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Review of the experience gained so far in enforcement cooperation, including at the regional level

Note by the UNCTAD secretariat

Executive summary

Accelerating globalization over the last few decades has expanded the geographical scope of competition. The activities of large firms can impact multiple markets in foreign jurisdictions, expanding the reach for anticompetitive conduct to have cross-border effects. A purely domestic focus on antitrust policy is therefore no longer sufficient. The international community has tried and tested various approaches to effectively cooperate and to tackle antitrust issues with a global dimension. Of late, significant progress has been made, particularly among developed nations in relation to case-specific cooperation in international cartel investigations and cross-border merger reviews.

This paper examines the experiences gained so far in competition law enforcement cooperation, highlighting approaches taken to deepen cooperation in enforcement practice and share information and best practices in order to effectively investigate market activities involving transnational elements.

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Introduction

1. As recommended at the Sixth United Nations Conference to Review the UN Set on Competition Policy, held in Geneva on 8–12 November 2010, the eleventh session of the Intergovernmental Group of Experts is to hold a round-table discussion reviewing "the experience gained so far in enforcement cooperation, including at a regional level". The following is a background note with the intent of assisting member States in structuring their discussions around this topic.

2. The primary sources for information in this note include UNCTAD studies, submissions received from members in response to a questionnaire, the contributions to the above-mentioned Conference, publications of the International Competition Network Working Groups and round-tables held by the Organisation for Economic Cooperation and Development (OECD) on the topic. This note also draws on competition authority websites, as well as academic literature on this topic.

3. Between 1999 and 2006, 12 air-cargo carriers engaged in an international cartel. Among them were major airlines, including Air France, KLM, SAS, Singapore Airlines, British Airways, Cathay Pacific and Air Canada. The carriers initially contacted each other to discuss issues concerning fuel surcharges and agreed on a flat rate for all shipments. Subsequently, the cooperation extended to security surcharges and a joint refusal to pay a commission on surcharges to freight forwarders. This allowed them to avoid competing on surcharges by granting discounts to customers, for example. The impact of the cartel spanned across multiple jurisdictions and has spurred on investigations by competition authorities around the world.1

4. Today mergers between companies also regularly have an international dimension. Take, for example, the recent merger between two companies based in the United States of America. Intel, a leading manufacturer of central processing units, and McAfee, a vendor of information technology (IT) security, raised concerns in the European Commission (EC), given Intel's strong presence in the world markets for computer chips and chipsets.2 The EC's approval of the merger was conditional upon commitments ensuring that competitors would not be precluded from providing IT security products compatible with Intel units. In reviewing this merger, the EC benefited from close cooperation with the United States Federal Trade Commission.

5. These cases are poignant examples of the increasing geographical reach of business transactions and the international impact of anticompetitive activities in modern globalized markets. In this context, competition agencies are faced with new challenges and opportunities to curb multinational anticompetitive behaviours and restore competition.

6. The failure of early attempts following the Second World War to develop a multilateral competition law led countries with advanced competition regimes to rely on the extraterritorial enforcement of their competition laws in order to tackle the adverse domestic impacts of anticompetitive behaviours carried out by foreign actors. More recently however, and in light of the inevitable frictions arising from extraterritorial enforcement in relation to State sovereignty, the discourse and practice has moved back towards creating a system of international linkages to adequately meet the challenges posed by antitrust implications of transnational business activities in a globalized world.

7. Efforts to achieve this have taken numerous forms, from formal bilateral and multilateral agreements, to informal interactions, exchanges of information and best

[1] Most recently the European Commission fined 11 of the air-cargo carriers €799 million.

[2] See http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_5984.

practices. It is now widely accepted that cooperation among competition authorities around the world facilitates the effective and efficient enforcement of competition laws and therefore helps to better maintain competition in markets.

8. Nonetheless, various factors have an impact on effective enforcement cooperation – not least variations from jurisdiction to jurisdiction with regard to substantive competition rules, procedure and institutional approach. In addition, although there is no denying the widespread proliferation of competition law and policy – today more than 110 countries have viable competition law regimes – a number of countries still lack the regulatory framework to counter anticompetitive behaviours originating from domestic or foreign actors. Furthermore, the propensity for cooperation activities to be centred among developed countries with more advanced competition regimes cannot be ignored.

9. This paper aims to examine the experiences gained since this period in enforcement cooperation, highlighting the practices and approaches taken by competition authorities thus far to deepen cooperation in competition enforcement and share information and best practice in order to effectively investigate market activities involving a transnational dimension. In particular, the paper will focus on enforcement cooperation with regard to cartels investigations and cross-border mergers control.

10. Chapter I provides an overview of the origins and influences that led to increased cooperation and examines the tools of international competition law enforcement cooperation that are utilized by competition authorities.

11. Chapter II takes a closer look at case specific issues relating to cooperation paying particular attention to cartel investigation and cross-border merger control. The chapter also looks at recent developments and challenges faced by authorities in cooperation in these areas. Chapter 3 draws conclusions and raises issues for discussion.

I. Tried and tested solutions

12. Accelerating globalization has expanded the geographic scope of competition. Firms can now provide effective competition in markets outside their jurisdictions. More globalization also means that more mergers affect two or more jurisdictions and may impact market structures of multiple countries. These changes highlight the limits of existing national competition laws to deal with the effects of anticompetitive behaviours on the global markets.

13. Over the past decades, the number of competition authorities around the world has rapidly increased, at least in part owing to the global shift in consensus towards a market economy and competition, as opposed to pervasive State planning, as the best means to achieve economic growth and development. However, substantial and procedural rules often differ drastically and can make compliance overly cumbersome and costly for actors carrying out legitimate business activities. Some sort of cooperation among countries is thus essential in order to ensure that anticompetitive behaviours on global markets are addressed effectively and efficiently, without competition laws themselves becoming an obstacle to efficient economic performance.

14. Efforts taken to address this issue can be divided into five broad categories:

- Extraterritoriality;
- Binding multilateral agreement on competition;
- Bilateral agreements;
- Regional/community agreements;

- Soft law, informal networks, cooperation and understandings.

A. Extraterritoriality

15. Extraterritoriality is the assertion of a State's legal power beyond its borders under principles of public international law. It has been applied even where the conduct does not originate from the enforcing jurisdiction but has some effect there. In the past this has often led to conflict between jurisdictions, with some countries enacting blocking statutes in a bid to prevent such extraterritorial enforcement and preserve their jurisdictional sovereignty. Growing global consensus on the importance of combating anticompetitive practices has made such conflict almost non-existent as jurisdictions are more willing to cooperate with extraterritorial enforcement.

16. On its own, extraterritoriality does not solve the issue of combating anticompetitive practices on a global scale. First, each country targets anticompetitive conduct that harms its own economy, leaving other countries to mount their own prosecutions. Since not all countries have the resources, expertise and sophistication to unilaterally enforce the rules extraterritorially, even if competition laws were in substance the same, there would be regions with under-enforcement, most likely smaller or less developed economies. Second, there may be more scope for non-competition political considerations to enter into extraterritorial prosecutions than those that are purely domestic.

B. Binding multilateral agreement on competition

17. As early as the Havana Charter for an International Trade Organization (1948), there has been discussion about the advisability of a multilateral agreement on competition law. The Havana Charter was the first major attempt to create a multilateral framework on trade and competition and included provisions on limiting restrictive business practices and prohibiting cartels and vertical restraints by monopolies. However, because of resistance from numerous countries, including the United States and many developing countries, the Havana Charter never came into force.

18. In the early 1990s, the European Union (EU) reintroduced the topic of a binding multilateral agreement on competition in conjunction with the impact of competition on international trade. It made an effort to include a multilateral agreement on competition law as part of the Uruguay Round negotiations of the General Agreement on Tariffs and Trade.

19. While that effort came to an end, enthusiasm for exploring multilateral standards for competition enforcement led to the creation of a World Trade Organization (WTO) mandate to study anticompetitive practices and its interaction with trade policy in 1996. However, competition law was dropped from the trade agenda at the Fifth WTO Ministerial Conference held in Cancun in 2003.

20. Some attribute the lack of success of this approach to the varied levels of advancement in relation to competition law regimes. The United States noted that, "When half of the world's antitrust agencies are only 10 years young or less, and there is still much discrepancy between agencies on antitrust enforcement principles, we believe that a forced path to uniformity would result in enforcement at the level of the lowest common denominator."[3]

[3] American Bar Association, Administrative Law Section, fall meeting, 2004.

21. Seven years on, despite the cooperation tools in use, such discrepancies are in many ways still very real, albeit less pronounced. Many countries continue to lack competition laws and or are at early stages of development. Another persistent concern of developing countries relates to potentially cumbersome requirements in the implementation of such agreements.

22. While competition as such does not form an active part of the WTO agenda, provisions in the General Agreement on Trade in Services (GATS) and in the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) address certain anticompetitive practices. For example, GATS includes a provision against abuse by monopoly or exclusive suppliers and provides for consultations among member States to eliminate business practices that restrain competition and thereby restrict trade in services. The TRIPS Agreement recognizes that licensing terms can be anticompetitive and says that, under certain conditions, governments may take action against anticompetitive licensing that abuses international property rights.

C. Bilateral cooperation

23. One of the first bilateral agreements on cooperation in the enforcement of competition law was concluded between the United States and Germany in 1976. Today bilateral agreements have been negotiated by a large number of countries and are influenced by the principles of positive comity and cooperation promulgated by OECD. These sorts of agreement typically provide for cooperation when either party becomes aware that its enforcement activity may affect the interests of the other party. They also usually involve agreement to exchange information, coordinate on enforcement activities and take into account important interests of the other party in the course of enforcement activities. Limitations on the exchange of confidential information are also invariably included in such agreements. This can sometimes be avoided where the parties grant waivers to the authorities allowing the exchange of confidential information.

24. Second-generation bilateral agreements allowing the exchange of confidential information emerged later. An example of such an agreement is the Antitrust Mutual Enforcement Assistance Agreement 1999 between the United States and Australia. Cooperation under this agreement involves extensive reciprocal enforcement assistance between the two countries, such as disclosing, exchanging and discussing information, taking individual testimonies and executing searches and seizures.

25. Another example is the agreement between the Peruvian National Institute for the Defence of Competition and Protection of Intellectual Property, or INDECOPI, and Colombia's Superintendence of Industry and Commerce, SIC. The agreement permits the exchange of confidential information and requires both agencies to maintain confidentiality of the information shared between them and to use it only for purposes of competition law enforcement. Further, the agencies are bound not to disclose or disseminate any of the information to third parties under mutual liability for misuse of the information.

26. Non-binding memorandums of understanding (MOUs) are also increasingly common and are typically applicable to situations where trade between the party States is affected. Turkey, for example, has entered into eight MOUs signed on the basis of mutual consent, willingness and determination of the parties. They aim to encourage cooperation through the exchange of non-confidential information and meetings. The Turkish competition authority indicates that the appeal of MOUs is the added flexibility afforded by their non-binding, yet formal nature.

27. Countries also include competition cooperation provisions under free trade agreements. The EU has expressed a keenness to include stronger provisions on

competition in the new generation of free trade agreements currently being negotiated and point to the one signed with Korea in 2009 as an example of such provisions. Zambia has also established through a joint trade protocol with its neighbour, Zimbabwe, for the exchange of information in competition cases resulting in substantial case-specific cooperation. Similarly, countries often cooperate through the means of mutual legal-assistance treaties such as the one existing between the United States and Canada that allows the sharing of information in criminal antitrust investigations.

28. Overall, as a tool of cooperation for the purposes of regulating transnational anticompetitive behaviours, bilateral agreements are valued by competition authorities. Such agreements are said to be useful in avoiding the duplication of investigation and enforcement actions, better ensuring that the most appropriate party should bear primary responsibility in dealing with anticompetitive conduct affecting both parties.

29. Some developing countries have noted particular benefit from the technical cooperation provisions included in bilateral agreements. Indonesia's Commission for the Supervision of Business Competition noted that it has one bilateral agreement with the Japan Fair Trade Commission as part of the wider bilateral economic cooperation between the two countries. As part of the technical assistance provision, the Commission for the Supervision of Business Competition has entered into a new three-year capacity-building programme with the Japan Fair Trade Commission.

30. Despite these benefits, bilateral agreements by themselves fall short of solving the problems associated with the regulation of transnational anticompetitive activities involving multiple jurisdictions. An obvious limitation is that they exist solely between the two parties involved and although a network of such agreements may help, they may not adequately address the multinational effects of some anticompetitive behaviour.

31. The limitation of most agreements to the exchange of non-confidential information can be a significant drawback. If confidential information located in a foreign jurisdiction is pivotal, such a restriction can be disruptive. While some competition authorities have identified this as an area in need of improvement, they have also reiterated that the ambit of non-confidential information is broad; in practice, not being able to exchange confidential information does not render cooperation useless.

32. Furthermore, most bilateral agreements are between developed countries. One reason for this is that developed countries focus on countries whose commercial activities are likely to impact their markets. Businesses from smaller economies are less likely to have such international reach. Discrepancies in the state of advancement of competition regimes also often impact the terms of bilateral agreements as well as their de facto implementation. For example, the Commission for Supervision of Business Competition has noted that negotiating the bilateral agreement between it and the Japan Fair Trade Commission was long and challenging and that the terms had to be limited so as not to include joint competition law enforcement as a focus in order to take into account the different levels of development between the two countries.

33. Such discrepancies indicate that the most advanced countries with the most resources and experience are better able to harness the benefits of greater cooperation whereas less advanced systems benefit in different ways, such as the exchange of non-confidential information and technical cooperation provisions.

D. Regional/community agreements

34. Another approach taken to deal with the effects on transnational anticompetitive activities has been to combine efforts to regulate competition with other countries in a similar geographic region. This potentially allows for more efficient and effective

enforcement against anticompetitive behaviours affecting several countries within a given region. More specifically, regional agreements on competition enforcement are often seen as a good fit within the wider economic cooperation between countries and complementary to trade policy.

35. Today, a number of regional agreements incorporate competition provisions. These agreements have had varying degrees of success. One example of a well functioning regional agreement of this kind is the EU and its European Competition Network. The latter was created in 2004 and is made up of the competition authorities of the EU member States who cooperate to apply EU competition rules.

36. Detailed provisions on cooperation are set out in the regulation of competition across the EU. This compels a minimum level of cooperation but leaves some discretion to authorities to employ other forms of cooperation. The regulation provides for members of the European Competition Network to exchange information, including confidential information for the purpose of applying the EC competition rules. In addition, there are very specific rules on notification, on the provision of investigatory assistance to the EC as necessary and on the use of information exchanged.

37. The European Competition Network is a complex system and is not without its own limitations. For example, the issues associated with different substantive and procedural competition domestic rules even among relatively similar EU member States persist, particularly in relation to differences in sanctions or the existence of leniency programmes.

38. The Nordic countries – Denmark, Iceland, Norway and Sweden – have also entered into an agreement concerning cooperation in matters of competition. The States agree to notify the other States when the former becomes aware of a competition issue that affects the latter's competition-law interests. The exchange of confidential information is permitted on the condition that the information is treated in a confidential manner by the receiving State, that it is used solely for the purposes of competition law enforcement and that it is not passed on to a third party without the explicit consent of the providing State.

39. The Commonwealth of Independent States, composed of former Soviet Republics, is another regional organization that has been active in competition law enforcement cooperation. The Interstate Council on Antimonopoly Policy is the basic platform for the interaction of antimonopoly authorities in the Commonwealth. Recently the Council has extended cooperation among the Commonwealth by conducting a series of joint investigations of interregional markets. This has involved coordination on the part of the various participating States in determining the scope of the investigations, gathering information and conducting simultaneous inspections.

40. Other such regional agreements include the Association of Southeast Asian Nations (ASEAN), the Caribbean Community, the Common Market for Eastern and Southern Africa (COMESA), the Southern Common Market (MERCOSUR), the Southern African Development Community (SADC), the Andean Group, the Secretariat for Central American Economic Integration; the Southern African Customs Union and the West African Economic and Monetary Union. However, these agreements have not had as much success in enforcement cooperation, owing to the lesser degree of political cohesion and resources compared with that enjoyed by the EU regional grouping.

41. Some encouraging steps have been made in some of these groupings that indicate a greater level of cohesion in the years to come. For example, in 2010, ASEAN adopted the ASEAN Regional Guidelines on Competition Policy and published the *Handbook on Competition Policy and Law in ASEAN for Businesses*. Further, in 2009, COMESA launched a regional competition commission to promote fair competition within the common market across its member States.

42. The Southern African Development Community commits its member States to "pursue case-specific cooperation to the extent consistent with each member's laws, regulations and important common interests in preventing hard-core cartels, abuse of dominance, anticompetitive mergers and unilateral conduct". The SADC Declaration also emphasizes the need to "formalize a system of cooperation between national regimes that can harness the collective efforts of relevant national authorities and add value to national enforcement efforts in the face of problems affecting more than one country".[4]

43. The success of the European Competition Network suggests possible useful elements for other regional groups. However, it also serves to highlight how the harmonization of substantive rules is necessary, but not sufficient, to reduce regulatory burdens and uncertainty. The details of procedural rules and domestic legal structures also play important roles.

African brewers: the value of regional cooperation

In 2001 SABMiller, the world's second largest brewer, and Castel, a Paris-based drinks group, formed an alliance in Africa enabling both groups to protect their preferred zones. SABMiller acquired a 20 percent stake in the beer division of Castel, and Castel acquired a 38 percent stake in SABI Africa, a subsidiary of SABMiller. This meant that Castel distributed SABMiller brands in about 15 West and Central African countries where it had a dominant position. In turn, SABMiller distributed Castel brands in southern and eastern African countries (except South Africa) where it was dominant.

The market-sharing agreement between SABMiller and Castel ensured that they would not have to compete with each other, ultimately damaging consumer choice and welfare. When asked whether the agreement created national monopolies, the head of SABMiller's communications department responded, "This agreement enabled us to develop opportunities. There may be antitrust laws at the national level, but none covering the continent. I don't see what the problem is".

This indicates that multinational firms from developed and developing countries alike are entering transactions that clearly reduce competition between themselves and this often involves engaging in transnational practices that contravene their home countries' competition laws. A well-functioning regional competition law covering all African countries could go a long way in helping to prevent agreements such as the SABMiller/Castel alliance. Short of this, improved cooperation between nations based on comity principles would better equip national competition authorities to source information, effectively investigate and prevent such transactions.

E. Soft law, informal networks, cooperation and understandings

44. Soft law principles and informal cooperation activity is today perhaps the most widely employed form of competition cooperation. For example, the EU notes that the existence of a formal cooperation agreement is not a prerequisite for cooperation and neither does its absence mean that authorities remain ignorant as to the goings on in other jurisdictions.

[4] SADC Declaration on Regional Cooperation in Competition and Consumer Policies.

1. OECD Guidelines

45. Perhaps the first significant set of soft law instruments to encourage cooperation came from OECD. As mentioned above, these principles have influenced the development and content of most bilateral agreements (see para. 24).

46. The limited membership of OECD meant that it initially has limited influence on the rest of the world. In an effort to bridge this gap, in 2001 the OECD Global Forum on Competition was formed in a bid to provide opportunity for policy dialogue among OECD countries and non-OECD economies.

47. Reluctance to exchange confidential information has been a major limitation to cooperation, according to the responses to the questionnaire used in preparation of this report. In dealing with the exchange of confidential information, it may be helpful to look again to the 2005 OECD Best Practices for the formal exchange of information between competition authorities in hard-core cartel investigations. The guidance encourages member countries to generally do what they can to support information exchange in an effective and timely manner so as to prevent imposing undue burdens on competition authorities. It does, however, recognize the reality of State sovereignty and notes that compliance to a request should be at the discretion of the requested nation. The guidance suggests best practice for such exchange including, inter alia:

- The inclusion of provisions for appropriate safeguards to protect the confidentiality of exchanged information should be put in place both by the requesting and requesting States;
- Safeguards should be erected to prevent comprising amnesty or leniency programmes as well as the interests of informants and legal professional privilege;
- Member countries should, as far as possible, ensure transparency by making available to the public relevant laws and regulations on information exchanges.

2. The UNCTAD Set of Principles and Rules on Competition

48. With UNCTAD's unrestricted membership, the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set) negotiated under the auspices of UNCTAD, is the only multilaterally agreed instrument of its kind. Like the OECD recommendations, the Set makes cooperation a priority in order to achieve effective control of anticompetitive practices that affect international trade. In addition to provisions relating to cooperation through notification, exchange of information, investigatory assistance and the like, the Set draws attention to the need for developed countries to consider the development, financial and trade needs of developing countries, particularly least developed countries (article C).

49. Section F of the Set volunteers the services of UNCTAD to serve as a forum in which consultations on competition cooperation, particularly involving a developing country, can take place. It encourages States to make efforts to fully consider requests for consultations under the auspices of UNCTAD. Thus far this provision has not been employed. However at the recent sixth Review Conference at UNCTAD, delegates discussed the merits of section F and noted it to be a valuable option in the repertoire of cooperation tools available to the global competition community.

50. Under its mandate (section G), UNCTAD is required to hold annual meetings of the Intergovernmental Group of Experts to discuss and exchange views between States on matters covered by the Set as well as to undertake and disseminate research and studies on restrictive business practices. In addition, UNCTAD holds conferences at five-year intervals to review the Set and consider proposals for its improvement and development.

UNCTAD also carries out a significant amount of capacity-building work and technical assistance for competition authorities in developing countries.

3. International Competition Policy Advisory Committee

51. The last Review Conference marked the Set's 30th year and was widely attended and hailed by many competition authorities and other international organizations as an invaluable forum for the exchange of experiences. In 1997, the United States Attorney General established the International Competition Policy Advisory Committee to examine, among other things, the issues and problems associated with reviews of mergers by multiple jurisdictions. The Advisory Committee issued its report, which offered many recommendations for eliminating unnecessary transaction costs on businesses that can arise when one transaction undergoes multiple reviews.[5]

4. International Competition Network

52. The International Competition Network is an informal network of 112 of the world's competition agencies aimed at addressing practical competition enforcement and policy issues. Together with non-governmental advisors from business and consumer groups, academia and legal and economic professionals, the Network produces consensus-based projects to enhance international convergence and cooperation.

53. The International Competition Network's growing membership suggests that its work is valuable to competition authorities. It has developed a substantial body of work, including recommended practices, case-handling and enforcement manuals, reports and templates on legislation and rules in different jurisdictions. As in UNCTAD, membership of the International Competition Network is not limited; it holds regular meetings and workshops providing another forum for exchange of experiences and best and relevant practices.

5. Technical assistance and capacity-building activities

54. Each of the aforementioned organizations carries out technical assistance and capacity-building activities for developing countries to help assist in the development of their competition law agencies. Capacity-building and technical assistance in case-specific competition cases and more general training and policy advice are offered on a State-State level. This is of particular importance for developing countries and young competition authorities who benefit from guidance and support for building the competition institution in the first place, including developing legislations and guidelines through to enforcement assistance. These experiences can subsequently result in cooperation.

6. Limitation of soft law and informal cooperation

55. The obvious limitation of soft law and informal cooperation is that it is a best endeavour. This can also be considered an advantage in that it provides for a degree of flexibility that is appealing to all States with varied agenda and political considerations in mind. As competition law and policy has proliferated, the distrust of previous years has given way to active promotion and participation by most States. The wide participation in the last UNCTAD Review Conference testifies to the prominence of competition law and policy on the global agenda. Therefore, the issue of a lack of compulsion is not as severe as it would have been just 20 years ago where buy-ins for competition values were less wide spread.

[5] See http://www.usdoj.gov/atr/icpac/finalreport.htm (ICPAC Report).

II. Case-specific cooperation: cartels and mergers

A. Cartels

56. Hard-core cartels involve agreements among competitors to fix prices, allocate consumers or markets and restrict output. Cartels are thought of as the "supreme evil of antitrust" and when practised on an international level, have a far-reaching effect. Studies have shown that the impact of international cartels on the developing world is particularly significant. For example, it was estimated that in 1997 alone, the value of known cartel effects by international cartels was $51.1billion, which surpassed the $39.4 billion of foreign aid given to developing countries that year.[6]

57. Particularly in relation to international cartels, cooperation between agencies may have a number of benefits. First, one agency may alert another agency as to the existence of a cartel in its jurisdiction. Second, one agency may agree to delay information-gathering so as to avoid alerting cartelists and giving them time to destroy evidence before a second agency can act. Third, as highlighted above, cooperation can make for a more efficient and effective exchange of information and allows agencies to gain access to evidence located outside their own territory. Finally, cooperation among agencies allows for a smoother progression of cartel investigations, as it encourages joint strategic planning.

58. Through the guidance produced by its working group on cartels, such as the *Anti-Cartel Enforcement Manual*, the International Competition Network indirectly encourages the convergence of procedure and substance, allowing for an international competition environment that is more conducive to cooperation.[7] The International Competition Network Conference Report on Cooperation between Competition Agencies in Cartel Investigations sheds light on the specific cooperation practices taking places at different stages of investigations as reported by member States of the International Competition Network. These are as follows.

1. Pre-investigatory stage:

- Sharing of leads and background information about the relevant industry and actors;
- Notification of initial investigative actions that can facilitate subsequent investigative requests for assistance;
- Coordinated searches, raids or inspections and interviews.

2. Investigative stage:

- Exchange of information relating to the procedural state of play;
- Joint assessment or consideration of the merits of the case;
- Coordination on obtaining documentation from companies where the documentation is in the possession of foreign affiliates.

3. Post-investigative/remedies stage:

- Coordination with other agencies on the filing of charges;

[6] See Levenstein and Suslow, 2004, Contemporary International Cartels and Developing Countries Economic Effects and Implications for Competition Policy, Antitrust Law Journal, Vol. 71, p. 801.

[7] See the International Competition Network's Anti-Cartel Enforcement Manual, http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/manual.aspx).

- Notification to foreign agencies of guilty pleas and convictions of foreign companies;
- Adoption of decisions in cases that are also under investigation in other jurisdictions.

59. Drawing from cases and country experiences, this chapter seeks to highlight the specific methods of international cooperation used in cartel enforcement as well as to describe the remaining challenges.

B. Case-specific cooperation

60. Over the last decade there has been an increase in case-specific cooperation in the enforcement of international cartels. The EC, for example, cooperates with other agencies in approximately 31 percent of cartel investigations. However, there are distinct patterns that make the cooperation on cartel enforcement between agencies suboptimal. International cartel investigations in which there have been international coordinated enforcement efforts include the following cases.

1. Vitamins Cartel: 1990–1999

61. For much of the nineties, the world's largest vitamin producers, including Hoffman-La Roche AG, BASF AG, Aventis S.A, Merck KgA and Solvay Pharmaceuticals, engaged in a market-sharing cartel. The producers conspired to raise and fix prices and allocate market shares for certain vitamins sold around the world. This eliminated competition in the market and meant that during that period consumers paid artificially higher prices for vitamins A, B2, B5, C, E and beta-carotene.

62. This case represented a leap forward in terms of coordinated enforcement activity outside the United States. At least eight other jurisdictions launched formal antitrust investigations of price-fixing, including Canada, the EU, Switzerland, Japan, Australia, New Zealand, Brazil and Mexico. The Canadian Competition Bureau, in particular, was able to capitalize on its long-standing cooperative agreements and years of actual coordination in cartel matters with the United States Department of Justice to carry out its investigation successfully.

2. Liquid Crystal Displays: 2001–2006

63. The Liquid Crystal Display cartel involved a price-fixing cartel between leading flat-screen producers – including LG Display of the Republic of Korea, Sharp of Japan and Chunghwa Picture Tubes of Taiwan Province of China. The cartel was investigated and fined by competition authorities across three continents. The investigation involved the coordinated efforts of competition agencies in the Europe, Asia and North America.

3. Marine Hose: 1986–2007

64. The investigation and prosecution of the Marine Hose cartel was also an internationally coordinated transaction. Authorities in the United States, the United Kingdom of Great Britain and Northern Ireland, the EU, the Republic of Korea and Japan jointly investigated the cartel involving worldwide bid-rigging, price-fixing and market allocation conspiracy between the executives of a number of companies that produced marine hoses used to transfer oil. United States and EU authorities conducted simultaneous searches at various locations around the world.

4. Airline cartel: 1999–2006

65. Turning back to the case mentioned at the beginning of this paper, the most recent large-scale international cartel investigation is that of the airline cartel. Investigations across three continents are far reaching and ongoing. Again, coordination played a big part in the success of these investigations, as did greater convergence in the substantive and procedural content of the legal frameworks of the jurisdictions involved.

66. The above cases indicate that there is a shared commitment to fighting international cartels and the establishment of cooperative relationships among competition agencies around the world. However, the cases also show that a number of factors remain to be improved. Procedural divergences in substantive provisions among different regimes, the lack of confidentiality safeguards, the lack of uniformity in cooperation between agencies, legal hindrances to release confidential data, restrictions on the admissibility of evidence deriving from cooperation efforts and the risk that information exchanged is impaired or compromised by the competition authority providing it are just a few.

67. For example, in the Vitamins case, the United States' and EC's leniency arrangements precluded them from sharing with other competition authorities key information obtained from leniency applicants during their investigations. This was a significant challenge for the Brazilian investigation. However, the Brazilian authorities did benefit from close informal cooperation with their Canadian counterparts, who offered leads on what exactly to investigate, demonstrating the effectiveness of informal networks, even where no official cooperation agreement exists.

68. The above situation also highlights the challenges of enforcement cooperation when there are different substantive provisions in different jurisdictions. At the time, Brazil did not have a leniency programme and as a result, was unable to attract the same level of cooperation from the cartelists as other jurisdictions.

69. Furthermore, the Japan Fair Trade Commission counts their investigation of Vitamins as a failure, as it was unable to take stringent legal action or levy fines because of difficulties in obtaining information and could only issue administrative guidance advocating that the companies concerned refrain from such behaviours in the future. The Commission attributed this failure in part to its lack of a leniency programme. As with the case of Brazil, this limited its ability to obtain information to properly investigate the cartel and inadvertently draws attention to the lack cooperation between the Japan Fair Trade Commission and United States and EU authorities, given the failure to exchange information.

70. Another point worth noting from the Vitamins case is that with the exception of Brazil, Mexico and Lithuania, there were no prosecutions in Central and Eastern Europe, Asia, Africa or Latin America. This is a pattern that has not changed significantly in relation to the more recent cases detailed above. In 2001, OECD studies showed that there is little cooperation in cartel cases among OECD member States and non-OECD States; many of which are, of course, developing countries. The United States antitrust authorities noted in their questionnaire response that requests for case-specific cooperation or assistance from developing countries are still extraordinarily rare, despite the readily available contact information relating to Department of Justice personnel on the agency websites.

71. Various reasons have been given in the past to explain this lack of cooperation on the part of developing countries, including the relatively young ages of the competition authorities in the developing world, the lack of focus on cartel activity and the lack of bilateral or multilateral relationships with other jurisdictions. In addition, for developing countries, cooperation can add to the complexity of what is already a complex situation of investigating cartels. Scrutinizing information for the legal requirements in each country is

a complex and costly task, and more so for countries lacking in sturdy administrative structures.

72. Whatever the reasons, they do not take away from the reality that international cartels like Vitamins inflict greater harm – in the form of overcharges – on those economies without active cartel enforcement regimes (see box 1 for a telling example of this). At the recent OECD Global Forum on Competition meeting, it was suggested that a way around the difficulties and additional expenses faced by young or developing countries in investigating international cartels is to piggyback on the investigations of more advanced agencies.

5. Cooperation and leniency

73. Leniency or amnesty in the context of cartel investigations refers to the practice of granting a reduction or removal of penalties and fines arising from a cartel investigation to parties that first bring a cartel to the attention of a competition agency and are fully cooperative thereafter. As demonstrated in the Vitamins and other cartels, leniency serves as an effective tool for the detection of cartels, encourages increased cooperation from applicants and enables greater access to important information.

74. The above cartel summaries have hinted that the increased coordination and cooperation among agencies has also led to a convergence in leniency programmes. Many countries around the world have followed the model of the United States in developing such programmes. For example Japan, Australia, Brazil, Canada, Germany, Ireland, the Republic of Korea and the United Kingdom have in the last few years announced new or revised leniency programmes and many others are in the process of doing the same. This development represents perhaps one of the more important drivers of cooperation between agencies, particularly where there are waivers of confidentiality from leniency applicants.

75. However, the international nature of many cartels today means that a lack of consistency in terms of leniency programmes from jurisdiction to jurisdiction could dissuade applicants from coming forward. Hansen[8] highlights the various challenges faced by leniency applicants, which can act as a deterrent to their cooperation as well as hinder cooperation among competition agencies. These include, inter alia:

- Different timing of the investigative steps;
- Different requirements for the marker, and the leniency and immunity applicant;
- Different scope of proceedings, and in turn, standards of leniency and immunity;
- Leaks from leniency to non-leniency jurisdictions;
- Risks of evidence leaking to third parties, such as the plaintiffs;
- Difficulty of reconciling demands on witnesses;
- Inability to comply with strict confidentiality requirements in leniency regimes (such as the EU regime);
- National legal constraints on authorities

76. Efforts to promote multiple leniency applications and to obtain waivers from applicants allowing agencies to compare information from applications will go some way to solving these issues. This solution is, of course, limited where there are fundamental

[8] See Hansen's presentation at the Fair Trade Centre in Tokyo 2010: http://www.lw.com/upload/attorneyBios/upload/docs/doc112.pdf.

differences in the legal culture of regimes, such as rules on confidentiality and evidence demands in courts.

C. Mergers

77. The worldwide proliferation of merger control regimes brings the advantage of improved monitoring of merger activities, which in turn leads to a reduction in market concentration that may harm economic performance and consumer welfare. However, without cooperation among competition agencies, there are significant draw backs to this development. From the perspective of business, additional complexity, legal uncertainty and costs are involved in the process of approving mergers. This is particularly the case if multiple merger notifications to various jurisdictions have different triggers and reviews – or final clearance – and different timing. From the perspective of the competition authorities, one transaction may generate inconsistent or conflicting decisions. The importance of cooperation in regulating cross-border mergers has been stressed by developed and developing countries alike.[9]

78. Early cooperation in reviewing international mergers centred on the United States and EU but is now practiced more widely. Again, convergence has been encouraged by the International Competition Network through the work of its Working Group on Mergers.[10] Parisi[11] of the United States Department of Justice sheds light on the sort of cooperation activities that are carried out between United State authorities and the EC in reviewing merger applications affecting markets in both jurisdictions. His comments highlight the following interesting points.

1. Pre-notification stage

79. Typically United States and EU agencies will contact each other about prospective mergers on the basis of press reports to alert each other of a potential merger review so that they can determine whether they are likely to have jurisdiction. Once in contact with the merging parties, agency staff will typically enquire about notifications in other jurisdictions and encourage the parties to consider coordination of those reviews, including waiving confidentiality.

2. Investigation stage

80. Once the investigation involving a merger that is likely to affect a foreign interest has been launched, the United States agency formally notifies the governments of affected party or parties as specified under the OECD Recommendations or any bilateral agreement in place. Once communication has been established among the agencies, an early priority is to determine the timetable. Differing procedural rules can make this challenging. For

[9] See for example, country contributions to the round-table discussion on *Cross-Border Merger Control: Challenges for Developing and Emerging Economies* at the 2011 tenth OECD Global Forum on Competition. http://www.oecd.org/document/52/0,3746,en_2649_37463_46076788_1_1_1_37463,00.html.

[10] See for example the International Competition Network's Recommended Practices for Merger Notification Procedures http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf.

[11] John Parisi, 2010, *Enforcement Cooperation Among Antitrust Authorities*, United States Federal Trade Commission .

example, while EU Merger regulations stipulate a timetable based on notification, United States procedural rules allow an indefinite timetable once a second request is issued.

81. In relation to the substantive analysis, agency staff share analysis for the purpose of determining the relevant markets. This is based on tentative conclusions as to the scope of the relevant markets rather than on specific pieces of evidence. In practice, the approach to market definition adopted by the United States and the EC is similar. In relation to the exchange of information, recommendations, bilateral agreements and general best practice stipulate that EC and United States authorities can share any information that their laws do not prohibit them from sharing and that each authority must maintain the confidentiality of information received from the other.

82. In relation to the agreement between the EC and the United States, information that can be shared between the agencies can include the following:

- Publicly available information;
- Confidential information where confidentiality has been waived by the relevant parties providing the information;
- Confidential agency information, such as the fact that the agencies have opened an investigation, the timetable of the merger control, how staff analyses a case, including determining the relevant market, the assessment of competitive effects and potential remedies.

83. Agency information is contrasted with confidential business information, which would include such information as premerger notifications, the responses to investigational inquiries or the identities of complainants or witnesses.

3. Determining remedies

84. The agencies cooperate and discuss and exchange ideas about remedies. This is particularly the case where anticompetitive effects overlap both jurisdictions so as to avoid conflict and to promote a remedy that satisfies each jurisdiction. Over the last two decades there has been notable convergence between the United States and EU authorities in relation to the methodologies used to analyse mergers, the economic and econometric tools applied during the analysis and the application of remedies.

D. Case-specific cooperation

85. Examples of such cooperation include the following.

1. WorldCom/MCI and MCI WorldCom/Sprint (1997)

86. In this case, EC and United States investigations were undertaken in parallel. Cooperation in these two cases involved almost daily contacts between the case teams of the two agencies, and coordinated information gathering, joint meetings and joint negotiations with the parties and discussion on possible remedies. This was a case that benefited from waivers granted by the parties, allowing the two agencies to share the results of their market investigation, including submissions from third parties.

2. General Electric/Instrumentarium (2002)

87. In this case, the EC and the United States independently stated that the product markets were slightly different. They decided that the appropriate divestiture would be a United States-based subsidiary. In setting the remedies, the United States and EC made efforts towards coordination in order to avoid imposing inconsistent obligations on the

parties. For example, the Department of Justice amended its consent decree to make clear that it would consult in good faith with the EC to come up with a common trustee.

3. Alcan/Pechiney (2003)

88. This case also involved international cooperation, but not at the same level; the Department of Justice discussed this investigation with both the European Commission and the Canadian Bureau of Competition. The Department of Justice and the Canadian authorities held joint interviews with various customers because the acquiring party (Alcan), some affected consumers (automakers and auto parts makers), and at least one competitor were located in Canada and because the assets to be divested were in the United States. The Canadians were satisfied that the divestiture ordered by the United States would comply with their interests as well.

4. Non-EU/United States Merger Cooperation

89. More cooperation in merger reviews now happens in mergers not involving United States and EU authorities. For example, Zambian and Zimbabwean competition authorities consulted each other and the Australian competition authorities during their merger assessment of the Coca-Cola/Schweppes merger in 1998. In addition, the Zambian and Zimbabwean authorities engaged in extensive consultations during the Rothams of Pall Mal/British American Tobacco (1999) merger in order to arrive at appropriate decisions, given their close geographical and economic proximity.

E. Remaining challenges

90. The United States-EC cooperation experience provides a useful example of the efficiencies that can be gained in reviewing cross-border mergers. The cooperative relationship between Australia and New Zealand is another successful example of bilateral cooperation in merger control and competition law in general. Although the increased level of cooperation in merger control of the last twenty years is marked, there is still some way to go to ensure that the anticompetitive effects of mergers – particularly those with a cross-border dimension – are curbed. Concerns about the current state of affairs of cooperation in mergers are as follows:

- A lack of transparency of the cooperation process in merger cases, given that specific details of communications and cooperation among competition authorities are not made public. This is an issue of particular concern to the business community and can affect its willingness to be cooperative;
- The benefits of private parties cooperating and sharing information is not guaranteed because of the legal risks associated with significant potential sanctions, different substantive laws, differences in investigation timetables and possible misinterpretations of information prepared with another legal system in mind;
- Some merger reviews, such as those of General Electric/Honeywell and Boeing/McDonnell Douglas, have led to divergent results, even though United States and EU authorities cooperated closely.
- Again, the level of cooperation enjoyed between the United States and EC is not yet enjoyed by most less developed States with less advanced competition regimes.

III. Conclusion and questions for further discussion

91. Today there is widespread consensus that cooperation among competition agencies is necessary, but not sufficient to tackle anticompetitive behaviours in the global economy. There has been significant growth in the number of competition regimes around the world as well as improved communication among them. Various tools – ranging from formal agreements to informal telephone conversations – are also now available to enable interaction and relationship-building between agencies, and to facilitate cooperation and greater convergence. For many jurisdictions, these tools of cooperation form an integral part of their procedure.

92. Nonetheless, there is still some way to go in order for young competition agencies, or those of small or of developing economies, to benefit from cooperation. Many of these agencies are not party to effective formal bilateral or regional agreements, even though cooperation could involve as little as joint training and reciprocal availability to comment on draft legislation and guidelines. The immediate benefits to more advanced jurisdictions of entering bilateral agreements with their counterparts in less developed countries may not be large, but over the longer term the greater competition policy harmonization that follows from repeated interactions may benefit the economic development of both jurisdictions.

IV. Issues for discussion

1. How can greater cooperation be encouraged among developing countries?

2. Are binding multilaterally agreed rules on competition realistic in the near future?

3. How to level the playing field between developed and developing countries when it comes to the benefits of competition cooperation?

4. How can regional agreements be used to better effect than they currently are to engender greater cooperation?

5. Should terms of cooperation in the area of competition law be mandated in bilateral trade agreements?