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International cooperation in competition law enforcement – challenges for developing countries and best practices

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Executive summary

International cooperation between competition authorities has been widely discussed by the international community. At the request of member States gathered in the Intergovernmental Group of Experts on Competition Law and Policy (IGE) meetings, the UNCTAD secretariat has drafted several papers on the obstacles faced by the developing countries with regard to international cooperation for cross border anti-competitive practices which includes mergers and on possible ways forward. UNCTAD's latest developments regarding international cooperation correspond to the "Guiding Policies and Procedures under Section F of the UN Set on Competition" (GPP), adopted by Member States in the Eighth United Nations Review Conference of the Set on Competition, held under the auspices of UNCTAD in October 2020.

This paper highlights on the importance of international cooperation for competition law enforcement, especially with respect to developing countries. Firstly, this paper describes the theory and practice of international cooperation in competition law enforcement around the world. It draws its analysis from UNCTAD's previous studies on international cooperation in competition law enforcement to address the challenges faced by the developing countries in dealing with cross-border competition cases. Thereafter, this paper presents international instruments as well as best practices to respond to the abovementioned challenges, including UNCTAD's latest initiative of the GPP. Lastly, this paper outlines UNCTAD's ambitious potential for future projects in the field of international cooperation post-2020.

Key words: International cooperation, Competition law and policy, developing countries



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1 Introduction¹

UNCTAD has been the focal point for work on competition law and policy within the United Nations system since 1980.² Its primary focus is to address the needs of developing countries as well, as economies in transition, in designing and implementing competition law and policy as an instrument to achieve inclusive economic growth and sustainable development. The mandate of UNCTAD in this field has been set by the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (UN Set). The objectives of the UN Set consist of promoting benefits which arise from competition law and policy and strengthening the enforcement against anticompetitive practices worldwide.³ Among other provisions of the UN Set, Section F, on international measures, establishes a framework for cooperation at the international level in eliminating or dealing with anticompetitive practices.

BOX 1 – UN Set Section F. *“International measures*

Collaboration at the international level should aim at eliminating or effectively dealing with restrictive business practices, including those of transnational corporations, through strengthening and improving controls over restrictive business practices adversely affecting international trade, particularly that of developing countries, and the economic development of these countries. In this regard, action should include:

- 1. Work aimed at achieving common approaches in national policies relating to restrictive business practices compatible with the Set of Principles and Rules.*
- 2. Communication annually to the Secretary-General of UNCTAD of appropriate information on steps taken by States and regional groupings to meet their commitment to the Set of Principles and Rules, and information on the adoption, development and application of legislation, regulations and policies concerning restrictive business practices.*

(...)

- 4. Consultations: (a) Where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to an issue concerning control of restrictive business practices, it may request a consultation with those States with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities*

¹ This paper gathers and reproduces the main points of previous UNCTAD research on this topic (as indicated in footnote 4), discussed in previous UNCTAD annual Intergovernmental Group of Experts on Competition law and policy meetings, and it refers to key work and instruments relevant to this topic adopted by the Organisation for Economic Co-operation and Development and by the International Competition Network as presented in Section B, 2, of part II. *Challenges faced by developing countries and instruments in international cooperation in competition law enforcement* of this paper. It also refers to related previous research, referenced, to present the background and framework and to introduce the “Guiding Policies and Procedures under Section F of the UN Set on Competition”, a set of recommendations approved by consensus by the Eighth United Nations Review Conference of the Set on Competition, held under the auspices of UNCTAD in October 2020. Several UNCTAD and other documents were therefore the direct sources of the text of Part I and II of this paper.

² As per the United Nations General Assembly resolution 35/63, 5 December 1980, on “Restrictive Business Practices”, which approved the UN Set, available at: <https://unctad.org/system/files/official-document/tdrbpconf10r2.en.pdf>.

³ Namely, to ensure that anticompetitive practices do not impede or negate the realisation of benefits that should arise from the liberalisation of tariff and non-tariff barriers affecting world trade (paragraph 1 of the section A); to attain greater efficiency in international trade and development such as through the creation, encouragement and protection of competition (paragraph 2); to protect and promote social welfare in general and the interests of consumers (paragraph 3); to eliminate the disadvantages to trade and development which may result from anticompetitive practices and thus help to maximize benefits to international trade (paragraph 4); and to facilitate the adoption and strengthening of competition laws and policies at the national and regional levels (paragraph 5).

*for such a consultation; (b) States should accord full consideration to requests for consultations and, upon agreement as to the subject of and the procedures for such a consultation, the consultation should take place at an appropriate time; (c) If the States involved so agree, a joint report on the consultations and their results should be prepared by the States involved and, if they so wish, with the assistance of the UNCTAD secretariat, and be made available to the Secretary-General of UNCTAD for inclusion in the annual report on restrictive business practices.
(...)"*

International cooperation remains important for member States in times of the COVID-19 crisis. Cross-border anticompetitive cases are still taking place, and competition authorities around the world are facing similar issues ranging from price fixing concerning health care products to abusive behaviour of online platforms. The unprecedented challenges faced by competition authorities calls for enhanced cooperation to prevent and deal with the crisis in an efficient and collaborative manner. Nevertheless, the current crisis has had a positive impact in fostering stronger cooperation at regional and international levels among competition authorities, which have shared best practices to respond to challenges coming out of this crisis. The crisis has demonstrated how useful regional cooperation is, and how international cooperation is much needed to deal with issues of common concern.

International cooperation between competition authorities has been a topic of discussion recurrently in the international competition community: UNCTAD has been very active in engaging in the discussion to foster international cooperation. Namely, the topic of international cooperation was extensively discussed at the level of the UNCTAD Intergovernmental Group of Experts (IGE) on Competition Law and Policy meetings from 2012 to 2017.⁴ Following these discussions, in 2018, UNCTAD conducted an assessment of the obstacles faced by competition authorities through a survey of 54 competition authorities' respondents (see Box 2).⁵

UNCTAD's latest work regarding international cooperation led to the document entitled "Guiding Policies and Procedures under Section F of the UN Set" (GPP),⁶ agreed by consensus by the Eighth United Nations Review Conference of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, held in October 2020. This set of recommendations to facilitate international cooperation to developing countries is the outcome of consultations launched at the fifteenth session of the IGE in 2016 after the Federal Antimonopoly Service of the Russian Federation (FAS) proposal of a toolkit on international cooperation to operationalise Section F of the UN Set. Due to the wide support received, in the

⁴ UNCTAD (2012) "Cross-Border Anticompetitive Practices: The Challenges for Developing Countries and Economies in Transition", UNCTAD (2013) "Modalities and Procedures for International Cooperation in Competition Cases Involving More than One Country", UNCTAD (2014) "Informal Cooperation in Competition among Competition Agencies on Specific Cases", UNCTAD (2015) "International Cooperation in Merger Cases as a Tool for Effective Enforcement of Competition Law", and UNCTAD (2017) "Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases: Tools and Procedures".

⁵ UNCTAD (2018) "Obstacles to International Cooperation in Specific Cases". It covered the following 54 competition authorities coming from: (1) **the Americas**: Argentina, Brazil, Costa Rica, Ecuador, El Salvador, Dominican Republic, Honduras, Mexico, Nicaragua, Panama, Peru; (2) **Africa**: Botswana, Democratic Republic of the Congo, Eswatini, Gambia, Kenya, Malawi, Mauritius, Seychelles, South Africa, Zambia, Zimbabwe; (3) **Asia and the Pacific**: Australia, Japan, Indonesia, India, Republic of Korea, Lao People's Democratic Republic, Malaysia, Philippines, Sri Lanka; (4) **CIS and Balkan**: Albania, Armenia, Belarus, Bulgaria, Croatia, Kazakhstan, Kyrgyzstan, Montenegro, Russian Federation, Serbia; (5) **Western/Central Europe/North America**: Austria, Canada, Germany, Netherlands, Hungary, Italy, Poland, Spain, Sweden, Switzerland, the United States Department of Justice, the United States Federal Trade Commission, United Kingdom. Out of these 54, 24 authorities started enforcing competition laws after the year 2000.

⁶ UNCTAD Drafting Committee "Guiding Policies and Procedures under Section F of the UN Set on Competition", 13 June 2019, available at: https://unctad.org/meetings/en/SessionalDocuments/ccpb_comp1_%20Guiding_Policies_Procedures.pdf.

sixteenth session of the IGE 2017, an UNCTAD Discussion Group on International Cooperation (DGIC) was established with the aim of exploring ways and means to improve international cooperation among competition authorities, particularly between developed and developing countries' competition authorities. After the two-year discussion among member States, the GPP were drafted by participating Competition Authorities' representatives and agreed at the eighteenth session of the IGE in 2019.

This report addresses the current framework of international cooperation in competition law enforcement, especially taking into consideration developing countries. It observes the challenges which less-experienced competition authorities faced when dealing with cross-border competition infringements, and the actions undertaken to overcome those challenges which are carried out at national, regional, and international levels. Then it highlights persisting issues and bottlenecks in international cooperation which remain to be tackled. Finally, it suggests ways of strengthening cooperation, namely with an increased UNCTAD role, including through the dissemination and guidance provided by the GPP under the Section F of the UN Set, whose content will be then presented.

2 Challenges faced by developing countries and instruments in international cooperation in competition law enforcement

Based on UNCTAD's previous work and discussions on this field, section II describes the challenges faced by developing countries in eliminating or dealing with cross-border anticompetitive practices and cooperating with other competition authorities, and efforts by competition authorities to overcome those challenges.

2.1 Challenges in international cooperation

Box 2: UNCTAD's previous work on challenges in international cooperation

Challenges in international cooperation have been addressed in various UNCTAD's reports from 2015 to 2018. The list of reports is as follows:

- "International cooperation in merger cases as a tool for effective enforcement of competition law"⁷ in 2015,
- "Enhancing international cooperation in the investigation of competition cross-border cases: tools and procedures"⁸ in 2017
- and "Obstacles to International Cooperation in Specific Cases"⁹ in 2018.

The UNCTAD survey conducted in 2018 highlights various challenges faced by competition authorities such as (i) a general lack of awareness of cooperation practices, (ii) a lack of national legal basis at the national level to facilitate and support cooperation with foreign authorities and (iii) an overall lack of trust to share information with other authorities. According

⁷ UNCTAD (2015) "International cooperation in merger cases as a tool for effective enforcement of competition law".

⁸ UNCTAD (2017) "Enhancing international cooperation in the investigation of competition cross-border cases: tools and procedures".

⁹ Supra note 5.

to the assessment of critical obstacles to international cooperation carried out in the survey, the main obstacles relate to awareness, legal and practical factors. Member states raised concerns about the lack of awareness in relation to types of cooperation. This in turn hinders cooperation for at least 33 respondents of the survey. The main obstacles that will be the focus of this research are the ones that have been highlighted by the member States: legal and practical factors. Concerns about legal factors can be summed up as follows: special restrictions on exchange of information and absence of international agreements which contain cooperation provisions. Regarding practical factors, the main obstacles faced by member States relate to lack of trust and the lack of contact with foreign authorities.

2.1.1. Legal factors

Differences among competition legal systems and institutional designs, including diverse procedural rules, hamper efficient coordination between competition authorities of different jurisdictions, namely regarding the standard of proof for competition law infringements under common law and civil law jurisdictions. These differences may also impact the effectiveness and relevance of leniency programmes. Convergence of competition laws is crucial to promote cooperation between competition authorities. The recently signed Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (MMAC)¹⁰ seeks to reinforce competition enforcement efforts by sharing intelligence, case theories and investigative techniques to better coordinate investigations across international borders.¹¹ The shared legal culture and common jurisdictional approach played an important role in its inception. Overall, international cooperation relies upon the adherence to basic legal principles and on converging substantive as procedural issues.

(1) Difference in legal systems and jurisdictional issues, including in competition legal and institutional frameworks

One of the main issues hindering international cooperation comes from different national legal systems, diverse legal standards and if and how jurisdictions are allowed to apply competition law extraterritorially. Quoting the relevant commentaries of UNCTAD's Model Law on Competition "[u]nder the principles of public international law, it is generally acceptable for a State to exercise subject matter jurisdiction to regulate (a) conduct that is within its territory (the territoriality principle); or (b) conduct of its citizenry, which includes the activities of corporations domiciled or registered under their company/corporate laws (the principle of nationality). However, in the area of competition law, it is accepted today that the principle of territoriality does not prevent a State from having subject matter jurisdiction over acts that originate in foreign countries but which produce effects within the State's territory (extraterritorial application of competition law)".¹²

¹⁰ Signed by the United States Department of Justice, the United States Federal Trade Commission, the United Kingdom Competition and Markets Authority, the New Zealand Commerce Commission, the Competition Bureau Canada and the Australian Competition and Consumer protection Commission.

¹¹ <https://www.accc.gov.au/media-release/competition-agencies-to-coordinate-on-cross-border-investigations-0>.

¹² UNCTAD (2017) Model Law on Competition (2017) - Revised chapter II, paragraphs 50 and 51 (TD/B/C.I/CLP/L.8).

Growing global consensus on the importance of combating anticompetitive practices has made possible jurisdiction conflict almost non-existent as jurisdictions are more willing to cooperate on cross-border law enforcement.

The qualification of competition law infringements can be divided into criminal and administrative infringements depending on the specific framework of competition law provisions. United States antitrust enforcement is well-known for its use of criminal sanctions against individuals, from fines to imprisonment. Since 2004, an individual who takes part in a cartel in the United States can be imprisoned for up to ten years under the Sherman Act. In 2011, some 35 to 40 individuals received an average prison sentence of 17 months in the United States for cartel activities.¹³ By contrast, European Union competition law exclusively focuses on infringements of competition law by “undertakings” and the European Commission can only sanction undertakings.¹⁴

The protection of individuals’ rights under criminal law may prevent international cooperation during competition cases’ investigations since different jurisdictions may not be allowed to exchange information in these circumstances. Therefore, the variation in the standards of proof may interfere with cooperation during competition cases’ investigations.

Divergences in competition law systems can hamper international cooperation and create hurdles in cooperation agreements. The international experiences gathered in Part 2 (commentaries) of UNCTAD Model Law on Competition classified the choices for structuring of competition authorities into three institutional models: the bifurcated judicial model, the bifurcated agency model and the integrated agency model.¹⁵ In cases of similar institutional models, for instance, between Chile and South Africa, cooperation would be easier since both share similar institutional structures. For Peru and Colombia, which both have “umbrella” authorities with a wide range of competences and integrated models, it is also easier to conclude cooperation agreements. UNCTAD observations suggest that most competition authorities have been conferred administrative independence to ensure independence from political and private interferences, which may be particularly important in developing countries and countries in transition.¹⁶ The adjudication techniques operates based on various factors that also affect the choice of a “model” for

¹³ <http://competitionlawblog.kluwercompetitionlaw.com/2013/04/25/individual-liability-for-cartel-infringements-in-the-eu-an-increasingly-dangerous-minefield/>.

¹⁴ *Ibid.*

¹⁵ “(i) The bifurcated judicial model – the Authority is empowered to be investigative, and must bring enforcement actions before courts of general jurisdiction, with rights of appeal to general appellate courts. (ii) The bifurcated agency model – the Authority is empowered to be investigative, and must bring enforcement actions before specialized competition adjudicative authorities, with rights of appeal to further specialized appellate bodies or to general appellate courts. (iii) The integrated agency model – the Authority is empowered with both investigative and adjudicative functions, with rights of appeal to general or specialized appellate bodies”. See UNCTAD (2010) Model Law on Competition, Chapter IX, available at: http://unctad.org/en/Docs/ciclpL2_en.pdf, at P. 2.

¹⁶ *Ibid.*, paragraph 8, at P. 4.

competition laws such as economic, legal and political views.¹⁷ The phrase “politics of law and economics” signals that adjudicating competition cases considers not only on economics but an intricate puzzle of national laws and politics.¹⁸ For instance, the Canadian Competition Policy has experienced a “pure political accountability” model whereby the competition authority became part of a Ministry to an “Independent Agency Model” and subsequently changed to a “Judicialized Tribunal Model”.¹⁹ Consequently, if there is a variety competition models then international cooperation might be limited since cooperation can be brought forward where there is convergence between the two authorities. In turn, the level of representation of competition bodies will be limited since it will depend on the model of each jurisdiction.

(2) Diversity in competition procedural rules

The proliferation of competition laws globally and the increased levels of enforcement by competition authorities with diverging procedural and substantive rules throughout the stages of investigation has heightened the risk of inconsistent and inappropriate outcomes. The diversity of procedural rules may interfere with cross-border enforcement cooperation. This may impair the exchange of information. Enforcement cooperation is often established in different stages of investigation: pre investigation, investigation, and adjudication. In all phases, competition authorities are bound to comply with procedural rules which ensure due process. Accordingly, competition authorities need to protect confidential information, and this will ensure that undertakings and individuals’ rights will be abided. Procedural rules in competition proceedings are essential also to ensuring consistent, predictable, and fair decision making in competition law investigations. For instance, in early 2019 the Ukrainian parliament adopted a law introducing and enhancing new instruments available to the Antimonopoly Committee of Ukraine, such as an improved leniency policy, a settlement procedure in cartel cases, and the determination of time limits for AMC investigations.²⁰ Procedural safeguards not only protect parties’ rights at the different stages of the investigation but also enhances the efficiency of competition authorities’ law enforcement.

In some countries there are formal proceedings regarding meetings with competition authorities’ officials, which allow for parties to meet with the case teams and senior managers within the competition authority at predetermined moments of the procedure. In other jurisdictions, informal meetings are a key tool in the investigations, but parties benefit from a previous established procedural framework enabling their rights to be protected. While informal

¹⁷ Tyhurst (1983) “The Adjudication of Competition Law Issues in Theory and Practice: An Assessment of the Reviewable Matters Jurisdiction of the Restrictive Trade Practices Commission”, available at: http://digitool.library.mcgill.ca/R/?func=dbin-jump-full&object_id=64728&local_base=GEN01-MCG02, at P. 9.

¹⁸ See more in: Fox (1986) “The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window”, 61 *New York University Law Review* 554.

¹⁹ Tyhurst, *supra* note 17, Chapter II.

²⁰ https://www.kinstellar.com/insights/detail/849/major-procedural-safeguards-introduced-for-competition-law-enforcement-in-ukraine?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.

contacts may work in some countries, this could be part of the transparency problem in others.²¹

However, the diversity of procedural rules may interfere with cross-border enforcement cooperation. A competition authority which secures evidence from outside its jurisdiction needs to ensure that the evidence was collected according with the right due process rules.²²

The process of compiling information in competition law enforcement proceedings encompasses clear limitations regarding the use of information compiled for purposes different than those for which it was collected. For instance, regarding cartels cases which have different legal qualifications in different jurisdictions, the issue is around the treatment on information compiled from a dawn raid among other techniques.²³ In the case of mergers, there are positive developments within the so-called second-generation agreements, such as the one between Switzerland and the European Union. This agreement allows for exchange of confidential information within certain conditions.²⁴

In order to encourage cooperation and promote convergence to deal with a high level of diversity in procedural rules at the various investigation phases that may interfere with cross-border enforcement cooperation, several institutions have been working on drafting a clear framework of best practices on procedural fairness in competition enforcement proceedings. The International Competition Network (ICN) and Organisation for Economic Co-operation and Development (OECD) have promoted guidance and international standards. The ICN Framework for Competition Agency Procedures (CAP) is designed to strengthen procedural fairness in competition law enforcement by promoting and discussing substantive Principles on procedural fairness. Though the CAP is non-binding, by joining the CAP each Participant agrees that it intends in good faith to adhere to the framework to the extent consistent with applicable laws. The CAP is the ICN's third opt-in implementation framework for competition authorities, following earlier ones on merger and cartel enforcement cooperation.²⁵ The International Chamber of Commerce Best Practices sets out key principles that competition authorities should follow in enforcing competition laws. They include principles of necessity and proportionality, transparency, predictability, impartiality, engagement, access to effective judicial review. The Best Practices also describes specific safeguards that authorities should

²¹ OECD (2010) "Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings", available at: <http://www.oecd.org/competition/mergers/48825133.pdf>

²² Mehta, Kirtikumar (2017) "Interview with the Former Director of the Cartel Directorate, DG Competition of the EU Commission".

²³ Official Journal of the European Communities, COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty, No. 1/2003, 4 January 2003, at P. 11.

²⁴ UNCTAD (2015) "International cooperation in merger cases as a tool for effective enforcement of competition law".

²⁵ <https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/>.

embrace to ensure their rules and procedures conform to due process norms and reflect current best practice.²⁶

(3) Leniency programmes

Most of the jurisdictions have adopted an alternative mechanism to detect cartels, prosecuting infringers and stopping these extremely negative anticompetitive practices. This is the case of the leniency programmes which, through the incentives offered to the first cartels participants that provide relevant evidence to the authorities, correspond to an effective method of revealing the increasingly sophisticated and geographically expanded cartels, otherwise never detected nor ceased. One of the most important elements of these instruments is the confidentiality of the information provided and identity of the cartel member applying for leniency. International cooperation is key to exchange and protect this information.

Confidentiality is essential to dismiss any fear that might exist regarding the likelihood that the information provided might be used against the applicant later before other courts (national or foreign). Some jurisdictions simply require that undertakings should submit information and evidence that will enable the competition authority to: (a) carry out a targeted inspection in connection with the alleged cartel; or (b) find an infringement in connection with the alleged cartel (this is the case of the European Commission and its Notice on Immunity from fines and reduction of fines in cartel cases of 2006). But other jurisdictions are not clear enough. For example, the Mexican leniency programme requires the presentation of “evidence that causes sufficient conviction”,²⁷ the Chilean leniency programme requires the presentation of “accurate, truthful and verifiable background that constitutes an effective contribution to the clarification of the collusion and determination of the other responsible”,²⁸ the Colombian leniency programme requires the presentation of “relevant and sufficient information that serves to the investigation”,²⁹ So, it seems that some programmes may not be clear at all and can grant certain degree of discretion to the competition authority to determine if the information provided actually complies with requirements stated in the programme. Indeed, it can be difficult to ascertain what may be constituted as “relevant” or “sufficient”. In these cases, competition authorities should be careful and consider issuing guidance with the purpose of giving more clarity to those terms.

The existence of the leniency programmes matters in international cooperation regarding the exchange of information. The applicant must

²⁶ <https://iccwbo.org/media-wall/news-speeches/icc-unveils-new-guidance-due-process-global-competition-law-enforcement-proceedings/>.

²⁷ Comisión Federal de Competencia de México, “Programa de Inmunidad”, available at: <http://www.cfc.gob.mx/index.php/que-hacemos-cfc/practicas-monopolicas-absolutas/programas-de-inmunidad>.

²⁸ Fiscalía Nacional Económica, “Guía sobre Beneficios de Exención y Reducción de Multas en casos de Colusión.” Available online at <http://www.fne.gob.cl/marco-normativo/guias/>.

²⁹ Superintendencia de Industria y Comercio, “Programa de Beneficios por Colaboración”, available at: <http://www.sic.gov.co/es/delacion>.

provide “precise, true and verifiable information” (Chile) that is full, true and vital information regarding the cartel (India).³⁰ To attract international cartelists, the leniency programme protects information sufficiently for the applicant to be no more exposed than non-applicants to proceedings elsewhere.³¹ For instance, under the Indian Regulation No. 4 of 2009, the applicant’s identity and the information submitted remain confidential.³² A simultaneous application to multiple jurisdictions, along with a waiver to allow the exchange of confidential information, allows coordinated investigations against the remaining cartelists. When one competition authority receives a leniency application, it can obtain information from the applicant on other jurisdictions to which it submitted its leniency applications, and thereafter the applicant can share the leniency information with the other competition authorities in those jurisdictions by obtaining a waiver.

Leniency programmes can mutually reinforce incentives to seek leniency in multiple jurisdictions. Simultaneous application in multiple jurisdictions, combined with waivers to allow the exchange of confidential information, allows coordinated cartel investigations, which in turn helps each jurisdiction’s proceedings. Together, these effects imply that countries benefit when others become more active against cartels and adopt effective leniency programmes. Consequently, more experienced competition authorities may to some extent provide technical assistance to less experienced authorities. But a jurisdiction imposing large sanctions while lacking an attractive leniency programme undermines others’ programmes. Follow-on private lawsuits for antitrust damages also undermine incentives to seek leniency. Law enforcers can attenuate the negative spillovers by reducing the information available to follow-on actions and modifying incompatible or disadvantaging requirements imposed on leniency applicants.

This, however, does not apply to competition authorities without leniency programmes. In cases of lack of leniency programmes and applications, competition authorities will also face challenges in obtaining information and evidence through companies’ cooperation in their investigations under the leniency programmes. What is crucial is equal protection for the information exchanged in other jurisdictions: authorities should have safeguards to ensure that potential information exchanges with other authorities do not violate legal protections afforded to individuals in those countries.³³

2.1.2. Practical factors

From UNCTAD work and other international discussions on this issue, two practical factors were stressed: lack of trust and lack of point of contact at foreign authorities. However, the recent UNCTAD survey concluded that trust can *never* be a practical factor in the equation of cross-border cooperation,

³⁰ UNCTAD (2010) “The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries” (TD/RBP/CONF.7/4).

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

the level of experience of competition authorities appearing to influence their perception regarding this factor.

(1) Lack of mutual trust and understanding

One of the utmost important elements for developing effective international cooperation is trust. This is not exclusive of relations between individuals as institutional trust, developed at different level and scale, is necessary to foster cooperation. The former is developed through “repeated interactions with others and is based on familiarity, interdependence, and continuity in relationships”,³⁴ which are commonly established between people rather than institutions.³⁵ The latter is developed when “individuals must generalize their personal trust to large organizations made up of individuals with whom they have low familiarity, low interdependence, and low continuity of interaction”.³⁶ Undoubtedly, if mutual understanding, trust and interaction are achieved between competition authorities, cooperation is much facilitated and can yield tangible results in any stage of a cartel investigation whether one or multiple jurisdictions are involved.³⁷ However, the development of trust and mutual understanding is time-consuming and requires heavy resources and effort.³⁸

The lack of mutual trust between authorities to share valuable information indicated that authorities are reluctant to share information pertaining to investigations of cartels especially in relations to international cartels. One possible explanation is the difficulty in predicting how an authority will act. The principle of “knowledge-based trust”³⁹ which is grounded on information and predictability propounds that: “the better we know the other [authority], the more accurately we can predict what [the authority] will do; as long as the other remains predictable (that is, confirming our knowledge and acting consistently with that knowledge), trust will endure”.⁴⁰ In other words, authorities will trust each other if the information contributes to the predictability of the other’s actions and if that reaction is consistent over repeated interactions. For instance, in regional organizations, trust among competition authorities can be developed due to their common language, historic and cultural backgrounds as in the case of Latin American Spanish-speaking competition authorities.⁴¹

³⁴ Roy Lewicki and Barbara Bunker (1994) "Trust in Relationships. A Model of Development and Decline" in Barbara Bunker and JZ Rubin (eds) "Conflict, Cooperation, and Justice: Essays Inspired by the Work of Morton Deutsch" (Jossey-Bass Inc 1995), at P. 137.

³⁵ For a comprehensive study on the nature and functioning of relationships of interpersonal trust, see: Daniel J McAllister (1995) "Affect- and Cognition-Based Trust as Foundations for Interpersonal Cooperation in Organizations", 38 *Academy of Management Journal* 24.

³⁶ Lewicki and Bunker, *supra* note 34, at P. 137.

³⁷ Indeed, trust is the essential condition for successful international cooperation in all stages of the investigation of cartels, including the exchange of information, coordination of dawn raids, and discussion on general investigative strategy and aiming at investigating cross-border anticompetitive practices.

³⁸ For a comprehensive analysis of why trust is easier to destroy than it is to build, see Lewicki and Bunker, *supra* note 34.

³⁹ Lewicki and Bunker identified three different types of trust: calculus-based, knowledge-based and identification-based. These three types of trust are related to each other in some manner as the development of trust should proceed through these 3 stages. *Ibid.*, at P. 153.

⁴⁰ *Ibid.*, at P. 149.

⁴¹ Cf. whereby two Latin American competition authorities have not been able to ‘trust’ each other due to a number of reasons related to the lack of personal contacts between the enforcers.

Another notable issue is the lack of interaction between the members of experienced and young competition authorities at the international level. Such interactions can be a real challenge for the young authorities which lack the necessary means to participate in the various *fora*. For instance, required participation and attendance at annual meetings organised by the ICN, OECD or UNCTAD can incur a significant financial burden on the young competition authorities if the development cooperation partners are unable to fund or compensate the expenses incurred at these events. In addition, some young competition authorities have no prior interaction and engagement with other competition authorities which would be beneficial to have, should they need to ask for cooperation in their investigations. In the case of young authorities, the new generation of international cooperation tools should be noted. As a response to challenges posed by cross-border anticompetitive practices, it was proposed during the thirteenth session of the IGE that enforcement capabilities be aggregated. One way to achieve this could be through the creation of a focused multinational information-sharing platform. An initial step was undertaken towards creating a platform. Key features of the platform include the pooling of resources to create a visible flow of non-confidential information and in order to enhance enforcement capabilities, especially for young competition authorities in developing countries.⁴²

Experienced or large authorities would be encouraged to respond to the requests for information if they feel and trust that the information shared with the foreign authority would not be misused or leaked to third parties. Given the growing number of the establishment of small or young competition authorities, there is a valid concern on how mature authorities will deal and cope with the rising number of case-specific requests. It is more probable for the young competition authorities to meet with experienced competition authorities when a cross-regional link is already in existence or is set up. This could be in the form of participation in shared conferences, workshops or established bilateral cooperation agreements and even to the extent of delivering technical assistance between the competition authorities. For instance, the relations between Australia and the Philippines competition authorities could be established through the Australian development projects that have been established with the ASEAN countries in the area of competition law and policy.

(2) Lack of focal point at foreign authorities

Another practical factor stressed was the lack of point of contact at foreign authorities. Some competition authorities, especially those in developing countries, replied that they had a problem in cooperating with other competition authorities as they did not know who to contact. That means that some competition authorities do not have regular interaction with others and do not know their contact points.

⁴² UNCTAD (2015) "International cooperation in merger cases as a tool for effective enforcement of competition law".

In addition, the 2018 UNCTAD survey also covered Section F of the UN Set as it provides a cooperation framework open to all United Nations Member States for consultations but unfortunately hardly ever used.⁴³ This is because most authorities (especially older and larger ones)⁴⁴ relied on direct communication with the foreign authorities, and considered that it would be unseemly to involve non-investigatory parties in the enforcement cooperation given the fact that this could pose a threat to the cooperation itself.⁴⁵ Some thought that the existing framework is inadequate (such as in Albania⁴⁶ and the Russian Federation⁴⁷), and not needed since cooperation within regional economic organizations (such as Southern African Development Community, Commonwealth of Independent States, and European Union) already takes place (such as in Botswana,⁴⁸ Kazakhstan⁴⁹ and Hungary⁵⁰).

A similar result was reached by the ICN survey on its framework for information exchange in merger review responding to the fact that the framework was not used in practice than expected.⁵¹ More than 70 percent of authorities who have registered to the Merger Cooperation Framework have never used it, mostly because they have used other cooperation mechanisms such as personal channel with other competition authorities, regional frameworks and bilateral cooperation agreements or MoUs.

Overall, international cooperation is often taking place between countries with regular interaction, or within existing (regional) frameworks between countries with closer relationships, so that authorities outside of these interactions have difficulties in getting involved in those cooperation activities.

It is evident that other factors must be taken into account.⁵² Common views shared included references to the “lack of a formal cooperation mechanism prevents effective cooperation”, to “cooperation requires an enforcement mechanism to make it work” and that “cooperation only takes place among developed countries.”⁵³ Nevertheless, this can be outweighed by the positive remarks such as “effective cooperation happens every day, with and without a formal mechanism” and where “cooperation requires mutual trust and

⁴³ Swaziland said that consultations are taking place but at the higher level of management. However, it did not provide details whether this was under the UN Set. Swaziland Competition Commission, "Survey Response by Swaziland", at P. 6.

⁴⁴ Bundeskartellamt, "Survey Response by Germany", at P. 8; Italian Competition Authority (AGCM), "Survey Response by Italy", at P. 10; Japan Fair Trade Commission, "Survey Response by Japan", at P. 13; Department of Justice, "Survey Response by the United States"; Federal Trade Commission, "Survey Response by the United States".

⁴⁵ Mexican Federal Economic Competition Commission (COFECE), "Survey Response by Mexico", at P. 10.

⁴⁶ Albanian Competition Authority, "Survey Response by Albania", at P. 8.

⁴⁷ Federal Antimonopoly Service (FAS), "Survey Responses by the Russian Federation", at P. 12 to 13.

⁴⁸ Competition Authority of Botswana, "Survey Response by Botswana", at P. 9.

⁴⁹ Committee on Regulation of Natural Monopolies, Protection of Competition and Consumer Rights under the Ministry of National Economy of the Republic of Kazakhstan, "Survey Response by Kazakhstan", at P. 9.

⁵⁰ Hungarian Competition Authority (GVH- Gazdasági Versenyhivatal), "Survey Response by Hungary", at P. 9.

⁵¹ ICN (2018) "ICN Framework for Merger Review Cooperation Survey Report", available at: <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/MWG-Framework-Survey-Report.pdf>.

⁵² In interviews with heads of young and small authorities, it transpired that cooperation with other authorities lies on legal barriers that arise from the distinction between common law and civil law systems as well as top-down policies whereby civil servants might be sanctioned if communications with foreign colleagues are concerned the cases handled, especially if these cases are related to cartel enforcement. The primary source here is anonymous at the request of the interviewees.

⁵³ Russell W. Damtoft "Mechanisms for cooperation: informal cooperation", at the 14th Session of Intergovernmental Group of Experts, at slide 18.

strong relationships” as well as the fact that “cooperation takes place wherever there are enforcement interests in common”.⁵⁴ It must be noted, however, that enforcement interests of the competition authorities, either experienced, large, young or small, are not often the same, as was the case in the auto parts investigation undertaken by the Colombian Competition Authority in 2012.⁵⁵

2.2 Cooperation instruments and initiatives undertaken at national, regional and international levels

In Section 1 above, the paper addressed the challenges that hinder effective international cooperation. This section 2 will illustrate how the ways and means to address such challenges have been developed at national, regional and international levels. This section will also make a particular reference to the initiatives by international organizations and networks, including UNCTAD.

2.2.1. At bilateral (national) and regional levels

Competition authorities and international organisations have designed a spectrum of tools with the aim to foster international cooperation and information sharing. In 2013, the UNCTAD study classified various forms of cooperation.^{56 57}

There are different ways in which competition authorities can establish frameworks for cooperation. In some cases, economic treaties or agreements between governments include competition provisions; these are State-to-State agreements and include free trade agreements (FTAs), economic partnerships agreements (EPAs) and regional trade agreements (RTAs). Although these are to achieve broader objectives such as trade promotion and economic integration, these often contain provisions on competition policy and encourage international cooperation. In other cases, competition authorities conclude agreements specifically on competition, such as memoranda of understanding (MOUs).

Also, some cooperation mechanisms follow a specific legal framework, including binding provisions and providing for legal certainty and

⁵⁴ *ibid.*

⁵⁵ In this investigation, SIC had requested information from these United States authorities at the initial stage of investigation so as to effectively get the evidence from the international case. Unfortunately, due to the SIC not being able to build a close cooperative relationship with the United States authority, the case was archived because of the lack of sufficient access to evidence under the legal requirements of Colombian Law. See Interview with a SIC Case Handler, Ms. Maria Claudia Martinez Beltran in 2013 on the issue "International Cartel Investigations in the SIC: Investigation Limitations and Possible Future Solutions".

⁵⁶ Namely, informal cooperation based on the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980); informal cooperation based on the 1995 OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings, or other similar “soft law” instruments with no particular legal basis; cooperation based on waivers; cooperation based on provisions in national law; cooperation based on non-competition-specific agreements and instruments; cooperation based on competition-specific agreements; and regional cooperation instruments.

⁵⁷ UNCTAD (2013) “Modalities and Procedures for International Cooperation in Competition Cases Involving More than One Country”, at P. 4.

transparency. In other cases, international cooperation takes place in more informal ways, which are more flexible and may be varied, relating to general and case specific cooperation experiences.

These cooperation mechanisms have provided a framework for effective cooperation on the basis of publicly available or non-confidential information; confidential information without waivers from parties; cooperative relationship building; and deferral to partners in appropriate cases.⁵⁸ On a general basis, competition authorities rely on formal cooperation mechanisms to exchange more sensitive information.⁵⁹ UNCTAD's past experience has revealed that formal cooperation agreements can, in fact, be used as a "break-the-ice strategy", where in circumstances where two competition authorities were initially reluctant to cooperate but they are subsequently obliged to do so.⁶⁰

There is a recent trend for RTAs to include competition provisions, and those RTAs result in the establishment of regional competition authorities/rules and/or the engagement in cooperation for more effective competition law enforcement. RTAs that have created a supranational competition authority includes the European Union, the Common Market for Eastern and Southern Africa (COMESA),⁶¹ the West Africa Economic and Monetary Union (WAEMU),⁶² the Caribbean Community (CARICOM),⁶³ the Andean Community of Nations⁶⁴ and the Common Market of the South (MERCOSUR).⁶⁵ Other RTAs such as the Association of Southeast Asian Nations (ASEAN), among others, have some competition provisions or guidelines in force but have yet created a supranational authority that can deal with competition matters at the regional level.

Among them, the European Competition Network (ECN) is one of the most advanced regional cooperation arrangements. ECN was established to ensure that the European Union competition law provisions are applied effectively and consistently by member States throughout the European Union. At the same time, ECN has been a forum for the European Union member States to exchange information, assist each other with investigations and identify their best practices. Member States are even allowed to exchange confidential information with each other and use them as evidence to prove competition law infringements.

⁵⁸ Damtoft, *supra* note 53.

⁵⁹ ICN (2013) "Anti-Cartel Enforcement Manual Chapter 9: International Cooperation and Information Sharing", available at <https://www.internationalcompetitionnetwork.org/portfolio/international-cooperation/>, at P. 9.

⁶⁰ Consider the case of China's Competition Law. The Antimonopoly Law (AML) is a product of compromise based on existing political and economic realities and 'pragmatism'. The Law was drafted as short and abstract so its future implementation will prove to be a trial-and-error process. See Huang (2008) "Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law", 75 *Antitrust Law Journal* (2008) 117, at P. 131.

⁶¹ COMESA Competition Regulations (2004).

⁶² Treaty of the West African Monetary and Economic Union, articles 88 - 90, Regulation No. 2/2002/CM/UEMOA and Regulation No. 3/2002/CM/UEMOA.

⁶³ Treaty of Chaguaramas, revised, 2001, chapter 8, articles 168 - 183.

⁶⁴ Decision 608 on the rules for the protection and promotion of competition.

⁶⁵ Protocol of the Defense of Competition (1996).

More recently, with the adoption of the Continental Free Trade Agreement in Africa, the competition provisions established thereof remain at the heart of making market economies increasingly functional. The assessment made by the United Nations and other partners in 2019 outlined that there are several cross-border anti-competitive practices in Africa that need to be tackled with a comprehensive set of regional competition rules.⁶⁶ These problems were exacerbated by the lack of national coordination between competition authorities on the one hand and trade negotiators on the other.⁶⁷ However, progress has been noted through the strengthening of the capacity of developing and transitioning RTA member countries after developed countries have strengthened their commitment to effectively address the main competition policy concerns of their trading partners.

Regardless of the existence of cooperation agreements, competition authorities can still cooperate with each other informally. Informal cooperation can either be general (e.g. asking for information regarding laws and methodologies in general) or case-specific.⁶⁸ Informal cooperation can even take place in conferences, bilateral meetings, and other forms of exchange of knowledge and information that can be shared between competition experts in the course of their deliberations. Also, capacity building and technical assistance cooperation may provide the platform where beneficiary countries can get together and promote common objectives. In this regard, UNCTAD, OECD and ICN are engaged in this type of informal cooperation through their contributions to multilateral, regional and bilateral meetings.

Without a doubt, informal cooperation has become an integral part of international cooperation between competition authorities.⁶⁹ Competition authorities appreciate the sharing of non-confidential information, such as public and investigative information, informally especially in cross-border cartel investigations.^{70 71} Informal cooperation has demonstrated to be

⁶⁶ United Nations Economic Commission for Africa (2019) "Next Steps for the African Continental Free Trade Area: Assessing Regional Integration in Africa - ARIA IX", available at: https://www.uneca.org/sites/default/files/PublicationFiles/aria9_en_fin_web.pdf, at P. 141. This is a joint publication of UNCTAD and UNECA.

⁶⁷ Horna and Kayali (2007) "National Implementation of Competition-Related Provisions in Bilateral and Regional Trade Agreements", in *Implementing Competition-Related Provisions in Regional Trade Agreements: Is It Possible to Obtain Development Gains?* (2007) 21, at P. 55.

⁶⁸ Case-specific informal cooperation could include discussion of investigation strategies, market information and witness evaluations. It would also entail sharing leads and comparing authority approaches to common cases. This form of cooperation can help young competition authorities in particular to streamline an investigative strategy and focus an investigation.

⁶⁹ "Informal information sharing is an important tool that many competition authorities utilize as an enforcement strategy." See ICN, *supra* note 59, at P. 9.

⁷⁰ "Mature Authorities currently exchange information on a variety of issues such as background information of the industry, sharing of case theories or the disclosure of investigative or analytical findings. Bilateral meetings at the management level generally involve high-level discussions of common cases, including the status of the investigation and other case-related information. In addition, bilateral meetings are also a good forum to discuss policy issues, or to seek guidance from another competition agency on a specific issue or concern. All these informal cooperation settings can take a number of forms including in-person meetings, e-mail exchanges, and telephone calls between individuals or case teams." See ICN, *supra* note 59, at P. 9.

⁷¹ "This form of contact normally occurs when multiple competition authorities are investigating the same or similar conduct in their respective jurisdictions. The contact can occur through in-person meetings, by e-mail, or by telephone. However, in-person meetings are rare due to logistical difficulties with arranging these meetings between several competition authorities. Multilateral contacts typically include discussions of investigative and analytical findings, the sharing of case theories and the coordination of formal powers". See ICN, *supra* note 59, at P. 9.

effective regardless of the level of maturity of competition authorities (young or experienced).⁷²

When it comes to the exchange of information, it may cover both pre-investigation and formal investigations. Even on an informal and voluntary basis, competition authorities can exchange basic information regarding the case such as on the relevant market, alleged competition concerns and legal basis for the intervention, all of which are regarded as non-confidential information under their national laws. Also, competition authorities can further discuss the details of the relevant market information, the scope of products and geographical areas affected by the anticompetitive practices at stake, planning of their case procedures, timescales or theories of harm, their findings from dawn raids and further investigations. Teleconferences can be held between investigative staff and case handlers, and also experts discussing methods to collect electronic evidence efficiently or to restore when it has been deleted.

With respect to coordination of dawn raids, competition authorities can discuss which persons and companies to be inspected and by which authority, and it can be conducted relatively on the same day and time, considering the time differences. The competition authorities can even share their findings from the dawn raids with each other, to the extent consistent with their national laws.

2.2.2. At the international level⁷³

The international community has devoted much effort to improve competition law enforcement, in order to effectively address cross-border anticompetitive practices and mergers. International and multilateral organisations, including UNCTAD, the OECD and ICN, have established frameworks to facilitate international cooperation and have compiled recommendations and best practices of competition authorities in international cooperation. OECD and ICN have also shared valuable information about how international cooperation in particular cases can be made more effective through joint efforts.

(1) Organisation for Economic Co-operation and Development (OECD)

⁷² For a further analysis of the exchange of information and evidence between competition authorities, particularly the case of the Polish Competition Authority, see M. Błachucki and S. Józwiak (2012) "Exchange of Information and Evidence between Competition Authorities and Entrepreneurs' Rights", SSRN Scholarly Paper, ID 2130849, available at: <https://papers.ssrn.com/abstract=2130849>.

⁷³

This section reproduces key parts of Pierre Horna, *Fighting Cross-Border Cartels: The Perspective of the Young and Small Competition Authorities* (Hart 2020).

For further information, see also: OECD: <https://www.oecd.org/competition>

ICN: <https://www.internationalcompetitionnetwork.org/document-library/?keyword=international+cooperation+&groups=11&types=12>

UNCTAD: <https://unctad.org/search?keys=international+cooperation+competition+law>.

The OECD's focus on international cooperation between its member States dates back since the establishment of its Competition Committee Working Party No. 3 (WP3) on Enforcement in 1964. The OECD works with a clear mandate based upon the "effectiveness of competition law enforcement, through measures that include the development of best practices and the promotion of co-operation among competition authorities of member countries".⁷⁴ In 1998, the OECD issued the Recommendation of the Council concerning Effective Action against Hard Core Cartels.⁷⁵

The OECD Competition Committee worked extensively on international cooperation between 2012 to 2014, eventually amending the recommendations of 1995 on international cooperation in a report titled "Improving International Co-operation in Cartel Investigations".⁷⁶ It also adopted new recommendations in September 2014⁷⁷ as demonstrated in "Challenges of International Cooperation in Competition Law Enforcement".⁷⁸ A joint survey OECD/ICN on international cooperation enforcement will be reviewed in the section on ICN work *infra*.

The 2012 OECD report identified the challenges faced when attempting to cooperate through its assessment. It was revealed that the implementation of OECD instruments in the area of cartels were sub-optimal and not available for all jurisdictions. In addition, the report found that informal cooperation appears to be more frequently used than formal arrangements. The report identified that political commitment, legislative change and innovation are needed to make progress in cartel cases. The report also showed that the developing and emerging economies face additional challenges relating to lack of expertise and resources and finally, that solutions to cross-border cartel enforcement could also be found in other policy areas.⁷⁹

In a similar vein, the 2014 report showed that "many, if not most, competition authorities where the law has been violated, have either not investigated in their own jurisdictions or did not have access to sufficient evidence to impose fines".⁸⁰ This alarming statement indicated that cartel victims are deprived from claiming damages in many jurisdictions partly due to the limited ability of competition authorities to enforce their national law. The 2014 report added that this ability is "clearly hindered by the lack of effective information sharing [which undermines any] successful prosecution [that] would require gathering evidence from other jurisdictions and [where] there is relatively little experience with small jurisdictions successfully obtaining, receiving or communicating such information across borders [...]. A gap in governance

⁷⁴ OECD (2014) "Challenges of International Co-Operation in Competition Law Enforcement", available at: <https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf>, at P. 55, Footnote 6.

⁷⁵ OECD (1998) "Recommendation of the Council concerning Effective Action against Hard Core Cartels", available at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0294>.

⁷⁶ Available at: <http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf>.

⁷⁷ OECD (2014) "Recommendation of the OECD Council Concerning International Co-Operation on Competition Investigations and Proceedings", available at: <http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf>.

⁷⁸ OECD, *supra* note 73.

⁷⁹ OECD, *supra* note 76, at P. 20.

⁸⁰ OECD, *supra* note 73, at P. 49.

appears to exist with respect to international cooperation for [...] cartel investigations”.⁸¹

In addition, the report also highlights on the rising number of competition authorities prosecuting international cartels rather than national ones, resulting an upward trend of international trade flows. The 2014 OECD report predicted that the cooperation complexity index would increase by 92% to 162% by 2030 as a result of cross-border enforcement cartel increasing in line with world trade predictions.⁸²

In July 2019, the OECD Council adopted a Recommendation regarding the fight against hard-core cartels.⁸³ The Recommendation updates and replaces the 1998 Recommendation Concerning Effective Action against Hard Core Cartels. While the 1998 recommendation is still valid, the OECD Competition Committee concluded that the 1998 Recommendation lacked some of the significant developments in anti-cartel policies and enforcement practices from the last 20 years in particular in the area of leniency programmes and its effectiveness.

The OECD Council adopted the Recommendation of the OECD Council concerning the “International Co-operation on Competition Investigations and Proceedings”,⁸⁴ which calls for the member States to foster their competition laws and practices in order to promote further international cooperation among competition authorities. Since the adoption of the Recommendation, the monitoring activity of the developments and trends in international cooperation in competition cases has been taken place.

(2) United Nations Conference for Trade and Development (UNCTAD)

The entire Section F of the UN Set was originally designed in 1980 to effectively deal with restrictive business practices (nowadays known as anticompetitive practices). This tool was designed to strengthen and improve controls over restrictive business practices that are adversely affecting international trade and economic development, particularly in developing countries.⁸⁵ This overall mandate entrusted to UNCTAD had four specific actions: (1) Section F.1 mandates for achieving common approaches in national competition policies compatible with the UN Set; (2) Section F.2 calls for constant dialogue between the member States and the UNCTAD secretariat regarding the appropriate steps to meet their commitments regarding how competition law is enforced; (3) Section F.3 requested UNCTAD to publicise the latest developments on competition law and policies based on publicly available information and primary information provided by the member States; and (4) Section F.4 seeks for establishing a consultation

⁸¹ Ibid, at P. 49 to 50.

⁸² Ibid, at P. 52.

⁸³ OECD Council (2019) “Recommendation of the Council Concerning Effective Action against Hard Core Cartels”, available at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452>.

⁸⁴ Supra note 76.

⁸⁵ Section F, “The Set of Multilaterally Agreed Equitable Control of Restrictive Business Practices”.

mechanism that member States can trigger in cases they would like to achieve a mutually acceptable solution to an issue concerning the control of a restrictive business practice affecting both members.

At the sixteenth session of the IGE in July 2017, member States requested the UNCTAD secretariat to facilitate the establishment of the DGIC whereby the participation was open to the member States on a voluntary basis. The DGIC was established with the objective to pursue the exchange and debate on the modalities for facilitating cooperation under Section F of the UN Set and report to the seventeenth session of the IGE in July 2018.⁸⁶ At the seventeenth session of the IGE, the mandate of the DGIC was renewed for one year until July 2019.⁸⁷

The Drafting Committee, which was set up by the DGIC in July 2018, finalized the consolidated text entitled “Guiding Policies and Procedures under Section F of the UN Set on Competition”.⁸⁸ The final version of the GPP text was agreed at the eighteenth session of the IGE held in July 2019,⁸⁹ and finally approved by the Eighth Review Conference held in October 2020.

The 2018 UNCTAD survey has identified various obstacles pertaining to international cooperation. UNCTAD member States recognised the need to enhance international cooperation in order to effectively fight cross-border anticompetitive practices. This is particularly relevant to the competition authorities that are unfamiliar with international cooperation schemes. Hence, UNCTAD took a step forward with the development of guidance under Section F of the UN Set, on “international measures”, aiming to respond to those obstacles through a toolkit and clear set of procedures. Instruments designed by the international community including the GPP have been developed to facilitate international cooperation and assist competition authorities to overcome legal and practical challenges.

The GPP was the result of intensive consultations and also meetings, that took place virtually and physically, among the members of the Drafting Committee between October 2018 and June 2019, having coordinated by the UNCTAD secretariat. The GPP was supported by the work of various countries competition authorities, especially Japan, the United States, the Russian Federation, Austria and Italy, which were instrumental in reaching a consensus on the different provisions covered by the GPP.⁹⁰

⁸⁶ UNCTAD (2017) “Report of the Intergovernmental Group of Experts on Competition Law and Policy on Its Sixteenth Session”, I. Agreed Conclusions, Paragraph 9.

⁸⁷ UNCTAD (2018) “Report of the Intergovernmental Group of Experts on Competition Law and Policy on its seventeenth session”, I. Agreed conclusions, Paragraph 12.

⁸⁸ UNCTAD Drafting Committee, *supra* note 6.

⁸⁹ UNCTAD (2019) “Report of the Intergovernmental Group of Experts on Competition Law and Policy on its eighteenth session”, I. Agreed conclusions, Paragraph 6.

⁹⁰ UNCTAD (2019) “Report of the Meeting of the UNCTAD Ad Hoc Expert Meeting on Competition International Cooperation”, available at: <https://unctad.org/meetings/en/SessionalDocuments/Report%20of%20the%20UNCTAD%20Ad%20hoc%20Expert%20meeting%20on%20Competition%20%2010%20May%202019.pdf>.

The GPP has three main sections that addressed the following issues: (i) guiding principles; (ii) toolkit for cooperation in competition cases; and (iii) the role of UNCTAD in facilitating cooperation under section F of the UN Set. It is non-binding, serving as a tool to facilitate communication between competition authorities; designed to promote mutual trust and understanding of each other's legal frameworks; to facilitate contact between authorities; and to clarify what is possible in the existing scheme, especially for young authorities with no actual experience of cooperation.

The GPP, as it stands now, outlines important guiding principles for cooperation in competition cases which includes benefits of such cooperation. It would be based on mutual trust and founded on an ability of participating authorities to effectively and credibly ensure that shared information will be kept confidentially and used for permitted purposes only. While there is an agreement on the need and urgency to provide guidance (particularly to young authorities in the developing countries), the GPP gives flexibility in terms of cooperation in accordance to the national laws and policies as well as per mutual agreement and understanding. Depending on the types of cooperation, the prospective cooperation could entail, *inter alia*: (a) initial contacts; (b) further communication among authorities; (c) timing alignment; (d) exchange of information, confidentiality, and waivers of confidentiality; as well as (e) discussions on substance and case resolution.

With specific reference to consultations under Section F of the UN Set, the requesting authorities may receive support from the UNCTAD secretariat regarding the following: (a) preparing the request for consultation; (b) advice on procedural matters within the scope of the consultation; (c) provision of mutually agreed conference facilities by the UNCTAD secretariat, if needed; (d) guidance, especially for authorities from developing countries and countries with economies in transition, concerning confidentiality assurances and any use of information shared in the course of such consultation, if necessary; (e) interpretation of the UN Set provisions; as well as (f) direct participation in the consultation itself, upon specific request and consent by the participating authorities.

Finally, since member States also requested the UNCTAD secretariat to disseminate the information across regions during the preparatory year before the Eighth Review Conference,⁹¹ the UNCTAD secretariat has proactively disseminated the GPP to the businesses, academia and also in the meetings and events across the world under this mandate.⁹²

⁹¹ *Ibid.*, paragraph 7.

⁹² The Philippines (July, 2019); UNCTAD-Latin American and Caribbean Economic System (SELA) annual meeting of the Working Group on Trade and Competition in Paraguay (September, 2019); VI BRICS International Competition Conference in Moscow (September, 2019); ASEAN Expert Group on Competition in Malaysia (October, 2019); ASEAN Competition Conference in Cambodia (November, 2019); Istanbul Competition Forum (November, 2019); African Competition Forum (December, 2019), OECD Global Forum on Competition (December), Asian Competition Forum (January, 2020), Manila Forum on Competition Policy for Developing Countries (January, 2020), and Japan Fair Trade Commission training seminar, in cooperation with Japan International Cooperation Agency (February 2020).

(3) International Competition Network (ICN)

The very nature of the ICN is to foster international cooperation amongst and within competition authorities being part of the network ever since its creation back in 2001. ICN through its working groups and sub-group working groups have produced a great number of products that have helped its members in addressing some of the issues and factors that competition authorities, particularly from the developing world, that hamper international cooperation.

For instance, in 2013 ICN and OECD also recognised that there are factors which hamper effective international cooperation. ICN and OECD have jointly conducted a survey on international enforcement cooperation which compiled the experiences of competition authorities dealing with international cooperation, their limitations and constraints on international cooperation, and areas of potential improvement for international cooperation.⁹³ The joint 2013 ICN OECD survey assessed the international cooperation in competition cases within the period of 2007-2012. The survey revealed that out of 57 participating countries that took part in the survey, 31 participants were OECD members. It was further revealed that a majority of non-OECD countries had little experience in international cooperation cases.⁹⁴ Notably, more than half of the respondents of the survey were from Europe, while Africa accounted for 7%, Asia 13%, and Americas 16%. Such figures do not offer a complete picture because of lower participation of non-OECD countries which represent the vast majority of young and small competition authorities remain in Africa, the Americas, and Asia.⁹⁵

In January 2021, OECD and ICN updated the 2013 survey by publishing a joint report on International Enforcement Cooperation.⁹⁶ The report re-affirmed the outstanding challenges and limitations to effective enforcement co-operation related to legal limitations, resourcing, co-ordination/timing, trust/reciprocity and other practical issues such as language and time differences. The report also proposed future areas of focus such as: (i) developing further enforcement co-operation work-products and networks; (ii) Improving transparency and trust; (iii) providing policy and practical support for further developing effective regional enforcement co-operation; and removing substantive and legal barriers to co-operation.⁹⁷

Japan Fair Trade Commission (JFTC) submitted a proposal to the ICN to strengthen information sharing amongst ICN members entitled “Proposal for establishing the ICN Framework for promotion of sharing non-confidential

⁹³ ICN and OECD (2013) “Report on the OECD/ICN Survey on International Enforcement Cooperation”, available at: <https://www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf>.

⁹⁴ Ibid.

⁹⁵ Fox, *supra* note 18.

⁹⁶ ICN (2021) “OECD/ICN Report on International Cooperation in Competition Enforcement”, available at: <https://www.internationalcompetitionnetwork.org/featured/oecd-icn-report-on-international-cooperation-2021/>.

⁹⁷ Ibid.

information for Cartel Enforcement” (ICN Framework).⁹⁸ The proposal was submitted twelve years after the existence of the Cartel Working Group.

In addition to the above, the ICN has also published a survey report on its framework for information exchange in merger review responding to the fact that the framework was not used in practice than expected.⁹⁹ The ICN has published practical guide in relation to international cooperation in cross-border merger cases¹⁰⁰ and also has established the revised frameworks for information exchange in merger review¹⁰¹ and cartel enforcement.¹⁰² The latter framework focuses on the sharing of non-confidential information and the fostering of “pick up the phone relationships”. The ICN also has published more specific guidance on waivers of confidentiality in merger¹⁰³ and cartel investigations¹⁰⁴ which include models and templates for waivers of confidentiality.

The ICN Framework aims to enable competition authorities to initiate an investigation of an international cartel case within their own jurisdictions. The competition authorities can commence an investigation based on the exchange of information that the initiating authority (Initiating Authority) could get from a peer authority that has already investigated the same cartel case in its own jurisdiction (Peer Authority).¹⁰⁵ In the ICN framework, participating competition authorities can register and then assign liaison officers to coordinate requests for cooperation. This will facilitate cooperation between the case team officers of the requesting competition authority and its peer authority through efficient and direct communications at the cross-border level. Overall, the ICN Framework highlights on the importance of information sharing between competition authorities. Information sharing can foster coordination in cross-border enforcement and also result in less parallel proceedings.

The ICN has produced subsequent reports to foster convergence in national practices such as the compilation of “Good Practices” from the Anti-Cartel Enforcement Manual of the ICN Cartel Working Group Anti-Cartel

⁹⁸ ICN (2015) “Proposal for Establishing the ICN Framework for Promotion of Sharing Non-Confidential Information for Cartel Enforcement”, available at: <https://www.internationalcompetitionnetwork.org/portfolio/non-confidential-information-sharing/>.

⁹⁹ ICN (2018) “ICN Framework for Merger Review Cooperation Survey Report”, available at: <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/MWG-Framework-Survey-Report.pdf>.

¹⁰⁰ ICN (2015) “Practical Guide to International Enforcement Cooperation in Mergers”, available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf.

¹⁰¹ ICN (2012) “International Competition Network’s Framework for Merger Review Cooperation”, available at: <https://www.internationalcompetitionnetwork.org/portfolio/icn-framework-for-merger-review-cooperation/>.

¹⁰² ICN (2016) “Framework for the promotion of the sharing of non-confidential information for Cartel Enforcement”, available at: <https://www.internationalcompetitionnetwork.org/portfolio/non-confidential-information-sharing/>.

¹⁰³ ICN (2015) “Waivers of Confidentiality in Merger Investigations”, available at: <https://www.internationalcompetitionnetwork.org/portfolio/model-confidentiality-waiver-for-mergers/>.

¹⁰⁴ ICN (2014) “Waivers of Confidentiality in Cartel Investigations - Explanatory Note”, available at: <https://www.internationalcompetitionnetwork.org/portfolio/leniency-waiver-template/>.

¹⁰⁵ Toshiyuki Nambu (2014) “Proposal for Establishing the ICN Framework for Promotion of Sharing Non-Confidential Information for Cartel Enforcement” (2014 ICN Cartel Workshop, Taipei, Taiwan, 2 October 2014), available at: <http://www.ftc.gov.tw/icncartel2014/pdf/2014.10.02.%20Penary%20III%20%20%20Toshiyuki%20Nambu%20JFTC.pdf>.

Templates,¹⁰⁶ Leniency Waiver Templates and an accompanying Explanatory Note.¹⁰⁷ Additional ICN reports on cartel enforcement are “Defining hard core cartel conduct: effective institutions, effective penalties”;¹⁰⁸ “Cooperation between Competition Authorities in Cartel Investigations”;¹⁰⁹ Cartel Settlements Report;¹¹⁰ “2010 Trends and Developments in Cartel Enforcement”;¹¹¹ the online compilation of cartel awareness materials;¹¹² and the worldwide Leniency Program links.¹¹³

3 Persisting issues and bottlenecks in international cooperation

UNCTAD, along with the International community, has developed instruments to facilitate international cooperation and assist competition authorities to overcome challenges, especially for developing countries, as stated above. However, international cooperation still does not occur frequently, and especially competition authorities in developing countries have difficulties in participating in international cooperation. The lack of mutual trust and understanding reinforces lack of interactions and focal point, and vice versa. Overall, what is behind is lack of common enforcement interests between experienced and less-experienced authorities, and lack of incentives for cooperation between them, particularly the incentives of experienced competition authorities to cooperate with less-experienced competition authorities.

Incentives can be considered as an important part of cooperation between competition authorities be it experience and/or large or young and/or small ones. Competition authorities may have an incentive to cooperate with each other in cases where companies involved, or relevant markets extend over several jurisdictions. However, due to the fact that companies involved in international cartels have no physical presence in developing countries in many cases, there could be an inequality between experience and/or large and young and/or small competition authorities; competition authorities in developed countries can obtain information that those in developing countries need, but not vice versa. Moreover, less-experienced authorities usually have insufficient capacity to collect evidence, resulting in them not being able to share information that is needed by experienced authorities. Thus,

¹⁰⁶ ICN (2017) “Compilation of Good Practices from the Anti-Cartel Enforcement Manual”, available at: <https://www.internationalcompetitionnetwork.org/portfolio/good-practices/>.

¹⁰⁷ ICN (2014) “Waivers of Confidentiality in Cartel Investigations - Explanatory Note”, available at: <https://www.internationalcompetitionnetwork.org/portfolio/leniency-waiver-template/>.

¹⁰⁸ ICN (2005) “Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties”.

¹⁰⁹ ICN (2013), “Anti-Cartel Enforcement Manual Chapter 9: International Cooperation and Information Sharing.”

¹¹⁰ ICN (2008) “Cartel Settlements, Report to the ICN Annual Conference Kyoto, Japan”, available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_Settlements.pdf.

¹¹¹ ICN “Trends and Developments in Cartel Enforcement”, available at: <https://www.internationalcompetitionnetwork.org/portfolio/cartel-enforcement-trends/>.

¹¹² ICN (2014) “Awareness & Outreach Compilation”, available at: <https://www.internationalcompetitionnetwork.org/portfolio/cartel-awareness-outreach-compilation/>.

¹¹³ ICN “Worldwide Leniency Materials Country/Organization + Link(s) to Leniency Program Materials”, available at: <https://www.internationalcompetitionnetwork.org/working-groups/cartel/leniency/leniency-links/>.

competition authorities of major developed countries may have less incentives to join in a cooperation with competition authorities of small or developing countries.

The incentives under which cooperation can occur vary from jurisdiction to jurisdiction. At the level of cross-border investigations, it depends on the number of coordination mechanisms carried out by the experienced or large competition law enforcers. Cooperation in cartel investigation differs from merger investigation cases since parties have another incentive in to cooperate in the case of international mergers. For instance, European Commission and United States competition authorities' cooperation on merger control is well established and well-grounded within the framework of the 1991 European Union-United States competition laws cooperation agreement. The agreement facilitates coordination of enforcement activities and a platform to accommodate competing interests and avoid possible conflicts, while the European Union-United States 2011 best practices on cooperation on merger investigations added clarity to the process by providing specific contact points within the investigative process between the Fair Trade Commission/Department of Justice and the European Commission. A similar agreement was entered between the United States authorities and the Canadian Competition Bureau in 2014.¹¹⁴

Experienced or large authorities should be encouraged to respond to the requests for cooperation from less-experienced authorities. It can be facilitated by enhancing their trust that the information shared with the foreign authority would not be misused or leaked to third parties.

In this context, the GPP can promote the trust and mutual understanding among competition authorities through the UNCTAD secretariat work by providing publicly available legal texts and guidelines that are relevant for the purpose of international cooperation. The guidelines should include information on confidentiality rules and rules concerning investigations (Section 25 of the GPP), in order to affirm that the national laws of requesting authority guarantee the same level of confidentiality protection as those of requested authority. This will enable requested authorities to share information confidently and smoothly.

Another instrument in the GPP for promoting mutual trust, especially the trust of experienced or large authorities is that UNCTAD assists developing countries in adopting or revising competition legislation and policies to align with international best practices (Section 22 of the GPP) and in developing with the development of confidentiality provisions (Section 24 of the GPP). This will also enable requested authorities, usually experienced authorities, to share information without any confidentiality concerns.

The GPP can also enable more active facilitation and assistance in international cooperation upon requests by the competition authorities. The

¹¹⁴ UNCTAD (2015) "International cooperation in merger cases as a tool for effective enforcement of competition law".

UNCTAD secretariat can, for example, arrange for teleconferences and meetings for competition authorities to facilitate their communications, and provide guidance with regard to confidentiality assurances and any use of shared information (Section 28 (a) (iii) and (iv) of the GPP).

Besides the above, the GPP enables competition authorities to refer to the list of contact persons maintained by UNCTAD secretariat and identify the persons to approach (Section 26 of the GPP).

It is to be noted that the GPP is not a legally binding instrument for exchanging confidential information, however, the exchange practice of non-confidential information can still be helpful especially for competition authorities in developing countries in conducting effective and efficient investigations.

It is perceived that the frequent interactions among competition authorities can foster mutual trust and understanding between them, which will eventually lead to more solid relationships and closer cooperation in future cases.

4 Future work and conclusions

This paper aimed to address the essential role of international cooperation in competition law enforcement to overcome challenges faced notably by developing countries. The paper outlined legal and practical challenges faced by developing countries in eliminating or dealing with cross-border anticompetitive practices and cooperating with other competition authorities, and efforts to overcome those challenges. For instance, in the legal factor section, the paper highlighted obstacles resulting from institutional design and the diversity of competition law enforcement procedures. Regarding practical factors, lack of mutual trust and lack of focal points were stressed. After describing different cooperation instruments at the regional and international levels as well as their shortcomings, the paper presented the GPP and how important this set of guidelines is as a tool to facilitate international cooperation to developing countries.

The GPP are the latest tool to improve international cooperation, through the provision of information to member States, through the facilitation of consultations under the Section F of the UN Set by the UNCTAD secretariat at the request of member States and through UNCTAD's assistance within the framework of Section F, "international measures", of the UN Set.

At the Eight Review Conference held in October 2020 new cooperation mechanisms on cross border cooperation issues were showcased such as for instance the Multilateral Mutual Assistance and Cooperation Framework (MAAC) between the two United States authorities, and the competition authorities of Australia, Canada, New Zealand, and the United Kingdom. In addition, various delegates called for the GPP guidance to be put into practice notably with respect to international cartel enforcement through the

establishment of a newly established working group on cross border cartels. This last section stresses the role of the GPP beyond 2020 to enhance international cooperation through effective and targeted assistance.

4.1 The implementation of the GPP beyond 2020

4.1.1 Consultations under the Section F of the UN Set on Competition

UNCTAD's role in international cooperation as detailed by the GPP will translate into the following through measures:

(a) UNCTAD assists developing countries and countries with economies in transition in adopting or revising competition legislation and policies, to align with international best practices, as well as regional frameworks in these areas (Section 22);

(b) UNCTAD secretariat provides valuable technical assistance to facilitate and improve the level of cooperation in competition cases. It can undertake a facilitating function to assist authorities, especially from developing countries and countries with economies in transition that desire to request cooperation from authorities that do not have well-developed relationships with such authorities (Section 23);

(c) UNCTAD secretariat can assist authorities with the development of confidentiality provisions and promote mutual trust among authorities that will support more effective cooperation (Section 24);

(d) UNCTAD secretariat can also assist authorities by providing publicly available legal texts and guidelines at the national and international levels that are relevant to cooperation, such as rules on confidentiality, investigations and data protection in different jurisdictions (Section 25);

(e) UNCTAD secretariat should maintain a list of contact persons in the competition authorities of member States who may facilitate cooperation, including contacts for particular types of conduct (e.g., mergers, cartels) and identifying linguistic abilities among contacts (Section 26); and

(f) In case of consultations under section F of the UN Set, the requesting authority may ask UNCTAD secretariat for (Section 28 (a)):

- (i) assistance with preparing the request for consultation;
 - (ii) advice on procedural matters within the scope of the consultation;
 - (iii) the provision of mutually agreed conference facilities by the Secretary-General of UNCTAD, if needed;
 - (iv) guidance, especially for authorities from developing countries and countries with economies in transition, concerning confidentiality assurances and any use of information shared in the course of such consultation, if necessary;
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- (v) interpretation of the UN Set provisions; and
- (vi) direct participation in the consultation itself, upon specific request and consent by all authorities involved.

The UNCTAD secretariat will also continue the dissemination of the GPP after 2020, as it was requested by member States in the Resolution of the Eighth Review Conference of October 2020, appealing to experienced competition authorities to respond positively to cooperation requests from young and small competition authorities, especially of developing countries, and encouraging less experienced authorities to make use of the UNCTAD facilities made available by the GPP.

4.1.2. Enabling Factors

In addition, in the Eighth Review Conference's session on the "International cooperation under section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Adoption of the guiding policies and procedures", the UNCTAD secretariat underlined enabling factors for the effective implementation of the GPP as follows: (a) respect for national provisions in handling information, (b) devotion of internal resources to international cooperation, (c) provision of resources to UNCTAD to fulfil its new role and (d) development of trust.¹¹⁵ Therefore, the UNCTAD secretariat will continue working on activities to ensure those enabling factors as of 2020.

(1) Respect for national provisions in handling information

The guiding policies and procedures give due consideration to prevalent national laws and policies, in particular in jurisdictions in which international cooperation, mutual agreement and understanding might be a challenge. In this regard, prospective cooperation could follow the practical guidance in the guiding policies and procedures related to initial contacts; further communications among authorities; the timing of alignment; exchanges of information, confidentiality and waivers of confidentiality; and discussions on substance and case resolution. Some of these procedures may be more difficult to implement than others, depending on the legal, regulatory, and practical considerations of the competition authority wishing to enter into an international cooperation scheme.

(2) Devotion of internal resources to international cooperation

A major constraint to young or small competition authorities is the scarcity of resources dedicated to international cooperation activities. In many instances, it may be difficult for young or small competition authorities in developing countries and countries with economies in transition to establish a large team. Unless there is a clear need and justification to address a cross-border

¹¹⁵ UNCTAD (2020) "International cooperation under section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Adoption of the guiding policies and procedures" (TD/RBP/CONF.9/5).

competition case that has a direct impact in a national jurisdiction, competition authorities may not be inclined to investigate and instead choose to investigate national-level anticompetitive practices. However, with the advent of the digital economy, which impacts all jurisdictions, in both developing and developed economies, it is unlikely that most significant anticompetitive practices can be deemed as having only a national effect.

(3) Development of trust

The guiding policies and procedures outline important principles of international cooperation in competition cases. To be beneficial, such cooperation should be based on mutual trust and founded on the ability of participating authorities to provide effective and credible assurance that shared information will be kept confidential and used for permitted purposes only. UNCTAD is mindful of the limitations that competition authorities in developing countries and countries with economies in transition may face in boosting the necessary trust vis-à-vis competition authorities in developed countries, and the use of the guiding policies and procedures will therefore depend on how trust is managed by such authorities. Trust requires the development of relationships through regular contact, such as through meetings and joint events.

UNCTAD secretariat has also suggested, two activities which will be undertaken as of 2020 to help support the successful implementation of the GPP, on gathering data on international cooperation experiences by sending questionnaires to member States once a year; and on providing information to member States on laws and regulations applicable to information exchanges, confidentiality rules, investigative powers and procedures, as well as data protection rules in different jurisdictions, through the collection and organization of publicly available texts and guidelines.¹¹⁶

4.2 Conclusions

Since the Seventh Review Conference held in 2015, many jurisdictions, including developing countries and countries with economies in transition, have newly enacted or substantially revised their competition, aiming to strengthen and improve their competition policy and enforcement. Among them, regional economic organizations, especially those whose member States are developing countries, have adopted and implemented regional competition rules, while other cooperation arrangements have also been flourishing for a more effective competition law enforcement.

Anticompetitive conducts and mergers are increasingly cross-border with the progress of globalization and the development of the digital economy. This calls for enhanced cooperation amongst competition authorities at bilateral, regional, and international levels. Cooperation may be easier to be launched at regional level, given that neighbouring countries usually have similar

¹¹⁶ Ibid.

backgrounds and legal frameworks, share common interests, mutual benefits and have a better understanding of each other.

Developing countries may not be able to investigate cross border anticompetitive practices that have been in the rise with the increase of the digital economy across the world. This may be due do different legal and specifically competition frameworks and different procedural rules applicable to competition proceedings, which don't allow for requesting information or gathering evidence directly and may prevent information sharing by experienced competition authorities.

Cooperation is a resource that is worth investing in when 140 countries have adopted competition legal and institutional frameworks notwithstanding their specific development status, and so much convergence has been achieved. Whether international enforcement cooperation occurs through formal agreements such as the MMAC, through memoranda between close authorities or is encouraged through regional and international training programs, international cooperation delivers significant benefits for the development and improved performance of competition authorities and to the effective enforcement of competition law.

The joint work done by international organizations and networks such as UNCTAD, the OECD and ICN remain critical to building international cooperation to address cross-border competition issues. The GPP can be of assistance to competition authorities when dealing with cross-border anticompetitive practices, because it may facilitate a dialogue and provide a reliable, reserved and neutral forum for consultations. UNCTAD is now able to play a more substantial role to developing countries in the area of international cooperation in competition law enforcement.
