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Cross-border anticompetitive practices: The challenges for developing countries and economies in transition

Note by the UNCTAD secretariat

Executive summary

While developed countries have been very successful in dealing with international cartels and cross-border mergers, the vast majority of developing countries are left behind. Only a handful of developing countries manage to regulate cross-border anticompetitive practices.

This paper looks into the experiences of several selected countries with a good record of cross-border cartel enforcement and merger control. It identifies specific challenges faced by developing countries in dealing with international cartels and mergers and provides possible measures to overcome these challenges. In international cartel enforcement, the paper suggests some national-level measures, including setting up leniency programmes and increasing enforcement efforts into domestic cartels in the first place. At the international level, it encourages international cooperation and proposes the establishment of an international intelligence network. In dealing with cross-border mergers, the paper highlights the importance of building capacities and development of skills at the national level. It promotes bilateral, regional and international cooperation by sharing case-specific information and exchanging views on methodologies and remedies, and highlights the need for coordination between the jurisdictions affected by international mergers.

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Introduction

1. Cross-border anticompetitive practices may occur, inter alia, through international cartels and cross-border mergers. International cartels adversely affect the economies and consumers in all countries. Although they cannot be compared to international cartels in terms of adverse effects, cross-border mergers may also have a considerable impact on economies by changing the structure of the relevant market, thereby increasing exposure to anticompetitive practices. Therefore, it is important to eliminate the anticompetitive effects of cross-border mergers and fight against cartels. However, developing and transition economies face many challenges in dealing with these cross-border anticompetitive practices.

2. The background note for the twelfth session of the Intergovernmental Group of Experts on Competition Law and Policy will examine the current features of international cartels and cross-border merger control in developing countries and economies in transition and look into the challenges they face in competition law enforcement in these areas and suggest areas for cooperation.¹

3. Owing to the prevailing limitations on the length of sessional documents, the main focus of this report is on the challenges faced by developing countries and economies in transition in cross-border cartels and mergers. The report will not examine the challenges posed by cartel and merger control in general.

I. International cartel prosecution in developing countries

4. The past two decades have witnessed great success in the fight against international cartels. While developed countries have been very successful in prosecuting international cartels, however, the vast majority of developing countries have not. Only a handful of developing countries seem to actively fight international cartels.

5. From a developing country's perspective, this chapter explores what underlies this asymmetry. It starts with a brief overview of international cartel prosecutions made by five countries that have stepped up enforcement during the last decade. Drawing upon their experiences, the chapter will then look into the main challenges faced by developing countries and economies in transition in the fight against international cartels. Lastly, it will discuss policy options that developing countries can take to address the issues.

6. For the purpose of this note, the term "international cartel" refers to cartels that involve firms established in more than one jurisdiction or affect more than one jurisdiction.

A. Experiences of selected countries

7. Five countries – Brazil, Chile, Mexico, the Republic of Korea, and Turkey – are a group of countries that followed the lead of traditionally developed countries and have become active enforcers against international cartels. This section presents an overview of international cartel prosecutions in these five jurisdictions during the period between 2000 and 2011. For this purpose, the UNCTAD secretariat collected information on their

¹ The observations in this paper are based on the information, data and cases provided by Brazil, Chile, Mexico, the Republic of Korea, South Africa and Turkey. The selection of these jurisdictions is based on their experiences in competition law enforcement against cross-border cartels and mergers, and in geographic representation.

prosecutions of international cartels directly from these authorities and other relevant studies. (See table for a sample of international cartels investigated or prosecuted by those countries.)

1. General description

8. Although they have increased their enforcement, these five countries are still small players in prosecuting international cartels, compared with the United States of America or the European Union (EU). For instance, during 1990–2007, the United States Antitrust Division convicted 67 international price fixing crimes.² For the same period, Brazil, the most active country in the group, investigated 10 international cartels.³ Another active country, the Republic of Korea, prosecuted eight international cartels during 2000–2011.⁴

9. Expectedly, high-profile global cartels caught the attention of these jurisdictions. The air cargo cartel was prosecuted across the continents by Brazil, the Republic of Korea, and Mexico. Mexico has fined cartelists in the lysine, citric acid and vitamin cartels. Brazil took actions against the lysine and vitamin cartels. The Republic of Korea has imposed fines on the cartel members in the graphite electrode and vitamin cartels.

10. For some international cartels, there is a tendency of regional division. The Republic of Korea investigated global cartels involving information technology products, such as the cartels relating to colour display tubes, cathode ray tubes and thin film transistor liquid crystal displays, while Brazil and Chile have been silent on those cartels. In the refrigerator compressor cartel, the situation is reversed. While the Republic of Korea is quiet, Brazil and Chile are investigating the case. By contrast, Turkey seems to have a very different set of international cartel cases from the others.

11. Of interest is the evolutionary development of their enforcement efforts. While they started with follow-on investigations into global cartels already prosecuted by developed countries, as seen in the famous vitamin or lysine case, now they are regular members of countries that simultaneously conduct dawn raids along with developed countries.

2. Stylized facts

12. From their experiences, several stylized facts can be observed. First, most international cartel investigations conducted by these countries involve a certain level of cooperation with developed countries, whether an exchange of informal information or coordinated dawn raids, pointing to the importance of international cooperation with authorities in developed countries. Second, these countries managed to have leniency applications for rather recent cases, stressing the importance of leniency programmes. An interesting observation is that in their early investigations, such as those relating to vitamins and lysine, they failed to have any leniency application. Given that those cases are follow-on investigations, their experience may suggest that the initiation of follow-on investigations does not necessarily guarantee leniency applications from cartelists.

13. Third, international cartels normally take several years to complete proceedings, indicating that international cartel investigations are time-consuming and resource-intensive enforcement activities. Even in follow-on investigations, such as those relating to vitamin and lysine, it took several years. In the case of the vitamin and lysine cartel investigations

² Connor J (2008). Latin America and the Control of International Cartels, Social Science Research Network Working Paper.

³ Connor J (2009). Latin America and the control of international cartels. In: *Competition Law and Policy in Latin America*. Fox E and Sokol D, eds. Hart Publishing. Oxford and Portland, Oregon.

⁴ Based on information received from the Korea Fair Trade Commission.

in Brazil, it took 7 and 11 years, respectively. Fourth, their successful enforcement against international cartels coincided with or was preceded by active anticartel enforcement against domestic cartels.

B. Challenges faced in international cartel enforcement by developing countries

14. Developing countries face many challenges in prosecuting international cartels. Even for those competition authorities that have successfully prosecuted domestic cartels, international cartel investigations pose difficult challenges. Apart from the general issues of developing countries, this Note will consider unique challenges faced by developing countries in investigating international cartels.

15. When developing countries detect an international cartel, there are generally several routes. The first scenario is that the cartel comes to their attention through leniency applications. The second one is that they become aware of the cartel through public announcements made by developed countries after dawn raids were conducted or the case went to trial. Another possibility is that developing countries detect an international cartel by themselves. An example is the seized coal cartel case in Turkey,⁵ where the Turkish authority initiated the investigation upon complaints from the public. Given the five countries' experiences, however, it is fair to say that the last scenario may be very rare.

16. Of the first two scenarios, it is clear that the leniency application scenario is much more desirable. For many developing countries, however, the second one is more plausible. Only a handful of developing countries have active leniency programmes, while the vast majority of developing countries do not. In addition, it is well known that cartelists make strategic choices in selecting jurisdictions to apply for leniency programmes and that they have little incentive to apply for a small jurisdiction where they face low exposure or time-consuming procedures. Many developing countries can be described as small economies.

1. Recognition of international cartels and initiation of investigations

17. Without a lead from leniency applications, developing countries are more likely to recognize the existence of international cartels through enforcement activities of developed countries. Developed countries usually announce their enforcement activities to the public at various stages of investigation proceedings. The announcement could be a press release of dawn raids into a certain sector, or it could be public announcements about their final decisions on cartel investigations. This kind of information, more probably on final decisions, could be useful leads for developing countries to launch their investigations into the same cartel. For instance, Brazil initiated investigations into the lysine and vitamin cases after the investigations were concluded by the United States.⁶ Likewise, the Republic of Korea started investigating the graphite electrode case after reading about the United States' enforcement actions against this cartel.⁷

18. Public announcements by authorities in developed countries may not contain enough information for developing countries to decide whether to launch their own investigations into the same cartel. Since the documents open to the public do not provide material

⁵ See contribution from Turkey to the seventh session of the Intergovernmental Group of Experts on Competition Law and Policy (2006).

⁶ UNCTAD (2003). Can developing economies benefit from WTO negotiations on binding disciplines for hard core cartels? UNCTAD/DITC/CLP/2003/3.

⁷ See contribution from the Republic of Korea to the seventh session of the Intergovernmental Group of Experts on Competition Law and Policy (2006).

evidence, which will be discussed below in detail, developing countries need to carry out preliminary investigations to see whether the international cartels in question affect their own markets. In this respect, more information from developed countries can be a valuable input to facilitate the assessment by developing countries. For instance, in relation to lysine, transcripts of the lysine cartel meetings provided by the United States authority to the Brazilian authority showed that Brazil was included in the global market allocation set by the international cartelists.⁸

2. Lack of leniency applications

19. Furthermore, even when developing countries initiate investigations against international cartels that have already been prosecuted by developed countries and thus whose existence is known to the public, as seen above, the initiation of follow-on investigations does not necessarily guarantee leniency application from cartelists. The early experience of the above-mentioned five countries points in the opposite direction. International cartelists seldom choose to apply for leniency in those jurisdictions. For the vitamin and graphite electrode case, although the Republic of Korea had a leniency programme in place at the time, none of the cartelists opted for leniency applications throughout the whole proceedings, which caused great difficulties in its investigations for the Korean authority. Thus it is more likely that developing countries have to proceed with investigations without any help of leniency applications, and that they encounter many obstacles to investigate international cartels.

3. Lack of physical presence

20. In many cases, international cartelists have no physical presence in developing countries. Where there is no branch or subsidiary in their jurisdiction, developing countries face huge difficulties in collecting evidence enough to prove a cartel. Since the cartelists are out of their jurisdiction, they cannot employ conventional investigation instruments, such as dawn raids, interrogation or requests for written statements. Hence, their investigations have no choice but to greatly rely on voluntary cooperation from cartelists, while cartelists have no incentive to cooperate with them.

21. Even the presence of a branch or subsidiary in developing countries does not necessarily guarantee effective investigations. International cartels are normally organized by head offices located abroad, and thus branches or subsidiaries located in developing countries may have no knowledge or documents directly relevant to the formation or operation of the cartel.

22. The actual experience from many jurisdictions does not appear encouraging. In its investigation against the graphite electrode cartel, for instance, the Korean competition authority requested the cartelists located abroad to provide general data of their businesses.⁹ The cartelists were relatively cooperative to the extent that their responses did not reveal any material evidence to prove the cartel. The Turkey experience in the seized coal cartel investigation is more discouraging.¹⁰ Upon the initiation of the investigation, one of the cartelists closed down its office in Turkey. The famous vitamin cartel prosecution by Brazil was the result of a long and difficult investigation,¹¹ although the Latin America operations

⁸ See supra note 5.

⁹ Seon Hur J (2006). *Competition Law/Policy and Korean Economic Development*. Ziumm, Ltd. Seoul, Korea.

¹⁰ See supra note 4.

¹¹ Nemr J (2007). Brazil Government censures vitamin cartel. *International Enforcement Law Reporter*. June.

of the major vitamin companies were centralized in Brazil, and thus the Brazilian authorities were fortunate enough to conduct dawn raids on the regional headquarters.¹²

4. Material evidence from developed countries' decisions

23. When developed countries have completed the prosecution of international cartels, developing countries may take advantage of the benefits of a follower. Official decisions normally posted on the website of a foreign agency or confidential evidence obtained from a foreign agency may serve as evidence within proceedings in many countries. Once developing countries have those, they may easily prove a cartel.

24. However, the investigation practices and legal constraints in developed countries significantly reduce the benefits. The United States authorities complete the vast majority of international cartel investigations through plea bargaining, which leaves few material documents available to developing countries. Unlike the United States, the European Commission, as an administrative body, makes its decisions and publishes its official decisions on its web page. However, official decisions open to the public only contain non-confidential information with a large amount of material information cut out. The other jurisdictions adopt a similar approach only to publish a public version of decision or to complete prosecutions through settlements. Furthermore, in many jurisdictions, the legal framework for confidentiality prevents third parties, including foreign authorities, from having access to confidential information.

25. However, court decisions, once made, are generally open to the public. If there are court decisions in relation to international cartels, therefore, they can be valuable sources of information for developing countries. One example is the decision concerning *United States v. Mitsubishi Corporation* handed down by the United States court. In a parallel law suit with the graphite electrode cartel case, Mitsubishi was accused of aiding and abetting the cartel. The court decision included cartel members' testimony and evidence. Since the decision is open to the public, the United States competition authorities could provide the relevant materials to their foreign counterparts. The Republic of Korea benefited greatly from this court decision in its own investigation into the cartel.¹³

5. Service of document

26. During investigation proceedings, various procedures specified in the law, such as notice of investigation, delivery of the statement of objections, notice of hearings and delivery of final decisions, may require the service of documents to cartel members. In general, there are several ways of the service. If cartelists have a physical presence in their jurisdictions, developing countries may deliver documents to the business location. Where there is no physical presence, the service of documents becomes complicated. First, documents can be delivered to an agent who represents cartelists. Second, it can be delivered to cartelist with the help of foreign governments. Third, authorities can deliver the document directly to head offices located abroad. Lastly, the service of documents can be made by public notice. Options available to a competition authority greatly depend on the legal framework of a jurisdiction concerned. Generally, jurisdictions differ in recognizing the ways of the service.

27. The service of documents is not just a simple notice, but often has a certain legal effect as an administrative or judicial action. Where the legal framework does not clearly

¹² Tavares de Araujo M (2002). The Brazilian Experience on International Cooperation in Cartel Investigation. Available at http://www.seae.fazenda.gov.br/central_documentos/documento_trabalho/2002-1/doctrab21.pdf.

¹³ See supra note 8.

specify rules about the service of documents to foreign companies positioned abroad, the legal effect can be a controversial issue. A way to avoid the dispute over the legal effect is to request cartelists to appoint a legal agent, an option that greatly depends on the voluntary cooperation of cartelists. Another way is to have a bilateral cooperation agreement between authorities that contains provisions on the service of documents by foreign authorities.

28. Expectedly, actual experiences differ from jurisdiction to jurisdiction. Chile relied on help from foreign authorities. In its first international cartel case, the Chilean authority encountered an instance where it had to notify one of the parties established in Brazil. With significant risk of the charges being dismissed, it dealt with the problem through a formal request to the Brazilian authorities. In its investigations into the graphite electrode cartel, the Republic of Korea requested cartelists to appoint their local agents, but the cartelists were not very cooperative. Given the poor response, the Korean authority chose to deliver the documents directly to the head offices of the cartelists along with public notice.¹⁴ The court supported the authority's approach. Turkey's experience is the worst. According to the procedural rule envisaged in Turkish law, a final decision cannot be reached without defendants' written defences to the investigation report prepared by the authority. In the seized coal cartel case, the Turkish authority could not impose fines on a foreign company to which the service of documents failed, although they found the company to be involved in the price fixing.¹⁵

6. Period of exclusion

29. When a jurisdiction initiates an investigation into the same international cartel already prosecuted by developed countries, the period of exclusion can become an issue. A number of competition laws specify a period of exclusion, normally ranging from two to five years. When the period has passed after the violation ceased, no legal action can be taken in those jurisdictions. The time-consuming nature of international cartel investigations may collide with the period of exclusion. First, it may take time for developed countries to complete investigations. As explained above, developing countries following on the same cartel have to spend additional time to end their own investigations. Japanese experience shows that this issue is not simply a theoretical possibility. In the graphite electrode and vitamin cases, Japan ended its investigations with only warnings issued. One of the main reasons for this failure was the expiration of the period.¹⁶

C. The way forward

1. Stance to international cartel investigations

30. It may be that developing countries that are not engaged in the prosecution of international cartels benefit to some extent from active enforcement by other jurisdictions. The benefit can be significant, especially where an international cartel concerned has a global impact, and prosecutions by other jurisdictions result in the worldwide breakdown of a global cartel.

31. However, a jurisdiction cannot rely entirely on another's enforcement. As the United States Department of Justice observed, there is a possibility that international cartels could operate globally, except for those jurisdictions where antitrust enforcement is stronger and

¹⁴ See supra note 8.

¹⁵ See supra note 4.

¹⁶ See Hiroyuki Yamashita's presentation given at the Capacity-Building Workshop of the Experts Group on Competition of the Association of Southeast Asian Nations, Jakarta, 2011.

thus the risk to be heavily punished is greater.¹⁷ As explained above, the experience of a handful of jurisdictions shows that an international cartel can also operate on a regional level, for which developed countries outside the region may have no interest or incentive to punish the cartel. Therefore, without developing countries on board, optimal deterrence of international cartels cannot be achieved.

32. Considering the time-consuming and resource intensive nature of international cartel investigations coupled with limited resources, it may be a more practical approach for developing countries to make strategic decisions on which case to pursue. They cannot pursue every international cartel that comes into their recognition mainly through enforcement activities by the authorities in developed countries.

33. In this regard, New Zealand's approach is worth noting. New Zealand does not pursue every international cartel challenged by large jurisdictions. Instead, it focuses its enforcement effort on international cartels that are found to create specific harm to New Zealand. When it applies the criterion of specific harm to itself, New Zealand appears to employ a rather higher threshold. In an international cartel case where the product concerned was an input into a product widely sold in its jurisdiction, for instance, the New Zealand competition authority closed the investigation, while many other jurisdictions took actions. The decision was based on its finding that there was not sufficient pass-on of the increased cost to the final product sold in New Zealand.¹⁸

2. Development of leniency programmes

34. There is no doubt that leniency programmes are the most effective and essential cartel investigation tool. In some instances, as noted above, countries may prosecute international cartels without any leniency application. However, without leniency applications, they face a number of difficult obstacles and will most likely end up with in failure after lengthy and daunting investigations. The Japanese experience in the vitamin case is a good example. Although the cartel had been already prosecuted in the United States and EU, and two of the cartelists were Japanese companies, the Japanese authority failed to prove the cartel, only issuing an administrative warning without imposing a fine. It attributed its failure to the lack of a leniency programme, which caused its limited ability to obtain information from the cartelists.¹⁹

35. Further, as many international cartel investigations have demonstrated, leniency serves as an effective tool for international cooperation. Combined with waivers obtained from leniency applicants where simultaneous applications in multiple jurisdictions exist, it promotes the exchange of information, including confidential evidence between competition authorities. It also allows agencies to closely coordinate their investigations from early on, including simultaneous dawn raids, which in turn helps each jurisdiction's proceedings. There is a growing tendency towards international cooperation being confined among authorities that receive leniency applications. Given all the advantages of leniency applications, the establishment of effective leniency programme should be considered the first policy priority.

¹⁷ See contribution from the United States Department of Justice to the seventh Latin American Competition Forum of the Organization for Economic Cooperation and Development (OECD) (2009).

¹⁸ Based on information received from the New Zealand authority.

¹⁹ See supra note 15.

3. International cooperation

36. Still, informal cooperation among competition authorities should not be underestimated. Where developing countries have no leniency programme or formal cooperation agreement with other countries, informal cooperation may be a valuable asset in their investigations into international cartels. For instance, when Brazil authorities were confronted with the same problem in their investigations into the vitamin cartel, Canada's informal cooperation offered leads on what exactly to investigate, which demonstrates the effectiveness of informal networks.

37. Global efforts for further cooperation can be built on what is already available. As Canada and Senegal suggested,²⁰ merely furthering the exchange of publicly available information through an intelligence network would be beneficial to all participants, especially authorities in developing countries.

38. The intelligence network may set up a system of alerts to inform the competition authorities about cartels that have been successfully prosecuted, including techniques of detection and evidence gathering. Another idea could be to establish an international data bank containing a list of all cartel members or businesses involved in serious and repetitive violations. Such schemes would ensure continuity of international efforts to prosecute cartels and send a strong signal that cartels will be prosecuted in other jurisdictions.

4. Building reputation and capabilities

39. To attract leniency applications from international cartelists, developing countries must first level up their anticartel enforcement efforts, probably into domestic cartels, from which they may build up their capabilities and reputations on their anticartel enforcement in general. The experience of the above countries supports this suggestion. After several years of active enforcement into domestic cartels, they started to attract attention from international cartelists.

40. In certain instances, a series of similar cartels involving the same group of multinational corporations can be formed and operated across several jurisdictions. Since each of the cartels only affects one country and there is no common scheme effective enough to call them an international cartel, the cartels are, by definition, not international, but domestic cartels. However, the cartels surely contain, to some extent, international dimensions. Multinational companies have their businesses in several countries, allowing them multi-market contact; this frequent contact in turn facilitates the formation and operation of the cartels across the region.

41. Latin America's experience provides a good example. Multinational companies supplying medical oxygen to hospitals formed bid-rigging cartels in several Latin American countries. Following the lead by Argentina, competition authorities in Peru, Chile and Panama successfully prosecuted the cartels.²¹

42. As the above experience shows, this type of cartel investigation has several advantages. Multinational companies have a physical presence, which allows authorities in affected countries to employ traditional investigative instruments, including dawn raids. There is no issue of the service of documents. Exchange of informal information may be enough to lead follow-on investigations. Another major advantage, especially for

²⁰ See contributions from Canada and Senegal to the OECD Global Forum on Improving International Cooperation in Cartel Investigations (2012).

²¹ OECD (2006). Competition Law and Policy in Latin America; OECD (2010). Competition Law and Policy in Panama: a Peer Review; Peru's presentation at the Asia-Pacific Economic Cooperation Workshop in Penang (2011).

developing countries, is that it allows them to build up reputations of active anticartel enforcers among multinational companies that are normally members of global cartels.

Table
Examples of international cartels investigated and/or prosecuted by five selected jurisdictions

<i>Country</i>	<i>Types of cartel</i>	<i>Product</i>	<i>Country of origin of indicted firms</i>	<i>Areas affected</i>	<i>Investigation period</i>	<i>Leniency application</i>	<i>Any physical presence</i>	<i>International cooperation</i>
Brazil	Price fixing Output restriction	Lysine	Europe, Japan, North America	Global	2000–2011	No	Branch	United States
	Price fixing Output restriction	Vitamins	Europe, United States	Global	2000–2007	No	Regional headquarter	United States, EU
	Price fixing	Marine hoses	United States, United Kingdom, EU, Brazil, Japan	Global	2007 to the present	Yes	N/A	United States, EU, United Kingdom, Japan
Republic of Korea	Price fixing Market allocation	Graphite electrodes	Japan, Germany, United States	Global	11.2000–4.2002	No	No presence	United States EU
	Price fixing	Air cargo	19 countries, including the Republic of Korea	Global	2005.12–2010.11	Yes	Head office and branches	United States EU
	Price fixing Output restriction	Thin film transistor liquid crystal displays	Republic of Korea, Taiwan Province of China	Global	3.2006–12.2011	Yes	Head office	United States EU
Mexico	Price fixing	Citric acid	Germany, Belgium, United States	Global	1998–2001	No	Subsidiary	United States
	Price fixing Output restriction	Vitamins	Germany, Belgium, France	Global	1999–2002	No	Subsidiary	United States
Turkey	Price fixing Output restriction	Coal	Austria, Switzerland	Turkey	2003–2010	No	Subsidiary	No
Chile	Price fixing	Refrigerators Compressors	Brazil, Japan, Others	Global	2010 to the present	Yes	No presence	United States EU, Brazil, Others

Source: Based on information received from the competition authorities.

II. Cross-border merger control in developing countries

43. The past two decades have witnessed the elimination of borders in doing business. The rapid pace of liberalization in many developing and transition economies has contributed to increased cross-border business operations. Consequently, the world has witnessed more and more cross-border mergers.

44. For the purposes of this paper, the term “cross-border merger” refers to mergers that involve firms established in more than one jurisdiction or affect markets in more than one jurisdiction. Thus, cross-border mergers may directly involve local firms or may involve foreign transnational companies, but affect the market of a third country.²² The terms “cross-border merger”, “international merger” and “transnational merger” are used interchangeably throughout the paper.

A. Experiences of selected countries

45. Developed countries have much experience in cross-border merger control. Many developing countries have limited or no experience in this area, mainly because of capacity and resource constraints. Between 2000 and 2011, countries such as Brazil, Chile, the Republic of Korea, Mexico, South Africa and Turkey, have speeded up their enforcement actions in cross-border mergers. This trend has become more prominent during the last five years.

46. Some observations could be made based on the experience of these six jurisdictions. The cross-border merger reviews undertaken by these jurisdictions have rather focused on horizontal mergers. Despite being rare, there are cases of vertical and conglomerate mergers, especially in South Africa and Turkey. The industries concerned in cross-border mergers reviewed by these jurisdictions vary from information technology and communications to chemical, mining and pharmaceutical products, energy and air transport.

47. Concerning the physical presence of merging parties in the reviewing country, in most of the case examples provided by Brazil, Chile, Mexico, South Africa and Turkey, at least one of the merging parties has a branch or subsidiary in the country concerned. In the Republic of Korea, however, merging parties do not generally have a physical presence in the country.

48. As for the decision on cross-border mergers, remedies are imposed. Most cross-border mergers have been approved subject to conditions, mostly partial divestitures, in five of the selected jurisdictions, except for South Africa. In South Africa, out of some 190 cross-border mergers reviewed between 2000 and 2011, all were approved and only 23 were approved with conditions. Being a small open economy, Singapore is an exception. In Singapore, of the 28 mergers reviewed since the entry into force of its merger control regime in mid-2007, 18 had a cross-border dimension.²³ Singapore has imposed no remedies on the cross-border mergers it has reviewed and cleared so far.

49. The experiences of the six jurisdictions show that they undertake their own merger reviews, even in cases where the same merger is reviewed by other jurisdictions in order to

²² Contribution from UNCTAD to the Round Table on Cross-Border Merger Control, OECD Global Forum on Competition (2011).

²³ Contribution from Singapore to the UNCTAD Round Table on Cross-Border Anticompetitive Practices: The Challenges for Developing Countries and Economies in Transition, twelfth session of the Intergovernmental Group of Experts on Competition Law and Policy (2012).

address the competition concerns in their markets. In some of the cases, cooperation is involved, particularly between the selected jurisdictions and the EU and the United States.

B. Challenges faced in cross-border merger control by developing countries

1. Notification

50. There are three merger notification systems:

(a) The pre-merger notification system, where merging parties are required to notify before the transaction takes place;

(b) The post-merger notification system can be either voluntary or mandatory;

(c) The voluntary merger notification system, where notification, either pre- or post-merger, is done on a voluntary basis.

51. For many developing countries there is a risk of non-notification by merging parties to an international merger, the risk being much higher in jurisdictions with voluntary merger notification systems. Further, they face challenges related to the timely filing of the transaction and respect for local legislation in mergers between foreign companies. Multinational firms prioritize larger and experienced jurisdictions in notifying the proposed transaction and only at later stages of the merger process do they notify “non-priority jurisdictions”.²⁴ This puts a lot of pressure on the latter in terms of time and resources, which results in frustration and conflict that could be prevented by timely notification.

52. Whether a merger is notified before or after its consummation is important. For jurisdictions with post-merger notification systems, the challenge with cross-border mergers is that they might receive notification of mergers after their approval by other jurisdictions and their subsequent implementation. In such cases, they might feel reluctant to disapprove the merger, despite its potential anticompetitive effects.

53. Prior to the amendments that took effect on 30 May 2012 and that require pre-merger notification, Brazil’s merger notification system fell under the second category above. The delay in notifying the Brazilian competition authorities was not uncommon in cross-border mergers. However, such delay does not cause major problems. The real problem arises when a cross-border merger is implemented before the clearance by the competition authority of a country affected by the merger. In that case, the ability of the competition authority to impose effective remedies on the notified transaction and to cooperate with foreign competition authorities is restricted.²⁵

54. In case of non-notification by parties to an international merger subject to mandatory notification, the competition authorities may inform the relevant companies of their notification obligation by e-mail or via their domestic affiliations or related customers. In some cases, major domestic law firms which usually have connections with large law firms in the United States and EU may be contacted.²⁶

²⁴ Contribution from South Africa to the Round Table on Cross-Border Merger Control, OECD Global Forum on Competition (2011).

²⁵ Botta M (2011). *Merger Control Regimes in Emerging Economies: A Case Study on Brazil and Argentina*. International Competition Law Series. Wolters Kluwer.

²⁶ Contribution from the Republic of Korea to the UNCTAD Round Table on Cross-Border Anticompetitive Practices: The Challenges for Developing Countries and Economies in Transition, twelfth session of the Intergovernmental Group of Experts on Competition Law and Policy (2012).

55. One challenge experienced by small economies in mergers between large foreign firms is that parties tend to submit notifications based on data they use to file with other jurisdictions. In its contribution to UNCTAD, Singapore states that in international merger cases involving foreign firms, data specific to their country is often not provided and parties target clearance from larger jurisdictions. Further, Singapore points out that it may be difficult to distinguish the specific effects of the merger in Singapore when the merging parties are involved in a wide range of activities globally. Despite these difficulties, the Competition Commission of Singapore has reviewed all the cross-border mergers notified to it, regardless of whether it was a cross-border merger or was reviewed by another jurisdiction.

2. Access to information

56. Competition authorities in developing countries and small economies may face difficulties in collecting information as well as questionnaire distribution and gathering from merging parties in cross-border mergers that do not involve local firms and when the parties do not have offices in their territories. In such cases, one way to collect information is to contact the involved parties directly or seek the support of diplomatic offices in the respective countries.²⁷ Another option is cooperation with foreign competition authorities. However, as in international cartel cases, the confidentiality of data and information received from parties involved in a transaction makes the exchange of certain information difficult.

57. Another difficulty in access to information is the language of communication. Most of the data collected from the parties in international merger cases are in English. This requires the staff of competition authorities in non-anglophone countries to have sufficient foreign language skills. The language issue presents a challenge in pursuing cooperation among competition authorities even within the same region.²⁸

3. Remedies

58. The decision as to whether to impose remedies, and the selection and design of those remedies in an international merger case depend on the market structure and the position of merging parties in the relevant jurisdictions. In some jurisdictions, an international merger may be approved without conditions, while in others it might require remedies. Many jurisdictions are limited to seeking remedies that protect competition in their own jurisdictions. If a jurisdiction were to seek remedies that went beyond what is necessary to address competition concerns in its market, it might be seen as overextending its sovereign powers beyond its frontiers.²⁹ The difficulty of enforcing remedies and monitoring their implementation is another challenge that might constrain competition authorities in their selection of remedies in international merger cases.³⁰

59. At present, only very few large jurisdictions have full control over large-scale international mergers, and they impose remedies to address anticompetitive effects on their markets. Therefore, the adverse effects of a merger on developing countries may not be adequately controlled.³¹ There are two scenarios followed by developing countries with respect to remedies on cross-border mergers. One scenario is where developing or small

²⁷ See supra note 25.

²⁸ See supra note 22 and 25.

²⁹ Comments provided by William Kovacic on the outline of this paper.

³⁰ International Competition Network Merger Remedies Review Report (2005).

³¹ Contribution from the Republic of Korea to the Round Table on Cross-Border Merger Control, OECD Global Forum on Competition (2011).

country jurisdictions follow the lead of developed jurisdictions, either (a) by taking no action or (b) by reviewing the merger and imposing the same remedies as the developed jurisdictions where these remedies may eliminate the competition concerns in developing countries. The second scenario is when developing countries review the merger and impose different remedies addressing their competition concerns.

60. For situation (b) in the first scenario, a good example is Dow Brasil, and the Rohm and Haas Química merger effected on 10 July 2008 between the two holding companies based in the United States. The merger was notified to Brazil on 31 July 2008. Until this date, the merger had been analysed and approved by many other jurisdictions, including South Africa, Turkey, Canada, China, Mexico and the EU. The United States Federal Trade Commission also reviewed the merger and ordered the Dow Group to sell its productive assets in the relevant market. The Brazilian authorities considered the Commission's decision in their analysis and decided that the conditions imposed by it eliminated the competition concerns in Brazil.³² Other good examples are the Manitowoc/Enodis merger and Thomson/Reuters merger, where Singapore decided that remedies imposed by the EU in the former, and the United States and the EU in the latter, would address competition concerns within Singapore.³³

61. A good case for the second scenario is the acquisition of Alcon by Novartis, which was reviewed by Mexico in addition to other jurisdictions, including the EU and China. This case shows that relatively more experienced competition authorities in developing countries can design and implement their own remedies, even structural remedies such as divestiture, to address the competition concerns in their markets. In this international merger, the Mexican Federal Competition Commission concluded that the merger would lead to a high level of concentration, and therefore, a number of competition concerns in the relevant market. The Commission received a proposal on 21 July 2010 from the merging parties on the divestiture of the product whose market in Mexico would be affected negatively by the proposed transaction. The Commission accepted this structural remedy subject to certain conditions imposed on parties.³⁴

62. For the second scenario, there are situations in which the decision taken by a developing country's competition authority does not address the competition concerns in another developing country. Therefore the local competition authority might need to carry out its own analysis. A good example is Mexichem's acquisition of Amanco's subsidiary PAVCO in March 2007, in which case the Superintendency of Industry and Commerce (SIC) of Colombia had to address the local competition issues arising from the particularities of the Colombian market by its own investigation. Mexichem is the largest producer of polyvinyl chloride (PVC) resin and compounds in Mexico, and PAVCO is one of its customers and the leading manufacturer of PVC pipes in Latin America. Brazil and Mexico cleared the merger, whereas SIC blocked the transaction in its decision on 16 July 2007.³⁵ The Superintendency concluded that Mexichem and PAVCO had dominant positions in their respective markets and their vertical integration would harm competition. The barriers to entry were high due to high import duties on imports of vinyl resin, of

³² Contribution from Brazil to the Round Table on Cross-Border Merger Control, OECD Global Forum on Competition (2011).

³³ See supra note 22.

³⁴ Resolución de la Comisión Federal de Competencia Expediente No. CNT-017-2010 (non-confidential version), 31 August 2010; Decision of the European Commission on Case No COMP/M.5778 – NOVARTIS/ALCON.

³⁵ Joseph Krauss (2009). Merger policy in Latin America. In Fox E and Sokol D, eds. *Competition Law and Policy in Latin America*. Hart Publishing. Oxford and Portland, Oregon.

which PAVCO is the sole manufacturer in Colombia. Therefore, approval of the merger would increase barriers to entry further.

63. Another important question in international mergers is whether there is a possibility of conflicting decisions or remedies between different jurisdictions and how such conflicts can be resolved. In its contribution, the Republic of Korea states that there might be cases where there are differences in approaches of competition authorities reflected in the remedies imposed. However, these cannot be regarded as “conflict”, and such differences do not block the merger. In case of joint work with foreign competition agencies, the Republic of Korea shares considerable amount of opinions on anticompetitiveness and final corrective measures in advance. This helps to converge towards similar viewpoints among authorities.³⁶ Even if the final decisions differ from each other, this does not cause problems, given that competition authorities have the right to issue a corrective measure based on their own assessment.

4. Capacity constraints

64. Dealing with cross-border mergers, especially those between foreign multinational firms, is not an easy task for young competition agencies with limited human and financial resources. Furthermore, this type of mergers usually involves very large companies and requires a good and detailed analysis of their potential effects in the markets of developing countries. Limited resources, expertise and experience could restrain developing country competition authorities from reviewing such mergers.

65. Regarding the Western Digital and Viviti Technologies merger, although the relevant product is part of the global supply chain in the computer manufacturing industry, where there is a high involvement of the developing countries in Asia, none of them, except for China, reviewed this merger, which could affect competition in their markets. The head of the Chinese Antimonopoly Authority stated in December 2011 that China’s Ministry of Commerce, which is becoming more and more influential in international merger control, would seek appropriate solutions to address its concerns.³⁷

C. The way forward

1. Building and strengthening capacities

66. Competition authorities in developing countries need to build and strengthen their capacities in order to better deal with cross-border mergers. They might start building their enforcement capacity by engaging in merger control at the national level and could start reviewing international mergers when their staff has gained enough experience. The development of skills and capabilities of staff of competition authorities and the judiciary is crucial in ensuring effective merger control.

67. Participation of competition authorities and members of the judiciary handling competition cases in international, regional and bilateral cooperation frameworks and international forums on competition such as the International Competition Network, OECD and UNCTAD is also very important. This would allow competition staff to raise awareness, build working relations and exchange experiences with their counterparts in other competition authorities in the area of cross-border mergers and seek technical assistance.

³⁶ See supra note 25.

³⁷ <http://www.businessweek.com>.

68. Given the large number of mergers taking place globally, the prioritization of cross-border merger cases for review should be considered for efficient and effective use of resources by competition authorities in developing countries. In cases where jurisdictions share common concerns regarding an international merger, developing countries and small economies may follow the lead of the large jurisdictions, which have more resources to deal with international mergers and more influence in the negotiation and enforcement of remedies imposed on merging parties.

2. Cooperation between competition authorities

69. Cooperation in dealing with restrictive business practices, including those of transnational corporations, is among the international measures provided for in the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices negotiated under the auspices of UNCTAD. The OECD Recommendation on Merger Review (2005) stresses the importance of cooperation and coordination in reviewing transnational mergers.

70. Cooperation in cross-border merger control may occur at multilateral, regional and bilateral levels. Cooperation may either be facilitated by competition provisions in regional or bilateral arrangements; or be done on an informal basis where competition officials in different jurisdiction cooperate with each other on specific cases. Chile, in its contribution, stresses the need for cooperation in cross-border mergers, particularly with respect to the assessment of appropriate remedies. Although Chile signed free trade agreements containing competition provisions, and memoranda of understanding, it has used direct informal cooperation with foreign agencies more frequently and is of the view that the latter has proven to be very useful especially in the selection and design of remedies. The LAN (Chile) and TAM (Brazil) airlines merger reviewed by both Chile and Brazil is a good example of informal cooperation. The Chilean competition officials cooperated with their counterparts in other jurisdictions and exchanged experiences on methodologies and tools that can be used in estimating the effects of and the potential risks that may arise from the merger. Further, they sought advice on remedies that have been successfully implemented in similar cases and those that should be avoided.³⁸

71. The Republic of Korea points out that in recent international merger cases, the assessment of anticompetitive effects and the remedies imposed have been similar.³⁹ This might be a consequence of coordination among the competition agencies reviewing the same merger. The most remarkable case in this respect is the recent acquisition of Viviti Technologies (Viviti) of Singapore by Western Digital of the United States, the world's third and second largest manufacturer of hard disk drives (HDD), respectively. The EU approved the merger on 23 November 2011 with conditions. After the EU's decision and given the Western Digital's commitment, Australia, Japan and the Republic of Korea followed suit. The close dates of their decisions point to coordination among the authorities involved. The merger was reviewed by many jurisdictions, including Australia, the EU, Japan and the Republic of Korea, all of which shared the same concern that the merger would decrease the number of competitors, thereby creating an anticompetitive effect in the global production and sale of the relevant product. To eliminate these concerns, Western Digital proposed the divestiture of the essential production assets for the manufacture of 3.5-inch HDDs. This measure was accepted by the mentioned authorities. In this case, the

³⁸ Contribution from Chile to the UNCTAD Round Table on Cross-Border Anticompetitive Practices: The Challenges for Developing Countries and Economies in Transition, twelfth session of the Intergovernmental Group of Experts on Competition Law and Policy (2012).

³⁹ See supra note 25.

Korea Fair Trade Commission consulted with its counterparts in the United States and EU to assess anticompetitive effects and suggest possible remedies.⁴⁰

72. The AP Moller-Maersk (Denmark) and Royal P&O Nedlloyd N.V. (PONL, Netherlands) merger in the shipping industry is a good example of cooperation between competition authorities of developed and developing country jurisdictions. The South African Competition Commission (SACC) and the European Commission cooperated during this case and shared information with the parties' consent.⁴¹ SACC approved the merger with conditions.

The power of cooperation and coordination: Rio Tinto and BHP Billiton Joint Venture Proposal

The Rio Tinto and BHP Billiton Joint Venture Proposal is a very good example of cooperation and coordination between the Australian Competition and Consumer Commission, the EC, the German Federal Cartel Office, the Japan Fair Trade Commission and the Korea Fair Trade Commission. The mentioned authorities exchanged opinions by e-mail or meetings in the course of the case. The motivation behind such strong cooperation was that the merger would affect the global market for seaborne iron ore, and therefore all the jurisdictions involved. Sharing common interests facilitated and strengthened coordination and cooperation efforts.

Rio Tinto of Australia and BHP Billiton of the United Kingdom are the world's second and third largest iron ore producers, respectively. They agreed to establish a joint venture for the co-production of iron ore in Western Australia in 2009.

After reviewing the case, the Korea Fair Trade Commission submitted its examination report summarizing the results of the investigation to the merging parties. Subsequently, it notified the Australian Competition and Consumer Commission and the EC of its decision that the proposed deal would have anticompetitive effects. The four authorities all reached the same conclusion.

Faced with strong coordinated action, Rio Tinto and BHP Billiton announced their decision to terminate the joint venture agreement on 18 October 2010 based on the consideration that transaction would not be approved by the above-mentioned competition authorities.

Source: Contribution from the Republic of Korea to the UNCTAD Round Table on Cross-Border Anticompetitive Practices: The Challenges for Developing Countries and Economies in Transition, twelfth session of the Intergovernmental Group of Experts on Competition Law and Policy (2012).

73. In enforcement, bilateral cooperation agreements seem to be functioning better than the regional cooperation frameworks. Bilateral agreements between the United States and Brazil, and the United States and Mexico are examples of formal cooperation frameworks and contain provisions on enforcement cooperation and coordination; they also avoid conflict of interest. They emphasize the importance of considering the other country's important interests at all stages of enforcement activity, including remedies and penalties sought in each case.⁴² Brazil states that, within the framework of the cooperation agreement

⁴⁰ See supra note 25.

⁴¹ UNCTAD (2006). Recent important cases involving more than one country. TD/B/COM.2/CLP/53. Geneva. 13 October.

⁴² See supra note 34.

between Brazil and the United States, both authorities notified each other in a number of merger cases that may affect the other jurisdiction.⁴³

74. Bilateral agreements between developed countries contain detailed rules and conditions on information exchange between the jurisdictions, whereas the agreements with developing countries do not include specific measures on information exchange. The incorporation of principles, such as the principle of reciprocity, protection of confidentiality and the prohibition of using information for other purposes, is significant for bilateral cooperation agreements. Another way to facilitate cooperation between competition authorities may be to obtain a waiver from merging parties in order to be able to access the information provided to other jurisdictions. Such measures would promote cooperation between competition agencies of developed and developing countries.⁴⁴

75. Although it involves some challenges, cooperation in cross-border merger cases is possible and would facilitate the work of competition authorities, particularly those of developing countries. Cooperation efforts should not be restricted to formal bilateral agreements between competition authorities. Working together by collecting and sharing information specific to cross-border merger cases, and exchanging views on appropriate methodologies, approaches and remedies in such cases are alternative ways in which cooperation could be furthered between competition agencies of developing and developed countries.

⁴³ Contribution by Brazil submitted to the seventh session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 2006.

⁴⁴ Comments provided by the Japan Fair Trade Commission on the outline of this paper.