-16 May 2003 in Paris. In addition to several opening and concluding remarks, this Forum comprised of five sessions; each devoted to one important aspect of the interface between trade and competition policies. Representatives from OECD member countries, from 33 other economies including many developing countries, from the business community and consumer organisations, and officials from several international institutions (UNCTAD, World Bank, WTO, among others) attended this Forum and contributed extensively to the discussions in each session. The OECD Secretariat provided sixteen background documents for this Forum.[1]

During the opening remarks, a number of related goals for the Joint Forum were advanced. The first was to share with non-OECD members the main findings and key points made during discussions that have taken place in the OECD's Joint Group on Trade and Competition since it was formed in 1996. With the WTO Ministerial meeting in Cancún close at hand, the second goal of the Joint Forum was to stimulate discussion of the efficacy and elements of a potential multilateral framework on competition policy. In doing so, it was noted that the Joint Forum was contributing to the policy dialogue on trade and competition policy matters that was mandated by the Doha Declaration of WTO Ministers. The third goal was to further discussions on the needs and concerns of developing countries in regard to technical assistance and capacity building. Moreover,

[1] Available at : http://webdomino1.oecd.org/comnet/ech/tradecomp.nsf or through http://www.oecd.org/competition.

donors of technical assistance would be offered an opportunity to share with participants their thoughts on this important matter.

Although later sections of this Report summarise the key points made in each of the five sessions of the Joint Forum, it is worth noting a number of key inter-related themes that recurred throughout the discussions. The first theme was the widespread recognition of the various interconnections between international trade and competition more generally and between trade policies and competition policies, in particular. For example, it was often noted that active and appropriately enforced competition laws were needed to secure the benefits of open borders. A second matter on which there was considerable discussion, but no apparent consensus, was the extent to which the principles that are central to trade policy formulation and the multilateral trading system can be readily and appropriately applied to competition law and its enforcement. Given the roles that disciplines on core principles and that compliance mechanisms might play in a multilateral framework on competition policy, this issue takes on a certain immediacy and relevance in the run up to the WTO Ministerial meeting in Cancun.

A third theme of the Joint Forum, in respect of which there appears to have been a general consensus, was that hard core cartels are the most egregious anticompetitive practice and an important threat to national and international commerce. The view was expressed by many present that negotiations on a multilateral framework on competition policy provided an opportunity to take concrete steps against these cartels. Many representatives from developing countries also expressed the concern that they do not have the means to tackle this anti-competitive practice at present; consequently, the discussion turned to the potential that any international initiative might have to buttress national enforcement efforts in this regard.

A fourth theme that emerged from discussions at the Joint Forum was the need for much more technical assistance and capacity building programmes and the need for more input into the design of such programmes by developing countries. Last, but not least, was the widespread recognition of the interconnections between the elements that have been identified for potential inclusion in a multilateral framework on competition policy; namely, core principles, hard core cartels, voluntary cooperation, and technical assistance and capacity building. For example, it was argued that cooperation between national enforcement agencies was essential if developing countries are to effectively prosecute hard core cartels. Similarly, the link between capacity building/technical assistance and both co-operation and as well as enforcement against hard core cartels was identified. However, some contended that only those jurisdictions with sufficient enforcement experience and capacity would benefit from potential multilateral provisions on voluntary cooperation. It would seem that a multilateral framework that did not fully take into account these interconnections and others—by, for example, focusing solely on provisions against hard core cartels—might fall short of its potential.

The discussions during the Forum also highlighted the matters of special and differential treatment and the coverage of competition law. One lead discussant from a

developing country made the point that developing countries should be provided with flexibility regarding the timing of their obligations as well as the nature and scope of exceptions. Another lead discussant and proponent of the multilateral approach commented by saying that flexibility should take account of different levels of development. One expert from a small island country noted that flexibility ought not to be linked to capacity building.

The remainder of this report describes various points made during each of the five sessions of the Joint Forum. It should be noted that the points reported here are those that the rapporteur felt to be pertinent to an accurate characterisation of the discussions at the Joint Forum and is necessarily based on his recollection of the observations made during this event. The following summary does not necessarily represent the views of the OECD Secretariat, the member countries of the OECD, or those present at the Joint Forum.

The Joint Forum comprised five substantive sessions on the following subjects: the Clarification of Core Principles (specifically transparency, non-discrimination and procedural fairness); Effective Action Against Hard Core Cartels; Voluntary Co-operation in Competition Law; Capacity Building and Progressive Reinforcement of Competition Institutions; and Peer Review and Other Possible Compliance Mechanisms: Merits and Approaches in a Trade and Competition Context. The discussions in each session are summarised in turn below although, as will become clear, many interventions in any given session drew upon points made in preceding sessions.

Session I. Clarification of Core Principles

This session began with a description of each of the three core principles that some have argued should be included in a multilateral framework on competition policy. Multilateral disciplines on transparency could include obligations to publish all relevant laws and procedures as well as to notify the World Trade Organisation of those laws and of various aspects of the national enforcement practices and policies. Potential provisions on procedural fairness were said to cover matters such as timely and effective access to courts and to other domestic review mechanisms as well as to the rights of firms before competition enforcement agencies, e.g. the right to know the case against them and to make representations. Finally, while recognising that WTO members might negotiate exceptions and alike, potential provisions on non-discrimination would seek to ensure that the treatment of foreign firms in national competition law was no worse than that for domestic firms. The latter amounts to a commitment to national treatment in the statement of national competition law; a commitment which it appears need not extend to the application of that law. (Put another way, the proponents of a multilateral framework on competition policy are seeking to ban *de jure* discrimination in national competition law but not *de facto* discrimination that can arise in the application of that law.)

In the ensuing discussion the point was frequently made that transparency and procedural fairness were characteristics of competition law and enforcement regimes

that have universal merit. Having noted this, many participants went on to observe that the codification of these principles in an international trade agreement might pose particular problems. In the case of transparency, some asked: what precisely would have to be notified to the WTO? Would all enforcement decisions—including those not to take enforcement action against a firm or firms—have to be notified to the WTO? Indeed it was noted that, in jurisdictions with common law systems, any judgements by courts on competition law matters could affect the rights of parties. Would each of these judgements have to be notified to the WTO and, if so, would this be too burdensome? Others were concerned that allowance be made for small economies and more generally, poorer developing economies which may not have the capacity to make such notifications. In the case of procedural fairness, some wondered how the considerable differences in national legal traditions and regimes could be reconciled with universal multilateral provisions.

Notwithstanding the important points made above, much of the discussion in this session was concerned with various implications of potential multilateral disciplines on non-discrimination. Several speakers from developing countries were concerned that a national treatment provision would unduly curtail national development strategies. Since not a single concrete example was given of a national development policy or practice that would be banned by a commitment to national treatment, this objection might be more hypothetical than rooted in national experience. The point made was that firms in developing countries must reach a certain size in order to compete in world markets and, that it might be appropriate for competition law to contain provisions that discriminate in favour of such firms.

Many speakers from developing countries also noted that any disciplines on non-discrimination could and should be linked to notions of flexibility, progressivity, and special and differential treatment. In the view of some, faithful implementation of the mandate contained in the Doha Development Agenda requires due account of the latter in the formulation of any multilateral framework on competition policy. Moreover, the inclusion of longer transition periods for developing countries, exemptions and the like, were not enough. What matters, it was argued, is the relevant capacity of developing countries—both in terms of the ability of their firms to withstand international competition and of their national enforcement capabilities—not the length of time granted to meet any binding multilateral rules. For a wide majority of participants, whatever be the future of a multilateral framework, it was important for any country to adopt a competition regime as early as possible.

Those in favour of multilateral disciplines on core principles noted that their purpose was to guide nations that are enacting new and revising existing competition statutes (as dozens of nations have done since 1985). Moreover, such provisions were said to provide firms operating across national borders with some assurances about their rights in the enforcement of competition law. As far as the disciplines on transparency and procedural fairness are concerned, it was argued that any well-functioning competition agency and court system would almost certainly meet the minimum

standards laid out in the proponents' proposals. Indeed, it was recognised that although national legal traditions and practices differ markedly across WTO Members, the intention was to identify the common elements of all such systems that are conducive to the sound enforcement of competition law and the appropriate respect for the rights of parties involved.

On the matter of potential provisions for non-discrimination, it was argued that restrictions on *de jure* discrimination do not prevent differentiation in national competition law nor discretion in the application of that law. For example, a competition law which contained exemptions for all small and medium sized enterprises (SMEs) would not fall foul of a multilateral requirement of non-discrimination, whereas an exemption for only certain SMEs might. Moreover, provisions in competition law that permitted authorities to weigh any social or other benefits of a corporate practice against its anti-competitive effects need not, it was argued, contravene the potential multilateral provisions on non-discrimination.

Session II. Hard Core Cartels

Throughout this session there was a strong consensus that hard core cartels are the most egregious anticompetitive practice and they should be severely punished since they represented a substantial threat to the operation of market forces and undermine what one participant referred to as a "level playing field." Another participant equated price fixing with theft and went on to note the link between bid rigging and corruption. For these reasons, and others, a consensus emerged that effective enforcement against hard core cartels should be a priority for national enforcement efforts. It was also noted that, in recent years, many OECD member states and non-members have stepped up their enforcement actions against cartels. Reference was frequently made to the OECD's ongoing work programme on hard core cartels and, in particular, to the OECD's 1998 Recommendation of the Council concerning Effective Action against Hard Core Cartels.(The most recent OECD report "Hard Core Cartels – Recent Progress and Challenges Ahead" was also discussed.

Several speakers described their nation's enforcement actions against hard core cartels. This discussion highlighted a number of domestic cartels that were the target of enforcement measures; a point which some felt should be borne in mind in the light of the considerable attention given to international hard core cartels in discussions at fora such as this. It was noted that domestic cartels were much more numerous than international ones and that they affected sectors of crucial importance for the growth of developing countries.

A number of views were expressed as to the efficacy and potential nature of multilateral provisions on hard core cartels. Several participants noted that these cartels tended to "migrate" to or to target jurisdictions without competition laws or the requisite enforcement capacity. So serious was this matter that, in one intervention, the view was expressed that multilateral provisions on hard core cartels and associated measures to

tackle them should be the primary focus of a multilateral framework on competition policy.

While many participants recognised the need to address hard core cartels in a multilateral agreement, several concerns were expressed as to the appropriate definition of these cartels. It was said that any definition would have to be very precise if it is to be part of any binding international agreement. Moreover, even though the definition contained in the OECD Recommendation provided a useful starting point, many questions remained. For example, would the definition cover vertical as well as horizontal inter-firm agreements? Would the definition of hard core cartels only refer to agreements between actual competitors rather than agreements involving potential competitors? Would export cartels—or rather exemptions from national competition laws for cartels whose effects are entirely felt abroad—fall within the definition of hard core cartels? In response, it was argued that these matters should be resolved once negotiations on a multilateral framework begin.

Several participants raised matters concerning developing countries and their enforcement actions against hard core cartels. Although it was recognised that such cartels often targeted non-industrialised countries, the view was expressed that these countries could do little to effectively prosecute multinational corporations engaged in price-fixing or other cartel conduct. Here the lack of enforcement capacity is not the only consideration. In addition, there is a fear that a multinational corporation fined for cartelisation would simply refuse to attorn to the jurisdiction and pay any fines imposed on it. Moreover, such a firm could simply stop supplying needed products to any developing country that had taken enforcement action against it.

Others suggested that developing countries are unlikely to be able to collect the information needed to prosecute an international cartel. It was suggested that this underscores the need for cooperation between enforcement agencies; however, the voluntary nature of that cooperation has to date yielded few benefits for developing economies. Another concern expressed was that a multilateral ban on hard core cartels might require WTO members to take enforcement actions against every single cartel uncovered, however small or inconsequential. With respect to the latter concern, one proponent of such a ban noted that the relevant multilateral provision could be crafted in such a way as to avoid this contingency. Other complex issues were raised such as *per se* versus *rule of reason* approaches and the appropriate burden of proof. A consensus also emerged regarding the difficulties that would be encountered in attempting to ensure that the definition of what constitutes “hard core” cartel conduct is not over-inclusive.

Even if the case for a multilateral ban on hard core cartels was accepted, some expressed the fear that WTO Panels and the Appellate Body might intrude on the prosecutorial discretion of national competition officials. More generally, the question was raised as to whether an international initiative outside of the WTO could not accomplish the same goals as a multilateral ban, especially in the light of the fact that

many developing countries do not, as of yet, have competition laws. In contrast, one participant from a developing country wondered what harm could be done by multilateral provisions that complemented and strengthened national enforcement efforts against hard core cartels.

Session III. Voluntary Co-operation in Competition Law

There was widespread agreement that voluntary cooperation was helpful in supporting the enforcement of national competition laws. Such cooperation was said to include general exchanges of views and best practices; case-specific cooperation; and, in the views of some, technical assistance and capacity building. As is discussed below, many linkages were drawn between voluntary cooperation and the matters discussed in other sessions, notably hard core cartels and the progressive reinforcement of competition agencies in developing countries.

It was argued by some developing country speakers that voluntary cooperation takes place only after domestic enforcement capacity has been established and, therefore, the primary beneficiaries of a multilateral provision on voluntary cooperation will be industrialised nations with considerable enforcement experience. This observation led to two other points being made. First, developing countries were entitled to ask what they might get in return for signing a provision that offered them so little in the near to medium term. Second, it was argued that the lack of enforcement capacity and experience in developing countries should be remedied before any multilateral provisions on voluntary cooperation be adopted; a point that has implications for both the sequencing and content of any further international initiatives on competition law and policy.

There was some disagreement as to the nature of cooperation between enforcement agencies that is needed to effectively prosecute hard core cartels. Several interventions were made to the effect that the information and assistance provided through *voluntary* cooperation mechanisms would be insufficient to tackle these cartels. Some went so far as to suggest that cooperation be mandatory, at least as far as industrialised vis à vis developing countries were concerned. (The fact that so many of the members of international cartels had their headquarters in industrialised countries provided, it was argued, the rationale for this asymmetric obligation on richer jurisdictions.) Others countered that mandatory cooperation mechanisms would lead to formalistic exchanges of information, would frustrate convergence of national practices, and would fail to meet its stated objectives. A related point made was that the extent rather than the form of cooperation should be the focus on discussions. In addition, it was pointed out that much currently is being achieved with voluntary cooperation and that one should continue to build on this experience before embracing more formal obligations within a multilateral framework on competition policy.

Differences of view were also expressed as to the merits of sharing confidential business information by enforcement agencies. It was stated that, as a factual matter,

such information is protected by national law in many jurisdictions as well as by a number of international agreements. Having said that, some national enforcement agencies can exchange such information under conditions that are set out in bilateral cooperation agreements, mutual legal assistance treaties, and the like.

Several participants argued that developing countries should have access to confidential information acquired during investigations into hard core cartels in industrialised economies. Without denying the value of such information to enforcers, others questioned whether non-confidential information might be sufficient to prosecute hard core cartels. The latter information might include publicly-available information about the markets and industry in question, observations on the so-called "theory of the case," and agency-specific information that is not covered by the confidentiality provisions in national laws.

Concerns were also expressed that adhering to multilateral provisions on voluntary cooperation might entail substantial resource costs and, indeed, one participant suggested that such provisions should only be entertained in so far as they had no resource implications. Others noted that such provisions would provide a legal framework in which voluntary cooperation could occur, increasing confidence and, subsequently, the extent of inter-agency collaboration. Moreover, it was said that non-binding approaches had been tried before and had yet to produce the desired degree of cooperation. The view was also expressed that, as far as younger competition agencies were concerned, perhaps the most important form of cooperation from abroad was the designation of a specific foreign enforcement official to answer telephone inquires and electronic mail messages. On this view, voluntary cooperation did not have to be too grandiose or subject to formal agreements to be effective.

Session IV. Capacity Building and Progressive Reinforcement of Competition Institutions

A number of commonalities in view emerged during the fourth session of the Joint Forum. It also was generally accepted that the substantial differences in national enforcement capabilities provided an important rationale for technical assistance and capacity building and that this is an important element of paragraph 25 of the Doha Declaration. Moreover, such initiatives should not be confined to competition enforcement agencies and their officials as the awareness of competition policy-related matters by the press, consumer organisations, other members of civil society, the judiciary, and government departments and ministries was seen as being critical to the development and sustenance of a "competition culture." In addition, capacity building efforts could take place at the regional level (the case of COMESA was mentioned) as well as the national level. Consequently, technical assistance and capacity building initiatives should be approached along a number of distinct yet related tracks.

A distinction was also drawn between the technical assistance provided under paragraph 24 of the Doha Declaration, whose goal is to enable WTO members to arrive

at a considered judgement on the merits of a potential multilateral framework on competition policy, and the type of assistance that seeks to strengthen and progressively reinforce competition enforcement agencies in developing countries, which is what is contemplated by paragraph 25 of that Declaration. The latter, it was noted, has been provided for many years and will continue into the future irrespective of the decisions taken by WTO Ministers at Cancun. An associated point is that some questioned the merits of "one-off" short term seminars about competition policy-related matters, especially when contrasted to the benefits of long-term "residencies" by experienced foreign enforcement officials.

Various aspects of effective technical assistance and capacity building programmes were highlighted in the discussion, in particular, the need to engage the recipient government as well as the competition enforcement agency; the importance of tailoring any initiatives specifically to local needs; the importance of longer term programmes organised within a partnership of equals; the merits of bolstering the long term supply of people with the skills that competition enforcement bodies require (through, it was mentioned, university courses and the like); the importance of conducting a so-called needs assessment before programmes are established; the value of sharing views on enforcement strategy and tactics as well as on pertinent law and economic analyses; and the importance of building the capability to undertake policy analyses and competition advocacy.

With respect to the type of assistance contemplated by paragraph 24 of the Doha Declaration, the role that technical assistance and capacity building already plays and might play in a multilateral framework on competition policy was the subject of some participants' remarks. It was observed that not enough has been done to date and that negotiations on, and the potential adoption of, a multilateral framework would require considerable amounts of technical assistance and capacity building; and that this point had been taken on board in discussions on these matters in Geneva. Others recalled the earlier discussions on voluntary cooperation and noted that technical assistance and capacity building measures would be essential to ensure that more WTO Members could reap the benefits of multilateral provisions on inter-agency collaboration. One participant wondered if technical assistance and capacity building measures should precede negotiations on a multilateral framework on competition policy, and whether the latter should occur once sufficient capacity was in place in all WTO members. The view that technical assistance and capacity building are important elements in the successful development of competition law and enforcement in developing economies was not disputed.

Session V. Peer Review and other Compliance Mechanisms

In summarising the contributions to the final session of the Joint Forum it is important to differentiate between the role of peer reviews of competition agencies more generally, and the role that peer reviews and other compliance mechanisms might play

in a multilateral framework on competition policy. With respect to the former, a detailed account was given of South Africa's experience during its peer review at the OECD. (It is worth noting that South Africa was the first non-OECD member to be the subject of a peer review of its competition agency at the OECD. Subsequently, Chile has been subsequently reviewed in this manner.)

The South African peer review was found to be particularly rewarding. Despite the initial misgivings by some as to whether reviewers from the industrialised world could appreciate local circumstances, it was felt that this review gave South African competition the benefits of constructive and well-intentioned observations of the reviewers and other participants in the exercise. This experience suggested that peer review could be a valuable instrument encouraging dialogue about and the adoption of better practices. Moreover, to maximise the benefits of peer reviews, participation in them should be voluntary. It was further observed that an agency that decides not to participate in a peer review would be sending a clear signal to the competition community at home and abroad.

In the ensuing discussion many participants agreed that voluntary peer reviews offered considerable promise. Some reiterated the point that the reviewing process is a "two-way street" with reviewers learning from the reviewed and visa versa. This process was also seen as not impinging on national sovereignty. Moreover, peer reviews could be seen as contributing to capacity building and to strengthening competition enforcement institutions more generally. The transparency of existing peer review processes was also seen as a desirable trait, as are the roles that the private sector and civil society could play in such reviews.

There was less agreement on the merits of different types of compliance mechanisms in a multilateral framework on competition policy. Some questioned whether formal dispute settlement procedures were needed should a multilateral framework be negotiated; others noted in this regard that much depended on what binding disciplines where adopted in such a framework. The observation was made that WTO commitments typically are subject to dispute settlement and that it is difficult to understand why binding multilateral disciplines on competition policy should be treated differently. One participant went so far as to suggest that there was little point in signing a multilateral agreement on competition policy if its disciplines were not subject to dispute settlement.

An alternative position advanced in this session was that a peer review mechanism be incorporated into a multilateral framework on competition policy. Such reviews, it was argued, would have an educative and informative role. Moreover, as these reviews are non-binding, it was said that they would be non-confrontational and would promote dialogue and compliance. This form of non-binding compliance mechanism was preferable to conventional WTO dispute settlement as competition law and policy is a new or relatively new concept for many countries, and because there is little agreement on the potential elements of a multilateral framework on competition policy. It was

further argued that the WTO's Trade Policy Review Mechanism, APEC's reviews of national Individual Action Plans, and the OECD's own peer reviews of regulatory reform might offer helpful precedents as to the modalities for a peer review mechanism within a multilateral framework on competition policy.

The foregoing remarks prompted some to ask whether a non-binding peer review mechanism could, in fact, hold WTO members accountable or ensure their compliance with the provisions of a multilateral framework. Others made the case that dispute settlements for certain elements of a multilateral framework should be buttressed by a peer review mechanism within the WTO, seeking to secure the benefits of the latter without abandoning the standard means for promoting compliance with WTO disciplines. More generally, a variety of views were expressed as to the desirability of applying dispute settlement in the competition law and enforcement arena, especially given concerns about prosecutorial discretion and the desire to avoid "second guessing" national enforcers. Others raised the concern that any understandings that might be reached regarding the inapplicability of any dispute resolution regime would not survive the negotiations process.

The Joint Forum concluded with a report from the Rapporteur (which involved a summary of the observations described here) and with some thoughts from the Chairman of the OECD's Competition Committee (which are summarised below).

Closing Remarks

by
Frédéric Jenny

I am going to limit myself to a few personal observations. I have been privileged to follow the debate on Trade and Competition now for five years, practically since the beginning. Listening to the conversation here yesterday and today induced me to make a little trip into a long travel through time, and to think about yesterday, today and tomorrow.

Thinking about *yesterday*, the question that came to my mind is: if this Global Forum had taken place three years ago, what would have been the main topics of the discussion and how would they have been different from the topics we heard during this meeting? It seems to me that, we would have taken up three main questions that we did not really discuss here.

The first one would have been: Do transnational anticompetitive practices really exist? Three or four years ago, there was a presentation at the WTO by a private group including economists, lawyers and business representatives who said that there was no substance to allegations of transnational anticompetitive practices. At present this appears rather incredible and it is indeed quite interesting to see the absence of such a discussion here today. A second issue that probably would have been discussed three years ago would have been: if such anticompetitive practices exist, are they relevant to developing countries or are they a phenomenon affecting developed countries? That is, are they entirely irrelevant for developing countries? Again, the idea that there are transnational anticompetitive practices and that they may impose a cost on developing countries, is a relatively new idea. Certainly the work on trade and competition has contributed to bring these issues to the attention of the international community**.** Thus in a relatively short period of time, we have moved rapidly on these issues. Probably a third question that we would have raised is the following: assuming that the anticompetitive practices exist, assuming that there are real costs, are they a real threat to trade policy and to trade negotiations? Again, the idea that the magnitude of these anticompetitive practices, which are relevant both to developed and developing countries, is sufficiently important to really call into question the efforts of people that are trying to realize benefits from trade is relatively new. So today's debate is quite different from yesterday's.

Now, what is the discussion about *today*? It seems to me that the first issue is that, as was said yesterday, there is rather wide agreement to recognize that the WTO is the

relevant place to raise trade and competition issues, even if there is discussion on the way it should be raised. However, when it comes to the substance of raising these issues in the WTO, there is a set of specific considerations, as summarised by Simon Evenett and also a couple of systemic issues which are not specific to competition but which are raised across the whole range of WTO issues. Probably the most important of the systemic issues is the issue of special and differential treatment. It is raised in what we talked about but it is also important with respect to other agreements or other negotiations going on within the WTO. There are two reasons for focusing on these: a) this is an OECD Global Forum, that is a Forum for discussion between OECD members and non members; and b) because in the WTO logic, the issue of special and differential treatment arises in particular for two reasons. The first one is the strengthening of the dispute settlement mechanisms and the fact that all countries which are part of the WTO realise now that entering into commitments has serious consequences because the dispute settlement mechanism aims at ensuring that commitments are met. The second fairly clear reason is that developing countries have been concerned by the TRIPs negotiations. Many feel that these negotiations have been unfair to them or at least that the trade-off costs are large and that the expected benefits from the TRIPs agreements in the form of increasing investments in developing countries have not been forthcoming. The combination of increased disciplines on commitments and the fact that on issues with which developing countries were not necessarily familiar, they have had what they see as a disappointing experience. This makes them particularly cautious about the Singapore issues in general, including competition issues. On most of the issues discussed here, special and differential treatment or, put in other words, progressivity and flexibility, is relevant. When the debate came to "core principles", we had a complex discussion on what is discrimination in a world of unequal countries and whether affirmative action (which in economics is very often called industrial policy or promotion of "national champions"), involves discrimination or whether this was redressing an inequality of levels of development**.** On transparency, the issue raised was the relative costs of transparency for developing countries and developed countries and all the systemic differences that we should keep in mind. I could go on in the list. In the discussion on fighting cartels, the question was on the treatment of export cartels which may be useful for developing countries, when they come from developing countries but may be very detrimental to their interests when export cartels are made by very large firms in developed countries. When we discussed co-operation, the issue was also whether co-operation should be compulsory at least for developed countries and whether voluntary co-operation should be demanded of developing countries despite their limited resources and means.

In the context of this question of special and differential treatment, the issue of technical assistance and capacity building also arose. To me, this was the most important part of this Forum. Having participated in this debate on the future of competition in the multilateral context for a number of years, I have heard repeated criticisms of, and numerous calls for more and better, technical assistance. We have attempted here to really focus on why technical assistance of the last thirty years has not been successful.

And the dialogue was particularly fruitful because the developing countries can really explain the kind of technical assistance that they would like to have and why they feel that past technical assistance has not been sufficiently useful. Three points come to mind. First, technical assistance is a long term process. It requires not only seminars, but also a deep association between the donors of technical assistance and their recipients which is going to last overtime to help to build the capacity which cannot be done in a theoretical way and within a short period of time. Second, technical assistance has not been wide enough. What I have heard, but this may be an interpretation, is that in many countries technical assistance has been reasonably good in terms of giving means or techniques for competition enforcement. However, in most developing countries, technical assistance has not been able to promote a competition culture. And a competition law enforcement system cannot survive in an environment without a competition culture. There is something to develop, something to invent, which goes well beyond assistance on competition enforcement. Third, we heard the idea that technical assistance as given in the past was not sufficiently relevant to the problems of developing countries. There was this image given of programmes being designed in Brussels, Paris or Washington rather than being based on a careful and deep analysis of local realities. That being said, we have to recognise that a lot of people have been trying to provide meaningful technical assistance, but overall, there is a desire on the part of developing countries, before or together with the promotion of the issue of competition, to receive technical assistance that will make greater impacts in their country. These dimensions of the debate are very useful and help to advance the discussions.

Now what about *tomorrow*? Beyond what was said explicitly about whether or not a multilateral agreement could be negotiated in the context of the WTO, there is the implicit question that the possibility of the successful conclusion of these negotiations depends very much on the expected distribution of costs and benefits between developed and developing countries. Underlying most issues we took up, was the perception that a multilateral agreement would be too costly for developing countries or not beneficial enough for them, or too costly for developed countries or of no interest to them. Some countries, mostly the developing countries, have had the feeling over the last few years that the "cost-benefit" ratio of the initial proposal of the proponents was too high for them. This is in particular due to the fact that, rightly or wrongly, they perceive that the costs of adapting and enforcing a comprehensive non discriminatory competition law is too high for them and that, equally, that the expected benefits from a multilateral cooperation agreement would not be all that great for them. The proponents' reaction so far, in my reading and again this is a purely personal view, has been to try to lower the costs of an agreement. But in doing so, they have also lowered the expected benefits for developing countries. They perceive that the balance between the costs and the benefits has not been sufficiently altered. A lot of the discussion we had on whether co-operation should be voluntary or compulsory is related to this issue. We heard some developing countries, not all of them, but some of them saying "we want compulsory cooperation because otherwise the benefits from this agreement are going to be negligible". So, the

question is whether, in the negotiations, if negotiations take place, diminishing the costs or the benefits is the right strategy, or whether addressing the imbalance between the costs and the benefits, particularly for developing countries, should not be faced more directly. In this connection, I must say that in the WTO, over the last year, a number of ideas have been put forward by developing countries which have the potential of dramatically altering the distribution of benefits and costs between countries and thereby the "costs-benefits" ratio of an agreement for developing countries.

In concluding, I would add that this Forum has offered a very helpful sign. Discussions have gone far enough to indicate that now there may be alternative sources of proposals and that we will be seeing a discussion of how an agreement could be drafted that would be in the mutual interest of all countries around the table.

OECD PUBLICATIONS, 2, rue André-Pascal, 75775 PARIS CEDEX 16
PRINTED IN FRANCE
(14 2003 10 1 P) ISBN 92-64-10278-7 – No. 53093 2003