UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Trade and Competition issues: experiencies at regional level

Implementing Competition-Related Provisions in Regional Trade Agreements: is it possible to obtain development gains?

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N O T E

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F O R E W O R D

The increasing share of developing countries in world trade and investment flows has been accompanied since the 1990s in particular by a proliferation of bilateral and regional trade agreements (RTAs), many of them containing provisions on competition policy. The same period has also seen the adoption of competition law and policy in virtually all corners of the globe.

This new generation of trade agreements has shifted the focus away from simple tariff reduction and towards 'behind-the-border' issues more generally. In terms of the relationship between trade and competition, competition provisions in RTAs have been viewed as one way of ensuring that the gains from tariff liberalization are not eroded by the substitution of private restrictive practices for government trade barriers. UNCTAD examined the effects of these provisions in a 2005 publication on *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, which also looked at the strengths and weaknesses of the various institutional arrangements in place dealing with regional competition problems. By way of follow-up, this publication considers the interrelationship between competition law and policy, economic development and trade. It shows the constraints faced by developing countries in using existing cooperation mechanisms and suggests ways to foster a culture of competition in developing-country markets. The book also stresses the importance of improving the institutional capacities of recently established competition authorities in developing countries to deal with anti-competitive practices in their own markets and help their enterprises deal with them in international markets.

This volume, part of UNCTAD's analytical and capacity-building work to assist developing countries on issues related to competition law and policies, makes a useful contribution to the policy debate, raising awareness and enhancing expertise among all stakeholders.

Supachai Panitchpakdi

Secretary-General of UNCTAD

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ANA MARÍA ALVAREZ
LAURENCE WILSE-SAMSON

Editors

List of Abbreviations

AC	Andean Community
ACCC	Australian Competition and Consumer Commission
AFP	Asociación Gremial de Administradoras de Fondos de Pensión (Chile)
AFTA	ASEAN Free Trade Area
AKI	Association of Kenyan Insurers
APEC	Asia-Pacific Economic Cooperation
ARV	Antiretroviral
ASEAN	Association of Southeast Asian Nations
ATA	Agency-to-Agency Agreement
ATPA	Andean Trade Preference Agreement
BCPS	Brazilian Competition Policy System
BEE	Black Economic Empowerment (South Africa)
BIMST – EC	Bangladesh–India–Myanmar–Sri Lanka-Thailand – Economic Cooperation
BLNS	Botswana, Lesotho, Namibia and Swaziland
CADE	Conselho Administrativo de Defesa Econômica (Brazil)
CAFTA–DR	Central America–Dominican Republic-United States Free Trade Agreement
CARICOM	Caribbean Community and Common Market
CEFTA	Central European Free Trade Agreement
CFC	Federal Competition Commission (Mexico)
CIS	Commonwealth of Independent States
CLP	Competition Law and Policy
CNDC	Comisión Nacional de Defensa de la Competencia (Argentina)
COMESA	Common Market for Eastern and Southern Africa
COMPAL	UNCTAD Technical Assistance Programme on Competition and Consumer Policies for Latin America
CPA	Cotonou Partnership Agreement
CRP	Competition-Related Provision
CSME	CARICOM Single Market and Economy
CU	Customs Union
CUTS	Consumer Unity and Trust Society
DDA	Doha Development Agenda
DoJ	Department of Justice
EAA	Europe Association Agreement
EAC	East African Community
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECDPM	European Centre for Development Policy Management

ECLAC	Economic Commission for Latin America and the Caribbean (UN)
ECN	European Competition Network
EEC	European Economic Community
EFTA	European Free Trade Association
ENP	European Neighbourhood Policy
EPA	Economic Partnership Agreement
ERO	Energy Regulatory Office (Poland)
EU	European Union
EUMFTA	EU Mexico Free Trade Agreement
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
FTC	Federal Trade Commission (US)
FTPP	Fair Trade Practices Policy (Malaysia)
GAFTA	Great Arab Free Trade Agreement
GATS	General Agreement on Trade in Services
GSM	Global System for Mobile Communications
IAA	Israeli Antitrust Authority
IADB	Inter American Development Bank
ICN	International Competition Network
ICT	Information and Communication Technology
ICTSD	International Centre for Trade and Sustainable Development
IDRC	International Development Research Centre
IGE	Intergovernmental Group of Experts (UNCTAD)
IIP	Infant Industry Protection
INDECOPI	Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (Peru)
IO	Industrial Organization
IP	Intellectual Property
IPR	Intellectual Property Right(s)
ISP	Internet Service Provider
KFTC	Korea Fair Trade Commission
KPPU	Commission for the Supervision of Business Competition (Indonesia)
LAIA	Latin American Integration Association
LFCE	Federal Economic Competition Law (Mexico)
M&A	Mergers and Acquisitions
MAT	Mozambique, Angola and Tanzania
MDGs	Millennium Development Goals
MDTCA	Ministry of Domestic Trade and Consumer Affairs (Malaysia)
MERCOSUR	Mercado Común del Sur (Southern Cone Common Market)
MLAT	Mutual Legal Assistance Treaty

MOU	Memorandum of Understanding
NAFTA	North American Free Trade Agreement
NCA	National Competition Authority
NEPAD	New Partnership for South Africa's Development
NGO	Non-Governmental Organizations
OECD	Organisation for Economic Co-operation and Development
OECS	Organisation of East Caribbean States
PFA	Pension Fund Administrators (Chile)
PTPA	United States – Peru Trade Promotion Agreement
RIA	Regional Integration Area
RTA	Regional Trade Agreement
S&D	Special and Differential Treatment
SAARC	South Asian Association for Regional Cooperation
SACU	Southern African Customs Union
SADC	Southern African Development Community
SAIC	State Administration for Industry and Commerce
SAFTA	South Asia Free Trade Agreement
SDE	Secretariat for Economic Law, Ministry of Justice, Brazil
SEAE	Secretariat for Economic Monitoring, Ministry of Finance, Brazil
SIEC	Significant Impediment to Effective Competition
SIECA	Secretariat for Central American Economic Integration
SME	Small and Medium-Sized Enterprise
SRA	Sector Regulatory Authority
SSA	Sub-Saharan Africa
TA	Technical Assistance
TCA	Turkish Competition Authority
TDCA	Trade, Development and Cooperation Agreement
tralac	Trade Law Centre for Southern Africa
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
US DoJ	United States Department of Justice
WAEMU	West African Economic and Monetary Union
WTO	World Trade Organization

INTRODUCTION

Lakshmi Puri

Recently, there has been a proliferation of regional trade agreements (RTAs) among developing countries and between developed and developing countries. Many of these agreements contain various commitments on competition policy at the regional and national levels (for example the adoption and enforcement of competition laws, competition norms applicable to trade between the parties, harmonization of competition laws, control of state aids and subsides, provisions on cooperation and technical assistance (TA)). Competition chapters are not the only places to look for competition principles. These are to be found in chapters concerning state aid and enterprises, procurement, investment, intellectual property and also in terms of the core principles governing the RTA as a whole, such as transparency, non-discrimination and due process – which all can have competition implications.

UNCTAD's Contribution to this Topic is Ongoing

For this reason, in 2005, UNCTAD prepared a publication, *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, which aimed at improving the understanding of trade and competition policy makers of the strengths and weaknesses of the various institutional arrangements in place dealing with regional competition problems. Some of the findings of this publication were discussed in five regional seminars, held throughout 2006, in various locations. The reports of these meetings form an integral part of the present publication and can be found in the Annex. They also provide a primary source of material for the chapters in this publication, which should be seen as a complement to the previous publication *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*.

The ultimate goal of this publication is an improvement in competition law enforcement, which will assist in preventing the gains to be had from the removal of government restraints through trade liberalization from being nullified through the imposition of private anti-competitive restraints. This strengthening of domestic enforcement powers and improved inter-agency cooperation will in turn promote productivity, growth and poverty alleviation.

In these seminars, it was noted that there has been an increase in the number of RTAs containing provisions related to competition policy between countries at various stages in the implementation of competition laws. The participants in these meetings provided further insights into the role of competition policy provisions in relation to South–South integration and trade on a regional basis. It was noted that, in many developing countries, there was an increasing concern expressed over the potential effects of cross-border anti-competitive practices. The mismatch between the ability of firms to organize anti-competitive practices across national borders and the ability of government to successfully prosecute such practices is a feature of the modern trading system. Thus, the beneficiaries of open borders, in the absence of competition policy enforcement and international cooperation, can be oligopolistic service providers, or powerful retailers, rather than consumers.

There is Untapped Potential in Terms of South–South Cooperation

Furthermore, it is clear that even in cases where there are no cross-border effects, there are important lessons that authorities can learn from each other, on account of countries sharing certain structural features, or the same multinational actors operating across many jurisdictions. This speaks of the great untapped potential in terms of South–South cooperation in competition policy enforcement. And at a time when developing country multinationals increasingly gain in global strength, South–South cooperation on competition policy is becoming *a fortiori* increasingly important.

Unresolved Constraints to Cooperation

In this context, the chapters included in this new publication tackle several issues of key importance to the nascent competition authorities in many developing countries. Thus, Chapter 1 investigates the extent to which cooperation provisions have been used in actual cases to foster cooperation in enforcement between agencies. One critical element, which determines to a large extent the parameters and success of cooperation in competition law enforcement, is the definition and use of confidential information. Despite the constraints imposed by confidentiality, the chapter argues convincingly that a large degree of cooperation is still possible in terms of the discussion of hypothetical cases, and the sharing of investigation techniques and enforcement experiences. Apart from confidentiality constraints, differences in domestic legal frameworks and different levels of institutional development can pose a barrier to effective international cooperation. This applies for instance in certain cases with clear international implications such as divergent merger regulations or leniency programmes, where increased experience and greater institutional development are required.

Could Competition Provisions in RTAs Strengthen Domestic Competition Institutions and Legal Frameworks?

In Chapter 2, the publication considers the potential use of competition-related provisions (CRPs) in RTAs to promote the development of the national competition authority, such as whether CRPs have been used to bring forward the date of enactment of a competition law, to strengthen the deterrent effect of the national law, to change the political economy of domestic competition enforcement, or to contribute to the strengthening of the powers, budget and resources of competition agencies. Despite these potential benefits, it is found that domestic political economy constraints impede these positive spillover effects from the regional to the national level. These constraints relate to a weak competition culture, problems with the overall effectiveness of other government institutions apart from competition agencies, the non-optimality of the negotiated CRPs, and the relative immaturity of domestic competition institutions.

Competition May Be a Powerful Factor in Poverty Alleviation

One of the preliminary conclusions from the Series of Seminars held was that the implementation of CRPs, whether in terms of their use to enhance the domestic powers, autonomy and status of the authority, or to promote international cooperation, was hindered by a lack of awareness in domestic constituencies of the potential benefits of competition law and policy (CLP) in areas of direct social concern. Chapter 3 therefore investigates the contribution that effective competition law enforcement

can make to economic growth and social development. There are common competition law issues arising across developing country jurisdictions related for instance to small markets, high levels of income inequality, large informal sectors, local institutional path dependency, data shortages, and human resource constraints. These need to be better understood in terms of their practical implications for enforcement, as well as in terms of how they relate to social development objectives. This will require specific local developing country expertise and the experience of those agencies that face these problems on a day-to-day basis to be understood and overcome.

A lack of a 'competition culture' was cited in some of the seminars as a major impediment to enforcement and advocacy activities within developing countries. This in part stems from a perception of the incompatibility of competition law enforcement and other social development objectives. A way of addressing these concerns is to survey examples of the successful prosecution of cases with a pro-poor impact. While, this is not directly concerned with issues of RTAs, or cooperation in competition law enforcement, these experiences might usefully be shared in regional fora.

Synergies with Local Institutions Help to Create a Culture of Competition

Establishing synergies with local institutions – not just government authorities and the judicial branch, but academic bodies, non-governmental organizations (NGOs), consumer and trade associations, think tanks, and so on, is important so as to build some momentum towards the creation of a general competition culture. This will promote more effective domestic competition law enforcement and hence international cooperation. The other component to improving the competition culture is careful enforcement case selection – managing the competition case portfolio to address the particular development ends in your country.

Technical Assistance Should Be Tailor-Made and Respond to Regional Priorities

The seminars pointed out the potential role that South–South cooperation could play in designing TA activities that are coherent on a regional basis, particularly with regard to the implementation of an effective domestic CLP, as well as commitments related to competition undertaken in RTAs. Such assistance should be tailor-made and respond to development priorities. Needs assessment is an important component of TA programmes. The important point is that countries have the role of establishing their own priorities, which will ensure a feeling of ownership over TA programmes. On the other hand, donors also need to be actively involved, since they have considerable experience with competition law enforcement, which the recipient country might lack. Needs assessment should not just be related to the national competition authority – other stakeholders also play an important role in effective enforcement (for example small and medium-sized enterprises (SMEs) need capacity to articulate competition issues, recognize anti-competitive activities and formulate complaints).

Improvement in Domestic Competition Law Enforcement and International Cooperation Can Be Mutually Reinforcing

What the chapters contained in the publication reveal is that domestic competition law enforcement and international cooperation are in fact closely interrelated. An agency with a deep knowledge of domestic competition law enforcement – both in terms of procedure and of substantive aspects of the law – is better able to make use of the international instruments for cooperation. At the same time,

strengthened South–South and North–South cooperation on competition policy serve to enhance domestic competition law and implementing agencies. Since the different legal and administrative systems and capabilities make a 'one-size-fits-all' approach highly problematic, the competition provisions of RTAs should reflect the level of development of the respective partners. CRPs in RTAs between countries whose agencies have similar levels of economic development should focus more on cooperation or harmonization, while CRPs in North–South RTAs might include provisions relating to Special and Differential (S&D) treatment, for instance in the form of TA. One of the primary constraints on North–South cooperation is a lack of enforcement capacity in developing country partners. Increasing this capacity through a research programme that offers policy recommendations in response to competition and consumer protection problems specific to developing country conditions will represent significant progress.

Chapter 1

Competition Law and Policy Provisions in International Agreements: Assessing the Low Level of International Implementation

Barbara Rosenberg[1]

[1]The author would like to thank Ana María Alvarez, Pierre Horna and Laurence Wilse-Samson for their contribution to this chapter, as well as Peter Holmes and James Mathis for insightful thoughts and suggestions that were a starting point for the chapter. Of course, any errors remain her exclusive responsibility.

1.1 Introduction

The Korea Fair Trade Commission (KFTC) recently reported successful outcomes in an international cartel investigation of 'air cargo',[2] to some extent indicating that without international cooperation the results achieved would not have been possible. Considering that the enforcement of Competition Law, particularly related to the fight against cartels, has been recognized as an important means to foster the development of the economy and (potentially) secure a direct social impact, cooperation among jurisdictions has emerged as a fundamental tool to achieve this goal.

The increasing globalization of mergers and anti-competitive conduct has led to the perception that international cooperation in the competition field is important to increase the effectiveness of enforcement by authorities by avoiding the risk of the destruction of evidence and by facilitating the smooth progression of the investigation. It is furthermore said to reduce the risk of conflicting/ incompatible decisions in individual cases and, within free trade areas, to guarantee that the lack of competition does not impair the free flow of trade.[3]

In this respect, the assumption that cooperation in the competition field is needed might provide some justification for the proliferation of regional and bilateral cooperation agreements among competition authorities (agency-to-agency agreements – ATAs) the inclusion of competition provisions in regional trade agreements (RTAs),[4] as well as the large efforts that have been devoted by competition authorities to extend informal cooperation and promote soft convergence in competition issues in a number of international fora (International Competition Network – ICN, United Nations Conference for Trade and Development – UNCTAD, and the Organisation for Economic Co-operation and Development – OECD),[5] especially in light of the recent setbacks in multilateral negotiations.

Despite all those efforts, authorities, especially from developing countries, report that the number of *successful* formal and informal cooperation cases has not reached the same trend in digits as the number of RTAs and ATAs signed,[6] and is far from the desired level.[7] It is undeniable that limitations and delays in the exchange of information make cooperation less effective, resulting in the under-enforcement and under-sanctioning of cartels.[8]

The reason for this low level of implementation of agreements possibly indicates that some features of the cooperation agreements themselves have been limiting their exercise and, as a consequence, preventing countries from really benefiting from the outcomes of joint efforts. This low level of implementation is possibly particularly harmful for developing countries, as they normally lack resources for enforcing their competition laws. However, through cooperation with mature authorities, the efforts devoted to investigation and developing capacity could be enhanced.

[2] Han (2006).
[3] On benefits of international cooperation, see Lowe (2006).
[4] According to Alvarez (2006), approximately 100 agreements out of more than 300 RTAs contain provisions on CLP, 56 including developing countries.
[5] About soft convergence in international organizations, see Papadopoulos (2006).
[6] See, generally, UNCTAD (2005a) and Holmes *et al.* (2006).
[7] Cernat (2005) in UNCTAD (2005a).
[8] Han (2006, p. 1).

By analysing some empirical examples of successful and non-successful cases of cooperation, this chapter aims to shed some light on the types of cooperation that have indeed occurred and aims to assess whether the low number of successful cases reported by developing countries has to do with the lack of local institutional capacity to profit from those provisions and/or from the content of the provisions themselves (that eventually do not guarantee effective cooperation). Based on this analysis, it should be possible to draw lessons from the implementation of ATAs and RTAs, to overcome the problems related to the absorptive capacity of developing countries and, to some extent, assess which types of provisions on cooperation should be included in international cooperation agreements.

1.2 International Implications of Competition Provisions in International Agreements: why cooperate?

It is a fact that countries and international organizations have been taking a number of steps with the aim of increasing cooperation between jurisdictions, which indicates that such cooperation would be helpful for increasing the level of competition law enforcement, as well as to build capacity in countries that are developing their competition institutional and legal frameworks. Based on the premise that cooperation is key, countries have been devoting great efforts to the negotiation of international agreements, as well as to participating in a number of international fora ramping up the level of informal cooperation among countries.[9]

If so much effort has been devoted aiming to engage and foster cooperation, but the level of implementation is still low and thus concrete outcomes are rare, it is possible to infer that the model being adopted is not adequate for its purposes. The reason for this might be two-fold: either cooperation is too costly to be pursued, as the agreements are ill-designed in a way that the burdens for cooperation tend to be higher than the perceived benefits arising from it;[10] or even though countries may be 'eager to ink' international cooperation agreements,[11] there is no real interest in spending the resources required to push such cooperation.

Aiming to identify features that could help to address the above hypothesis, the experience of three countries – Turkey, the Republic of Korea and Brazil – in requesting and receiving cooperation will be described and analysed. The three countries chosen for such an analysis – even though having some differences in terms of economic situation and length of existence of the competition law and authority – have comparably evolving experiences in terms of developing their competition institutional capacities, as well as in the recent enforcement of the competition law.[12] By examining the cooperation experience from these countries, the aim is to evaluate to what extent (i) the existence of competition provisions in international agreements has been important to foster cooperation between agencies on actual enforcement cases, (ii) it is important that the cooperation provisions contained in international agreements are duly designed and phrased in such a way that they indeed allow cooperation to take place, when desired and/or requested, (iii) informal cooperation can play a role, (iv) having binding competition enforcement provisions would have changed the outcome of the cooperation, and (v) positive outcomes resulted from the cooperation.

[9] See, for example UNCTAD (2005b) and Klawiter and Laciak (2003).

[10] On costs and burdens in implementing international cooperation agreements, see Rosenberg and Araújo (2005).

[11] Cernat (2005).

[12] For assessing the similarities and differences in implementing the competition law in those countries, see the Peer Reviews completed by the OECD (OECD, 2005a,b,c). All three countries have recently been subject to such review.

1.2.1 Turkey: is binding cooperation needed?

Turkey is one of the developing countries that has clearly been investing in strengthening its institutional capacity aiming at combating anti-competitive conduct.[13] In the context of its anti-cartel enforcement actions, and especially with regard to the fight against international cartels, the Turkish Competition Authority (TCA) has been devoting effort towards profiting from international cooperation, but has yet a long way to go to achieve the desired results.

The authority reports that it has been focusing on two types of cooperation, namely *soft cooperation* and *hard cooperation*.[14] The former involves the sharing of experience, best practice, and theoretical developments and is found in international fora. In terms of soft cooperation, many useful insights have been gained through the work of organizations such as UNCTAD, the OECD competition committee meetings, the World Trade Organization (WTO) Working Group on Trade and Competition, and the ICN working groups. On the other hand, *hard cooperation* involves the sorts of cooperation which assists in enforcement in actual cases, and requires the sharing of data and information, coordinated dawn raids, and so on, normally in the context of a cooperation agreement.

With respect to *hard cooperation*, it can be noted that even though the TCA has been trying to use different legal grounds as a basis for international cooperation, the experience with actual cooperation is still limited in Turkey, and so far no successful results have been achieved.[15] In this subsection, we will focus on a particular and recent experience on (the lack of) actual cooperation in enforcement, as it is illustrative of the importance of international cooperation, as well as the difficulties faced in its implementation and execution. Turkey (2006) reports:

> The TCA decided to examine the coal market upon complaints regarding sharp increases in coal prices. As a result of the preliminary investigation, it was decided that the sharp increase in domestic retail prices resulted from the systematic increases in the prices of imported coal. During the preliminary investigation phase, the price increases were associated with price fixing by Company A, Company B, and the subsidiaries of Company C which are Company C1 and Company C2, therefore the Competition Board (the decision-making body of the TCA) initiated an investigation against these undertakings for fixing the price of sized coal on 3rd of June 2004.
>
> When the investigation was initiated, (i) *Company A*, based in Austria, had an office in Turkey; however upon the initiation of the investigation, they closed down their office; (ii) *Company B*, whose headquarters is in Switzerland, did not have any operation unit in Turkey. However, during the investigation phase, it started an operation unit in Turkey; (iii) *Company C*, based in Switzerland, had its subsidiaries based in Turkey. Although two of the undertakings had no companies in Turkey, their activities were affecting the markets within the boundaries of Turkey ("effects doctrine").[16] Thus, they were under the scope

[13] OECD (2005b).

[14] See also Tekdemir (2006).

[15] See Turkey (2006).

[16] 'According to this doctrine, domestic competition laws are applicable to foreign firms – but also to domestic firms located outside the state's territory, when their behaviour or transactions produce an "effect" within the domestic territory. The "nationality" of firms is irrelevant for the purposes of antitrust enforcement and the effects doctrine covers all firms irrespective of their nationality.' Definition provided by the European Commission DG Competition at http://ec.europa.eu/comm/competition/general_info/e_en.html.

> of the Act on the Protection of Competition no 4054 (Competition Act). Although an investigation was initiated against these relevant undertakings, **efficient use of powers concerning request for information** or **on the spot inspections** was not considered possible, as the head offices of these undertakings were situated abroad.[17]

The interesting issue in relation to this case is that even though the investigation was finalized on 25 July 2006 by the Competition Board – after more than 2 years following the launch of the investigation – the TCA only reached a decision with respect to those companies that are located in Turkey. The author explains that despite the fact that one of the undertakings was found to be guilty, the TCA could not impose a fine as the procedure envisaged in the Act could not be completed properly due to the fact that the TCA was not able to collect the necessary evidence in relation to the companies located abroad, resulting from the lack of collaboration from the foreign authorities. As mentioned, based on the effects doctrine, the TCA requested cooperation from those countries where the relevant undertakings were located: for collecting evidence in Austria, cooperation was requested under the provisions of its Customs Union (CU) with the European Union (EU); for collecting information from Switzerland, cooperation was requested under the framework of the free trade agreement (FTA) with the European Free Trade Association (EFTA) countries. Nevertheless, no cooperation was achieved.

Tekdemir (2006) explains that, in the first case, the Austrian Government did not accept the request to share information and documents on the following bases: (i) no implementation rules for competition rules of the CU 1/95, (ii) confidentiality issues, alleging that European Commission officials had informed them that they could not share any information or documents about the firms and their activities with any country that is outside of the scope of the jurisdiction of the European Commission due to the principle of professional secrecy, and (iii) an allegation that the relevant article (Article 43) of the CU Agreement was not sufficient for providing the necessary framework for cooperation (in particular as the conduct had no effect in the EU market). As a consequence, even though the Commission officials accepted the justification for such a request, they argued that such requests caused great sensitivity and discussions. They mentioned further that they themselves had faced similar situations and had been unable to obtain information from third countries.

In the second case, Switzerland responded by saying there was no possibility of enforcing Swiss competition law in the case, and noted that the OECD Recommendation concerning cooperation between member countries on anti-competitive practices affecting international trade (1995 OECD Council Recommendation) would provide a more proper framework for receiving cooperation.

Aside from the difficulties in receiving cooperation in competition law enforcement, the TCA identified the need to create capacity in *procedural issues* related to cooperation, such as notification of the investigation decision and notification of investigation reports to the undertaking in other countries. In the above-described case, for one of the companies concerned, the Turkish embassy was unable to complete the notification, for the other 'the Austrian government [rejected communicating] the investigation report arguing that there is [no] bilateral or multilateral agreement between the two countries which cover competition related administrative documents'. It is thus clear that procedural issues have become quite important and indeed they might be decisive in competition cases:

[17] Turkey (2006, p. 4).

> As seen from the case examined above, even if the TCA had found sufficient evidence to conclude that Company A was involved in a competition infringement, it could not have imposed any fines as long as the procedure envisaged by the competition law is not completed. During the final phase of the investigation, the TCA could not communicate with the headquarters of those undertakings that are located abroad due to lack of international juridical cooperation with respect to competition laws between Ministries of Justice of Turkey and those of third countries. Although the TCA tried diplomatic channels, they were time consuming, insufficient and improper. Thus, national agencies have to find solutions with respect to hard cooperation in procedural matters via their Ministries of Justice to launch any relationship among them.[18]

In conclusion, even though adopting all the available steps to obtain cooperation from foreign authorities – which was the only way to gather the required evidence – the TCA was unable to obtain the requested cooperation. For this reason, the author suggests that in the absence of a clear procedural cooperation agreement, the effects doctrine is inoperative and, as a consequence, it suggests that there is a need to negotiate ATAs or RTAs with provisions that duly address those issues.

The example provided above provides an interesting framework within which to analyse the extent to which formal agreements are indeed needed for allowing cooperation, as well as why cooperation provisions need to be duly designed to guarantee that cooperation can be implemented. This case also tackles two other interesting and more sensitive issues: (i) whether having binding enforcement provisions on cooperation agreements is convenient and/or required; and (ii) the fact that cooperating with a foreign authority when the conduct is not being investigated within the country – as the conduct does not have local effects – raises particularly sensitive issues and, to some extent, may pose a question mark over countries' real interests in cooperating. These issues will be evaluated in Section 1.3, together with the cooperation experience of Brazil and the Republic of Korea.

1.2.2 Republic of Korea: relevant outcomes arising from international cooperation

The Republic of Korea is possibly one of the countries that, though possessing a relatively young national competition authority, has the most experience in cooperating with foreign jurisdictions for cracking international cartels, even though it describes itself as still having scarce experience with these activities – which further corroborates the assumption that cooperation is still very low.

In this context, two cases in which the KFTC reports success resulting from international cooperation will be analysed: (i) the prosecution of the graphite electrodes cartel, and (ii) the prosecution of the international cartel on air cargo fares.

Joseph Seon Hur, a former chief of the KFTC, describes that even though the KFTC intended to develop its institutional capacity to fight cartels, it as yet lacked the ability to initiate international cartel investigations.[19] In addition, even though the institution has been building capacity to fight international cartels since 1997, there was a lack of internal consensus on the need to

[18] Turkey (2006, p. 8).
[19] See Hur (2006).

prosecute international cartels. The first step was to educate the staff on the harmful effects of international cartels. Even though consensus was gradually reached on the importance of fighting international cartels, the KFTC faced difficulties in the investigation process. Such difficulties consisted of (i) inexperience in collecting material evidence, and (ii) the fact that companies had no branches or affiliates, thus making it impossible to pursue coercive investigation.

Based on this framework, in the graphite electrodes case, the KFTC collected evidence in an indirect way and, to some extent, relied on cooperation from the United States and the European Commission, which had already collected evidence on the anti-competitive conduct.[20]

Aiming to gather the available information, the KFTC notified the US Department of Justice (DoJ), the European Commission, the German authority and the Japanese authority, in accordance with the 1995 OECD Council Recommendations. Based on this request, the KFTC received assistance from foreign competition authorities, which provided them with publicly available non-confidential information. Among the documents delivered, since in this case Mitsubishi was indicted for aiding and abetting the cartel, the KFTC reported that it could obtain relevant materials from the court records of *US v. Mitsubishi Corp*. It was noted that at the time the KFTC requested cooperation, the US DoJ had already resolved the case by plea-bargaining and so no material evidence was disclosed to the US DoJ. In addition, the KFTC obtained the non-confidential version of the European Commission decision, but this document did not include material evidence that could be used in the Korean investigation.

Even when accessing such material, the KFTC still faced difficulties in its decision-making process, especially as cartel members were adopting a number of (non-legal) measures to prevent the KFTC from punishing them, such as hinting that they could stop exporting to the Republic of Korea. In any case, the KFTC was firmly determined to punish the companies, based on the information supplied by experienced authorities and scholars of the damaging effects of cartels, and it was able to conclude the investigation based on the information it had available.

Interestingly, even though the KFTC was successful in concluding this investigation, Mr Hur, the Chief of the KFTC at the time of the investigation, stated that it is impossible for competition agencies from developing countries to address international cartel cases on their own, due to the large cost and time-consuming nature of the investigations, thus stressing the reliance on the collaboration with the US and EU competition authorities.

A different experience of cooperation is reported by Cholsoo Han, a KFTC official, in relation to the alleged international air cargo cartel.[21] In this case, the European Commission and the KFTC joined efforts and exchanged information aiming to investigate the alleged cartel, even planning a quasi-simultaneous (time difference considered) search in different countries. This joint investigation was extremely helpful for the investigation, indicating that effective cooperation leads to a higher level of enforcement and sanctioning. Even though both parties have clearly benefited from this cooperation, it is possibly particularly important from the Korean perspective as, being a less mature agency

[20] As the KFTC cannot bring criminal investigations against cartels, the use of Mutual Legal Assistance Treaties (MLATs) is ruled out as a means of conducting joint international cartel investigations. On the other hand, the KFTC can recommend to the Public Prosecutors' Office that it starts criminal proceedings based on evidence available and in such cases MLATs can be used. In this sense, Han (2006) states that 'since Korea primarily addresses cartels with administrative means, MLATs are not used for international cooperation initially, only if the national competition authority files a cartel report with the prosecutor's office'.

[21] Han (2006, p. 5).

compared to the European Commission, it can profit from the experience and expertise of the latter, shortcutting the process of building capacity and reaching efficient enforcement outcomes.

An examination of the above-mentioned cooperation experiences is an interesting means whereby to explore the differences between formal and informal cooperation, as the effective outcomes in the two cases seem to differ. These cases also allow us to examine the extent to which the existence of competition provisions in international agreements have fostered cooperation between agencies on actual enforcement cases and how well-crafted provisions can lead to effective cooperation, even between developing and developed countries. At the end of the day, these two cases are unambiguous examples of how international cooperation can develop into an important aspect of fighting international cartels, and help to build enforcement capacity in developing countries. These issues will be evaluated in Section 1.3, below, together with the cooperation experiences of Brazil and Turkey.

1.2.3 Brazil: cooperation agreements providing a framework for cooperation

In recent years, the Brazilian Competition Policy System (BCPS)[22] has been taking a number of measures at national level to increase the level of enforcement in fighting anti-competitive conduct.[23] These efforts have received international praise.[24]

To some extent Brazil is seen as an example for other developing countries; it has been able to expand its interaction with a number of foreign authorities within the context of international organizations,[25] which theoretically allows for increased formal and informal cooperation. However, the Brazilian investigative authority, the Secretariat for Economic Law, Ministry of Justice, Brazil (SDE), reports that despite its numerous attempts to use international cooperation in its investigations, very limited results have been achieved thus far.[26]

In a quite comprehensive paper recently presented, Mariana Tavares de Araújo reports on the SDE's general experience in cooperating with other agencies, indicating those circumstances where results were accomplished and those where the efforts were moot. She describes that Brazil is both a donor and a recipient of TA and that, in the last 4 years, the Brazilian authorities have used international cooperation mechanisms for technical assistance (TA) purposes and, to some extent, as a substantive investigative tool in merger and conduct cases. For furthering cooperation, she notes that the Brazilian agencies have taken as much advantage as possible of the network developed during international competition meetings, as well as used cooperation agreements and other soft law instruments allowing for cooperation, such as the 1995 OECD Council Recommendation.[27]

Aiming to describe the various experiences in collaborating with international authorities, and to

[22] The Brazilian Competition Policy System (BCPS) is formed by the Secretariat of Economic Law of the Ministry of Justice (SDE/MJ); the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE/MF), and by CADE (Administrative Council of Economic Defense).

[23] See Rosenberg and Berardo (2006).

[24] See, for example, OECD (2005c, p.7).

[25] For example, Brazil has been invited to chair three subgroups within the International Competition Network, including one in the Cartel Working Group; its request to be peer reviewed by the OECD was accepted; its participation as an OECD observer was confirmed in 2005, even though a number of other developing countries lost this status; and Brazilian representatives have been invited by UNCTAD to engage in training programmes abroad and to participate in UNCTAD Peer Reviews.

[26] Araújo (2006).

[27] *See* Rosenberg and Araújo (2005, pp 191–243).

evaluate the extent to which a framework for cooperation was indeed necessary, de Araújo illustrates Brazil's experience in light of the cooperation agreement that Brazil is party to with the United States, signed in October 1999 and entered into force in March 2003.[28] The Brazil–US Agreement is described as the first agreement for competition matters that Brazil was a party to and is one that overall she reports has been useful:

> Initially, the Brazilian authorities used the agreement mostly for technical assistance purposes, but in the past four years, the BCPS and the US Department of Justice (US DoJ) and the Federal Trade Commission (FTC) staff have moved from purely technical assistance initiatives, to the exchange of non-confidential information, including investigation strategies, views on relevant market definition, theories of anticompetitive harm, potential remedies, and the like. The type of assistance required during these years have ranged from discussions regarding several provisions of the Bill that will amend the Brazilian Competition Law, *vis-à-vis* the United States experience and international recommended practices in the area, to the necessary elements for the creation of a Marker System for our Leniency Program, all of which have been of undisputed value. In addition, the Brazilian and the US authorities have also notified each other regarding a number of mergers that may have impacted the other jurisdiction, in fulfillment of the notification provision of the agreement and consulted on conduct investigations that involve firms located in the other countries' territories. (…)
>
> On another occasion, the SDE informed the US DoJ through the official notification channels that there was a domestic cartel investigation involving multinational firms that were also based in the United States. The purpose of the communication was to make available copies of the related public documents and/or discuss the general aspects of the case with the US DoJ staff, if there was also an investigation of any of these firms in the United States. One year later, the SDE was consulted by the FTC about that same cartel case, since the US agency was investigating another conduct involving the same industry. The SDE confirmed the existence of the case and informed that due to a decision in the criminal court, all the files of the administrative process were sealed and that the SDE was barred from giving out any additional information on the investigation, but suggested discussing on general terms aspects of the relevant market, if it were useful for the investigation.[29]

While Brazil reports relevant outcomes of the agreement that is in place with the United States, it reports that its experience with the European Commission, outside the context of a formal agreement – but with whom it has tried to cooperate informally – even though possible, has not been as successful as expected. Araújo describes that the BCPS has consulted the European Commission on

[28] In addition, Brazil has cooperation agreements with Argentina, Portugal, Russia and one with its MERCOSUR partners. These are all first-generation agreements that include provisions on technical cooperation, non-confidential information exchange and comity. In addition, Brazil has an MLAT with the United States. The agreement between Brazil and Argentina, which was signed in October 2003, has also been used to exchange non-confidential information regarding conduct and merger cases, on occasions where staff members identified that a certain investigation would concern the other authority. The agreements with Portugal and Russia are less than a year old and have not yet been tested, but as previously mentioned, also include the same cooperation mechanisms referred to above. The cooperation agreement between MERCOSUR partners has not yet been ratified by all parties, but to some extent has been used for reciprocal technical assistance during the meetings of the MERCOSUR Competition Committee (CT5), where parties make presentations on issues of interest to the other members.

[29] Araújo (2006).

a number of occasions to discuss specific competition and regulatory issues, on three occasions to obtain information on unilateral conduct cases and three other times to request any non-confidential information available on cartel cases that were reviewed by the two jurisdictions, based on the 1995 OECD Council Recommendation. Generally speaking, some information was provided by the Commission to be used in the respective investigations.

> In the first case, SDE contacted the Commission after the European investigation had already been concluded and the parties found guilty and fined by the European Commission. For that investigation, SDE requested any non-confidential information available to the Commission that could be in any way relevant for the Brazilian investigation and received the public decision issued.
>
> In the second case, the cooperation occurred at the investigation stage, when the cartel was simultaneously being investigated by the European Commission and by the Brazilian authorities. Since the Statement of Objections that had been issued contained confidential information, the Commission sent a summary of the non-confidential information regarding the case available at that moment.
>
> The third case concerned another international cartel simultaneously being investigated by the Commission and by the Brazilian authority. In that case, the same party that had been granted amnesty in Europe was applying for the benefit with SDE, therefore the purpose was to ensure that the Brazilian authorities had access to the same information that they had presented in Europe. This was particularly important, since a substantial part of the files presented in Europe could not be replicated (such as agendas, phone transcripts and other documents), as some of the employees of the applicant had already left the firm. The Commission in that case said that it might be possible to forward the party's file if the party issued a waiver.[30]

Araújo reports an additional attempt to use international cooperation as a tool to gather evidence for this same case, also based on the 1995 OECD Council Recommendation. After the agreement was signed, the SDE contacted the Australian Competition and Consumer Commission (ACCC) to inquire about the possibility of having access to non-confidential information located in one Australian city, to which the SDE might be unable to have access without the assistance of the ACCC. The information needed consisted of confirmation that the parties met at a certain hotel in the country on specific dates. The SDE had already all the details provided by a leniency applicant, but still needed to corroborate it with the hotel's registry. After having attempted to assist the SDE to gain access to the information, the ACCC informed the SDE that the Australian authorities could compel a party to provide information under their investigatory processes, but were prevented from disclosing any information to a third party. Therefore, since the ACCC was unable to use their formal powers, the approach to the hotel was made on a voluntary basis and unfortunately the hotel was unwilling to provide the information requested. According to the ACCC, that was an area in which amendments to the legislation were being sought, but that, however, had not yet occurred.

From the experience described above, it is possible to see that Brazil has made considerable efforts to

[30] Araújo (2006, p. 3).

use the international cooperation mechanisms available to it, possibly under the view that cooperation may be a very important tool to increase the enforcement of competition law. Summing up its experience, Araújo states that the 'experience has shown that in general, the exchange of information for technical assistance purposes, be it through informal cooperation or through bilateral cooperation agreements has been very successful. Similarly, the exchange of non-confidential information on mergers and unilateral conduct cases is increasing and, overall attending SDE's expectations'.[31]

Interestingly, however, the author states that from the Brazilian perspective, even though considerable efforts were made with the aim of benefiting from cooperation provisions, the attempts to use international cooperation tools to combat cartels have had limited or no success at all as, at the end of the day, no important information has been gathered. The crucial point made within this context is that, 'even though legal constraints existing in all jurisdictions are indisputable and seem to be the main obstacle for effective cooperation, the "non-confidential information" category appears to be sufficiently broad to include types of data that so far have not been exchanged simply for lack of opportunity and/or because the agencies may need to establish closer ties before cooperating more freely'.[32]

As a final remark that could be helpful to address the effectiveness and convenience of entering into cooperation agreements, Araújo concludes that even despite the fact that all the bilateral agreements Brazil is a party to are non-binding first-generation agreements (and therefore only allow for the exchange of non-confidential information), those instruments have a clear advantage compared to soft-law instruments and to informal cooperation in general, as they provide the parties with a clear *framework* within which to cooperate.

1.3 Why Turn the Ink into Practice?

A comparison of the above experiences allows for an assessment of some features relating to the level of implementation of cooperation procedures between countries, to an extent emphasizing the importance of joint efforts to avoid under-enforcement and under-sanctioning of anti-competitive practices. The experiences further indicate some features of the cooperation procedures that limit or foster cooperation. In this context, even though the examples do not allow for either extracting a 'one-model-fits-all' cooperation chapter or for identifying clear tools that would indeed increase the level of effective cooperation among countries, the concrete cases allow the identification of some key issues that can be taken into account if the intent is to find viable ways to foster cooperation.

As mentioned above, the main questions that would arise in this context are the extent to which (i) the existence of competition provisions in international agreements have been important to foster cooperation between agencies on actual enforcement cases, (ii) it is important that the cooperation provisions contained in international agreements are duly designed and phrased in such a way that they indeed allow cooperation to take place, when desired and/or requested, (iii) informal cooperation can play a role, (iv) having binding competition enforcement provisions would have changed the outcome of the cooperation, and (v) when cooperation was indeed in force, positive outcomes were

[31] Araújo (2006, p. 5).
[32] Araújo (2006, p. 7).

identified and resulted in strengthening enforcement and sanctioning.

The three described experiences help answer the question as to whether competition provisions in international agreements have indeed fostered cooperation between agencies on actual enforcement cases. Examining the Brazilian case, it is possible to infer that even though a formal agreement may not be a requirement for cooperation, when agreements are in place they indeed increase the links between countries and competition authorities and, as a consequence, end up fostering the exchange of information and thus increasing cooperation and, to some extent, assist in capacity building.

Apparently, ATAs provide for stronger linkages between authorities than competition provisions in RTAs, possibly as ATAs are negotiated by the competition authorities rather than by trade officials. This has two potential outcomes: competition authorities meet each other and open communication channels between the authorities, who being aware of their needs, are theoretically better placed to design enforceable agreements. This assumption may eventually be deduced from the description of the mechanics of the Brazil–US ATA, as Araújo describes that it was this agreement that formed the basis of the liaison between the authorities and fostered cooperation. The Korean experience adds further support for this conclusion.

However, the question that naturally arises has to do with the importance of the cooperation provisions contained in international agreements being duly designed and phrased in such a way that they allow cooperation to take place, when desired and/or requested. The first issue that comes to mind, and which has already been explored elsewhere, relates to the importance of having the agreement designed in such a manner that burdens do not overshadow the potential gains from the agreement.[33] The second has to do with the mechanics of the provisions themselves. Even though the agreement is just a framework for cooperation, both Korean cases, as compared with the case handled by the Turkish authority, reveal that agreements that do not establish clear, operative and functional cooperation rules can indeed preclude cooperation.

The fact that cooperation agreements can foster cooperation and that duly designed agreements are needed to make cooperation viable in some circumstances, does not mean that a formal agreement is *always* needed. In this sense, the Brazilian and the Korean experiences can be seen as indications that informal cooperation can play a role in actual enforcement. Rather than allowing for the actual exchange of information, experience illustrates that informal cooperation is key for increasing the contacts between the authorities and, as a consequence, allowing for building capacity and increasing the level of communication among authorities worldwide, also promoting some sort of soft convergence. The Korean investigation of the graphite electrodes cartel demonstrates the extent to which informal cooperation with mature jurisdictions allowed the KFTC to further its enforcement capacity. The Brazilian case further illustrates this aspect in two ways: on the one hand, as the case demonstrates, that to some extent Brazil has profited from cooperation; while on the other, it also reveals how the lack of cooperation may result in limited joint investigations and, as a consequence, eventually a greater level of enforcement.

However, some practical examples, such as the already described investigation conducted by the Turkish authorities, indicate not only that informal cooperation is often not enough, but also that

[33] See Rosenberg and Araújo (2005).

when there is no mutual interest in cooperating, voluntary cooperation in many cases will not achieve the desired results. This example raises the question of the extent to which having binding competition enforcement is convenient or even needed. Would it be fair to ask if the outcomes in the case of Turkey could have been different if cooperation was mandatory? Interestingly, even though the answer to the question is possibly yes, a more seminal concern arises: does it make sense to oblige one country to cooperate with another?[34] There is no single answer to this question, but the sensitivity of (confidential) information[35] that might be involved in a request for cooperation, as well as the resources that usually need to be dedicated to ensure the cooperation, to some extent challenge the viability of mandatory cooperation. Developing countries, however, may claim that without binding rules they would not be able to profit from real and effective cooperation.

This last point mentioned leads to another decisive question, namely, to what extent do the different levels of institutional maturity affect cooperation or, in other words, would less mature countries be able to profit from cooperation? The cases described above could lead to the comparison of, on the one hand, the Republic of Korea, which has been able to profit from cooperation with mature countries, while Brazil and Turkey, on the other, seem to be at a more embryonic stage, when it comes to actual enforcement, joint investigation and the effective exchange of information. The fact that the Republic of Korea started cooperating within the framework of the OECD Council Recommendation (and only had support to access the publicly available information, that is, in the graphite electrodes cartel) and, a few years later, evolved to an actual joint investigation with the European Commission (that is, air cargo) is likely to indicate that developing capacity and demonstrating the effectiveness of one's institutions are a prerequisite for actual cooperation. One (mature) authority would only envisage the possibility of profiting from cooperation (and be sure that its own investigation would not be affected) if it believed that the cooperating authority has the capacity to cooperate. Even though such a conclusion may sound natural, the problem arising from it is that those countries that lack capacity are precisely the ones that possibly need greater help from mature authorities.

Positive outcomes from cooperation have been signalled and reported on a number of occasions[36] and, as a consequence, efforts to cooperate should continue. From the above-described cases, it seems that cooperation in actual cases requires prior capacity and the existence of effective institutions, as only this setting would potentially lead to actual joint cooperation and enforcement. In this context, cooperation is also needed for building such capacity as, if no assistance is provided to create competence, it seems that there is no possibility of ever reaching actual cooperation with effective outcomes.[37]

[34] The issue on voluntary or mandatory cooperation was deeply discussed by the World Trade Organization Members at the Working Group on Trade and Competition. For reports and papers presented by countries on this matter, see www.wto.org. See, also, UNCTAD (2003).

[35] The exchange of confidential information is possibly the most sensitive and controversial issue when it comes to the effectiveness of cooperation. See, for example, Damtoft (2006).

[36] Jenny (2002).

[37] In this context, it is worth citing the Japanese cooperation model in which enforcement cooperation should be more flexible and start from more elementary levels. Nevertheless, it is desirable to establish a certain degree of common understandings, such as: (i) commitments to control anti-competitive activities, (ii) commitments to ensure consistency with the core principles of non-discrimination, transparency and procedural fairness, (iii) commitments to cooperate in controlling anti-competitive activities in accordance with the developmental level of each country, and (iv) technical assistance.

1.4 Final Remarks, Rather Than a Conclusion

As mentioned, the aim of this chapter was, by analysing some empirical examples of successful and non-successful cooperation, to shed some light on the types of cooperation that have been implemented and to assess if the low number of successful cases reported by developing countries has to do with the lack of local institutional capacity to profit from those provisions and/or from the content of the provisions themselves (that eventually do not guarantee effective cooperation).

Based on this analysis, even though the examples do not permit final conclusions to be drawn in relation to a cooperation pattern that could increase the level of cooperation among countries, the concrete cases may facilitate the identification of some issues that could (or should) be taken into account when attempting to identify the international factors that affect the low level of implementation of cooperation provisions in RTAs and ATAs. Therefore, rather than drawing conclusions, the following final remarks may be useful in this context.

From all the information collected, it is clear that international cooperation, whether formal or informal, between competition authorities in the fight against (international) cartels remains quite limited, being the exception rather than the norm. However, when cooperation exists, positive outcomes have been reportedly achieved in many cases, indicating that the results reached could not have been achieved by any other means. Indeed, in this context, Frédéric Jenny reports that cooperation is considered useful by competition authorities that have indeed cooperated,[38] especially with reference to countries with less institutional capacity that report that they cannot defend themselves from global/external cartels.

As cooperation is needed to fight international cartels, and considering that cartels have large cost implications for developing countries[39] and a negative impact on economic development, the importance of cooperation, especially in sectors such as intermediate goods/services is extremely high. This is particularly so when one considers that the evidence required for the detection and punishment of international cartels is, in many cases, scattered across different jurisdictions and that an agency may require information to carry out successful prosecution from another country. In this context, if a jurisdiction that has also been harmed by the cartel finds itself unable to sanction this cartel because of its inability to obtain the necessary information from other agencies, the result is under-enforcement and under-sanctioning,[40] thus also affecting economic growth and development.

Even though benefits from cooperation have been identified, there is also an indication that, to some extent, agreements may be ill designed, as burdens to negotiate and notify may be high and it is not always the case that agreements take into consideration the real needs of the parties, including the differences in the level of institutional maturity. In this sense, considering that cooperation is identified as key, the lack of implementation of competition law provisions in RTAs and ATAs possibly occurs due to the fact that the benefits of devoting efforts to cooperation are insufficiently clear and the costs are high.

[38] Jenny (2002).
[39] Levenstein *et al.* (2002).
[40] Han (2006, p. 1).

Consequently, the means of enhancing international cooperation in cartel investigations should be to start with building capacity and effective institutions and then move to addressing sensitive issues, such as the existence of voluntary/mandatory notification, as well as the exchange of confidential information. In this context, Jenny (2002) has stated that the fact that a formal cooperation agreement exists between two countries is not a guarantee that they will cooperate on every case. As cooperation provisions are not binding, and possibly should not be, and normally not subject to dispute settlement, positive comity and actual cooperation have a limited role.

It has been mentioned that most cooperation agreements do not allow for the exchange of confidential information. The fact that only public information can be exchanged makes the effect of formal cooperation limited, in some cases preventing real joint investigations. Thus, countries should consider finding ways to authorize their competition authorities to exchange confidential information with foreign competition authorities, provided that appropriate safeguards against unauthorized disclosure are in place.

A number of experiences reveal that the level of informal international cooperation has increased somewhat over the last few years (for example through the ICN and the OECD), but the precise extent of this informal cooperation is still difficult to assess. Some reports indicate that even though informal cooperation has its uses – not only in actual cases, but also as, to some extent, it is likely to assist the evolution of cooperation, including follow-on agreements – sources indicate that having a framework seems to be important in quite a few concrete situations.

Based on the above, it is indisputable that the level of implementation is still much lower than desirable and, thus, (developing) countries are not able to profit from cooperation as much as is optimal. Eventually, if more positive actual effects are identified (such as in the case of the Republic of Korea), developed and developing countries would be more engaged in cooperating, even though facing burdens. The major hypothesis drawn, therefore, is that to the extent positive outcomes are continuously identified this would provide motivation – both instrumental and moral – for increased and more efficient cooperation towards developing countries, creating incentives for countries to establish an appropriately organized framework for cooperation, providing (developing) countries with strong political support and the technological assistance needed to overcome challenges in every phase of competition policy development.

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Chapter 2

National Implementation of Competition-Related Provisions in Bilateral and Regional Trade Agreements

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2.1 Introduction

Since the conclusion of the Uruguay Round, the birth of the World Trade Organization (WTO), and various regional and bilateral agreements, traditional trade barriers (tariffs and quotas) have been reduced and have become of less importance compared to non-tariff barriers and trade-related measures in the evolving global trading system. The latter can be seen in the current regional trade agreements (RTAs) being negotiated, which extend far beyond trade in goods to include such 'behind-the-border' issues as intellectual property (IP), competition, and investment. RTAs containing competition-related provisions (CRPs) have multiplied in recent years (Cernat, 2005). There is a wide range of types of CRPs, ranging from older provisions that tended only to be 'best-endeavour' clauses to competition agreements that constitute supranational authorities with regional jurisdiction, such as in the case of the European Union (EU). There are many different reasons for adopting different designs – one size doesn't fit all. Different countries have different legal histories and administrative capabilities and policies need to be tailored accordingly.

Earlier research has established however that while countries have been eager to ink these RTAs containing competition chapters, there has not been the matching political will to implement these provisions (Cernat, 2005). This chapter attempts to assess the degree of, barriers to, and motivation for the national implementation of these CRPs. It has been argued that one of the most important factors when it comes to implementing international treaties such as RTAs into national law is the problem of supranationality (Jenny and Horna, 2005).

This motivates our analytical division between the national implementation of CRPs in bilateral agreements, particularly North–South agreements, and the national implementation of CRPs in regional integration schemes,[42] especially those constituting supranational authorities.

Furthermore, within each case, this chapter argues that two factors need to be studied as potentially affecting the use made of CRPs: firstly, the existing as well as the changes in trade flows between signatory countries before and following the conclusion of the trading agreement; and secondly, the willingness of competition agencies to apply these competition provisions at national level, which itself relies heavily on the institutional and absorptive capacities of the agency and the prevailing competition culture in the country.

The rest of this chapter is organized as follows: Section 2.2 aims to look at two different cases with respect to national implementation: national implementation in bilateral trade agreements and the national implementation of CRPs arising from regional integration agreements. A set of criteria is sketched to assess the potential national implementation of both cases. Furthermore, Section 2.3 of this chapter attempts to apply these criteria in specific bilateral agreement case studies. Final remarks will consider the extent to which technical assistance (TA) should be addressing those problems identified throughout the chapter.

This chapter does not address the possible constraints to international cooperation arising, for instance, out of the reticence of a trading partner to assist in enforcement, related to constraints

[42] This paper introduces a distinction between the two concepts of bilateral and regional trade agreements (or regional integration schemes). Elsewhere in the publication RTAs refer to bilateral, plurilateral and regional trade agreements. In this chapter, an important distinguishing feature of RTAs is territorial contiguity.

emanating from substantive or procedural divergences in competition law, or the parameters imposed by confidentiality. This topic is dealt with by Rosenberg in Chapter 1 of this publication.

2.2 National Implementation of CRPs in Regional and Bilateral Trade Agreements

2.2.1 Need to split national implementation arising from CRPs in bilateral trade agreements, and regional integration agreements, which may include the creation of a supranational authority

First, a definition of the 'national implementation of CRPs' is provided. Second, the importance of distinguishing between the two cases (bilateral and regional integration) will be stressed in terms of differentiating between the challenges that signatory countries face in terms of CRP implementation.

2.2.1.1 Defining the national implementation of CRPs

The effect of the existence or negotiation of free trade agreements (FTAs) on the domestic political economy of competition law enforcement is considered.

CRPs in trade agreements might bring forward the date of enactment of a national competition law. In this case, the effect on the domestic political economy of competition law and policy (CLP) enforcement is straightforward. Alternatively, CRPs in RTAs might be used to strengthen the deterrent effect and enforcement of national laws, or enhance the powers, budget and resources of competition agencies.[43] Furthermore, the elimination of, for instance, the ability to use anti-dumping or trade remedies within the context of an FTA might alter the size and composition of caseloads of competition agencies. The magnitude of each of the above potential effects is something requiring further empirical investigation.

The national implementation of CRPs in either regional integration or bilateral trade agreements could also entail harmonization of the norms of national scope. This process has legal implications that are to be analysed under a case-by-case approach. Furthermore, provisions around cooperation, or the creation of a regional authority might also change the scope and assignment of responsibilities for competition enforcement.

Although in the competition literature there has been a division of competition chapter types into North American Free Trade Agreement (NAFTA)-style and EU-style agreements, Evenett and Anderson (2006) propose that a broader taxonomy could include some of the following elements:[44]

- The nature and content of competition principles/instruments embodied in chapters of the Agreement dealing with individual economic sectors (e.g. telecoms, transportation, financial services) in addition to provisions found in general chapters on "competition";
- Whether the application of competition law and/or policy is subject to general (as opposed to

[43] Evenett and Anderson (2006, p. 28).
[44] Evenett and Anderson (2006, p. 28).

competition-specific) principles regarding non-discrimination, transparency and procedural fairness;
- Whether the agreement requires the adoption of general competition legislation and/or establishes individual or common enforcement authorities;
- The emphasis placed on and enforceability of rules relating to designated monopolies and state owned enterprises as compared to private anti-competitive practices.

Hence, one can see that the 'national implications' of CRPs extend beyond commitments emanating from the competition chapter. It is important to bear this in mind when examining later for instance the comments surrounding the agreement between the US and Peru. In this FTA, dispute settlement is mandated for disputes involving designated monopolies, but not in 'pure competition' disputes.[45]

2.2.1.2 National implementation of CRPs in RTAs

Broadly speaking, CRPs in RTAs may be classified into substantive or cooperation provisions. The first may entail harmonization schemes such as the ones emerging from the EU competition law system. Harmonization of the national CLP and its enforcement is a prerequisite for the candidate countries. Furthermore, enforcement activities are coordinated through the implementation of the European Competition Network (ECN).[46]

Regional competition law may be difficult to enforce, and might require the domestic enforcement capability (that is the existence of a national competition authority). For example in the case of Caribbean Community and Common Market (CARICOM), as pointed out by Alvarez *et al.* elsewhere in this publication (Section 3.4.3) 'while the Commission is empowered to determine the existence of and remedy anti-competitive practices, to a large extent it is dependent on national competition authorities (NCAs) for enforcement'. The South African Customs Union (SACU) agreement does not require the creation of a supranational competition authority, but instead requires each country to adopt its own competition law, and then to cooperate on enforcement. Finally, the Andean Community (AC): *normativa andina* (Decision 608) applies to cross-border cases; but the regional law is to be temporarily used at national level in Bolivia and Ecuador (Decisions 608 and 616, respectively) while national competition law enforcement capability is still to be developed.[47] In any of the aforementioned cases, there is a lack of operational procedures related to coordinated enforcement, especially as many of the member countries of those agreements do not possess a competition law and/or authority.

[45] See Final Text of the United States–Peru Trade Promotion Agreement. Web source available at http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html

[46] Previous attempts have drawn some conclusions as regards the possibility of extrapolating the ECN experience into other regional groupings. See Jenny and Horna (2005).

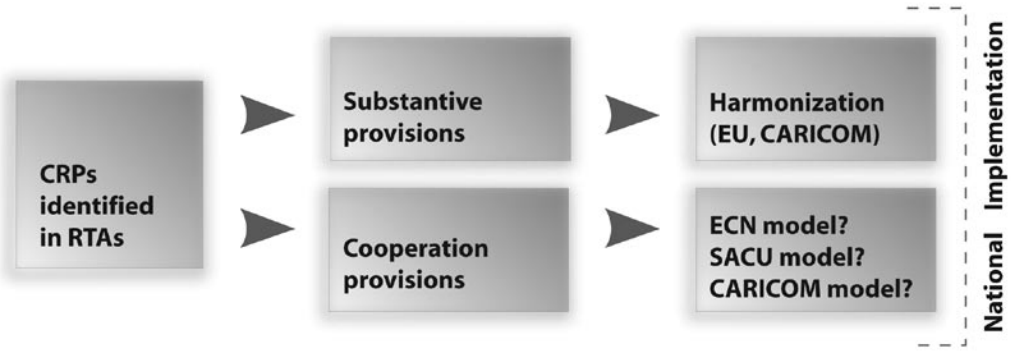
[47] The striking feature of this new decision is that those countries that do not have national competition laws will have the possibility of applying the community law by virtue of Article 5 of the decision. It is worth noting that to apply this law, it is necessary that the anti-competitive conduct must have intra-regional effects. Therefore, and in accordance with a ruling by the Tribunal of Justice of the AC, if the conduct does not go beyond national boundaries, it will need to be subordinated to the appropriate domestic legislation. In addition, pursuant to Article 49 of the decision, Bolivia can apply the decision to merely domestic anti-competitive practices, outside the scope of application of Article 5 regardless of the intra-regional effect requirement described above. As agreed, as established by Article 50 of the assessed decision, Bolivia has appointed the Vice-Minister of Industry and Trade within the Ministry of Economic Development as an interim authority to implement Decision 608. In Ecuador, on 15 July 2005, Decision 616 amended Article 51 of Decision 608 and adopted the same extent and consequences of Article 49 (for the Bolivian case referred to above) in order to apply the community law within the Ecuadorian domestic boundaries (Souza, 2006, p. 215).

The problems that have arisen with respect to these agreements may relate to incorrect expectations about what the competition provisions implied, or may be explained by the type of competition arrangements being envisaged in the agreements being inapplicable. For example, whereas, the CARICOM 'supranational' model may fit the small open economies of the Caribbean, the Mercado Común del Sur (Southern Cone Common Market) (MERCOSUR) 'inter-governmental' model, which proposes that national authorities sit together to determine cases with effects on the region and then make a non-binding recommendation to the trade authorities, might be inappropriate. The latter is mainly because of the difficulties in reaching a consensus among the national authorities. Furthermore, even if a consensus is achieved there is a risk that the trade authorities will modify the decision with non-competition goals in mind and then command the national competition authorities to enforce a decision with which they do not agree. In a nutshell, harmonization and policy transfer of CLP in RTAs require a better absorptive capacity that may entail best practices, a number of policy alternatives to better adapt the legal framework, an institutional set-up and a policy network.

In addition, the national implementation of cooperation provisions including CRPs may produce better preliminary results as it entails tangible and immediate results between the signatory countries or institutions. However, it is undoubtedly true that the absence of a law hinders cooperation, given that without law there is no national competition authority and the exchange of information will therefore not be possible. In concrete terms, the creation of a supranational authority in a South–South agreement, when the countries involved have different levels of development in terms of their competition enforcement, for example CARICOM, MERCOSUR, AC, Common Market for Eastern and Southern Africa (COMESA), and potentially the proposed Southern African Development Community (SADC) CU, raises a series of political economy problems in these settings which might make the implementation of CRPs difficult. This presents problems for the integration objectives of the respective RTA. In this regard, it should be noted that regional competition policy was and is still an important component of the creation of the European common market.

Finally, an attempt to illustrate the sequence that the CRPs in regional integration agreements might create as a consequence should these agreements be implemented at national level is presented in Figure 2.1. The substantive and cooperation provisions of an RTA are distinguished.

Figure 2.1: Assembling the logical sequence in national implementation of CRPs in RTAs.



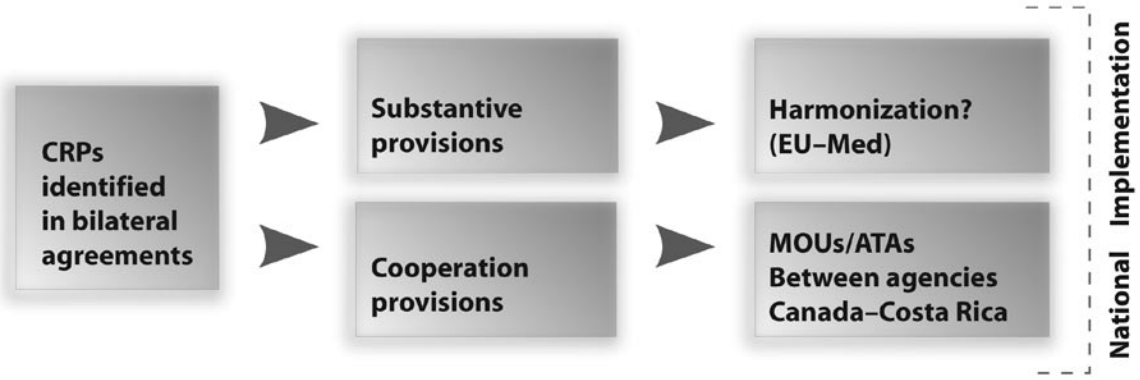
2.2.1.3 National implementation of CRPs in bilateral trade agreements

Bilateral trade agreements such as those between Canada and Chile (1997 FTA articles, 2001 agency memorandum), Canada and Costa Rica (2001 FTA, article provisions only), the EU and Mexico (2000

FTA articles with attached annex), and the EU and South Africa (2004 FTA, provisions within articles) are in general those where there is no *territorial* continuity between the signatory countries, but an important interest in enhancing market access – in general in terms of increasing existing trade flows between them. However, in this respect, other interests may be present and competition chapters may be devised accordingly such as investment, services, competition-in-itself, or some combination.[48]

In these types of agreements, there is no attempt to create a supranational authority, although in some agreements disputes might be referred to an Association Council for instance. It is thus not usually appropriate to think in terms of harmonization schemes when it comes to assessing implementation at national level; nevertheless, in some agreements a degree of harmonization is required such as in a few of the EU–Mediterranean agreements.[49] Furthermore, some of the agreements have provided a legal basis for cooperation where before there was none. This has in some cases led to further consolidation of cooperation in the form of a bilateral agency-to-agency agreement (ATA), and in other cases the mere existence of a formal basis for cooperation has improved contacts between agencies, and in turn made informal cooperation easier.[50] In an attempt to illustrate the foregoing, Figure 2.2 (see below) assembles the logical sense of the implementation of substantive and cooperation provisions in CRPs in bilateral agreements.

Figure 2.2: Assembling the logical sequence in national implementation of CRPs in bilateral agreements (e.g. N–S)



Holmes *et al.* (2006) draw a careful distinction between EU RTAs with competition provisions when these were signed with candidate countries and when they were not. They note that when signing with non-pre-accession countries the main aim was in general to discipline anti-competitive practices rather than to create obligations for cooperation/information exchange. They further noted that the competition provisions were not directly tied to a reduction in contingent protection, although in the Euro–Mediterranean Agreement, there is a reference to the possibility of negotiating the elimination of EU countervailing duties following an eventual application by the Mediterranean countries of EU rules on state aid rules.

In competition provisions in pre-accession agreements, the aim was harmonization, rather than cooperation – the adoption of EU law and policy was a necessary but not sufficient condition for the

[48] See Warner (2006, p. 213).

[49] Including Morocco, Jordan, the Palestinian Authority and Tunisia. According to Szepesi (2004) 'Though precise rules still need to be adopted, Jordan, Morocco, the Palestinian Authority and Tunisia have effectively committed themselves to the EU legal framework regarding competition and state aid policies'.

[50] See Rosenberg (Chapter 1 of this publication).

reduction of dumping charges ('the application of commercial defence instruments'). The EU–Turkey CU and the EU–Poland Economic Association Agreement (EAA), and the EU–Croatia Stabilisation and Association Agreement, were found to contain similar provisions, in all cases the institutional changes being driven by accession negotiations.

In Poland, for example, there was limited exchange of information and no access to confidential information pre-accession, whereas post accession Poland cooperates fully with other Member States through the mechanism of the ECN. Whereas there is some informal cooperation with Croatia and Turkey and the EU, Turkey for instance has been unsuccessful in some instances where it has requested information from DG Competition.[51] The main point is that pre-accession negotiations typically require strict harmonization, without there being much cooperation other than the informal type. This changes after accession when EC law becomes directly effective and the national competition authority (NCA) joins the ECN.

The foregoing discussion thus has some potentially serious implications for non-candidate countries.[52] Holmes *et al.* (2006, pp. 16–17) put it thus '[these provisions] call for acceptance of EU competition and state aid rules potentially deeply intrusive with no binding cooperation provisions and no guaranteed end to contingent protection'. On the other hand, there are benefits from these agreements as a commitment device and as fostering informal cooperation. They conclude by noting that 'Non-candidate EU neighbours should agree to enforce agreements if they think domestic consequences will be beneficial, not for market access or cooperation reasons'.[53]

2.2.2 Problems that impede national implementation of CRPs in bilateral and regional trade agreements

This chapter thus distinguishes RTAs from bilateral trade agreements. When looking at the motivation for, degree of, and barriers to the implementation of competition aspects of trade agreements, South–South regional integration agreements fall into one category and the competition chapters North–South bilateral trade agreements into another.

The fundamental problem arising from the implementation of substantive CRPs in RTAs relates to the loss of policy autonomy, or space. *This is accentuated in cases where the countries concerned have different levels of development and hence widely diverging priorities*. The underlying obstacle has been identified as the problem of supranationality, that is, the relationship between regional and national laws. As noted by Alvarez *et al.* (Chapter 3 of this publication), what is required is that 'the benefits of effective enforcement against anti-competitive practices with cross-border implications (spillover effects) and the gains from economic integration must exceed the loss of domestic autonomy' for each country. Compounding this might be the lack of a national law and the difficulties in allocating competences. These issues have been considered at some length in Jenny and Horna (2005). Hence we do not pursue this topic further here, instead concentrating on case studies of the competition chapters of North–South bilateral trade agreements.

[51] See Rosenberg (Chapter 1 of this publication).
[52] This thus refers to those countries signing bilateral rather than regional trade agreements.
[53] See Holmes *et al.* (2006, pp. 16–17) ibid.

Some other common problems related to the implementation of CRPs in bilateral trade agreements merit some attention. A national competition agency might have a focus either on the enforcement of the competition law, or on competition advocacy, although it does not mean that these two might not also be complementary.[54] The potential implications of the CRPs thus may vary depending on where the domestic competition focus lies. When designing competition policies at national level, policy makers, particularly in developing countries, often need to make a choice between enforcing competition laws and strengthening awareness of the benefits of introducing competition in a certain setting or in specific regulated sectors. In this sense, problems related to the lack of a competition culture and competition enforcement, such as the relative ineffectiveness of the national competition law or its agency due to limited powers, budget and resources are often to be found when assessing the national setting of the member countries of bilateral or regional trade agreements.

Whether we are in the 'regional' or 'bilateral' case, we can then go on to look at the potential implications of the competition agreement, depending on whether the agency is primarily focused on enforcement or advocacy. For instance, if the focus of the public policy is competition advocacy, the interplay of competition and industrial policies might have an implication. Similarly, if instead there is a focus on competition enforcement, then the level of technical capacity of the national competition authority to deal with anti-competitive practices might be more important.

Other problems related to the implications of provisions on trade remedies for the size and composition of caseloads of competition agencies are also found in the implementation of bilateral or regional trade agreements.

2.2.3 Interlinked factors that may impede the national implementation of CRPs in bilateral and regional trade agreements: assembling the set of criteria to assess the degree of implementation

At the outset of the analysis, it is advisable to bear in mind the following preliminary observations. First, economic theory has attempted to establish the implication of bilateral and regional trade agreements for trade flows. The implications of the trade agreement for changes in trade flows (as well as the existing trade stocks) might be related to the use of the competition provisions of the competition chapter. For instance, Peru's motivation for having a competition chapter in the US FTA is to protect their exports.[55] It must be noted in this regard that not all modern 'trade agreements' have trade as their primary concern. Agreements may also be heavily focused on market access in terms of the services sectors, and the investment chapters of modern FTAs are increasingly important. In terms of trade though, one also needs to look at the relationship (if any) between the competition provisions and provisions governing trade remedies.[56] The topic of the exemption of export cartels is also important in this regard. One could conclude that while importing countries should evaluate foreign export cartels under a 'rule of reason', most of them will be constrained by a lack of technical expertise and limited enforcement capacity.[57]

[54] See Evenett (2006).

[55] Based on a document released by INDECOPI entitled: *PERU: Intereses en los acuerdos regionales de comercio* at www.indecopi.gob.pe. This statement was also based in the high-level commission appointed by INDECOPI to review the impact of intellectual property and free trade agreements. See http://200.121.68.202/portalIndecopiWebApp/ArchivosPortal/estatico/articulos/1.pdf

[56] See Holmes *et al.* (2005a).

Second, bilateral and regional trade agreements might help in the strengthening of the developing country partner's competition regime. Often RTAs do not address to any significant extent substantive provisions, but contain provisions on cooperation instead, which in North–South agreements often focus on capacity building. When countries are at the same level of development, then cooperation normally may address information sharing and may be focused on assisting in enforcement.[58] Although they take time to develop, these relationships often are built in part through the exchange of non-confidential information and develop into agreements on confidential information exchanges (this is the transition from first-generation into second-generation agreements). In addition, one of the factors that could lead to effective cooperation is the need to strengthen the regional nexus: it can be easier to establish cooperation if the countries involved share some kind of similar background (language, history, and so on).

Third, there are few examples of definite results when it comes to assessing the impact of CRPs in RTAs. Hence, it may be necessary to wait longer for some concrete evidence as to their effects.[59]

Having mentioned these caveats, an attempt to build up a set of criteria to assess the degree of implementation of these CRPs in RTAs at national level is presented based on the three following interlinked factors:[60] relevant political and socio–economic situation, legal framework, and institutional setting.

2.2.3.1 Factors related to the relevant political and socio–economic situation: knowing the country or region dynamics

The political economy of the country or region is driven by the convergence or divergence between overall governance and markets. This assessment will influence the choice of whether to pursue competition advocacy or to concentrate on the enforcement of competition law in each specific case.

In the competition policy literature, there has been some attempt to incorporate the general feature of 'institutions' into the effectiveness of competition policy enforcement. Krakowski (2005, p. 2) characterizes competition policy as one of the components of a market economy essential to its operation. In the same way, the positive effects of competition policy will not be realized if it is not coupled with other policies, which comprise the institutional set-up of the economy under consideration.

[57] See Bhattacharjea(2004). Export cartels are exempted from the competition laws of most countries. While some scholars and several WTO members have recently condemned such cartels, others have argued that they allow efficiency gains that actually promote competition and trade. This paper examines the various issues involved, with special reference to developing countries and to recent discussions on trade and competition policy. After summarizing the contending views on export cartels, and also the scanty theoretical literature on the subject, it reviews the treatment of such cartels in various jurisdictions and the limited empirical evidence that is available on their prevalence, efficiency justifications, and effects on international trade. Insights from economic theory are then applied to the arguments for and against export cartels, suggesting criteria that could help to determine their validity and an importing country's best response.

[58] A few even allow sharing of confidential information (examples: Nordic Plurilateral Cooperation Agreement, Aus–US bilateral agreement).

[59] Widegren (2006) and UNCTAD (2006).

[60] Such classification has a number of benefits. Firstly, it allows identifying the interaction between each of the factors. Secondly, it facilitates the identification of the problematic factors in each group, and its interaction with the other factors in the same group or other groups of factors.

In Krakowski (2005), an indicator measuring 'overall government effectiveness' together with 'experience in the application of competition policy' is used to explain a subjective measure of the 'effectiveness of the application of competition policy'. In this regression, the 'overall government effectiveness' indicator is provided by the Kaufmann, Kraay, Zoido-Lobatón data set.[61]

Voigt (2006) controls for 'general institutional quality' using the same indicator. In this case, the inclusion of this broad indicator renders his four competition law and agency indicators (these are explored further in Section 2.2.3.3 below) insignificant in explaining differences in total factor productivity[62] across jurisdictions. However, individual components of those variables remain significant. Furthermore, his study is interesting in its consideration of other narrower country institutional controls together with his competition law and agency variables.

Nicholson *et al.* (2006, pp. 8–9) also argue that effective competition policy is part of a broader set of reforms, '[complementing] structural reforms such as the rule of law and control of corruption'. They further write that 'the interrelationships between various market-based policies, from government procurement to anti-dumping enforcement to antitrust, require many similar self-enforcing mechanisms. The underlying culture to support market-based economies and a competitive environment is often a fundamental requirement for support'.

In Nicholson *et al.* (2006, p. 17), the perceived effectiveness of TA is explained by the type of TA, and two vectors of agency and country controls. The country variables which they choose to include measure 'market freedoms, income, capital infrastructure and legal aptitude'. While these are being used to explain the effectiveness of TA, they might reflect more generally the commitment of the country under consideration to implementing CLP (and the CRPs of RTAs).

The above observations relate to the internal political economy of the country. The above indicators might also be used to compare the general strengths of the 'institutions' of the countries negotiating the trade agreement. These indicators and broader economic measures give some sense of the different levels of development of the partner countries and can be used to, for instance, test the hypothesis that different levels of development matter for the implementation of CRPs in RTAs. One then needs to complement this analysis with an examination of the external dynamics influencing the negotiation of the trade agreement as a whole, the choice of trade partner, and so on.

This is the broader context for the relationship between CRPs and RTAs. The questions these factors suggest would take us too far though for the present purposes. In what follows, we consider the narrower context of the agreement itself, and some other questions related to the general political economy of a particular country or region which were surveyed in UNCTAD (Alvarez *et al.*, 2005), and included:[63]

- Did the agreement's existence or negotiation affect the political economy of the country? If yes, how?

[61] 'They provide data for 160 countries on "Voice and Accountability", "Political Stability", "Government Effectiveness", "Regulatory Quality", "Rule of Law" and "Control of Corruption", derived from several surveys. Kaufmann, Kraay, Zoido-Lobatón (2002, pp. 8–9). The data are aggregated using an unobserved components model (Kaufmann, Kraay, Zoido-Lobatón 1999).' Krakowski (2005, p. 7).

[62] This refers to the Solow residual of growth accounting exercises.

[63] These questions were posed through a questionnaire addressed to different member states: Alvarez et al. (2005). See also a balanced summary on the world economy carried out by UNCTAD and ECLAC: UNCTAD Trade and Development Report 2006 found at http://www.unctad.org/en/docs/tdr2006_en.pdf

- Is there a sectoral approach? Which sectors are included in the scope of the RTA and which sectors are excluded from the application?
- Does the agreement exempt certain sectors from the substantive competition provisions?
- What are the exempted sectors and are the reasons given for their exemption?
- What is the existing relationship between competition rules and the regulatory regime?

2.2.3.2 Factors related to the legal framework

Dealing only with the existing law within the normative framework is the primary feature of the factors related to the legal framework. The reason for such a choice is to identify the positive and negative aspects of the existing framework and interpret the rules in their context, bearing in mind the negotiations, the underlying policies, which can be extracted from the preamble and articles of the treaty, and secondary legislation. Therefore, the nature of the agreement could be assessed through the objectives of the agreement, origins and nature (origins, legal nature, content, its links with trade, and implementation provisions), competition provisions (the domain of actors and activities covered), and operation of competition provisions (the operation mechanisms, domestic effects, and sectoral regulation).[64]

After dealing with the CRPs of the bilateral or regional trade agreement under consideration, there is a need to analyse the national legal system of the developing country partner. This assists in identifying the parallelism of the CRPs of the bilateral or regional trade agreement and the national rules, as well as their compatibility and interaction. An attempt to determine deviations in the national system and the extent to which they occur will then be carried out. In addition, the enforcement mechanisms in the national system giving effect to the rules are to be assessed as well.

An OECD study of CLP and the optimal design of a competition agency demonstrates that the competition laws of many OECD countries include goals that promote broader public interest purposes than promoting economic objectives. It is also observed that there is a shift in developed countries away from using competition policy for policy objectives other than 'efficiency enhancement'.[65] Voigt (2006, p. 1) develops an indicator evaluating the extent to which a country's competition laws 'incorporate an economic approach'. Furthermore, he presents another indicator measuring the substantive content of economic laws. Hylton and Deng (2006) develop an indicator measuring the 'scope' of a country's competition law.

Again, the importance of posing questions to these interlinked factors is clear:[66]

Questions regarding the agreement itself:

- What are the stated objectives aims of the agreement?
- What does the agreement provide for? Loose wording, importing policy or mutual recognition?[67] Is the developing partner required to align its domestic system in accordance with the industrialized

[64] Holmes *et al.* (2005b).
[65] OECD (2003c).
[66] See the survey in Alvarez *et al.* (2005).
[67] See Szepesi (2004).

partner's law? Or is there a system of mutual recognition between the parties?[68]
- What is the link to trade in the application of competition provisions?
- Is there a binding dispute-settlement mechanism provided in the agreement?
- What is the scope of CRPs? Which areas of competition law are covered in the relevant legal framework?
- Does the agreement regulate state aid or public procurement?

Questions regarding the agreement vis-à-vis the national legal system:
- Are there any deviations in the CRPs of the relevant agreement from the national legal system with regard to the objectives and terms?
- In what ways, if at all, have competition provisions strengthened the deterrent effect of national laws?
- Were there pieces of legislation adopted to comply with the CRPs of the relevant agreement?
- Do the relevant national laws have policy objectives other than protecting the established goals of CRPs, that is, competitive process/consumer welfare/economic efficiency, such as social objectives (for example employment and reduction of poverty), promotion of small and medium-sized enterprises (SMEs)? Are they compatible with the objectives of the agreement?[69]
- Which enforcement mechanisms are provided for in the law, that is, public enforcement (investigative powers, cease and desist orders, periodic fines, fines, and so on), private enforcement (civil actions, damages, and so on)?

The answers to these questions might differ depending on the type of competition provision included in the agreement. Nonetheless, a final observation is presented as follows.

There are indeed certain assumptions that need to be taken into account and according to them factors may have more or less influence in the national implementation of CRPs in RTAs. For instance, in FTAs where both signatories already have competition law and authorities in place, the impact of these provisions may be related only to the strengthening of cooperation between the agencies. In other cases, the post-agreement impact may first deal with the prerequisite of adopting a law and establishing a national competition authority. The latter could, however, clash with other political economy considerations mentioned in the first interlinked factor. In any case, one of the signatories would definitely have a legal framework that should provide a point of reference.

2.2.3.3 Factors related to the institutional setting

Overall, the institutional setting determines the success of the implementation of CLP as it may depend upon several factors connected to financial resources, degree of independence enjoyed by the competition and legislative authorities, legal and political environment, and human capital endowment.

The 'institutional setting' in this section is understood in terms of the effectiveness of the national competition authority, and is in part determined by and a determinant of the choice made between

[68] Holmes *et al.* (2005b, pp. 10–11).

[69] One participant in the seminars in South Africa remarked that, for instance, while the South African legislation included various criteria for public interest such as Black Economic Empowerment (BEE), these goals were not necessarily shared by South Africa's neighbours.

competition advocacy and enforcement. There are certain instances where the institutional implications of the competition provisions are stark and others where the influence is subtler. In the first category must be those agreements mandating the creation of a supranational authority or mandating the creation of a national competition law and authority where before there was none (for example the enactment of the Singaporean competition law and the establishment of the agency as a result of the signing of the US–Singapore FTA). The following types of questions arise in terms of institutional implications:

- Do member states have authorities in charge of enforcing competition law? If yes, what kind of institutions?
- Do member states have a specific institution in charge of CLP application or is it a part of a bigger authority?
- To what extent have bilateral and regional trade agreements been used to strengthen the powers, budget and resources of competition agencies?
- Is there sufficient political support in the relevant legal system for the national competition authority?
- What kind of power is provided for the authority in charge? This question should be addressed in terms of adequate resources to tackle cases as a result of the fact that the authority is politically and financially independent.

A fundamental question is whether or not a country under consideration has developed a competition culture that adequately internalizes the implications arising from the existence of CRPs in international agreements. Furthermore, the commitment of the national competition authority to the implementation of the competition agreement needs to be determined. Was the authority actively involved in the negotiation of the agreement? Does the authority expect any benefits to arise from the completion of the agreement? Is there any reason for the authority to expect benefits in terms of domestic competition law enforcement from the completion of the agreement?

Some measures are found in the literature relating to the institutional capacities of the national competition authority. Voigt (2006, p. 6) develops indicators measuring the *de jure and de facto* independence of the competition agency in his model relating competition law and agency characteristics to total factor productivity. *De jure* independence is a composite index combining information about government supervision, agency objectives, agency appointments, term length of agency officials, agency case allocation, the nature of executive instructions to the agency, and transparency. *De facto* independence is a composite combining the executive's 'average term length', competition officer incomes, competition decisions reversed by executive decisions, as well as other variables. Before controlling for 'general governmental effectiveness', 'de facto independence seems to be most significant for explaining variation in total factor productivity'[70] However, the significance of this variable does not survive the inclusion of the 'general governmental effectiveness' variable.

2.2.3.4 Is it possible to assemble a set of criteria?

Assessing the impact and potential impact of CRPs could constitute an important step for enhancing

[70] Voigt (2006, p. 26).

their implementation in national settings where their role is not understood.[71] Hence, it would be useful to build out of the previous three sections, the most suitable criteria so as to better assess the impact of CRPs in bilateral and regional trade agreements at national level, taking into consideration that, with some exceptions, bilateral and regional trade agreements concluded during the last 10 years including developing countries have indeed contained competition provisions or at least principles.[72]

It is proposed that the degree of implementation of the CRPs of bilateral and regional trade agreements is in part related to the degree of institutional maturity of the partners to the agreement. This might be related to the country characteristics discussed in Section 2.2.3.1, and the institutional characteristics of Section 2.2.3.3. Furthermore, there should also be some relationship between the legal implications of the provisions of the agreement, and the legal setting of the agreement partners. Some indicators on this were advanced in Section 2.2.3.2.

2.2.3.5 Preliminary remarks

First, what matters when implementing CRPs is whether the agreement is a bilateral agreement or a regional trade agreement eventually entailing the creation of a supranational competition authority.

Second, one should examine the aims of the competition provisions of the trade agreement to determine the likelihood of their use. In this regard, one needs to consider if the main aim of the CRPs is market access, or whether the provisions are mainly trying to offset the possible negative impacts of trade liberalization.[73] Furthermore, the CRPs might relate more closely to commitments around services or investment. It is important whether these provisions set out substantive competition provisions, or simply stipulate cooperation provisions. Cooperation in general should depend on the trade flows between the signatory parties and the subsequent effects of anti-competitive cross-border business practices. However, it is not clear the extent to which cooperation will be through the CRPs in RTAs – instead the signatory parties might choose to use informal techniques, or other modes of cooperation (such as through an ATA).

Third, it is also important to examine the relationship of the CRPs to trade remedies such as anti-dumping (see Holmes *et al.*, 2005a, 2006).[74] Furthermore, Warner notes that in the Canada–Chile agreement it is noteworthy that the abolition of anti-dumping laws was 'replaced by safeguard law [and] not competition law'.[75]

Lastly, it was pointed out that the objectives of the RTA are important factors in separating them. What countries think as the objectives of the agreement may vary and their respective achievements

[71] There are three underlying reasons as to why countries include CRPs in their RTAs: firstly, anti-competitive practices can counteract trade benefits; secondly, it is in the interest of the parties to have a region-wide competition regime to create a common market for economic integration; and thirdly, it is in their interest because there is a risk to domestic companies where competition regulations are absent.

[72] For instance, the CAFTA–DR does not include a competition chapter as such, but it does contain competition principles in the chapter governing telecommunications.

[73] This point was made by Holmes in the Yeditepe University conference. See the Report from the Seminar held in Turkey, in the Annex.

[74] See *ibid.*

[75] Warner (2006).

shall be determined accordingly.[76]

2.3 Examining Case Studies

The aim of Section 2.3 is to attempt to explore the applicability of the set of criteria assembled in Sections 2.1 and 2.2 of this chapter by looking at two major world trading powers (the US and the EU) entering into negotiations and agreements with selected partner countries (Israel, South Africa, Mexico and Peru). Prior to these case studies a motivation for the selection of these bilateral agreements is presented. Further, each case study provides its own set of preliminary conclusions.

2.3.1 Motivation for the selection of bilateral agreements as opposed to regional integration agreements

During 2005, some selected RTAs around the world (AC, CARICOM, MERCOSUR and the West African Economic and Monetary Union (WAEMU)) were examined in the light of the new system of enforcement of EU competition law and the distribution of competences among national and EU authorities (Jenny and Horna, 2005). The aim was to look into what elements of the new system of EU enforcement could be extended to other regional competition enforcement schemes. The main characteristics of this new European enforcement scheme were assessed, in particular decentralization, avoidance of multi-jurisdictional conflicts and excessive costs, improved effectiveness, and enhanced cooperation among regional and national authorities. Out of these four elements, only cooperation was thought to be applicable to other regional settings. Jenny and Horna (2005) find that the creation of a supranational authority in a South–South agreement, when the countries involved have very different levels of development, is expected to entail nearly insurmountable political economy problems.

Hence the present chapter will focus on bilateral agreements. The examples selected involve North–South agreements in the cases of Mexico, Peru, and South Africa. A variety of political economy features might be at work in a North–South trade agreement in accordance to what has been said previously in this chapter. Modern trade agreements incorporate a wider and deeper set of trade-related aspects than simply traditional. North–South agreements seem to create a mixed set of outcomes, sometimes leading to some convergence or divergence depending on the political economy of the member countries, and the overarching objectives of the agreement as a whole. Particularly when it comes to the CRPs' dimension, it is also possible to witness an increased number of notifications for investigations to be undertaken by correspondent competition agencies as a result of increased trade flows and, subsequently, the potential likelihood of experiencing cross-border anti-competitive practices.

For all these reasons, Section 2.3 of the present chapter deals with selected bilateral agreements in different regions of the world – in particular the EU–Israel, the EU–Mexico and the EU–SA TDCA. Finally, the recently signed agreement between the US and Peru will be assessed in terms of forecast national implementation problems of the CRPs.

[76] See Marsden (2006), in the Turkey Seminar Report, in the Annex.

2.3.2 Assessing the impact of the EU–Israel partnership agreement at national level (EU and the Mediterranean basin)

2.3.2.1 Political and socio–economic situation of the target country

Background

EU relations with Israel are governed by the Euro–Mediterranean Partnership established through the EU Israel Association Agreement and the regional dimension of the Barcelona Process.[77] The EU's Euro–Mediterranean Partnership[78] was launched at the 1995 Barcelona Conference between the European Union and its 12 Mediterranean Partners at that time.[79] In addition to the former, and following the enlargement of the European Union, the EU launched the European Neighbourhood Policy (ENP), which is designed to strengthen even further the relationship within the Euro–Mediterranean Partnership. The ENP aims at preventing the emergence of new dividing lines between the enlarged EU and its neighbours and at offering them greater political, security, economic and cultural cooperation. The objective is either achieved through negotiations or through jointly agreed action plans covering a range of fields, such as political dialogue and reform, trade, measures preparing partners for gradually obtaining a stake in the EU's Internal Market, justice and home affairs, energy, transport, information society, environment and research and innovation, and social policy and people-to-people contacts.[80]

Trade between the EU and Israel is conducted on the basis of the Association Agreement. The EU Israel Association Agreement was signed in Brussels on 20 November 1995. Following the ratification process by the parliaments of the EU Member States and the European Parliament on the one hand, and the Knesset on the other, the Agreement entered into force on 1 June 2000.[81] It replaces the earlier cooperation agreement of 1975. A Protocol has been concluded which amends the Agreement to accommodate the enlargement of the Union to 25 Member States in May 2004.

It should be noted that Israel has undergone liberalization of its telecommunications industry as have some other Mediterranean countries. Such liberalization could be triggered as a result of external pressures. As a member of the WTO it committed itself to open some of its network industries to competition. Besides Israel, nine Mediterranean countries (Algeria, Cyprus, Egypt, Jordan, Lebanon, Malta, Morocco, Tunisia and Turkey) were engaged in some form of telecommunications liberalization.[82]

The EU is Israel's major trading partner.[83] The agreement with Israel incorporates free trade

[77] See http://ec.europa.eu/comm/external_relations/euromed/bd.htm. Also see the "Barcelona Declaration" adopted at the Euro–Mediterranean Conference, 27 and 28 November 1995, available at http://europa.eu.int/comm/external_relations/euromed/bd.htm.

[78] See http://ec.europa.eu/comm/external_relations/euromed/index.htm.

[79] See http://ec.europa.eu/comm/external_relations/israel/intro/index.htm. Israel, Morocco, Algeria, Tunisia, Egypt, Jordan, the Palestinian Authority, Lebanon, Syria. Cyprus and Malta have become Member States, and Turkey is an accession candidate, still participating in Euro–Med activities. Libya currently has observer status at certain meetings.

[80] See Commission Staff Working Paper, European Neighbourhood Policy. Country Report. Israel. Brussels 12.5.2004. SEC(2004)568. Also available at: http://ec.europa.eu/world/enp/pdf/country/israel_enp_country_report_2004_en.pdf.

[81] http://ec.europa.eu/comm/competition/international/bilateral/background/il1_en.html

[82] See Gerardin and Petit (2004, pp. 69–70).

[83] 'In 2004 the total volume of bilateral trade (excluding diamonds) came to over €15 billion. Thirty-three per cent of Israel's exports went to the EU and almost 40 per cent of its imports came from the EU. In 2004, Israel's exports to the EU, excluding diamonds, were composed of electrical machinery and equipment (39 per cent), chemical products (17 per cent), plastics and rubber (9 per cent) and optical measuring and medical instruments (8 per cent). Its major imports from the EU were electrical machinery and equipment (35 per cent), chemicals (13 per cent) and base metals (6 per cent). Total EU (25 Member States) trade with Israel rose

arrangements for industrial goods, concessionary arrangements for trade in agricultural products (a new agreement here entered into force in 2004), and opens up the prospect for greater liberalization of trade in services and farm goods from 2005.[84]

There are four main goals of the Association Agreement, which include political and economic elements as well as other areas such as cooperation in science and technology.[85]

Competition provisions in the bilateral agreement

The Association Agreement concluded between the EU and Israel contains provisions relating to private anti-competitive practices (competition) and governmental restrictions to competition, that is, state aids. The competition provisions within the Association Agreement are outlined in Title IV, which deals with capital movement, payments, public procurement, competition and IP. Articles 36 to 38 deal with competition issues. The agreement states, in terms very similar to Articles 81 and 82 of the EC Treaty that anti-competitive agreements and practices, and abuses of a dominant position, are incompatible with the proper functioning of the agreements to the extent that these practices may affect trade between the EC and Israel.[86]

Besides, the Agreement provides for a provision with regard to public undertakings or undertakings to which special or exclusive rights have been granted, which is in parallel with Article 86 EC of the Treaty of Rome.[87] In addition, state aid having an effect on such trade is deemed to be incompatible with the functioning of the agreements, in terms identical to Article 87 of the EC Treaty.[88]

There is also an obligation on Israel to ensure that State monopolies are adjusted so as to eliminate any discrimination against Community nationals in the procurement or marketing of goods, and that there are no measures in force regarding companies with exclusive rights that would disturb trade between the EU and Israel in a manner contrary to their respective interests.[89]

The agreement provides that rules for the implementation of these provisions shall be adopted by the Association Council within 5 years of the entry into force of each agreement. In the absence of implementing rules, the Community's and Israel's authorities may, if they consider that a particular practice is incompatible with the agreement, take 'appropriate measures' to remedy the situation, after consulting the Association Committee. Pending the adoption of rules for the implementation of the state aid provisions, the WTO subsidy rules apply as the rules for their implementation.

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from €19.4 billion in 2003 to €21.36 in 2004. EU exports to Israel reached €12.75 billion in 2004, while imports from Israel were €8.6 billion. The trade deficit with Israel was €4.15 billion in the EU's favour in 2004.' See http://ec.europa.eu/comm/external_relations/israel/intro/index.htm *ibid*.

[84] See *ibid*. For the latest trade statistics between the EU and Israel, see http://ec.europa.eu/comm/external_relations/israel/intro/tradoc_113402.pdf

[85] Article 1[. . .] 2. The aims of this Agreement are: - to provide an appropriate framework for political dialogue, allowing the development of close political relations between the Parties, – through the expansion, *inter alia*, of trade in goods and services, the reciprocal liberalization of the right of establishment, the further progressive liberalization of public procurement, the free movement of capital and the intensification of cooperation in science and technology to promote the harmonious development of economic relations between the Community and Israel and thus to foster in the Community and in Israel the advance of economic activity, the improvement of living and employment conditions, and increased productivity and financial stability, – to encourage regional cooperation with a view to the consolidation of peaceful coexistence and economic and political stability, – to promote cooperation in other areas which are of reciprocal interest.

[86] See Article 36 (1).

[87] See Article 38.

[88] See Euro–Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, OJ L 147, 21.6.2000, p. 3. (OJ L 147, 21.6.2000, p.3) Decision of the Council and the Commission of 19 April 2000 on the conclusion of a Euro Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part and the State of Israel, of the other part (2000/384/EC, ECSC) also available at http://ec.europa.eu/comm/competition/international/bilateral/extracts/il2a_en.pdf

[89] See Article 37.

2.3.2.2 The legal framework provided by the national system

The original Israeli competition act was enacted in 1959. Regulation regarding mergers came into existence in the late 1980s. Amendments in the 1990s were as follows: the Antitrust Authority (Article 41A) was established in 1994. The monopoly chapter was amended prohibiting a monopolist from abusing its dominant position in a manner that might harm competition or the public (Article 29A). Class actions were introduced in 1996 under the law by virtue of Articles 46A–46J. Furthermore, the amendment of 1998 authorized the antitrust director to instruct a monopolist to avoid abusive behaviour (Article 30) and introduced the director's authority to regulate block exemptions (Article 15A). Lastly, some procedural changes were introduced with the 2000 amendment regarding the consent decree procedure (Article 50B), the pre-ruling procedure (Article 43A) and the aggravating circumstances in antitrust offences (Article 47A).[90]

At the substantive level, the Restrictive Trade Practices Law, 5748-1988 (the Law) defines three types of restrictive trade practices: restrictive agreements, company mergers and monopolies.

Firstly, all restrictive agreements are prohibited by the Law. The agreements should be notified to the Court for Trade Restrictions and to the Director of the Antitrust Authority. The Court could grant an exemption if the agreement is covered in the list of exceptions relating to 'public good'. Besides, a decision in that direction could be provided by the Director of the Authority if the agreement does not have a significant effect on competition. Secondly, a series of intrusive obligations are imposed on monopolies such as scrutiny. Every six months, the Director of the Authority must provide a list of all the monopolists to a parliamentary committee. The monopolies are obliged not to behave so as 'to reduce' competition or 'harm the public'. An indicative list of abuses is also provided by the Law. In addition, the Court has the right to regulate a monopoly if the public is being harmed as a result of its existence. The Court can order measures of de-monopolization under exceptional circumstances, upon request of the Director of the Authority. Finally, mergers between firms are submitted to preliminary authorization. The Director of the Authority can prohibit operations that significantly harm competition or the public.[91]

Israel has set up a modern competition regime by virtue of the Israeli Law on the Restrictive Trade Practices, which shares features with the EC competition law regime. An example is the part dealing with restraint of trade, which contains a block exemption system similar to that of the ex-EC model. However, the Law also shares features with the US model. For instance, while the Law contains a provision on 'Abuse of Position' that appears to be based on Article 82 of the EC Treaty, this provision refers to the concept of 'monopolist', which is constituted when one operator controls more than 50 per cent of a given relevant market, rather than on the concept of 'dominance' that is used in EC competition law.[92]

The Law provides for varied remedies in cases of infringement. Antitrust Law violations are a criminal offence as well as a civil tort. Severe antitrust violations may be subject to criminal prosecution and may result in fines and prison terms. Liability is imposed upon the corporation and its executives. The civil and administrative remedies for infringements of the Antitrust Law include consent

[90] See Epstein and Abramovich © (2006).
[91] See Gerardin and Petit (2004, p.75).
[92] See Gerardin and Petit (2004, p. 75).

decrees, injunctions and court orders granted by the Antitrust Tribunal. The General Director has the power to declare an activity as *prima facie* illegal and has the power to issue rules of conduct on monopolies.[93]

As described above, the institutional provisions of the Israeli Law are remarkable as a hierarchical system of several specialized organizations is set. An Antitrust Court is established that has a wide range of powers to address anti-competitive practices (injunctions, provisional measures, and so on). Its decisions can be challenged before the Supreme Court of Israel. A national competition authority known as the Trade Restrictions Authority (hereafter, the Israeli Antitrust Authority (IAA)) is also established by the Law. This authority, which enjoys significant powers, is directly subordinated to the Ministry of Commerce.[94]

In sum, the Antitrust Law of Israel is an adequate tool for dealing with competition issues. Therefore, there was no need to amend the Law according to the Association Agreement where competition issues are dealt with in more general terms. Besides, the Law is enforced by the IAA in an effective manner, as can be observed from the reports of case enforcement. Further, the IAA is not an infant authority in terms of the date of establishment, its experience with competition matters, and its resources.

2.3.2.3 The institutional structure provided by realistic facts of the target country

The Association Agreement does not deal with the issue of the establishment of a national competition authority as the IAA was established in 1994 under an amendment to the Restrictive Trade Practices Act, 5748-1988. The IAA is an independent government enforcement agency. The IAA's mandate is to prevent market power through merger control and anti-cartel enforcement, to restrain abuse of their positions by dominant firms and to preserve competition in the various markets.[95]

It is thus vested with powers to initiate civil and criminal proceedings and has also the power to order monopolies not to act in a manner that constitutes abuse of dominant position. While the IAA has an important enforcement function, the Antitrust Law also provides for any person to independently seek a remedy from the Court.[96]
An Antitrust Tribunal, sitting with the District Court in Jerusalem, has exclusive jurisdiction over non-criminal governmental antitrust proceedings. Interim orders and final decisions of the tribunal can be appealed to the Supreme Court, the highest judicial authority in Israel. The District Court of Jerusalem has exclusive jurisdiction over criminal antitrust matters. The Court's decisions can be appealed to the Supreme Court as well.[97]

It should also be noted that while the IAA has an important enforcement function, the Law also provides for any person to seek a remedy from the Court independently (private enforcement).[98]

[93] See Annual Report on Competition Policy Developments in Israel 2004 at pp. 10–13. Also see Article 30 of the Law No. 5748.
[94] See Gerardin and Petit (2004, p. 76).
[95] See the Annual Reports by the IAA, Annual Report on Competition Policy Developments in Israel 2001 to 2004, available at: http://www.antitrust.gov.il/Antitrust/en-US/PublicInformation/AnnualReports.htm
[96] http://www.antitrust.gov.il/Antitrust/en-US/About/deafult.htm
[97] See Annual Report on Competition Policy Developments in Israel 2004.
[98] See Chapter VII of the Law No 5748, available at: http://www.antitrust.gov.il/Antitrust/en-US/LawandRegulations/

A number of factors could be used to analyse the Israeli system and the IAA in particular, which could be autonomy of the agency, nomination of the director, budget, judicial scrutiny, discretionary powers, and so on.[99] These factors could be used generally to analyse the political component of a competition system (see the factors in Sections 2.2.3.1–2.2.3.3).

It is widely accepted that an antitrust authority should be set as an autonomous agency.[100] On this matter, the IAA was a subdivision of the Ministry of Commerce in the past. However, the IAA became a stand-alone agency that is directly subordinated to the Minister. It could be elaborated that this institutional change has given the authority much independence in its actions.[101] Besides, the director of an agency determines the priorities and affects the decisions of an authority. For instance, he might decide whether to conduct an inquiry into a certain sector. Although it might prove to be impossible to eliminate political pressure on the nomination of the director, attempts could be made to minimize such pressures and 'the Israeli system attempts to minimize such pressures. In the past, the Minister of Commerce chose the Director of the Antitrust Authority. Nowadays he is chosen by a special committee headed by a judge, who selects amongst the contenders to a public tender in accordance with their personal qualifications. Only one of the three committee members is appointed by the Minister. The chosen director must meet the criteria necessary for a justice of peace. This process reduces political pressures on an important decision'.[102]

Funding and staff are other important factors to consider in this respect.[103] Another factor that could reduce the political pressures regarding the antitrust authority is juridical scrutiny. For such scrutiny to be meaningful, the scrutinizing court should be an expert one that is empowered to hear cases *de novo*, rather than determine whether the decision was reasonable which is the legal situation in Israel.[104] Legal limitations regarding discretion also have the effect of reducing the political pressure on the system. In Israel, the IAA is allowed to consider the cases of collusive agreements while the Antitrust Tribunal, which is an expert court that is part of the Israeli court system, is legally empowered to consider broader public-good considerations. This may be considered to be healthy division of competence as it minimizes pressures on the antitrust agency and it allows for a clear and consistent policy.[105]

Moreover, the IAA acts as a competition advocate to disseminate competition principles in government agencies and Parliament so that all government bodies acknowledge competition as a crucial factor in policy decision making. The IAA's advocacy efforts were also directed to the general public as well as to the business and legal communities.[106]

2.3.2.4 Preliminary remarks

From the above information, it can be observed that Israel has a developed competition system. It

[99] See Gal (2006).
[100] See Section 2.2.3.3 above.
[101] See Gal (2006, p. 6).
[102] See Gal (2006, p. 7).
[103] The funding provided to the IAA is 18,666,000 NIS (which was approximately 4.1 million USD) in 2004. The annual budget of the institution was cut by 1/7 in comparison to that of 2003. Although according to the IAA, the budget had not changed significantly, the effect of such a cut remains to be seen in the enforcement activities of the institution.
[104] See Gal (2006, p. 7).
[105] See Gal (2006, p. 8).
[106] See Annual Report on Competition Policy Developments in Israel 2004 at pp. 90–109.

is further noteworthy that the material scope of application of the system is quite similar to the EC competition law. The state aid control mechanism of Israel does not apply to all economic activities. The objective of the Israeli competition regime is limited to maintaining a competitive market structure and does not contain broader objectives as in the South African case considered below. The system is comprised of independent institutions and authorities. The system could be said to be an effective one. Lastly, there is no alignment between the Israeli system and EC competition law.[107]

An interesting aspect regarding Israel is that it has a cooperation agreement with the US and does not have a similar agreement with the EU.[108] Therefore, it could be said that the Israeli interests are more interlinked and aligned with the US regarding antitrust matters than with the EU.[109] Therefore, it is thought that the national implications of this agreement for the Israeli system are limited. It would thus be useful to compare the analysis above with a comparison with the cooperation agreement with the US. It appears that political economy factors are at play here, but without further investigation all conclusions are tentative. One might perhaps speculate that potential implications of factors related to legal and institutional matters (as in Sections 2.2.3.2 and 2.2.3.3) only come into play provided there are requisite incentives for implementation as determined by the political economy factors outlined in Section 2.2.3.1.

2.3.3 1999–2006: An 8-year assessment of the national implications of the Trade, Development and Cooperation Agreement between the EU and South Africa

2.3.3.1 Political and socio–economic situation of South Africa

Following the first democratic elections in 1994, the South African Government decided to reintegrate into the world economy as a trading nation. South Africa's initial approach to the EU was to join a modified Lome IV Convention, which would give South Africa the same preferential access to the EU markets as its African neighbours. This was refused and instead the South African government negotiated bilaterally, the Trade, Development and Cooperation Agreement (TDCA) which governs South Africa's relations with the EU and which was signed on 11 October 1999.[110] At the regional and continental levels, several processes relate Africa to the EU, and South Africa. These include the Berlin Process (SADC), the Cairo Process (Africa), the Cotonou Partnership Agreement (CPA) and the New Partnership for Africa's Development (NEPAD).[111]

The TDCA that was concluded after a lengthy discussion and negotiation process covers around 90 per cent of current bilateral trade between the EU and South Africa.[112] The main element in the

[107] Gerardin and Petit (2004, p. 82).

[108] See Agreement between the Government of the United States of America and the Government of the State of Israel Regarding the Application of Their Competition Laws, available at: http://www.usdoj.gov/atr/public/international/2296.pdf

[109] The US Israel cooperation agreement covers notifications, enforcement cooperation, coordination, positive comity, avoidance of conflicts, consultations, inter-agency meetings, and confidential information.

[110] The preamble of the Agreement notes the importance of the existing links of friendship and cooperation between the EU and South Africa and the wish to further strengthen these links and to establish close and lasting relations based on reciprocity, partnership and co-development. It praises the recent historical achievements of the South African people in abolishing the apartheid system and building a new political order based on the rule of law, human rights and democracy.

[111] http://www.dfa.gov.za/docs/2005/euc0623.htm

[112] See Chetty (2005, p. 9–10).

agreement is the creation of a free trade area between the EU and South Africa.[113] The agreement has an asymmetric implementation timetable, in which the EU opens its markets faster and more extensively than its counterpart, due to the restructuring efforts in the South African economy.[114] South Africa had three main concerns regarding the negotiation of the free trade area namely enshrining the principle of asymmetry, improving market access, and the impact of the agreement on the Southern African Development Community (SADC) and particularly its CU partners of Botswana, Lesotho, Namibia and Swaziland (BLNS) in the SACU.[115] Some commentators have said that developing countries are often hampered by lack of experience, insufficient capacity and generally weak bargaining power in negotiations with developed countries and regions; however, South Africa has nevertheless pursued a development-focused trade strategy and successfully mobilized its capacity.

The EU, already South Africa's largest market, source of foreign investment and development aid, pledged to drop average duties on South African goods from 2.7 per cent to 1.5 per cent. For its part, South Africa agreed to cut average duties on EU goods from 10 per cent to 4.3 per cent. The deal is also notable for the EU because it constitutes the first time that the regional grouping has included agriculture in a bilateral FTA.[116]

The TDCA has a significant effect on the other SACU countries (BLNS), as the SACU links the trade regimes of its members and interlinks their currencies as well, with the exception of the Botswanan pula. Since trade between SACU economies is tariff free, the effect of the TDCA is *de facto* extended to the BLNS countries.[117] The potential impact of the TDCA and the economic partnership agreement (EPA) negotiations on the SACU is examined further in the preliminary conclusions in Section 2.3.3.4.

2.3.3.2 The legal framework provided by the agreement vis-à-vis the national system of South Africa

Firstly, it should be noted that South Africa is a country with an English common law legal tradition.[118] The objectives of the agreement are encapsulated in Article 1 (a) of the TDCA.[119] Prior to analysing

[113] http://www.europa.eu.int/scadplus/leg/en/lvb/r12201.htm. The objectives of the Agreement are to provide an appropriate framework for dialogue between the parties, promoting the development of close relations in all areas covered by this Agreement; to support the efforts made by South Africa to consolidate the economic and social foundations of its transition process; to promote regional cooperation and economic integration in the southern African region to contribute to its harmonious and sustainable economic and social development; to promote the expansion and reciprocal liberalization of mutual trade in goods, services and capital; to encourage the smooth and gradual integration of South Africa into the world economy; to promote cooperation between the Community and South Africa within the bounds of their respective powers, in their mutual interest.

[114] It will liberalize around 95 per cent of its imports from South Africa within 10 years, whilst the respective figure on the South African side is around 86 per cent in 12 years. Similarly, gradual liberalization is envisaged for industrial products.

[115] See Chetty (2005, p. 9–10).

[116] See Irving (1999, p. 1).

[117] See Irving (1999, p. 3).

[118] Lee (2004, p. 24, table).

[119] The stated objectives of the Agreement are:
(a) provide an appropriate framework for dialogue between the parties, promoting the development of close relations in all areas covered by the Agreement;
(b) provide an appropriate framework for dialogue between the parties, to support the efforts made by South Africa to strengthen the economic and social foundations of its transition process;
(c) promote regional cooperation and economic integration in the Southern African region in order to contribute to its harmonious economic and social development;
(d) promote the expansion and reciprocal liberalization of mutual trade in goods, services and capital;
(e) encourage the smooth and gradual integration of South Africa into the world economy;
(f) promote cooperation between Community and South Africa within the bounds of their respective powers in their mutual interest.

the receiving legal framework of South Africa, it is worth noting the substantive provisions of the TDCA as follows:

The TDCA deals with competition policy in Section D, Articles 35 to 40. The agreement provides that restrictions of competition and abuses of dominance affecting trade between the EU and South Africa are incompatible with its proper functioning.[120] Section E of the agreement deals with state aids in Articles 41–43.[121] Besides, the EU–South Africa TDCA apparently does not cover mergers. That is to say, the TDCA does not specifically mention mergers. However, though the word 'merger' does not appear, the TDCA also provides for positive comity without wording that excludes mergers and state aids.

The agreement makes a reference to the implementing measures in Article 36 which states that if at entry into force of the Agreement the contracting Parties do not have laws and regulations in place necessary for the implementation of the competition rules, they would have to do so within 3 years. However, there is no requirement in the agreement with regard to harmonization in antitrust matters.

The agreements also provide for the establishment of cooperation mechanisms between the parties in the field of CLP.[122]

Either side can take 'Appropriate measures', after consultation with the Cooperation Council or after 30 working days following referral for such consultation, if it considers that a particular practice has not been adequately dealt with and is harmful to its interests.[123] Therefore, the agreement recognizes the competency of both parties' competition authorities, but requires consultation before any action is taken.[124] Article 38 of the agreement provides further details as to the due process where the EU or South Africa considers that anti-competitive activity affecting its important interests is taking place in the other's territory.

The agreement also deals with the issues of granting TA in competition matters by the EU to South Africa and information exchange and confidential information (professional and business secrecy).

Having described the substantive legal provisions of the agreement in question, the following summarizes the national competition law of South Africa. The first and most distinctive character of the South African competition law is that it contains special rules to overcome economic segregation from the former apartheid regime.[125] The first democratic government in South Africa 'inherited an economic structure characterized by high levels of market concentration and ownership centralization'.[126]

[120] See Article 35 of the agreement for definitions. The said practices are: agreements and concerted practices between firms in horizontal relationships; decisions by associations of firms and agreements between firms in vertical relationships, which have the effect of substantially preventing or lessening competition in the territory of the Community or South Africa, unless the firms can demonstrate that the anti-competitive effects are outweighed by pro-competitive ones; abuse by one or more firms of market power in the territory of the Community or of South Africa as a whole or in a substantial part thereof.

[121] The agreement provides that public aid, which distorts or threatens to distort competition, and which does not support a specific public policy objective or objectives of either Party, is incompatible with the agreement in Article 41(1). The parties agreed that granting public aid in a fair, equitable and transparent manner is in their interests in Article 41(2).

[122] Holmes *et al.* (2005b, pp. 31–2).

[123] Article 37.

[124] See Szepesi (2004, p. 3).

[125] Hartzenberg (2004, p. 207–26).

[126] OECD (2004a, p. 2).

One important objective in South Africa, therefore, was to further increase ownership, amongst historically disadvantaged persons. Thus, South Africa's competition law incorporates specific objectives of social and other public policies into its own objectives. The competition law of South Africa mandates the promotion of employment, SMEs, and the increase of 'the ownership stakes of historically disadvantaged persons'.[127]

These objectives reflect, to an extent, the differing pressures on policy makers, and their prioritization depends on the development of precedents from cases.[128]

Section 2 of the Competition Act of 1998 states 'to promote and maintain competition in the Republic' as the main purpose of the Act and a list of six objectives follows. Besides the similarities to the laws of the developed economies, however, it is not difficult to recognize that the objectives of South Africa's new competition law have an unusually broad scope. This broad scope reflects the transitional context of the formulation of this piece of law and the role it has been expected to play in the country's economic development.[129]

Therefore, in the case of South Africa, it could be said that social policy was included coherently in competition law and that the government was careful in the implementation of such principles into the law.[130] It should be noted that the broad scope of competition policy objectives met considerable discussion and criticism during the preparatory works of the law. Some argue that such a broad formulation was necessary to obtain wide political support for the law which was an important pillar on the way to becoming a modern market economy.[131]

The South African competition law was based on a number of international examples, some of which were used to a limited extent.[132] For instance, the Robinson-Patman Act of the United States seems to have been used as background material for elaborating the regulation of price discrimination, and EU regulations have seemingly influenced the restrictive practices related part of the South African law (OECD, 2003, p. 10).[133] The main examples used are the German, the Canadian and the Australian competition law. Although the exact reasons for this modelling are not known, German law could have been used as it was used as a tool to achieve social market economy. Canada and Australia may have been appropriate examples for South Africa as they have consequently kept their British-inspired legal system and culture.[134]

2.3.3.3 The institutional structure provided by realistic facts of the target country

South African competition law was enacted and a national competition authority was installed with a view to improving consumer welfare. The modern institutional system included a high degree of independence from political influence, and the separation of investigative and adjudicative functions.

[127] Evenett (2003, pp. 12–13).
[128] CUTS (2003, pp. 31–32).
[129] See Török (2005, p. 35).
[130] Kronthaler *et al.* (2005, p. 82) and OECD (2004a, p. 3).
[131] Török (2005, p. 36).
[132] Török (2005, p. 36).
[133] OECD (2003a, p. 10).
[134] Cf. the straightforward positive assessment of South Africa's legal culture by the OECD peer review (OECD 2003, p. 39). Török also reports in his paper his personal experience of the same.

The institutional solution chosen is either called the 'tripartite' model or the 'three-pillar model', which was used by most of the transition economies in Europe and by a number of developing countries.[135] The first pillar is a government body, which ensures financing, strategic direction and parliamentary representation. In the case of South Africa, this is the Department of Trade and Industry (DTI). An organization for analytical work and investigation is the second pillar. In South Africa this is the Competition Commission. The third pillar in South Africa is the Competition Tribunal, which interprets and applies the law. Another complementary institution is the appellate body, the Competition Appeal Court, which is a specialized division of the High Court. The solution provided in the institutional setting in this respect is similar to some European countries such as the UK, Ireland and Poland as well as the EU itself.[136]

The competition policy implementation in South Africa is praised by commentators and it is noted that the expectations as to the level of political independence and professional competence are fulfilled. The level of financing is also considered to be adequate. In South Africa, case filing fees have played a significant and rapidly increasing role in financing the competition authorities. This could have a bearing on the complete professional and political independence of the authority. Ideally, filing fees should not be used for the financing of competition policy implementation as the use of filing fees for financing competition policy authorities could increase their interest in obtaining more filings.[137]

As has been well documented, an adequate level of human resources is of paramount importance to competition authorities. The functioning of the South African competition authorities is thought to be made difficult as a result of inadequate human resources. As professional skills required by CLP are of a very high standard it is hard to find adequate personnel. When found, these qualities are financially much better compensated in the business world. It is thought that the problem is aggravated in South Africa by the fact that appropriate training (for example in Industrial Organization – IO) is not provided at a sufficient scale by the higher education system of the country and people having studied abroad only rarely seek employment with the Competition Commission or the Tribunal.[138]
It is reported that in South Africa there have been various types of competition advocacy regarding various sectors of which there were statements in the OECD peer review.[139] Some success was noted in terms of import-parity pricing on raw materials, but there are also ongoing efforts with regard to the food sector, commercial banking, telecommunications, electric power, ports regulation, water, electric power, media, and aviation.[140]

2.3.3.4 Preliminary remarks

South Africa is a country that still has major social and economic problems inherited from the apartheid regime. Thus, regarding CLP, emphasis has been laid on the role of competition policy in 'correcting the concentration of economic power, and in lowering the level of economic domination by a minority within the white minority'.[141] The objectives have evolved, however, towards promoting

[135] See Török (2005, p. 38).
[136] CUTS (2003, p. 51).
[137] Török (2005, p. 39).
[138] Török (2005, p. 40).
[139] OECD (2003a).
[140] Evenett and Clarke (2005, p. 26).
[141] Török (2005, p. 22).

competition within the domestic market and controlling anti-competitive behaviour. The promotion of SMEs is also a very important aim as a result of the historically rooted phenomenon of intense cross-ownership (cross-holding) between large financial corporations and large conglomerates, that constitutes a systemic disadvantage for SMEs.[142] As problems of the society, which are not purely competition-related, are addressed in the law some commentators describe the process of development of the South African competition regime as a 'bottom–up approach'.[143]

In South Africa, working institutional structures were in place that made the implementation of the competition regime easier in comparison to some other developing and transition countries. Two major shortcomings of the country regarding competition regime were addressed before the enactment of the TDCA. First, the content and design of the competition rules were changed. Secondly, the institutional setting, which lacked political independence, was reformed. A flexible and modern system was in place in 1998. The new system includes features that are beyond the scope of typical competition legislation. The reasons for such difference could be linked to the task of finding a balance between competition and development aims, and of having a long-term development plan.[144]

Implications for the SACU

The SACU, the oldest existing CU in the world as dated from 1910, demonstrates a high level of market integration and one of its defining features is the penetration of South African firms into neighbouring countries.

In 2002, the members of the SACU negotiated a new CU agreement. While the SACU was previously managed by South Africa, this new agreement is a watershed as it provides for democratic decision making in the Union. It is primarily focused on trade in goods. It also requires that each state have a CLP and a functioning national competition authority. Only South Africa has these at present. Indeed, the Agreement requires SACU countries to establish a common negotiating mechanism for establishing trade agreements with third parties. Although all are developing competition policies, they are reluctant to include trade-related issues within these negotiations as they frequently cite a lack of capacity, evidenced, for instance, in the breakdown of negotiations with the US.

Indeed, the most important extra-regional negotiations that the SACU is discussing refer to an EPA with the EU. The EPA negotiations aim at replacing the unilateral preferential access regime set out in the Cotonou Partnership Agreement with reciprocal EPAs. For the purposes of the negotiation of the EPA agreements, the ACP (Africa, Caribbean and Pacific) countries are divided into six groups, one of which, the SADC-7, comprises the BLNS countries, plus Mozambique, Angola and Tanzania. South Africa is an observer to this negotiation, and is also currently engaged in a review of the TDCA. It should be noted that to date only Namibia has adopted a competition law, yet has not fully implemented this due to funding constraints.

These agreements form a 'complicated web'[145] of regional integration agreements, in the Southern African region. There is overlap between the membership of SACU, SADC, and COMESA, all of which

[142] CUTS (2003, p. 27).
[143] Török (2005, p. 19).
[144] Kronthaler *et al.* (2005, p. 20).
[145] Grant (2006).

have the aim of moving towards a CU. Added to this are the complications emerging out of the TDCA and the EPA negotiations.

The EU considers the inclusion of trade-related aspects, such as competition in the EPA negotiations, as a core component of the 'development dimension' mandated by the Cotonou agreement, seeing them as essential to enhancing domestic market processes and regional integration within Southern Africa. However, while the SACU countries agree with this, they are still reluctant to move ahead in this area because of their lack of capacity to develop an institutional framework. They furthermore interpret the 'development dimension' as a reference to a commitment to provide development finance. On the other hand, the EU is reluctant to simply provide enhanced finance; but financial support in the form of support for competition policy capacity building could provide a compromise.

If the negotiations of the SADC EPA go ahead as is now being suggested, then the BLNS countries will simply accede to the TDCA. In terms of the agreement, they will then need to adopt competition laws and establish competition authorities within the next 3 years (that is, an assessment relative to these countries is not yet possible). Nonetheless, it is clear that the interplay between domestic competition law, South–South regional integration and competition law, and North–South RTAs including competition policy will be important in this setting.

2.3.4 2002–2006: Assessing the national implications of the EU–Mexico Free Trade Agreement

2.3.4.1 Political and socio-economic situation of Mexico

The EU Mexico trade relations are governed by the EU–Mexico Free Trade Agreement (EUMFTA). The basis for this agreement was laid by the parties through Economic Partnership, Political Coordination and Cooperation Agreement, the so-called Global Agreement, the Interim Agreement and a Final Act signed in Brussels on 8 December 1997.[146] The EUMFTA is the 'commercial edge' of the Global Agreement which made such trade negotiation possible and in effect paved the way to the signing of the EUMFTA, which came into force on 1 July 2000.[147]

The Agreement is based on democratic principles and on respect for human rights,[148] which are an 'essential element' that 'underpins the domestic and external policies of both Parties'. It also institutionalizes a regular political dialogue at the highest level and extends bilateral cooperation that existed in the 1991 Framework Agreement.[149]

Mexico has been one of the most important trading partners in Latin America for the EU and strategically important for its exports. The EUMFTA is the first agreement signed between the EU and a Latin American country. The EU is Mexico's second trading partner after the USA.[150] An interesting point to note in that respect is that the notifications of enforcement actions from the Mexican side

[146] http://europa.eu.int/comm/external_relations/mexico/doc/a3_acuerdo_en.pdf

[147] Holmes *et al.* (2005a, p. 103).

[148] Mexico was one of three priority countries in Latin America for the 2002–2004 European Initiative on the Project on Democracy and Human Rights.

[149] http://ec.europa.eu/comm/external_relations/mexico/intro/index.htm

[150] According to EUROSTAT, bilateral trade between the EU and Mexico in 2004 totalled € 21.1 billion, with EU exports amounting to € 14.6 billion, and Mexico's exports to the EU representing € 6.8 billion, leaving the EU with a trade surplus of € 7.8 billion.

grew considerably more than in the EU following the conclusion of the agreement. A reason for that could be the number of European firms operating in Mexico.[151]

The trade aspects of the Agreement were subsequently adopted through decisions of the EU–Mexico Joint Council.[152] With respect to trade in goods, Decision 2/2000 of the Joint Council established an FTA in goods. This decision was adopted on 23 March 2000 by the EU–Mexico Joint Council and entered into force on 1 July 2000.[153] Regarding the services, Decision 2/2001 of the Joint Council was adopted on 27 February 2001 by the EU–Mexico Joint Council (published on 12 March 2001) and entered into force on 1 March 2001.[154] In addition, there are three sectoral agreements between the EU and Mexico.[155]

With respect to trade, the specified objectives of the Agreement are establishing a free trade area in goods and services, the mutual opening of the procurement markets, the liberalization of capital movements and payments, as well as the adoption of disciplines in the fields of competition and intellectual property rights (IPRs), establishment of a cooperation mechanism in competition matters, a consultation mechanism for the issues of IP, and a dispute-settlement mechanism.[156]

Accordingly, both the EU and Mexico expect to eliminate all industrial tariffs.[157] Moreover, there shall be a partial removal of the agricultural and fisheries tariffs which is due in 2010. Services are not covered by the agreement, yet the EU–Mexico Association Council concluded a separate agreement on that in 2001.[158] During the fourth EU–Mexico Joint Committee, which took place in Mexico in November 2004, the parties agreed to start the review clauses in agriculture, services and investments as foreseen in the Agreement.

In order to ensure that the advantages of the free trade regime were not undermined by private anti-competitive conduct and/or were not diminished, the parties included competition policy and cooperation and coordination. The detailed competition provisions within the EUMFTA are outlined in Annex XV to the agreement, in which the first article (Article 1.1) directly emphasizes mutual recognition: both parties commit to apply their respective competition laws to safeguard the benefits of the agreement.[159] Annex XV includes not only provisions on competition policy but also on cooperation and coordination mechanisms in this field. These provisions are relatively detailed and provide for notification of enforcement activities,[160] coordination of enforcement activities,

[151] Marsden and Whelan (2005, p. 22).

[152] http://ec.europa.eu/comm/external_relations/mexico/intro/index.htm

[153] The full text of the Decision is published in OJ L157 of 30 June 2000, and the annexes are published in OJ L245 of 29 September 2000.

[154] OJ L 70 of 12 March 2001.

[155] These agreements are: 1) Agreement between the European Commission and the United States of Mexico concerning the mutual recognition and protection of designations for spirit drinks, signed on 27 May 1997 OJ L 152, 11.06.1997.2), Agreement between the European Commission and the United States of Mexico on cooperation regarding the control of precursors and chemical substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances, signed on 13 March 1997 OJ L 077 19.03.1997. 3) Agreement between the European Commission and the United States of Mexico on Scientific and Technological Cooperation, promoting the establishment of long-term institutional alliances between research centres, signed on 3 February 2004. Council Decision of 13 June 2005 on the conclusion of the Agreement for Scientific and Technological Cooperation (2005/766/EC) OJ L 290 04.11.2005.

[156] See Article 1 of the EUMFTA and Marsden and Whelan (2005, p. 7).

[157] The EU shall eliminate its industrial tariffs by 1 January 2003 while Mexico shall do the same by 1 January 2007. See Marsden and Whelan (2005, p. 3).

[158] Decision No 2/2001 of the EU–Mexico Joint Council 27 February 2001 Implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership, Political Coordination and Cooperation Agreement http://www.sice.oas.org/Trade/mexeufta/english/dec201a.asp

[159] Article 1.1 EUMFTA.

[160] Annex XV of EUMFTA Article 3 specifies on which occasion the national competition authority should notify the other party on its enforcement activities.

consultations, avoidance of conflicts and TA.[161] Separate regimes of competition enforcement have been bridged through a pragmatic spirit and mechanism of cooperation and assistance.[162]

The objectives of the competition cooperation mechanism are three-fold. Firstly, it aims to promote cooperation and coordination between the parties with regard to the enforcement of competition laws in their territory to provide mutual assistance in the competition field when considered necessary. Secondly, to eliminate anti-competitive activities by enforcing the appropriate legislation so as to avoid any adverse effects on trade and economic development, and their interests. The last aim is the promotion of cooperation to clarify divergences in their respective competition law application.

The competition authorities of the EU and Mexico confirmed that the provisions of Annex XV regarding competition enforcement cooperation are practically as useful and effective as those that could be included in an ATA and therefore there are no plans for the conclusion of such an agreement in the future.[163] Furthermore, there is very little difference in substance between Chapter XI of the Canada–Costa Rica FTA and the Canada–Chile Memorandum of Understanding (MOU). The same observation applied in terms of the EU–Mexico FTA. In this agreement, cooperation has been 'more official, more open and more intense since [the] signing of [the] FTA'.[164]

The EUMFTA contains extensive provisions with regard to the parties' competition policies as mentioned earlier. An important exception though is the exclusion of state aid provisions. Therefore, there is no reference in the agreement to either the EC state aid legislation or annual reporting on public aid.

The agreement also contains provisions on dispute settlement. According to the EU, the dispute-settlement mechanism covers all aspects of the agreement and is binding for the parties.[165] However, it is questionable whether these rules can be applied effectively in competition cases.[166]

The EUMFTA does not oblige the parties to establish competition authorities as both parties have law, rules and agencies. Besides, there is no requirement as to harmonization of domestic competition laws. Nevertheless, the agreement contains rules on coordination and cooperation and lays out detailed provisions on the implementation of such rules. The cooperation on the Mexican side became more official, open and intense since the signing of the agreement as the Mexican authority notified the EU on 31 instances, while they were notified in only one case.[167]

2.3.4.2 The legal framework provided by the agreement vis-à-vis the national system of Mexico

It should be mentioned that Mexico is a country with French civil law tradition.[168] Wise (1999, p. 5) states that Mexico is aiming to 'reduce the temptation for protectionist intervention [by the government]

[161] Marsden and Whelan (2005, p. 5).
[162] Marsden and Whelan (2005, p. 3).
[163] Marsden and Whelan (2005, pp. 6–7).
[164] Marsden (2006) Turkey Seminar Report, in the Annex.
[165] http://europa.eu.int/comm/trade/issues/bilateral/countries/mexico/index_en.htm
[166] See Marsden and Whelan (2005, p. 27).
[167] Marsden and Whelan (2005, pp. 22, 26). The authors submit that a possible reason for that could be the rules on business secrets and confidential information in the EU.
[168] Lee (2004, p. 24, table).

and increase the potential for market-based discipline'.

Mexico raised another concern against the adoption of competition laws and their application to state-owned enterprises: in case of a crisis, it might become necessary to re-nationalize important industries of national interest, for example utilities (see OECD, 2004b, p. 29).

Article 28 of the 1917 Constitution specifically prohibits monopolies and monopolistic practices, and establishes that concentrations contrary to the public interest must be avoided in concessions of public services and goods of the federal domain (for example spectrum, mines, and so on).[169] Competition policy was not fully implemented, however, until the enactment of the 1993 Federal Economic Competition Law (LFCE).[170]

Most international trade agreements to which Mexico is a party contain specific chapters on competition, and Mexico has also signed various bilateral competition agreements with other nations.[171] Several sectoral laws also grant the Federal Competition Commission (CFC) specific authority, most frequently in issuing determinations of market power or effective competition, and in the approval of prospective participants in auctions conducted in regulated sectors by the federal government.[172]

The LFCE includes seven chapters. Articles 1 to 7 are general provisions, monopolies and monopolistic practices are dealt with in Articles 8 to 15. Concentrations is the heading of Chapter 3 and this is regulated in Articles 16 to 22. The CFC is addressed between Articles 23 and 29 as the fourth chapter. Procedures, sanctions and appeal for review are dealt with, respectively, in Articles 30 to 34, 35 to 38, and Article 39.

2.3.4.3 The institutional structure provided by realistic facts of the target country

The CFC, created in 1993, is an agency of the Ministry of Economy with technical and operational autonomy, which is responsible for the implementation of the LFCE in Mexico.

The CFC's mandate is to protect the process of competition and free access to markets, through the prevention and elimination of monopolistic practices and other restrictions to market efficiency, in order to contribute to societal welfare as stated in the law.

The CFC's main activities are four-fold. The institution is in charge of approving mergers and acquisitions that must be notified. Besides, it is competent to investigate and impose penalties for monopolistic conduct prohibited by the law. In addition, it authorizes the firms that wish to participate in privatizations and public tenders for the granting of concessions and permits in regulated sectors. Lastly, it is the main actor in competition advocacy.[173]

[169] http://www.cfc.gob.mx/english/index.php?option=com_content&task=category&sectionid=33&id=178&Itemid=294
[170] http://www.cfc.gob.mx/english/index.php?option=com_content&task=blogcategory&id=180&Itemid=29
[171] http://www.cfc.gob.mx/english/index.php?option=com_content&task=blogcategory&id=179&Itemid=29
[172] http://www.cfc.gob.mx/english/index.php?option=com_content&task=blogcategory&id=181&Itemid=29
[173] http://www.cfc.gob.mx/english/index.php?option=com_frontpage&Itemid=1

The CFC is comprised of five commissioners: the President and four other commissioners are all appointed by the President of the Republic for 10-year terms. The institution possesses 134 professionals and 41 support staff.

2.3.4.4 Preliminary remarks

In Mexico, it is reported that 'competition policy has registered substantial achievements in promoting economic development and enhancing consumer welfare'.[174] The WTO synthesis paper, for example, lists a number of countries (Mexico, Kenya, Turkey, Peru, Brazil, the European Community and its Member States) that support the claim that 'CLP have been implemented or strengthened not in isolation, but rather as one element of a package of interrelated reforms of policies aimed at promoting economic and social development'.[175]

According to Clarke *et al.* (2005), there were 21 allegations of anti-competitive conduct in Mexico concerning 17 different lines of business. Lines of business involved in more than one allegation are retail, telecoms and fuel distribution.[176]

Privatization promotes productivity and leads to network expansion only in the presence of competition. Competition in the market matters, and may both reduce prices and increase efficiency.[177] Therefore, it is an indication of the recognition of the current issues that the CFC is provided with competence regarding the privatization process from the start.

With regard to the EUMFTA and cooperation principles in particular, there is no need for an ATA cooperation agreement as the cooperation mechanism provided is sufficient. However, if an exchange of confidential information is considered, then the framework provided is not adequate.[178]

There do not seem to be any constraints in terms of the factors presented earlier for the implementation of the competition provisions of the RTA. Harmonization is not mandated, and the cooperatives provisions such as notification have been exercised (especially by Mexico). Deeper cooperation, such as on enforcement, would require the countries to address closely the question of confidential information. Again, it would be interesting to compare Mexico's experience with this agreement and its experiences under the NAFTA.

2.3.5 Forecasting the national implementation of the newly negotiated United States–Peru Trade Promotion Agreement

In May 2004, the United States initiated negotiations with three Andean nations – Peru, Colombia and Ecuador. Talks with Peru concluded on 7 December 2005 and negotiations with Colombia concluded on 27 February 2006. Discussions are ongoing with Ecuador. Bolivia initially participated as an observer.

[174] OECD (2004a, p. 2).
[175] WTO (1998, p. 3).
[176] See Clarke *et al.* (2005).
[177] See Naessi and Neven (2005).
[178] See Marsden and Whelan (2005, p. 27).

On 12 April 2006, the US Trade Representative and the Peruvian Minister of Foreign Trade and Tourism signed the Peru Trade Promotion Agreement (PTPA). The negotiations for this PTPA started formally on 18 May 2004. In July 2006, it was ratified by the Peruvian congress. The US congress has not yet ratified the agreement, but instead extended the Andean Trade Promotion and Drug Eradication Act.[179]

It is said that upon implementation of this agreement, 80 per cent of consumer and industrial products and more than two-thirds of current US farm exports to Peru will become duty-free immediately. Over the coming years, Peru will continue to provide substantial market access to US goods, services and agricultural products by gradually eliminating all tariffs on US exports to Peru. The agreement will also provide a secure, predictable legal framework for US investors operating in Peru, provide for enforcement of quality labour and environmental standards, protect IPRs, and install an effective dispute settlement process.

2.3.5.1 Political and socio–economic situation of Peru and the United States

The PTPA, a comprehensive agreement,[180] if ratified, will eliminate tariffs and other barriers to goods and services and expand trade between the two nations. For the US the PTPA is expected to spur new export opportunities for US businesses, manufacturers, farmers, and ranchers, expand choices for consumers and will help create jobs in the United States. Similarly for Peru, this agreement will significantly increase opportunities for economic growth and serve as a catalyst to further develop and modernize its economy.

As a result of this agreement, the United States will have greater access to the Peruvian market for products such as machinery, mineral fuel, electrical machinery and plastics, along with meats and poultry, grains, oilseeds, dairy products, horticulture, processed products, and other agricultural products.

The US is Peru's largest trading partner accounting for 26 per cent of its total exports and 19 per cent of imports. According to available information, Peru's terms of trade are positive (surplus) as a result of the sharp increase of exports, and the decrease of imports, since 2003. In addition, the United States is an important source of foreign investment for the country. Between 1994 and 2001, the stock of FDI registered as American in Peru grew from USD 754 million to more than USD 1,960 million, which represents an expansion of 160 per cent in only 7 years.[181]

Many products from Peru already entered the US market duty-free under the Andean Trade Preference Act (ATPA), which expired in 2006. The new agreement expands the ATPA and locks in duty-free access for Peru. Building on the ATPA, duty-free treatment can now be a two-way street.[182]

The United States has significant economic ties to the region. Total two-way goods trade with the

[179] See www.whitehouse.gov/news/releases/2002/10/20021031-9.html

[180] The agreement contains 23 chapters and several annexes. Whereas Chapter 8 relates to Trade Remedies and Chapter 10 to Investment, Chapter 13 is on competition policy. Web source at http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html

[181] http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=PE,US. Ministry of Trade and Foreign trade of the Peruvian Government at http://www.tlcperu-eeuu.gob.pe/index.php?ncategoria1=101&ncategoria2=103. Official statistics of the Peruvian Government at ww.inei.gob.pe

[182] Press release of: the United States and Peru Sign Trade Promotion Agreement as of 4 December 2006. web source available at: http://www.ustr.gov/Document_Library/Press_Releases/2006/April/United_States_Peru_Sign_Trade_Promotion_Agreement.html

Andean countries of Peru, Colombia and Ecuador was approximately USD 29.4 billion in 2005. The countries comprised an important market for US goods exports totalling USD 9.7 billion in 2005. Leading exports included machinery, organic chemicals, plastics and cereals. US exports of agricultural products to Peru, Colombia and Ecuador totalled USD 1.0 billion. Leading exports included wheat, coarse grains, cotton and soybeans. Goods imports from Peru, Colombia and Ecuador totalled USD 19.7 billion in 2005. The stock of US FDI in these countries in 2004 was USD 7.7 billion.[183]

Since 2001, the US has signed a significant number of FTAs with different countries and regions. In addition to the trade benefits derived from these agreements, such initiatives may reflect an effort on the part of the US to secure political alliances through FTAs.

2.3.5.2 The legal framework

Chapter 13 of the Comprehensive Agreement not only deals with competition policy but with Designated Monopolies, and State Enterprises. By virtue of Article 13.1, the objectives of recognizing that the conduct subject to this chapter has the potential to restrict bilateral trade and investment, the parties believe that proscribing such conduct, implementing economically sound competition policies, and cooperating on matters covered by this chapter will help secure the benefits of this Agreement.

From the first reading of this competition chapter, CRPs of both types can be found, but their implications when it comes to substantive provisions are no more than coordinated provisions rather than harmonization schemes. Thus, Article 13.2 (Competition Law and Anti-competitive Business Conduct) proscribes that each party needs to maintain national competition laws that proscribe anti-competitive business conduct and promote economic efficiency and consumer welfare.

Nonetheless, cooperation with regard to CRPs is well developed in Article 13.3, as it states that parties recognize the importance of cooperation and coordination between their respective authorities to further effective competition law enforcement in the free trade area. In this regard, cooperation on issues of competition law enforcement, including notification of cases that affect the important interests of another Party, consultation, and exchange of information relating to the enforcement of each Party's competition laws and policies are mentioned as well. By virtue of Article 13.4, a Working Group comprising representatives of each Party is established so as to promote greater understanding, communication, and cooperation between the Parties with respect to matters covered by the competition chapter. A salient feature of this article is a follow-up initiative in terms of reporting the status of the working group's efforts within 3 years of entry into force of this Agreement and may make any appropriate recommendations for future action that may further promote the achievement of the objectives of this Article.

In addition, Articles 13.8 and 13.9 deal with transparency and information requests and consultations, respectively. These two articles ensure that trade or investment between the Parties is not affected by any of the government actions. In the same direction, prohibitions of designated monopolies and state enterprises that create obstacles to trade and investment are established in Articles 13.5 and 13.6, respectively. In a nutshell, it seems that the competition chapter is a crucial ingredient to

[183] Official source from the Peruvian Ministry of Trade and Commerce, web source available at http://www.tlcperu-eeuu.gob.pe/index.php

maintain trade and investment secured as part of the main objective of the whole agreement.

2.3.5.3 The institutional setting

As most of the competition chapter deals with CRPs, much of the institutional setting required to implement these provisions is already in place in both member countries. As both countries possess competition agencies (Federal Trade Commission (FTC)/DoJ and Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI)), their institutional capacity to absorb the national implications of these provisions, such as the implementation of the working group or to undertake consultations, is sufficient.

2.3.5.4 Preliminary remarks

While it is envisaged that the US–PTPA will contribute strongly to the expansion of trade and economic relations between these nations, Peru, as a minor trading partner with regard to the US, will definitely face problems at the domestic level (lack of domestic competitiveness to counter international competition from US products) despite their preventive efforts to mitigate them. In what follows, the major problems arising from this comprehensive agreement are summarized.

Nevertheless the agreement is deemed to be an excellent model to promote development as it provides extensive opportunities for cooperative activities, including the creation of a permanent trade capacity-building committee, as well as innovative provisions such as consultation mechanisms that aim to expand the possibilities for improving trade cooperation and preventing disputes and the protection of IP, ensuring fair and effective protection for investors, provides improved business facilitation, greatly improved access for service providers, and contains state-of-the-art treatment for new forms of doing business, including e-commerce. The agreement immediately levels the playing field between US and Peruvian producers, despite the very different levels of development between the US and Peru.

Indeed, Peru has already had virtually complete market access through the ATPA, while US exporters to Peru have been paying significant duties. Fully 98 per cent of all imports to the United States from Peru already enter duty-free, and the average US duty on imports from Peru is just one-tenth of 1 per cent (0.1 per cent). For instance, Peru's average applied duty on imports of manufactured goods is 10 per cent, and the elimination of these duties will confer a significant advantage to US exporters with serious consequences for Peruvian competitors.

As a preventive measure, the Peruvian government is taking actions with the aim of reducing the exposure of those local producers that are incapable of competing with US products that will enter the market duty-free.

All these forecasted problems are indeed in relation to the first interlinked factor described in Section 2.I, that is the political economy of the implementing country. The national implication of applying the whole comprehensive agreement, together with the competition chapter that actually supports the ultimate goal of the agreement, increase of trade flows between US and Peru, will motivate the Peruvian government to attempt to raise the level of competitiveness of each of those products that are deemed to be the most vulnerable to US competition. In turn, competition policy implications will

need to be adjusted to better increase domestic competitiveness. It would need, therefore, a careful assessment to determine whether or not some sectors should be exempted from the application of competition rules and the competition chapter itself. To that possible extent, it is speculated that those products expected to experience the greatest difficulties in adapting to market conditions after the bilateral opening will receive subsidies or compensation. In addition, cooperation mechanisms between Peruvian businesses and the Peruvian government will be implemented with the aim of supporting productivity improvements.

2.4 Concluding Remarks

From the foregoing, there seems to be a shortage of use made of the CRPs in bilateral trade agreements. This might be explained, in part, by the lack of coordination between competition authorities on the one hand and trade negotiators on the other. However, in the Mexican case in contrast, the detailed competition chapter was as comprehensive as an ATA.

The need to evaluate the objective of the competition provisions in the trade agreement in order to evaluate the likelihood of their use was noted. In this regard, it is important to consider whether the main aim of the CRPs is market access, or whether the provisions are mainly trying to offset the possible negative impacts of trade liberalization. Furthermore, the CRPs might relate to commitments around services or investment.

Moreover, it is important to evaluate whether the provisions of the agreement at hand set out substantive competition provisions, or simply stipulate cooperation provisions. Cooperation in practice may depend on the trade flows between the signatory parties and the subsequent effects of anti-competitive cross-border business practices. However, the extent of cooperation through the CRPs in the agreements is not clear – instead the signatory parties might choose to use informal techniques, or other modes of cooperation (such as through an ATA), as is developed in other chapters (see Rosenberg, Chapter 1) of this publication. The relationship of the CRPs to trade remedies such as anti-dumping is a further important consideration.

Our case studies suggest a way of applying the interlinked factors we have highlighted in Section 2.2 as potentially impacting the degree of domestic implementation of the CRPs in bilateral agreements. In the first place, one needs to consider political economy factors influencing the agreement as a whole. Linked to this are what the provisions themselves provide for in terms of substantive commitments and cooperatives arrangements. The particular institutional structure is not so important provided the country possesses a fairly well-functioning authority. In the discussion about the potential impact of the EU–SA TDCA, in the terms of the EPA negotiations, there are both political economy and institutional deficiency factors at play. It was noted that while the EU would like to include competition and other trade-related aspects as negotiating items, the BLNS and MAT (Mozambique, Angola and Tanzania) countries are reluctant to do so, due to their lack of institutional and negotiating capacity in these areas, and the fact that they have not yet developed regional institutional frameworks. Furthermore, differences in terms of what is understood by 'development finance' have been an important political sticking point. It is possible that, instead, these negotiations might secure support for the development of the regional and domestic CLP of the SACU countries, if the negotiations lead to the SACU countries acceding to the TDCA. This may be important for the region as focus shifts behind the border to domestic reforms complementing liberalization.

In this endeavour, the role of TA and international cooperation becomes crucial. The impact of TA to better address the national implementation problems of CRPs in regional and bilateral FTAs is important.

Strengthening human and institutional capacities may provide a conducive politico–socio–economic environment in the countries to fully exploit the benefits of the CRPs in the RTAs of which they are signatories, challenge the existing balance of power in trade decision making, empower developing countries to act independently in terms of their domestic reforms, ensure a level playing field in international trade, and take seriously the need to build developing country power in international negotiations.

CRPs in bilateral agreements and the ATAs that develop out of these agreements may be effective instruments through which TA may be transmitted.

As a way to better absorb TA, developing countries require:

- A team of technically competent, diplomatically savvy negotiators that can participate effectively and persuasively in ongoing negotiations and decision making.
- An equally informed back-up team to articulate the various national interests, negotiating objectives and strategies, as well as a layer of expertise external to government that can provide trade policy advice to government.
- An effective domestic policy-making process which involves a spectrum of relevant government agencies and draws systematically on expertise and advice external to the government.
- An ability to forge, maintain and service effective coalitions with other countries on particular issues of negotiation.
- The capacity to use the current regional approach (predominant at the WTO) and its dispute settlement process to defend and advance their rights.

It is proposed that TA initiatives are structured to consider the three interlinked factors identified in Section 2.2, which provide a means of structuring and determining the absorptive capacity of recipient countries. In this context, UNCTAD and other major international organizations take into consideration these aspects in the form of preliminary need assessment phases before implementing TA programmes. In the design of these programmes, the influence of the 'three interlinked factors' on the national implementation of regional or bilateral competition provisions should be carefully considered. [184]

[184] An example of these combinations of criteria can be mentioned in the COMPAL programme, whose objective is to strengthen institutions and capacities in the area of competition and consumer protection policies in Bolivia, Costa Rica, El Salvador, Nicaragua and Peru, which has provided important lessons since its inception in 2003 under the auspices of UNCTAD. So far, COMPAL has reached major findings during its need assessment scheme in 2003 on lessons for developing countries. These major findings have been related to the potential linkages between COMPAL and bilateral and regional trade agreements. Indeed, the COMPAL programme contributes to foster the linkages between international trade flows, international investment, and competitiveness, namely: (i) Analyses of competition-related problems that arise in the transportation and communication infrastructures. (ii) Undertaking competition advocacy activities so that firms gearing up to take advantage of the market-opening opportunities created by a FTA know to whom to complain if they suffer at the hands of those providing export-related services. (iii) Undertaking competition advocacy to ensure that any other provisions of the free trade agreement that would stimulate competition in national markets are implemented in a timely fashion. For further information, see http://compal.unctad.org

A final important remark related to this topic refers to the increasing importance of multinationals from the South, and the new poles of world growth. South–South bilateral trade agreements (possibly including competition provisions) are expected to become increasingly important in the near future.

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Chapter 3

Anti-competitive Practices and the Attainment of the Millennium Development Goals: Implications for Competition Law Enforcement and Inter-Agency Cooperation

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3.1 Introduction

Competition law and policy (CLP) is now a feature of the business environment in many jurisdictions around the world. There are a variety of reasons for this phenomenon, including the recent tendency of regional trade agreements (RTAs) to consider 'behind-the-border' issues. The adoption by many states of market principles, incorporating programmes of privatization and deregulation, has also been a contributory factor. Many developing countries have abandoned failed policies of import-substituting industrialization, and acknowledged the importance of competitiveness and innovation to development.

Trade liberalization has also been a component of this profound shift in economic management. As has been well documented in the past, it is important that the development of a liberalized trade regime is coupled with the effective implementation of CLP to ensure that when government restraints on competition are removed they are not replaced by private restraints, so that the benefits of trade liberalization can be realized. One response has been to include competition provisions in RTAs, which is the subject matter of this publication. However, these provisions are perceived differently by different institutional actors. A trade official might see the goal of such provisions as *market access*, while a competition official might hope for increased exchange of information and *enforcement cooperation*. On the other hand, competition provisions have been used in the context of the European Union as a key instrument for *market integration*.

Having said that, rationales for competition law and its enforcement can be made independent of international trade. Anti-competitive practices might be undertaken in the domestic non-tradable sector. Cement companies might allocate territories, service providers might rig bids for government contracts and a domestic trade association might collude on the price of an essential good whatever the country's openness to trade. Also, the importance of competition policy is not contingent on the balance a country favours between private and state-owned enterprise; what matters is the importance attached to the promotion of inter-firm rivalry. This chapter will consider to what extent CLP can target matters of social concern, including the prominent Millennium Development Goals (MDGs). It will further consider the lessons recent cases provide for cooperation between competition agencies.

The rest of the chapter is organized as follows. Section 3.2 will account for our focus on the MDGs and shed some light on their potential relationship to competition policy. It will also review some of the existing academic and empirical literature on the indirect effect of competition law enforcement on developmental outcomes. Section 3.3 presents a taxonomy of cases of CLP that have had direct pro-poor effects, while Section 3.4 emphasizes that, notwithstanding these successes, there are still considerable challenges that developing countries face in implementing and enforcing competition law. Section 3.5 explains how, in the light of some of the cases analysed in Section 3.3 and the difficulties noted in Section 3.4, competition provisions in RTAs and other forms of cooperation might be of assistance. Section 3.6 concludes.

3.2 Background and Motivation

Competition policy[186] can have numerous benefits for an economy. First, by removing entry barriers, competition policy helps create an enabling environment for entrepreneurial development. Competition also ensures a more efficient allocation of resources in an economy and allows for lower prices and an increase in the variety of available products. Effective competition law enforcement strengthens competition, and competition is a spur for productivity and hence growth. Finally, growth is the key to poverty alleviation. Most income inequality is between and not within countries. A fast-growing economy lifts the poorest out of absolute poverty.

However, this link between competition law enforcement and poverty alleviation is often perceived as too indirect. Some developing countries are concerned that countries and institutions that emphasize the priority of the adoption of CLP fail to properly consider the many other national priorities they face. Therefore, our goal is to focus on specific social development concerns such as access to food, housing, medicine, income-generating activities, and so on, and to investigate how competition can contribute to addressing them. In view of the importance they have been accorded in the UN literature, the MDGs will be employed as an organizing principle, to avoid long digressions into precisely what constitutes social development. Regardless of one's persuasions on this topic, it is hoped that the cases considered here, from all parts of the world, will begin to convey the sort of positive (pro-social development) impact that the effective implementation of CLP can have.

It first needs to be considered to what extent existing MDG-oriented reports recognize the importance of CLP. Evenett contends that while MDG-related reports have emphasized the importance of competition for development, competition policy has not received matching attention in 'flagship UN publications'.[187] In a paper addressing this topic, he identifies 876 'credible' instances in MDG-related reports where competition is identified as contributing to the attainment of an MDG target.[188] Furthermore, most often addressed were those relating to 'poverty-, hunger-, and technology transfer-related MDG targets'. As he points out, this probably reflects a lack of awareness by many in the development community about the relationship between competition and MDGs 'relating to education…the provision of health care…access [to] safe drinking water, and to the availability of medicines needed to reduce the incidence of HIV/Aids, malaria and other major diseases'.[189] Comparing statements in these documents encouraging governments to promote competition to statements endorsing governments to develop their private sectors, Evenett finds marginally more of the former.[190] However, in absolute terms, the number of competition-related statements per MDG-related paper only averaged 1.28, which is small. It nonetheless seems that some of the rhetoric of MDG-oriented documents in emphasizing the competitive process does not yet match the reality in terms of a commitment to effectively enforcing CLP in developing countries.

[186] By competition policy, we mean all of the government policies that affect the intensity of competition between firms in a market economy. Many government policies are therefore part of competition policy, including competition law and its enforcement.

[187] Evenett (2006b, p. 2).

[188] Evenett (2006b, p. 9).

[189] Evenett (2006b, p. 11).

[190] 845 instances as opposed to 756. Most prominent were statements varying around 'Governments should take steps to promote competition, including steps to enact and enforce a competition law'. Evenett (2006b, table 3).

An ECLAC (2005) report on the attainment of the MDGs in Latin America and the Caribbean, underlines the need for a comprehensive strategy involving institutional change and better regulatory structures.[191] While the report is not per se about competition policy, some of the strategies recommended relate to it. With reference to the first MDG goal referring to hunger and food security, the report considers exclusionary practices towards small-scale producers, deriving from the monopsonistic nature of trading chains.[192] With respect to financing for the MDGs, the report refers to – among other things – the creation of more competition among the current intermediaries of remittances, a particular concern for countries in the region. The report furthermore refers to the need for the better regulation of information and communication technology (ICT) goods and services.

In terms of a general motivation for the enforcement of CLP, Evenett (2003a, p. 7) writes that 'the conceptual arguments and available empirical evidence by and large supports the view that promoting inter-firm rivalry enhances the dynamic economic performance of developing economies'. In support of this contention, he lists (Evenett, 2003a, p. 6) the following five arguments originally presented in a report he prepared for the WTO secretariat:

1. Greater competition between firms sharpens incentives to cut costs and to improve productivity.
2. The benefits from trade reform, deregulation and privatization will not be realized without the potential for active and effective enforcement of competition law.
3. The appropriate enforcement of competition law adds transparency to a nation's commercial landscape, which, in turn, attracts Foreign Direct Investment (FDI).
4. Greater competition in product markets stimulates both product and process innovations
5. Rivalry in the market for future innovations can be protected by the active and appropriate enforcement of merger and acquisition laws, which prevents, for example, one firm taking over another firm which has a potentially strong, but not as yet fully developed, range of rival products.

Though it is difficult to isolate and quantify the general effects of a competition regime on an economy, some authors have attempted to measure different aspects of the law.[193] Evenett (2002, 2003b) has examined the impact of different merger review systems on FDI flows and mergers and acquisitions (M&A) activity and there have been attempts, which we examine below, to look at cross-country evidence on the relationship between the presence or absence of competition law and productivity, domestic competition and industry mark-ups.

It is also possible to quantify the impact of competition policy enforcement on a case-by-case basis, by examining how prices of, for instance, previously cartelized or monopolized products change following enforcement action[194] or to examine how the structure of the industry develops in other ways. When estimating 'value for money' of CLP enforcement, studies on cartel enforcement described below (Clarke and Evenett, 2003a,b) have been able to estimate the benefit of having an

[191] See ECLAC (2005) Section I.C, and more precisely p. 22 in the electronic version: 'Another key requirement is to adapt the design and operation of institutions involved in the development process so that they allow markets to function properly and promote social cohesion'.

[192] ECLAC (2005: Section II.B).

[193] This part draws on a presentation by Clarke and Evenett (2006).

[194] A UK DTI (2004) commissioned study examined the impacts of implementing competition policy in six "illustrative cases: Retailers Opticians' services, international telephone calls, the net book agreement, passenger flights in Europe, new cars and replica football kits". While not all the studies have to do with the enforcement of competition law, they all fall under the scope of competition policy more generally. The conclusions from the study are almost uniformly positive in that the promotion of competition is found to promote product choice; increase quantities sold, and reduce prices.

active anti-cartel enforcement regime by looking at a broad cross-section of countries.

In a cross-country study, Krakowski (2005, p. 15) finds that the perceived[195] 'effectiveness of antitrust policy is of significant influence on the perceived intensity of local competition'. Another explanatory factor is found to be the size of the economy, while 'external protection' is not found to be significant. The perception of the effectiveness of antitrust policy is in the same paper found to be explained by the experience in the application of competition policy, and overall government effectiveness. While there are dangers of endogeneity in the analysis, tentative support for a positive impact on standard of living is also noted.[196]

Dutz and Vagliasindi (2000) in a survey of competition policy in 18 central and East European countries find the earliest adopters of CLP to be the most effective. They then survey 3000 firms and find that the most effective competition policy enforcers and advocates 'improve the extent that new enterprises can expand in the economy'.[197] In a study employing dummy variables for the date on which a competition law is enacted, Kee and Hoekman (2002) find that through its impact on market structure (that is, the number of firms in the industry) competition law affects the industry mark-up.[198]

An OECD (2002) discussion note reports many country submissions as identifying access to 'essential facilities' as well as other inputs (such as 'transport services' and 'financial services') as an important facet of promoting competition.[199] Hayri and Dutz (1999) conclude that effective antitrust policy is 'positively associated with residual growth'.[200] Furthermore, the competition policy effect is distinct from the trade openness one. Hence, we have traced through the literature the link between antitrust enforcement, competition, productivity and growth. This gives us the general indirect link between competition law enforcement and poverty alleviation.

One the other hand, the magnitude of the direct negative impact of anti-competitive activity on economic development has been quantified in the area of international cartels. Evenett *et al.* (2001) recognize that persistent international cartels are very much a feature of our modern world. International cartels undermine the benefits of liberalization to consumers. The authors argue for 'aggressive prosecution' of such cartels, facilitated by 'sufficient international cooperation…to gather and prosecute offenders'.[201] The promotion of competition they argue might be furthered by 'the

[195] 'Effectiveness of the application of competition policy' and 'intensity of local competition' are both based on surveys of business leaders completed by the World Economic Forum. The Kaufmann, Kraay, Zoido-Lobatón data set is used to measure the 'overall effectiveness of government policy'.

[196] In a working paper, Hylton and Deng (2006) examine the scope of a country's competition law (and various sub-components of that law) and find that increasing the scope of a country's competition law increases the perceived intensity of competition in that economy. However, this result does not survive the use of a non-subjective measure of competition intensity they suggest, nor does it survive instrumental variables estimation where the authors attempt to control for the endogeneity of the scope of a nation's competition law and the perceived intensity of competition. One further interesting result (p. 2) is that 'increasing the range of remedies available to enforcement authorities has the largest impact on perceived competition intensity'. The classification of scope of competition law is very much similar to the approach taken in Nicholson (2004, p. 3) where the competition law is divided into the following categories: 'Territorial Scope, Remedies, Private Enforcement, Merger Notification, Merger Assessment, Dominance, and Restrictive Trade Practices'. On this classification (and as at the end of 2004), the authors report that the EU law is of the widest scope, followed by that of North America, whereas South and Central America have laws with the most limited scope. To get a sense of 'antitrust risk' though, and as the authors point out, one would have to supplement the measure of legal scope, with information on enforcement. In their model (p. 32), the scope index is used as an explanatory variable for competition intensity, together with factors such as 'variables that influence aggregate demand, production costs, or the number of firms serving the market'.

[197] Nicholson (2004, p. 6).

[198] Nicholson (2004, p. 9).

[199] OECD (2002, p. 2).

[200] OECD (2002, p. 6).

[201] Evenett *et al.* (2001, p. 2).

criminalisation of price fixing… [to deter] prospective international cartels and [to gather] evidence to prosecute existing cartels'. They also remark that without merger review, cartelization might simply be replaced by formal combinations of firms.

A study of the effects of the vitamins cartel in Latin America by Clarke and Evenett (2003b) finds that total overcharges from the practices of the cartel amounted to, at a minimum, some USD 789.398 million and, importantly, 'import bills rose more in those Latin American jurisdictions which did not have active cartel enforcement regimes'.[202] In Clarke and Evenett (2003a), they provide evidence that generalizes this finding to exports to Asia, Western Europe and Latin America. Looking at nine economies in Latin America and Western Europe that do have anti-cartel enforcement, they conclude that 'in seven of the nine economies the reduction in overcharges in this one international cartel alone exceeded a quarter of their government's spending on the entire competition policy enforcement regime'.[203] This estimate furthermore excludes the benefits that lower import prices can have for the competitiveness of domestic industry.

Evenett (2003a) surveys the evidence on the impact of competition enforcement on agent incentives for investment. FDI can be reduced by vertical restraints imposed by domestic suppliers on distributors. Industry associations composed of domestic firms might set standards so as to exclude foreign entrants, something which might also limit FDI, and which might be confronted with competition law enforcement. On the other hand, merger law could be drafted so as to discriminate against foreign producers, and mandatory merger notification requirements can be burdensome. In a study completed in 2002, Evenett concludes that merger regimes with mandatory pre-merger notification reduced 'the inflow of cross-border mergers and acquisitions by American firms [by] half'.[204]

Thus, divergent conclusions seem to emerge from the literature on competition law and FDI. However, Evenett (2003a, p. 10) suggests that it might be the case that competition law and enforcement against restrictive vertical and horizontal practices has increased (good – that is, pro-competitive) FDI, while at the same time, mandatory pre-merger notification regimes have reduced (bad) FDI. This, as he recognizes, requires empirical investigation into the variation in type of FDI across countries. It is also important, as he (2003a, p. 10) argues, to take into consideration the impact of CLP on the strategy that foreign firms decide to employ to enter or penetrate a market. The prosecution of bid rigging can impact the composition of state and private investment. Furthermore, competition agencies may aid the entry of new firms into markets in which the previously dominant state enterprise has been privatized.

From this discussion, we can conclude that the theoretical basis as well as empirical support for CLP is strong. Competition policy can be used to improve domestic productivity and spur innovation. It can strengthen the benefits of complementary regulatory reforms, and when improving certainty through provisions concerning transparency, it can promote FDI. The cost of maintaining an effective competition agency is small in comparison with the benefits of the deterrence of future cartels, the restraints on the exercising of market power by existing cartels and the prosecution of former cartels.

[202] Clarke and Evenett (2003b, p. 33).

[203] Clarke and Evenett (2003a, p. 692).

[204] As Evenett (2002, p. 18) notes though, a reduction in M&A is not the same thing as a reduction in welfare. At least some of the reduced cross-border investment may reflect a deterrence of anti-competitive mergers. However, 'there must surely be a concern that a considerable number of benign M&A transactions are being caught in the merger review net'.

However, despite these general benefits, it is still important to see the direct mechanism by which CLP can realize social objectives, and for this we turn to specific case studies.

3.3 Cases in Health, Education, Financial Services for Low-Income Earners, Infrastructure and Housing, Food

Following this presentation of the overall theoretical and empirical basis for the belief in the general benefits of competition policy for economic development, it is apposite to consider specific cases illustrating how competition law enforcement translates into the realization of social objectives, understood through the lens of the MDGs. Other authors have also recognized CLP as a means of addressing the concerns of the poor. Owen (2003:9–10) identifies the role of CLP in developing countries as 'a means of increasing…economic well being. [It] should have…anticipated effects on economic incentives which, acted upon, would tend to enhance the welfare of consumers, especially the poor'.

It must be noted that the intent of this presentation is not to suggest that CLP is all one needs to attain the MDGs, nor even that it is one of the most important measures towards their realization. The aim is far more modest. It is argued that relative to the potential impact of competition law enforcement on development goals, as illustrated by the following cases, it has been under-emphasized in MDG-oriented reports. CLP is also not to be understood as something uniform; indeed the cases below illustrate the different emphases in application adopted by different authorities. The overall theme though, is of the importance of inter-firm rivalry as a development tool.

3.3.1 Public health: pricing and availability of pharmaceuticals and other health services

Our discussion of health relates specifically to MDG goals 4, 5, 6 and 8, namely the reduction of child mortality, the improvement of maternal health, the combating of HIV/AIDS, malaria and other diseases, and the development of a partnership for global development.

As noted by Evenett, the UN Road Map to the implementation of the MDGs' recommendation for the reduction of 'import duties, tariffs and taxes on pharmaceuticals' will only result in lower prices for those products, to the extent that the market power of the producers of those products is kept in check. Thus, these measures ought to be complemented by initiatives to 'detect, deter and punish anti-competitive acts'.[205]

There has been an increasing focus on global access to medicines. The possibility of curbing global epidemics depends on the pricing of and access to affordable medicines and other health services, which are severely constrained in the case of developing countries. It is here where the interplay between competition law and intellectual property protection is keenest.[206] In terms of effect on competition, patent holders are endowed with monopoly rights in recognition of their innovation, and local enterprises are placed in a situation in which they face high barriers to compete. Patent

[205] Evenett (2006b, p. 4). This is an insight that can be applied to many other products. One can also think about for instance, retailing and foods.

[206] See the presentation by Barbara Rosenberg to the UNCTAD/IDRC/tralac seminar in Cape Town, South Africa, 4 October 2006 in the Annex. Also see Maskus and Lahouel (2000).

protection can inhibit domestic competition by generic producers, furthermore pricing under patent may place the medication beyond the reach of those most in need. In Brazil, the introduction of generic competition in the production of anti-retrovirals resulted in price falls in equivalent branded products of 79 per cent.[207]

Avafia *et al.* (2006) consider the access and pricing of pharmaceutical medicines in Sub-Saharan Africa (SSA), in light of the Doha Declaration on Public Health, the August 30 agreement of the General Council of the WTO, the 'December 2005 Decision of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Council to permanently amend Article 31 of TRIPs' and the impediments that still exist for developing countries in SSA to make use of those TRIPs flexibilities. Since many of those flexibilities involve the application of competition policy[208] a developed CLP can be very important for safeguarding access to essential medicines. Furthermore, it might be important for competition authorities to participate in the negotiation of the IP chapter of an RTA to make sure that TRIPs+ provisions, which might be agreed, do not impinge on the flexibility of the authority to remedy anti-competitive practices.

Avafia *et al.* (2006), aspects of which were discussed at the UNCTAD/IDRC seminar in Cape Town, South Africa, present two famous cases in which the South African Competition Act has been used to secure the access of generic competitors in pharmaceutical products to voluntary licenses for antiretroviral production.[209]

> The first concerned the excessive prices of the patented drugs of zidovudine (AZT), lamivudine (3TC) and nevirapine, products which were marketed in South Africa in the absence of any generic competition. In that case, GlaxoSmithKline and Boehringer Ingelheim were alleged to have "engaged in excessive pricing of ARVs to the detriment of consumers". This was alleged to be in contravention of section 8(a) of the Competition Act, 89 of 1998. The case was framed in deliberately emotive language in order to elicit a strong public response.[210] In December 2003, after the South African Competition Commission had decided to refer the matter to the Competition Tribunal for adjudication, the matter was settled without a hearing, which would have subjected the respondent parties to an intense public scrutiny of their pricing policies in the context of an ongoing national tragedy in terms of HIV/AIDS. Instead two sets of settlement agreements were concluded – one between Tau *et al.* and the two groups of companies, and another

[207] Medicins Sans Frontières (2001). The point here is not to deny that patent protection can be an important component of an economic development strategy. Rather it is simply to illustrate the inherent conflict of static and dynamic efficiency, and to suggest that the optimal amount of patent protection, both in terms of scope and duration, may well vary by country and/or industry. In any event, the creation of monopoly power raises the possibility that a firm endowed with patent protection may abuse its dominant position. In the context of RTAs, this would mean that a North–South RTA that includes TRIPs or TRIPs+ provisions, without a commitment on competition policy, may be detrimental – especially where the southern country in question does not have an effective national competition authority.

[208] 'Compulsory licensing (art. 31), exhaustion of rights ("parallel imports") (art. 6), exceptions to rights conferred (art. 30), control of anti-competitive practices in contractual licenses (art. 40) and the definition of patentable subject matter and patentability of living things (art. 27 and art. 27, III.b)' Presentation by Barbara Rosenberg at the UNCTAD/IDRC/tralac seminar in Cape Town, South Africa, 4 October 2006. Ms Rosenberg went on to note that the types of anti-competitive practices that might be undertaken by IP holders can include 'Refusals to deal, tying or restrictive licenses, patent pools, cross licenses, standard settings and IP (sham) litigation/settlements in IP litigation'.

[209] This text borrows from the summary of the presentation by Jonathan Berger to the UNCTAD/IDRC/**tralac** seminar in Cape Town, South Africa, 4 October 2006. The full summary of that presentation can be found in the Annex. The reader is furthermore referred again to Avafia et al. (2006).

[210] This influenced the decision to chiefly concentrate the case on excessive pricing grounds, rather than on something the public may have found less understandable such as 'refusal to license' Avafia *et al.* (2006, p. 29). However, the investigation by the Commission 'found both parties guilty of excessive pricing and two additional grounds relating to the failure of the companies to license generic manufacturers in certain circumstances'.

> between the Competition Commission and the two groups of companies. The settlement to an excessive pricing complaint thus involved a "voluntary" licensing solution. Since the complaint was lodged, prices of AZT, 3TC and nevirapine products in South Africa have fallen by between 58% and 88%. The second case, considered an already off patent product which was being marketed to the South African public sector at prices alleged to be 30% higher than those "in the British national formulary" and at far higher prices than in Brazil, where generic production was licensed. In this instance, the threat of an excessive pricing complaint resulted in a decision by the pharmaceutical manufacturer to lower their prices by 80–85%.

Leaving aside the merits of the two cases considered here, and the appropriateness of competition law including penalties for 'exploitative' practices such as 'excessive' pricing, it must be recognized that there is a need for the relationship between competition policy and intellectual property protection to be made clearer, perhaps through the issuing of guidelines such as those released by the US DoJ and FTC.[211] It is also important to review other legislation, such as those governing medicines regulation and patents, in light of the aim of promoting competition. It is for instance important to clarify the circumstances under which compulsory licensing is appropriate. Although, customs unions (CUs) are granted additional flexibility in terms of the August 30 decision, inconsistencies in regulations between CU members are hampering the implementation of this flexibility.[212] Avafia *et al.* (2006) suggest that a regional approach to competition policy as well as harmonization in other directions may help to bring certainty to questions concerning pricing and access of these medicines. Certainly, regional relationships, whether in terms of cooperation, technical assistance, and the sharing of information and experience (which could be spurred by bilateral or regional competition provisions, or strengthened informal cooperation) could help in ensuring that countries in SSA have a consistent approach to patent protection which guarantees flexibility for the optimal trading off of dynamic innovation and consumer welfare.

Factors inhibiting static competition in health care extend beyond patents and copyright. There may be anti-competitive practices in the health services delivery system, pharmacies, hospitals and diagnostic clinics.[213] A government thus needs to take a multifaceted approach to the question of health care and pricing and access to medicines with respect to CLP.

In July 2005, a bid-rigging cartel involving local affiliates in Argentina of international companies in the supply of medical oxygen was uncovered and fined by the Competition Commission in Argentina following an investigation initiated in 1997. [214] It was found that the companies had agreed not to compete in the tendering proceedings carried on by various public and private hospitals to buy medical oxygen. Instead they had designated which company was to win each bid and set and agreed on prices to be offered accordingly.

As a direct result, costs of this vital good to hospitals and patients increased for an extended period of time. Different fines were set for each company, totalling 70 million Argentine pesos, equivalent at the time to approximately USD 23 million. In Panama 2004, it was found that two competitors in the

[211] US DOJ/FTC (1995).
[212] Avafia *et al.* (2006).
[213] CUTS (2006).
[214] UNCTAD TD/RBP/CONF.6/5 p. 4; Dictamen CNDC No. 510, 8 July 2005.

market for medical oxygen had agreed to divide the nine provinces of Panama between themselves and to fix prices in public procurement in each province. They were found to have been planning to coordinate prices, in violation of Law 29, February 1996.[215]

Thus, we have an instance where two Latin American countries, Panama and Argentina, both pursued cases against suppliers of medical oxygen. The scope for cooperation and sharing of experiences in terms of investigation techniques, evidence collection and market definition might be enhanced by the increase in cooperation initiatives, as outlined in Section 3.5.

3.3.2 Education

The discussion on education relates to the second and third MDGs, namely the achievement of universal primary education and the promotion of gender equality and empowerment of women.

As in the case of pharmaceutical products, the pricing and accessibility of education are primary concerns. A barrier is the direct costs of school. UNESCO reports that the cost of educating one child for 1 year in some developing countries is the equivalent of a month's wages. [216] The shortage of low-cost textbooks threatens the quality of education. Competition policy can have important implications for education by tackling bid rigging in the markets for schooling support services such as textbooks and other instruction materials, furnishings for the school, transportation, and construction services, lowering the costs to governments and parents of providing education. Thus, competition policy can be a necessary part of a national strategy to provide high-quality education at a low cost.

The OECD (2001) reports a case of bid rigging in school construction in China. In this case, one company was assigned by a group of companies to calculate all of the bid values, agreeing it to be awarded the tender in return for side payments to the others. The State Administration for Industry and Commerce declared the bid invalid and the illegal gains from the transaction were appropriated.

In the Republic of Korea, the KFTC pursued a case against the three major school-uniform manufacturers who they alleged were fixing the prices of their products. As a result of this investigation action, the parents' union began to exercise countervailing buyer power by conducting joint purchases of uniforms, reducing the prices of uniforms.[217]

In Chile, the Tribunal issued rules on the use of school uniforms, in the interests of promoting 'competition and transparency in this market'.[218] This followed complaints regarding exclusive purchasing requirements. Certain schools were alleged to have signed such exclusivity agreements with manufacturers and distributors without calling for bids, and without consulting 'teachers, parents and guardians, and mid-level education student centres'.

3.3.3 Financial services for low-income earners

The discussion on financial services for low-income earners is primarily focused on the MDG of

[215] See Panama competition website, http://www.clicac.gob.pa/pdf/memoria%20CLICAC%202005.pdf
[216] UNESCO http://portal.unesco.org/education/en/ev.php-URL_ID=30871&URL_DO=DO_TOPIC&URL_SECTION=201.html
[217] Kang, C.-K. (2005), KFTC.
[218] Owen (2003, p. 38).

eradicating extreme hunger and poverty, and in particular the first target, namely halving the proportion of people living on less than one dollar a day.

Remittances are a source of foreign exchange, often used to meet the basic needs of recipients, and are a potential source for economic growth.[219] Migrant remittances provide direct support for the consumption needs of many of the very poorest throughout the world.[220] They are a direct source of income support, reaching recipients without mediation though international organizations, and national governments, some of which do not always allocate aid efficiently.[221] The flow of migrant remittances has been on the increase, and with that the potential negative impact of anti-competitive practices in the provision of this financial service.

The transfer of funds is conducted through a variety of channels. Formal channels include money transfer services, informal include migrants carrying it themselves, or undertaking reciprocal 'in-kind' purchases. The cost of either formal or informal measures may be lowered, and a good mechanism for achieving this may be CLP. An estimate from the Inter-American Development Bank (IADB) on remittance costs in the Latin American and Caribbean region was '$4 billion in 2002, or about 12.5 per cent of the remittance total for the region'.[222] In the Dominican Republic, despite increasing competition, the market for remittances is still dominated by money-transfer firms supplying cash delivery at home.

The effects of increased competition, where that is achieved, are marked. In some corridors, prices have already been reduced by 50 per cent.[223] Major competition issues in the remittance service market are 'regulatory barriers to entry, limited access to financial infrastructure, the impact of informal competition, information asymmetries or lack of market information and the challenge of exclusive agreements'.[224] Competition concerns can exist here in both the sending and receiving countries – hence there potentially exists scope for competition cooperation between authorities.

It is important thus, to consider ways in which competition in the market for remittance services might be promoted. The most important aspect of this might be new technologies, but the introduction of new technologies requires conditions of intense rivalry. Financial services markets in developing countries are often extremely concentrated, and said to be characterized by an absence of competition.[225] Regulatory constraints may constrain entry, either in the sending or recipient country.

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[219] OECD (2006, p. 10).

[220] Suki (2004, p. 14) notes that, in the Dominican Republic, 'remittances may account for 20% of disposable income for the average recipient'. Furthermore (p. 5) 'the use of remittances can be harmonized with government objectives in other areas such as relieving hunger, raising access to education at all levels, increasing gender equality, improving development and raising health standards'.

[221] Furthermore, lowering the costs of remittances also relates to the goal of basic universal primary education. Suki (2004, p. 14) In the Dominican Republic, a survey for 2004 has indicated that 17 per cent (USD 460 million) of remittance receipts for 2004, were spent on education.

[222] *Id.*

[223] Suki in OECD (2006).

[224] OECD (2006, p. 10).

[225] Suki (2004, p. 23) speculates that, in the Dominican Republic context, 'certain companies may also be engaging in predatory pricing to take advantages of this particularly stressful period of market evolution'. Suki (p. 25) further notes that the foreign exchange rate offered in New York, by money transfer operators displays 'remarkable homogeneity' and that a reference rate is set by the Asociación Dominicana de Empresas Remesadores de Dinsus (ADEREDI), although the association denies any attempt at price fixing or monopolization. She further states (p. 51) that 'the relationship with agents in pricing and competition should be examined'. In New York City, the high concentration of Dominican immigrants has led to the development of specialists operating in the New York – Dominican Republic 'corridor', in competition with Western Union and Moneygram. However, outside of this 'corridor', competition is only between Western Union and Moneygram. (Suki, 2004, p. 17).

Moving away from the provision of remittance services to financial services in developing countries more generally, Troya-Martinez (2006) has documented the anti-competitive practices found in the payment card sector in many Latin American countries. Colombia, Mexico and Brazilian authorities are now for instance beginning to challenge 'excessive and/or discriminatory interchange fees'. Previously, the regulatory oversight in this area may have been too limited. The Mexican authorities have attributed the restricted point-of-sale usage of debit cards to a high interchange fee, determined in a non-transparent process by the Mexican Bankers' Association. In Argentina, there has been a lot of concern regarding allegedly high and discriminatory merchant fees. The publication of a report commissioned by the Competition Commission and public hearings on the National Payments System in South Africa has already led to proposals by two of the four major retail banks to scrap the interchange fee, a move that could save consumers R500 million or approximately USD 70 million at exchange rates in 2006.[226]

The financial services industry in Thailand has been characterized as 'cartel-like'.[227] The banks of Papua New Guinea have been accused of excessively large spreads between the rate at which they borrow and lend, which they can maintain through a lack of competition. This seriously raises the costs of starting a new business.[228] In Lao, the monopoly insurer 'does not accept comprehensive insurance of second-hand vehicles'. This adversely affects low-income earners and small businessmen, unable to insure their vehicles.[229]

In Kenya, the Association of Kenyan Insurers (AKI), whose members included all actors in the Kenyan insurance industry, was found to have fixed 'the rates, terms and benefits to apply to all motor policies to be issued after 1st July, 2002'. It is easy to see why this was so upsetting to all minibus drivers (who meet most of the transportation needs in Kenya) as well as insurance brokers. In this case, the association claimed an exemption from the competition act, saying that they were regulated by the insurance act. A consent agreement was negotiated between the Commission and AKI, resulting in the latter withdrawing its rates schedules. UNCTAD (2005a, p. 144) argues that the resultant harmony between players in this industry, brokers, insurance companies and the transport industry is likely to have been extremely beneficial to consumer welfare and the Kenyan economy as a whole.

The OECD (2001) reports that a price-fixing conspiracy in the Ukraine, involving technical services for electronic cash machines, was prosecuted. After being fined, the prices charged fell. In the Tunisian peer review, a case of price fixing in cheque commissions against banks was reported.[230]

Pension fund administration is one area that has attracted a large amount of debate. The sector in Chile, one of the earliest targets of privatization initiatives has achieved high levels of profitability for existing suppliers, but this has not attracted new entrants, which suggests the existence of some form of entry barrier. One factor that may contribute to this is that members do not know the cost – *comisión* – they have to pay to their pension fund management company (Asociación Gremial de Administradoras de Fondos de Pensión – AFP). Members often cannot understand how

[226] Business Report, "Nedbank supports eliminating Saswitch fees" 9 November 2006 http://www.busrep.co.za/index.php?fSectionId=552&fArticleId=3529191 Accessed 13 November, 2006.

[227] Thailand 'sixteen banks organised loosely under the Thai Bankers Association' – with only four large banks See UNCTAD (2005a, p. 5).

[228] Jenny (2005).

[229] See UNCTAD (2005a, p. 76).

[230] UNCTAD (2006, p. 25). The price fixing was done through the professional association to which they were members. The peer review uses this case to illustrate the importance of a culture of competition since 'the banks had not realized that in fixing the cheque commissions collectively, they were breaking the law'.

their contribution is calculated, or the relationship between the contribution they make and their pension. Furthermore, regulation aimed at lowering the cost of attracting members to an AFP may have created entry barriers. Different proposals circulate addressing these problems, for example one suggestion is that the regulator (Superintendencia de AFP) periodically tenders a member's package. With appropriate reforms there is potentially significant growth in the supply of pension services and a lowering of commission charges.[231]

3.3.4 Infrastructure and housing

The discussion here addresses amongst other things the seventh MDG, namely ensuring environmental sustainability, and in particular the cases discussed are most relevant to the eleventh target under this goal, namely the achievement of a significant improvement in the lives of at least 100 million slum dwellers.

Transportation and telecommunications are critical in achieving universal access to essential services, and are at the same time two sectors often beset by anti-competitive practices underscoring the importance of an effective competition policy. For example, in telecommunications, competition can be an important tool for creating an environment in which network industries can both operate efficiently and increase penetration and usage of the system.[232] Anti-competitive practices in the transportation sector are important for all developing countries, but especially land-locked and island economies, some of which number among the very poorest in the world. A few relevant cases that have been prosecuted recently are listed below. In all these cases, anti-competitive practices were keeping prices abnormally high and thus had an impact on the cost of different infrastructure-related issues, such as the building of homes, roads, telecommunication networks, and so on.

In Brazil, reports UNCTAD (2004), there was alleged cartel behaviour among competing crushed rock suppliers, who accounted for 70 per cent of all supply of the material concerned. Cartel behaviour here raises costs all the way down the value chain working its way into the costs of construction, housing, and other public works. The cartel was alleged to have been in operation for 2 years, until a dawn raid by the Secretariat for Economic Law (SDE) on 16 July 2003. A cement cartel was uncovered and fined in Argentina. Dictamen of the Argentinean Competition Commission (Comisión Nacional de Defensa de la Competencia – CNDC) No. 513, issued 25 July 2005, levied fines amounting to 300 million Argentine pesos, or approximately USD 100 million.

The OECD (2001) reports an instance of bid rigging on a contract for a secondary electricity net in a city in Peru. The three bidders for the contract submitted documents in the same format and with the same errors. The same OECD document reports three other instances of bid rigging, one in a contract for mobile cranes in Taiwan, Province of China, another in construction engineering in Jiangxi province in China, and a final one in the 'supply of pipe and pipe processing services' in Indonesia. The bidding parties were found to have exchanged prices with each other the day preceding the

[231] Engel and Navia (2006, Chapter 3) – See the bibliography in this reference, especially Valdes (2004). Proposals, to, amongst other things, increase competition in the industry, from the Pension Advisory Commission established by President Bachelet, are currently being considered.

[232] The linkage between transportation and telecommunications has a long history. In *United States v Terminal Railroad Association of St Louis* (224 US 383[1912]), the US Supreme Court prescribed the railroad companies in control of the terminal facilities at the main Mississippi crossing at St Louis not to discriminate against competitors. This judgement which gave rise to the 'essential facilities' doctrine is critical in the study of other network industries such as telecoms (Kovacic and Shapiro, 2000, p. 46).

bid opening. This case was the first brought by the Commission for the Supervision of Business Competition (KPPU) in Indonesia, and resulted in dissolution and re-tendering of the contract. The OECD (2001) also reports a price-fixing cartel in Slovenia where it was found that the major electricity producers coordinated prices on the provision of electrical energy. In the Czech Republic, the Office for the Protection of Competition imposed a fine on fuel distributors who were found to collude in the setting of their sales prices. Petrol station prices remained high even as the fuel purchase prices of the six distributors fell.[233]

Motorcycles are extremely important for transport in Thailand, especially for the poor in the rural areas.[234] Thai Honda was alleged to be insisting on exclusive dealing contracts, as well as pursuing other unfair trade practices. It was recommended by the Thai Competition Commission to pursue criminal proceedings in this case. There have also been allegations levelled of price fixing by domestic tour bus companies in Jordan, and an alleged shipping cartel operating shipping lines in Sabah has been accused of '[rendering] the finished products less competitive compared to those from Peninsular Malaysia and Sarawak'.[235] In Costa Rica, the Commission for the Promotion of Competition found businesses supplying 'trucking services to haul containers for the import–export trade' to have been in violation of the law.[236] See Box 3.1 below, for a discussion of anti-competitive practices in urban transportation in Peru. This case is illustrative of both the importance of competition law enforcement in terms of the welfare of a large group of people, and secondly, the difficulties of enforcement in the context of a general lack of domestic competition culture and knowledge of the competition law.

A product such as cement is essential for economic development since 'higher prices for cement… increase the costs for building roads, irrigation systems, housing construction and other infrastructure development activities'.[237] The product has certain special characteristics, such as difficulties in substitution, costly transportation (and limited international trade). In Central America, following the privatization process and a spate of mergers, both domestic and cross-border production is highly concentrated. Businesses are also many times vertically integrated.238 Technological innovations, for instance in cost-reducing processes, do not always correlate with lower domestic prices of the product.[239] There have been different impacts for local consumers: i) high quality building and housing constructors get a diversified and better quality of housing construction raw material supply, while ii) poorer sectors have seen rising prices of construction and reduced supply of cheaper qualities.[240]

In the Republic of Korea, the KFTC administered surcharges amounting to USD 22 million on cement manufacturers alleged to be inhibiting entry into the cement market by means of group boycotts.[241] Through allegedly reducing the supply of cement to two recently established manufacturers of ready-mixed concrete, they sought to prevent those companies from later developing capacity in slag powder, a substitute for cement in some applications. The Korea Cement Manufacturing Association

[233] UNCTAD TD/RBP/CONF.6/5 p. 7.
[234] UNCTAD (2005a, p. 24).
[235] Jenny, F. (2005).
[236] Owen (2003, p. 63).
[237] UNCTAD (2005a, p. 69).
[238] The privatization and M&A process coincided with the process of the deregulation of international capital flows and a reorganization of different sectors in the world economy. As a result, the production of some goods, especially commodities, became concentrated in a limited number of large international enterprises.
[239] Schatan and Avalos (2006, p. 177).
[240] Schatan and Avalos (2006, p. 177). The authors also analyse, besides cement, the markets for sugar and fertilizer.
[241] UNCTAD (2004).

(KOCMA) was also found to have been involved in this conspiracy, and was also fined. The KFTC also filed for the Public Prosecutor's office to begin criminal investigations into the parties involved.

Box 3.1: Urban transport in Peru

On 24 March 2003, a meeting was held between the mayor of the city of Iquitos (in the Peruvian rainforest) and representatives of the urban transport carriers, which led to the publication of a statement in the city's newspapers. The statement mentioned that: i) the mayor had been able to convince the carriers to cease the strike they had started, and also to reduce the bus fare, from 1 sol (approximately USD 0.30) to 0.80 (before the strike the bus fare was 0.50), and ii) the carriers explained that the decision to increase the fare had been taken since the type of fuel they used (Diesel 2) was not among those fuels that had experienced a reduction in price. The facts mentioned were expressed by the President of the urban transportation carriers on a local TV programme.

The Free Competition Commission (FCC) of INDECOPI started an investigation in order to determine whether the facts described above constituted a violation of Legislative Decree 701, a law that proscribes cartels and collusion.
In the analysis, the FCC concluded that during the meeting held, participants engaged in a price agreement, a violation of Legislative Decree 701.

Regarding participant firms: Transportes Iquitos, Transportes Loreto, Transrápido and El Condor admitted having attended the meeting, but the other firms denied their attendance.

Regarding the mayor's participation, the FCC decided not to initiate an investigation against him, providing that his political intervention did not constitute a violation of the competition law.

According to the FCC, the price agreement was also implemented, since Transrápido, Transportes Iquitos, Transportes Selva, Transportes Loreto and El Condor charged the agreed price of 0.80 soles days after the meeting.

Nevertheless, the FCC considered that certain conditions of the socio–economic setting put pressure and conditioned the behaviour of the offenders, and that these conditions should be considered as attenuating factors when imposing fines.

In its decision, the FCC declared sustained the ex-officio investigation for the adoption and implementation of a price-setting agreement of the urban transport fare in the province of Maynas during March 2003, and imposed sanctions on the following firms:

El Condor	1.4 Reference Tax Units (RTU: 1 RTU = approximately USD 1000)
Transportes Iquitos:	8.3 RTU
Transportes Selva	15.2 RTU
Transportes Loreto	11.2 RTU
Transrapido	16.1 RTU

It appears that only El Condor has accepted the decision.

Source: INDECOPI

A newspaper in the Philippines has also alleged the existence of a domestic cement cartel, a critical industry to housing and other construction in that country (which in turn accounts for a large share of employment). Similarly in Egypt, in 2002, a time when there was no competition law and authority in that country, industry representatives admitted to setting price ranges and considering other mechanisms for allocating market shares in response to price wars. A basic calculation by Jenny (2005) is that the cost to consumers of this action is USD 227,291,111 *per annum*. This is more than 20 times the *per annum* cost of funding a national competition authority in South Africa, which gives some indication of the cost of not having effective competition law enforcement.

Following information that the Barbados Fair Trading Commission was investigating alleged collusive practices in the cement industry, a 'general price reduction in the related products' was quick to emerge.[242] In the UNCTAD Tunisian peer review, it is reported that the greatest number of complaints 'related to activities by cartels in the fields of cement transportation and maritime transport and by training institutions in connection with invitations to tender for Government contracts'.[243]

In Zambia, in 2001, the Zambian Competition Commission placed conditions on an acquisition by LaFarge of Chilanga Cement, a company that was integrated downstream and upstream into local small and medium-sized enterprises (SMEs). The conditions entailed, among others, such things as undertakings on priorities in supply of cement, not to operate exclusive dealing contracts without notification to the Zambian Competition Commission, and the implementation of a compliance programme.

In Zimbabwe, in 1999, the dominant cement producers were found to have engaged in a variety of restrictive practices in terms of distribution. It is important that in this investigation the Zimbabwe Competition Commission also uncovered a range of other concerns in terms of the domestic cement market such as: 'lack of transparency in the distribution of the product…high import duties...and discriminatory sales tax regime in favour of large buyers' to which they alerted the appropriate authorities.[244] This illustrates the important advocacy function that a competition enforcement action can have.

In a case involving cement producers in Kenya, the Monopolies and Prices Commission recommended to the Minister that he refuse a transaction that would have the effect of reducing competition in the cement industry.[245] Cement is a product critical to economic development. As it is, the major cement producer as of 2001 had enough shareholding to allow representatives 'to sit in the Boards of all three cement manufacturing companies in Kenya'.

Cement production in SSA is in the main carried out by just two firms. Countries moving towards a CU, as is foreseen by the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC), need to ensure that potential private restraints in the form of, for instance, territorial division do not offset the potential benefits of market integration. Regional competition principles or closer cooperation by independent competition authorities might be able to see to this end.

[242] Eversley (2005, p. 19).
[243] UNCTAD (2006a, p. 24).
[244] UNCTAD (2005a, p. 344).
[245] *Id.* pp 116—27.

3.3.5 Food

The discussion on markets for food speaks to the first MDG of eradicating extreme hunger and poverty in terms of the second target, namely the halving (between 1990 and 2015) of the proportion of people who suffer from hunger.

There are many places where anti-competitive practices may impede the attainment of the above target. It has been contended that dumping of food and, linked to this, predatory pricing, endangers local production and hence threatens food security. Furthermore, large retailers or food processors can endanger the livelihoods of small farmers. Cartelized prices on fertilizers can increase the prices of food.[246] International cartels were uncovered in a variety of products in the 1990s in products such as lysine, citric acid, bulk vitamins and corn fructose.[247] Many of the agricultural markets are characterized by long legacies of limited competition: there may be a history of subsidies, state marketing boards, other price controls, association arrangements and cooperatives which make creating a culture of competition difficult.

ActionAid (2005a) warns of 'the threat of buyer power concentration in Global Agrifood Chains', pointing to the large number of workers in agriculture worldwide and the centrality of the sector to 'poverty reduction and food security'. They characterize the global food chain as a 'double bottleneck' with high levels of concentration in 'processors and manufacture bulk traders, in agri-inputs and increasingly retailers'. Retailers are often guilty of restrictive practices in relations with suppliers. The higher the retailer market share, the lower in general the average prices paid to suppliers.[248]

The result, ActionAid (2005a) states, is that many farmers are forced out of global supply chains, and wages and employment conditions of farm workers are worsened. ActionAid (2005a) further points to a number of governmental initiatives that have been undertaken in various parts of the world, involving in some cases governmental initiatives to stop anti-competitive retailer practices. These include the Loi Galland law in France, actions by the Republic of Korea against Walmart for 'abusive buying practices', the UK Competition Commission's enquiry into supermarkets and the resulting 'supermarket Code of Practice' and other initiatives in Ireland and Argentina. The lesson to draw from this is that cross-border abuse of buyer power needs to be addressed by improvements in, amongst other things, the enforcement of CLP and international cooperation in this field. In this respect, one might refer to two ongoing cases being investigated in Chile alleging that milk processors are fixing the price that they pay milk producers (at a low level). In each of the two cases, interim orders have been issued to alleviate some of the harmful effects of the putative anti-competitive practices.[249] Similar allegations have been levelled against fish processors and exporters in Lake Victoria, Kenya, and cotton purchasers in Malawi.[250]

ActionAid (2005b) notes the enforcement difficulties developing country competition authorities

[246] Evenett (2005, p. 2).

[247] ActionAid (2005b, p. 27).

[248] Sexton *et al.* (2004, p. 23) argue that where developing country exporters face 'a marketing system characterized by a structure of successive oligopoly/ oligopsony' the price increase implied by tariff reduction may be captured by large retailers and processors, rather than producers. This theoretical result lends support to initiatives to aid developing countries to integrate and diversify into 'value-added activities in the food marketing system'.

[249] Jenny (2005). See original source OECD peer review of Chile, 2003.

[250] Jenny (2005). See CUTS and Consumer Association of Malawi (CAMA), 2003 for the original source.

face when trying the anti-competitive exertion of buyer power by developed country processors and retailers. The report further documents the potential exercise of monopoly power in the supply of agricultural inputs such as seed. This is another area where the close relationship between IPRs and competition policy needs further attention. This report, in addition, recommends that competition regulators re-orient on addressing the exercise of buyer power, promote Special and Differential (S&D) treatment for developing countries, and examine closely 'strategic business alliances' (ActionAid, 2005b, p. 51). They furthermore argue for national competition policy to be complemented by regional and global initiatives (ActionAid, 2005b, p. 52). Increased regional cooperation should be in the form of, amongst other things, coordinated capacity building, information sharing, and inter-agency cooperation.

In Peru, INDECOPI found Peruvian poultry farms and their association guilty of price fixing, in that they colluded to limit new entry, limit available live poultry and engaged in exclusionary practices against some existing producers.[251] Previously, INDECOPI also found against the wheat flour producers and their association who had been engaged in price fixing in respect of the price of bread. In both cases, the parties involved were fined.

In Zambia, the Competition Commission nullified anti-competitive exclusive dealing arrangements between the two dominant upstream and downstream poultry producers. The agreement between the two parties, which provided that the chicken broilers only purchase day-old chicks from the dominant rearer, guaranteed that it would stay out of the chicken hatchery business, and involved various rights of first refusal accorded by the two parties to each other, was found to be by 'motive and concerted practices' foreclosing competition both upstream and downstream.[252] In Latvia, a cartel between the producers of hens' eggs was found to exist.[253]

Milk processors in Estonia were found to have met to discuss the pricing of milk products (OECD, 2001). This led to similar pricing in these markets. In Panama, four vertically integrated butchers were sentenced by the Panamanian Competition Authority in February 2005 and were requested to pay a fine of 100,000 Balboas (1 Balboa equivalent to 1 USD) for price fixing on carne de res.[254]

In Zimbabwe, a proposed merger in the supply of cattle and pigs for slaughter market and the supply and distribution of pork and beef was prohibited on the grounds that it would be economically rational for the merged entity to engage in a variety of anti-competitive practices. In Malawi, CUTS documents that before intervention by the Ministry of Commerce and Industry, the Master Bakers Association would fix the price of bread. Following this action, CUTS report that prices are now competitive. [255] In Taiwan, Province of China, a buyer's cartel organized by the Flour Association, was found to have controlled and allocated total quantities among 32 producers.[256] The association was

[251] Jenny (2005). See original source OECD peer review of Peru, 2004.

[252] UNCTAD (2005a, p. 229).

[253] The OECD reports that the evidence used to support this judgement was 'information contained in explanations of suspected undertakings, a fax containing information that prices would be discussed in a meeting of the Association of Egg Producers (hereinafter Association), invoices showing a trend of price increases after Association meetings, and information about the increased surplus of eggs during the periods of the cartel agreement'. http://www.oecd.org/dataoecd/59/8/35935918.pdf#search=%22Latvia%20Hens%20Eggs%22

[254] See http://www.eclac.cl/publicaciones/xml/5/22665/L677-Serie%2037.pdf. For a case involving the flour industry see http://www.clicac.gob.pa/pdf/memoria%20CLICAC%202005.pdf

[255] CUTS and Consumer Association in Malawi (2003), in Jenny (2005).

[256] OECD (2001).

fined and ordered by the Fair Trade Commission to cease those practices.

3.3.6 Preliminary remarks

The presentation of the above cases is intended to illustrate to the reader how the enforcement of competition law in certain cases has contributed to development ends. While the evidence is anecdotal and does not facilitate easy generalization, it is certainly illustrative of a large number of competition-related issues arising in the context of problems related to development. For instance, the general relationship between competition policy, intellectual property protection and access to medicines is a very serious topic that has received a large amount of attention in the literature. Any consensus that emerges around this issue will need to define clearly the appropriate parameters for the operation of competition policy. This may also be the case in the supply of agricultural inputs. The supply chains of agricultural products are certainly an area where developing countries can profitably share experiences in regional fora over enforcement initiatives. The same reasoning applies in the area of the provision of remittance services.

A developing country faces constraints in terms of available resources and human capital. Thus it seems appropriate that developing country authorities concentrate enforcement efforts. For instance, in Brazil, it was explicitly decided in 2003 to focus on the construction value chain. Later, in 2005 and 2006, the infrastructure sector more generally received chief priority.[257]

In general, it appears as though there are competition-related development problems that emerge specifically in developing countries out of particular structural features of their economies, which require the innovative and careful application of competition policy to resolve. The development of methods to combat these problems will be enhanced by increased cooperation between developing countries in the form of the sharing of experiences related to the enforcement of competition law and the application of competition policy.

3.4 Difficulties in Implementing CLP in a Developing Country Setting

Despite the benefits of CLP as emphasized by the broad cross-sectional indicators in Section 3.2, and the case-specific benefits outlined in Section 3.3, there are still reasons why the impact of the adoption of CLP has not been as great as it could have been. It must be recognized that many jurisdictions experience great difficulties in effectively implementing CLP. Some authors have stated reasons why implementing competition policy in developing countries is different and more difficult. These include the large size of the informal sector, the often small size of the market, high barriers to entry, and the legacy effects of state-owned enterprises and rushed privatization, lack of competition culture, capacity constraints and more severe political economy problems.[258] The following considers the first six of these aspects.[259]

[257] See Goldberg (2006).

[258] See Oliveira (2006), Oliveira and Paulo (2006) and Oliveira and Fujiwara (2006). An OECD (2004) background secretariat note identifies four categories of difficulties: A general category 'lack of competition culture' to be understood as 'political support for, and the use of, competition policy as "default" or "normal" way of organising economic activity'. The other three kinds of difficulty relate to a) the particular problems faced by small developing economies, b) problems related to informal sectors, and c) 'institutional adaptation to the introduction of pro-competition laws and policies'. To this a submission by China to the Global Competition forum adds the problems of anti-competitive activity by local and regional governments although this links to point c) on institutional adaptation.

[259] Note though that state-owned enterprises or legal monopolies may also offer handicaps to the enforcement of competition policy in some developed countries.

3.4.1 Market characteristics[260]

Developing country markets are characterized by a variety of features inimical to competition, not all of which are best remedied by CLP. Such features as industrial uncompetitiveness, high transport costs, excessive licensing requirements, lack of technological infrastructure, high taxes and weak government support systems, cited in a review of Zambian competition policy,[261] have an impact on the status of competition within the market. A report on the development of competition policy in Lao People's Democratic Republic notes further economic features with a potential competition impact on how the competition law is operationalized, and on how enforcement priorities are selected, including the fact that 90 per cent of border trade is with Thailand[262] and perennial concerns over the high cost of road transport. Markets in Lao are affected by cross-border smuggling and many government-imposed barriers such as import and forex restrictions,[263] tariff and tax concessions, and subsidies. It is important to expand on the general features of developing country markets, after examining developing country cases, since this will give us a feel for how much more competition policy could contribute to attaining the MDG targets in the way outlined in Section 3.3.

3.4.1.1 Large informal sectors

Large informal sectors can have implications for estimating market power, cartel detection, merger analysis and identifying and remedying predatory pricing. For instance, firms might identify informal competitors as pricing 'unfairly' due to them not paying tax, or meeting labour regulations, and so on. The efficient remedy in this case could be, for instance, lightening the regulatory burden.[264] In this regard, competition agencies can play the vital role of competition advocate, by pointing to areas where regulations are overly restrictive, creating barriers to entry. Furthermore, consumer protection measures might be required to ensure that competition is based on price, and that quality is not compromised.

As noted in Devey *et al.* (2006), writing in the South African context, 'increasingly, informal activities are a result of formal firms 'informalizing''[265] Informal activities are characterized as '[those] economic activities which are small scale and elude certain government requirements…[such as] registration, tax and social security obligations and health and safety rules'.[266] It ought to be recognized that this encompasses a broad range of 'economic activities…employment relations…and activities with different economic potential'. It must further be noted that the proportion of informal employment in the non-agricultural sectors in developing countries is extremely large.[267]

[260] This section draws heavily on UNCTAD (2005a). Thus, the fact that the experiences of certain countries are emphasized more than others is a reflection of the source material and does not necessarily indicate that competition policy implementation in these developing countries is more difficult than in others.

[261] UNCTAD (2005a, p. 167).

[262] A number of smaller countries have a limited set of major trading partners. The Southern African countries trade heavily with South Africa. In South Asia, India is overwhelmingly Bhutan's major trading partner. This would suggest that an analysis of competitive concerns in transport and distribution services would be of benefit to many developing and least-developed countries.

[263] Dual pricing arising from exchange controls and rationing (making forex only available to selected companies) will affect competition, since those companies favoured will have access to imported inputs at a cheaper price than competitors.

[264] Oliveira (2006). For instance in India, it seems as though a major spur for industry growth was the end of the 'license raj'. However, as Aghion et al. (2006) demonstrate, growth was unequal depending on whether labour institutions were 'pro worker' or 'pro employer', with growth greater in the latter.

[265] Devey *et al.* (2006, p. 226).

[266] *Id.* p. 227,

[267] *Id.* p. 233. The forward and backward linkages between the formal and informal parts of the economy must be recognized for an optimal approach to be initiated to securing economic growth and helping the indigent. labour-force surveys in South Africa indicate that workers move quite regularly between formal and informal employment, which belies the 'two South Africa's' characterization of the economy.

A related feature is the large number of SMEs that typically populate the economies of developing countries. Thailand has been attempting to promote SMEs since 1997, and is trying to do so in a context where CLP aims not at protecting competitors, but at the 'process of fair and free market competition'.[268] Despite CLP being about promoting competition, and not competitors, it is important to note that SMEs are often the most vulnerable to abusive practices by dominant enterprises.[269]

3.4.1.2 Small size

The significance of the small size of developing country economies on competition policy has been studied widely.[270] Some authors have for instance argued that this militates against merger control; others contend that it simply means that greater care must be taken in applying the merger regulations.[271] Enforcement against abuse of dominant position takes on added importance in the context of a small market, since often the scope for numerous competitors is severely circumscribed. It has been noted in the Jamaican peer review conducted by UNCTAD in 2005, that there are no provisions monitoring mergers and acquisitions in Jamaica, and that this may be of some concern given the recent consolidation of the financial services sector.

3.4.1.3 High barriers to entry

Linked to the problems and differences in emphasis arising out of conditions of small size, are the relatively high barriers to entry in certain sectors of these economies. For instance, in Lao it has been speculated that the following are potential barriers to competition:[272] refusal of the foreign supplier to supply other potential importers, international cartels raising prices of imports, joint venture arrangements of foreign firms with favoured local producers which may result in the creation of domestic monopoly, predatory dumping, and unfair competition through counterfeit goods. While the evidence to support some of the above speculations is as yet thin, there is some indication that the concessions that FDI firms and joint venture companies receive may discriminate against domestic producers. Furthermore, what is clear is the importance of both domestic competition law, and international cooperation on competition law enforcement.

3.4.1.4 Legacy of state-owned enterprises

Legacy effects of large state-owned enterprises, and problems arising out of rushed privatizations, have been well documented by many developing country authorities. These effects are often coupled with the long-term impact of an ineffective import-substituting industrialization policy, which results in highly concentrated sectors in what are small markets. Furthermore, aside from legacy effects, there are the potential negative impacts of current state-owned enterprises, many of which receive favourable treatment – for instance in Thailand, state-owned enterprises, generally operating in industries such as telecommunications, electricity and railroad and agricultural cooperatives, are

[268] UNCTAD (2005a, p. 12).
[269] In developed countries, and in some developing ones, there are specific laws and agencies to promote small business. A variety of jurisdictions also employ thresholds and other measures to exempt small businesses from the application of antitrust law.
[270] See for example, Gal (2003) and OECD (2002).
[271] UNCTAD (2005d).
[272] UNCTAD (2005a, p. 60).

exempted from the provisions of the 1999 Competition Act.[273]

The legacy of state-owned enterprises can mean that more attention is directed at abuses of dominant position than the norm. Nonetheless, cartels remain perhaps the most dangerous business behaviour, in any institutional setting. Furthermore, excluding merger review from the ambit of CLP can lead to the situation where firms acquire others rather than compete with them.[274]

It is important, related to this, that the relationship between competition authorities and sector regulators is rendered more transparent. In Zambia,[275] there have been concerns that concurrent jurisdiction of the competition agency and a regulatory authority in certain regulated sectors has increased uncertainty (in for instance Energy and Telecoms). It has been noted in Jamaica that amendments are needed in the Fair Competition Act (FCA) to address the 'regulated industry' defence, which has developed.[276]

3.4.1.5 Lack of competition culture

The legacy of state-owned enterprises and the history of price controls can contribute to the absence of a culture of competition[277] as well as increase barriers to entry.[278] For instance, in Thailand, the large public sector, stretching into 'manufacturing, transport, hotels, services, trade and finance', is exempted from application of the competition act.[279] Competition advocacy has an important role to play in fostering cultures that embrace the principles of fair and competitive markets.[280]

One of the features of the Zambian experience[281] is that there seems to be a lack of government buy-in to CLP. The causes for this may lie in a failure to focus attention on the contribution that CLP can make to productivity improvements, growth and poverty reduction outlined in the previous section. This accounts, at least in part, for the failure to incorporate competition principles into other legislation.

A shortage of studies and reports documenting the benefits of competition perhaps explains the continued scepticism regarding the benefits of CLP, and the relatively low profile of the Jamaican Commission. A history of price controls has resulted in a culture of price fixing, which is hard to change.[282] Some governments in fact have perceived the national competition authority as having a price-control function.[283] On the other hand, competition policy in others explicitly repeals the price-

[273] 'Of the four exempted groups . . . the state-owned enterprises (SOEs) are the most controversial. Large Thai firms believe that it is unfair that the Competition Act of 1999 regulates their conduct but exclude from its scope SOEs.' UNCTAD (2005a, p. 12). This is not something unique to developing countries. US Laws grant exemptions from antitrust law (antitrust immunity) for insurance, railroads, agriculture, fisheries, and even professional baseball.
[274] Evenett (2005, p. 2).
[275] UNCTAD (2005a, p. 167).
[276] Lee (2005, p. 14).
[277] UNCTAD (2005d, p. 75). See footnote 258 for the OECD (2004) characterization of 'competition culture'.
[278] In Lao, UNCTAD (2005a, p. 46) notes 'most of the barriers to competition exist due to the nature of public sector policies and how they are implemented'. Furthermore, a 'lack of clarity and precision is another problem in Lao laws . . . giving officials wide discretion in applying the laws'.
[279] UNCTAD (2005a, p. 8).
[280] Hoo Seong Chang (2006).
[281] UNCTAD (2005a, p. 166).
[282] *Id. p.* 247.
[283] *Id. p.* 303.

control regulations.[284] In Tunisia, despite this, 'competition is still perceived, to a certain extent, as complementary to State intervention…when competition is intense, companies are inclined to act in concert or request the State to intervene'. [285]

This lack of competition culture can manifest in a lack of support from the public, other government institutions and non-governmental organizations (NGOs). As noted in the Kenyan case (UNCTAD, 2005a), a primary role of the national competition authority should be advocacy. When there is no input from the commission into the promulgation of new legislation then many new laws may foster anti-competitive practices.

In China, administrative monopoly problems figure most prominently in three specific ways.[286] In certain key sectors such as transportation and postal services, the state is both regulator and sole operator. In other sectors such as telecommunications, complicated registration and approval procedures constrain private sector entry. Finally, many local administrations use various measures to limit competition from other regions. Under the current, anti-unfair competition law, it is unclear who the appropriate 'higher authority' is who should prosecute these actions. Furthermore, 'the officials of these authorities sometimes do not have a good understanding or experience of the context of anti-monopoly law'.[287]

3.4.1.6 Capacity constraints

It is well recognized that there is a dearth of skilled industrial organization and competition law experts in developing countries, necessary to rationally, consistently and fairly enforce the law.[288] These capacity constraints can then manifest themselves in a variety of ways. It has been stated with respect to CARICOM[289] that there is a lack of skills in microeconomics, statistics and forensic accounting. This is compounded by a lack of data available in terms of business transactions and organizations. One of the net effects of this in the context of the Jamaican Fair Trade Commission is that there has been a 'disproportionate' focus on consumer protection issues, due to limitations in 'technical capacity'.[290] The same sort of budgetary and professional constraints have been noted in Indonesia.[291] These deficits often require long-term strategies to rectify, since there are usually deficiencies in complementary institutions such as a shortage of appropriately trained judges, a lack of awareness in professional organizations and consumer groups, and not enough university courses

[284] UNCTAD (2006a, p. 9). However, in Tunisia price liberalization is not as complete as this legislation makes out. As noted further in the Peer Review (p. 16) 'in the production sector, the prices of 13 per cent of products are regulated, as compared with 20 per cent in the distribution sector. It therefore seems that a non-negligible part of the Tunisian economy is not open to free competition, and there are no signs of improvement in this respect'.

[285] *Id. p.* 26. Pittman and Tineo (2006) examine the extent to which fears about over-enforcement of abuse of dominance provisions have been borne out in the context of CLP in Latin America. The authors find (p. 9), instead, that enforcement actions in this category have been limited, have in any case been inflated by the lack of strong regulatory bodies in these countries and have also challenged government interventions, often in cases where that intervention was designed to protect 'powerful business interests'. Furthermore (p. 12), while legislation in Latin America generally includes prohibitions against 'exploitative' practices by dominant firms, in practice 'these provisions are infrequently used'. Most enforcement activity has been centred on combating 'exclusionary' practices, and hence competition policy has not been used to smuggle in a form of price control.

[286] Yang (2006).

[287] *Id. p.* 26.

[288] The implications of a shortage of economic knowledge and analysis can be a retreat into legalism. See the report of the speech given by Dennis Davis in the UNCTAD/IDRC/**tralac** seminar in Cape Town, South Africa, 4 October 2006 in the Annex for a brief discussion of the implications of this.

[289] Edwards (2006).

[290] Lee (2005, p. 12).

[291] Gunawan (2001).

geared towards addressing the needs of the new institution and legal framework.[292]

3.4.2 Legal and enforcement constraints

The adoption of a competition law within a new jurisdiction can raise difficulties concerning its proper placement within the existing legal framework. The general point here is that it takes time for each jurisdiction to fit CLP appropriately within its system of laws. There is a wide body of literature relating to the 'transplant' of laws in general, which is not considered here.[293] Instead, some of the difficulties that can arise in the competition law setting in particular are illustrated by cases.

3.4.2.1 Problems with substantive provisions

The legal provisions can be deficient in a variety of ways: there can be inconsistencies in legal provisions and a lack of clarity on confidential information or information-sharing provisions which prevent authorities from making use of outside assistance. There are various other areas where the legislation can be improved. In Jamaica,[294] it has been said that there is a lack of consistency in threshold application, and not enough clarity on the welfare approach (for instance whether distributional concerns are incorporated or not). In other countries, the legal provisions relating to competition might be dispersed in different laws, with powers of administration in different authorities leading to a lack of consistency in application.[295]

3.4.2.2 Procedural shortcomings

The procedural shortcomings in the drafting and implementation of the legislation often relate to other aspects of the law and more general features of the legal system in which the competition regime is operating. For instance, the Jamaican Fair Competition Act, by not ensuring the separation of investigative and adjudicative functions, resulted in uncertainty regarding its constitutional validity, since in the Jamaican Stock Exchange case, the court found the act to be in violation of the principles of natural justice. This has to an extent undermined the effectiveness of the FTC.[296] Furthermore, the vagueness in the relationship between sector regulators and the authority may lead to large portions of the economy being exempted. The lack of clear understanding between the national competition authority and the (proliferating) sector regulators has also been identified as a problem in Kenya[297] and numerous other developing countries.

In Kenya, furthermore, there is no streamlining of the processing of notifications since there is no *de*

[292] More details can be found in Nicholson (2004) who has looked at the budget and resources of devoted to competition enforcement in 38 countries, including some developing countries. He observes though (p. 11), that his analysis in terms of budget per staff member and budget as a percentage of national income is 'coarse' since enforcement may benefit from economies of scale and large economies typically also have stronger and more stable legal systems more generally, 'which may positively interact with antitrust regimes'. For other measures of 'institutional effectiveness' see the discussion in Section 2 of Horna and Kayalı in Chapter 2 of this publication.

[293] Rodrik (2000, p. 3) argues for the importance of 'local knowledge' and 'not [over-emphasizing] best practice "blueprints" at the expense of local experimentation'. Berkowitz *et al.* (2003, p. 166–7) argue that the *way* in which the law is transplanted is more important for development (through its impact on enforcement) than the particular legal family one draws the law from. The law needs to be relevant to the context, so that there exists a demand to use the law, and to have supporting institutions for the law, and secondly, those responsible for implementing the law have to be able to improve its quality as there is a demand for more effective and efficient enforcement. These insights extend to the particular case of competition law.

[294] UNCTAD (2005d) p. 70.

[295] Yang (2006).

[296] UNCTAD (2005d, p. 2).

[297] UNCTAD (2005a, pp. 131–4).

minimis rule.[298] There are also no prescribed timeframes for investigations.[299]

3.4.2.3 Enforcement difficulties

The problems that have been outlined above, whether arising out of the unique developing country market conditions, or from the substantive and procedural legal hiccoughs, can manifest in difficulties in enforcing CLP.

Enforcement can also be hampered by the legal powers accorded the authority itself, the degree of autonomy enjoyed by the agency, and linked to this, the composition of the adjudicating body. Enforcement can further be weakened by the absence of a well-designed leniency programme, which makes it very difficult to establish the existence of hard-core cartels and conclude the case successfully. Powers of discovery might also be limited. In Jamaica, there are no powers to search computers, or to conduct wiretapping.[300] In Kenya, the commission has no powers to conduct search and seizure operations and there is no independence of the appeal tribunal from the adjudicating minister.[301]

3.4.3 Preliminary remarks

Some of the difficulties considered in this section are encapsulated in the case of the CARICOM countries. Furthermore, this case illustrates keenly the relationship between domestic and regional competition law enforcement and regional arrangements. In the small developing economies of that community, as noted by Pierre Chase, 'the biggest challenge to adopting competition law is the cost of its administration'.[302] In the CARICOM, only two of the member states to the CARICOM Single Market and Economy (CSME) have adopted competition law, while the Treaty of Chaguaramas, establishing the community, makes provision for a common supranational authority, the Caribbean Competition Commission, as well as for each member state to undertake relevant legislative, institutional and administrative measures to enforce consistency with the rules on competition.[303] Thus, as pointed out by Edwards (2006, p. 5) 'policy making on the one hand, and law enforcement on the other will continue to be divided between Community bodies in the former instance and national bodies in the latter respectively'. In other words, the ability of the Community Commission to prosecute cross-border dominance and anti-competitive conduct cases requires domestic competition laws to give it that authority, and to lay out the procedural mechanisms 'by which the Commission will enter a Member state and conduct its business'.[304] Thus, while the Commission is empowered to determine the existence of and remedy anti-competitive practices, to a large extent it is dependent on national competition authorities (NCAs) for enforcement.[305] Thus, it has been suggested that the smaller states in the CARICOM use the Community Commission as their national enforcement authority. This has been in principle accepted by the Organisation of East Caribbean States (OECS) although 'some of

[298] *Id.*

[299] For a discussion of the difficulties differences in merger provisions present to legal practitioners see the report of the presentation by Nkonzo Hlatshwayo in the UNCTAD/IDRC/**tralac** seminar in Cape Town, South Africa, 4 October 2006 in the Annex.

[300] UNCTAD (2005d, p. 10).

[301] UNCTAD (2005a, pp. 131–4).

[302] Pierre Chase (2006). See also T. Stewart in Schatan and Avalos (2006).

[303] *Ibid.* p. 7.

[304] Edwards (2006, p. 19).

[305] Edwards (2006, p. 19).

them are concerned that cross-border matters will be given priority over national matters'.[306]

This illustrates some of the difficulties in the relationship between the domestic competition regime and the regional (supranational) authority. But domestic legislative shortcomings can hinder enforcement through inhibiting cooperation as might be captured by provisions in an RTA, or an ATA. In Jamaica, 'sharing information is difficult because there are no provisions in the FCA which clearly stipulate the sets of information which are confidential and which are not'.[307] This limits the ability of the Jamaican FTC to share information both with other Jamaican enforcement agencies, and also foreign enforcement agencies. Overcoming this requires legislative amendment. The topic of international cooperation is addressed further by Rosenberg in Chapter 1 of this publication.

A few tentative remarks regarding the implementation of developing country CLP might now be made. It must be recognized that in any jurisdiction there is a trade-off between an in-depth investigation of the economic effects of a certain practice, and the importance of administrative efficiency and legal certainty. This is simply a statement of why one size does not fit all – appropriate administrative requirements vary with administrative capacity and the abilities of economic analysis available to the authority. However, in a time of increasing economic integration, there is a further trade-off to be made in terms of international harmonization and lowering transaction costs of international transactions, and room in the domestic area to implement the type of CLP most suited to country-specific needs.[308]

When analysing competition policy for the Central American and Caribbean small economies, for instance, Schatan and Avalos (2006) argue that it is important to take into consideration their low levels of domestic competition, the effects of their exposure to international markets, the limitations of reproducing without variation the developed country competition policy within these economies, and the potential advantages of a regional competition approach in this setting.[309]

The importance of other complementary regulations must be acknowledged – in some countries such as Lao, import restrictions and price controls are extremely anti-competitive. High-entry barriers such as these make the legacy of state-owned enterprises more persistent. However, deregulation needs to be coupled with the institution of an effective CLP to make sure that when government and trade controls are removed they are not simply replaced by private restraints.

Effectively enforcing CLP can be costly – on the other hand, equally so might be the consequences of a lack of enforcement. Research into where government has regulatory restrictions on entry and market access (and hence inter-firm rivalry) may be more cost-effective, and feasible in terms of human resource constraints, than actual enforcement. However, as has been noted by Evenett, it must be remembered that advocacy is often less effective when not coupled with an enforcement record.[310]

[306] Shillingford (2005).

[307] UNCTAD (2005d, p. 57).

[308] UNCTAD technical assistance programmes, such as COMPAL, attempt to tailor assistance, employing needs assessment to determine recipient priorities. Furthermore, the assistance attempts to empower national authorities and stakeholders. For more information see Chapter 2 and http://compal.unctad.org.

[309] Schatan and Avalos (2006, p. 28).

[310] Evenett (2006a, p. 11) notes that 'in the light of the available evidence, one question that arises is whether the policy recommendation that developing countries prioritize competition advocacy over enforcement has the necessary empirical support'.

Transparency in how the authority arrives at its decisions is extremely important, given the political nature of competition law enforcement. Careful case selection is another vital aspect of national competition authority management best practice. Here the importance of selecting cases that target practices affecting a large number of people must be emphasized. This chapter seeks to pull together from a variety of sources, examples of just such instances of competition law enforcement.

Combining the functions of competition policy and consumer protection can be a good way of gaining legitimacy for the institution, since consumer protection concerns are often more immediate for developing countries – for example, counterfeit goods, product safety concerns, deceptive advertising, and so on. Similarly, the combination of the two measures can underscore the consumer-centred focus of the overall economic framework.
Positively, in Zambia since the introduction of the consumer awareness campaign in 2002, there has been a large increase in the number of cases reported to the commission. This indicates a problem in other economies with nascent authorities – namely the lack of consumer awareness.[311]

In summary, the axes of reform for the domestic competition law architectures of developing countries seem to be as follows: legislative review, targeted interventions into key economic sectors, cultural change (which entails improved communications), and capacity building.[312]

3.5 Implications for Cooperation on CLP

How then might we promote a more effective pro-poor-oriented enforcement of developing country CLP? Careful case selection has already been cited as an important element. The increased sharing of experiences in prosecuting cases is also desirable. Multilateral initiatives, such as the meetings of the Intergovernmental Group of Experts hosted yearly by UNCTAD and the OECD Global Competition Forum, already play a role in meeting this need. Moreover, competition provisions in an RTA might provide an additional basis for greater international cooperation. Such provisions need not necessarily involve the creation of supranational regional competition authorities. Considerable progress can be made through regional networks of authorities that could host workshops looking into case studies of competition problems common to the region and associated enforcement techniques.

Where RTAs create a common supranational authority for this to be effective it requires that, on a country-by-country basis, the benefits of effective enforcement against anti-competitive practices with cross-border implications (spillover effects) and the gains from economic integration exceed the loss of domestic autonomy. In this regard it is important to note that an external influence, such as region-wide prescriptions on competition, can help national competition authorities to overcome domestic political economy constraints provided, that is, that there exists the political will to implement the regional trade agreement as a whole.

In a region such as COMESA where there are plans for significant integration, a regional competition policy could be important so that transactions (such as mergers and acquisitions) that have regional implications are treated in a consistent and rational manner. Lipimile and Gachuiri (2005) illustrate the importance of this with the case of consolidation in cement production in East and Southern

[311] UNCTAD (2005a, p. 197).
[312] UNCTAD (2005d).

Africa. Even when countries have enacted competition laws, transactions of a regional dimension are currently evaluated in a piecemeal manner on a national basis.[313] Lipimile and Gachuiri (2005) argue for a commitment to the regional competition law, pointing to the increasing prevalence of cross-border transactions, and the potential value for smaller countries without the resources to implement national merger control. They also note that regional harmonization of competition law could ease the regulatory burdens for companies.

Some of the problems of implementing CLP at national level, instead of being solved by regional rules, are simply transferred to the regional setting. Lipimile and Gachuiri (2005) note the '…marked difference in experience and resource endowment[s] among national competition authorities', and argue that 'if the national competition authorities command neither national political support nor technical competence, then the intervention of the COMESA Competition Commission shall be met with constraints, thereby inhibiting the progress of trade and investment'.[314]

Difficulties in securing evidence against anti-competitive practices orchestrated abroad and the desirability of devising a set of coherent remedies for firms' conduct are just two of the justifications for greater cross-border cooperation on competition law enforcement. Creating regional or subregional enforcement agencies with teeth will give each member state much more clout against large international companies than it would have on its own. This latter argument is particularly compelling for smaller or poorer countries. International accords can also entrench minimum standards of due process, and so on, which affords international companies the opportunity to defend themselves, highlighting the fact that regional accords on competition law do not have to be anti-business. Such accords can also define common objectives for competition law, which provides for greater certainty for firms. All in all, national social and economic objectives as well as corporate interests can be promoted in international accords on competition law.

3.6 Conclusions

Increasing inter-firm rivalry should be an important component of any strategy to increase productivity, economic growth, and development. CLP is one part of the strategy to increase rivalry within an economy.

As noted by Jenny, the evidence indicates the widespread existence of anti-competitive practices in developing countries in a variety of sectors. He notes that cartels have been documented in 'basic staples (bread, chicken, meat, dairy products, beer, pharmaceutical products), services (insurance, banking, transportation, intermediate distribution, retail), the construction sector (cement, building materials, procurement markets), the industrial sector (chemical products, steel, aluminium, heavy electrical equipment, etc.)' and that they have the effect of harming consumers, farmers, firms and domestic competitiveness.[315] CLP can be used to detect, punish, and deter these corporate acts.

CLP can also be used as a tool for governments who wish to target specific social objectives, such as those agreed by heads of state in the Millennium Development Goals initiative. CLP implementation

[313] UNCTAD (2005c, p. 383).
[314] *Id.* p. 407.
[315] Jenny, F. (2005).

in developing countries may need to be seen to be directed towards attaining pro-poor outcomes so as to retain the political legitimacy necessary for the enforcement authority to be independent.

For the implementation of CLP to promote development, careful case selection, sector analysis dedicated to this task, and appropriate policy research – both within the authority, and conducted/ pushed by consumer organizations and independent researchers are needed. Sensitizing groups within society to the benefits of competition between firms and inter-firm rivalry plays a role too. Having an autonomous competition agency is a plus as well.

An illustration of this thinking is the stated policy of the competition agency in Costa Rica. The industries looked at first by this institution involved 'basic foodstuffs that had high concentration ratios (bread, chicken, etc.) or where there were special laws that in effect created cartels (sugar, rice, beans)'. Secondly, they looked at intermediate products such as plastics, cement and construction materials. [316]

Regional cooperation can be an important means of promoting a regional 'pro-poor agenda' and as such CLP could be an important component of regional integration. Such cooperation can not only strengthen national enforcement regimes but also allow for more anti-competitive practices to fall within the reach of competition law. In addition, these initiatives need not be anti-business as minimum standards for treating corporations in enforcement proceedings could be adopted. There is substantial scope here for a win–win solution with countries benefiting from more effective enforcement of competition law with the potential for benefits for the poor, and law-abiding firms facing clearer legal rules and stronger legal rights and protections.

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[316] Costa Rica (2005).

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Conclusions:

Regional Cooperation in Trade and Competition Issues: Further Thoughts

Ana María Alvarez and Lucian Cernat

This book tried to contribute to a long series of efforts by UNCTAD to highlight the significance of competition policy for development. UNCTAD has received a specific mandate to further strengthen analytical work and capacity-building activities to assist developing countries on issues related to competition law and policies, including at a regional level.

Earlier reports discussed the important role domestic competition policy could play in promoting overall economic development, in entrepreneurship and in addressing supply capacity constraints in developing countries (UNCTAD, 2004) However, the potential benefits arising from domestic competition law enforcement can be severely hampered if there are gaps in international cooperation on competition matters. One way for promoting such cooperation is through the inclusion of competition provisions in regional and bilateral trade agreements. This was the main topic of the current book, which complements the findings of a 2005 UNCTAD publication entitled *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*.

One of the main conclusions of that publication was that although countries are 'eager to ink' competition provisions in regional and bilateral agreements, they seem less 'ready to act' on those provisions. Based on the empirical evidence gathered in the 2005 UNCTAD report, apart from a handful of cases, there were few attempts to use such competition provisions as a main vehicle for cooperation on competition policy among regional trade agreement (RTA) members.

This conclusion holds true in the present publication as well. The contributors to this publication and participants in the dissemination phase provided primary sources of information highlighting current problems facing developing countries in implementing competition provisions under bilateral and regional experiences. As shown in this report, competition provisions in RTAs, despite a significant potential for cooperation on a number of issues, have yet to prove their value. This is true for both North–South and South–South agreements. In the case of South–South RTAs for instance, when trade is liberalized on a regional basis competition policy has an important role to play in ensuring that markets are not subjected to abuses of power and that inter-country trade and investment are welfare enhancing. In the case of North–South RTAs, regional competition rules can potentially reinforce the bargaining position of developing economies challenging anti-competitive practices of international corporations.

Given these conclusions, what should be the priorities for further work in this area?

One avenue explored in this publication was the contribution of both domestic and regional competition rules to poverty alleviation and the achievement of other internationally agreed development goals, including the Millennium Development Goals (MDGs). This research area is still in its early stages and more systematic evidence and analyses should follow. For instance, it would be important to focus the new research on the poverty-reduction implications of competition policy enforcement, under several policy scenarios and in various regional contexts. An angle that could be further explored is to identify practical ways in which both sectoral regulators and competition agencies could work hand in hand to promote these social objectives and ensuring widespread provision of essential services that are directly related to MDGs. Further research could also identify the best ways in which consumer protection agencies could ensure that policies and regulatory measures guarantee the provision of essential services to all social segments.

Another non-negligible area of research where further efforts are needed is the actual process of RTA negotiations and the ways in which competition provisions are tailored to a specific agreement. Preliminary findings suggest that involving competition authorities in the negotiation of an RTA might help to make the competition chapter more effective. However, more systematic research, combining both theoretical and empirical insights, could lead to the identification of the negotiating processes that maximize the chances for subsequent implementation of competition provisions. For instance, several North–South RTAs also include the promotion of competition as part of the 'development' component of developed countries' negotiations with southern partners. However, this understanding of competition law enforcement as a component of development can differ from that of recipient developing countries who don't necessarily see a clear relationship between competition law enforcement and growth. Given the current level of implementation of CRPs in RTAs, any research focused on finding 'best practices' in this regards is all the more important.

Furthermore, since both this and the previous UNCTAD publication concluded that there is still a large untapped potential for cooperation under existing CRPs in RTAs, it should be asked what remaining barriers to cooperation exist, and how these might best be overcome. It is also important to compare the impact of CRPs with other instruments used to promote cooperation, whether in terms of informal arrangements, bilateral agency-to-agency agreements (ATAs) or Mutual Legal Assistance Treaties (MLATs). For instance, one could see whether the inclusion of competition-related provisions (CRPs) in RTAs leads to the signature of dedicated legal instruments for cooperation on competition matters.

In the light of the proliferation of RTAs and the recent increase in RTAs containing behind-the-border issues such as competition law and policy (CLP), a major issue discussed was the need to rationalize commitments relating to competition provisions. In view of the proliferation of agreements, it may be important to focus in the future on research that could provide policy recommendations aimed at better coordination among the agreements and harmonization where appropriate.

One other trade and competition issue that may be of relevance for RTAs is merger control. Despite the growth in cross-border mergers and acquisitions and its obvious implications at regional level, and the potentially useful role that merger control provisions could play in both South–South and North–South RTAs, the number of RTAs containing such merger control provisions remains limited and little is known about the potential for using RTAs as an effective way to promote intra-regional cooperation on merger control. This gap could partly be explained by disparities in capacities, approaches and objectives of domestic competition policies among RTA members with regard to merger control. Strengthening merger control, as well as other competition provisions with significant economic implications at regional level, could be facilitated by the inclusion of an evolving clause allowing members to adopt a gradual approach to enlarge the scope of regional competition provisions as this would introduce additional flexibility.

Another area of research addressed in this report was the impact of CRPs in RTAs on the development of national competition authorities. In this area as well, important questions remain unanswered. For instance, many North–South RTAs contain CRPs with regard to technical assistance (TA) and support to strengthen the institutional capacity in developing country members and improve the implementation of domestic competition laws. A more systematic analysis would be needed to identify practices that would be most appropriate for each country, depending on their needs and

level of development. The effectiveness of such bilateral TA provisions could in turn be benchmarked against efforts by international organizations to strengthen competition law implementation in developing countries.

What else could be done, at the frontier between research and TA?

This publication contains several examples showing that competition policy offers significant opportunities for development. However this potential remains partially untapped at domestic and regional level. While it is true that competition policy can be a powerful policy tool, getting the benefits from effective competition policy involves human capabilities and specialized expertise. A competition culture is another prerequisite for this potential to be realized. Tacit knowledge may be seen as being of equal or even greater value than formal knowledge, which is conveyed in its codified, structured and explicit form. Given the important role of tacit knowledge, cooperation on competition policy can also lead to a more effective transfer of expertise and skills, as well as an interactive process of learning by doing and learning by using. Therefore, further light should be shed on effective policies that lead to a higher level of expertise in the field of competition policy in developing countries. More efforts should be spent, for instance, on active policies designed to create training materials that are suited for local needs. If training materials are imported, care needs to be taken in how they are used in order to minimize any clash with local specificities.

Overall, any future research in this area should refocus on developing country competition law enforcement experiences, problems and priorities. In this context, the dissemination phase has been key to identifying such needs and priorities, based on the inputs received from academics, experts, competition institutions and government officials in developing countries. Furthermore, one solution to improve the current level of implementation of CRPs in RTAs is to foster partnerships for development. Through such partnerships, cooperation on competition issues would be fostered not only at domestic level (and thus articulating various positions and interest more coherently) but also at regional level. For instance, thematic networks could be developed on specific competition-related issues that would create 'epistemic communities' for informal cooperation, leading in time to a strong basis for more formal cooperation under treaty provisions. In order to build effective national competition policy regimes, many different stakeholders from both the public and the business sectors should be involved. These include governments, business associations (including small and medium-sized enterprises (SMEs)), financial institutions, aid donor agencies, and non-governmental organizations (NGOs) as well as regional groupings. Promoting partnerships may prove an effective way to ensure positive synergy among all concerned. Policy makers in developing countries often operate in a context in which their capacity for action is highly constrained both by established practices and by the urgent development problems that need to be addressed.

In order to be successful, innovative mechanisms may need to be applied to meet at the same time the rigors of effective competition laws and the development challenges faced by many developing countries, in particular least-developed countries (LDCs). This will involve partnerships between various stakeholders at national level, but also the commitment of donors and development partners in the North. UNCTAD will continue to promote such public–private partnerships in the context of regional integration and South–South cooperation, with a view to establishing a policy framework that addresses some of these issues that are likely to be of critical importance for developing countries in the years to come.

References

- UNCTAD (2004), *Competition, Competitiveness and Development: Lessons from Developing Countries*. United Nations: New York and Geneva
- UNCTAD (2005), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*. United Nations: New York and Geneva

Annex:

Reports of the Series of Seminars on Competition Provisions in Regional Trade Agreements

Introduction

The purpose of the Series of Seminars was to disseminate the findings of the UNCTAD/IDRC (International Development and Research Centre – Canada) publication *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*.[317] This publication was launched in Antalya, Turkey in November 2005 at the 5th UN Conference to Review all Aspects of the *UN Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices*. The following seminars comprised the Series, with the names of the host institutions listed first:

- Graduate Institute of International Studies (HEI), Geneva, Switzerland 24 May 2006
- Yeditepe Üniversitesi, Istanbul, Turkey 31 July–1 August 2006
- Korea Fair Trade Commission (KFTC), Gyeongju City, Republic of Korea, 6–7 September 2006
- Trade Law Centre for Southern Africa (**tralac**), Cape Town, South Africa, 4 October 2006
- Fundaçao Getulio Vargas, São Paulo, Brazil, 30 November – 1 December 2006

By promoting this exchange between member countries, experts, and other interested parties, UNCTAD intends to provide room for the examination of subjects that are perhaps more relevant to developing and least-developed countries than those provided in other fora. It is hoped that this research provides the stimulus for other research in these areas vital for the promotion of developing country interests.

UNCTAD has forwarded the individual reports to the participants at the seminars who have provided comments and suggestions on the descriptions of their presentations. Furthermore, the opinions do not necessarily reflect the views of their respective institutions or that of the UNCTAD Secretariat.

[317] For this reason, when referring to the Series of Seminars, the phrase 'dissemination phase' is sometimes employed.

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Competition Provisions in Regional Trade Agreements
Graduate Institute of International Studies, HEI, Geneva, Switzerland, 24 May 2006

Report of the session

Executive summary

The aim of the session was to brainstorm the progress that has been achieved so far since the launching of the UNCTAD/IDRC publication at the Fifth UN Conference to Review all Aspects of the UN Set on Competition held in Antalya, Turkey, in November 2005.

The session was organized jointly by the Graduate Institute of International Studies, Geneva (HEI) and UNCTAD with the support of the Canadian International Development Research Centre (IDRC). A number of competition experts including UNCTAD staff were invited to form a panel. Professor Simon Evenett, University of St Gallen, expert on Trade and Competition Law and Policies, Lucian Cernat, UNCTAD, Ana María Alvarez, UNCTAD Competition Law and Consumer Policies Branch, Philippe Brusick, Head of the Competition Law and Consumer Policies Branch, UNCTAD, and Professor Damian Neven, Professor, HEI, Geneva.

The session

Philippe Brusick, UNCTAD, started the discussion with some introductory remarks on UNCTAD's Set of Principles and Rules on Competition, which is the only multilateral instrument in existence today. It was also the basis of the mandate of the competition branch of UNCTAD whose work has been ongoing since the 1980s. He drew attention to the fact that objective No. 1 of the Set, was to ensure that 'restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries'. He highlighted that this objective was valid for regional trade agreements (RTAs) and multilateral agreements such as the UN Set and work at the World Trade Organization (WTO). The mechanisms at the multilateral level were the OECD Hard-Core Cartel Recommendations, UNCTAD's Set on Competition (1980, reconfirmed at the 5th Review Conference in November 2005) and the WTO Working Group on Interaction between Trade and Competition Policies (suspended from the Doha Round of negotiations).

He further noted that in line with its mandate provided in the Set, UNCTAD assists developing countries and transition economies in adopting national competition legislation (prohibition of cartels and abuse of dominance as well as merger control). As national laws are limited to the domestic territory, he emphasized the need for international cooperation on competition issues as more and more anti-competitive practices and mega-mergers are transnational. He recalled that there are two different types of cooperation agreements: 'pure' competition agreements and competition agreements that are part of an RTA. Most competition agencies preferred the former, involving direct agency-to-agency cooperation.

Such agreements, which are mainly bilateral, involve notification procedures of enforcement with effects on a partner country, technical cooperation, periodic meetings between national competition

authorities (NCAs), and consultation procedures. The 'first-generation' agreements are more voluntary, whilst the 'second-generation' have increased obligations. They are, however, limited to a small number of similarly sized countries, (US–EU, US–Japan, US–Canada and US–Australia, Germany–France), sometimes between close neighbours (Australia–New Zealand) and seldom between very different partners (Canada–Costa Rica). This can be explained by a need for balanced interest and the difficulties arising from asymmetry between large and smaller countries as well as NCAs with limited resources in smaller countries, which might be overwhelmed by requests for cooperation from larger partners.

RTAs have become more numerous in the 1990s, and increasingly contain provisions related to competition that contain a commitment from both parties to adopt (and enforce) competition legislation as well as to provide for technical assistance (TA) and the exchange of information subject to confidentiality rules.

Regional free trade agreements (FTAs) can be consolidated by further integration such as a customs union (CU), a single (or common) market, or the adoption of regional competition rules. He cited the example of the Japan–Singapore bilateral agreement: Singapore was reluctant to adopt competition law; it was therefore a surprise that after the discussions with the WTO, Singapore entered into a bilateral FTA with Japan, and as a result adopted a national law.

In most RTAs containing competition rules, partners were required to adopt national competition law. In recent regional agreements, such as the Common Market for Eastern and Southern Africa (COMESA) and the West African Economic and Monetary Union (WAEMU) regional competition rules supplement national rules. Should a controversy arise, it is the 'subsidiarity rule' that prevails: the regional rule supersedes the national rule.

Simon J. Evenett, professor at the University of St. Gallen, pointed to the mismatch between firms' ability to organize anti-competitive practices across national borders and the ability of governments to successfully prosecute such practices. Therefore, the question arises as to who gets the benefits of open borders, the customers or suppliers? He also raised the concern that enforcement decisions create cross-border spillovers so that there is a case for international cooperation or international collective action. If a country decides not to enforce its competition rules, this can affect all the other countries from which the enterprise is operating, as many firms operate across borders. On the other hand, if countries decide to enforce competition legislation, such as breaking up a cartel, they may have positive spillovers in other countries in which the cartel has been operating. These countries could then benefit from such a break-up.

Cooperation is thus needed on competition law and enforcement, which has been translated into including competition provisions in RTAs.

According to a recent OECD study[318] there are eight different types of competition provisions to be found in RTAs:

[318] Sennekamp, A. and Solana, O. (2005), "Competition Provisions in Regional Trade Agreements", OECD Trade Policy Working Paper No. 31 COM/DAF/TD(2005)3/FINAL.

1) 'Measures' relating to the adoption, maintenance, and application of competition law,
2) Provisions relating to the cooperation and coordination of activities by competition law enforcement authorities,
3) Provisions relating to non-discrimination, due process, and transparency in the statement and application of competition law,
4) Provisions to exclude the use of anti-dumping measures against the commerce of signatories,
5) Provisions concerning the circumstances and conditions under which recourse to trade remedies (such as anti-dumping duties, countervailing duties, and safeguards) are permitted,
6) Provisions relating to the application of dispute settlement procedures in competition policy related matters,
7) Provisions relating to flexibility and progressivity, sometimes referred to as special and differential (S&D) treatment provisions, and
8) Agreement to create a supranational enforcement body, such as DG Competition in the EU.

These provisions may differ markedly from each other, for example enactment *versus* enforcement, cooperation *versus* dispute settlement, and so on. Some are non-binding, others are binding. Some occur more frequently than others, such as those concerning the exchange of information, or the tackling of cartels, abusive position, and consultation mechanisms for dispute settlements. Provisions concerned with anti-competitive mergers are very uncommon, as are provisions on structured cooperation between agencies and provisions on S&D treatment.

The most common stated rationale for competition provisions in FTAs is to prevent anti-competitive practices, both private and/or public, from undermining the benefits created by the FTAs. Other stated rationales are to foster competition between enforcement agencies in specific cases and in more general matters and to enact or strengthen competition agencies and competition laws in signatories.

There is, however, limited available evidence of provisions, especially in terms of counts of prevalence as well as their impact and effectiveness. Professor Evenett believes that this is an unsatisfactory situation, as there is little or no evidence of the effectiveness of such provisions within RTAs.

There are, however, alternatives to competition provisions in FTAs such as informal cooperation between competition agencies that is not covered by a bilateral cooperation agreement between those agencies, as is the case for subject- (rather than case-) specific cooperation under the aegis of the International Competition Network (ICN). Another alternative is cooperation between competition agencies that is covered by such a bilateral agreement and cooperation that is pursuant to a Mutual Legal Assistance Treaty (MLAT) or a Letter Rogatory, such as the US–Canada MLAT and its application to cartel enforcement. Other alternatives include agreements to pool jurisdiction and to create a supranational enforcement agency. While considering these alternatives, the question thus arises as to the need for competition provisions. The lack of evidence is an obstacle to responding to that question.

According to Professor Evenett, there are many questions still unanswered in the field of competition provisions in FTAs, and these include:

1) To what extent have FTAs been used to bring forward the date of enactment of a competition

law? How did the FTAs' existence or negotiation affect the political economy of competition law enactment and enforcement? An example here could be the US–Singapore FTA.

2) To what extent have FTAs been used to strengthen the powers, budget and resources of competition agencies? Again, one could ask related political economy questions. Relevant examples include the Canada–Costa Rica FTA and the US–Canada FTA.
3) In what ways, if at all, have competition provisions fostered cooperation between agencies on actual enforcement cases? Compared to other cooperation instruments what are the pros and cons of binding competition enforcement?
4) In what ways, if at all, have competition provisions strengthened the deterrent effect of national laws?
5) Regarding the control of other factors, does the presence of competition provisions lower the mark-ups that importers charge?
6) To what extent, if at all, have provisions on core principles fostered cross-border mergers and acquisitions after the agreement was signed?
7) What are the implications of provisions on trade remedies for the size and composition of the caseloads of competition agencies?
8) What disputes have arisen on competition policy matters between signatories? How were they resolved? To what extent were the dispute settlement provisions used in this regard?
9) What are the metrics for evaluating whether proposals for S&D treatment on competition provisions make sense?

Overall, it is too early to draw strong conclusions for policy makers as to the importance of provisions within RTAs. With so little evidence to support or refute any of the proposed means of fostering cooperation on competition law, Professor Evenett said it was hard to understand the hard line taken by many officials, especially those in competition agencies. Professor Evenett concluded that the competition community should take a pragmatic rather than a dogmatic approach to this area.

Damien Neven, professor at HEI, as the discussant of the session, drew attention to some evidence of the effect of competition provisions within FTAs, as is the case for the Eastern European accession countries, which in 1994 signed FTAs with the European Economic Community. Lessons learnt from these cases were evidence of the slow implementation of the competition provisions due to a number of difficulties, such as the political environment at the time and the lack of competent expertise among government officials. Other issues considered to be causes for the slow implementation of competition provisions in the accession countries concerned state aids provisions.

Considering how the implementation of competition provisions had effectively been dealt with in trade fora, Professor Neven found that the record of the WTO, which has some competition provisions in the telecom field, was poor (in particular the Telmex decisions). Turning to cooperation among competition agencies, he observed that when the stakes were high one could not rely on the logic of repeated interaction to foster coordination. In addition, other attempts to coordinate competition enforcement, such as the ICN, had increasingly been captured by corporate interests. He concluded that initiatives towards coordination from antitrust and trade regimes should be seen as complements which mutually reinforce one another.

Lucian Cernat, UNCTAD, mentioned that while over 140 trade agreements contained competition provisions, their actual impact was unclear. Judging only by the potential impact of such competition

provisions, one could expect to see multiple linkages between competition provisions and trade and development issues. The development dimension is of crucial importance to UNCTAD's future discussions on competition and trade. However, despite this important potential, there is little evidence of successful implementation, partly because competition agencies and firms were often unaware of the deterrent effects of an RTA on anti-competitive practices.

Another issue was the connection between free trade areas and multilateralism. Competition provisions are introduced in RTAs, often following a different logic than that used in the WTO context. If and when WTO discussions on competition are resumed, they will need to take into account the existing RTAs and their cooperation principles.

As a response to Professor Neven's statement, Mr Cernat replied that in the case of the accession countries, apart from strong domestic effects in acceding countries (such as adopting EU-style national competition laws), there was little, if any, cooperation on cross-border anti-competitive practices between the EU and acceding countries as a result of the Europe Agreements.

Ana María Alvarez, **UNCTAD**, in her concluding remarks, mentioned some topics which merit further discussion and call for possible research:

- Reasons that justify the existence of the trade agreements and the competition-related provisions (CRPs) within them; poor knowledge of their contents and impact
- Types of CRPs negotiated in bilateral and regional trade agreements
- To what extent are they adapted to integration schemes and their general objectives?
- Conditions and effectiveness of their implementation
- Stocktaking of competition law and policy (CLP) provisions in bilateral and regional trade agreements
- Coherence of CLP provisions with general objectives of bilateral and regional trade agreements
- Examination of the feasibility of the implementation and public policy advice regarding bilateral and regional trade agreement negotiations
- Can RTAs with competition provisions contribute to ensure equity and poverty alleviation?
- Linking competitiveness (including CLP) to enhance absorptive capacity of member countries to an RTA to take advantage of the impact of regionalism and globalization (trade liberalization and foreign direct investment (FDI))
- Need for tailor-made national and regional competition laws: key for a successful implementation.

The interactive session organized at the HEI contributed to the following:

1) Increased awareness of the UNCTAD/IDRC publication among interested individuals and institutions in Geneva
2) Enabled an open discussion with experts in the field of trade and competition
3) Raised important issues for future concern and possible research
4) Contributed to discussion ideas for the next dissemination meetings in Turkey, the Republic of Korea, South Africa and Brazil
5) Fostered partnerships with trade and competition students/researchers.

Competition Provisions in Regional Trade Agreements
Yeditepe University, Istanbul, Turkey, 31 July – 1 August 2006

Report of the session

Executive summary

On 31 July and 1 August 2006, Yeditepe University in Istanbul hosted the second in a series of seminars aimed at disseminating the findings of the UNCTAD/IDRC publication, *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*. This seminar covered a broad range of issues, introducing the main subjects to be discussed during the dissemination phase of the UNCTAD/IDRC project.

Participants brought to the seminar the lessons they had learnt from the signature and implementation of RTAs as well as their technical insights into the economic implications of competition policy and RTAs.

The meeting then considered the problems with enforcement and procedural cooperation they had experienced as well as the opportunities provided by more effective cooperation. This information may help to clarify the appropriate provisions to be included in future agreements. In this discussion, important country examples were presented, which demonstrated the pertinence of these issues. Furthermore, the division between trade negotiations (and trade negotiators) and the competition authorities was illustrated in this discussion.

One topic which deserves further exploration, and which was to be addressed in the 7th UNCTAD Intergovernmental Group of Experts (IGE) meeting from 31 October to 2 November, is the interrelationship between sector regulators and competition authorities. This was introduced through country experiences, but there may be a need to look further into regional aspects. The seminar also considered relatively unexplored issues such as merger regulations and the cross-border trade in network-bound energy products.

Introduction

İsmail Hakkı Karakelle, Vice President of the Turkish Competition Authority (TCA), offered some background on the Turkish competition law, and outlined the following three important developments: firstly, the OECD Turkey peer review which, being open to the business community, demonstrated a commitment to transparency, secondly, the 5th UN Conference on Competition at Antalya in 2005, and, thirdly, the initiation of negotiations for accession into the EU.

Philippe Brusick, Head, Competition and Consumer Policies Branch of UNCTAD, expressed his pleasure to be back in Turkey, host to the highly successful 5th Review Conference in Antalya, and expressed gratitude to the TCA and Yeditepe University and highlighted again the agenda of the forthcoming 7th Session of the IGE on Competition Law and Policy, to be held in Geneva on 31 October – 2 November 2006

Rifat Hisarcıklıoğlu, President of the Union of Chambers and Commodity Exchanges in Turkey, in his keynote speech, emphasized the problems of overlapping trade agreements and the importance of policies complementary to regional integration, such as competition law.

Theme 1: Introduction to competition provisions and regional trade agreements

Philippe Brusick, UNCTAD, explained the role of UNCTAD in fostering and shaping CLP to achieve regional development. He highlighted UNCTAD's Set of Principles and Rules on Competition, which is the only multilateral instrument in existence today. It was also the basis of the mandate of the Competition and Consumer Policies Branch of UNCTAD, whose work has been ongoing since the 1980s. He drew attention to the fact that objective No. 1 of the Set, was to ensure that 'restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries'. He went on to say that the same logic was behind the introduction of competition provisions in RTAs.

He restated the general case for an effective CLP, pointing out that anti-competitive practices affect not only consumers, but also enterprises and thus country competitivity. The aims of RTAs (to realize economies of scale, to create a larger market free of trade barriers and to foster a more competitive setting) can be undermined if there is an absence of effective CLP.

He provided a taxonomy of RTAs (be they bilateral, regional or plurilateral), and detailed the types of competition provisions that can be found in them. He noted that competition provisions in RTAs only comprise part of the agreement, and often include items such as: a commitment for both parties to adopt (and enforce) competition legislation, the exchange of information subject to confidentiality rules and provisions for technical assistance (TA).

Regional competition laws can provide for region-wide merger control and the creation of a common Supranational Competition Authority, in which case the rule of subsidiarity might be applied, by which the regional rule trumps the national one.

He highlighted the importance of the UNCTAD research on this topic: since the mid-1990s, there has been a significant increase in RTAs worldwide (over 300) and, most recent RTAs contain CRPs (around 140 out of 300), possibly following the decisions at Cancun to drop competition and investment from the Doha multilateral trade negotiations. This trend would be even greater now that the Doha Round has been put on hold.

Ana María Alvarez, project leader of the UNCTAD/IDRC Project on Trade and Competition: Regional issues at UNCTAD, noted that the seminar provided an opportunity for participants to share their experiences in the implementation of CRPs in RTAs, and to explore ways of making the agreements more development friendly.

The types of hurdles to implementation can be either in terms of constraints at the national level, in terms either of absorptive capacity constraints, inadequate legislation and domestic concerns about industrial policy, or at the international level, in terms of inappropriate or ill-defined cooperation arrangements or concerns about the national interest – in terms of national security and 'national

champions'. In order for UNCTAD or other bodies' TA programmes to be more effective, and the benefits implied by trade liberalization to be realized, a detailed taxonomy and careful research of the motives for, degree of and barriers to implementation need to be conducted.

Questions related to the 'international' implications of competition provisions in RTAs include:[319]

- In what ways have competition provisions fostered cooperation between agencies on actual enforcement cases?
- What are the pros and cons of binding competition enforcement issues?
- What disputes have arisen regarding CLP between signatories of agreements? How were they solved?
- What is the relationship between cross-border mergers and acquisitions and the implementation of CRPs in bilateral and regional trade agreements?

Questions related to the 'national' implications of the implementation (or not) of agreements:

- To what extent have FTAs been used to bring forward the date of enactment of a competition law? How did the FTAs' existence or negotiation affect the political economy of competition law enactment and enforcement?
- In what ways, if at all, have competition provisions strengthened the deterrent effect of national laws?
- How can bilateral and regional trade agreements contribute to strengthen the powers, budget and resources of competition agencies?
- What are the implications of provisions on trade remedies for the size and composition of caseloads of competition agencies?

She highlighted the importance for UNCTAD research in this area to be nurtured by inputs from local sources, mainly national competition agencies and trade negotiators that have participated in the formation of agreements and have directly faced their implementation problems.

Mihai Berinde, President of the Romanian Competition Council, noted that while RTAs are found in every continent, Europe has the greatest concentration of these. He noted that given the absence of an effective CLP, the following problems may arise: market access may be inhibited due to collusion between large firms in importing markets, exporting firms may divide world markets and abuse their dominant positions, mergers and acquisitions between both domestic and international firms can reduce competition, and competition might be distorted through anti-competitive state aid practices.

He also pointed out that while the negotiation of competition is on hold at the multilateral level, the General Agreement on Trade in Services (GATS) and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreements already contain provisions relating to the control of anti-competitive practices. Furthermore, the lack of progress on a multilateral initiative has not prevented the internationalization of CLP, which is increasingly included in RTAs. In this respect, he drew attention

[319] These questions were first posed by Simon J. Evenett in the preceding seminar in Geneva.

to the OECD (2005)[320] classification of the types of CRPs in RTAs:

1) Adoption of competition laws;
2) Coordination and cooperation provisions;
3) Provisions addressing anti-competitive behaviour;
4) Competition-specific provisions relating to 'core principles' (non-discrimination, due process, transparency);
5) Exclusion of anti-dumping;
6) Recourse to trade measures;
7) Provisions relating to dispute settlement in the form of exclusion of competition provisions from the general dispute-settlement mechanism, consultation, arbitration;
8) Flexibility and progressivity (special and differential (S&D) treatment with respect to competition policy).

The types of competition provisions included in RTAs can be grouped into two 'families' – the EU-style arrangements, which include substantive provisions and provide for harmonization of laws, and the US- and Canada-style agreements which relate mainly to cooperation arrangements.[321]

Mr Berinde then laid out Romania's trade and competition policy. He noted in this respect, the conformity of Romania's trade policy with international rules, the concordance of Romanian competition policy in line with both international rules and EU rules, and the application of the competition *acquis* prior to the closure of the EU accession negotiations, necessary so as to safeguard the good functioning of the internal market. He added that the Europe Association Agreement (EAA) provided for the harmonization of Romanian policy with the EC in accordance with Articles 81, 82 and 87. While merger policy was not explicitly a part of the EAA, merger regulation in Romania has also been harmonized.

He also detailed Romania's agreement with the European Free Trade Association (EFTA), as well as the CRPs found in its agreement with the Central European Free Trade Agreement (CEFTA) countries. These include rules relating to applying measures with respect to state-aid provisions, exchange of information with respect to state-aid provisions, and 'provisions addressing anti-competitive behaviour such as: anti-competitive agreements, abuse of dominance, state aid and state monopolies'. The entry of new members into CEFTA will spread competition policy, and facilitate cooperation, and this he explained required a modernization of the agreement's provisions. Referring to the bilateral free trade areas with the countries that had constituted the former Republic of Yugoslavia, the Republic of Moldavia, Albania, Israel and Turkey, he noted that these include agreements on concerted practices, abuse of dominance, as well as exchange of information provisions related to state aids.

[320] Sennekamp, A and Solana, O "Competition Provisions in Regional Trade Agreements" OECD Trade Policy Working Paper No. 31 COM/DAF/TD(2005)3/FINAL

[321] Evenett and Anderson (2006, pp. 28–9) call for a broader taxonomy including:

- The nature and content of competition principles/instruments embodied in chapters of the Agreement dealing with individual economic sectors (e.g. telecoms, transportation, financial services) in addition to provisions found in general chapters on "competition";
- Whether the application of competition law and/or policy is subject to general (as opposed to competition-specific) principles regarding non-discrimination, transparency and procedural fairness;
- Whether the agreement requires the adoption of general competition legislation and/or establishes individual or common enforcement authorities;
- The emphasis placed on and enforceability of rules relating to designated monopolies;
- and state-owned enterprises as compared to private anti-competitive practices'.

In terms of international cooperation, the Romanian submission,[322] noted that several bilateral agreements had been completed, and that there had also been much informal cooperation initiated. Bilateral cooperation provided for the exchange of information and experience, subject to the confidentiality disclaimer. Furthermore, they were seen as fostering closer relationships between competition agencies.

On the subject of international anti-competitive practices, the submission notes the importance of agreement on 'common principles and objectives' rather than requiring harmonization of laws. Finally, the role of RTAs as a complement to multilateral liberalization was stressed.

Barbara Rosenberg, Getulio Vargas Foundation in Brazil, spoke about the general costs and burdens of international CLP agreements.[323] She noted that not all of these agreements had been implemented, and suggested that either this flowed from the costs of such agreements being too high, or the benefits not being perceived.

Agreements come in two types: first, bilateral or plurilateral cooperation agreements, as found in agency-to-agency agreements (ATAs) or mutual legal assistance treaties (MLATs). These involve existent NCAs. Second, there are competition provisions within some broader RTA or customs union (CU).

The costs involved in the implementation of the agreements will depend on the type of agreement concerned. ATAs, which are said to reduce the risks of incompatible decisions between agencies, generally involve the sharing of non-confidential data and enforcement coordination and may have two effects:

> '**[a]** to *effectively implement enforcement cooperation activities* between two countries where transnational activities are involved; and/or
> **[b]** Serve as *an instrument to foster capacity building* to one of the countries, which normally happens when the level of development of the parties to the agreement are uneven'.

The cost of an ATA will depend on whether it is between countries of different levels of institutional development, or similar levels of development. Ms Rosenberg noted that in ATAs where the levels of institutional development are uneven, 'agreements are less ambitious, concentrate on exchange of limited type of information and there is no mandatory notification'. Costs tend to be in terms of human resources, and benefits are experienced in the strengthening of technical capacity. The costs are fully justified in cases where there is the avoidance of duplication and the successful conclusion of cases.

In ATAs between countries of a similar level of development, access to data is generally wider, coordination is normally more extensive and there is frequent notification. Examples include the

[322] Berinde, M. "Overview of competition rules in Regional Trade Agreements" Paper available at http://www.yeditepe.edu.tr/7tepe/index_js.shtml?http://www.yeditepe.edu.tr/7tepe/egitim/lisans/hukuk/UNCTAD.shtml

[323] See Araújo and Rosenberg in Chapter 6 of UNCTAD (2005) *Competition Provisions in Regional Trade Agreements: How to assure Development Gains* United Nations, New York and Geneva http://www.unctad.org/en/docs/ditcclp20051_en.pdf

US–EC, US–Australia and Plurilateral Nordic Cooperation Agreement. Rosenberg noted that one of the chief benefits of the ATAs was that 'those agreements grant officials an adequate framework for information exchange'.

Moving on to competition provisions in RTAs, these were found to be of a more general form than the bilateral agreements, in many cases not including operational procedures related to coordinated enforcement. Also, RTAs may include competition provisions even without one of the member countries of that agreement having a competition law or authority. The provisions may either require the creation of a national body to enforce the law, or may involve the creation of a supranational authority to address cross-border cases.

Ms Rosenberg noted that the lack of exercise of competition provisions in RTAs may relate to incorrect expectations about what those provisions implied or may be simply due to the type of competition arrangements envisaged in the agreements being impracticable. For example, the Caribbean Community and Common Market (CARICOM) 'supranational' model may adequately fit the small open economies of the Caribbean, whereas the Mercado Común del Sur (MERCOSUR) model, which proposes that national authorities sit together to determine cases with effects on the region, has been found to be inappropriate. It is the appropriateness of the model being fitted to the region and agreement concerned that determines the cost of implementing the provisions.

She concluded by noting that the 'challenge is to find models that are adequate to each reality, as there is no "one size fits all"'. This involves '[evaluating the] nature and possible impacts of (cross-border) anti-competitive conducts on trade' and '[evaluating the] institutional capacity and (real) national interests'.

Bahri Özgür Kayalı, University of Manchester and lecturer at Yeditepe University, spoke on harmonization and policy transfer of CLP in RTAs. The three dimensions to policy transfer, which was defined as the willing adoption of best practices and policy alternatives based on governments studying each other's methods, are the legal framework, the institutional set-up and the policy network. The legal framework can involve either soft or hard convergence (that is, through imitation of best practice or through some binding agreement) and the institutional set-up can be either 'vertical' or 'horizontal.' The 'policy network' involves links and personal contacts. Thus, this refers to social relationships enabling coordination, cooperation and understanding.

After this introduction to the theoretical framework underlying harmonization and policy transfer, he outlined the framework of the European Competition Network (ECN). Until the 1980s, the system could properly be described as a 'foundational' model with what cooperation there was between 'autonomous spheres of operation'[324] – and based mainly on personal contacts. Over time, this was replaced by the 'solar model' characterized by partial integration,[325] with the commission making decisions affecting all Member States, but with little interaction flowing the other way. In its current guise, following the formation of the ECN,[326] the system may be better described as a 'centralized

[324] Gerber, D. (2005), "The Evolution of a European Competition Law Network" in C. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* Hart Publ'g: Oxford.

[325] Gerber ibid.

[326] Regulation (EC) No 1/2003, applied from 1 May 2004.

interactive model.' The modernization of the EU competition law enforcement process increased decentralization, and called for increased Member State and EC cooperation.

As stated in the European Bank for Reconstruction and Development (EBRD) publication *Law in Transition* (2004, p. 56), 'Regulation 1/2003 establishes a system of parallel competence in which both the Commission and Member States' competition authorities are competent to apply Articles 81 and 82 EC to cases capable of affecting trade between Member States'.[327] Guidelines have been provided on the allocation of competences, and the information obligations. What makes the interaction interactive though is that cooperation is not only between the commission and the national authorities, but also between the authorities themselves. This includes the sharing of some confidential information.

The OECD (2005, p. 8) report in summary states 'Modernization of the enforcement process, by eliminating notification and prior approval of exemptions while sharing enforcement responsibility with national agencies, is designed, among other things, to redirect resources so that DG Comp can concentrate on complex, Community-wide issues and investigations'.[328]

Erdal Türkkan, Competition Association Chairman, introduced an important distinction in the implementation of competition provisions in RTAs between what he called the 'priority approach' against the 'piecemeal approach.' The latter he identified as the dominant paradigm at present, while the former he advocated as an appropriate alternative.

Both are rooted in the theory of the second best: when markets are incomplete, the perfect competitive partial equilibrium need not be welfare maximizing overall. The point is that 'At least a part of existing deviations from the optimal rules may represent the second best solutions (Optimal deviations). Then, under certain circumstances the national competition authority's interventions may have harmful effects rather than desirable effects'.

The point is that, in the absence of the possibility of competitive equilibrium, a piecemeal approach to the introduction of competition is inappropriate and it is far better to determine priorities in the implementation of competition policy. This means measuring the deviations from the first best solution. Then comes the determination of the most important deviations from the first best solution and then the determination of 'strategic deviations', which refer to deviations having the effect of causing many other deviations. These types of deviations are particularly important, in general, in developing countries. He identified among many others the following 'strategic deviations' – 'high inflation, high indirect and direct taxes an inefficient taxation system, over-valued or under-valued national currency, excessive deviation of the price of internationally marketed basic goods and services from the opportunity cost, natural monopolies, imperfections in the customs system and protectionism, existence of an important underground economy, bureaucratic entry barriers to new markets, etc.'.

[327] http://www.ebrd.com/pubs/legal/lit041i.pdf

[328] "Competition Law and Policy in the European Union-2005" http://www.oecd.org/dataoecd/7/41/35908641.pdf

The priority approach is primarily concerned with, firstly, the determination of the magnitude and interrelatedness of deviations from the first best solution and, secondly, the systemic causes of such deviations. It calls for a considered application of competition policy, both at national and regional level to achieve 'workable competition.'

Vural Savas, Yeditepe University Faculty of Economics and Administrative Sciences, spoke on the topic of 'Regionalism and Globalization'. The presentation was a broad overview of the relative merits and demerits of regional and multilateral approaches to trade liberalization and he spoke in favour of the former. In particular, he felt that regional agreements were more aligned to national goals of participating countries, while WTO-led multilateral talks were dominated by the trade agendas of big trading partners.

Theme 2: Promoting cooperation in enforcement between agencies

Philip Marsden, British Institute for International and Comparative Law, spoke about the experience of the EU–Mexico, Canada–Costa Rica and Canada–Chile FTAs and explained how cooperation agreements can promote trust and confidence between competition agencies.

His presentation first focused on the factors affecting the choice of cooperative instruments, what their influence on formal and informal enforcement cooperation was, and what factors impede cooperation. He made the crucial distinction between competition provisions in FTAs, and agency-to-agency enforcement arrangements. This was a distinction that was reiterated in the presentations by James Mathis, and Barbara Rosenberg. As stated, he looked at the Canada–Chile, Canada–Costa Rica and EU–Mexico FTAs, as well as at the Memorandum of Understanding (MOU) between Canada and Chile. The research he presented was based mainly on questionnaires and interviews of officials from the relevant authorities. Cooperation arrangements were found to promote best practice, trust and confidence. Cooperation provisions in an FTA have the ability to initiate a working relationship that could be entrenched by an (ATA). Notifications had the positive impact of providing early warnings of anti-competitive behaviour, establishing channels of communication, and signalling the serious light in which anti-competitive practices were considered.

'Soft law' cooperation agreements had problems arising from the vagueness of the provisions and their unenforceability. He also noted that many officials believe restrictions on the exchange of confidential business information to be the chief limitation on cooperation. The *definition* of confidential information (as well as its potential *use*) was identified as an area that needs further study.

With respect to comparing the effectiveness of competition provisions in RTAs, as opposed to ATAs, the Canada–Chile MOU was thought to contribute more to enforcement cooperation than the chapter in the Canada–Chile FTA. When looking at the Canada–Costa Rica agreement, the competition provisions of the FTA were found to be as useful and as effective as ATAs. Furthermore, there is very little difference in substance between Chapter XI of the Canada–Costa Rica FTA and the Canada–Chile MOU. The same observation applied in terms of the EU–Mexico FTA. In this agreement, cooperation has been 'more official, more open and more intense since [the] signing of [the] FTA'.

However, cooperation could be more intense, since, for example, the provisions on positive comity

have yet to be used. With respect to each of these agreements, the speaker concluded that no new agreement was required, unless it dealt with the exchange of confidential information. Finally, he urged authorities to publish reports on cooperation.

James Mathis, professor at the University of Amsterdam, began by noting that an RTA could have competition provisions, even without the establishment of a regional competition law. For example, an agreement could mandate the harmonization of competition law. Furthermore, an agreement could create regional law, without creating a regional authority. Competition policy in regional agreements, he pointed out, had a variety of possible objectives, including 'supporting domestic competition law capacity, addressing anti-competitive practices with an international dimension', and 'supporting regional integration'. He noted that there may be an even greater possibility for undertakings to undermine the benefits from trade liberalization in the case of preferential agreements than in multilateral ones. In this case, integration may require more than voluntary cooperation'.

The main theme of the presentation was to look at the instruments in North–South RTAs being used to enable national authorities to cooperate to address cross-border and exclusionary anti-competitive practices. His main conclusion was that these were not strong enough to facilitate information exchange. This is especially important due to the fact that, in general, developing country agencies may lack enforcement capacity due to a shortage of information.

At present, such FTAs typically do not have any common enforcement authority, and specifically exempt the competition provisions from dispute settlement. In this case, cooperation between the national authorities is required. Typically the provisions used in FTAs are close to the OECD 1995 recommendations. The weakness of these provisions is especially felt in the area of exporting undertakings. In the absence of better assistance, it appears as though concerns about market access trump concerns about developing countries being able to prosecute actions with effects on their markets.

Professor Mathis presented the outlines of two instruments, hinted at in some recent FTAs, which might be developed to potentially overcome this weakness. The first he calls 'assistive notification' and the second is 'positive comity and recourse'. In traditional notification arrangements, a country ought to notify the other when 'its proceedings affect the important interests' of the other. In some of the agreements he looked at though,[329] there were some hints at a form of notification that envisaged 'the possibility of transmitting information regarding violations affecting the other party without the need for receiving a request'.

While the burden of this first instrument would primarily fall on the more developed partner to the FTA, the 'positive comity and recourse' instrument's burden would mainly be borne by the developing country. Traditional positive comity involves 'requests for consultation when anti-competitive practices in another member state are substantially and adversely affecting its interests – the requested member should take remedial action it considers appropriate'. At the moment though, positive comity is not being used in North–South trade agreements. However, the EC–South Africa agreement has language that embodies stronger provisions on positive comity. In terms of this

[329] In sum, he studied the Canada–Costa Rica, Canada–Chile, EU–Mexico, and EU–South Africa FTAs, and the US–Brazil ATA.

agreement, there is provision for 'appropriate measures' to be taken when 'there is a defect in the implementing rules or the absence of rules'. Thus, it addresses the inability of the one party to make use of positive comity due to rules against certain exclusionary practices not being implemented. It is unclear though, what 'appropriate measures' means, although it may refer to recourse trade measures. Finally, Professor Mathis notes that the effectiveness of these instruments will probably require political oversight.

Lerzan Kayıhan Ünal, competition expert from the TCA, examined the CRPs found in three groups of agreements signed between Turkey and other parties: the Turkey–EU Customs Union (CU), FTAs signed by Turkey, and ATAs signed between the TCA and other agencies.

The provisions contained in the CU agreement signed with the EU were revealed to be the most detailed. Association Council Decision 1/95 completed the CU in agricultural and industrial goods between the EU and Turkey. Competition rules in the CU are found in Articles 32–45. Articles 32–34 prohibit anti-competitive practices impacting on trade between Turkey and the Community. Aside from these articles, three types of coordination and cooperation provisions are found in this decision.

Firstly, there is the approximation of legislation. The CU included the EU's substantive provisions on competition, and 'obligated Turkey to enact those provisions as part of its own law prior to… December 31, 1995'.

Secondly, there are provisions relating to information exchange. Under Article 36 parties may exchange information, subject to business and professional secrecy limitations. Thirdly, there is a positive comity provision found in Article 43. The Article provides that 'if the Community or Turkey believes that anti-competitive activities carried out on the territory of the other party are adversely affecting its interests, the first party may request the other party to initiate enforcement action'.

Ms Kayıhan Ünal then proceeded to outline Turkey's FTAs and provided an overview of the EFTA–Turkey FTA's competition provisions as well as an introduction to Turkey's bilateral FTAs.

The third part of her presentation addressed the TCA's ATAs, with, for example, the Korea Fair Trade Commission (KFTC), and the Romanian Competition Council. She concluded by introducing two cases where the TCA had attempted to implement the competition provisions in its RTAs, apparently with little success. These cases would be picked up by Mr Tekdemir's presentation. In conclusion, she noted that the effectiveness of competition provisions in many cases was contingent on an alignment of common interest between the parties.

Yaşar Tekdemir, Associate Director of the International Relations Unit in the TCA, identified two types of cooperation on CLP issues at international level, namely 'soft cooperation' and 'hard cooperation'. The former involves the sharing of experience, best practice, and theoretical developments and is found in international fora, bilateral and regional trade agreements, and ATAs. Hard cooperation, on the other hand, involves the sorts of cooperation that assist in enforcement in actual cases, and require the sharing of data and information, dawn raids, and so on. This second type of cooperation is rarely observed.

He then went on to outline the experience of Turkey with each type of cooperation. In terms of soft cooperation, many useful insights had been gained through the work of organizations such as the UNCTAD IGE meetings, the OECD competition committee meetings, the WTO Working Group on Trade and Competition, and the International Competition Network (ICN) working groups.

In terms of hard cooperation, the experience was less favourable. In the seized coal market case, while evidence seemed to indicate the presence of price fixing by a number of companies, 'only the companies located in Turkey could be fined. Despite the fact that one of the undertakings was found guilty, the TCA could not impose a fine as the procedure envisaged in the competition law was not completed properly'.

Based on this experience, Mr Tekdemir identified the need for cooperation both in terms of the enforcement of competition law and in terms of procedure '(notification of investigation decision and investigation report, etc.)' Turkey requested cooperation from the countries where the companies were based – Austria and Switzerland – under the provisions of its CU with the EU and its FTA with the EFTA countries but in the former case the European Commission rejected support on the basis of:

- 'No implementation rules for competition rules of the CU 1/95
- Confidentiality,
- No effect in the EU market,
- Article 43 is not sufficient'

And in the latter, Switzerland responded by saying there was:

- 'No possibility of enforcing Swiss competition law in the case', and recommended the
- 'OECD as a better place'.

Aside from cooperation in competition law enforcement, Tekdemir identified 'the second initiative is the need for cooperation in procedural issues such as notification of investigation decisions, notification of investigation reports to the undertaking in other countries'.

One of the reasons for the failure of notification according to Tekdemir was the lack of an international framework on competition. Although the TCA tried diplomatic channels via the Turkish Ministry of Foreign Affairs, it turned out that the diplomatic channels are not appropriate for such an issue. Rather, there is need for procedural cooperation among the countries. For one of the companies concerned, the Turkish embassy was unable to complete the notification, for the other 'the Austrian government [rejected communicating] the investigation report arguing that there is [no] bilateral or multilateral agreement between the two countries which cover competition related administrative documents'.

In conclusion, Mr Tekdemir notes that during the absence of a procedural cooperation agreement, the effects doctrine[330] is inoperative. To solve this, it might be apposite to negotiate ATAs and RTA provisions addressing this.

[330] "According to this doctrine, domestic competition laws are applicable to foreign firms – but also to domestic firms located outside the state's territory, when their behaviour or transactions produce an 'effect' within the domestic territory. The 'nationality' of firms is irrelevant for the purposes of antitrust enforcement and the effects doctrine covers all firms irrespective of their nationality" Definition provided by the European Commission DG Competition at http://ec.europa.eu/comm/competition/general_info/e_en.html

Theme 3: Country experiences with respect to competition law and policy in regional trade agreements

Peter Holmes and **Anna Sydorak**[331] drew a careful distinction between EU RTAs with competition provisions when these were signed with candidate countries and when they were not. They noted that when signing with non-pre-accession countries the main aim was in general to discipline anti-competitive practices, rather than to create obligations for cooperation/information exchange. They further noted that the competition provisions were not directly tied to a reduction in contingent protection, although in the Euro–Mediterranean Agreement, there is a reference to the possibility of negotiating the elimination of EU countervailing duties following an 'eventual application by the Med countries of EU rules on state aid rules'.

In competition provisions in pre-accession agreements, the aim was harmonization, rather than cooperation – the adoption of EU law and policy was a necessary but not sufficient condition for the reduction of dumping charges ('the application of commercial defence instruments'). The EU–Turkey CU and EU–Poland EAA, and the EU–Croatia Stabilisation and Association Agreement, were found to contain similar provisions, in all cases the institutional changes being driven by accession negotiations.

In Poland for example, there was limited exchange of information and no access to confidential information pre-accession, whereas post-accession Poland cooperates fully with other Member States through the mechanism of the ECN. Whereas there is some informal cooperation with Croatia and Turkey and the EU, Turkey for instance has been unsuccessful in some instances where it has requested information from the EC's DG Competition. The main point is that pre-accession negotiations typically require strict harmonization, without there being much cooperation other than the informal type. This changes after accession when EC law becomes directly effective and the national competition authority joins the ECN.

The foregoing discussion thus had some potentially serious implications for non-candidate countries. Holmes and Sydorak put it thus '[these provisions] call for acceptance of EU competition and state aid rules potentially deeply intrusive with no binding cooperation provisions and no guaranteed end to contingent protection'. On the other hand, there are benefits from these agreements as a commitment device and as fostering informal cooperation. The speakers concluded by noting that 'Non candidate EU neighbours should agree to enforce agreements if they think domestic consequences will be beneficial, not for market access or cooperation reasons'.

Anestis Papadopolous, Hellenic Competition Commission, developed the history of regionalization in different parts of the world, before introducing the regional models of CLP and outlining the Greek experience in the RTA of the EU. He traced regionalization as being a feature of each continent, although he noted that in Asia, the major countries still preferred to go down the bilateral route.

In the context of regional CLP, he noted that regional agreements may provide the spur for the adoption of national law and policy. He also noted that the adoption of the Greek Law in 1977 was

[331] Seminar presentation based on a paper written by Holmes, P., Kayalı, O. and Sydorak, A. (2006), " Competition Policy in RTAs: Lessons from the EU Pre-Accession Process".

in the context of the accession negotiations. Merger regulation came first in 1991, and a leniency programme in 2006. He traced the development of the competition law enforcement institution, from its inception in 1979 as a branch of the Ministry of Commerce, to its status now as a financially autonomous administrative authority and a member of the European Competition Network (ECN). The Greek experience indicates that developing a competition culture takes much time and effort.

Kemal Erol, Faculty of Law at Yeditepe University, spoke on the impact of the competition rules on the CU of Turkey and the EU. In terms of Association Council Decision 1/95, the realization of the Turkey–EC CU, Turkey 'is committed to align with part of the internal market *acquis*, including free circulation of industrial goods, intellectual and industrial property rights, competition policy (antitrust and state aid control) and to adopt the common external tariff'.

He outlined the commitments contained in this decision and then looked at the achievements of Turkey in meeting these deadlines. Article 4 of the Turkish law on the protection of competition matches Article 81 of the EEC treaty, while Article 6 is very similar to Article 82. Similarly, merger control regulations were written to match the EEC regulations at the time.

He noted also that the independence of the TCA permitted investigations into anti-competitive conduct of undertakings regardless of whether they were publicly or privately owned. He noted that Article 7 of the Competition Act, governing Mergers and Acquisitions, did not yet match European Law, but that the TCA was preparing to make amendments. He noted that requests for merger or acquisition since 1997 numbered 371, of which two were denied outright and 32 were allowed to proceed subject to conditions.

He concluded by reflecting on the benefits of the CU. The most important was the adoption and implementation of a national competition law. He also noted that the increase in foreign direct investment (FDI) and trade coincided with the adoption of competition law, although identifying the impact of competition law alone is difficult. He did note, however, the continuing difficulties Turkey is experiencing with its state aids regime. He remarked too on the failure to secure cooperation from the EU on enforcement matters, due to concerns about confidentiality. He finally expressed concerns about the application of anti-dumping measures by both bodies, especially in the context of a CU agreement.

Andrea Belényi, General Secretary of the Hungarian Competition Authority, outlined the exceptions and exemptions found in Hungarian CLP. In the transitional stage, which she outlined as being from 1990 to 1996, there 'were few cases, less enforcement activity'. However, in this early stage of development and process of transition, there was still room for a role for the national competition authority in terms of advocacy and development of a competition culture. The second stage of Hungary's development of competition law she outlined as being the accession period. In this period, 'in a functioning market economy the three pillars of competition policy (enforcement–advocacy–competition culture) can be used effectively'. Three cases were then detailed outlining enforcement decisions of the Hungarian Competition Authority to demonstrate that in 'a well-established and well-functioning economy sophisticated competition policy tools can be used, such as Exceptions, Block exemptions and Remedies'. Thus, exceptions and exemptions were not so much a feature of a developing institution, but of one firmly established.

Theme 4: The role of competition authorities and sector regulators

Gamze Öz, professor at the Middle East Technical University, firstly introduced the importance of regulatory reform in modern economic systems – in which the market is the organizing principle. Professor Öz also spoke about the importance of competition advocacy, especially in developing and transition economies.

She noted that RTAs, in general, often do not explicitly cover the area of the relationship between the sector regulator and the national competition authority in the same way as they address substantive competition rules. She noted that the preferred relationship model often even varies within a jurisdiction and that the appropriate model was a function at least in part of the administrative system and the legal tradition.

Secondly, the speaker introduced the forms of relationship that might be seen between the national competition authority and the sector regulator.[332] She noted the *ex ante ex post* form of regulation, whereby the sector regulator is given power to stipulate certain requirements *ex ante*, while the national competition authority reviews potential anti-competitive behaviours *ex post*. Alternatively, the two authorities can have concurrent jurisdiction. Or the sector regulator may have sole jurisdiction.

Professor Öz noted also the possibility of clearly allocating roles for the two bodies, and of defining modes of cooperation between the authorities, two options that are not exclusive.

The third part of her presentation focused on the general relationship between the TCA and the sector regulatory authorities (SRAs) in Turkey. She then provided a more detailed classification of the forms of cooperation that can be seen between the two types of bodies. She considered these cooperation forms under the headings of: informal and soft cooperation techniques, delimitation of jurisdiction, and organized cooperation.

The final part of her presentation was concerned with the impact of RTAs on the relationship between competition authorities and SRAs. In this respect, she pointed to the EU agreements and the influence they have had on Turkish national law. She also noted that the EC's reports on Turkey's progress to accession also have an impact on the relationship between the TCA and the SRAs.

Finally, she mentioned that any RTA that refers to the relationship between competition agencies and sector regulators would serve as a model for cooperation among them. However, the usual caveat that 'one size does not fit all' should be kept in mind. This issue may merit further research.

Halil Baha Karabudak, Head of Department II at the TCA which deals with ICT matters, spoke on the Turkish experience of the relationship between competition policy and regulated markets. He

[332] On pp. xviii–xix of the 2005 UNCTAD COMPAL Programme report *Strengthening Institutions and Capacities in the area of Competition and Consumer Protection Policies in Latin America* reference is made to an Evenett (March 2004) input detailing the advantages and disadvantages of eight policy options for the jurisdictional allocation between competition agencies and sectoral regulators.

identified the main sector-specific regulators in Turkey (with the dates of creation of the regulator in parentheses) as being:[333]

- Capital Markets Board (1982)
- Radio and Television High Council
- Banking Regulation and Supervision Board (2000)
- Telecommunications Authority (2000)
- Energy Markets Regulatory Authority (2001).

The TCA, on the other hand, was established as an organization in November 1997, after the adoption of the competition law in December 1994.

He viewed the role of competition policy in regulated markets from three perspectives: firstly, with respect to market structure, secondly, with respect to liberalization, and, thirdly, in terms of conduct. In terms of the first, he gave the illustration of the TCA's intervention in the privatization of Turk Telekom in 2005. In this case, one of the recommendations was that the purchaser of the company be required to divest the cable TV operation. There were also other structural conditions recommended in the privatization of Tekel.

With respect to 'liberalization' he explained that this entailed the removal of barriers to entry and illustrated this by pointing to the National Roaming Case in which it was alleged that the two incumbent Global System for Mobile Communications (GSM) operators 'held joint dominance over the infrastructure necessary as an essential facility' and denied the use of their infrastructure to the market entrant 'without a legitimate basis'.

In terms of conduct regulation, he gave the example of the *Turk Telekom v. ISPs Case* (2002) in which case Turk Telekom was found guilty of abuse of dominance because of the disparity between the prices charged to its own Internet service provider (ISP) branch and competing ISPs.

He concluded by outlining different ways of allocating technical and economic regulation and competition law enforcement between the sector regulator and the national competition authority.

Przemyslaw Mechlinski, Office of Competition and Consumer Protection in Poland, spoke on the relationship between the Polish Competition Authority, and the sector regulators in Poland. The Office of Competition and Consumer Protection is responsible for 'Competition protection, State aid, Consumer protection, General product safety, Fuel quality monitoring and scrutinizing system and CE marking'. The Office for Electronic Communications oversees the liberalization of the telecommunications market. The Energy Law establishes the regulatory framework for the Polish energy sector and the Energy Regulatory Office (ERO) oversees 'instruments of competitiveness promotion and protection against monopoly abuse'. Mr Mechlinski further documented the responsibilities of the Office for Railway Transport and the Civil Aviation Office.

Yuriy Kravchenko, First Deputy Chairman of the Anti-monopoly Committee of Ukraine, spoke on the features of the interaction between the Anti-monopoly Committee of Ukraine and the sector

[333] http://www.yeditepe.edu.tr/7tepe/index_js.shtml?http://www.yeditepe.edu.tr/7tepe/egitim/lisans/hukuk/UNCTAD.shtml Main Sector-Specific Regulators in Turkey.

regulators. He first identified natural monopolies that were subject to regulation in the Ukraine. These included, for instance, 'transportation of oil and oil products by pipelines; transportation of natural and oil gas by pipelines; transfer and distribution of electric power; special services of terminals and other types of natural monopolies'. He then identified 'economic' (price regulation and access), 'technical' and 'anti-monopoly' aspects of regulation, explaining how in the Ukrainian systems these aspects could be assigned to different institutions. For instance in transportation, technical and economic regulation are the responsibility of the Ministry of Transport and Communications, whereas in communications the Ministry of Transport and Communications regulates the technical requirements, while the National Commission on the Regulation of Communication (NCCR) regulates the economic aspects. In all cases, the Anti-monopoly Committee is responsible for the 'anti-monopoly regulation'. He concluded with a memorandum on the interaction between the NCCR and the Anti-monopoly Committee detailing the advocacy role that the Anti-monopoly Committee plays.

Theme 5: Other issues

Ercüment Erdem, professor at the Galatasary University Faculty of Law, outlined what he felt to be the deficiencies in Turkish competition law, in light of the EU merger regulations. In particular, it is important to take into consideration Council Regulation 139/2004 ('New Merger Regulation'). He first outlined the substantial amendments to the merger regulations, including the definition of 'concentration' and the Significant Impediment to Effective Competition (SIEC) test and described how the Commission's recent decisions concerning merger applications have taken into consideration unilateral, coordinated and portfolio effects. He then detailed some of the procedural amendments regarding notifications ('notifications prior to binding transactions, pre-notification referral and referral after the notification'), time frames and investigative tools. Finally, he outlined the penalties for infringement.

Following this introduction, he offered a brief critique of existing Turkish merger regulations as found in Article 7 of the Competition Act. First, the text was thought to be 'vague' and 'imprecise'. Second, the failure to include joint ventures in the provision was thought to be inappropriate. Finally, it was felt that other merger-related provisions in Turkish law, as found in communiqués, ought to be included in the Act.

In light of these criticisms, he suggested various changes to the Turkish merger control law.

Brendan Oviedo, Centre for Energy Petroleum Mineral Law and Policy at the University of Dundee, gave a presentation on cross-border trade in network-bound energy products (that is, electricity and natural gas). Prior to liberalization, the electricity and natural gas markets were largely characterized by vertically integrated state (and sometimes privately) owned monopolies. Cross-border trade was undertaken between monopolists if at all. The main liberalization measures involved the restructuring of the market, privatization, the creation of competition in the wholesale and retail markets and independent regulation. The nature of electricity and natural gas means that trade is regionally bound (although the use of liquefied natural gas does permit natural gas trade over longer distances). Furthermore, transmission and distribution, due to their network characteristics and their economy-of-scale nature are still regarded as natural monopolies.

Mr Oviedo then detailed several competition issues that can arise in cross-border trade of these products. Firstly, trade between markets with different degrees of liberalization (and hence different market structures and concentrations) could be problematic. Cross-border mergers and acquisitions may also have potentially anti-competitive effects. Next, competition in wholesale and retail markets is dependent on 'non-discriminatory' and 'transparent' third-party access to the transmission and distribution networks. He also noted the importance of interconnection between bordering markets and the need to regulate the operation of the network to prevent any abuse of the operator's dominant position.

The large scale of the investment required in these industries, means that there are many long-term contracts in operation intended to guarantee debt repayment. Take or pay and destination clauses contained in these long-term electricity and natural gas contracts can create market access problems.

It is thus clear that competition, as well as regulatory issues, arise in these markets. Certainly, network regulation would seem to be important, but Mr Oviedo notes that competition law may also be applied in parallel. He writes 'competition law could be applicable to any abuse of the network operator's dominant position by treating competitors discriminatorily, charging unfair prices for capacity and/or transmission services that restrict or distort cross-border electricity and natural gas trade'.

Cross-border trade of these products is likely to give rise to many difficult questions concerning the application of competition policy and competition cooperation. Competition law and sector regulation might be applied differently in neighbouring jurisdictions and there may be serious disagreements about jurisdiction. There is thus the need for coordination not just between the national competition authorities (NCAs) and sector regulators, but also for these bodies to coordinate across borders.

Summary of meeting

Philippe Brusick provided a general summary of the proceedings of the meeting.

Emerging from the discussions, some of the key issues facing NCAs were the following: the different agendas between trade and competition officials, the role of competition provisions as complementing economic and sustainable development and domestic competition law capacity and the need for reciprocity between developed and developing countries in the responsibilities emanating from agreements.

Furthermore, what many participants agreed on was the need for better mechanisms to coordinate cooperation between agencies, both in terms of general procedures for RTAs, as well as for specific competition law enforcement issues.

In all, Mr Brusick identified six key areas that need further examination:

1) Understanding better the social impact of CLP.
   To what extent can we link the work being done on competition policy to development – both in the short and long term?
2) Preparing an IGE Model competition cooperation agreement.
   To develop a toolkit for the implementation of cooperation and to study the costs and benefits of RTAs containing CRPs as against direct ATAs.
3) Develop a specific case enforcement procedural framework.
4) Study competition issues in the intermediary goods/services area.
5) Foster best practice between NCAs and sector regulators.
6) Undertake further research in network and energy industries.

Following this general summary, **Jim Mathis** chaired a panel discussion on the topic of *RTAs and regulatory issues: CLP and related policies: poverty alleviation/sustainable development*.

He began by outlining the UN Millennium Development Goals (MDGs).[334] He then posed the question of which formulations of CLP are most appropriate for poverty alleviation and efficient development. This is a question that arose in the background note and was to be reiterated shortly by Barbara Rosenberg. He noted that it is also important to consider the role of the national competition authority 'in targeting social concerns (a quest for a long-lasting competition culture)'. He noted also that in some cases inconsistent goals for CLP are stated in the social goals outlining the legislation. Further, he identified also that it was important to study how NCAs and judges weight and adjudicate mutually exclusive objectives of the law – for example full employment and economic efficiency. Furthermore, he remarked that exceptions and exemptions from competition law and policy were often used in CLP to relate to other objectives, although these were not always so obviously social and developmental aims (for example an exemption for baseball).

[334] 'Eradicate extreme poverty and hunger, Achieve universal primary education, Promote gender equality & empower women, Reduce child mortality, Improve maternal health, Combat HIV/AIDS, malaria and other diseases, Insure environmental sustainability, Develop global partnership for development.'

He explained that it was important to establish the link between 'CLP provisions and other RTA regulatory policies – and other domestic regulation'. In this domain, it is vital to establish the optimal mix as well as the most appropriate sequencing of reforms. For instance, it is important to study the role of unfair trading practice laws. These are simpler, easier and cheaper laws than competition policy, but also serving objectives that are not always aligned with competition law objectives and can catch many of the same problems that competition policy does. Consumer protection may be a very important component of poverty reduction.

Thus, the overall approach to this broad investigation should have two aspects: an economic and a legal one. In terms of the economic, it is important to try and establish the effects of individual policies. In terms of the legal, 'what is the hierarchy among policies what is the effect of that hierarchy for the objectives, and for rights and obligations'.

In the subsequent discussion **Peter Holmes** pointed out that when looking at an RTA it is important to have an understanding of what the relevant RTA, and the RTA's competition provisions, are hoping to achieve, and what is expected by the parties.

Are competition provisions simply trying to facilitate trade liberalization and safeguard market access? Or, are they trying to offset the possible negative impacts of trade liberalization?

If one is considering exempting certain sectors in one's competition law, the nature of possible social exemptions differs according to these perspectives. Social provisions might on the one hand fully accept competition aims, but seek to prioritize the maximization of the share of gains going to the poor, for example by linking competition to consumer protection and removing entry barriers for certain kinds of small and medium-sized enterprise (SME).

On the other hand, Mr Holmes noted that, in cases where liberalization is considered to be efficiency creating but at the expense of certain groups, the nature of exemptions might be viewed differently, perhaps preservation of existing SMEs (rather than promotion of new ones) or tolerating practices which allow socially desirable cross-subsidies (an outcome which most economists, however, consider unlikely to be achieved by relaxing competition law).

Erdal Turrkan, however, expressed the view that liberalization was always pro-poor and that there was not likely to be a need to mitigate its effects.

Barbara Rosenberg posed the question of what formulations of CLP are most appropriate for development. If these are different from those found in developed countries to what extent should soft cooperation be fostering convergence if this leads to competition laws and policies inappropriate for development? She further noted that it was important to develop an understanding of what information countries should have before negotiation to better evaluate benefits and costs of CRPs in an RTA?

Philip Marsden made the point that we should be looking at the objectives of the RTA and separating them out. The question can perhaps be put to countries what they think the objectives of the provisions of that RTA were, and whether they achieved them. For instance, was it market access, or something else? Furthermore, one needs to think here about how some of the achievement of

these objectives might be measured.

The second part of his presentation drew on what he felt were two of the more important questions raised by the UNCTAD background note written in preparation for the seminar, namely:

(a) In what ways, if at all, have competition provisions fostered cooperation between agencies on actual enforcement cases? Compared to other cooperation instruments what are the pros and cons of binding competition enforcement issues?
(b) What disputes have arisen on competition policy and matters between signatories? How were they resolved? To what extent, if at all, were dispute settlement provisions used in this regard?

The third theme he drew on was to highlight the difficulty of actually convincing judges to consider the question of social provisions in their decisions. On this topic it is remarkable that despite the laws on abuse of dominance and mergers making extensive reference to consumers, this was rather less so when it came to actual cases.

Halûk Kabaalioğlu again underlined the importance of cooperation, especially in the case of a CU.

Khaled Hamdy, Executive Director of the Egyptian Competition Agency, noted that it was not easy to pick and choose which elements of an RTA to include when negotiating with strong trading partners. He also noted that, even if 'deep integration' in the sense of harmonization of product standards, legislative framework, and so on, would yield substantial benefits to a country in an RTA with the EU say, for some countries this harmonization of standards is almost impossible. Consider for instance the difficulties of harmonizing Egyptian and European water standards. He also drew attention to the importance of the role of the non-governmental consumer organizations.

11th International Workshop on Competition Policy
Korea Fair Trade Commission, Gyeongju City, Republic of Korea, 6–7 September 2006

Report of the session

Executive summary

On 6 and 7 September 2006, the Korea Fair Trade Commission (KFTC) hosted the third in a series of events aimed at disseminating the findings of the UNCTAD/IDRC publication, *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, in Gyeongju City, Republic of Korea. This workshop drew a wide audience, and was attended by participants from every part of the world.

The first session covered the experience in negotiating, signing and implementing regional trade agreements (RTAs) containing competition law and policy provisions. Speakers considered the different experiences with these provisions, and the different perspectives of parties involved in those negotiations, whether the country was developed or developing. The second session then considered this experience and examined further what the desirable role of those provisions was, trying to map the objectives of those provisions and looking, in light of the experiences listed in the first session, at whether these were well addressed. The third session then aimed to chart the way forward in terms of the substance of the provisions, and the cooperation and technical assistance (TA) strategies they envisage.

The second day of the workshop then turned to the specific problems of international cooperation in the cartel investigation and law enforcement and the introduction of competition into regulated industry. The latter is a topic that was to be addressed at the 7th UNCTAD Intergovernmental Group of Experts (IGE) meeting from 31 October to 2 November 2006.

Session 1: Experience in negotiating, signing and implementing bilateral and regional trade agreements containing competition law and policy provisions: lessons learned and findings

The session was moderated by Eduardo Pérez Motta, President of the Federal Commission on Competition. He opened the proceedings by highlighting the importance of cooperation in this field for the Mexican Federal Competition Commission (CFC).

Experience in negotiating, signing and implementing regional trade agreements containing competition law and policy provisions: findings and lessons learned
Ana María Alvarez, project leader of the UNCTAD/IDRC Project on Trade and Competition: Regional issues

The speaker began by noting that the seminar provided an opportunity for participants to share their experiences in the implementation of competition-related provisions (CRPs) in RTAs, and to explore ways of making the agreements more development friendly.

The types of hurdles to implementation can be either in terms of constraints at national level, in terms either of absorptive capacity constraints, inadequate legislation and domestic concerns about industrial policy, or at international level, in terms of inappropriate or ill-defined cooperation arrangements or concerns about the national interest – in terms of national security and 'national champions'. In order for UNCTAD or other bodies' TA programmes to be more effective, and the benefits implied by trade liberalization to be realized, a detailed taxonomy and careful research of the motives for, degree of and barriers to implementation need to be conducted.

Furthermore, the speaker highlighted that developing countries, and particularly least-developed countries (LDCs), face other national-level urgent competition-related problems. They have also expressed concerns about competition provisions in RTAs that are not suited to their level of development. This highlights the need to go beyond the current research, and to look more fundamentally at the direct potential social benefits of competition law and policy (CLP), and improved strategies for implementing competition and consumer protection policies, suited to developing countries concerns.

Questions related to the 'international' implications of competition provisions in RTAs include:
- In what ways have competition provisions fostered cooperation between agencies on actual enforcement cases?
- What are the pros and cons of binding competition enforcement issues?
- What is the relationship (if any) between cross-border mergers and acquisitions and the implementation of CRPs in bilateral and regional trade agreements?

Questions related to the 'national' implications of the implementation (or not) of agreements:
- To what extent have free trade agreements (FTAs) been used to bring forward the date of enactment of a competition law? How did the FTAs' existence or negotiation affect the political economy of competition law enactment and enforcement?
- In what ways, if at all, have competition provisions strengthened the deterrent effect of national laws?
- How can bilateral and regional trade agreements contribute to strengthen the powers, budget and resources of competition agencies?
- What are the implications of provisions on trade remedies for the size and composition of caseloads of competition agencies?

She highlighted the importance for UNCTAD research in this area to be nurtured by inputs from local sources, mainly national competition agencies and trade negotiators that have participated in the formation of agreements and have directly faced their implementation problems.

The next part of her presentation focused on outlining the potential ways of promoting cooperation between countries in the investigation and enforcement of competition law. This drew on ideas that had earlier been covered in a preceding workshop in this series in Istanbul, Turkey. There is a need to look at each of the various cooperation instruments[335] and to consider whether or not they can be implemented or suitably modified to better match the interests of developing countries. It would

[335] Notification, Coordination, Investigative Assistance, Positive Comity, Compulsory Assistance, Technical Assistance.

be interesting here to explore further South–South regional cooperation strategies such as those already existing in the framework of regional integration schemes (the Andean Community (AC), the Caribbean Community and Common Market (CARICOM), the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC), the Southern African Customs Union (SACU), the East African Community (EAC), and so on).

The final part of the presentation considered various unique social and economic problems confronting developing countries and important areas for further research. On the basis of discussions held in the earlier seminar in Yeditepe University, Istanbul, the following proposals have been made:

In terms of promoting the implementation of CRPs in RTAs:
- Prepare a model competition cooperation agreement.
- Develop a toolkit for the implementation of cooperation and to study the costs and benefits of RTAs containing CRPs as against direct agency-to-agency agreements (ATAs).
- Develop a specific case enforcement procedural framework.

In terms of social issues and development, these include:
- Understanding better the social impact of CLP.
- Study competition issues in the intermediary goods/services area.
- Analyse to what extent it is possible to link the work being done on competition policy to development – both in the short and long term.

Meinrad Dreher, Professor at Johannes Gutenberg University – Mainz

The speaker began by considering the question of why CRPs might be included in RTAs. The first positive impact could be the facilitation of trade liberalization – that is the locking in of the benefits of lower tariffs by ensuring that they are not replaced by private anti-competitive practices. The second positive aspect is that they may be used to avoid the costs of anti-competitive practices on an international level. CRPs 'seek to close the gap between international effects and intra-national enforcement of competition rules by introducing more competencies and mechanisms of cooperation'. The third aspect is that CRPs may be used to create a good investment climate. Some measure of harmonization may reduce companies' costs of compliance with competition rules and reduce the risk of convictions because of infringement of competition rules. Linked to these two points is the fact that CRPs may offer a 'one-stop shop' for mergers.

After this introduction, he turned to the example of European Community (EC) competition rules and lessons from the process of 'negotiating and signing' of EC competition rules. This happened very early on in the development of EC law, since EC competition rules were already included in the Treaties of Paris and Rome. 'Later their existence [was] a matter of course, a fact which has facilitated their effective implementation significantly'. The supranationality of EC law is underpinned by the fact that many secondary legal acts (regulations, decisions and guidelines) are binding for the Member States. The speaker noted that the 'negotiating' and 'signing' of secondary legislation differs greatly here in the EC, for example, than what seems to be the case in other regional groupings. He noted that the enactment of secondary legislation by the Council in the field of competition law in many aspects may be by 'qualified majority and these majority decisions are also binding for those Member States that have not agreed'. He also noted that 'decisions in competition cases are mostly issued by the

Commission alone which exercises direct administrative power *vis-à-vis* undertakings and Member States'.

Professor Dreher then outlined various prohibitions in EC competition law – anti-competitive agreements, the abuse of a dominant position, certain mergers and market distortion of state aids. He identified the treatment of anti-competitive agreements as most exemplifying the features of a supranational competition rule. EC competition rules, which require that the practice affects trade between Member States, have a wide application since this is interpreted as referring to influence that may be direct or indirect and actual or potential.

The enforcement of Articles 81 and 82 is not only undertaken by the European Commission, but also by the national authorities. To facilitate the smooth allocation of cases, the national competition authorities (NCAs) cooperate with the Commission, through consultations and information exchange. But the supranationality of the competition law is realized by 'the ceasing of the competence of national competition authorities when the Commission takes up a case as well as by the rule that national competition authorities and even national courts cannot take decisions running counter to a decision adopted by the Commission'. These are distinctive features of the European competition law experience, as opposed to other RTAs.

He then identified certain features that are necessary for integration. The first is that 'the development status of the national competition laws in question should not be too diverse'. He ascribes that to the fact that 'uniform competition rules only make sense if uniform application of those rules can be achieved'.

He concluded by noting the critical contribution that competition law had made to the creation of the European Common Market, and by stating that this was an example illustrating that trade liberalization and an active competition law regime are effective in concert.

Implementation costs and burden of international competition law and policy agreements
Barbara Rosenberg, professor at Getulio Vargas Foundation, Brazil

Professor Rosenberg spoke about the general costs and burdens of international CLP agreements.[336] She began by noting that not all of these agreements had been implemented, and suggested that either this flowed from the costs of such agreements being too high, or the benefits not being perceived.

Agreements come in two types. First, there are bilateral or plurilateral cooperation agreements, as found in ATAs or in Mutual Legal Assistance Treaties (MLATs). These involve existent competition authorities. Second, there are competition provisions within some broader RTAs or CUs.

The costs thus involved in the implementation of the agreements will depend on the type of agreement concerned. ATAs, which are said to reduce the risks of incompatible decisions between

[336] See Araújo and Rosenberg in Chapter 6 of UNCTAD (2005) *Competition Provisions in Regional Trade Agreements: How to assure Development Gains* United Nations, New York and Geneva http://www.unctad.org/en/docs/ditcclp20051_en.pdf

agencies, generally involve the sharing of non-confidential data and enforcement coordination and may have two effects:

> '**[a]** to *effectively implement enforcement cooperation activities* between two countries where transnational activities are involved; and/or
> **[b]** Serve as an *instrument to foster capacity building* in one of the countries, which normally happens when the levels of development of the parties to the agreement are uneven'.

The cost of an ATA will depend on whether it is between countries of different levels of institutional development, or similar levels of development. Rosenberg noted that in ATAs where the levels of institutional development are uneven, 'agreements are less ambitious, concentrate on exchange of limited type of information and there is no mandatory notification'. Costs tend to be in terms of human resources, and benefits are experienced in the strengthening of technical capacity. The costs are fully justified in cases where there is the avoidance of duplication and the successful conclusion of cases.

In ATAs between countries of a similar level of development, access to data is generally wider, coordination is normally more extensive and there is frequent notification. Examples include the US–EC, the US–Australia and the Plurilateral Nordic Cooperation Agreement. Rosenberg noted that one of the chief benefits of the ATAs was that 'those agreements grant officials an adequate framework for information exchange'.

Moving on to competition provisions in RTAs, these were found to be of a more general form than the bilateral agreements, in many case not including operational procedures related to coordinated enforcement. Also, RTAs may include competition provisions even without one of the member countries of that agreement having a competition law or authority. The provisions may either require the creation of a national body to enforce the law, or may involve the creation of a supranational authority to address cross-border cases.

Professor Rosenberg noted that the lack of exercise of competition provisions in RTAs, may relate to incorrect expectations about what those provisions implied, or may simply be due to the type of competition arrangements being envisaged in the agreements simply being impracticable. For example, the CARICOM 'supranational' model may adequately fit the small open economies of the Caribbean, whereas the Mercado Común del Sur (MERCOSUR) model, which proposes that national authorities sit together to determine cases with effects on the region, has been found to be inappropriate. It is the appropriateness of the model being fitted to the region and agreement concerned that determines the cost of implementing the provisions.

She concluded by noting that the 'Challenge is to find models that are adequate to each reality, as there is no "one size fits all'. This involves '[evaluating the] nature and possible impacts of (cross-border) anti-competitive conducts on trade' and '[evaluating the] institutional capacity and (real) national interests'.

Alternatives to formal provisions: Vietnam's experience of informal cooperation
Tran Anh Son, Deputy General Director of Vietnam Competition Administration Department (VCAD)

The speaker began by pointing out that given the varying levels of development between RTA partners, that the formal cooperation provisions could present difficulties both in terms of negotiation and in terms of implementation. However, these difficulties did not restrict the potential of informal cooperation, which could be in the form of 'exchange of information and experts, education and training; to some extent, cooperation in investigations of international cartels.'

The speaker gave as an example Vietnam. Only the bilateral trade agreement with the US contains competition provisions (the upcoming agreement with Australia and New Zealand may as well), but nonetheless the VCAD had established relationships with economies such as 'the US, Canada, France, Japan, the Republic of Korea, Taiwan, Indonesia…The cooperation activities are limited to one-way assistance by those authorities and organizations'.

He identified formal and informal cooperation as performing two different functions. The former he identified as facilitating enforcement cooperation and harmonization; the latter he noted could be used for capacity-building purposes and for the exchange of information and experience. It could also perhaps be used to some extent for cooperation in enforcement.

He noted that while informal cooperation served many useful purposes, it was limited by the extent of the closeness of the relationship between agencies, and that formal provisions might still be considered important. He noted also that some countries were not necessarily yet ready for formal cooperation, but that with greater development there might be a need for greater formality.

However, he noted that from their own experience in VCAD informal cooperation with the US Federal Trade Commission (FTC) and the Department of Justice (DoJ) was more beneficial than the formal provisions under the bilateral trade agreement. Thus, he saw formal and informal cooperation strategies as complementary and not mutually exclusive.

Draft of competition law in Cambodia
Un Buntha, Domestic Trade Department, Ministry of Commerce, Cambodia

Mr Buntha noted that as part of its accession to the World Trade Organization (WTO) in 2004, Cambodia is establishing a competition law. Capacity-building measures related to this have been undertaken with UNCTAD, the Association of Southeast Asian Nations (ASEAN) secretariat, the US FTC, the Japan Fair Trade Commission (JFTC), the KFTC and the Ministry of Commerce in Thailand. Capacity building is very important for Cambodia as it is a very new policy area, and since 2005, there have been many important contributions from UNCTAD in this regard.

The first draft of the competition law was completed in March 2006, which contains four chapters. It contains provisions relating to anti-competitive practices, abuse of dominant position, and merger control. The scope of the law is universal, applying to all enterprises whether formal or informal, national or foreign, and to all undertakings having an effect on the Cambodian market. There are some exemptions, for example 'sovereign acts of the state and local authorities, exemptions for economic

progress and job creation and exemptions for the public interest' – the latter being considered under a rule of reason. The key institutions in the implementation of Cambodian competition law are the National Competition Council, the Minister of Commerce and the Commercial and Appellate Courts, the latter having the power to review the decisions of the preceding three.

Mr Buntha concluded by outlining the way forward for the draft and by stressing the further capacity-building measures required.

Impact of regional trade agreements containing competition law and policy provisions
H.E. Siaosavath Savengsuksa, Vice Minister of Commerce, Lao PDR

Mr Savengsuksa recognized the importance of competition as a means for promoting economic efficiency, and as a complement to trade. He noted that the commitment to a competitive and fair trading environment is written into Lao's constitution. The movement towards the establishment of a Fair Trading Commission in Lao PDR has been initiated in the absence of a commitment to an RTA; while there have been trade and/or economic cooperation agreements negotiated with member states of ASEAN, USA, China, the Republic of Korea and the EU, these do not refer to competition policy. Within the ASEAN FTA there is some reference to exploring competition rules and the proposed ASEAN–New Zealand–Australia FTA may, on the recommendation of the latter two countries, contain competition policy provisions.

The speaker noted that while Lao had little experience in negotiating CRPs in RTAs, it did seem that Lao was suffering in the context of anti-competitive practices from trading partners, the impact of which is increased in the context of lower trade barriers. He mentioned in this context, export and other anti-competitive subsidies. He noted also the impact of cross-border investment, mergers and acquisitions, and cross-border cartels, all problems that a country with weak competition law enforcement has difficulty overcoming.

He noted the potential for South–South competition provisions to promote regional competition, and generate economies of scale, and for North–South competition provisions to include cooperation in addressing anti-competitive practices by powerful MNEs located in developed countries. He also noted LDC needs in terms of special and differential (S&D) treatment – in terms of safeguard measures, exceptions and exemptions, transitional time periods, and TA.

Discussions

Hyungbae Kim, expert in the Competition and Consumer Policies Branch in UNCTAD, asked Professor Dreher whether, if there was an international cartel operating in the Republic of Korea based in Germany, the KFTC should direct its request for information to the EC or to Germany. Professor Dreher replied that it would first be necessary to explore which law is applicable, either community law or national law. As this hypothesis was posed as a case involving an international cartel operating in the Republic of Korea, it would probably have a community dimension.

The Mongolian authority asked the Vietnamese delegate, Ahn Son Tran, for further details and provisions in the agreement it had signed with the United States. Mr Tran replied that it was a bilateral

agreement between the United States and Vietnam and that the United States pledged support in terms of finance and TA. The law had been implemented.

Philippe Brusick asked to what extent friendly questions are responded to, which sort of information requests were granted by responding agencies and whether there was a need for more mandatory agreements and a stronger obligation of response, whether in the context of an ATA or in the context of competition provisions within an RTA.

Barbara Rosenberg noted in response that having a cooperation agreement fosters cooperation and that information is exchanged within the context of an agreement even if it is not mandatory (for example in an ATA). She further questioned to what extent we can believe in non-mandatory cooperation. The risk is not to have cooperation. It could also be more burdensome for the developing country to have a compulsory agreement as the information flow could be one way (from the developing country to the developed partner).

The final question was about the relevance of considering cooperation in the setting of CLP when the characteristics of developing countries were often so markedly different in terms of their small markets and large informal markets.

This area has been looked at briefly in a workshop on the development dimension of CLP,[337] but it perhaps ought to be explored further; certainly it speaks to a potential need for greater South–South cooperation.

Session 2: Desirable impact and role of provisions on competition law and policy in regional trade agreements: experiences and bottlenecks

The need for cooperation on competition law and policy – The case of Malaysia
The Hon. Mr Hoo Seong Chong, Parliamentary Secretary, Ministry of Domestic Trade and Consumer Affairs (MDTCA), Malaysia

The Malaysian cabinet agreed in December 2005 to implement the Fair Trade Practices Policy (FTPP). The speaker noted that, in this regard, Malaysia is a small market and can sustain only a few players to benefit from economies of scale. Mr Hoo noted that Malaysia has taken a long time to adopt a competition law – previously state-owned enterprises played a very important role in ensuring that companies had the ability to compete in the global economy. The law, while it has yet to be implemented aims at creating a fairer and more competitive market. Initially, state advocacy programmes are being undertaken in four of the 14 states, and once the capacity of the Ministry of Domestic Trade and Consumer Affairs (MDTCA) improves, this will be scaled up.

To date, TA has been received from Japan, Australia and UNCTAD, but there is further need in terms of drawing up guidelines, investigation procedures and choosing cases with the greatest potential impact for consumers. Japan, for instance, has already given training to Malaysia on the exemption system in Japan, and how this might be implemented in a developing country such as Malaysia.

[337] http://www.tralac.org/scripts/content.php?id=4427

Increased TA from Japan is envisaged following the conclusion of the Japan–Malaysia Economic Partnership Agreement (EPA), with respect particularly to the cooperation chapter of that RTA.

The speaker then listed reports of cases in the local press, which give some indication of the impact of advocacy. This included an alleged beef cartel based in India, and the alleged KLIA taxi service monopoly.

Further steps in the implementation of the law included increased advocacy activities, training for investigators, administrators, judges and lawyers, institutional capacity building and the establishment of the Fair Trade Commission.

Improve the competition laws and policies and strengthen international cooperation and coordination
Yang Jie, Deputy Director Antimonopoly Division, Fair Trade Bureau, China

Ms Jie noted the importance of international cooperation in the face of cross-border cartels. She drew a distinction between bilateral cooperation, which requires coordination between the agencies of two countries on competition enforcement, and regional cooperation under which cooperation may be conducted under the auspices of an RTA. Finally, there are multilateral initiatives led by UNCTAD, the WTO, the OECD and the ICN.

She noted then that China's State Administration for Industry and Commerce carries out cooperation on competition matters through these three channels. In the bilateral agreement between China and the Russian federation, the parties undertake to provide laws related to unfair competition, monopolies and consumers' rights, pledge to carry out cooperation in these fields and undertake to increase interaction and exchange of views. To implement the outlines a Memorandum of Understanding (MOU) between the two authorities was signed in 2006–2007. This MOU provides for regular high-level meetings, an exchange of information regarding laws, rules and information, and provides for the possibility of a future agreement concerning cooperation in law enforcement. China has also signed a bilateral agreement containing provisions on anti-monopoly and consumer protection with Kazakhstan.

Ms Jie then outlined China's participation in international fora concerned with international cooperation and coordination. For instance, its delegates have been attending competition policy seminars held by Asia-Pacific Economic Cooperation (APEC) since 1996, and the Intergovernmental Group of Experts meetings organized by UNCTAD since 1998. There were also international CLP meetings held in Shanghai and Shenzhen organized by the State Administration for Industry and Commerce (SAIC) and UNCTAD in 1994.

The SAIC also participated in the Working Group on Trade and Competition in the WTO and participates as well in the OECD Global Forum on Competition. Although not a member of the ICN, China keeps a close eye on proceedings in that forum. Finally, Ms Jie noted the close cooperation and exchanges of ideas between the SAIC and certain developed country institutions such as those in the US, EU, Germany, France, Japan, the Republic of Korea and Australia; and developing country institutions, such as those in Russia, India, Brazil, South Africa and Thailand. Ms Jie spoke then about the other important international resources aiding the training of specialists in the development and

enforcement of competition law in China. These include the United Nations Development Programme (UNDP), the Asian Development Bank, the OECD and other country development and competition bodies such as those found in Japan, the Republic of Korea and Australia.

Finally, Ms Jie noted that China faces the challenges of international cooperation and coordination in a positive spirit. Their focus at the moment in terms of cooperation is on capacity building although they are paying attention to the development of mechanisms to confront the coordination problems in international competition law enforcement. She also spoke on the need to preserve policy space for development, for example through S&D treatment for developing countries, the exemption of export cartels, and tackling cross-border multinational company abuse of dominant position. Her final point was on the antithesis of anti-dumping to competition principles.

Negotiation on regional trade agreements including competition provisions: can trade and competition negotiators cooperate?
Keiichi Iwase, Deputy Director of International Affair Division, Japan Fair Trade Commission

Mr Iwase explained that competition policy is an important component to trade and investment liberalization, ensuring the free flow of goods and services.

He noted that Japan is concluding RTAs mainly with East Asian countries, taking into consideration their deepening economic relationships. These RTAs include competition provisions. Japan has also some fully fledged bilateral cooperation agreements with the US, the EU and Canada.

The RTAs being negotiated are much wider than FTAs in their scope, and Japan calls them EPAs. EPAs go beyond a standard FTA, and cover components such as 'trade in goods, services, investment, competition, intellectual property rights, business environment enhancement, dispute settlement and other forms of cooperation'.[338]

Although the competition chapter in the EPA is one of its components, the JFTC considers the EPA negotiation as an opportunity to have pseudo-bilateral cooperation agreements with other foreign NCAs. He noted that according to Japan's experiences, the JFTC could have a fully fledged competition chapter if both sides wished to do so.

On the other hand, when negotiating the competition chapter with the various East Asian countries, he notes that Japan recognizes the need to consider the various developmental levels of CLP when negotiating:

- With countries with an advanced stage of development: an emphasis on enforcement activities, and specifically cooperation in enforcement
- With developing countries the main focus would be on cooperation and building capacity: more flexible TA, and the establishment of a certain level of common understanding

In terms of the former, the Japan–Mexico EPA and the bilateral agreements with the EU, US and

[338] Iwase, K "Negotiation on RTAs including competition provisions: can trade and competition negotiators cooperate?" Submission to the UNCTAD/IDRC/KFTC 11th Workshop on Competition Policy.

Canada, have seen fully fledged cooperation in terms of notification, the coordination of enforcement activities, provision of relevant information, positive and negative comity.

In the context of EPAs with less-developed partners, he highlighted the need for more flexible enforcement cooperation, the creation of a framework for cooperation and the provision of TA in accordance with the level of development of the partner. Typically though the EPAs did place importance on: 'commitments to control anti-competitive activities within the scope of relevant laws and regulations, commitments to ensure consistency with the core principles of non-discrimination, transparency and procedural fairness when controlling anti-competitive activities, and commitments to cooperate in controlling anti-competitive activities in accordance with the developmental level of each country'.[339]

In the context of EPAs there were initiatives envisaged for policy dialogues for deepening mutual understanding, for training experts and trainers, and for creating an open platform for sharing and exchanging information. In this respect, he drew attention to the work of the East Asian Competition Policy Forum at http://www.jftc.go.jp/eacpf/.

He concluded that trade and competition negotiators can cooperate, provided that during negotiations both sides take into consideration what kind of cooperation will be possible with the counterparty.

The experience of the Republic of Korea with competition provision in regional trade agreements
Yongho Han, Deputy Director of International Competition Team, KFTC

The speaker noted that the Republic of Korea has been devoting particular interest in the negotiation of RTAs, as trade and foreign direct investment (FDI) are expected to bring economic growth, and deepening competition from market opening enhances productivity and competitiveness for domestic companies.

The speaker noted that recent RTAs cover a broader range of issues than simply tariff reduction, including references to many trade-related subjects such as services liberalization, provisions on cross-border investment, intellectual property rights, competition policy and trade remedies. Mr Han then detailed particular features of the Republic of Korea–Chile, Republic of Korea–Singapore and Republic of Korea–EFTA (Switzerland, Norway, Iceland and Liechtenstein) FTAs. Mr Han then described the major contents of competition provisions in these FTAs which he listed as: (i) application of competition laws against anti-competitive business conducts, (ii) mutual notification, (iii) consultations to eliminate particular anti-competitive practices that affect trade or investment between the parties, and (iv) exchange of information. While these are the broad categories that underpin the agreements, each is unique in its emphasis. Some FTAs include provision for bilateral TA. Although dispute settlement applicable to the CRPs is not in any FTAs, in the Republic of Korea–EFTA Agreement disputes are settled through the parties' Joint Committee.

Mr Han then outlined the ATAs that the Republic of Korea is party to. There are bilateral cooperation agreements with Australia, Mexico, Canada and MOUs with Russia, Romania, and 13 countries

[339] *Ibid. p.* 4

including 11 members of the Commonwealth of Independent States (CIS), as well as the EU and Turkey. Indeed ATAs are more common than RTAs.

RTA chapters are different to bilateral cooperation agreements: bilateral cooperation is usually more detailed and has established procedures for the avoidance of conflicts, consultation and exchange of information. They are easier to negotiate, as they cover only competition provisions negotiated by authorities, as opposed to trade ministries, and take into consideration the level of development of each of the two agencies and their respective competition laws and polices. For example, the agreement with Australia covers both competition and consumer protection law, the agreement with Mexico includes provisions on positive comity, and the MOUs with the CIS countries recognize their early stages of development and refer to TA.

The speaker noted that competition provisions in RTAs have not met expectations and that the less-binding ATAs had been much more effective in building cooperation or providing TA. On the other hand, more binding cooperation is only possible through RTAs. He concluded by noting that more effort must be made to make the most out of the CRPs in RTAs.

Harmonization and policy transfer in regional trade agreements
Bahri Özgür Kayalı, Yeditepe University and University of Manchester

The speaker addressed the questions of harmonization and policy transfer of CLP in RTAs. The three dimensions to policy transfer, which was defined as the willing adoption of best practices and policy alternatives based on governments studying each other's methods, are the legal framework, the institutional set-up and the policy network.[340] The legal framework can involve either soft or hard convergence (that is through imitation of best practice or through some binding agreement) and the institutional set-up can be either 'vertical' or 'horizontal.' The 'policy network' involves links and personal contacts. Thus, this refers to social relations enabling coordination, cooperation and understanding.

After this introduction to the theoretical framework underlying harmonization and policy transfer, he outlined the framework of the European Competition Network (ECN). Until the 1980s, the system could properly be described as a 'foundational' model with what cooperation there was between 'autonomous spheres of operation'[341] – and based mainly on personal contacts. Over time, this was replaced by the 'solar model' characterized by partial integration,[342] with the commission making decisions affecting all Member States, but with little interaction flowing the other way. In its current guise, following the formation of the ECN,[343] the system may be better described as a 'centralized interactive model'. The modernization of the EU competition law enforcement process increased decentralization, and called for increased Member State and EC cooperation.

[340] The possible definitions for 'policy network' were identified by the speaker as: stable patterns of social relations between independent actors (Kickerts); or method of coordinating activity and may arise spontaneously (Wilks).

[341] Gerber, D. (2005), "The Evolution of a European Competition Law Network" in C. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* Hart Publ'g: Oxford.

[342] Gerber *ibid.*

[343] Regulation (EC) No 1/2003, applied from 1 May 2004.

As stated in the EBRD publication *Law in Transition* (2004, p. 56), 'Regulation 1/2003 establishes a system of parallel competence in which both the Commission and Member States' competition authorities are competent to apply Articles 81 and 82 EC to cases capable of affecting trade between Member States'.[344] Guidelines have been provided on the allocation of competences, and the information obligations. What makes the interaction interactive though is that cooperation is not only between the Commission and the national authorities, but also between the authorities themselves. This includes the sharing of some confidential information.

The OECD (2005, p. 8) in summary states 'Modernization of the enforcement process, by eliminating notification and prior approval of exemptions while sharing enforcement responsibility with national agencies, is designed, among other things, to redirect resources so that DG Comp can concentrate on complex, Community-wide issues and investigations'.[345]

Discussions

William Blumenthal, the moderator of this session, launched the discussion by posing the following propositions about cooperation agreements to be discussed by the panel and audience:[346]

- Do most cooperation agreements really create a particular framework for cooperation (except for MLATs)?
- Usually cooperation agreements are not mandatory.
- Everything that could be made in the framework of an agreement could be done outside it as well.
- For the agreement to be successful cooperation needs to be indeed institutionalized.
- If competition is just one subject among others such agreements are taken less seriously by competition enforcers.
- If countries have competition agreements, do they need competition provisions in RTAs?
- Who takes the lead in the negotiations? Trade officials or competition officials?

Philippe Brusick noted that these statements failed to recognize that there is more related to RTAs: in particular that in some cases RTAs induce countries to create a law and authority (and that the RTA is a strong catalyst for competition laws). Once the authority has developed its capacity, this might pave the way for further cooperation. He noted further that when preparing an FTA both parties to the agreement want to free the market. If one does not have a national competition authority, the other may want it to have a competition law and authority, in order to ensure that there will be competition on a level playing field. Competition authorities may want to negotiate a specific agreement at a later stage once the authority is established.

Barbara Rosenberg noted that the MERCOSUR RTA, which had a competition protocol and which had been negotiated by trade officials, had not been effectively applied. However, two of the MERCOSUR

[344] http://www.ebrd.com/pubs/legal/lit041i.pdf

[345] "Competition Law and Policy in the European Union-2005" http://www.oecd.org/dataoecd/7/41/35908641.pdf

[346] Mr Blumenthal noted that the above propositions were originally made by Steve Ryan, from the EC, in a presentation entitled: *Formal agreements: don't exaggerate their importance for cooperation.*

member state NCAs – Brazil and Argentina – had subsequently negotiated an ATA concerning procedural issues. One of the problems with the MERCOSUR agreement was that two of the other member countries, Paraguay and Uruguay,[347] did not have a national competition authority.

Ana María Alvarez pointed to the lack of coordination between trade and competition experts as being an item of some concern. Ms Alvarez further questioned Mr Iwase on the possibilities of entering into agreements with countries without a competition law and authority. Mr Iwase replied that agreements are negotiated with countries that do not have NCAs, but enforcement activities are not possible in these cases, and so the scope is seen to be very different.

Mr Masruri, Malaysia, noted that in the Japan–Malaysia agreement, the main focus was on trade. He further remarked that it was important to involve officials from different areas.

Session 3: The way forward: promoting efficiency of regional cooperation in competition law and policy

Moderator Raymond Pierce, Deputy Commissioner of Competition, Canadian Competition Bureau, introduced the session.

Competition law and consumer protection enforcement in Sri Lanka
Sarath Wijesinghe, Chairman of the Consumer Affairs Authority, Sri Lanka

The Consumer Affairs Authority Act takes a unified approach to consumer protection and competition law enforcement. The Consumer Affairs Authority (CAA) is invested with investigative and adjudicative powers with respect to consumer cases whereas the Consumer Affairs Council (CAC) is tasked with the adjudication of competition cases. Hence, competition cases have separate investigative and adjudicative authorities. The main objectives of the Act include the protection of consumers against hazardous products and unfair trading practices. It also seeks to promote competitive prices and provide redress against anti-competitive actions. However, separate legislation is envisaged governing monopoly behaviour and merger regulation. This to some extent may weaken the legislation.

The CAA Act goes wider than earlier legislation, in that it covers both the public and private sectors, whether foreign or locally owned, or foreign or locally based. The chief constraints on the implementation of the law lie in capacity shortages – there are few qualified competition lawyers, and government budgetary shortages mean that there exist concerns about being able to attract and retain talented professionals. To counter this, the government is seeking increased TA, in terms of training investigators, building technical and analytical abilities, training in investigative procedure, developing advocacy programmes and building a consumer culture.

Promoting efficiency of regional cooperation in competition law and policy
Toshiyuki Nanbu, Director of International Affairs Division, JFTC, Japan

Mr Nanbu, began by noting the need for international enforcement cooperation between competition

[347] Venezuela is now also a member of MERCOSUR.

authorities in the face of the globalization of anti-competitive practices and the limits of jurisdiction of CLP.

With the liberalization of trade and investment, there may arise two kinds of increased anti-competitive activities. Firstly, there is anti-competitive activity in the host country by foreign businesses (international cartels, anti-competitive mergers and abuse of dominant position) as well as anti-competitive activities that affect multiple markets (mergers). Secondly, there are anti-competitive activities in the domestic market that impact on trade and investment. These can either involve import cartels, which constitute a large barrier to entry, or export cartels impacting markets in other countries.

The negative effects of these types of arrangements provide the motivation for cooperation in competition law enforcement. He noted in this respect, the spread since 1999 of formal, high-level international agreements providing for cooperation in competition law enforcement.

He then outlined the characteristic provisions for cooperation as found for instance in the US–Japan agreement concerning cooperation on anti-competitive activities.[348]

The global trend to position competition policy as an element in FTAs and EPAs, he sees as having two major components:

1) Commitments to control anti-competitive activities
2) Commitments to further enforcement cooperation.

In the incorporation of a competition chapter in an FTA or EPA, he noted that it was important to consider the current development of CLP in individual countries and gradually evolve from there. Thus, there should be a difference in the approach between the developed regimes and less developed regimes. In this regard, the scope of cooperation should be flexible. Cooperation frameworks should be 'comprehensive' – they should 'consider the potential for extending from commitments to control anti-competitive activities to measures to provide for cooperation among authorities, and also furnish technical assistance'. And agreements should incorporate the principle of incrementalism, foreseeing increased cooperation with increased institutional development (by way of illustration he pointed to the Japan–Malaysia EPA).

Japan's experience suggests that there is little operational burden from the notification, information exchange and enforcement coordination aspects of enforcement cooperation, since 'competition law enforcement activities have mainly focused on domestic anti-competitive activities and anti-competitive activities that are detrimental to the important interests of the counterparty do not occur on a regular, day-to-day basis'.

He concluded by reiterating that international enforcement cooperation between competition authorities is vital to secure the benefits of trade liberalization.

[348] These are: Notification, Cooperation for enforcement through information exchange, respect for the important interests of the counterparty (negative comity), requests for enforcement activities of the counterparty (positive comity), enforcement coordination, and consultations.

How can competition in bilateral and regional trade agreements contribute to growth, equity and poverty alleviation?
Luna Abbadi, Assistant Secretary General, Director, Competition Directorate, Ministry of Industry and Trade, Jordan

Ms Abbadi began by noting that competition law and policy helps to secure the benefits of trade and investment liberalization. She noted also that Jordan was the first Middle Eastern country to desire accession to the WTO following its establishment, and that Jordan completed the process of accession in 2000. She then outlined one of the significant RTAs to which Jordan is a party, namely the Great Arab Free Trade Agreement (GAFTA). This aims at the creation of a free trade area among the 22 member states. At this stage only four member countries (Egypt, Jordan, Morocco and Tunisia) have a competition law, although the agreement contains provisions for consultations leading to the progressive harmonization of trade systems, legislatures and policies.

The next part of her presentation was devoted to the EU–Jordan association agreement, which entered into force on 1 May 2002. This agreement aims to create a free trade area between the EU and Jordan by 2010, and contains competition provisions which mandate the adoption of substantive measures entailing the prevention of monopolistic practices, and details commitments regarding state monopolies of a commercial character, public enterprises and enterprises to which special or exclusive rights have been granted. Jordan received technical cooperation from the EU, in terms of assistance in the drafting of the competition law, education of Jordanian experts, and the creation of a competition culture in Jordanian society.

The FTA between Jordan and the US entered into force on 17 December 2001. While the agreement covered trade in goods and services, protection of intellectual property rights, environment, labour and electronic commerce, it did not contain any provisions relating to competition policy.

The Agadir partners (Egypt, Jordan, Morocco and Tunisia) aim to establish a free trade area between the member states by 2012. These countries are the only Arab states to have competition policy, which the speaker noted as being important in maintaining a healthy and competitive economic environment and in sustaining growth. Jordan thus developed a competition law 33/2004 which sought to enhance competitiveness, protect small and medium-sized enterprises (SMEs) and enhance Jordan's investment attractiveness.

Bilateral and regional trade agreements: exploring linkages between regional competitiveness, competition and consumer protection
Garid Byambaa, Director of International Cooperation Department, Unfair Competition Regulatory Authority, Mongolia

The speaker noted that Mongolia does not have any bilateral or regional trade agreements, although it is interested in signing an FTA with the US, as well as seeking membership in RTAs in the Asia Pacific region, particularly the Asia Pacific Trade Agreement (Bangkok Agreement) and the North East Asian FTA (Tumen River).

He noted that S&D treatment is very important in Mongolia, as a least-developed nation, and it will seek to secure such treatment.

After outlining some of the hoped for and expected benefits from increased liberalization of trade, he spoke about the relevance of RTAs for Mongolian competition policy. The relevance of CLP is relatively small in Mongolia, which has a very young CA. Mr Byambaa identified the Mongolian Competition Authority as needing RTAs as another instrument for promoting competition law and policy. Furthermore, the authority could benefit from increased interaction with other authorities as that would provide a valuable learning opportunity. He identified, thus, a need for NCAs to participate in trade talks, despite it usually being the case that only the Ministry of Trade is involved in trade negotiations. He then drew attention to the possible linkages of RTAs with enhanced competitiveness in the region.

In closing, he spoke about the Mongolian consumer protection law and the possible benefits from contemplating 'some forms of institutional support for Mongolian agencies involved in consumer protection [in] RTAs'.

Bilateral and regional trade agreements: expectations from a Nepalese trade perspective
Shanti Ram Sharma, Director Department of Commerce, Nepal

Mr Sharma concentrated his presentation on what he identified to be the main objective of Nepal in 'in concluding bilateral trade agreements and joining multilateral and regional trade frameworks [namely] securing its export interests within built-in special and differential treatment'.

He highlighted Nepal's extreme poverty and reliance on subsistence farming, as well as its troubled domestic politics, but pointed to the potential offered by hydropower and tourism. Trade with India comprises about 65 per cent of all trade, which was 're-energized after the conclusion of the Nepal–India Trade Agreement in 1996'. He noted, however, the declining competitiveness of Nepal in certain key areas following the conclusion of the Multifibre Agreement. He highlighted also in this regard, the problems with transportation costs, transit and customs delays and other transaction costs as constraints on trade.

He then concentrated his presentation on the bilateral relations of Nepal with its large neighbours, India and China. Nepal relies on India for transit purposes, although there are bottlenecks with respect to customs and transit procedures. Nepal hopes that this will be addressed, that investment will increase, that technical standards and customs classifications will be harmonized, and that India will assist Nepal in curbing informal trade between the two countries. Nepal hopes that China will match the trade preferences offered to Nepal by India and that in general trade between the two countries can be boosted. He also outlined the possible assistance that Nepal can offer in boosting Sino–Indian trade.

He then turned to Nepal's involvement in regional trade initiatives, particularly the South Asia Free Trade Agreement (SAFTA) and the Bangladesh–India–Myanmar–Sri Lanka–Thailand – Economic Cooperation (BIMST – EC). He noted that Nepal hoped to diversify its export base through these initiatives. BIMST–EC is viewed 'as a bridge between the five South Asian Association for Regional Cooperation (SAARC) and two ASEAN countries'. It is a framework agreement aimed at promoting trade, investment and technical cooperation.

He concluded by outlining the key strategies Nepal is pursuing to enhance its export capacities.

Discussions

The moderator, **Raymond Pierce**, the Deputy Commissioner of Competition at the Fair Practices Branch of the Competition Bureau in Canada launched the discussion by posing the following question: If there was one thing to improve the level of cooperation, what would it be?

Ms Abbadi from Jordan remarked that it was ensuring that there was a serious intention from the countries to the agreement to implement it. In the Agadir Agreement, four countries decided to adopt competition provisions in the framework of that agreement.

A Korean representative stated that it was the need for cooperation that determined its scope.

Mr Wijesinghe from Sri Lanka suggested that there was a need for centralization, harmonization and coordination. This would only be possible with developed world assistance.

Mr Nanbu from Japan emphasized the importance of the distinction between first- and second-generation agreements. Most agreements are of the first-generation type. Many small countries are ready to enter into second-generation agreements. However, it is not easy to sign second-generation agreements in view of confidential information restrictions.

He also noted that entering into formal cooperation agreement gives an advantage in competition advocacy.

Wrap-up session

Philippe Brusick summarized the proceedings of the first day of the workshop (the day specifically dedicated to the dissemination of the UNCTAD publication) and then outlined various areas that are important for further study:

Firstly, whether CLP has the ability to level income inequality and alleviate poverty reduction.
Secondly, it is important to look at the distribution of agricultural products and the prices of agricultural commodities. Here a key feature might be the monopsony power of multinational retailers, as well as other food wholesalers and distributors. Linked to this is the question of S&D treatment for competition in the agricultural sector.
The third potential area of study is whether cooperation between the trade and competition officials leads to a better implementation of RTAs.
Fourthly, the social impact of competition law has to be better understood, as well as the means for delivering the benefits of CLP to the general public.
Fifthly, in the realm of competition law and policy, the interrelation between law and policy and an appropriate delimitation of regulative space need to be determined.

Raymond Pierce noted the importance of the creation of a culture of competition, and in this respect the importance of a study of best practices in competition advocacy and an analysis of the role of competition agencies and legal framework to this end.

Eduardo Perez Motta posed the question of how CLP could become a driving force in the development process. He noted that in Mexico, there are bottlenecks in certain key sectors and that perhaps CLP could play a role here. He noted that regulated sectors are generally problematic, citing the examples of transportation and telecommunications. Best practice here would involve not only a sectoral aspect, but also an appropriate design of CLP institutions. How do the sectoral regulations work together to promote a more efficient economy?

Hyungbae Kim said that it was important to study and enumerate actual cases where CLP has contributed to improved welfare.

Barbara Rosenberg posed the question of whether we should regard RTAs and ATAs equally. It is also important to study further potential language covering rules on confidentiality. Furthermore, there needs to be an understanding developed regarding the extent to which it is convenient to have mandatory provisions on cooperation. These questions need to be answered in order to understand how the benefits of implementing the agreement might outweigh the costs.

Luna Abbadi noted that it is important to see to what extent countries commit themselves to the implementation of the RTAs they sign. She reiterated the importance of best addressing the interrelationship between sectoral regulation and competition.

Ana María Alvarez noted that it was important to interrogate carefully the possibility of criminal sanctions for *per se* national competition law infringements. She also wondered about the differing stated aims of the competition policy, when for instance there is the listing of considerations such as environment, competition and employment. How are these weighted in practice? How should they be weighted? She also said that the fundamental question here was whether or not it was a good idea for an RTA to have a competition chapter.

Session 4: International cooperation in cartel investigation and law enforcement

This session was moderated by Mr Philippe Brusick, Head, Competition and Consumer Policies Branch, UNCTAD.

Cooperation between competition agencies in cartel investigation and law enforcement
Cholsoo Han, Director General Competition Policy Bureau, KFTC

Mr Han began by noting the increasing presence of global cartels, and the difficulties individual agencies have in sanctioning those cartels, due to evidence being scattered in various jurisdictions and the confidentiality constraints on sharing that evidence. He identified one of the pressing issues as being 'to reach a compromise between the duty of protecting confidential information of a company under investigation, in terms of domestic laws, and the necessity of efficiently regulating international cartels through the exchange of information'.

He then provided an analysis of the types of cooperation being undertaken on international cartel cases, in the forms of informal cooperation, cooperation based on waivers, cooperation based on non-competition agreements and cooperation based on competition agreements. In the case of informal

cooperation, this is limited to what is outlined in the 1995 OECD recommendations and exchange of information is limited to what is publicly available. Nonetheless, notification of investigative and prosecutorial steps and exchange of open information and experiences can be useful. Cooperation based on waivers may involve exchange of confidential information when the company is applying for leniency. The problem here is that the cooperation 'lacks predictability in timing of the exchange of key information. And if countries are at different stages of investigation, they would have difficulties in coordinating investigation and sharing information'. Furthermore, cooperation based on waivers is dependent on whether or not both countries have established leniency programmes. Effective leniency programmes require transparency and predictability. Indeed, the recent increase in cartel enforcement due to self-reporting indicates the benefits of improvements in this respect.

The third type of cooperation (based on non-competition agreements) is made through MLATs in criminal matters. Cooperation here can be more extensive, involving testimony taking, process serving, executing search and seizure, and so on. Also, it is important here that 'the requested jurisdiction is not usually able to refuse completely to provide assistance'. The Republic of Korea has MLATs with the US, Canada, Australia, France, China and some others. However, since the Republic of Korea primarily addresses cartels with administrative means, MLATs are not used for international cooperation initially. MLATs can be used only when the national competition authority files a cartel report with the prosecutor's office.

Finally, Mr Han addressed cooperation arrangements through FTAs and through separate cooperation arrangements. He noted that such cooperation also follows the 1995 OECD recommendations, including notification of competition law enforcement, cooperation for non-confidential information exchange, and positive and negative comity. Since Article 62 of the Korean antitrust statute prohibits the disclosure of confidential business information, it cannot be shared.

The third part of the speaker's presentation concerned the experience of the Korean Competition Authority in the investigation of international cartels. The first considered was the graphite electrode cartel. The Korean investigations only began after the Canadian and US authorities had sanctioned the cartel. Thus, the Korean case began by gathering publicly available information and then investigating the impact of the cartel on the Korean market. This involved requests for certain documents from the cartel participants concerning market shares, prices and reasons for price changes. When starting the case, the KFTC notified relevant authorities and then requested documents necessary for its investigation. Helpful assistance was provided by the US DoJ and the EC DG Competition. None of the companies involved had local branches, and thus the KFTC requested the participants designate domestic agents to deal with the investigation process. The investigation was concluded satisfactorily, although there were some procedural difficulties in the service of documents, and there was only the provision of open and non-confidential information.

The second case he outlined was a case currently under investigation involving a possible international cartel on air cargo fares. He notes that in this case the EU, US and Korean authorities conducted simultaneous on-the-spot investigations, 'preventing destruction of evidence, and maximizing the effect of the investigation'.

Drawing from these experiences, the speaker concluded that efficient international cooperation requires 'proliferation and convergence of enforcement policy and practice'. Where some countries

punish cartels with administrative measures, and others have criminal punishment, it is not possible to make use of the MLAT. If leniency programmes are harmonized, then cooperation based on waivers may also be increased. There should also be an attempt to develop some more binding form of cooperation, although in the meantime, cooperation based on strong networks, other informal channels, and existing bilateral and multilateral agreements should be enhanced.

Fighting cartels in Indonesia: the cement case
Kurnia Syaranie, Director of Law Enforcement, Indonesia (KPPU)

Mr Syaranie first introduced the development of competition law in Indonesia. Following the decline in oil prices in the 1980s and the increased liberalization of trade emanating from participation in the ASEAN agreement and the APEC summit meetings, there was already discussion around this topic, but momentum was accelerated with the International Monetary Fund assistance programme during the 1997–98 Asian crisis. In 1999, the law was adopted.

In terms of Law No. 5/1999, there are provisions on various kinds of cartels, and interestingly, different provisions for different kinds of cartels (Article 5 addresses price cartels, Article 7 predatory cartels, Article 9 territorial cartels and Article 11 production and marketing cartels).

The speaker then introduced the details of the cement cartel case: The agreement involved exclusive marketing areas, exclusive distribution arrangements, joint marketing offices in distribution areas and a prohibition on cross-selling. The price was determined by SG (the main company which had entered into the agreement with the ten distributors concerned), which prohibited price competition. Based on collected evidence, the Commission for the Supervision of Business Competition (KPPU) found that apart from breaching the rules on retail price maintenance and exclusive dealing, the Commission judged the distributors to have formed a distribution and marketing cartel.

The KPPU gave an order to dissolve the consortium and imposed a fine of USD 1 million. The upstream firm, SG, was ordered to revoke the RPM and exclusive distribution clauses of the agreement and similarly fined.

The speaker concluded by saying that this case indicates the commitment of the KPPU to combat cartels and reiterates the desire of the KPPU for more international cooperation in the combating of cartels. Furthermore, he noted a need for further policy reform, harmonization and increased competition advocacy.

Enhancing capacity to challenge cross-border cartels in developing countries
Barbara Rosenberg, Getulio Vargas Foundation, Brazil

Professor Rosenberg noted that a prerequisite for international cooperation in cartel enforcement is local capacity. Since 2003, efforts at fighting cartels have gained increased emphasis in Brazil. The initial investigations showed that there was little concern from local business about the importance of competition law but as the cartel enforcement has got stronger, the evidence available has tended to vanish. This she noted implies a need for greater international cooperation. Thus far, some publicly available data from abroad has been used to open investigations in Brazil, but

there is no public record of a case in which Brazil has pursued joint international investigation or has used a cooperation agreement to request data collection, but as it develops internal capacity, it is able to profit from public information collected abroad.

Two questions arise with respect to the ability of developing countries to benefit from international investigations:

(i) To what extent can developing countries directly benefit from international investigations and evidence collected abroad?
(ii) Are there any indirect effects?

Indirect benefits:
(i) To the extent that deterrence and enforcement increase, a larger number of leniency agreements might be concluded in the country.
(ii) By developing local capacity, Brazil becomes better able to understand and process publicly available information and pursue its own investigations.

In principle, evidence collected abroad is admissible in Brazil provided that the due process rules of Brazil are respected. The capacity to increase deterrence and enforcement can be strengthened, with more successful searches and raids, and with the proper use of information received – taking note of both the quality and validity of evidence received (for example from anonymous sources).

In concluding, the speaker posed the question of whether developing countries are able to benefit further in terms of international investigation. At the moment, there are no reports of Brazil having been part of joint international investigations either in terms of its cooperation agreements or its MLATs. It is important to explore whether the reasons for this perhaps lie in the provisions of the cooperation agreements themselves, or in constraints in local institutional capacity.

Cartels and leniency programmes
Chee-Wah Cheah, Director, firstprinciples (Kuala Lumpur and Melbourne)

Dr Cheah noted that key features of a cartel are its secretive and deceptive nature and the fact that it involves very little documentary evidence. Thus, a national competition authority should, in addition to deterring collusive behaviour over the long run, aim at undermining the stability of existing cartels in the short run.

An important component of the above can be the introduction of a leniency programme for voluntary self-reporting of collusive activities by a cartel member. Leniency may be provided in the form of immunity from prosecution (as in the US) or reductions in fines (as in the EU). The latter form of leniency reduces the severity of the penalty compared to that imposed in the absence of full voluntary cooperation.

An effective leniency programme can improve economic welfare by shortening the operational lifespan (and by implication, the associated deadweight economic losses) of a cartel, as well as the time (and associated costs burden) of gathering the requisite evidence to prosecute a cartel.

Professor Gary Becker (the 1992 Nobel Laureate in Economics) introduced the idea that improving the probability of detecting (a crime) has a greater deterrence effect on risk-averse economic actors than increasing the penalty (for the same crime). The application of this economic idea to the structuring of a leniency programme suggests that emphasis should be placed on enhancing the probability of detecting a cartel by appropriate design of the incentives for voluntary self-reporting. The crucial elements of incentive design include:

(i) What form of immunity?
(ii) When is it granted?
(iii) To whom is it granted?
(iv) How is it granted?

The issue of incentive design has been examined by economists through the lens of Game Theory. Hinloopen (2003) demonstrates by way of an infinitely repeated Nash game that where there is already a high penalty for breach of antitrust law, a cartel member is more likely to 'blow the whistle' through a leniency programme that provides a large reduction in penalty for the whistle-blower only.[349] In the repeated Bertrand game of Chen and Harrington (2005), the theoretical results provide some support for the idea that a leniency programme can make collusion more difficult, but a programme with partial waivers of penalties can *increase* cartel stability.[350] Motchenkova (2004) constructed an 'optimal stopping game' to examine the circumstances under which cartel members will be motivated to pre-empt one another in 'blowing the whistle'.[351] Her theoretical findings suggest that a leniency programme with strict rules, *viz.* confidential application of leniency with the penalty waived only for the first whistle-blower, *will be more effective* in undermining cartel stability.

On the basis of the theoretical findings so far, Dr Cheah is of the view that:

> An effective leniency programme is one that confronts cartel members with high-powered incentives to pre-empt one another
> To avoid diluting the incentives for whistle-blowing, international cooperation should be structured on the basis of communication (and information sharing) procedures and processes that maintain the confidentiality of the initial whistle-blower.

Tackling cross-border anti-competitive practices: ways to enhance cooperation amongst enforcement agencies through technical assistance
Abdul Ghaffar, Monopoly Control Authority, Pakistan

Mr Ghaffar spoke about the cross-border anti-competitive activities from increased cross-border trade and investment, the restrictions on competition arising from import and export cartels and finally the anti-competitive actions of governments such as distortionary subsidies. He began by noting that where there is no competition legislation in a jurisdiction, there is a need to develop the law and institutions and capacity building. He noted further that closer cooperation on competition

[349] See Hinloopen, J. (2003), "An Economic Analysis of Leniency Programs in Antitrust", *The Economist*, 151(4), 415–32.
[350] Chen, J. and Harrington, J.E., Jr. (2005), "The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path". http://www.econ.ntu.edu.tw/sem-paper/94_2/micro_950330.pdf (accessed 12 August 2006).
[351] Motchenkova, E. (2004), "Effects of Leniency Programs on Cartel Stability". http://ideas.repec.org/p/dgr/kubcen/200498.html (accessed 12 August 2006).

can strengthen the efforts of individual competition agencies and may help to eradicate the chances of private anti-competitive practices.

He cited various cooperation agreements between developed countries, and looked at the multilateral activities undertaken by organizations such as UNCTAD and the ICN, in terms of their efforts in promoting cooperation, capacity building and, in some cases, harmonization.

He outlined the following issues for consideration:

- Developing countries have not participated in cooperation agreements in a major way as their economies are underdeveloped; there were not many international transactions.
- There are impediments to cooperation as there is no competition framework and supporting legal provisions.

He emphasized that the type of international cooperation required by developed and transition economies differs at the initial stages. Whereas developed economies require cooperation in simultaneous searches and raids (so-called dawn raids), and so on, developing jurisdictions having nascent or fragile competition authorities would need international cooperation in capacity building.

He then outlined Pakistan's experience. During the last year there were four cartel cases, two each in the sugar and cement industries. The Monopoly Control Authority (MCA) was successful in the sugar cases but not in the cement ones. He noted that the MCA was never contacted by any counterpart agency to share/exchange information on cartel investigation nor was any case taken by the MCA on cross-border spillovers. There is, thus, a need for enhanced cooperation.

His conclusions on the way forward call for a comprehensive step-by-step approach to cooperation and TA:

- To gather information, promote dialogue and study each economy's requirements, laws, procedures, and so on.
- To identify technical assistance needs in the form of a model cooperation agreement.
- To help the transition economies in framing proper competition laws, in designing effective competition institutions, exchange information regarding best international practices in the competition law sphere; and
- To help developing economies in capacity building.

Dealing with cross-border cartels: perspectives from Bhutan
Dophu Tshering, Joint Director, Internal Trade Division, Bhutan

Mr Tshering began by noting that Bhutan has a trade to GDP ratio of 80 per cent, which underscores its vulnerability to cross-border cartels. Almost all of Bhutan's trade is with its neighbouring countries (China and India) and it relies on them for trade and transit due to Bhutan's landlocked status. Mr Tshering highlighted Bhutan's vulnerabilities to road transport cartels operating on the Indo–Bhutan borders due to the inherent weaknesses of a small economy. Such cartel formation and operations become possible as the scale of the Bhutanese economy cannot attract players or service providers

from other areas.

Mr Tshering pointed to the possible negative impact that Bhutan has felt due to the recently uncovered cartels in steel, heavy electrical equipment and vitamins in terms of increased prices. He noted that import cartels increased the bargaining power of domestic firms with respect to their foreign suppliers though they could impede the market access of exporters.

He stated that Bhutan did not currently have a competition law in place. The Bhutanese government, however, 'initiated a process of de-monopolization as early as 1992'. This involved prohibiting exclusive dealership rights by the principal companies and their subsidiaries. He related the examples of bilateral negotiations between the Bhutanese government and Hindustan Lever Ltd and Nestle India Ltd, which resulted in the appointment of a number of local Bhutanese firms as their agents. This provided consumers with a choice of suppliers and even lower prices.

Current developments in Bhutan included the debate on a national consumer protection law, including prohibitions on unfair trade practices, and possible future negotiations with India about its export cartel exemption.

However, the speaker pointed out that Bhutan simply does not have the economic power to deal with international cartels. In this respect, Mr Tshering noted that a regional competition framework, perhaps in the SAFTA agreement, could be a solution. He noted that there is provision made for competition rules in SAFTA in Section 3 (b).

Discussion

In the discussion concluding the session, **Raymond Pierce** noted that in Canada's experience, cases that have to be based on documentary evidence fail more, and that therefore leniency programmes are very important. In leniency applications, reaction time has been found to be very important. Another important component of successful cartel investigation is the capacity to find digital evidence.

Finally, it was suggested to the audience that the right way to approach the better functioning of leniency programmes was to continuously ask oneself: How do informants and competition authorities think?

Session 5: Introduction of competition to the regulated industry

Relationship between national competition authority and regulatory agency
Hyungbae Kim, Consultant, Competition and Consumer Policies Branch, UNCTAD and Director, Korea Fair Trade Commission

Mr Kim began by identifying four different types of rationale for regulation arising out of market failure. These were the existence of a natural monopoly, significant externalities, imperfect or incomplete information, and market power or concentration. Regulation could be *ex-ante* or *ex-post* sector regulation (economic and technical is of the first kind) and, excepting for mergers and acquisitions, competition law enforcement is of the second kind.

Specific regulation may also be required in sectors with network characteristics and in sectors with universal service obligations. This means that sector-specific regulators often pursue a broad range of goals, whereas competition authorities primarily focus on static and dynamic efficiency. The *ex-post* approach is often less susceptible to regulatory capture.

Mr Kim then turned to the overlap in responsibilities between competition authorities and sector regulators and the best ways to manage that overlap. Where there is an unclear delineation of authority, there is bound to be a clash – as was experienced in the Republic of Korea in a case concerning wireless companies. Mr Kim warned of the potential for forum shopping and the dangers of firms being subject to two sets of regulations ('double jeopardy'). Notwithstanding conflicts, the ultimate objectives of the two sets of regulators are the same – lower prices, higher quality, and broader choices. The important thing then, was to properly define the relationship between the two bodies.

The next part of the presentation was concerned with outlining the four approaches. These are: that the national competition authority assumes all authority for a sector, that the national competition authority assumes authority over competition issues and the sector regulator authority over regulatory issues, that there is concurrent jurisdiction, or alternatively that regulators assume jurisdiction over all aspects of a sector. Mr Kim noted that most countries, the Republic of Korea included, follow the second approach although in some instances (to do with mergers and acquisitions) there is concurrent jurisdiction. He notes also, that the KFTC will be strict in its application of CLP to regulated industries and that it will strengthen its advocacy role.

The final part of his presentation focused on conflict resolution between competition authorities and sector regulators. This requires clear demarcation of responsibilities, and well-defined formal or informal coordination and cooperation strategies. Formal cooperation strategies can include the drafting of MOUs, and detailed cooperation and consultation arrangements. Informal cooperation might include frequent meetings and information exchange.

Mr Kim concluded that the variety of experiences suggested that this was not a case of 'one size fits all', but that it was certainly important for countries to share experiences. Two trends arising from this process are:

1. the role of competition authorities in regulated industries have been increasing, and
2. there is a convergence towards the idea that competition issues are primarily taken by the national competition authority.

Introducing competition to the regulated industry: Indonesian case
Taufik Ahmad, Policy Analyst, Commission for the Supervision of Business Competition, the Republic of Indonesia

During the time period from 1967 to 1980, Indonesia was a centralized economy, characterized by strong and large state-owned enterprises and numerous unfair competition practices. Some liberalization began first in 1980 in the financial sector, and this was followed in the mid-1990s by greater liberalization in trade, with the signing of agreements such as in the context of APEC, the ASEAN Free Trade Area (AFTA) and the WTO.

The competition law was enacted in 1999. Mr Ahmad identified the key role played by the KPPU at this time, in advocating the consideration of competition principles and in discontinuing rigid regulations in certain key sectors.

In terms of the airline sector, the KPPU advocated the government to take the power of regulation away from the Indonesian National Air Carrier Association, which it did. This liberalization of the airline sector has led to an increase in the number of airline companies and a significant decrease in the flight tariff. Cargo transportation and passenger use have both seen sharp increases in response.

In the area of telecommunications, there has been a similar shift away from conditions of monopoly and dramatic price decreases. This has also been positively spurred by technological improvements. In the oil and natural gas sector, there has been some liberalization in the upstream sector, although downstream there are greater problems, mainly arising from the fact that 85 per cent of fuel traded is subsidized. Nonetheless, for non-subsidized fuel, there has been new entries.

Mr Ahmad then presented some challenges for further privatization and liberalization. Firstly, there are some concerns about the state losing control of certain assets. Secondly, there are concerns about the appropriateness of the competition mechanism in network industries. Thirdly, there is resistance to change from incumbent business operators, especially those controlling essential facilities.

He noted that the effective introduction of competition in these industries was a close collaboration between the competition agency and the sector regulator. He pointed to effective partnerships between the KPPU and the Departments of Transport and Communication and Information in the airline and telecommunications sectors, respectively.

Competition and regulations: lessons from Singapore
Christopher Tan, Deputy Director, Legal & Enforcement Division, Competition Commission, Singapore

Mr Tan gave a brief overview of Singapore's competition law framework. Singapore's Competition Act ('the Act') is largely modelled after the UK competition regime, which is in turn based on the EC model. The Act prohibits three forms of activities, namely, (i) anti-competitive agreements and concerted practices, (ii) abuses of dominant position, and (iii) mergers that substantially lessen competition. The Competition Commission of Singapore (CCS) has the power to commence investigations and, upon establishing a breach of the Act's prohibitions, to impose (civil) sanctions. A private right of action can be brought by private parties after the CCS makes a finding of infringement and the avenues of appeal against that finding have been exhausted. The implementation of competition law in Singapore is being conducted in three phases, with the prohibition against mergers that substantially lessen competition coming in the final phase. The CCS has been making efforts to increase the awareness of competition law in Singapore through various outreach programmes. Certain regulated sectors that are already governed by their own competition regulatory frameworks (for example, media, gas and electricity, telecoms, auxiliary police) have been excluded from the Act's prohibitions. Furthermore, certain infrastructural sectors are also excluded. Cooperation between the CCS and the regulators of these sectors is envisaged when cross-sectoral competition issues arise.

Relation between competition authorities and regulatory bodies
Victorio Mario A. Dimagiba, Director, Bureau of Trade Regulation and Consumer Protection, Department of Trade and Industry, Republic of the Philippines

The speaker began by explaining that the Philippines has no overarching competition policy or law, and the competition bill has been in the parliament for 10 years, although certain competition provisions are in the regulations governing some key sectors. For instance, the National Telecommunications Commission is developing a competition framework for that sector.

Mr Dimagiba then turned to consider the efforts in this area. He considered first the difficulties to do with introducing competition in the fixed line, mobile and Internet and data service markets: mainly to do with high access charges, price squeezing and cross-subsidization and spoke of the need 'for policies to impose market power obligations requiring a different regulatory treatment between dominant licensees and non-dominant ones'. He then considered further possible approaches in this area such as *ex-post* price regulation.

Drawing from the example of telecommunications regulation, he noted that it is important that the principles of CLP be applied throughout the economy. Sectors could be covered by additional regulations and regulators but it was important to synchronize the efforts of the NCA (should it be established) and the sector regulators.

Competition Provisions in Regional Trade Agreements
Trade Law Centre for Southern Africa (tralac), Cape Town, South Africa, 4 October 2006

Report of the session

Executive summary

On 4 October 2006, the Trade Law Centre for Southern Africa (**tralac**) hosted the fourth in a series of events aimed at disseminating the findings of the UNCTAD/IDRC publication, *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, in Cape Town, South Africa.

The workshop consisted of three sessions: the first introduced the general framework of regionalism in Southern and East Africa. The difficulties of overlapping agreements were emphasized at length here. Countries are at present committed to more than one putative future customs union (CU), and furthermore there is the impact of the Economic Partnership Agreement (EPA) negotiations and configurations. The session also introduced the motivation for and political economy of competition law and policy (CLP) in the region as well as the divergent merger procedures mandated by those authorities in possession of a competition law and authority. The second session continued by looking more closely at competition provisions within regional trade agreements (RTAs). Speakers looked at the existing (weak) regional competition law architectures, competition provisions in North–South RTAs, and the potential national implications of competition-related provisions (CRPs) in RTAs. The final session turned to more practical matters. The first speaker addressed the Brazilian approach to the relationship between competition and intellectual property rights in the pharmaceutical industry, the second presented a case study of where competition policy was used to promote access to essential medicines, and the third addressed the potential scope (and dangers) of exceptions and exemptions in competition law.

Introduction

The workshop was organized jointly by the Trade Law Centre for Southern Africa (**tralac**) and UNCTAD with the support of the Canadian International Development Research Centre (IDRC). A number of competition experts, including UNCTAD staff, representatives from national competition authorities (NCAs) and academia were invited to give their inputs.

The opening statement was made by **Trudi Hartzenberg**, Executive Director of **tralac**, and placed emphasis on what competition can do for the region. The complexity in the estimation of economic benefits from competition provisions in RTAs was also noted. The importance of regional competition provisions to act as a major complement to the current efforts to develop an open, rules-based, predictable, non-discriminatory trading system, with a fair distribution of benefits for all developing countries was highlighted. Furthermore, it is important for an effective operating CLP to address private-sector and consumer organization capacity.

Ana María Alvarez spoke on the role of UNCTAD in developing countries. She noted that discussion on RTAs is increasing in the world and that developing countries should take a greater part in these

discussions, referring in the context of competition to the Ad Hoc Expert Group on Competition Law and Policy, which was to be held on 30 October 2006 in Geneva. She also gave a brief overview of the recently published *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, which was launched in October 2005 at the 6th IGE meeting on CLP in Antalya. The message from the articles in the publication is that there is an important link between competition and trade and there is a need to support developing countries' initiatives.

Judge Dennis Davis (Cape High Court, Judge President of the Competition Appeal Court of South Africa) gave the keynote speech.

He stressed that there were two profound aspects to consider when thinking about the development of CLP. The first thing to consider is the global context of trade which he characterized as diametrically opposed to competition on the merits[352] in the sense that there was extensive use (especially by developed countries) of tools such as tariff and non-tariff barriers, subsidies, and countervailing measures. Furthermore, some countries exempt export cartels (for example, the US Webb Pomerene Act) from competition law. This is the context in which national and regional CLP is to be implemented. In brief, the rules of the global economy do not comply with the very principles advocated for competition law, which in turn raises the question as to the absence of incentives for developing countries to adhere to competition on the merits. This then led to his second focus, namely the potential role of national or regional competition regimes within the constraints imposed by the global context.

Even within the constraints on competition on the merits at a global level, national competition laws still have a role to play in disciplining anti-competitive practices. For instance bid rigging in government procurement is an immediate area where governments (and citizens) can see the benefits of effective competition law enforcement. By ensuring that the tender process is based on clear, rational objectives, efficiency of key national projects can be ensured while the cost to the taxpayer is minimized.

Judge Davis then turned to the implementation of CLP in a developing country context, pointing to the severe limitations in empirical evidence and economic expertise characterizing investigations in these settings. While competition law is in some jurisdictions, in principle, meant to address equity and employment (as well as efficiency) objectives, it is extremely difficult to evaluate and weight competing claims in the absence of measurement (and with a shortage of competition economists who can undertake such measurement). Without measurement, it is impossible to consider such factors in a rational and transparent way, and hence the courts must rely on a 'legalistic' approach. These are the challenges facing nascent competition authorities, and this is the context informing the day's deliberations.

He concluded by speculating that regional-level resource consolidation may solve some of the problems that affect developing countries.

[352] For a discussion of this concept, see the June 2006 OECD Policy Brief on this topic. The OECD has also hosted a best practices roundtable on this topic in 2005.

Session 1: Competition issues in Southern and East Africa

Trudi Hartzenberg, Executive Director of **tralac**, moderated this session.

Promoting development through competition law and policy at a regional level: stocktaking of the UNCTAD/IDRC project
Ana María Alvarez, project leader of the UNCTAD/IDRC Project on Trade and Competition: Regional issues

Ms Alvarez's presentation gave an introduction to the day's topic, by first introducing how CLP can contribute to development, then by sketching the relationship of CLP to trade and RTAs, and finally by outlining the types of CRPs that can be included in an RTA.

As has been well documented, the benefits from trade liberalization can be undone if government restraints in the form of tariffs are simply replaced by private restraints in the form of anti-competitive conduct. Import, export and international cartels all clearly have an impact on trade, as do other exclusionary behaviours (such as vertical restraints). Furthermore, cross-border mergers and acquisitions, as well as certain extraterritorial mergers can affect the domestic market. The lessons Ms Alvarez drew from these facts were: without an effective CLP, there was not much an affected country could do. Even with a national competition authority, bilateral and multilateral cooperation would be necessary. Finally, there is potentially a place for regional competition rules to address the capacity constraints of small and poor developing countries.

The second part of her presentation focused on the benefits of RTAs more generally. These can include increasing economies of scale, creating a larger and more attractive market for investment, and increasing competition. She then outlined the different forms of competition law enforcement that could be applied in a regional setting. Countries may commit to each adopt and enforce CLP on a national level and there may be the adoption of a common supranational competition authority.

These distinctions led into her discussion of competition-related provisions in RTAs, the subject of the book being disseminated at the workshop. It is important to study the burden of the implementation of competition-related provisions in RTAs, the relationship of these provisions to other formal types of cooperation agreements (Mutual Legal Assistance Treaties (MLATs), agency-to-agency agreements (ATAs)), as well as the strengthening of relationships and the promotion of harmonization currently being fostered by informal cooperation arrangements such as in the International Competition Network (ICN).

One also then needs to examine the interests of developing countries with respect to the types of competition provisions in RTAs. The types of provisions Japan includes regarding enforcement cooperation, for instance, vary according to the capacity of the trading partner. Furthermore, technical assistance (TA) provisions are in many cases appropriate and indeed necessary. The final part of Ms Alvarez's provision provided a taxonomy of the different types of CRPs found in EU trade agreements, a topic that will potentially be important for Sub-Saharan African (SSA) countries negotiating EPA agreements with the EU.

Rationale and architecture of regional integration in Southern and East Africa
Colin McCarthy, tralac associate

Professor McCarthy focused on two models: a Free Trade Agreement (FTA) on intra-regional trade in goods and a CU in which a common external tariff exists, while noting that this can extend to even deeper forms of integration, and that many regional arrangements are characterized by the phenomenon of variable geometry. He then outlined the traditionally understood benefits and costs of regional integration. The former includes the conventional argument on trade creation, access to larger markets and commensurate economies of scale and increased dynamic benefits. The speaker noted that the normal argument is that regional integration (RI) encourages investment, both local and foreign but also promotes the improvement in policy credibility and opportunities to revise the tariff structure. The costs involve trade diversion, loss in policy sovereignty and agglomerate economies that could increase regional inequality. He argued that countries only participate in RI when they perceive that the costs are outweighed by the benefits.

He then sketched the existing trade arrangements in Southern and East Africa. These include the Southern African Customs Union (SACU) between South Africa and the BLNS (Botswana, Lesotho, Namibia and Swaziland) countries. Within this, there is a common monetary area within South Africa and the LNS (Lesotho, Namibia and Swaziland) countries. The EU and South Africa have signed an FTA called the EU-SA TDCA (European Union–South Africa Trade, Development and Cooperation Agreement). Then there is the Southern African Development Community (SADC), which includes the SACU countries and nine others and which has a roadmap to a CU, the Common Market for Eastern and Southern Africa (COMESA) countries which also have a roadmap to a CU and the East African Community (EAC) (Kenya, Uganda, and Tanzania). There is significant overlap in membership in these agreements, which may lead to significant challenges and the need to take hard decisions. Furthermore, there are the ongoing EPA negotiations between the EU and the SADC-7 and ESA groupings of countries. These complications lead to the need for 'RIA [Regional Integration Area] re-engineering'. He then posed the question: 'How do we deal with the potential conflicts of South Africa's economic dominance?' In conclusion, he noted that these difficulties meant that 'the development of competitive markets will require an appreciation of the workable, a commitment to restructure RIAs, and [the need] to be modest in our expectations and roadmap design'.

Infant industry protection in the Southern African Customs Union: the Namibian UHT milk industry
Omu Kakujaha-Matundu, Namibian Competition Commission and the University of Namibia Economics Department

Mr Kakujaha-Matundu noted the asymmetry in development found within the SACU, suggesting that as competition was only possible between 'teams in the same league' that this was a hindrance to competition. He then proposed to examine the relationship between Articles 26, 38, 40 and 41 of the SACU agreement in light of a case study from the Namibian dairy industry.

He further noted the arguments for regional integration in terms of greater openness and competition having positive welfare effects. However, he noted that economic convergence was a 'prerequisite' and that there was 'greater risk of polarization from asymmetric levels of development'. He continued thus by suggesting that protection was thus a necessity, but that it was better effected by being

applied to more than one industry. He noted that a common SACU industrial policy would thus identify industries for infant industry protection (IIP). He thus pointed out that competition policy (in terms of Article 40 of the SACU agreement) in the context of asymmetry in development between on the one hand South Africa, and on the other the BLNS countries was an uneasy instrument.

He then set about examining the case of the Namibian UHT ('long life') dairy milk industry. This industry is under threat from South African UHT milk, and currently receives IIP in terms of the SACU agreement, which is set to expire in 2008. Namibia has applied for such protection to be extended for a further 3 years, as well as the nature of the protection to be shifted from a specific to an *ad-valorem* tariff. The arguments in favour of protection he listed as including the 'development imbalances' and strategic objectives (employment and future exports).[353] Against this, one must consider the interests of importers, consumers, as well as the continued failure of the Namibian dairy industry to achieve maturity. He concluded his analysis of the case study by recommending that a full cost–benefit analysis be conducted. He also noted that it was unclear who the appropriate body to weigh the evidence is.

His presentation reached the following conclusions:

1. Asymmetry poses a threat to competition
    - Protection on a sectoral basis without a comprehensive industrial policy, no solution
2. Article 26 (Trade Development), no solution without
    - Implementation of Article 38 (common industrial policy)
    - Proposed annexure on competition law and regulations
3. Article 40 (competition policy) is a function of Article 38

He recommended the need to hasten the drafting of common industrial development policies for the SACU (Article 38), and to accelerate ongoing efforts of developing an annexure on competition to the agreement.

Anti-competitive practices in South Africa: possible consequences for Southern and East Africa

Thulani Kunene, Enforcement and Exemption Division, South African Competition Commission

Mr Kunene noted that South Africa is an important source for foreign direct investment (FDI) in Southern and East Africa in terms of telecoms, financial services and mining. It is important to bear in mind that some of these jurisdictions do not have competition authorities and effective competition law enforcement. Furthermore, due to the territorial nature of competition law, unless there are anti-competitive effects of actions in South Africa, the South African competition authorities have no jurisdiction. For instance, if export cartels and South African companies are 'abusing dominance' abroad they cannot be investigated by the South African competition authorities. This may raise problems for those countries lacking an authority. In fact the SA competition laws allow for an exemption for anti-competitive conduct that promotes exports, for example export cartels. Exemptions have been granted to export cartels (for example citrus fruit exporting to the US).

[353] Note also that a large proportion of Namibians lack access to refrigeration and thus a stable, affordable UHT milk supply is extremely important in that country.

In South Africa, it has been alleged that the high cost of communications is at least in part due to anti-competitive conduct by former SOE, Telkom. This is a company with extensive investments in Southern Africa. Similarly, in the case of SASOL which dominates the fertilizer market in South Africa, SABMiller which dominates beverages in many southern African countries, the major banks in South Africa and South African Airways, the largest airline on the continent. All of the above have been alleged to have engaged in anti-competitive conduct in South Africa, and all have significant investments in Southern and East Africa.

The above cases raise concern about whether these companies are possibly engaging in unlawful conduct in these countries. Furthermore, it indicates the importance of cooperation between African competition authorities.

Merger approvals in Africa: a practitioner's experience
Nkonzo Hlatshwayo, Webber Wentzel Bowens

Mr Hlatshwayo noted that competition regulations have been seen to slow down transactions in Africa. Indeed, the introduction of competition legislation in Africa is a relatively new phenomenon – since 1990, competition legislation has been enacted by Kenya, Zambia, Tanzania, Zimbabwe, South Africa, Malawi and Namibia. Other countries are also in the process of developing and adopting competition law.

Mr Hlatshwayo then turned to the challenges that face the legal practitioner. Firstly, it must be noted that the trigger for merger notification varies between on the one hand South Africa, Zimbabwe and Namibia, and on the other Kenya, Zambia and Swaziland. In the first group, the trigger is the acquisition of control over a pre-determined financial threshold. In the second case, notification depends on the substitutability of the products. In practice, this can create a fair degree of uncertainty. Mr Hlatshwayo noted also that in the case of Tanzania, there is both a notification and exemption regime for mergers. Per se prohibited mergers may be exempted for 1 year. This is a peculiar provision since it is not clear why parties would wish to merge for 1 year.

The *analytical framework* for mergers also differs across jurisdictions – while some countries employ a significant lessening of competition test, others employ the dominance test, which might be overly restrictive in small markets. Furthermore, some jurisdictions lay out public interest as well as competition tests, and some also make provision for the consideration of efficiencies and the failing firm defence. There exist also differences *in time frames* for merger reviews. The remedies and punishments in cases of non-compliance again vary across jurisdictions. Fines may be linked to turnover – in terms of both ceilings and floors – and there may also be criminal prosecutions.

There is room for great improvements in *transparency*. Authorities often do not provide guidelines, detailed reasons for decisions or written advisory opinions. Communication difficulties may be alleviated by such 'soft issues' as electronic communication, websites, and the greater availability of officers.

In his concluding remarks, Mr Hlatshwayo noted that many of the issues are being tackled under the ICN, but it is unclear whether African authorities are willing to accept and implement ICN initiatives. He suggested that there might be room for an African Competition Network that would work towards

the *harmonization* of the substantive provisions of the law and investigation procedures.

Discussions

A first question from **Margaret Chemengich** from the Ministry of Trade and Industry in Kenya considered the issue of overlapping memberships in RTAs and a second was directed at how practising lawyers dealt with merger notifications in Southern and East Africa. **Colin McCarthy** noted that there were historical reasons for overlapping memberships, and that originally the agreements had had very different motivations. **Nkonzo Hlatshwayo** responded to the question on merger notifications by reporting that the process is a piecemeal one and that the enquiry into whether or not a merger is notifiable is often very time consuming.

San Bilal from the European Centre for Development Policy Management (ECDPM) made the point that establishing a solid competition regulation environment is very difficult if you have problems in the legal system itself that could hinder the regime (such as corruption).

Diana Mandaza, Zimbabwe Competition Commission, inquired about how joint ventures are dealt with in the South African competition regime. **Mr Hlatshwayo** responded that joint ventures are treated as ordinary mergers. He gave the example of the proposed joint venture between Shell (SA), BP South Africa, Caltex Oil and Trident Logistics which in 2000 the Competition Commission had recommended be prohibited. The parties at that point abandoned the joint venture. The grounds for the recommendation were that there were no mitigating factors to offset the anti-competitive effects of the merger and, furthermore, there were no public interest grounds on which to justify the merger.

Thulani Kunene made the point that for national companies to be able to be competitive internationally, they would need to be competitive domestically. Thus a 'national champion' type exemption argument, was often not very compelling. On another point, he noted that it was an important point that South Africa's neighbours often do not share the same objectives as the South African authorities; some areas where there might be divergence are for instance Black economic empowerment (BEE) and the promotion of small and medium-sized enterprises (SMEs). This could have an impact on competition law enforcement, particularly in a regional context.

Omu Kakujaha-Matundu reiterated the point that it is extremely difficult to integrate unequal economies. Even within a country this is the case.

Session 2: Regional approaches to competition law and policy

The session was moderated by **Kim Kampel**, ITED, South African Department of Trade and Industry.

Competition provisions in regional trade agreements: assuring development outcomes through cooperation research and assistance
Ana María Alvarez and Laurence Wilse-Samson, Competition and Consumer Policies Branch, UNCTAD

The first part of the presentation introduced the role of UNCTAD in assisting countries with each

step in building an effective national CLP regime and hence enabling them to take an active role in competition law enforcement and enforcement cooperation, implemented at the appropriate speed for each jurisdiction.

The second part then turned to the work being undertaken in the UNCTAD/IDRC project 'dissemination phase'. There are two (not unrelated) aspects to this work. Firstly, it is important to look at the barriers to, motivation for, and the degree of implementation of, competition provisions in RTAs. Secondly, to examine the potential social impact in developing countries of CLP, and to analyse the particular difficulties developing countries have in implementing an effective CLP.

The types of hurdles to implementation of competition provisions in RTAs can be either in terms of constraints at the national level, in terms either of absorptive capacity constraints, inadequate legislation and domestic concerns about industrial policy, or at the international level, in terms of inappropriate or ill-defined cooperation arrangements or concerns about the national interest – in terms of national security and 'national champions'. In order for UNCTAD or other bodies' TA programmes to be more effective, and the benefits implied by trade liberalization to be realized, a detailed taxonomy and careful research of the motives for the degree of and barriers to implementation need to be conducted.

The next part of the presentation focused on outlining the potential ways of promoting cooperation between countries in the investigation and enforcement of competition law. This drew on ideas that had earlier been covered in preceding workshops in this series of seminars. There is a need to look at each of the various cooperation instruments[354] and to consider whether or not they can be implemented or suitably modified to better match the interests of developing countries. It would be interesting here to explore further South–South regional cooperation strategies.

The final part of the presentation considered various unique social and economic problems confronting developing countries and important areas for further research. These can be divided into two categories. Firstly, there is scope for looking at the direct impact of CLP on 'social aspects', in terms of studying competition aspects to topics such as: public health, financial services for low-income earners (for example, remittances, microcredit) and education. Secondly, one needs to look at specific challenges for implementing CLP and consumer protection in a developing country setting. This includes addressing the legacy of pervasive state intervention, rushed privatization and deregulation, highly concentrated industries and cooperative relationships between producers, and examining what the impact is of inequality and a large informal sector on appropriate developing country CLP and consumer protection.

The regional competition law architecture relating to Southern and East Africa
Robert Wilson, Capacity Building Manager, tralac

Mr Wilson noted that COMESA and the EAC have similar provisions with regards to competition but that, unlike COMESA, the EAC has specific development exemptions. He also observed that the

[354] Notification, Coordination, Investigative Assistance, Positive Comity, Compulsory Assistance.

COMESA agreement is fundamentally about trade. The SACU has no mention of a common regional CLP (instead the provisions of the SACU agreement call for each member state to develop its own CLP, and then for an annex to the SACU agreement to be developed governing cooperation strategies between the states).

Mr Wilson further posed some questions concerning the future course of those members of the SADC-7 grouping that do not wish to accede to the EU–SA TDCA and also highlighted the lack of political will in Southern and East Africa to pursue competition provisions in a regional context. Sacrifices and trade-offs have to be made when pursuing regionalism. He noted that narrow-interest lobbies have been able to hold governments hostage and that there was a need to recognize the variable geometry that exists. It is also important to consider whether domestic restraints can actually create development. Furthermore, it is important to examine the relationship between competition and industrial policy. Integration will be promoted to the extent that governments recognize that a common approach to both may be required.

National implications of competition-related provisions in regional trade agreements Bahri Özgür Kayalı, Yeditepe University and the University of Manchester

My Kayalı presented an outline of the research he was conducting under the framework of the UNCTAD/IDRC project. His purpose is to examine the 'national-level' problems that countries are facing in implementing competition-related provisions in RTAs. These may relate to the 'absorptive capacity' of the affected institutions. The main components in the analysis, which will necessarily require an interdisciplinary approach, will comprise: the political and socio–economic situation, and the relevant legal frameworks and institutional structure of the countries under investigation.

The context will comprise the 'legal framework provided by the CRPs', their scope and the origins of the agreement. In terms of the latter, it is necessary to examine the RTA within which the CRPs are situated, and the potential impact of the negotiation of the RTA on competition law enforcement within the affected jurisdiction. It is also important to look at exempted sectors and the relationship 'between competition rules and the regulatory regime'. The scope of the CRPs may include substantive commitments on horizontal and vertical restraints, state aids and potentially mechanisms to ensure that commitments are enforced.

Mr Kayalı proposes to examine the impact of CRPs on national enforcement through certain carefully selected case studies, which will necessarily involve an investigation of the legal and institutional framework provided by the national system. This will include looking at existing or previously existing differences between CRPs and national law, and the question of whether competition provisions have strengthened the deterrent effect of national laws. The questions will necessarily be addressed within the context of the country's competition culture, the political and financial independence of the national competition authority, and other capacity constraints.

Discussions

San Bilal from the ECDPM posed the question of whether a regional CLP for Southern Africa was possible given that some of the jurisdictions did not yet have a functional national regime.

Mr Kayalı noted in response that that was precisely the case in the development of the EU competition regime where for instance Belgium was very late in developing a national competition regime. **Robert Wilson** noted that the problem was perhaps one of political will and conflicting national interests. Furthermore, it must be noted that the SACU agreement does not make provision for a supranational competition authority.

Session 3: The development and potential social impact of competition law and policy

The session was moderated by Mr David Vivas from the International Centre for Trade and Sustainable Development (ICTSD).

Competition law, intellectual property and compulsory licensing: experience from Brazil
Barbara Rosenberg, Getulio Vargas Foundation, Brazil

Professor Rosenberg addressed the topic of intellectual property (IP) and CLP. She began her presentation by illustrating Brazilian expenditure on antiretroviral (ARV) procurement. Seventy-nine per cent (USD 310 million) is spent on drugs imported from multinational manufacturers, and of this, 60 per cent is spent on just three drugs. Professor Rosenberg then noted the important interdependence between IP protection and competition policy, noting that in terms of dynamic efficiency, both should promote innovation and development. She then noted that the appropriate level of IP protection should vary according to the level of development and local production capacities. She emphasized the importance of generic competition by noting that while the average reduction in price of ARVs without generic competition had fallen by 9 per cent, the price of ARVs subjected to generic competition had on average declined by 79 per cent, illustrating that generic competition makes health care more affordable.

Her presentation then turned to a consideration of the framework of IP protection. The Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement has in many countries elevated the minimum standard of IP protection. This has entailed price and implementation costs, as well as in some cases an extension of patent duration and the scope of patentable subject matter (database, software, data exclusivity). Competition policy may have a role in balancing this creation of market power. She observed that the principles of the TRIPS agreement note that measures consistent with the agreement may be undertaken to promote economic and social welfare and technological development, and to prevent the abuse of IP rights.

Many of the flexibilities included in the TRIPS agreement explicitly relate to CLP. These include 'Compulsory licensing (Article 31), exhaustion of rights ("parallel imports") (Article 6), exceptions to rights conferred (Article 30), control of anti-competitive practices in contractual licenses (Article 40) and the definition of patentable subject matter and patentability of living things (Article 27 and Article 27, III.b)'. This implies that the implementation of a balanced IP protection regime may require an effective competition policy. Furthermore, competition may be harmed in the implementation of the IP regime itself by, for instance, having a too-low standard of patentability. This could especially apply in cases of second use, polymorphism and basic research. A proper understanding of the country's patent criteria is important.

The next part of her presentation turned to anti-competitive conduct that may be undertaken by IP holders. These may include: 'refusals to deal, tying or restrictive licenses, patent pools, cross-licenses, standard settings and IP (sham) litigation/settlements in IP litigation'. To counteract anti-competitive practices the Brazilian law contemplates the use of compulsory licensing as a remedy (it is also contemplated in cases of public emergency and national interest cases). However, in no case has a compulsory license been used for that end, although it can be said to have been used as a threat and a bargaining tool. There is a need though for clear rules and standards, as in their absence businesses are less likely to give credence to a government's threat.

Ms Rosenberg drew three main conclusions from her presentation:

1) Intellectual property rights (IPRs) have been strengthened in TRIPS agreements and hence in RTAs
2) Competition authorities should participate in the negotiation of RTAs and, from a local perspective, prevent IPR abuses that damage competition
3) Avoid IP interests to undermine competition through monopoly conduct, horizontal agreements and vertical restraints.

Utilizing TRIPs flexibilities on competition law to ensure a sustainable supply of affordable essential medicines: a focus on South Africa
Jonathan Berger, AIDS Law Project

Mr Berger began by introducing the South African context, characterized by concerns about access to essential medicines, both in terms of sustainability of supply and excessive pricing. He noted that aside from access, the South African context was marked by a lack of government leadership – there were no government-issued licenses under the Patents Act, and there was the 'chilling effect' of TRIPs+ provisions with the failure to implement the Doha Declaration. Finally, it is important to bear in mind the constitutional context in South Africa, in terms of 'socio–economic rights protections, positive state obligations and interpretation of all legislation' in light of the constitution.

He then made some points about legal strategy in terms of the South African competition act. Turning to pricing concerns, he illustrated the situation with two case studies. First, the case of *Hazel Tau v. GlaxoSmithKline and Boehringer Ingelheim* (BI), and, second, the matter of Bristol–Myers Squibb's Amphotericin B (Fungizone®). The first concerned the excessive prices of the patented zidovudine (AZT), lamivudine (3TC) and nevirapine drugs, products that were marketed in South Africa in the absence of any generic competition. In that case GlaxoSmithKline (GSK) and BI were alleged to have 'engaged in excessive pricing of ARVs to the detriment of consumers'. This was alleged to be in contravention of Section 8(a) of the Competition Act, 89 of 1998. The case was framed in deliberately emotive language in order to elicit a strong public response. To make the case it had to be established that the prices being charged had no reasonable relation to the 'economic value' of the good and were higher than that value. The difficulty here relates to determining the 'economic value' of the good, which largely is based on the failure of the Act to provide a definition. The 'reasonable relation' aspect, it was argued, had to be interpreted in light of the constitution of South Africa. In December 2003, the matter was settled without a hearing before the Competition Tribunal, which would have subjected the respondent parties to an intense public scrutiny of their pricing policies in the context of an ongoing national tragedy in terms of HIV/AIDS. Instead, two sets of settlement agreements were concluded – one between Tau *et al.* and the two groups of companies, and another between the

Competition Commission and the two groups of companies. The settlement to an excessive pricing complaint thus involved a 'voluntary' licensing solution. Since the complaint was lodged, prices of AZT, 3TC and nevirapine products in South Africa have fallen by between 58 and 88 per cent.

In the second case of Amphotericin B, the matter was settled after a series of letters was exchanged between the parties' lawyers. Here the substance involved a *threat* of an excessive pricing complaint – a credible threat in the wake of the previous excessive pricing complaint in *Hazel Tau*.

In conclusion, Mr Berger sketched some ways of potentially strengthening the South African Competition Act, including amending the statute to clarify its relationship to IP, and providing guidelines on a 'policy approach to [the] competition/IP interface'. He felt that it may also be appropriate for the Commission to facilitate the complainant's role, to clarify when compulsory licensing was an appropriate form of relief, and to relate more clearly the competition act and other medicines regulation.

He concluded by acknowledging the difficulties other SADC countries may have in following a similar approach, both in terms of lacking appropriate competition laws, and having capacity challenges. Furthermore, the context, in terms of constitutional framework and a well-resourced civil society, obviously differs. Finally, he noted that in terms of access, litigation by means of the competition act was only one aspect of a comprehensive strategy.

Exceptions and exemptions in competition law
Hunter Nottage, Counsel, Advisory Centre for World Trade Law

Mr Nottage highlighted the role of exceptions and exemptions in CLP, their importance as well as their potential dangers. His presentation stressed that certainly flexibility was going to be an important component of the EPA negotiations. In terms of competition policy, this might translate as exceptions and exemptions, but could also involve other forms – such as transitional time periods and TA.

In this regard, Mr Nottage referred to his experiences while at the OECD at the time that competition disciplines were being considered in the WTO and the broad consensus in the WTO Working Group on the Interaction of Trade and Competition Policy that if an agreement on trade and competition was to further development objectives then it needed to contain sufficient flexibility. Additionally, that the UNCTAD has advocated S&D for over 25 years, with provisions on 'preferential or differential treatment' in the 1980 *UN Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices*.

Mr Nottage, next referred to the number of comments made by developing and developed countries in the WTO Working Group on the Interaction on Trade and Competition Policy, that exceptions and exemptions would allow developing countries the flexibility to pursue their development objectives, citing specifically Trinidad and Tobago and the European Commission.

He also commended the work by UNCTAD examining how flexibility has been incorporated into RTAs containing competition disciplines,[355] noting that in their analysis of 157 RTAs they conclude that

[355] Philippe Brusick and Julian Clarke – Chapter 5 of the October 2005 UNCTAD Publication "Competition Provisions in RTAs: How to Assure Development Gains"

'exceptions and exemptions' are one of the four main categories of special and differential treatment in RTAs.

While recognizing the potential importance of exceptions and exemptions, he nonetheless introduced a cautionary remark on the use of exceptions and exemptions in national competition laws as a means to support development efforts. This cautionary remark was based on the view that CLP is important for sound economic development. And therefore a system that exempts certain sectors or exempts certain practices may not necessarily be of developmental benefit.

To support this proposition, Mr Nottage referred to some national experiences including one study by the Japanese Government summarizing the effects of its competition policy and exemptions systems for its post-war economic development. The study highlights that much of Japan's economic dynamism at that time was in fact rooted in robust competition, rather than industrial policy, which allowed many promising new industries (such as the automotive, semiconductor and animation industries) to actually sharpen their competitive edge. Notably, while not rejecting exemptions *per se*, the study suggests that developing countries limit exemption systems as 'Japan's experience indicates that international competitiveness can eventually be further strengthened by increasing competition among domestic companies, rather than regulating competition through exemptions'. Japan's conclusion is succinct: 'we believe that exemption systems themselves have nothing to do with industrial development'.[356]

Similarly, despite the considerable *practice* of sectoral and non-sectoral exemptions in OECD countries, the *economic analysis* of the OECD Secretariat suggests that those exemptions often reduced economic performance by allowing anti-competitive practices – such as abuses of a dominant position, cartel conduct and anti-competitive mergers.

Therefore the OECD analysis recommends that: 'an essential reform is to reverse such exemptions and apply the general competition law as widely as possible'.[357] That 'such exceptions to the legal coverage of competition law should be constantly reviewed and tested… with a view to their progressive elimination'.[358]

Mr Nottage opined that these divergent messages should be carefully considered when analysing whether exceptions and exemptions in EPA competition disciplines would be of developmental benefit for countries of Southern and East Africa, noting that it is not at all clear that exceptions and exemptions to national competition laws will always be of benefit to the development objectives of developing countries. In fact, such flexibility may simply assist powerful interests to maintain anti-competitive practices that are contrary to the national interest.

Mr Nottage concluded that while flexibility will be an essential development component in any EPA competition disciplines that might be negotiated, what form those flexibilities take will ultimately determine the extent to which they serve development objectives. In the case of exceptions and

[356] See Communication from Japan, "Competition Policies and Exemption Systems", WTO Working Group on the Interaction between Trade and Competition Policy, 4 July 2001, WT/WGTCP/W/177

[357] OECD (1997), *The OECD Report on Regulatory Reform: Synthesis*, 1997, Paris, p. 32.

[358] See Communication from the OECD, WTO Working Group on the Interaction of Trade and Competition Policy, 29 July 1997, WT/WGTCP/W/21, para. 17.

exemptions, there's plenty of evidence to suggest that not all exceptions and exemptions would be of benefit.

Wrap-up session

Trudi Hartzenberg summarized the proceedings of the first day of the workshop (the day specifically dedicated to the dissemination of the UNCTAD publication) and then outlined various areas that are important for further study.

Ana María Alvarez noted that the creation of a culture of competition, and in this respect a study of best practices in competition advocacy and an analysis of the role of competition agencies and legal framework, is important.

Robert Wilson again drew attention to the importance of a transparent process to the formulation and implementation of regional (and national) trade and competition policy. In this respect, institutions need to be independent, transparent, accountable and credible involving public and private sectors, NGOs and social commentators.

In all, the session moderators, discussants and audience identified the following topics as arising out of the day's proceedings, and perhaps requiring further investigation, especially in the Southern and East African context.

- The relationship between industrial policy and competition policy.
- The relationship between sectoral regulation and competition policy.
- The private sector will judge the policies developed by governments, so they need to be engaged fully.
- The private sector sees CLP as a rather dull instrument to promote development.
- Article 40 of the SACU agreement should be investigated.
- The kinds of competition provision appropriate in a North–South agreement.
- The SADC should look at how to incorporate industrial policy into the SADC protocol.
- Overlapping membership – what is it that needs to be done? [359]

[359] For another summary of the proceedings of this meeting, on which this report draws, see **tralac** http://www.tralac.org/pdf/20061012_tralac_CompetitionProvisionsWorkshop4Oct06report.pdf

Competition Law and Policy in Latin America and the Caribbean: tackling development priorities
Getulio Vargas Foundation, São Paulo, Brazil, 30 November – 1 December 2006

Report of the session

Executive summary

On the 30 November–1 December 2006, the Getulio Vargas Foundation, in São Paulo, Brazil, hosted the fifth and final of a series of events which disseminated the findings of the UNCTAD/IDRC publication, *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*.

The workshop consisted of five sessions: the first considered the potential impact of competition law enforcement on development outcomes. The general theme was anecdotal evidence on the actual implementation of competition law enforcement, as well as some more theoretical discussion of the potential use of competition policy in the setting of fostering Latin American and Southern African market integration. The second session considered potential problems that countries can have in implementing the competition provisions of regional trade agreements (RTAs) in the domestic setting, as well as considering the role of technical assistance (TA). The third session revolved around the important theme of the relationship between competition authorities and sector regulators.

The second day consisted of two sessions. The morning session comprised a panel on Brazilian competition law – representatives from the Conselho Administrativo de Defesa Econômica (CADE), the Secretariat for Economic Law (SDE) and the Secretariat for Economic Monitoring (SEAE) spoke about developments in their institutions and the direction of Brazilian competition law more generally. The final session moved on to improved strategies in international cooperation.

Session 1: Competition policy at national and regional levels: net outcomes derived from competition enforcement and the impact on poverty alleviation

Competition and development: experience from Southern Africa
Trudi Hartzenberg, Trade Law Centre for Southern Africa (tralac)

Ms Hartzenberg began with an outline of the regional trade agenda of Southern Africa. As a region it is beset by problems of poverty, inequality and skills shortages.

Key features of the economic landscape, with competition policy implications, are the dominance of South African firms, and the importance to the region of foreign direct investment. Competition policy can be seen to be both complementary to trade reforms and important for market development itself.

While competition policy is recognized as an important component of regional integration within southern Africa, there is an apparent reluctance to include it (as well as other trade-related aspects) when completing trade agreements with partners outside the region (e.g. SACU–EFTA RTA, US–SACU RTA negotiations).

Within the Southern African Customs Union (SACU) only South Africa has a functioning competition law and authority – Namibia, while in possession of a law, does not yet possess an authority. The other three member states are still in the drafting stage. In terms of the 2002 SACU agreement though, all member states are required to implement a competition law and then cooperate on case enforcement. South African firms compete strongly in mining, retail, wholesale, telecoms, financial and other services sectors within the region. It is important to tease out the implications of this for the negotiation of RTAs in the region as well as externally. Negotiations are currently under way, or are about to begin with the US, India and Brazil, and China. There are also important developments in terms of the Economic Partnership Agreement (EPA) negotiations, and the SA–EU TDCA review.

In terms of the EPA negotiations, the EU would like to include trade-related aspects such as competition, while the BLNS (Botswana, Lesotho, Namibia, and Swaziland) and MAT (Mozambique, Angola and Tanzania) countries are reluctant to do so. Ms Hartzenberg argued instead that the EPA negotiations '[present] an important opportunity for the SACU to anchor its regional and domestic competition law and policy (CLP) agenda and to secure support to implement and enforce the laws [and] also to develop cooperation mechanisms in the SACU'. This is especially so in the context of an increasing focus on behind-the-border issues as well as an acknowledgement of the importance of complementary domestic regulatory reforms to liberalization initiatives. This final component of her presentation emphasized the importance of these complementary reforms so that local markets are developed taking into consideration the importance of equity.

Competition policy and free trade agreements in Latin America
Verónica Silva, Expert in international negotiations

The speaker's presentation consisted of three parts. The first consisted of an overview of free trade agreements (FTAs) in Latin America. The speaker began by characterizing the economic performance as 'growth without equity'. In terms of FTAs, there has been an evolution from a broad economic complementation agreement in the Latin American Integration Association (LAIA) to a proliferation of bilateral agreements.[360] The present challenges emanating from the latter include implementation and concomitant institutional development, and possible convergence across the agreements. Ms Silva characterized the current debates over regionalism as being important to advance in light of the urgency to increase competitiveness, and to face increasingly important cross-border concerns relating to sectors such as energy, infrastructure and trade facilitation.

The second part of the speaker's presentation considered the role of competition provisions in bilateral trade agreements. Ms Silva noted the increasing importance of deepening commitments in RTAs, their proliferation, and the increasing presence of competition-related provisions (CRPs) within RTAs. On this topic, Ms Silva posed two questions. First, whether there was the possibility of building a network of cooperation around the commitments in the RTAs, and, second, whether it was possible to use these provisions for development.

[360] The ALADI agreement was followed by Latin American involvement in APEC, the MERCOSUR and Andean Community agreements, Mexico joining NAFTA, the frozen FTAA, and the DR–CAFTA. These are just the plurilateral agreements – there have also been multinational negotiations in the Uruguay round and the DDA, and numerous bilateral intra- and extra-regional RTAs.

There are now 14 countries with competition agencies in Latin America. The Caribbean Community and Common Market (CARICOM), Mercado Común del Sur (MERCOSUR), and Andean Community (AC) integration schemes all have competition provisions,[361] and since the conclusion of the North American Free Trade Agreement (NAFTA), bilateral trade agreements often include competition provisions – if not in competition chapters then at least in chapters covering specific sectors. The speaker then detailed a timeline for integration, intra-regional and extra-regional agreements containing competition provisions, noting that all countries in Latin America, whether through bilateral trade agreements, or through integration schemes, are party to RTAs containing CRPs.

The speaker then went on to consider the broad differences to be found between agency-to-agency agreements (ATAs) and the competition chapters of trade agreements. While both tend to cover the usual provisions concerning cooperation, the latter might also contain provisions mandating the adoption and implementation of competition legislation, as well as provisions concerning monopolies and state enterprise.

The final part of Ms Silva's presentation considered the challenges posed by competition policy in the RTAs. These include the differences posed by the integration agreements, the competition-related chapters in RTAs governing investment, services and government procurement rules, and the diversity of competition agreement models.

Ms Silva in conclusion reflected on the potential for increasing links between the agencies. This is especially important in light of structural similarities across economies in the region – which speaks to the potential for synergies in enforcement cooperation. Furthermore, there is the possibility of learning from the experiences of other southern partners in the negotiation and implementation of North–South bilateral trade agreements. This work is especially important in view of the importance of creating globally competitive economies in Latin America.

Reflections on the potential role for competition policy in poverty alleviation
Mariana Tavares de Araújo, Ministry of Justice, Brazil

Ms Tavares de Araújo concentrated her presentation on the use of competition policy in Brazil to promote access to essential medicines. The first case centred around a generic drug cartel, and the second concerned predatory pricing claims against pharmacy chains.

After the enactment of the Generic Drug Law in February 1999, the executives of the main pharmaceutical companies met to allegedly discuss joint tactics to inhibit the entry of generic manufacturers into the market. This included collective refusals to deal, as well as various media campaigns designed to increase demand for patented drugs, and reduce the demand for generic products. In September 1999, the Secretariat for Economic Law (SDE) issued a preliminary order to prevent the implementation of these strategies. In November 1999, an investigation was begun into price increases. The market is characterized by impaired competition, information asymmetries and even though generic products are 30 per cent less costly than branded products, they enjoy a

[361] The Protocol of Fortaleza of MERCOSUR has not been ratified by all member countries.

smaller market share than patented products. Furthermore, there has been limited entry by generic producers.

The 'Brazilian Authorities concluded that the agreement could have effectively blocked entry of generics' and 'imposed fines of 1 per cent of the firms' turnover in 1998'. Ms Tavares de Araújo argued that this facilitated the implementation of a medicines programme directed at the needs of the poor.

In terms of the second case, two large pharmacy chains were alleged to be pricing so as to eliminate smaller competitors. A consent order was negotiated to restrain discounts in excess of 15 per cent of the final product price. However, the SDE concluded that the pricing was *not* anti-competitive since the market was not concentrated and the chains were not found to possess market power. Furthermore, price controls were thought to be a significant feature of the market, and entry barriers were found to be low. On the SDE's recommendation, the CADE ceased the investigation. The result was that the practice in fact was found to be pro-competitive and was encouraged, reducing prices and promoting access to these medicines.

Ms Tavares de Araújo concluded by noting that competition law enforcement, coupled with complementary public policy and advocacy can have 'obvious direct effects in the promotion of equity and poverty reduction'.

Marina Bidart, Consultant and Competition Practitioner, Argentina

Marina Bidart's presentation aimed to show to the audience the possibility of making competition law enforcement more attuned to social needs, including the Millennium Development Goals (MDGs).

After presenting some indicators about poverty in Argentina, illustrating that it is firstly related to political and macroeconomic stability and economic development, she stated that, nonetheless, competition law enforcement can operate to improve social outcomes at the margin.

She made this case in two ways. She first presented a historigraphical viewpoint demonstrating how antitrust law enforcement has evolved in developed countries while being sensitive to the political, social and economic challenges that their societies were facing at their various stages of development.

She then considered current cases from Argentinian competition law enforcement, showing that recent and important decisions of the Argentinian Competition Authority, while being decided on the basis of an 'efficiency' mandate, nonetheless were directly related to key economic sectors and the development and welfare needs of low income groups.

Anti-competitive practices affecting the attainment of the Millennium Development Goals: potential implications for increased cooperation in competition law enforcement
Laurence Wilse-Samson, General Assistant to the UNCTAD/IDRC Project on Competition Provisions in RTAs

Mr Wilse-Samson addressed the topic of the relationship between competition law enforcement and the MDGs. The motivation for the topic was provided by the fact that while the subject of 'competition' has received quite a lot of attention in publications related to the MDGs, there has not been a corresponding emphasis in these MDG-related publications on 'competition law and enforcement'.

The presentation had four parts. The first reviewed the empirical literature on the indirect relationship between competition law enforcement and the MDGs *via* the promotion of competition, productivity and growth within the economy. The second part of the presentation then presented the 'direct' evidence by considering cases where the enforcement of competition law had contributed towards meeting MDG targets. This investigation looked at four components – financial services for the poor, health, food and hunger, and the catch-all 'infrastructure', but noted that the review of cases was not yet completed.

The third part of the presentation looked at difficulties in implementing CLP in a developing country setting – these were thought to relate to differences in competition culture, and structural features of developing countries. Finally, the speaker considered potential implications for competition cooperation. Cooperation between authorities should be promoted on account of certain shared product features interacting with the same underlying structural features of the economies concerned (the same underlying economic logic) or alternatively on account of common actors operating within the region.

Session 2: The national implementation of competition provisions in regional trade agreements: the role of technical assistance

Celina Escolán, Head, Superintendente de Competencia, El Salvador
Problems related to the implementation of competition provisions at national level: the role of technical assistance

Ms Escolán began her presentation by informing the audience that El Salvador had been adopting a global orientation since 1989. Trade policy is focused on the promotion of access to new technologies and productive processes, the elimination of trade barriers, investment promotion and the widening of trade opportunities at the regional and national levels.

As regards regional trade, El Salvador has engaged in the process of fostering a regional competition policy for the Central American region, with the support of the Secretariat for Central American Economic Integration (SIECA).

She turned then to the country's motivation for participating in regional trade agreements containing competition provisions, namely, to address anti-competitive practices, to adopt common policies

harmonizing the obligations of actors participating in the markets covered by the agreements or treaties, to supervise mergers of enterprises operating in the region's markets, and to promote competition in sectors such as infrastructure, telecommunications, and electricity.

As regards the participation of El Salvador in RTAs, she specifically referred to the three types of agreements that include Central America as a group: bilateral RTAs, such as in the case of Central America with Mexico (2001), Chile (2002) and Panama (2002). Furthermore, plurilateral trade agreements such as CAFTA–DR (2004), which also involves the Dominican Republic, and the third type of agreement, namely a regional legal framework under the Central American Economic Integration area, which aims at developing a customs union (CU).

The CAFTA–DR includes references to competition in the section on telecoms. It was agreed before the Competition Law of El Salvador was passed in 2004, and implemented in January 2006.

She then referred to the importance of including competition provisions in the agreements as a tool for fostering cooperation and securing TA.

She addressed some common features of the five Central American countries, such as the high numbers of small and medium-sized enterprises (SMEs) and the fact that the US is the major trading partner with all countries in the Central American region. In this respect, she referred to the work carried out by the Central American Working Group on Competition Policy. It pursues coordination and cooperation between the authorities dealing with competition issues and promotes the exchange of experiences at subregional level and with more developed countries.

She then mentioned the major objectives of the Group, namely, cooperation in the development of a competition law for countries that have not yet adopted one, the implementation of national laws and harmonization of national legislations, and the fostering of cooperation and coordination. Enhancing capacity building, promoting a culture of competition and developing competition advocacy within the subregion are further objectives of the Group. She ended by mentioning that there are some elements that should be considered when negotiating trade agreements containing competition provisions: primarily that competition laws should be exempted from the application of dispute settlement and should instead follow national procedures. In agreements between competition agencies, especially when one of the parties is a young agency, the provision of TA is important.

The challenges of technical assistance
Russell Damtoft, Federal Trade Commission, USA

Mr Damtoft's presentation was informed by the International Competition Network (ICN) study of TA, as well as the experience of the FTC and DoJ's (Department of Justice) bilateral TA activities. Mr Damtoft began by noting the critical importance of TA in view of the spread of competition law, especially since the early 1990s.

The speaker noted the importance of complementary aspects to the enactment of the law for the successful application of competition principles – particularly the importance of fostering a country's competition culture to provide the public and political support for free markets, a well-structured agency, and strong supporting institutions.

With these goals in mind, he then outlined the challenges of TA. The first he identified as being 'to build policy support for sound and effective competition policy'. This requires developing supporting institutions such as modern corporate banking and bankruptcy laws, regulatory agencies and educational institutions. Judicial training is something that needs a lot of care when implementing given potential conflicts of interest.

This led into the second challenge, namely 'to build and strengthen needed supporting institutions' – a new competition agency requires not just good human capital and a working institution but also the creation of the legal norms which underpin the implementation of competition enforcement decisions and advocacy initiatives, which are transparent and procedurally fair; and which fit within the context of the country's existing legal structure.

This underlined the third and fourth challenges: 'a legal structure adequate to support economically based decision making', and 'building an administrative structure that produces sound decisions'. Sound competition policy requires equal doses of economic and legal expertise so as to produce clear, transparent, and economically rational enforcement decisions. Thus, it is human capital constraints that underpin the fifth challenge: 'replication of experience and institutional knowledge for an authority with neither'.

This led into Mr Damtoft's description of TA activities, and the experience countries have had with this assistance. The general observation is that both donors and recipients need to be actively involved in the entire process. The donors understand better what the general effective application of competition policy requires, and the recipients understand better the specific characteristics and constraints of their country. The ICN subgroup on TA has found that the most effective forms of assistance are the 'presence of a long-term advisor', assistance with 'drafting competition legislation and regulations' and 'study missions and internships abroad'. It is important to recognize though that the absorptive capacity of the recipient institution modifies this general conclusion, with countries with less capacity benefiting more from 'short-term advisors, national and regional seminars and procurement support', while agencies with greater capacity benefit less from short-term advisors and more from 'long-term advisors' and 'study missions abroad'. Especially important is that the long-term advisors are of high quality and come from experienced authorities. The experience of FTC and DoJ TA activities supports these observations, while also pointing to the usefulness of 'short-term investigational training seminars'. Long-term advisors can build trust, can reach the entire staff of the recipient authority, and can provide advice most suited to the local context. Short-term investigational training seminars can take recipients through the entire process of initiating an investigation to identifying remedies and are thus extremely useful in teaching the actual mechanics of competition law enforcement.

Session 3: New trends on linkages between competition policy and sectoral regulations

Regional experiences and lessons learnt in fostering competition in regulated sectors, focusing on the link between competition agencies and regulated bodies
Gamze Öz, Middle East Technical University, Turkey

Professor Öz began her presentation with a discussion of some common features of competition law – the internationalization of competition law principles, increasing criminalization of certain anti-competitive practices, civil law enforcement, the strong importance placed on judicial review, and the importance of competition advocacy in the relationship between the sector regulators and the national competition authority.

Professor Öz then considered the adoption of competition law in Turkey (originating in the contexts of the association agreement with the EC in 1963, and the Customs Union Decision of 1995). The increasing emphasis on the relationship between the sector regulators and national competition authority comes in the light of privatization and liberalization initiatives, and concerns regarding 'consistency, certainty, transparency and fairness'. Energy, Banking and Telecommunications in Turkey each have their own sector regulators and the speaker noted that there is no 'general statutory provision' governing the relationship between these regulators and the Turkish Competition Authority (TCA). In RTAs involving Turkey, there are no mechanisms allowing for the sharing of information between an authority on the one side, and a sector regulator on the other.

The speaker then went on to consider the various permutations concerning possible defined relationships between the sector regulatory authorities and the TCA – *ex post or ex ante*, concurrent or exclusive jurisdictions, and cooperation variations. Furthermore, the type of relationship could vary by sector.

While concurrent jurisdiction has various advantages and disadvantages, introducing 'workable cooperation' in the context of the country's political economy constraints was identified as the key feature in promoting efficiency in the implementation of competition principles in the system. Acceptable cooperation needs: 'a proper legal basis', combined involvement in the drafting of rules and guidelines governing the sector, and the time for a full sharing of views about the sector.

In conclusion, the speaker noted that given the different legal traditions of each of the jurisdictions involved, a common approach would be unwise, although defining common ends would perhaps be appropriate with each country free to develop the most appropriate means for themselves. RTAs could help to define the proper 'legal basis for cooperation' and could also help to create a forum for the sharing of experiences around this topic.

Competition advocacy: the Brazilian experience
Carlos Emmanuel Joppert Ragazzo, SEAE/Ministry of Finance

Mr Joppert Ragazzo presented some recent experience of the SEAE with competition advocacy initiatives. He began with the ICN definition of competition advocacy as those non-enforcement measures the national competition authority takes towards 'the promotion of a competition

environment...mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition'.

Advocacy entails looking at the overall costs of regulation, liaising with regulatory bodies, and promoting a competition culture. The components of this endeavour included examining the overall rules of competition, examining the competition impact of trade regulations, and regularly meeting, on a formal and informal basis, with other governmental authorities.

The speaker then presented a recent experience of the SEAE with advocacy. The case involved driving schools in Brazil, which fell both under minimum (from a state regulator – Detran) and maximum (from a federal regulator – Denatran) retail price maintenance. The SEAE investigation concluded that these measures, which were undertaken to assure a good-quality provision of the service, were not the most efficient means to attain these ends. Following meetings with the Federal Ministry of Justice and Denatran explaining this analysis, the anti-competitive regulations were ended.
Mr Joppert Ragazzo concluded by stating that future investigations would look into areas of considerable importance to many people, namely the taxi market and funeral services.

Session 4: Brazilian panel on competition law

The session was chaired by Mrs. Barbara Rosenberg and began with Mr Daniel Goldberg's presentation which assessed the last 4 years of the Brazilian Competition Policy System (BCPS) and looked towards what can be expected in the future.

Daniel K. Goldberg, SDE, Ministry of Justice, Brazil

As a general assessment, Mr Goldberg noted that there have been substantial improvements in the system. To support this, he proposed considering the competition agency's task as a portfolio management problem, subject to budget restrictions like any body in the public administration.

Thus, there are two aspects to consider: have the assets under management appreciated and, is the pay-off of the investment greater than its opportunity cost? As an example, the speaker considered the value added of the recent prosecution of 13 pharmaceutical laboratories for the illegal increase of their prices.

Mr Goldberg acknowledged that this might be seen as an unusual way to approach antitrust enforcement. It might be particularly difficult for jurists, who are more used to maximal effort being allocated to each case. However, resource constraints and the value of prioritization must be recognized.

According to this vision, Mr Goldberg described what has been done by the SDE to improve its portfolio. Three achievements were mentioned: a drastic re-structuring of the agency to increase administrative agility, a decision to focus on fighting cartels – today 40 per cent of the portfolio consists of cartel cases – and an effort to get SDE judgements ratified by the CADE – while in 2003 less than 1 per cent of the sanctions imposed by the SDE were ratified by the CADE, that percentage has now increased to 10 per cent in 2006.

The speaker emphasized the importance of not initiating investigations in a frivolous manner. To

that end, substantive selection criteria have been used: to focus on cartels with a large economic or social impact, and to proceed in investigations and sanctions considered likely to be ratified by the CADE. The substantive selection criteria prioritize those sectors related to economic development and those with greater impact on consumer welfare.

To that end, in 2003 the SDE decided to focus on the construction value chain. As a result, important sanctions were imposed by the SDE and confirmed by the CADE. Later, in 2005 and 2006, it was decided to focus on infrastructure sectors.

As a practical way of assessing whether the BCPS portfolio of cases was improving, the speaker proposed evaluating the 15 most important cases of the last year. The criterion to look at was whether those 15 cases were closed with a satisfactory outcome. To achieve that end, the speaker proposed using all the forensic techniques available (dawn raids or searches, leniency programmes, improved economic analysis, and so on).

It was reported that in 2006 those 15 high-profile cases were cartel cases operating in the industrial gases, medicines, infrastructure, chemical inputs, and chemical products packages sectors. All of them had originated from the leniency programme. While the leniency programme has helped to improve the SDE's credibility, it was recognized that it is important to investigate cases without using the programme in order that the threat of cartel enforcement would remain credible.

Another key element mentioned regarding the improvement achieved in the operation of the BCPS, has been a major informatics project that has networked the three agencies. As a result, all agencies are now able to track online the steps undertaken in any investigation.

Regarding the future development of the BCPS, the speaker went on to consider a minimal amendment to the competition law that has already been presented to Congress.

The proposed amendment has three components.[362] The first are measures to allow the SDE to settle cartel cases when defendants have agreed to pay the fine, without the case having to be referred to the judicial branch. It was stressed that the judicial proceedings could take as long as 15 years to be decided, which diminishes the present value of the case portfolio. The second aspect is the creation of a mechanism to allow those cartel members that did not access the leniency programme to cooperate with the investigation as a trade-off against fine reduction. The third part of the amendment would formally allocate faculties and tasks between the three agencies that constitute the BCPS.

Marcelo Leandro Ferreira, SEAE, Ministry of Finance, Brazil

Mr Ferreira stressed the importance of proactive behaviour on the part of the national competition authority. That is, he felt it was important not just to be waiting for claims of anti-competitive conduct to be presented to the authority, but to develop a strong role of competition advocacy in the economy.

He reported that in terms of the framework of the BCPS, the SEAE is increasingly focusing on competition advocacy, through four sets of measures: The first is the *ex-ante* or *ex-post* analysis of

[362] For further details of the proposed amendment, see http://www.isnie.org/ISNIE06/Papers06/04.5/farina.pdf

proposed or implemented government regulations. The second comprises the analysis of tariff and non-tariff barriers to trade (for instance anti-dumping actions). The third is the analysis of the competition framework of the bidding processes for government contracts. The fourth is the participation of the SEAE in government and civil society meetings and fora in order to promote the culture of competition.

The SEAE's competition advocacy activities have included the following:

- Persuading the civil aviation authority that there was no predation as a result of special deals offered by GOL airlines – a recent entrant to the air transportation business in Brazil – and hence that the company should be allowed to continue with their pricing strategy.
- Finding that a technical rule about preparation, control and reception of cement or concrete had to be amended since it was damaging the competitive capacities of small business.
- Opposing the anti-dumping duties imposed on cement imports originating in Venezuela and Mexico, on the basis that the petitioner was a monopolist operating in the north of the country and was charging a price higher than the price prevailing in the rest of the country and abroad. As a result, although in general the anti-dumping duty was maintained, it was suspended in the State of Roraima.
- Recommending, in the context of a public bidding process, that the provider of highway services relate the contract value to the expected turnover of the provider and not to its projected investments. Since the latter is usually significantly higher, it would mean that bidding participation would be restricted on account of greater required equity and warrants.
- Counselling a commission set up to study the international air transportation sector, making the case for increasing the number of companies and flights allowed to operate the routes to South America, USA and Europe, and designating more than one company to operate long-haul domestic routes.

As a final example, the speaker reported an item of particular social relevance: the provision of funerary services, with respect to which many anti-competitive complaints have been received. An investigation has been initiated to assess firstly, if local government regulations are creating barriers to competition and, secondly, if there is cartelization among the incumbent companies. Either could be a cause of price increases.

In conclusion, the speaker stressed the importance of the allocation of public resources within the BCPS framework, through an optimal assignment of tasks between the three agencies and the significance of enforcing competition policies where there is the most social impact.

Elizabeth Mercier Querido Farina, Conselho Administrativo de Defesa Econômica (CADE), Brazil

Ms Farina reminded the audience that increasing the effectiveness of the CADE through case prioritization is difficult, as it is a collective body constituted by seven judges, each with his/her own ideas about where priorities lie. Nevertheless, some improvements have been achieved, at least in terms of the efficiency with which cases are handled – at present most of the cases are being solved on average in 60 days.

The CADE has furthermore improved its transparency, mainly by means of public dissemination of cases on the Internet. A further improvement has involved the establishment of a technical secretariat and the amendment of the internal regulations of the CADE, and the allowing of an electronic notification procedure.

Ms Farina stressed that the key issue regarding the reputation of the BCPS lies in connection with the judiciary, as the majority of the important decisions made are still pending judicial confirmation. The situation is particularly complicated with respect to merger decisions since Brazil has an *ex-post* merger rule. To improve relations with the judiciary, the speaker reported that the CADE undertakes many tasks such as talking to and writing reports for the judges and holding seminars in which the judiciary participate.

Ms Farina also stressed the importance of amending the law to allow the national competition authority to settle cases with defendants, particularly in cartel cases, without the case having to be referred to the judicial branch.

As a final remark, Ms Farina stressed the importance for the BCPS to build up its reputation, which in turn depends on a good relationship with the judiciary to make the sanctions imposed effective.

Gesner de Oliveira, EAESP/FGV, Brazil

Mr Oliveira noted that competition defence requires a global vision but a local focus, which in turn implies an awareness of local sensitivities and the importance of institutional innovation.

He further remarked that the defence of competition is more important in the South than the North, based on his reading of the available empirical evidence. He reported the results of the World Economic Forum global survey about the perceived competitive environment, showing a negative association between development and perceptions about anti-competitive practices. Of particular noteworthiness in terms of these surveys is that businessmen find Latin America especially to be characterized by an absence of competition.

He stressed the importance of seriously thinking through the implications for competition policy of large informal sectors in the economies of developing countries (for example, Brazil's economy is said to be approximately 40 per cent informal).

As a final remark, he stated the importance for the BCPS of institutional amendments to better regulate the relationship between the competition authorities and the sector regulators and to efficiently distribute tasks between the three competition agencies.

Panel discussants

The session concluded with the comments by **Sergio Varella Bruna, IBRAC**, and **Fernando Passos, Ordem dos Advogados do Brasil, Secao São Paulo (OAB/SP)**

The first speaker was not persuaded of the appropriateness of the proposed legal amendments, while the second was more disposed towards the government proposal.

The first speaker based his criticism on his view that the judicialization of cases was good, despite the delays in giving effect to the decisions. In his view, the country was guaranteeing fair decisions rather than quick ones. Furthermore, he felt that in order to improve the connection between the competition authorities and the judiciary, what is required is a strong legal and economic foundation for the decisions by the CADE, an area in which he felt there has been some improvement in the last few years.

Discussions

The speakers were asked by a participant from Turkey to elaborate more on the issue of the large informal sector in the economy, since this was also an issue in Turkey.

Mr Goldberg responded by warning that it was not appropriate to accept agreements among formal competitors on the basis that they were defending themselves against unfair competition from informal rivals. He also argued that it was inappropriate to authorize mergers creating dominant positions where the merging firms were arguing that their pricing would be restrained by informal rivals. He based his conclusions in these two cases on his view that it was wrong to balance one market failure (informality) with another (the constitution of market power through collusive agreements or anti-competitive mergers).

Furthermore, Mr Goldberg reminded the audience, that while informality raises empirical difficulties, these need not be insurmountable. Also, he felt that it is preferable to exclude the informal sector from the definition of the relevant market, and to rather consider its presence as a mitigating factor for the merger parties or the defendants. As a general recommendation, he stressed that it is not appropriate to use antitrust policy to solve the problem of tax evasion, which is the task of a different branch of government.

The session concluded with final statements from Ms Farina and Mr Goldberg in favour of amendments to the competition law in order to, among other things, strengthen the competition advocacy powers of the competition authorities. Mr Goldberg characterized competition advocacy as the most political task of the competition agencies, for that reason requiring a large amount of technical expertise.

In addition, they stressed that a legal amendment was also necessary to simplify and facilitate procedures for those businesses wanting to accept sanctions and pay the fines.

Session 5: Regional experiences in competition law and policy cooperation

Bilateral/regional competition law: barriers to enforcement cooperation
Mark Warner, Fasken Martineau DuMoulin LLP

Mr Warner examined the different modalities of enforcement cooperation. His presentation noted that cooperation could be from agency to agency, from court to court, or even potentially from foreign agency to court. Furthermore, cooperation might be informal or formal, and through cooperation agreements or Mutual Legal Assistance Treaties (MLATs) (where both countries criminalized certain anti-competitive practices).

The speaker then went on to trace US and EU experience with bilateral enforcement cooperation, noting that in the EU partnership agreements (with Eastern European, Mediterranean and Central Asian countries) there was some mandating of approximation of laws. The third part of his presentation considered other bilateral cooperation agreements, before turning to competition provisions in RTAs. In this respect, the speaker classified some of these competition chapters according to whether the overarching aim of the chapter related to trade, investment, services, competition per se, or some combination of these.

The speaker's discussion of the NAFTA, Canada–Chile, US–Chile and Canada–Costa Rica agreements drew attention to the treatment of monopolies and state enterprises noting provisions mandating 'non-discriminatory treatment' and in the case of monopolies 'no monopoly leveraging' in the first three. Furthermore, it was noteworthy that the abolition of anti-dumping laws in the Canada–Chile agreement was 'replaced by safeguard law [and] not competition law'. The Canada–Costa Rica agreement provides for TA. While the above agreements do not have dispute settlement provisions applying to the competition elements, designated monopolies and state enterprises are subject to dispute settlement in the US–Colombia and US–Peru agreements.

The next part of the speaker's presentation concerned the use of leniency programmes, where he noted the importance of concerns over confidentiality. It will be interesting to see how applications for leniency change as a result of more countries adopting such programmes.

Confidentiality and the lack of procedural and substantive convergence of laws were identified as limits to enforcement cooperation – the concerns here relate to timing and the identification of actions as anti-competitive or not. The other important dimensions to consider are 'coordinating remedies, enforcement priorities, [and] reciprocity and public policy'.

The speaker concluded by emphasizing the importance of confidentiality and by hypothesizing that 'enforcement cooperation will continue to grow in competition, but not trade and competition issues'.

Cooperation and its challenges
Russel Damtoft, Federal Trade Commission, USA

Mr Damtoft noted that cooperation was important in the light of markets being increasingly cross-border, regional or global and national competition issues increasingly having cross-border dimensions. He then presented a taxonomy of cooperation scenarios to examine under which circumstances cooperation posed difficulties. Conduct could be either domestic or foreign, and the effects of that conduct could be domestic, foreign or both. There is no issue at stake when both conduct and effects are foreign. The appropriate response to the situation of domestic effects and conduct is the increased sharing of experiences and TA. Where conduct and effects are both domestic and foreign, there is a need for coordination and communication. This might be effected through competition agreements, although such agreements are not essential to effective cooperation. Where conduct is domestic and effects are foreign, most agencies do not have jurisdiction, which means that the foreign authority is only able to source publicly available information and experience. The most potentially problematic for authorities is where conduct is foreign and effects are domestic. Information gathering can be difficult, although Mr Damtoft identifies this scenario as relatively rare.

Mr Damtoft then spoke to the challenges of cooperation. The first is confidentiality – firms are concerned about trade secrets, and stock market manipulation. Furthermore, voluntary cooperation between the firm and the agency is promoted by the guarantee of confidentiality. The second challenge to cooperation is inconsistencies in enforcement policies, such as when the same conduct might be seen as predatory pricing in one country but aggressive pro-consumer discounting in another. Thirdly, cooperation might be inhibited by resource constraints.

Mr Damtoft then examined cooperation by type of conduct. Merger cooperation normally only requires the exchange of non-confidential information, although cooperation might also be promoted through firms waiving confidentiality requirements to hasten the merger review process – informal cooperation might suffice for this.

Criminal cooperation instruments (for example MLATs) can be applied in cases where cartel behaviour is criminal in both jurisdictions. Abuse of dominance cases do not usually lead to cooperation issues.

Mr Damtoft noted that informal cooperation based on trust and good contacts can be most effective. Formal bilateral agreements do not usually provide for the sharing of confidential information although they 'do authorize sharing of non-public information that is not protected by law (such as the existence of an investigation)'. Mr Damtoft, noted that most cooperation that goes on happens either through these bilateral agreements, or informally, and not through the competition chapters of RTAs.

Enforcement assistance, including the sharing of confidential information under 'strict conditions of confidentiality and usage' has been authorized in the case of the US–Australia agreement although its use has been rare. Cooperation through positive comity has been very rare in practice with respect to all agreements.

Mr Damtoft concluded by noting that the most important aspect to improved cooperation was dependent on good working relationships, and that the lack of binding commitments does not pose a barrier to effective cooperation.

Cooperation strategies in the field of competition policy
Patricia Agra Araújo, CADE

Ms Araújo noted that cooperation involving the Brazilian authorities has come both in the form of TA as well as with respect to investigations in conduct or merger cases.

Brazil currently enjoys first-generation cooperation agreements, involving technical cooperation, comity and the exchange of non-confidential information with a variety of partners including the United States, Argentina and other MERCOSUR partners. Furthermore, it is hoped that the MLAT with the United States might prove to be a useful investigative tool since it provides for both confidential and non-confidential information exchange.

The bilateral agreement with the United States, which was initially used as an instrument for the delivery of TA, also provides for the exchange of thoughts concerning cases ('relevant market

definition, harms, potential remedies, and so forth'), as well as notification of enforcement activities, and coordination of leniency. The ATAs signed with Portugal and Russia have not yet been used.

The MERCOSUR agreement has not yet been ratified by all parties, but it does provide for ' exchange of experiences, debate on the MERCOSUR region as a relevant market, exchange of information on strategic sectors [and the] joint identification of potential conducts'.

There has been informal cooperation between the Brazilian authorities and the European Commission about judged cases in common sectors.

The Brazilian authorities have also been donors of TA, particularly with El Salvador. Participation in the peer-review process of Jamaica, Argentina, Costa Rica and Kenya was found to be very helpful and thought provoking for all parties involved – both donors and recipients.

International organization meetings were found to provide a good forum for networking, and informal cooperation is becoming increasingly effective, as individuals exchange information about cases, for example concerning the theoretical application of competition principles.

Nonetheless, the legal constraints are still a barrier to effective cooperation, and non-confidential information exchange could be more regular with closer ties. Human capital and financial constraints still inhibit closer cooperation in the Brazilian experience.

The new competition regime in the Andean Community: Decision 608
Ricardo Souza, Comunidad Andina/Andean Community

Mr Souza described how the Andean Community (AC), formed by Bolivia, Colombia, Ecuador and Peru, is a subregional organization with international juridical status, instituted by the subscription of the Cartagena Agreement, on 26 May 1969, in the city of Bogotá, Colombia.

In March 2005, the Commission of the Andean Community adopted Decision 608 'Norms for the Protection and Promotion of Free Competition in the Andean Community', the objective of which is the protection and promotion of free competition within the Andean Community, to achieve market efficiency and promote consumer welfare.

Decision 608 introduced a new competition regime in the Andean Community and was the realization of joint research under the direction of the General Secretariat of the Andean Community.

This norm prohibits anti-competitive agreements and the abuse of a position of dominance by economic agents, when these occur within the territories of one or more member countries, and their effects are produced in one or more member countries; or when such behaviour is carried out in a non-member of the Andean Community territory and the effects are felt in one or more member countries. The economic agents can be natural or juridical persons, public or private, with or without profit aims.

Decision 608 establishes a centralized administration system and the application of rules for the protection and promotion of free competition within the scope of the Andean Community.

Participating in this system is the General Secretariat of the Andean Community, which has overseen the entire process, the national competition agencies, who together with the General Secretariat elaborated the joint research plan at the beginning of the process, and the Andean Committee of Defence of Free Competition.

Perspectives

Of the four member countries of the AC, Bolivia and Ecuador, do not have yet national norms on competition. Nonetheless, they have approved the application of Decision 608 within their national frameworks, while developing their respective competition legislation. For this, they have nominated interim authorities in charge of the implementation of Decision 608.

At the subregional level, there is ongoing work on the elaboration of a Practical Guide for the application of Decision 608, the purpose of which is to explain the objectives, reach, contents, and scope of application of the norm, allowing transparency and predictability in the processes to be administered by the General Secretariat. The Practical Guide is expected to be released in the first half of 2007.

Also, studies have been advanced to analyse the suitability of having a community norm on the matter of business concentrations. Other studies are being advanced to analyse the pertinence of a norm on unfair competition and another on consumer protection.

Conclusions of the dissemination phase of the UNCTAD/IDRC project Review of the main lessons to be drawn from the series of seminars held in Geneva, Turkey, the Republic of Korea, South Africa and Brazil: the way forward

Ana María Alvarez, Pierre Horna UNCTAD, Barbara Rosenberg – FGV, Consultant to the UNCTAD/IDRC project and Laurence Wilse-Samson – General Assistant to the UNCTAD/IDRC project

The panellists addressed some of the issues emanating from both the preceding two days and the series of seminars as a whole.

The first point made was that the there was both a spread of competition laws and an increasing concern over the effects of cross-border anti-competitive practices. Furthermore, it is clear that even in cases where there are no cross-border effects, there are important lessons that authorities can learn from each other where products or actors are common. Since the goal is more effective competition law enforcement, this motivates improved mechanisms for cooperation

RTAs have proliferated in the last ten years, as have the number of those agreements containing competition-related provisions. However, since the different legal and administrative systems and capabilities make a 'one-size-fits-all' approach highly problematic, perhaps the CRPs of RTAs ought to be restricted to providing a proper legal basis for cooperation.

Competition chapters are not the only places to look for competition principles. These are to be found in chapters concerning state aid and enterprises, procurement, investment, intellectual property

and also in terms of the core principles governing the RTA as a whole, such as transparency, non-discrimination and due process – which all can have competition implications.

There is a clear awareness of the linkage between implementation problems of CLP and RTAs containing CLP, and the type of TA required. The latter needs to be tailor-made and respond to development priorities. Needs assessment is an important component of TA programmes. The important point is that countries have the role of establishing their own priorities, which will ensure ownership of the TA programmes. On the other hand, donors also need to be actively involved, since they have considerable experience with competition law enforcement which the recipient country might lack. Needs assessment should not only be related to the national competition authority – other stakeholders also play an important role in effective enforcement (for example SMEs need capacity to articulate competition issues, recognize anti-competitive activities and formulate complaints).

The definition and allowable uses of confidential information to an extent fix the parameters on cooperation in competition law enforcement. However, a large amount of cooperation is possible in terms of the discussion of hypothetical cases, the sharing of investigation techniques, and the *ex-post* discussion of enforcement experiences. The proper phased introduction of a leniency programme internally is necessary before being able to cooperate with other authorities with leniency programmes. More generally, domestic implementation of competition law enforcement can pose a barrier to effective international cooperation. Both increased experience and greater institutional development are required.

Establishing synergies with local institutions – not just government authorities and the judicial branch, but academic bodies, NGOs, consumer and trade associations, think tanks, and so on – is important so as to build some momentum towards the creation of a general competition culture. This will enhance the momentum for more effective domestic competition law enforcement and hence international cooperation. The other component to improving the competition culture is careful enforcement case selection – managing the competition case portfolio to address the particular development ends in your country.

This requires that more importance be placed on understanding better the link between competition law enforcement, growth, development and social objectives. There are also vital technical considerations to bear in mind from the structural features of developing country economies. These need to be better understood in terms of the practical implications for enforcement of, for instance, large informal sectors. This will require specific local developing country expertise and the experience of those agencies that face these problems on a day-to-day basis.

It is also important to continually refine our experience of best practice in TA and international cooperation.