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**THREE DECADES OF UNCTAD WORK ON  
COMPETITION AND CONSUMER PROTECTION POLICY**

*Reflections  
by member States*

30<sup>ème</sup> anniversaire  
TROIS DÉCENNIES DE TRAVAUX À LA CNUCED  
**SUR LA POLITIQUE DE CONCURRENCE ET LA  
POLITIQUE DE PROTECTION DES CONSOMMATEURS**

30° aniversario  
TRES DÉCADAS DE LABOR DE LA UNCTAD  
**SOBRE POLÍTICA DE LA COMPETENCIA  
Y DEFENSA DEL CONSUMIDOR**

*Réflexions des Etats membres  
Reflexiones de los Estados miembros*



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## ***Foreword by UNCTAD's Secretary General***

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UNCTAD is the focal point on all work related to competition policy and consumer protection within the United Nations system which, in turn, is part of the United Nations' work on trade and development. UNCTAD's work on competition and consumer protection dates from the adoption of the United Nations Set of Multilateral Principles and Rules for the Control of Restrictive Business Practices in 1980 (henceforth referred to as the "United Nations Set"). It is characterized by the position that the basic norms of competition law, which have long been in use in developed countries, should extend to the operations of enterprises, including transnational corporations (TNCs), in developing countries. Thus, the Objectives section of the United Nations Set emphasizes that the interests of developing countries in particular should be taken into account in the elimination of anti-competitive practices that may cause prejudice to international trade and development. Furthermore, the Objectives section sees the United Nations Set as an international contribution to a wider process of encouraging the adoption and strengthening of laws and policies in this area at the national, regional and international levels. To date, the United Nations Set is the only fully multilateral instrument on competition law and policy.

In order to understand the context in which competition policy has been brought within the ambit of UNCTAD, a cursory overview of the main attempts at international cooperation in this area is necessary. Competition law and policy was born with the Sherman Antitrust Act in 1890. The United States Congress recognized that competition would lead to the optimal allocation of economic resources, lower prices, better quality, widest supply, and the enhancing of social and economic structures favourable to democracy.<sup>1</sup>

Following the Second World War, the United States advocated the advantages of multilateralism and free trade over segmentation and protectionism, citing as evidence the disastrous policies of trade protection and competitive devaluations during the Great Depression. Consequently, in February 1946, the United Nations Economic and Social Council unanimously approved a resolution submitted by the United States on convening a United Nations Conference on Trade and Employment, which eventually took place in Havana, in 1947. The Havana Charter, arising from the Conference, sought to create an International Trade Organization (ITO) as a United Nations agency and included provisions on restrictive business practices (RBPs) prohibiting cartels and vertical restraints by monopolies and dominant enterprises. Although the Havana Charter never entered into force (owing largely to its non-ratification by the United States' Congress, and other countries), the Charter has

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<sup>1</sup> These views are clearly reaffirmed, for example, in *Northern Pacific Railway Co. v. United States*, 365 U.S.,1,4 (1968).

remained an important historical reference that affected the evolution of international efforts to deal with RBPs.

The idea of dealing with RBPs at the multilateral level persisted in the activities of the Economic and Social Council and contributed to the organization of a second United Nations Conference on Trade and Development (UNCTAD) in 1964. As a growing number of decolonized countries entered the United Nations throughout the 1950s, an organization that better represented their concerns became an increasing desire of developing nations. UNCTAD I therefore established the organization as a standing Conference which would meet every four years.

At UNCTAD IV in 1976 (Nairobi, Kenya) governments decided in part III of resolution 96 (IV) that action should be taken by countries in a mutually reinforcing manner at the national, regional and international levels to eliminate or effectively deal with RBPs, including those of TNCs, adversely affecting international trade. Actions towards this end included, *inter alia*, negotiations with the objective of formulating a “set of mutually agreed equitable principles and rules for the control of RBPs on international trade, particularly that of developing countries, and on the economic development of these countries”. The resolution launched the negotiations which resulted in the formulation of the United Nations Set of Principles and Rules on Restrictive Business Practices, and called for an instrument to control RBPs in the context of international trade.

Finally, in 1980, after two negotiating conferences under the auspices of UNCTAD, the “United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices” was approved and adopted by the United Nations General Assembly (resolution 35/63). This marked the beginning of UNCTAD’s active work on promoting competition law and policy at national, regional and multilateral levels, and formed part of the development dimension phase of competition law and policy.

Soon after, in 1985, under the impetus of Consumer International, the Economic and Social Council was able to negotiate and adopt the United Nations Guidelines on Consumer Protection, which was an important landmark in bringing basic principles of protection of fundamental consumer rights, including health and safety as well as consumers’ economic rights, within the United Nations framework. Among consumers’ economic rights the Guidelines made special reference to the defence of competition and the need for protection from the adverse effects of anti-competitive practices, or RBPs, as called for in the United Nations Set.

During the five-year period after the first Review Conference, a phase of interest in competition policy started as a result of market-oriented reforms in many developing countries undertaking structural adjustment programmes (SAPs), which in many cases were imposed by the International Monetary Fund and the World Bank as lending conditions. In 1986, with the help of the Norwegian and Swedish Governments, the first technical assistance activity related to the United Nations Set was made possible in the form of a seminar on RBPs for African countries, which took place in Nairobi, Kenya. A series of background notes was produced by the UNCTAD secretariat and these formed the basis of what was to become one of UNCTAD’s largest technical assistance and capacity-building programmes.

Towards the end of the 1980s, the policy orientation of developing countries turned in favour of competition policies supported by domestic competition laws and implementing authorities. It was widely recognized that market-oriented economic reforms needed to be accompanied by effective competition policies. This, together with fundamental political changes such as the break-up of the Soviet Union, led developing countries and economies in transition to establish market-economy systems and to adopt anti-monopoly laws, challenging concentrations of market power and prohibiting cartels.

The convergence of interest on competition legislation created considerable support for the further implementation of the United Nations Set at the second Review Conference in 1990. The Conference successfully placed an emphasis on technical assistance and capacity-building for developing countries and countries in transition but also on the “Model Law” aimed at helping countries to engage with the challenging exercise of drafting domestic competition legislation.

By the end of the 1990s, UNCTAD’s activities in assisting developing countries (particularly least developed countries (LDCs) and economies in transition) in their efforts to draft, adopt and implement competition law and policies had grown considerably. The Intergovernmental Group of Experts (created by a provision of the United Nations Set) continued to monitor the UNCTAD secretariat’s analytical work on specific anti-competitive or RBPs issues related to the implementation of the Set as well as review its technical assistance programmes in this field. Today, some 110 countries worldwide have functioning competition law regimes, including developing countries and economies in transition, more than 20 of which have introduced competition laws in the last five years alone. Many LDCs are also in the process of drafting competition laws with the assistance of UNCTAD.

Cooperation with other relevant international organizations, such as the World Bank and the Organization for Economic Cooperation and Development (OECD), has also been enhanced. The Uruguay Round agreements contained within the rules of the World Trade Organization (WTO) created new trade rules which had a potential impact on competition-related issues. The UNCTAD secretariat, therefore, produced one of the first comprehensive analyses of the Uruguay Round agreements relevant to competition policy and their implications for developing and transition countries, identifying these countries’ limitations on controlling RBPs. This initiated a new era of close cooperation between UNCTAD and WTO.

Furthermore, the WTO Fourth Ministerial Conference adopted the Doha Declaration in 2001, which recognized the interaction between trade and competition policy, and acknowledged the need for developing countries and LDCs to have enhanced analytical support in this area. Such support provides a better evaluation of the implications of closer multilateral cooperation in competition law and policy for these countries’ development policies and objectives, along with their human resources and institutional development. The Doha Declaration also acknowledged the pivotal role played by UNCTAD in this process (para. 24 of the Declaration).

UNCTAD X in 2000 was another landmark in the history of competition law and policy. The outcome document of the Conference called for “the international community as a whole... to ensure an enabling global environment through enhanced cooperation in the fields of trade, investment, competition and finance,... so as to make

globalisation more efficient and equitable” (UNCTAD, 2000a, para. 4). In this context, it was decided that the UNCTAD secretariat should expand its assistance to interested countries in developing their national regulatory and institutional framework in the area of competition law and policy, in cooperation with the United Nations Development Programme (UNDP), the World Bank and other relevant organizations.

As part of this process, the secretariat continued to explore and clarify methodologies for defining relevant markets and assessing market power and restraints in strategic sectors and their impact on developing countries and countries with economies in transition, particularly regarding their competitiveness. Other research topics covered merger control issues, including in the process of privatization, and particularly as they affect the development and integration of developing countries and economies in transition into the world economy, the benefits of competition law and policy for consumers, and poverty alleviation and economic development.

In 2005, UNCTAD launched its Voluntary Peer Review on Competition Policy (VPR). The VPR aims to enhance the quality and effectiveness of the competition policy enforcement framework in member States. It involves the scrutiny of competition policy as embodied in competition law and assesses the effectiveness of institutions and institutional arrangements in enforcing competition law. The VPRs are an important tool for countries to compare their performance against international best practices. Since the Fifth United Nations Review Conference, UNCTAD Voluntary Competition Peer Reviews have been undertaken for Jamaica (2005), Kenya (2005), Tunisia (2006), West African Economic and Monetary Union (2007), Costa Rica (2008), Indonesia (2009) and currently Armenia.

In light of the historical background of international efforts to create a multilateral framework on competition policy, the 1980 adoption of the United Nations Set was an outstanding achievement. The Set continues to be considered as a fundamental element of international cooperation on competition law and policy and its relevance is still widely recognized. At UNCTAD XII in 2008, in Accra, Ghana, the Conference reaffirmed the role of competition law and policy as integral to sound economic development and included competition policy among UNCTAD’s top priorities in contributing to making globalization both more efficient and more equitable.

Furthermore, the fifth Review Conference called upon States to increase cooperation between their competition authorities and Governments for the mutual benefit of all countries in order to strengthen effective international action against anti-competitive practices as covered by the Set.

As such, through the creation of the Set and its various activities, UNCTAD has contributed to a more efficient and more equitable world economy by emphasizing the need for globalization based on competition rules at national, regional and international levels and promoting a competition culture as well as consumer interests, in cooperation with non-governmental organizations (NGOs) and consumer organizations.

The sixth Review Conference, held in November 2010, marks the 30th anniversary of the adoption of the United Nations Set. The Conference signifies a turning point in the direction of UNCTAD’s work and the application of the Set. It is



anticipated that, given the global proliferation of a competition culture and the growth in the number of developing countries (including LDCs) that have adopted or are in the process of adopting competition legislation, there will be greater depth of understanding of competition law. Additionally, its role in economic development as well as the need for cooperation at the regional and international levels will gain wider support. UNCTAD has been intimately associated with the history of a multilateral framework on competition regulation and will continue to play its part in encouraging the future development of policy and law, and international cooperation.

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Supachai Panitchpakdi  
Secretary-General of UNCTAD



## *Part I: Competition Authorities*



## ***Albania: Albanian Competition Authority***

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It is well articulated in theory and verified in practice that the competition is a necessity for the market efficiency, the promotion of innovation and productivity, and the creation of opportunities for economic growth and social welfare. This axiom is already verified during the economic recovery after financial crises in the global economy.

Markets do not always operate according to free game principles because of their players conducts. Their efficiency is often hampered from anti-competitive practices, which affects either directly, or indirectly a negative impact on consumer welfare. The mission of the competition agencies is to detect, prevent and prohibit the competition restrictions. It might look even easy or simple, but it is as complex as it is important for the whole society.

The role of competition policy in development strategies and the specific features of institutional design that are most conducive to development have been constant areas of enquiry in development economics. It was found very useful approach of UNCTAD addressing competition policy and competitiveness issues in the developing countries. There is a relative knowledge gap in developing countries on the specific impact of competition law and policy on their development prospects.

The Albanian Competition Authority exercises its activity as an independent public institution since 2004, aiming to protect free and effective competition in a functional market, with the final goal of improving consumer welfare. Building on its modest experience the Albanian Competition Authority has been focused particularly on the development of competition policy and the strengthening of institutional capacity taking into account the economic and social conditions and the state of competition culture in Albania. The competition agency can give its contribution to those processes through its active participation in the development of public policies, providing comments and intervening in regulation procedures as well.

Being part of the competition family we are facing similar challenges and difficulties in the implementation of the competition law and policy. Therefore, we have been convinced that events organized by UNCTAD are a wonderful opportunity to exchange information, improve knowledge and share experience in the exercise of the powers granted from the respective competition laws of our countries. Furthermore, these events are not considered only in terms of knowledge and skills received but especially in expanding and strengthening our network of colleagues and friends as well as to increase our cooperation.

Despite that Albanian is a small European country, competition agency has been considered from Competition and Consumer Policies Branch of UNCTAD. On our

experience, we should highlight how important was a “simple” phone call from Head of Competition Mr. Hassan Qaqaya, at the beginning of 2008, addressing the level of efforts made from our new agency which were reflected in the agency’s website and the needs for any assistance. This very appreciable and encouraged approach raised the incentives to meet the committed objectives.

The viable contributions are the enormous publication and reach website concerning the competition and consumer protection issues. Diversity cases and studies delivered through digital library is an endless resource of knowledge and experience for less experienced and new established competition authorities to foster the institutional capacity.

A handwritten signature in black ink, appearing to read 'Lati' with a stylized flourish above it.

Prof. Asoc. Dr.Lindita Milo (Lati)  
Prof.asoc.Dr Servete Gruda  
Competition Commission

## ***Argentina: Comisión Nacional de Defensa de la Competencia de Argentina (CNDC)***

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### **Sexta Revisión del UN Set : La agenda antitrust de los países en vías de desarrollo en el Conjunto de Principios y Normas sobre competencia de las Naciones Unidas**

El Conjunto de Principios y Normas Equitativos Convenidos Multilateralmente para el Control de Prácticas Comerciales Restrictivas impulsado por la UNCTAD y aprobado por la Asamblea General de las Naciones Unidas en diciembre de 1980 es un hito en la historia de la internacionalización del derecho y la política de competencia.

Hasta ese entonces, el derecho y la política de competencia se habían desarrollado primordialmente en los países de industrialización temprana. La Sherman Act (1890) y la Clayton Act (1914), codificaron la Common Law que prohibía las restricciones no razonables del comercio y su aplicación acompañó activamente el desarrollo de la industria en EE.UU. y la formación del mayor mercado de consumo del siglo XX.

Por otra parte, los artículos 81 y 82 del Tratado de Roma (1957) - actualmente artículos 101 y 102 del TFEU<sup>2</sup> - han cumplido y continúan cumpliendo un rol fundamental en la creación y ampliación del mercado común europeo, sancionando fuertemente las prácticas de negocios restrictivas del comercio intracomunitario.

El Conjunto de Principios y Normas sobre competencia de la UN revela el primer interés de los países en vías de desarrollo por incluir al derecho y la política de competencia en el menú de opciones políticas para desarrollar sus propias economías.

La preocupación original que impulsaba la iniciativa era la amenaza que los países en vías de desarrollo no lograran apropiarse de las ganancias de la creciente liberalización del comercio internacional, debido a la proliferación de prácticas comerciales restrictivas. En parte esta preocupación se relacionaba con el posible comportamiento de las empresas transnacionales.

El posterior descubrimiento y penalización de grandes carteles internacionales, liderados por empresas multinacionales de nota, señalan lo acertado de esa preocupación originaria.

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<sup>2</sup> Treaty on the Functioning of the European Union (2009).

Varios carteles internacionales que operaron en la década del 90, fueron investigados y sancionados por las autoridades de competencia de los países desarrollados en la década siguiente, a saber: vitaminas, ácido cítrico, tubos sin costura, lisina, electrodos de grafito. Se observó que estos carteles lograron precios sustancialmente mayores que los precios de competencia a escala global, afectando los precios que pagaban los países en vías de desarrollo. En el caso de las vitaminas, los electrodos de grafito y los tubos sin costura, se han estimado sobrepuestos del orden del 35%, 45% y 10%, respectivamente, con un costo asociado de USD 1,710 millones, USD 975 millones y USD 1,190 millones, para los países en vías de desarrollo<sup>3</sup>.

Estos hechos han conferido un sólido sustento fáctico a la visión contenida en el Conjunto de Principios y Normas auspiciado por la UNCTAD, a saber, la existencia de una agenda de interés común a países desarrollados y en vías de desarrollo, en torno a la necesidad de lograr mecanismos eficaces de detección y sanción de carteles internacionales.

Los avances observados en el pasado reciente en relación a la profundización de la cooperación formal e informal entre autoridades de competencia, así como también el establecimiento de programas de clemencia para la detección de carteles en países en vías de desarrollo indican la vitalidad de esta agenda de interés mutuo.

Por otra parte, el accionar de las autoridades de competencia de los países en vías de desarrollo comenzó a mostrar la capacidad de los agentes económicos locales para desarrollar prácticas anticompetitivas con gran capacidad de producir obstaculizar al desarrollo económico y humano.

Como ejemplos, pueden citarse en Argentina, los casos del cartel del cemento (2001), de sobrepuestos en gas licuado de petróleo (producto utilizado por los segmentos de menores ingresos para cocinar y templar los ambientes) (1999); en Perú, el caso del cartel de pollos (1995); en Brasil, el cartel de la arena (2008) y el cartel de la roca partida (2005); en Colombia, el cartel de la leche fluida (1999), los acuerdos en distribución minorista de combustibles líquidos (2002), los acuerdos entre las industrias procesadoras para pagar precios bajos a los agricultores de arroz paddy y cacao (2005 y 2009) y el cartel del cemento (2008); en Costa Rica, el cartel entre las industrias procesadoras de aceite de palma (2002); en El Salvador el cartel entre las industrias fabricantes de harina blanca (2008), en Panamá, el cartel de la industria procesadora de carne bovina (2005), el cartel de la industria procesadora de azúcar (2008) y el cartel de la harina de trigo para molinería (2006).

Los precitados casos ponen en evidencia la importancia del derecho y la política de competencia para abordar algunos aspectos específicos de los países en vías de desarrollo como la falta de acceso universal de la población a los alimentos y otros bienes y servicios esenciales, la formación de los precios al productor de los productos agrícolas<sup>4</sup> y de los precios de los insumos industriales que utilizan las pequeñas y medianas empresas.

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<sup>3</sup> Yinne Yu (2003). The Impact of Private International Cartels on Developing Countries. Honors Thesis, Advisor: Timothy Bresnahan. Department of Economics. Stanford University.

<sup>4</sup> Petrecolla, Diego; Bidart, Marina. (2009). Condiciones de Competencia en Cadenas Agroalimentarias Claves de América Latina y El Caribe. Instituto Interamericano de Cooperación para la Agricultura (IICA), San José, Costa Rica.



Algunos de esos temas, de lo que podría llamarse la agenda antitrust específica de los países en vías de desarrollo, aparecieron en la 5° Revisión del Conjunto de Principios y Normas (Anatolia, Turquía, 2005) y han sido objeto de tratamiento específico en la reciente publicación de UNCTAD sobre los efectos de las prácticas anticompetitivas en los países en vías de desarrollo<sup>5</sup>.

La vitalidad de la visión sobre el derecho y la política de competencia que hace 30 años propuso el Conjunto de Principios y Normas sobre competencia de la UN radica en su capacidad de articular la agenda antitrust de interés mutuo de países desarrollados y en vías de desarrollo, que incluye la detección y sanción de carteles internacionales, con la agenda antitrust específica de los países en vías de desarrollo, que incluye la el desarrollo de una economía competitiva, la erradicación de la pobreza y la inclusión de la población en el mercado de consumo.

En concordancia, a lo largo de estos 30 años, la UNCTAD en su carácter de auspiciante del Conjunto de Principios y Normas y punto focal del sistema de Naciones Unidas en materia de defensa de la competencia, ha desarrollado un rol que corresponde celebrar y continuar en tanto facilitadora y articuladora de la cooperación y asistencia técnica no sólo en los temas de interés mutuo, sino también y muy especialmente en los temas de interés específico de los países en vías de desarrollo.



Diego Petrecolla  
Ex-Presidente de la Comisión Nacional de  
Defensa de la Competencia de Argentina  
(CNDC)



Marina Bidart  
Ex miembro del staff de profesionales  
de la CNDC.

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<sup>5</sup> Hassan Qaqaya; George Lipimile (Editores) (2008) The effects of anti-competitive business practices on developing countries and their development prospects. UNCTAD/DITC/CLP/2008/2.

## ***Austria: Austrian Federal Competition Authority***

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UNCTAD, a permanent intergovernmental body of the United Nations General Assembly, not only plays an important role in dealing with trade, investment and development issues in general, but also in engaging in the field of competition law and policy in particular. Within the last 30 years UNCTAD adopted a set of guidelines to unify national standards on competition law and consumer protection and established itself as an international forum with global reach hosting annual meetings to enhance a dialogue between developed countries on the one hand and developing countries on the other hand.

Equitable principles and rules set out on a multilateral level are inevitable in order to control transnational restrictions on competition. UNCTAD adopted a resolution on restrictive business practices as early as 1980, followed by guidelines on consumer protection adopted 1985. It was therefore one of the first international platforms to set out global standards for greater efficiency in international trade and development. UNCTAD's model law not only serves as a pioneering task for other international organizations that followed suit, but also constitutes a valuable contribution in promoting competition in developed as well as developing countries.

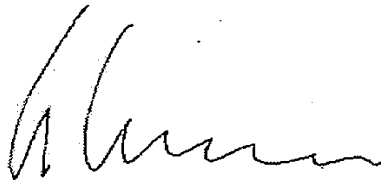
Today UNCTAD has a total of 192 member states, including nearly every sovereign state in the world. This makes UNCTAD the most far reaching intergovernmental forum addressing practical competition law and policy issues. The global dimension of the forum underlines the importance of its work. UNCTAD specifically brings into focus the interests of developing countries. It provides these countries with technical assistance to formulate and implement competition law, which is a great contribution to gradually level the playing fields between developed and developing economies. Therefore, UNCTAD has a unique function next to other intergovernmental organizations such as OECD, ICN and ECA.

Each year, UNCTAD summons a meeting of an Intergovernmental Group of Experts (IGE). These annual meetings raise awareness for the issues of developing countries, establish an understanding for legislative approaches in different member states and provide an informal platform to deepen bilateral contacts. Austria participated in the past several times and experienced these meetings as a great opportunity to enhance cooperation not only on a multilateral but also on a bilateral level.

Austrian understands the importance of exchanging and disseminating information among governments regarding restrictive business practices of transnational character. A continuous collaboration on a global as well as on a regional level advances effective enforcement of competition law. Together with the Czech Republic Austria

therefore initiated the so-called Marchfeld Competition Forum (MCF), a platform for Middle and Eastern European countries, to additionally intensify cooperation and coordination of enforcement policies on a regional level.

In conclusion international collaboration is a necessity to successfully deal with restriction of competition. Hence, the global work of UNCTAD is of great importance. It is highly desirable, that UNCTAD keeps up the fruitful discussions at the annual IGE-meetings to further strengthen the communication between its member states as well as improving cooperation with other intergovernmental organizations on international and regional level.

A handwritten signature in black ink, appearing to read 'Theodor Thanner', written in a cursive style.

Dr. Theodor Thanner  
Director General  
Austrian Federal Competition Authority

## ***Benin: Contribution a l'évaluation du rôle de la CNUCED en matière de droit de la concurrence et de la protection des consommateurs - Evaluation des efforts de la CNUCED***

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Si la CNUCED ne disposait pas d'une branche dans le domaine du droit et de la politique de la concurrence et de la protection des consommateurs, il aurait fallu la créer.

En effet, au cours de ces deux dernières décennies, il a été noté un fort intérêt des cadres des pays africains au domaine de la concurrence et de la protection des consommateurs, à travers fondamentalement les actions de la CNUCED en matière de promotion de la culture de la concurrence et de renforcement des capacités.

Il est indéniable que la CNUCED a contribué substantiellement à l'élaboration et à l'adoption des législations sur la concurrence dans la plupart des pays en développement ou en transition, avec comme guide « L'ensemble de principes et règles équitables convenus au niveau multilatéral pour le contrôle des pratiques commerciales restrictives ».

De même, le cadre de concertation mis en place, à travers le Groupe Intergouvernemental d'Experts du Droit et de la Politique de la concurrence, permet aux représentants des Etats membres de partager leurs expériences et meilleures pratiques dans le domaine de la concurrence notamment. Il offre également l'occasion aux participants d'échanger sur les cas pratiques rencontrés dans leur Etat respectif relativement aux pratiques anticoncurrentielles imputables aux entreprises. Il a ainsi permis d'instaurer un début de coopération entre les cadres et autorités de concurrence des pays.

En outre, le programme de renforcement des capacités et de formation TRAINFORTRADE a permis d'une part, de doter les pays bénéficiaires de cadres spécialistes en matière de droit et politique de la concurrence et d'autre part, d'intégrer dans les programmes universitaires des modules sur le droit et la politique de la concurrence dont l'un des objectifs est la protection des consommateurs.

En particulier, pour le Bénin, ce programme a permis d'introduire dans le programme de formation des étudiants du cycle II de l'Ecole Nationale d'Economie Appliquée et de Management (ENEAM), un cours sur le Droit et la Politique de la Concurrence.

Par ailleurs, la CNUCED a innové, en admettant et en mettant en œuvre pour la première fois au Bénin, la possibilité d'un examen collégial volontaire du droit et de la politique de la concurrence pour un pays dépourvu d'une législation sur la concurrence. L'objectif visé étant entre autres de faire prendre conscience aux autorités des pays concernés, de l'importance du droit et de la politique de la concurrence et de mettre à leur disposition d'éléments pertinents devant leur permettre d'élaborer leur législation sur la concurrence, adaptée aux réalités internes.

## **DOMAINES D'INTERVENTIONS FUTURES**

Pour consolider les importants acquis induits par la CNUCED dans le domaine, il est important dans le cadre de ses futures interventions, d'élargir son champ d'action et d'œuvrer à une internalisation de la politique et du droit de la concurrence par les Autorités Politiques au plus haut niveau des Etats membres, en l'occurrence ceux en voie de développement ou émergents.

### **Elargissement du champ d'action**

Les actions de la CNUCED en matière de politique de concurrence et de protection des consommateurs ont jusque là porté sur les pratiques imputables fondamentalement, pour ne pas dire exclusivement, aux entreprises.

Par ailleurs, dans le cadre de ses activités, la CNUCED, au-delà des Etats, s'intéresse de plus en plus aux Regroupements et Ensembles Régionaux. En témoigne l'examen Collégial de la Politique de la Concurrence dans l'espace UEMOA.

Au regard de ce qui précède, il apparaît important et opportun que, dans le cadre de ses actions futures, la CNUCED s'intéresse également aux « pratiques » distorsives de concurrence imputables aux Etats à savoir :

les aides d'Etat : subvention directe et/ou indirecte, etc.

les pratiques anticoncurrentielles imputables aux Etats : contingentement, actes administratifs conférant des avantages anormaux à des entreprises en difficultés, même structurellement.

Aujourd'hui, il est indéniable que tous les pays, en l'occurrence ceux en développement, en dépit des dispositions pertinentes des réglementations régionales sur la concurrence, continuent de soutenir bon nombre d'entreprises, alors que leurs concurrents se trouvent mis en position moins confortable, occasionnant des distorsions au libre jeu de la concurrence. Aussi importe-t-il que la CNUCED s'y intéresse très sérieusement.

## **Internalisation du droit de la concurrence par les autorités politiques**

Cette internalisation passe par l'adoption et la mise en œuvre d'une stratégie en vue d'une meilleure prise de conscience des autorités sur l'importance de la politique et du droit de concurrence.

En effet, malgré les efforts notables de la CNUCED pour contribuer à promouvoir la culture de la concurrence dans les pays en développement, en l'occurrence ceux africains, les autorités au premier rang des Etats ne s'en préoccupent guère.

Au regard de la nécessité d'une forte implication desdites autorités pour atteindre les objectifs visés à travers la promotion de la culture de la concurrence, il importe de trouver une stratégie pour y parvenir.

A cet effet, il serait souhaitable d'envisager et d'approfondir en vue de son institutionnalisation, une rencontre sous l'égide de la CNUCED des Ministres en charge de la Concurrence et des Autorités de Régulation sectorielles des différents Etats. Cette rencontre, qui pourrait être organisée tous les deux ans, sera tournante afin de mieux impliquer et intéresser les différentes parties et acteurs du pays d'accueil.



**Moudjaïdou I. SOUMANOU**

M. Soumanou  
Ancien Ministre de l'Industrie et du Commerce de la  
République de Bénin

## ***Bhutan: Competition and Consumer Protection in Bhutan***

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### **Background information:**

At present, the country does not have a competition law in place. Nevertheless, the Ministry of Economic Affairs has taken some steps to increase competition to protect consumer interests under Rule No.6.3 of General Guideline for Industrial and Commercial Ventures in Bhutan, 1997. Under the de-monopolization scheme, the Government requires any principal company supplying goods to Bhutan to have more than one dealer in the country, in order to bring about greater competitiveness and to provide better services for consumers. As a result, the prices of the commodities supplied by these companies have decreased, and consumer choices in products have increased.

As Bhutan strives to integrate into the global economy and develop its private sector, protection of consumers' interest in the complex marketplace becomes a priority. In the absence of a Consumer Protection Act and in the light of accession to the World Trade Organization, it was pertinent to draft relevant laws that are compatible with the countries' level of development, social and cultural milieu. It was against this backdrop that the Ministry of Economic Affairs initiated the drafting of a Consumer Protection legislation to protect the consumers from unfair and unscrupulous trade practices in the country.

The country is currently finalizing the Consumer Protection Bill of Kingdom of Bhutan, which is expected to promote competition and consumer welfare.

### **Capacity Building and Technical Assistance:**

In the area of consumer protection, UNCTAD has been instrumental at providing Technical Assistance (TA) and Capacity Building (CB) in the formulation of the Consumer Protection Law and the Competition Law. The services have been carefully crafted to meet all the needs of the country. The conduct of economic mapping surveys, providing legal experts to formulate the legal instrument, training of officials

and conduct of nationwide consultation and consumer awareness campaigns are elements of the partnership for the Consumer Protection Bill.

The UNCTAD assistance for the consumer protection led by Mr. Hassan Qaqaya of UNCTAD has the hallmarks of a best practice. The legal instrument has incorporated the best of the world through adaptation to the local situation in the most efficient and effective manner. The job started in 2006 and traversed through the most profound transition of the country to democracy in 2007-2008. Among the many consultative meetings and workshops, a consultative meeting to share international and regional experiences with Bhutanese parliamentarians, policy makers, legal experts, producers and consumers was held in March 2010, followed by two national awareness workshops in Bumthang in Central Bhutan and in Mongar in Eastern Bhutan in June 2010. These events were conducted by the leading specialists in the field from the Hong Kong Consumer Council, Consumer Education Research Centre, Ahmadabad, India and Thailand Development Research Institute.

Pursuant to the most successful partnership with UNCTAD for the Consumer Protection Bill, the Royal Government requested assistance for the formulation of a Competition Law. UNCTAD commenced the work with a situational analysis market survey which has been completed. The Ministry of Economic Affairs is hopeful and confident that UNCTAD would provide the TA and CB for the Competition Law on similar lines to that of the Consumer Protection Bill.

**Conclusion:**

The Bhutanese case is representative of the contributions of UNCTAD in the establishment of consumer protection frameworks in developing countries. The Royal Government feels that UNCTAD can play a role towards a multilateral framework on Competition Law. The work and experiences of UNCTAD in the field make it the most appropriate agency to lead the world. A multilateral framework on competition law would bring about one common standard and facilitate the resolution of the extraterritorial challenges in the implementation of competition law.



Mr. Sonam P. Wangdi  
Director General Department of Trade  
Ministry Economic Affairs  
Thimphu, Bhutan



## ***Brazil: Developing countries: catching-up, keeping-up and going beyond UNCTAD's role to promote competition for development***

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Competition is fundamental to boost productivity and innovation, which in turn is the key driver for sustainable growth and development. A dynamic and competitive environment can result from a different set of competition policies, having an impact over market structure, business behaviour and economic performance.

One of the most notable changes in law and legal thinking in the past few decades has been the dissemination of antitrust legislation among developing economies, with the important support of international organizations such as UNCTAD. It is widely accepted that an open, privatized and deregulated economy needs an antitrust law and policy in order to guarantee more efficient and competitive markets. There is also an interest of leveling the playing field and guaranteeing equal treatment for foreign and national corporations. Developing countries, in an effort to be viewed as striving for development, issued antitrust laws incorporating for the most part what are said to be the three main elements of antitrust law: merger control, conspiracy provisions and abuse of dominance provisions.

During the last 30 years, the United Nations Conference on Trade and Development (UNCTAD) accumulated extensive knowledge and expertise in making competition law and policy work for development and economic growth. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, UNCTAD Model Law on Competition and important initiatives, such as the annual meeting of the Inter-governmental Group of Experts on Competition Law and Policy (IGE) and countries' peer reviews, have contributed to national, regional and global efforts to promote international trade and competition, especially in developing countries and economies in transition. UNCTAD has been successful in fostering cooperation, exchange of information and sharing of best practices on competition matters. But even more importantly, UNCTAD has a noteworthy mission in promoting capacity building and technical assistance among developing economies.

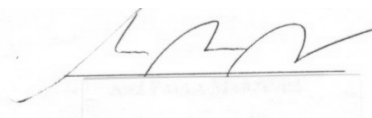
Brazil has benefited from a close relationship with UNCTAD since the issuance of its current antitrust law (1994), when the modern era of competition began in Brazil. A number of capacity building and technical assistance were held for Brazil, including recent training sessions with judges and public prosecutors. At the same time, through UNCTAD, Brazil has also been active as donor of the technical assistance to countries such as Mozambique and Angola, as well as shared experience among fellow countries in Latin America.

Significant challenges remain ahead. UNCTAD has the strength to channel the needs of developing countries, incorporating successful experiences from different jurisdictions while dealing with the heterogeneity typical of developing economies. It is important to use such advantage to go beyond the realm of the traditional toolbox of antitrust regimes. Some institutional reforms and arrangements - by setting more appropriate incentives to economic activity - are capable of jump-starting long-term growth to the extent they boost productivity and innovation. Therefore, measures aimed to reduce entry barriers, eliminate price controls and deregulate activities should take precedence over the classical antitrust agenda. Given the scarcity of resources and deficiencies of some countries, cost-benefit analysis would be highly beneficial when considering the adoption of different policies to promote competition.

Another current challenge is how to deal with the aftermath of the financial crisis. Discussions regarding protectionist trade measures, interventionist industrial policies, crisis cartels and national champions were back to the table. Some countries are now tempted to put competition principles on hold, disregarding the consequences for development in the long term. UNCTAD has widely advocated that the promotion of competition should remain as a policy tool, irrespective of a country's position in the business cycle. Nonetheless, considering recent developments and policy changes by developing countries, this is an area where countries need further input and support from UNCTAD.



Mariana Tavares de Araujo  
Secretary of Economic Law of the  
Ministry of Justice  
Brazil



Ana Paula Martinez  
Director of SDE's Antitrust Division and Deputy  
Secretary of Economic Law of the Secretariat of  
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<sup>6 \*</sup> Mariana Tavares is the Secretary of Economic Law of the Ministry of Justice, Brazil. She received an LL.B. degree from the Catholic University of Rio de Janeiro and an LL.M. degree from Georgetown University Law Center. Ana Paula Martinez is the Director of SDE's Antitrust Division and Deputy Secretary of Economic Law of the Secretariat of Economic Law (SDE) of the Ministry of Justice, Brazil. She received an LL.B. degree from the University of São Paulo Law School and an LL.M. degree both from Harvard Law School and the University of São Paulo. She is currently a Ph.D. Candidate in Criminal Law. The views expressed in this article are those of the authors and do not necessarily represent the views of Brazil's Ministry of Justice

## ***Brazil: The avant-garde UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and its Practical Visionary Consequences***

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As soon as I became a competition commissioner in Brazil in 2008 I proposed to my board colleagues to represent our agency (CADE), the Brazilian Competition and Antitrust Council, in the Program on Competition and Consumer Policy of UNCTAD.

The mandate of UNCTAD and the work of the Program management clearly showed me that my previous experiences as chief of staff of the minister of State and as director of the Department of Trade Defense both at the Ministry of Development, Industry and Foreign Trade of Brazil could be useful in cooperating with them.

Since then I have been given the opportunity to help UNCTAD work specially within the Technical Assistance Program on Competition and Consumer Protection Policies (COMPAL), which is funded by the Swiss Government and implemented by UNCTAD and has been instrumental in strengthening institutional capacities in many Latin American countries.

In 2009, for example, I joined an important mission to Paraguay along with UNCTAD officials, representatives of the Competition Tribunal of the Basque Country (Spain) and from the Chilean Competition Authority to help the Paraguayan Government to approve the country's first Competition Law. That mission included the discussion of a draft of the proposed law with several private sector associations as well as with many Congress people.

Another very compensating experience within COMPAL was a capacity building "hands-on" workshop in Bolivia in 2010. Colleagues from COPROCOM of Costa Rica and INDECOPI of Peru, as well as UNCTAD representatives and myself helped competition authorities from Bolivia to understand UNCTAD guidelines and our countries' experiences in applying competition principles and legislation to practical cases. Bolivia had just approved a Competition Policy and created a competition branch within its Government and is considering to promulgate a Competition Law for the country.

Those are only a couple of examples on how important UNCTAD and its partners work towards developing countries are in relation to consumer and business welfare.

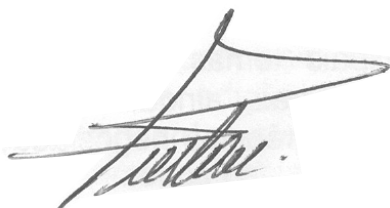
Some believe that the Program on Competition and Consumer Policy of UNCTAD's role in international competition cooperation is not as important as the role of other international organisms and ONGs such as the Organization for Economic Cooperation and Development - OECD or the International Competition Network - ICN, for instance. None-the-less even those have to recognize that the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, negotiated and implemented 30 years ago has influenced and served as reference for the structure, agenda and work of such other international entities related to Competition.

"The Set", as it is called, can easily be considered visionary and avant-garde for today's reality. What to say then for the reality of the 80's.

The UNCTAD and partners' funding and initiatives are crucial for countries with limited resources to go, for example, to Paris where the OECD meetings take place or to all the locations around the world where ICN conferences happen.

Such organizations are not entirely focused on spreading the culture of competition and on building capacity throughout the developing world and are more concerned about discussing and conceiving state-of-the-art and sophisticated economic methodologies.

In such scenario the efforts and work of UNCTAD must be acknowledged and applauded.

A handwritten signature in black ink, appearing to read 'Furlan', with a large, sweeping flourish above it.

Fernando de Magalhães Furlan  
Commissioner of the Brazilian Competition and Antitrust Council  
Brazil

## ***Cameroun: La coopération entre le Cameroun et la CNUCED: Bilan et perspectives***

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Au moment où la République du Cameroun, membre de l'Organisation des Nations Unies et acteur de son système, célèbre les cinquantièmes de son indépendance et de sa réunification, elle se souvient aussi qu'elle fut, avant son accession à la souveraineté internationale, fille de l'organisation internationale, que ce soit sous mandat de la Société des Nations ou sous la tutelle des Nations Unies.

Le Cameroun partage les objectifs de paix, de justice et de progrès de l'ONU pour un monde plus uni et plus solidaire dont il a su du reste tirer partie, aussi bien pour l'émancipation de son peuple que pour la sauvegarde de ses intérêts légitimes comme en témoigne encore récemment, la restauration de sa souveraineté sur une partie de son territoire lors du règlement pacifique du différend sur la péninsule de BAKASSI.

Après l'indépendance et la réunification, l'économie camerounaise est pour l'essentiel administrée, marquée par un régime d'autorisations et de licences. A partir de 1990, un vent de liberté souffle sur le pays et conduit notamment à la libéralisation de la vie politique et de l'activité économique. Dans ce dernier domaine, l'Etat fait le choix d'une économie de marché et se désengage du secteur productif et des services. Il adopte à cet effet, entre autres, la loi 90/031 du 10 août 1990 régissant l'activité commerciale et, quelques années plus tard, la loi 98/013 du 14 juillet 1998 relative à la concurrence, laquelle institue une Commission Nationale de la Concurrence (CNC).

Au cours de la même année sont également adoptées, les lois régissant les secteurs de l'électricité, des télécommunications, des ports, de l'aviation civile et des marchés publics avec, à chaque fois, l'institution d'un régulateur sectoriel, toutes choses qui ont permis l'ouverture de ces marchés à une concurrence effective et incité des investisseurs à y prendre pied. Ceci a contribué à y apporter le progrès technique, un meilleur rapport qualité/prix des produits et services pour le bien-être des consommateurs.

Enfin, le 16 février 2010 est pris l'arrêté n° 0000003/MINCOMMERCE fixant les seuils, les conditions et les modalités de déclaration des fusions et acquisitions d'entreprises à la Commission Nationale de la Concurrence.

Toutefois, une vingtaine d'années après l'option prise, le Président de la République du Cameroun, Son Excellence Paul BIYA, lors d'une communication spéciale, fait le constat suivant :

« Bien que nous ayons fait le choix de la libéralisation, il me paraît que nous n'en avons pas encore tiré tous les avantages. Nos reflexes restent la plupart du temps celles qui ont cours dans une économie administrée ».

Si les marchés de la plupart des pays en développement affichent une offre et une demande faibles qui ne permettraient pas à une pluralité d'offres de prospérer, cette situation favorise aussi le recours, par les opérateurs économiques situés à l'intérieur et à l'extérieur du pays, aux pratiques anticoncurrentielles, quand on sait par ailleurs que ces pratiques ne se limitent pas aux frontières.

Dans un tel contexte, il s'est agi, et il le sera encore dans l'avenir, pour la CNUCED, dans le cadre de son mandat, d'apporter son appui et de promouvoir une véritable coopération internationale qui a permis, de mobiliser des ressources aussi bien à l'intérieur qu'à l'extérieur du Cameroun, pour la mise en place d'une politique d'assistance et d'entraide en faveur du pays.

Le Cameroun a bénéficié, au cours de la période 2006/2009, de l'assistance technique de la CNUCED pour la formation et le renforcement des capacités des membres de l'autorité de concurrence. C'est ainsi que sont organisés respectivement les 28 et 29 mai à Yaoundé, puis le lendemain 30 mai 2008 à Douala, un atelier et un séminaire.

L'atelier portait sur la formation des membres de la CNC aux principes du droit et de la politique de concurrence. Le séminaire quant à lui s'est penché sur la sensibilisation des hommes politiques, des parlementaires, des opérateurs économiques, des universitaires, des hommes et femmes de médias et des associations de défense des droits des consommateurs aux bienfaits du droit et de la politique de concurrence d'une part et de vulgarisation de ses principes et règles d'autre part.

Au cours de l'année 2008, lors de la 8ème session du Groupe Intergouvernemental des Experts (GIE) en matière de concurrence, le Cameroun est élu Vice-président des travaux à Genève.

Toujours en 2008, la CNUCED a organisé à Kribi, du 1er au 05 décembre, un atelier de formation des membres de la Commission en matière d'investigation et de répression des pratiques anticoncurrentielles, atelier élargi aux membres de la Cour Communautaire de Justice et aux responsables de la CEMAC.

L'autorité de concurrence du Cameroun, la seule de la sous-région, a ainsi servi d'organe de prolongement de la politique de formation et de renforcement des capacités en Afrique Centrale.

Ont accompagné la CNUCED dans ces différents programmes le Gouvernement camerounais, la CEMAC, l'Union Européenne à travers le projet PAIRAC (Programme d'Appui à l'Intégration Régionale en Afrique Centrale) le Conseil Français de la Concurrence et la Direction de la Concurrence, de la Consommation et de la Répression des Fraudes.

Le document portant la vision du Cameroun jusqu'à l'horizon 2035 décline ses perspectives de développement jusqu'à cette échéance ainsi que ses objectifs à court et moyen termes dans le Document de Stratégie pour la Croissance et l'Emploi(DSCE). Le

CNUCED pourrait utilement assister le Cameroun à travers le droit et la politique de la concurrence qui est une garantie offerte aux investisseurs par la Charte des Investissements pour l'amélioration du climat des affaires et le bien-être des consommateurs.

Dans cette perspective, il est envisagé l'adoption au cours de l'année 2010, d'une loi-cadre sur la protection du consommateur pour la sauvegarde de ses intérêts et d'une loi régissant le commerce électronique.

Au niveau national, la CNUCED pourrait aider les autorités de concurrence en matière d'investigations dans le cadre de grandes affaires dont elles seraient saisies, celles-ci pouvant avoir des implications au-delà du territoire national. Une coordination de la coopération dans ce sens serait appréciée.

Au niveau régional, l'organisation de la coopération pourrait se traduire par un encouragement des autorités de la concurrence des différents Etats membres à se mettre en réseau à travers une association étroite des services d'enquêtes et d'échanges d'informations pour prévenir, détecter et réprimer, les pratiques anticoncurrentielles afin que le sillon pour la diffusion et l'enracinement de la culture de la concurrence s'approfondisse toujours davantage.

La CNUCED a signé en 2009 avec la CEMAC, un mémorandum de coopération sur les questions relatives au droit et à la politique de concurrence. Dans ce document, il est précisé les responsabilités respectives de chaque institution dans une approche cohérente et bénéfique de l'assistance technique en faveur de la CEMAC, de ses Etats membres, de SAO TOME E PRINCIPE et de la République Démocratique du CONGO. Ce programme d'assistance porte, entre autres, sur le renforcement des capacités institutionnelles et la formation en vue d'une application harmonisée des règles de la concurrence dans l'espace communautaire.

La CNUCED pourrait aussi assister la CEMAC dans son processus d'intégration, elle dont certains analystes affirment qu'elle serait une des sous-régions les moins intégrées au monde, par l'encouragement des Etats membres à l'accroissement des échanges intracommunautaires qui ne représenteraient aujourd'hui que 2% de son commerce. Il s'agirait « de promouvoir une véritable régionalisation communautaire qui permettrait d'élargir les marchés, de mobiliser les forces pour mettre en place une politique commune et d'entraide pour détecter et réprimer les pratiques anticoncurrentielles » à l'instar de ce qui est prévu à l'article 45 de l'Accord de Cotonou.

De manière générale, une coopération plus étroite entre les États membres pour raffermir leur solidarité en faveur des plus défavorisés, la promotion de l'économie de marché par l'élimination des entraves au commerce et la coordination des programmes de développement qui nécessitent la mise en commun des moyens et des informations pourraient être poursuivies et renforcées.

Enfin, lors du sommet de COPENHAGUE sur le climat en décembre 2009, l'Afrique Centrale a été identifiée comme un pôle essentiel pour le développement durable et la préservation de l'environnement. Mais le Golfe de Guinée est aussi une région qui regorge de d'importantes ressources pétrolières où affluent des investisseurs. La CNUCED pourrait jouer un rôle non moins important dans la conciliation des

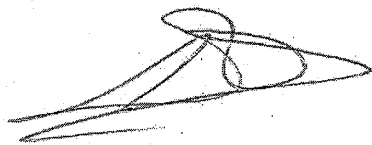
intérêts en présence, ceux du développement légitime des pays de la sous-région et ceux de la préservation de la nature afin qu'une compétition économique incontrôlée ne vienne pas hypothéquer les efforts entrepris pour le bien-être des populations locales et la survie de l'humanité toute entière.

Le lancement du programme AFRICOMP en faveur des pays d'Afrique en 2009 dont le Cameroun est un des premiers bénéficiaires, la signature d'un mémorandum de coopération avec la CEMAC en 2009, l'assistance de SAO TOME E PRINCIPE dans l'élaboration d'une législation sur la concurrence et la protection du consommateur en décembre 2009, le lancement d'une étude pour faire l'état des lieux de la concurrence au Cameroun en mars 2009 et la publication de cet ouvrage collectif en 2010 ne sont-ils pas autant de signes de vitalité et du dynamisme de la CNUCED qui invitent l'ensemble de la communauté internationale à se mobiliser pour plus de solidarité, notamment en faveur de pays les plus vulnérables ?

Dans un monde où les Etats, mêmes les plus puissants, ne cessent de se regrouper et les grands ensembles de se renforcer pour faire face aux enjeux d'un marché ouvert, caractérisé par la globalisation des échanges, la compétition économique est permanente et de plus en plus rude.

Aussi, une coalition mondiale pour une croisade contre les comportements illicites qui entravent le bon fonctionnement du marché et fragilisent encore plus les économies des pays en voie de développement, ayant pour porte étendard la CNUCED, devrait-elle être soutenue.

Le souhait est que la CNUCED, dont le rôle est essentiel pour la généralisation d'un commerce débarrassé de pratiques inéquitables, ait plus de ressources pour mener à bien la mission qui lui est assignée. Le Cameroun, comme il est de son devoir, y apportera sa contribution et sa coopération en tant qu'Etat membre et partenaire de la CNUCED.



Léopold Noel Boumsong  
Président de la Commission Nationale de la Concurrence  
Cameroun



## ***Chile: Misión de la UNCTAD y su relación con el trabajo de la Fiscalía Nacional Económica de Chile***

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### **1.- Colaboración Internacional**

Un componente esencial del trabajo de la UNCTAD es lograr grados crecientes de colaboración internacional, como lo demuestra la creación y organización del foro que reúne al Grupo Intergubernamental de Expertos en Derecho y Política de la Competencia que se congrega en Ginebra cada año. En dicho foro las agencias y representantes gubernamentales pueden celebrar consultas sobre cuestiones relativas a la competencia que preocupan a los Estados miembros, así como para mantener intercambios informales de experiencias y mejores prácticas, lo que incluye un examen voluntario entre homólogos del derecho y la política de la competencia.

La FNE ha entendido que la colaboración internacional es clave también para el cumplimiento de su misión, por tal motivo, se ha concentrado tanto en la firma de acuerdos con agencias de competencia extranjeras para la cooperación en investigaciones, intercambio de mejores prácticas y capacitación mutua como también en la participación activa en los distintos foros internacionales.

Así, actualmente la FNE tiene vigentes siete acuerdos de cooperación internacional firmados durante los últimos diez años con Canadá, Costa Rica, México, El Salvador, Ecuador, España y Brasil. Uno de estos acuerdos, con la Comisión Nacional de Competencia de España (2009), es el primer convenio de este tipo logrado con una agencia de competencia europea. Por la importancia de las relaciones comerciales y de inversión entre nuestro país y España, este acuerdo de cooperación alcanza una relevancia singular.

Por otra parte, Chile ha firmado una serie de Tratados de Libre Comercio, dentro de los cuales doce contienen “Capítulos de Competencia”, es el caso de los celebrados con Canadá, EEUU, la Unión Europea y México<sup>7</sup>.

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<sup>7</sup> Mayor información en [http://www.fne.cl/?content=tlc\\_capitulos](http://www.fne.cl/?content=tlc_capitulos) (Rev. julio 2010)

La suscripción de los convenios mencionados demuestra el reconocimiento internacional alcanzado por la FNE, y en especial, entre las agencias de competencia de la región, que ven en la FNE un referente técnico.

En cuanto a la participación en foros internacionales, la FNE ha participado activamente en los foros especializados en las materias propias de la libre competencia. Esta participación se sustenta, entre otros factores, en la elaboración documental y el envío regular de contribuciones técnicas sobre temas específicos en discusión. Para ello la FNE ha destinado una cantidad importante de recursos técnicos, lo que se refleja en el número creciente de contribuciones escritas el que se ha triplicado en los últimos cuatro años.

## **2.- Promoción la de competencia**

La UNCTAD ha focalizado sus esfuerzos hacia la promoción de la competencia, como lo demuestra también el Plan de Acción de Bangkok (UNCTAD X) que acordó la necesidad de "reforzar la capacidad de las instituciones públicas de los países en desarrollo encargadas de la defensa de la competencia y la protección del consumidor y ayudarlas a educar al público y a los representantes del sector privado al respecto".

Por su parte, uno de los pilares de la acción de la FNE ha sido la promoción de la competencia en Chile, para generar una cultura de la competencia y a su vez, a través de la implementación de buenas prácticas de transparencia y acceso a la información, proporcionar la mayor certeza posible a los distintos actores económicos presentes en nuestro país.

De este modo, se destaca la organización de actividades de difusión como el Día de la Competencia, celebrado por siete años consecutivos, y que se ha convertido en la instancia nacional más importante de debate público sobre cuestiones de libre competencia. Asimismo, uno de los recientes desafíos abordados por la FNE es potenciar su rol de Promoción Activa de la Competencia ("Advocacy"), con el fin procurar condiciones que favorezcan la competencia en los mercados, interviniendo e influyendo en el marco regulatorio, normativo y cultural de modo de generar incentivos que favorezcan al desarrollo competitivo de las actividades económicas.

Particular importancia se debe dar a la estrategia frente a otras agencias del Gobierno, fortaleciendo la colaboración con los organismos reguladores y orientando ese esfuerzo a la profundización del conocimiento conjunto del funcionamiento de ciertos mercados y a la identificación de problemas de interés común. Destacamos las relaciones con las autoridades de telecomunicaciones, transportes y obras públicas.

## **3.- UNCTAD y la Fiscalía Nacional Económica**

La identificación de objetivos entre la FNE y UNCTAD y el reconocimiento de la cooperación internacional como un baluarte para el logro de ellos, hacen necesario perseverar en las acciones que ha emprendido UNCTAD, particularmente, a través de las reuniones del Grupo Intergubernamental de Expertos en Derecho y Política de la Competencia, en las que esta Fiscalía ha participado y seguirá colaborando activamente como parte de su agenda internacional. Las actividades vinculadas a la revisión y discusión del "Conjunto"<sup>8</sup> que vienen para este año 2010 son de alta importancia para esta FNE.

El trabajo de UNCTAD durante esta última década ha sido de gran importancia para el logro de los objetivos de la FNE antes descritos. Como foro internacional, nos ha permitido recoger en nuestros procesos internos y en la estructura legal de defensa de la libre competencia, las mejores prácticas difundidas en el foro, siendo UNCTAD una instancia de discusión y análisis que ha sido reconocida por las distintas agencias a nivel internacional, junto con la OCDE y la International Competition Network.

Los enfoques provenientes de jurisdicciones que se encuentran en vías de adoptar una normativa de competencia, o en proceso de implementación de nuevas instituciones en esta materia, son de mucho provecho ya que aportan una mirada más global, al no dejar de lado aspectos y problemáticas que tienen vinculación con el nivel de desarrollo de los países y sus economías. Esta última visión le otorga a UNCTAD un carácter diferenciador respecto de los otros foros, vitalizando la discusión global sobre materias transversales y de preocupación de todas las agencias encargadas de la defensa de la libre competencia, y que incluyen problemas de índole organizacional, teórico - económicos o de doctrina jurídica.

Esperamos con entusiasmo seguir trabajando y colaborando con UNCTAD como organización y con sus expertos, en pro del objetivo de contribuir al resguardo de mercados más competitivos a nivel local y global, para que los agentes económicos que compiten en ellos y los consumidores, se beneficien de una competencia libre.



**Jaime Barahona Urzúa**  
**Subfiscal Nacional**

Jaime Barahona Urzúa  
Subfiscal Nacional  
Fiscalía Nacional Económica

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<sup>8</sup> En 1980, la Asamblea General de las Naciones Unidas adoptó el Conjunto de Principios y Normas Equitativos Convenidos Multilateralmente para el Control de las Prácticas Comerciales Restrictivas (referido como el Conjunto)

## ***Chile y la Oficina de la competencia de la UNCTAD***

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He tenido, en mi calidad de Presidente del Tribunal de Defensa de la Libre Competencia de mi país, la oportunidad – siempre grata e interesante - de participar, en los Últimos cuatro años, en las reuniones anuales de la Conferencia de Expertos Gubernamentales en materias de competencia que se celebran en Ginebra y que patrocina la UNCTAD. Tuve el honor de presidir la Última de estas reuniones en esa Ciudad en julio de 2009.

Asimismo, me ha correspondido participar en otros Seminarios en América Latina patrocinados igualmente por la Oficina de Derecho y Políticas de Competencia de este mismo Organismo.

Lo anterior me ha permitido ser testigo privilegiado de la labor que esta Oficina ha desarrollado en los países del Tercer Mundo, que ha significado que año a año se hayan establecido institucionalidades de Defensa de la Libre Competencia en nuevos países de África, América Latina y Asia. En todos estos casos, ello ha sido posible gracias a la asesoría de expertos de UNCTAD que han llevado su experiencia a las condiciones especiales que cada país ha debido enfrentar, según sus diferentes sistemas económicos y políticos, para lograr este objetivo.

De esta manera se cumple el fin superior que se ha planteado la UNCTAD, en su condición de organismo especializado de Naciones Unidas, en cuanto a considerar competencia como una herramienta para el desarrollo social y económico" y le permite de esta forma "monitorear la implementación del Conjunto de principios y normas equitativos convenidos multilateralmente para el control de las prácticas comerciales restrictivas", todo lo cual ayuda a asegurar que las prácticas anticompetitivas o negocios restrictivos no impidan el desarrollo asociado a la apertura comercial de los mercados.

Los debates que año a año se plantean en estos eventos revelan por si solos la manera en que se va generando en cada país, lo que se ha llamado la "cultura de la competencia" mediante adecuadas políticas de "advocacy" y que contribuyen a consolidar tanto la institucionalidad de la defensa de la competencia, como la disposición de los distintos agentes económicos a respetar adecuadamente las reglas de libre mercado.

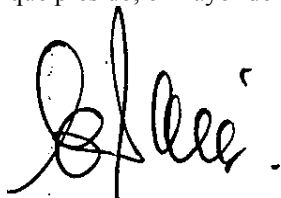
Asimismo, especialmente ilustrativos son los "peer review" o examen entre pares, que en cada oportunidad ha permitido a los países que están en pleno proceso de desarrollo de sus instituciones, mostrar al resto de las naciones, sus fortalezas y

debilidades y a estas recoger esas experiencias que acrecentaran su acervo de conocimientos en beneficio de sus propias instituciones.

Mención especial merece, además, la labor de COMPAL en América Latina que ha permitido que hoy prácticamente la totalidad de los países de América Latina cuenten con instituciones de Defensa de la Competencia, para lo cual han sabido inteligentemente lograr la cooperación de países desarrollados a esta tarea.

Chile reitera su disposición a colaborar, en la medida de sus posibilidades, a la extraordinaria labor que desarrolla la UNCTAD en esta materia y que he intentado resumir en estas líneas.

Felicito muy cordialmente a los organizadores de la celebración de estos treinta años del Conjunto de principios y normas equitativas convenidos multilateralmente para el control de las prácticas comerciales restrictivas. Esta celebración que tendrá lugar en Ginebra en el mes de Noviembre de este año, será un evento que, sin duda, marcara un hito en el desarrollo de nuestra disciplina por lo que les deseo en nombre propio y del Tribunal que presido, el mayor de los éxitos en dicha actividad.

A handwritten signature in black ink, appearing to read 'E. Jara', with a stylized flourish at the end.

Eduardo Jara Miranda  
Presidente  
Tribunal de Defensa de la Libre Competencia

## ***Colombia: El papel de la UNCTAD en la consolidación de una política de la Competencia en Colombia***

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La necesidad de una política de competencia es evidente en el contexto de los objetivos de intervención pública asociados con el mercado, como eje rector del proceso de creación y asignación de riqueza<sup>9</sup>. En concreto, dicha política tiene como finalidades establecer los instrumentos para generar las condiciones institucionales y de entorno necesarias para incrementar la eficiencia económica en los mercados y, en general, un mayor bienestar de la sociedad. La promoción de la competencia ha sido una preocupación no sólo para las economías desarrolladas de mercado, sino también para la mayoría de países en desarrollo y países emergentes.

En Colombia, el primer antecedente normativo del régimen de libre competencia tuvo lugar en 1959 con la expedición de la ley 155 que estableció el régimen general sobre prácticas comerciales restrictivas y control previo de integraciones. A partir de esta fecha inicia el proceso de consolidación de una política en materia de competencia, siendo uno de los primeros de Latinoamérica. Su aplicación fue no obstante limitada, dada la organización de la economía nacional durante las tres décadas siguientes a su adopción.

La aplicación de ese instrumento adquirió un nuevo impulso a comienzos de la década de los noventa debido a varias circunstancias. En primer lugar, por la puesta en marcha de la política de liberalización económica. En segundo lugar, porque a partir de la promulgación de la Constitución Política de 1991 se impuso al Estado, por mandato de la ley, el deber de impedir se obstruya o se restrinja la libertad económica y evitar o controlar cualquier abuso que personas o empresas hagan de su posición dominante en el mercado<sup>10</sup>.

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<sup>9</sup> Es precisamente en estos términos que el manual para la formulación y aplicación de las leyes de competencia de la Conferencia de las Naciones Unidas sobre comercio y desarrollo (UNCTAD), se expresa a propósito de las posibles ventajas de la política de competencia. Naciones Unidas, UNCTAD, Manual para la formulación y aplicación de las leyes de competencia, 2004, ed. en español., p. 4.

<sup>10</sup> Al conjugar los propósitos del derecho de la competencia con los objetivos de las actuaciones de la SIC – en tanto intervención del Estado en la economía – la Corte Constitucional señaló en la sentencia C- 815 de 2001 y C-228 de 2010 lo siguiente: “[S]e concibe a la libre competencia económica, como un derecho individual y a la vez colectivo (artículo 88 de la Constitución), cuya finalidad es alcanzar un estado de competencia real, libre y no falseada, que permita la obtención del lucro individual para el empresario, a la vez que genera beneficios para el consumidor con bienes y servicios de mejor calidad, con mayores garantías y a un precio real y justo. Por lo tanto, el Estado bajo una concepción social del mercado, no actúa sólo como garante de los derechos económicos individuales, sino como corrector de las desigualdades sociales que se derivan del ejercicio irregular o arbitrario de tales libertades. (...) Por ello, la protección a la libre competencia económica tiene también como objeto, la competencia en sí misma

En desarrollo de lo dispuesto en el artículo 20 transitorio de la Constitución de 1991 se expidió el Decreto 2153 de 1992, norma base de una nueva política de la competencia, y se reestructuró la Superintendencia de Industria y Comercio (SIC) con el fin de adecuarla a los mandatos de la nueva Constitución. Adicionalmente, se diseñó un modelo institucional “descentralizado” de promoción y de protección de la competencia en aquellos sectores que, como el de los servicios públicos, fueron abiertos al libre juego de la competencia. Con estas reformas se pretendió lograr un mayor crecimiento centrado en la apertura de la economía colombiana.

En julio de 2009 se actualizó por parte del Congreso de la República la normativa relacionada con la libre competencia.<sup>11</sup> Es así como se incorporó su promoción dentro de una estrategia de crecimiento basada en un incremento de la competitividad de la economía nacional. El objetivo de esa reforma fue “actualizar la regulación en materia de protección de la competencia para adecuarla a las condiciones actuales de los mercados, facilitar a los usuarios su seguimiento y optimizar las herramientas con que cuentan las autoridades nacionales para el cumplimiento del deber constitucional de proteger la libre competencia económica en el territorio nacional”<sup>12</sup>.

Se trata de una adecuación institucional y normativa a la evolución del mercado local y a las tendencias mundiales de políticas de competencia, de manera que la Superintendencia de Industria y Comercio (SIC), autoridad administrativa de carácter técnico y funcionalmente autónoma, se consolide en un instrumento de promoción de la competencia a nivel nacional, regional e internacional (i). Esta actualización del sistema nacional de protección y promoción de la competencia han contado con el apoyo de la UNCTAD (ii).

### **El alcance de la reciente adecuación de la política nacional de competencia**

La Ley 1340 de 2009 mantiene el alcance de las funciones de inspección, vigilancia y control previstas en el Decreto 2153, con el objeto de detectar y reprimir prácticas restrictivas de la competencia (actos, acuerdos y abuso de posición dominante) y ejercer control previo de integraciones empresariales. Sin embargo, la nueva ley extiende la jurisdicción de la SIC para abarcar todas las facultades de investigación de conductas anticompetitivas, abuso de posición dominante y fusiones empresariales respecto de todos los sectores de la economía.

La nueva ley faculta a la autoridad de competencia para participar en los procesos de regulación en los diferentes sectores económicos, convirtiéndose en un instrumento para promover una cultura de la competencia entre empresarios,

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considerada, es decir, más allá de salvaguardar la relación o tensión entre competidores, debe impulsar o promover la existencia de una pluralidad de oferentes que hagan efectivo el derecho a la libre elección de los consumidores, y le permita al Estado evitar la conformación de monopolios, las prácticas restrictivas de la competencia o eventuales abusos de posiciones dominantes que produzcan distorsiones en el sistema económico competitivo. Así se garantiza tanto el interés de los competidores, el colectivo de los consumidores y el interés público del Estado.”

<sup>11</sup> Ley 1340 de 24 de julio de 2009.

<sup>12</sup> Artículo 1, Ley 1340 de 2009.

funcionarios del Estado y representantes de grupos de intereses públicos y privados, como son las asociaciones profesionales o de consumidores.

La habilidad de la autoridad de competencia para promover la cultura de la competencia en los mercados depende de factores como su grado de autonomía funcional, la disponibilidad de recursos humanos y financieros, la complejidad de los mecanismos de cooperación con otras autoridades y la calidad e intensidad en sus relaciones y comunicaciones con los diversos sectores productivos.

Con la reforma de 2009 se ajusta la actividad de la SIC a las tendencias mundiales de políticas de competencia. Se busca garantizar que los avances doctrinales de la autoridad respondan a la evolución de los mercados, de manera que sea posible alcanzar mayores niveles de seguridad jurídica. Cabe resaltar que una de las tendencias corresponde al creciente lugar que ocupa el análisis económico en la toma de decisiones por parte de las autoridades de competencia a nivel mundial. Es desde la perspectiva del análisis económico que se examina el comportamiento de los diferentes agentes en el mercado, sea para determinar el posible efecto de una operación de integración o para aproximarse a la valoración de la conducta de quienes podrían haber actuado en forma anticompetitiva. De ahí que se haya venido fortaleciendo institucionalmente a la SIC, incorporando en su equipo funcionarios especializados en diversas áreas de la economía.

Esta autoridad es consciente de la necesidad de mantener y reforzar vínculos estrechos con autoridades supranacionales y extranjeras para responder eficazmente a los nuevos retos que esta reforma implica, en particular en relación con las garantías constitucionales de libertad de empresa, libre iniciativa privada y libre competencia económica.

## **La actividad de cooperación desarrollada por la UNCTAD**

En materia de cooperación internacional, la SIC participa en diversas actividades de asistencia técnica y ha suscrito memorandos de entendimiento con múltiples autoridades extranjeras. Un ejemplo lo constituye el Programa de Creación de Capacidades en Política y Leyes de Competencia y Protección al Consumidor con la Conferencia de la Naciones Unidas sobre Comercio y Desarrollo, UNCTAD, que fue diseñado inicialmente para cinco países latinoamericanos: Bolivia, Costa Rica, Salvador, Nicaragua y Perú<sup>13</sup>. Este programa tiene por objeto fortalecer y crear capacidades en las agencias de competencia y protección al consumidor, incrementar su eficiencia y generar entornos favorables para el crecimiento de las empresas a partir de una política de competencia y consumidor. Colombia, se hizo parte del programa el 23 de abril del 2009, mediante la suscripción del memorando de entendimiento con la UNCTAD y la Secretaria de Estado de Economía del Gobierno de Suiza, SECO.

En el caso colombiano, la Superintendencia estableció tres objetivos transversales, fortalecer la Entidad en aspectos y capacidades técnicas en materia de competencia y protección al consumidor, reforzar la actividad de abogacía de la

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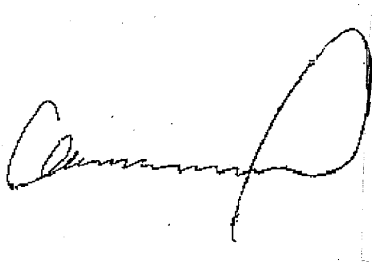
<sup>13</sup> COMPAL es un programa de creación de capacidades en política y leyes de competencia y protección al consumidor suscrito entre la SIC y la UNCTAD-SECO. Este programa constituye un mecanismo de fortalecimiento regional.



competencia y de difusión de los derechos de los consumidores, así como los mecanismos para garantizar su vigencia y la procura de condiciones para el libre desarrollo del mercado a través de estudios sectoriales y recomendaciones en el diseño de las políticas públicas.

Es preciso resaltar que la actividad de cooperación internacional liderada por la UNCTAD desde su creación en 1964 ha contribuido al desarrollo de una política de competencia en varios países del mundo, principalmente en economías pequeñas. Como organización intergubernamental, su actividad de asistencia y cooperación a las naciones en desarrollo ha evolucionado gradualmente hasta llegar a convertirse en una herramienta clave para orientar el debate en torno a una armonización de las políticas nacionales y la acción internacional en materia de competencia. Del mismo modo, la UNCTAD se ha convertido en un espacio en el que se llevan a cabo importantes reflexiones sobre la política de competencia, sus retos y perspectivas de evolución; y su estrecha vinculación con el desarrollo.

El caso colombiano, sin duda, ilustra los beneficios de contar con el apoyo de la cooperación internacional con miras a aumentar al máximo las oportunidades de comercio, inversión y progreso de los países en desarrollo y a afrontar los retos derivados de la globalización mediante la investigación y el análisis de las políticas económicas y de desarrollo, las deliberaciones intergubernamentales, la cooperación técnica y la interacción con la sociedad civil, tal como lo ha venido liderando eficazmente en sus años de existencia la UNCTAD.

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Gustavo Valbuena Quiñones  
Superintendente de Industria y Comercio  
Colombia

## ***Costa Rica: La contribución de UNCTAD: Más allá de la Competencia***

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El Conjunto de Principios y Normas para la Competencia de las Naciones Unidas (el Conjunto) fue aprobado por la Asamblea General mediante su resolución 35/63, desde el 5 de diciembre de 1980. Treinta años atrás el mundo y las relaciones comerciales entre los países, eran muy diferentes. Por eso es importante destacar que el Conjunto anticipó los principios y normas para el correcto funcionamiento del mercado antes que a nivel local iniciaran los procesos internos de desregulación y privatizaciones y a nivel global proliferaran los acuerdos comerciales y el significativo aumento del comercio internacional. Sin embargo, estos procesos dan inicio sin que la mayoría de los países en vías de desarrollo cuenten con una legislación de competencia.

UNCTAD ha contribuido significativamente para que treinta años después de aprobado el Conjunto de la ONU más de cien países tengan una legislación de competencia que para combatir las prácticas anticompetitivas en sus mercados. Algunos países han ido más allá y en varias instancias a nivel regional se han incorporado disposiciones para combatir prácticas anticompetitivas, y en muchos tratados de libre comercio bilaterales se incluyen cláusulas de cooperación con ese mismo propósito.

Es claro que la experiencia de los países desarrollados ha sido una luz importante para alumbrar el desarrollo de la normativa y la práctica de las agencias de competencia, por medio de la cooperación técnica, seminarios, talleres y otras actividades. Esto ha permitido a estas agencias de competencia estar pendiente constantemente de las más recientes innovaciones en la materia y participar en una red formal e informal de agencias y personal para compartir especialmente los casos y resoluciones más importantes, y desarrollar las mejores prácticas en la materia.

Aprobar una ley de competencia o su reforma, no es tarea fácil. Primero por el contenido técnico que se requiere y segundo por la resistencia que suelen presentar determinados grupos de interés, que en los países en vías de desarrollo suelen tener más influencia sobre los órganos del Estado. Por eso, es sorprendente la cantidad de países que han promulgado y mejorado su legislación de competencia en las últimas tres décadas. La participación de UNCTAD en este proceso ha sido esencial y se distingue por los siguientes aspectos:

UNCTAD ha puesto especial atención a los países menos desarrollados.

Además de ofrecer cooperación técnica en campo de la competencia, UNCTAD ha hecho grandes contribuciones para demostrar el vínculo que existe entre competencia y otras áreas fundamentales como comercio exterior, competitividad, protección del consumidor, propiedad intelectual, competencia desleal, y desarrollo de

las PYMES; con lo cual ha puesto de manifiesto la necesidad de formular una política económica integral que incorpore todos estos elementos de manera consistente.

Por su agenda vinculada al desarrollo económico, UNCTAD ha orientado su trabajo hacia los países menos desarrollados, con lo cual ha venido desarrollando una red de agencias de competencia que facilitan el intercambio de experiencias y la cooperación sur-sur.

Estos aspectos han permitido a su vez, que UNCTAD desarrolle una especial sensibilidad por las necesidades particulares que presenta cada país según el modelo de desarrollo que ha adoptado y según las condiciones político, culturales y de otra índole que indiquen de una u otra forma en el funcionamiento del mercado. Esto es necesario para que la implementación y aplicación de las mejores prácticas sea aceptada localmente; bajo la máxima de que no hay una solución apta para todos los casos.

Afortunadamente Costa Rica se ha beneficiado significativamente de la contribución de UNCTAD. En términos generales ha sido importante la participación de varios seminarios a nivel local e internacional, así como la participación en el Grupo Internacional de Expertos. Pero particularmente hay que destacar la participación de Costa Rica en el programa COMPAL y en la revisión de pares del 2007.

La participación en el Programa COMPAL desde su inicio le ha permitido a COPROCOM (la agencia de competencia) desarrollar proyectos para atender necesidades específicas, incluyendo actividades de difusión de la ley, la redacción de un proyecto de reforma de la ley de competencia, y la elaboración de guías para la investigación de prácticas anticompetitivas. Mientras que la participación en el proceso de revisión de pares significó un alto en el camino para hacer un análisis sistemático de los aspectos institucionales y sustanciales de la normativa, así como de la eficacia de su aplicación por parte de la agencia. El seguimiento a las recomendaciones de la revisión de pares y la prolongación del COMPAL II hacen que podamos seguir contando con el valioso aporte de UNCTAD de una manera sostenida en el tiempo y en línea con los objetivos de la agencia.

Ahora bien, no cabe la menor duda que todavía hay muchos países que están promulgando o implementando la ley de competencia y otros que aunque la tienen, necesitan reformarla para ajustarla a las mejores prácticas. Por otra parte, la gran mayoría de los países están experimentando la creciente dinámica de los mercados y el incremento del comercio internacional. Estos son los dos aspectos que hacen que a pesar de los grandes logros alcanzados por UNCTAD, la necesidad de una mayor y más profunda contribución de su parte sea permanente.

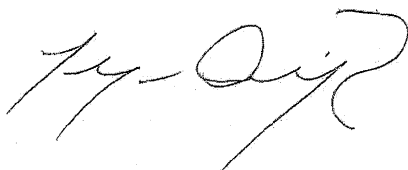
La necesidad de ampliar el aporte de UNCTAD para beneficiar a la mayor cantidad de países posible tiene como objetivo lograr la convergencia de las distintas normativas atendiendo a las necesidades y particularidades de cada país, pero sin que la calidad y profundidad se diluyan en el proceso. Con este propósito podrían intensificarse los seminarios de alcance regional y pensar en intensificar la actividad del Grupo Internacional de Expertos, formando subgrupos por regiones y por temas de interés. Otros dos instrumentos pueden ser explotados con más intensidad. La revisión de la Ley Modelo podría incluir las regulaciones especiales que cada país ha incorporado en su legislación con una breve descripción de la justificación de esa norma especial. Además, sería de gran utilidad que la Ley modelo tuviera un vínculo a

resoluciones importantes adoptadas por diferentes agencias. Se trataría de un banco de resoluciones recopiladas por UNCTAD, pero ordenadas de manera sistemática.

El otro instrumento de gran valor es la revisión de pares. Pero a pesar de haber completado más de nueve revisiones, la gran mayoría de países aún no ha tenido la experiencia de participar como revisado ni como revisor. Seguramente la información acumulada en las revisiones realizadas hasta ahora permite sistematizar los descubrimientos (identificando dónde hay elementos en común y dónde hay desviaciones importantes) para poder compartirlos con el resto de los países en forma de lecciones aprendidas. Esta sistematización debería al menos incluir los siguientes aspectos: debilidades en los aspectos institucionales y sustantivos de la normativa y en su aplicación, normas destinadas a atender necesidades específicas de los países, dificultades encontradas en la aplicación de la ley, posicionamiento de la agencia en el aparato institucional del Estado y posicionamiento de la competencia en la política económica del Estado, y el impacto de la política de competencia en la estrategia de desarrollo.

Finalmente, la creciente dinámica de los mercados y el incremento en el comercio internacional hacen que la contribución de UNCTAD deba ser todavía más profunda e integral. Además de la implementación de las mejores prácticas en política de competencia, es importante diseñar estrategias para asegurar un vínculo más duradero y de mayor impacto entre esta y los demás componentes de la política económica del Estado, que suelen involucrar a un número mayor de instituciones que cuentan con sus propias agendas. Aquí también debe aplicarse la máxima de que no hay una solución apta para todos los casos. Por otra parte, es importante que UNCTAD intensifique sus esfuerzos, dentro del marco de su mandato, para asegurar que las prácticas anticompetitivas no impidan ni anulen la consecución de los beneficios que deberían resultar de la liberalización de las barreras arancelarias y no arancelarias al comercio internacional. A falta de una normativa especial de competencia que aplique para el comercio internacional, UNCTAD puede promover la cooperación entre Estados para el control de las prácticas anticompetitivas con efectos transfronterizos dentro del marco provisto por el Conjunto, específicamente en las secciones E y F.

En resumen, especialmente los países en vías de desarrollo tienen en UNCTAD un aliado para mejorar el proceso de competencia y acceso al mercado no como un fin en sí mismo, sino como un medio que vinculado a las demás áreas de la política económica permita lograr los objetivos de la estrategia de desarrollo atendiendo a las necesidades particulares de cada caso.



Edgar Odio –Rohrmoser  
Costa Rica

***Ecuador: La competencia beneficia el desarrollo de los pueblos a través de la protección de los consumidores***  
***La Política de la Competencia y Defensa del Consumidor de la UNCTAD a través del Programa COMPAL***

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Fausto Alvarado  
Sub-secretario de Competencia y Defensa al Consumidor  
Ministerio de Industria y Productividad  
Ecuador

La competencia en el mercado de bienes y servicios garantiza el derecho de los consumidores a elegir libremente aquellas opciones de compra que le resulten más satisfactorias para sus intereses.

El derecho a la libre elección de los consumidores está definido a nivel mundial por la resolución número 39/248 de la Asamblea General de las Naciones Unidas, emitida en el año 1985, el cual reza textualmente: “Derecho a la posibilidad de elegir entre diversos productos o servicios con la seguridad de una calidad satisfactoria”.

De este enunciado se desprende que las acciones que realizan los gobiernos y los agentes económicos privados para limitar los procesos de competencia en el mercado constituyen, una flagrante violación a nuestros derechos humanos como consumidores.

El aporte de la UNCTAD en el desarrollo de políticas y normas en materia de competencia y defensa del consumidor en el Ecuador a sido consistente y sistemática, más aun en los últimos dos años de manera particular con el programa COMPAL, del cual el Ecuador desde 2009 forma parte, los aportes en materia de competencia y defensa del consumidor ya empezaron a notarse desde el año 2009 con los eventos auspiciados por la UNCTAD tanto en materia de consumidor como de competencia llevados adelante en las ciudades de Quito, Guayaquil y Cuenca. Para el año 2010 se tiene dentro de la asistencia técnica y de cooperación previstos varios programas como estudios de mercado y eventos de promoción y difusión de los Derechos de los Consumidores y de la Competencia, esto como plataforma en lo referente a conseguir generar una cultura de la competencia, pero sobre todo en lo que respecta a la formación de una sociedad de consumidores y consumidoras responsables con la vida, la salud, el medio ambiente y la economía.

Con el apoyo de UNCTAD a través del programa COMPAL, el Ecuador a podido analizar y evidenciar como los efectos negativos de la falta de competencia en el mercado conlleva para los consumidores un detrimento en su bienestar; y, como tales

prácticas y acuerdos anticompetitivos son aguantados a diario por todos los ecuatorianos y ecuatorianas; quienes debemos pagar precios, en muchas ocasiones superiores a los que se negocian en países vecinos e incluso a nivel internacional.

Luego de recibir el apoyo de la UNCTAD a través de programa COMPAL y la asistencia del resto de países hermanos, hemos podido detectar a través de los diferentes estudios de mercado que ha llevado adelante la Autoridad ecuatoriana de Competencia la infinidad de fallas de mercado en el funcionamiento del mercado que perjudican a los consumidores y consumidoras y de manera particular con mayor preponderancia ( a los estratos de menores ingresos) ya que son los productos de primera necesidad de la canasta básica de alimentos en donde mayor concentración de los mercados existe y políticas anti-competitivas, productos tales como: el azúcar, fósforos, sal, leche, huevos, pero no solo son los sectores agro industriales y de la canasta básica, también se han detectado problemas en sectores sensibles como: cemento, distribución a nivel de cadenas de retail supermercadista, banano, medicamentos de uso humano, fertilizantes, transporte: aéreo, terrestre pesado, telefonía fija y celular, acero, vidrio, tarjetas de crédito, refrescos o colas, etc.

Cuando este tipo de prácticas y acuerdo (anticompetitivos) se dan dentro del mercado, es importante que las mismas sean evidencias y sacadas a la luz pública a través de la autoridad respectiva ya que dichas prácticas y acuerdos tienden a sacrificar el bienestar de la gran mayoría de consumidores para que sólo unas pocas personas (grupos económicos) u operadores económicos se vean beneficiadas de los precios y de las ganancias monopólicas que se generan con este tipo de prácticas o acuerdos anticompetitivas.

En el caso de los servicios públicos se impone la misma lógica, cuando los consumidores o usuarios nos vemos sometidos a las decisiones de los entes que monopolizan estos servicios, y a los cuales no les interesa arrastrar costos de ineficiencia o privilegios, ya que no cuentan con empresas que, les obliguen, mediante los procesos de competencia efectiva a mantener costos basados en criterios de beneficio al consumidor a través de costos basados en la eficiencia.

Por todas estas razones, afirmamos que el deber de las autoridades gubernamentales y de manera particular de una Autoridad de Competencia, es promover la competencia, regular y controlar eficientemente y responsablemente los mercados, así como educar y brindar información oportuna al consumidor para que se pueda desenvolver en el marco del respeto mutuo a sus derechos y obligaciones dentro del mercado y no de libertinaje como muchas veces suelen desenvolverse los diferentes operadores económicos.

En este sentido, podemos concluir que el aporte de la UNCTAD-COMPAL al Ecuador a sido altamente positiva y esperamos que pueda ser mantenido, y aun mejor, ampliado, sobre todo los recurso ya que son este tipo de acciones y políticas las que nos llevan a que los derechos de los consumidores sean plenamente reconocidos y respetados. Sólo cuando se respete en toda su amplitud nuestro derecho a escoger libremente aquellos bienes y servicios que nos satisfagan de parte de los proveedores que consideremos conveniente sin distorsiones de otros agentes económicos o del propio Estado, podremos mejorar nuestro bienestar. Tampoco podemos renunciar al deber ser y sobre todo a la capacidad del Estado moderno, social y solidario de poder intervenir de manera firme y soberana cuando existen las distorsiones del mercado que

afectan la economía en contra del bienestar de los consumidores y consumidoras, el cual se fundamenta constitucionalmente en su obligación y capacidad reguladora en los casos establecidos por la ley y que redundaran en el interés económico general donde cuyo eje fundamental son los ciudadanos y ciudadanas de nuestro país.

## **El comportamiento integral del consumidor**

En Ecuador, como resultado de los procesos de apertura de mercados y de liberalización de precios de los productos (bienes y servicios) debemos tratar de consolidar los deberes y obligaciones de los consumidores a través de la creación y fortalecimiento de las asociaciones de consumidores que traten de velar por los derechos de todos nosotros como consumidores. El papel que deben jugar dichas asociaciones, debe ser enfocado en aspectos educativos y de capacitación de los agentes involucrados en el proceso: consumidores, Estado; y, los productores de bienes y servicios.

Aspectos como información sobre precios reales de los productos, garantías, calidad, información veraz, inocuidad, entre otros, han sido tratados, no obstante, desde el punto de vista económico de la conducta del consumidor podría pensarse en incorporar otros aspectos que son parte integral de la conducta del consumidor y que podrían complementar el trabajo realizado en este campo.

Entre los aspectos que se pueden citar y que influyen principalmente en la conducta del consumidor en el mercado, están: las preferencias personales y el poder adquisitivo de los agentes. Asimismo, si agregamos a los dos aspectos anteriores, los precios relativos de los productos, tendremos así los aspectos esenciales que determinan el grupo de productos o servicios que un consumidor elegirá.

Es así como, el consumidor o usuario debería ser capacitado para que comprenda que está integrado dentro de un sistema económico donde sus posibilidades de compra, dado por la diversidad de bienes y servicios disponibles y su capacidad de generar ingresos, son parte de una misma dinámica por lo que ambos deben ser valorados y considerados con el mismo grado de importancia. De nada sirve tener la posibilidad de escoger entre una gran variedad de zapatos si la opción real de compra dada por el ingreso se pierde.

En este sentido, la capacidad de compra de los consumidores, puede verse afectada (de manera positiva o negativa) por las políticas económicas imperantes o por los procesos de proteccionismo, apertura y globalización. Por lo anterior, los consumidores ecuatorianos como grupo relevante –somos todos- deberían ser más activos y proponentes en la búsqueda de mecanismos y estrategias para ayudar a definir la mejor forma de incorporación en estos procesos, que permita a través de las instancias respectivas –ya sean estructurales o de cualquier tipo- beneficiosa para la mayoría.

Asimismo, las distintas instituciones del Estado, relacionadas con esta materia, podrían y deberían ser instrumentos importantes en la apertura y creación de espacios de opinión y de discusión sobre el asunto, complementando de esta manera el trabajo

específico y de gran valor ya desarrollado en áreas como la libre competencia o la protección del consumidor.

Es síntesis, no debería verse al consumidor únicamente como un agente con una mayor opción de consumo de bienes o servicios, en cantidad y calidad, aspecto que se sobreentiende es muy importante, sino que se incorporen las posibilidades reales de mantener, o mejor aún, incrementar su ingreso, no sólo utilizando la vía de precios más competitivos que da el mercado cuando existe una competencia verdadera o efectiva, sino realmente, potenciando las ventajas del comercio a nivel interno para que los consumidores en su mayoría sean beneficiados con el valor generado –capacidad de redistribución- por el intercambio comercial.



## ***Egypt: Egyptian Competition Authority***

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Mrs. Mona Yassine  
Egyptian Competition Authority

Since 1995, there were many efforts to adopt competition legislation in Egypt, but only in 2005, the Law No. 3 on Protection of Competition and the Prohibition of Monopolistic Practices, herein called the “Egyptian Competition Law” was promulgated, and accordingly, the Egyptian Competition Authority was established.

UNCTAD provided technical assistance related to the preparation and adoption of competition policy and legislation in Egypt, as well as, institutional capacity support to establish a strong, independent Competition Authority to be able to enforce effective competition legislation. UNCTAD also assisted Egypt in identifying the role of competition policy and its implications at the national, regional and international levels.

1. UNCTAD provided a number of advisory and training activities in Egypt which were provided through seminars, workshops, meetings and activities directed at stakeholders, specific officials or a wide audience including government officials and academia, as well as business- and consumer-oriented circles. These activities contributed to raising awareness of the role of competition and promoting a competitive culture in Egypt.

For example, UNCTAD delivered a presentation to the Conference on Competition and Privatization in Egypt organized by the Trade-Related Assistance Center (TRAC) in cooperation with the Egyptian Competition Authority and the Commercial Law Development Program of the US Department of Commerce. Speakers included representatives from the Egyptian Government, Egyptian Competition Authority, UNCTAD, academia, business associations, private sector and sector regulator for the telecom industry. The aim of the Conference was to open discussions - based on the views of the experts - on topics such as objectives, scope and application of competition law and policy in Egypt, international and regional cooperation on competition policy and the impact of privatization and reform on competition and the Egyptian economy.

2. UNCTAD provided assistance to Egypt, within the framework of efforts to help countries draft and/or review their competition legislation. Assistance in this regards was provided in the drafting phase of the Competition Law, which enhanced the understanding among government officials of the Competition legislation by presenting international best practices in competition. Also, UNCTAD assisted in the preparation of the Executive Regulations of the Egyptian Competition Law as well as the institutional framework of the competition Authority.

3. Within the framework of training activities for competition case handlers, the Egyptian Competition Authority participated in the first regional workshop organized by UNCTAD on the “Role of competition policy in the current food crisis” in 2008. It was held within the newly established UNCTAD/Tunisia Regional Centre on Competition Policy in Tunis. The workshop was the first step in maintaining coherence in governments’ approaches to competition policy, taking into account the need for government intervention to alleviate the impact of price hikes on the poor while enforcing the objectives of the competition law.

4. UNCTAD provided technical cooperation and capacity-building programs to Egypt within the framework of regional and sub-regional activities. This is by providing assistance to the COMESA Competition Commission in the implementation of the regional competition regulations and rules.

5. Within the framework of worldwide cooperation on competition policy implementation, each year, an Intergovernmental Group of Experts (IGE) on Competition Law and Policy meets under the umbrella of UNCTAD to discuss ways of enhancing convergence through dialogue and international cooperation between competition agencies around the world. This annual meeting is highly beneficial for a developing agency like the Egyptian Competition Authority in order to be engaged with other competition authorities in competition issues and exposure to best practice.

Finally, Capacity building programs, Competition advocacy, and technical assistance had been very useful to Egypt. And UNCTAD had played a remarkable role in shaping the competition policies in Egypt. Thus, the continuation of UNCTAD’s technical assistance and capacity building programmes are very important especially to a relatively young agency as the Egyptian Competition Authority.

## ***El Salvador: Superintendencia de Competencia,***

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J. Enrique Argumedo  
Superintendente de la Competencia  
El Salvador

El Conjunto de Principios y Normas Equitativos Convenidos Multilateralmente para el Control de las Prácticas Comerciales Restrictivas (Conjunto de Principios y Normas sobre Competencia de las Naciones Unidas), recopila una serie de definiciones y mejores prácticas sobre el tema de competencia. Si bien, dicho documento fue adoptado en 1980, y en El Salvador la Ley de Competencia entró en vigencia el 1 de enero de 2006 (fecha en la cual también inició operaciones la Superintendencia de Competencia) la institución se ha favorecido de disposiciones incluidas en el mismo pues los principios se encuentran reflejados en el que hacer institucional.

Por ejemplo, la Sección F del mismo (Medidas Internacionales), dispone en el número 6, la “Ejecución o facilitación de la ejecución por UNCTAD, y por otras organizaciones pertinentes del Sistema de Naciones Unidas, junto con la UNCTAD, de programas de asistencia técnica, asesoramiento y capacitación sobre las prácticas comerciales restrictivas, en particular para los países en desarrollo”, que, entre otros, comprende la celebración de seminarios, programas, o cursos de formación, así como la organización o facilitación de intercambio de personal entre organismos que se ocupen del control de prácticas comerciales restrictivas.

En este sentido, para la ejecución de diferentes actividades, principalmente de abogacía de la competencia, incluyendo la realización de estudios sectoriales y capacitación del personal; la SC ha contado con recursos provenientes de su participación en el Programa COMPAL fase I (2005-2008), y actualmente de la fase II del mismo (a partir de 2009). Además, la SC participa en la Reunión Anual del Grupo Intergubernamental de Expertos sobre Derecho y Política de Competencia (cuyo origen puede encontrarse en la sección G: Mecanismo Institucional Internacional, del “Conjunto”), y en 2010 participó en el II Seminario Regional UNCTAD-SELA sobre Comercio y Competencia.

En ese sentido, podemos afirmar que el conjunto de principios y normas equitativos convenidos multilateralmente para el control de las prácticas comerciales restrictivas puede contribuir al logro del objetivo, en el establecimiento de un nuevo

orden económico internacional; así como al desarrollo y al mejoramiento de las relaciones económicas internacionales sobre una base justa y equitativa.

## ***España: XXX Aniversario del Conjunto de Principios y normas sobre Competencia de las Naciones Unidas***

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Consumidores y empresas acudimos a los mercados para satisfacer nuestras necesidades adquiriendo bienes y utilizando servicios. En este ciclo la existencia de libre competencia es la mejor garantía para que todos podamos escoger lo que mejor se adecue a nuestros gustos y necesidades y obtengamos la mejor relación calidad-precio en cada momento.

El entorno competitivo incentiva a las empresas para mejorar la calidad de sus productos y servicios y ajustar sus precios. De esta forma, la competencia se convierte en un estímulo clave para la innovación, el progreso tecnológico y la búsqueda de medios más eficientes de producción.

Al mismo tiempo y en último término, la existencia de mercados abiertos a la competencia permite a aquellas personas con iniciativa empresarial emprender sus proyectos con total libertad. Con ello, se facilita la creación de empresas y, consecuentemente, de empleo.

Los anteriores párrafos sintetizan los efectos positivos de la libre competencia en los mercados sobre el bienestar, la eficiencia y la competitividad y son ampliamente compartidos por la profesión económica, tanto desde una perspectiva doctrinal como desde una aproximación empírica. La competencia es, en definitiva, el mejor garante de que todos y cada uno de los participantes en el mercado actúen de forma competente y ofrezcan sus bienes y servicios al menor precio posible, que innoven y que mejoren la calidad y variedad de su oferta.

Y si bien todos salimos beneficiados de la competencia de terceros, es ampliamente reconocido que condicionar la actividad propia a la incertidumbre competitiva es incómodo y mucho más exigente que no hacerlo, por lo que todos compartimos el deseo de proteger nuestro ámbito de actuación ubicándolo al abrigo de la competencia de nuestro competidor, sea comprándolo, coludiendo con él o convenciendo a los poderes públicos de que nos permitan actuar como monopolista.

Es evidente que se produce una contradicción entre los intereses particulares y los generales cuya resolución queda condicionada a la decisión y acierto con el que se aplique la política de competencia y a la fortaleza, solvencia y credibilidad de las autoridades de competencia de cada país

Todos y cada uno de los elementos conceptuales anteriores son, no sólo válidos en todos los países y territorios sino que ponen de manifiesto que la competencia, además de ser plenamente compatible con el desarrollo económico, es un extraordinario promotor de este. Creo que podremos aceptar mayoritariamente este punto que aunque obviamente pueda matizarse, difícilmente podrá rechazarse.

En segundo término, no se puede negar que los países en desarrollo y las economías en transición en general se enfrentan a una problemática ligeramente distinta en la gestión política de estos asuntos. Por un lado, tienen la dificultad de hacer frente con sus marcos normativos e institucionales –en ocasiones inexistentes y otras demasiado imprecisos y débiles- y con sus recursos –insuficientes, con una formación básica y escasa experiencia- a unas grandes inercias de resistencia a la competencia, así como a realidades económicas y empresariales cuya complejidad organizativa y funcional se ha incrementado con la globalización de los mercados y con el progreso tecnológico.

En este contexto, las políticas de reforzamiento institucional y capacitación técnica de los profesionales públicos que tienen que aplicar las normas de competencia es fundamental. La inversión en capital humano cualificado en este ámbito es la clave para conseguir la aplicación de normas promotoras de un marco más competitivo y de una lucha eficaz contra las prácticas más nocivas contra el libre mercado, como son los cárteles y los abusos de posición de dominio.

Esta transferencia de conocimientos es imprescindible para fortalecer y emancipar a las recién creadas Autoridades de Competencia. Al mismo tiempo, el diálogo y el intercambio de experiencias entre éstas permiten mejorar las prácticas que cada una aplica en la defensa de la competencia. Esa, desde luego, es la percepción de la CNC, Autoridad de la Competencia de España creada en 2007 tras un intenso y extenso debate que culminó con una sustancial mejora del sistema de defensa de la competencia español a partir de una nueva Ley de Defensa de la Competencia que establecía como uno de sus principios rectores la incorporación de las mejores prácticas existentes en el plano institucional, organizativo y operativo, estuvieran acreditadas en los sistemas de otros países de referencia, o se derivaran de un proceso de aprendizaje interno derivado de la propia experiencia acumulada durante años.

Y es en este aspecto de la transferencia de conocimientos donde la UNCTAD viene desarrollando un trabajo de especial relevancia durante las últimas décadas, al actuar no sólo como depositaria de las legislaciones internacionales en materia de competencia, de la Ley modelo sobre la competencia y del Conjunto de Principios y Normas sobre Competencia de las Naciones Unidas, sino ofreciendo a las autoridades que se ocupan de la competencia en los países en desarrollo y en las economías en transición un foro intergubernamental centrado en el desarrollo para tratar cuestiones prácticas relativas al derecho y la política de la competencia.

El Grupo Intergubernamental de Expertos en Derecho y Política de la Competencia se reúne todos los años para celebrar consultas sobre cuestiones relativas a la competencia que preocupan a los Estados miembros, así como para mantener intercambios informales de experiencias y mejores prácticas, que incluyen el examen voluntario del derecho y la política de la competencia entre homólogos.

También participa en la cooperación técnica con países que solicitan ayuda para el fomento de la capacidad, y asistencia técnica para formular y/o aplicar efectivamente su legislación sobre la competencia. Y en el marco de sus actividades de cooperación técnica, la UNCTAD también ha creado un mecanismo de examen voluntario entre homólogos.

Y no se puede negar que estas plataformas junto con otras que pudieran utilizar los países en desarrollo y economías en transición pueden proporcionarles los medios y conocimientos necesarios para fortalecer progresivamente sus políticas y autoridades de competencia, aunque en último término son estos países los que se encuentran en la mejor posición para valorar si esos medios y conocimientos se ajustan, en mayor o menor medida, a sus necesidades puntuales y a sus posibilidades o si las recomendaciones que se les ofrecen pueden o deben ser implementadas y cuando hacerlo.

Son por tanto estos países los que deben condicionar y dirigir, sobre la base de sus necesidades, el trabajo de la UNCTAD en este ámbito, siendo a su vez necesaria, para completar el proceso de transferencia de conocimientos, la continua colaboración de los países con un mayor nivel de desarrollo en el terreno de la defensa y promoción de la competencia.

En este ámbito de cooperación institucional, España ha acumulado una considerable experiencia durante la última década en las sucesivas ediciones de la Escuela Iberoamericana de Competencia que tiene por objetivo la formación de los funcionarios de las Autoridades Iberoamericanas de Competencia en cuestiones relativas al derecho de la competencia y a su aplicación. Tanto la Escuela Iberoamericana como los cursos virtuales de competencia que la CNC realiza en colaboración con la Fundación CEDDET, permiten el diálogo y el intercambio de experiencias entre las Autoridades de Competencia de toda Iberoamérica.

Desde el año 2002 en que se lanzó esta iniciativa más de 300 funcionarios han participado en estos programas de capacitación y con ello se han fortalecido los lazos formales e informales entre todas las Instituciones que integramos esta comunidad, con resultados muy positivos para la promoción de mercados más fuertes y competitivos en toda la Región. Desde la CNC seguiremos impulsando y participando activamente en estas iniciativas como la mejor vía para promover la competencia más allá de nuestras fronteras.



D. Luis Berenguer  
Colaboración del Presidente de la CNC  
Spain

## ***France: Autorité de la concurrence***

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Bruno Lasserre  
Président de l’Autorité de la concurrence  
Paris –France

2010 est une année clé pour l’engagement de la Conférence des Nations Unies sur le commerce et le développement (CNUCED) en faveur du droit et de la politique de la concurrence.

La sixième Conférence des Nations Unies prévue à Genève en novembre 2010 marquera en effet le 30ème anniversaire de l’adoption de l’ « Ensemble de principes et de règles des Nations Unies en matière de concurrence », point de départ d’un consensus multilatéral en faveur d’une concurrence libre et non faussée à l’échelle mondiale. Cette Conférence offrira aussi l’occasion aux Etats parties de réexaminer et, si besoin, de compléter ou de moderniser ces principes.

Comme tout anniversaire, cet évènement est l’occasion de dresser un bilan des réalisations passées et des voies de progrès possibles.

En tant que président d’une autorité de concurrence depuis six ans, je peux mesurer les avancées majeures de la CNUCED qui, au travers de ces principes, s’est investie pendant trente ans à jeter les bases d’un consensus en matière de concurrence au niveau mondial, qui stimule la convergence tout en tenant compte de la situation propre aux pays en développement.

Au-delà des principes unanimement reconnus par les Etats parties, une véritable culture de concurrence a donc commencé à se développer à travers le monde. Cette culture se développe et s’approfondit en permanence grâce aux travaux annuels du Groupe Intergouvernemental d’Experts (GIE) qui contribuent à renforcer la coopération au bénéfice des autorités de concurrence issues des pays en voie de développement.

Chaque année, le GIE est le théâtre d’échanges nourris permettant plus de convergence sur les règles fondamentales en matière de droit et de politique de concurrence sur des sujets généraux tels que l’importance de l’analyse économique dans les affaires de concurrence (2009) ou l’indépendance et la responsabilité des autorités de concurrence (2008). A ces débats théoriques s’ajoute l’examen annuel collégial du droit et de la politique de concurrence d’un pays ou d’une région mené sous l’égide de la



CNUCED autour d'experts d'autorités de pays développés et en développement. Ces exercices permettent des échanges d'expérience voire de meilleures pratiques. A ce titre, les examens collégiaux conduits pour l'Union Economique et Monétaire Ouest Africaine (UEMOA) en 2007 ou pour l'Indonésie en 2009, auxquels l'Autorité de la concurrence française a pris part avec beaucoup d'intérêt, ont clairement mis en avant à la fois le dynamisme et les besoins des pays et régions concernés en matière de concurrence. Enfin, la mise en place par la CNUCED de programmes d'assistance technique et d'activités tendant au renforcement des capacités des autorités de concurrence des pays en développement a incontestablement renforcé les liens des autorités de concurrence dans le monde.

Les perspectives pour le futur augurent toutefois de nombreux défis. D'une part, parce que les efforts de la CNUCED ont leur propre limite : l'Ensemble est un recueil de textes non contraignants dont l'application dépend de la seule discrétion des Etats parties. D'autre part, parce que le monde des années 80 n'est plus celui d'aujourd'hui. La situation économique de nombreux pays a évolué et a modifié les rapports entre les pays en développement et les pays développés. Plus récemment, la crise a bouleversé l'échiquier économique mondial. Si certaines entreprises tentent de tirer argument de cette situation économique difficile pour remettre en cause les fondements du droit et de la politique de concurrence, il est impératif de ne pas céder à ces tentations néfastes pour les marchés du monde entier. Car le droit et la politique de concurrence, en permettant de renforcer la compétitivité sur les marchés nationaux, régionaux et internationaux, bénéficient au développement économique de chaque Etat.

Dans ce contexte économique critique, la coopération internationale est plus que jamais nécessaire. A cette fin, la CNUCED joue un rôle prépondérant : garante des spécificités des pays en développement, elle contribuera à garantir le libre jeu de la concurrence sur la scène mondiale tout en assurant l'accompagnement des jeunes autorités et les autorités naissantes de concurrence vers l'adoption de règles claires, transparentes et objectives. La CNUCED aura une place de premier ordre également pour assister ces autorités de concurrence à passer de l'adoption de la règle à sa mise en œuvre concrète.

A la contribution majeure de la CNUCED sur le plan multilatéral s'ajoutent celles du Réseau International de la concurrence (ICN) et du comité de la concurrence de l'OCDE avec lesquels des collaborations sur des projets spécifiques sont déjà envisagées.

La coopération internationale doit également s'accompagner d'échanges et de partenariats régionaux et bilatéraux. A ces niveaux également, le rôle de la CNUCED est considérable. Ainsi, le programme COMPAL et, plus récemment, celui de l'AFRICOMP sont d'excellentes initiatives permettant à certains pays d'une même région, partageant des problématiques communes, de bénéficier d'appuis forts en matière de droit et de politique de concurrence. S'agissant de la coopération bilatérale, la CNUCED peut compter sur le soutien fort de nombreuses autorités nationales de concurrence au premier rang desquelles l'Autorité de la concurrence française.

«Prendre acte des succès du passé pour préparer l'avenir ensemble», tel pourrait être le mot d'ordre de la prochaine Conférence. Je forme le vœu qu'elle débouche sur des échanges fructueux, favorables à l'ensemble de ses participants et profitant in fine au bien être des consommateurs du monde entier.

## ***Germany: Celebrating two landmark United Nations documents***

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Andreas Mundt  
President of the Bundeskartellamt  
Germany

This year marks the anniversaries of two landmark United Nations documents in the fields of competition law and consumer protection. One is the 30<sup>th</sup> anniversary of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (UN Set) and the other the 25<sup>th</sup> anniversary of the United Nations Guidelines on Consumer Protection. These documents are each significant both for competition policy as well as consumer protection. After all, competition policy ultimately also serves consumer interests, and a key tool of consumer protection is a sound competition policy. While both documents ultimately work towards a common goal and deserve due attention, this short contribution will focus on the UN Set.

When the UN Set was adopted in 1980, economic globalization – in particular the globalization of competition policy – was at a different stage than it is today. The degree of economic cross-border activity was significantly lower and relatively few jurisdictions, compared with the current status quo, had adopted competition law regimes. UNCTAD was a true pioneer in striving to put competition law and policy on the international agenda. Consequently, the UN Set can very well be conceived as the “early shining light” in the globalization of competition policy, a process which has steadily gained momentum over the last thirty years.

Nowadays, besides UNCTAD, a number of international organizations and fora (e.g. ICN, OECD, WTO) are very active in promoting the adoption of sound competition law regimes and working towards the convergence of national regimes. While the WTO has dropped the competition dossier from its current agenda<sup>14</sup>, both the ICN and OECD have produced – and continue to produce – remarkable results. Given the exceptionally broad UN membership, however, the UN Set is still the competition policy document with the farthest reach world-wide. At the same time, it explicitly and comprehensively takes into account the interests of developing countries. As many developing countries have only recently adopted competition law regimes, this further stresses the importance of the UN Set.

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<sup>14</sup> See decision adopted by the General Council on 1 August 2004 (WTO Doc. WT/L/579, para 1 lit. g), available at [http://www.wto.org/english/tratop\\_e/dda\\_e/ddadraft\\_31jul04\\_e.pdf](http://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf).

Based on the UN Set as the most important work product, UNCTAD's activities in the field of competition policy revolve around three main areas: Consensus-building through the holding of intergovernmental meetings and conferences, technical assistance activities and research and policy analysis. In all these areas, UNCTAD has over the last thirty years produced outstanding results. Key roles in this process are played by the annual meetings of the Intergovernmental Group of Experts, which are crucial for fostering consensus, and the UNCTAD Model Law on Competition.

From the beginning, Germany has actively participated in UNCTAD's competition activities. For example, the Bundeskartellamt has – sometimes together with the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) – conducted various UNCTAD technical assistance programmes, most recently with Indonesia (2009). These programmes would not have been possible without UNCTAD's management and support. Also, the Bundeskartellamt has participated in UNCTAD's voluntary peer reviews of national competition law regimes, most recently in the review of Indonesian competition policy (2009).<sup>15</sup> These reviews have proven to be not only a valuable learning experience for the countries reviewed, but also for the Bundeskartellamt as a reviewer. They are an important and effective tool for fostering convergence and increasing mutual understanding.

Given that a number of international organizations and fora such as the ICN and OECD are active in the field of international antitrust, cooperation between UNCTAD and these fora is becoming more and more important. This holds particularly true as both the ICN and OECD have substantially broadened their membership and extended their focus over the years: The ICN now counts more than 110 members from roughly 100 jurisdictions. The OECD has extended its membership to presently 31 countries and reaches beyond its member constituency through the Global Forum on Competition founded in 2001. Cooperation with these bodies is important and serves to provide transparency, achieve synergies, facilitate learning from each other's experiences and promote each other's work products.

In addition to international cooperation, the UN Model Law on Competition should remain one of UNCTAD's prime objects of focus. Although by now more than 100 countries have adopted some kind of competition law regime – most of them over the last few decades – the UN Model Law on Competition continues to be a valuable instrument, partly due to the fact that it also serves as a rich source of reference for subsequent law amendments. It may also provide guidance for the substantive work of other international bodies, just as UNCTAD and its flagship work products in the area of competition law and policy can benefit from the efforts of others. The UN Model Law contributes to consensus building in international antitrust and forcefully serves to promote UNCTAD's overall mission.

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<sup>15</sup> Report available at [http://www.unctad.org/en/docs/ditccp20091\\_en.pdf](http://www.unctad.org/en/docs/ditccp20091_en.pdf).

## ***Honduras: Comisión para la Defensa y Promoción de la Competencia***

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Desde el inicio de funcionamiento de esta Comisión a finales de 2006, hemos sido partícipes del apoyo sustancial y técnico para promover la competencia para el desarrollo y la protección al consumidor, lo cual refleja en buena medida el papel preponderante que ha jugado la UNCTAD en el bienestar no solo nacionales, sino regionales y globales. Desde nuestra primera participación en las reuniones del -Grupo Intergubernamental de Expertos en Derecho y Política de Competencia, precisamente en el séptimo período de sesiones en noviembre de 2006. hemos seguido atentos los lineamientos emanados de este grupo, convencidos de que dichos lineamientos son claves en el proceso de cimentación de una filosofía de trabajo y una correcta aplicación de la ley.

Particularmente. la Comisión para la Defensa y Promoción de la Competencia (CDPC) ha sacado el mejor de los provechos de toda la capacitación y apoyo técnico recibido en varios aspectos de la promoción y la defensa de la competencia, entre los cuales son destacables los siguientes:

Es de vital importancia que las agencias de competencia tengan conciencia que una liberalización y una privatización sin medidas de protección de la competencia pueden tener repercusiones negativas en el logro de un desarrollo sólido.

Es importante tener en cuenta de la conveniencia de la relación entre la competencia y la regulación y que la coordinación entre ambas autoridades garantiza la eficiencia de la labor de cada una.

Se ha tornado conciencia de la necesidad de continuar avanzando en la promoción de la eficiencia y la desregulación en los mercados de los servicios públicos, axial como también el de asegurar la aplicación de las normas de competencia y las de derechos de propiedad intelectual y. las evaluaciones continuas y periódicas de los criterios para evaluar la eficacia de las autoridades encargadas de competencia.

Es a para las agencias de competencia tener presente que un entorno propicia y eficaz para la competencia y el desarrollo lo constituyen las relaciones entre las autoridades de competencia y la cooperación externa. para crear frentes comunes en contra de las practicas y conducta anticompetitivas transfronterizas.

Se ha creado conciencia de la importancia de la independencia y la responsabilidad que deben observar las agencias de competencia.

De igual manera, se ha tornado como necesario la utilización del análisis económico en las cuestiones de competencia.

Profundización en el estudio de la relación monopolios públicos y concesiones, y derecho y política de competencia, con el fin inicial de armonizar la aplicación de la política de competencia y el resto de políticas públicas. De la misma manera, se tiene conciencia de la necesaria y cercana relación entre la política de competencia y la política industrial para privilegiar el desarrollo económico, a fin de evitar distorsiones en los mercados que generen limitaciones a la competencia.

Constructivos y aleccionadoras han sido los foros sobre competencia y protección al consumidor auspiciados por la UNCTAD en el sentido de servir de canal para compartir experiencias en cómo enfrentar las dificultades de formular y aplicar políticas de competencia en el marco de limitaciones de recursos financieros para estos fines específicos: así como para persuadir a la sociedad y a los mismos gobiernos de las bondades de la competencia.

De mucha utilidad ha sido también el apoyo de la UNCTAD en brindar opciones factibles para el manejo y aplicación de la política de competencia en el marco de la crisis mundial de alimentos y el petróleo, así como también para relajar la preocupación de los países en desarrollo respecto a la amenaza que enfrenta las MIPYMES frente a la competencia de grandes empresas versus la necesidad de apoyar esquemas que faciliten la contribución de las MIPYMES al desarrollo económico y a la competencia efectiva.

Los estudios de la UNCTAD sobre la intensificación de la cooperación internacional en materia de competencia han sido vitales para que los esfuerzos de las agencias en particular se centren en la aplicación de derecho y la política de competencia, en temas como: exámenes judiciales de casos relacionados con la competencia; sanciones y criterios para definir los recursos apropiados, y la implementación de programas de indulgencia (clemencia) como herramienta para la lucha contra las prácticas y conductas cartelarias.

Sin duda que, desde la creación de la CDPC, ha sido invaluable el apoyo que hemos recibido de la UNCTAD, tal hacemos votos porque este apoyo se fortalezca y consolide por el bien de la familia de las instituciones que luchan por el respeto de los principios de la competencia y del bienestar de los consumidores.



Efraín Correa Yañez  
Presidente Por Ley  
Comisión para la Defensa y Promoción de la Competencia  
Honduras

## ***Hong Kong Consumer Council***

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The Hong Kong Consumer Council (HKCC) takes pleasure in congratulating the United Nations on the 30th anniversary of the UN Set and the 25th anniversary of the Guidelines on Consumer Protection. Both of these two landmark documents, and the related work by UNCTAD, have provided a valuable resource for the work of consumer protection bodies which include the HKCC over recent years.

The uncertainty over the long-awaited introduction of a general competition law in Hong Kong has finally ended as the Hong Kong Government recently set into motion the process of establishing an appropriate law similar to that operating in other advanced economies. The principles in the proposed legislation are in line with the UN Set.

Prior to the Government's decision to move forward in this area, the HKCC tirelessly promoted the introduction of such a law. Also, in cooperation with UNCTAD, the HKCC developed a series of conferences on competition policy aimed at assisting various areas of Government to understand the benefits to be derived from adopting a competition law and how it would work in practical terms. These conferences have contributed greatly to the various efforts that have been made over the years, culminating in the proposed law.

Moreover, advances are also being proposed in the evolution of Hong Kong consumer laws to protect consumers from unethical business conduct. These also follow the basic principles set down in the UN Guidelines on Consumer Protection.

Having an organization with the stature and technical competency of UNCTAD as an ally has greatly assisted the HKCC in its drive to bring about an improvement in the competition and consumer legal framework for Hong Kong.

### **Executive and Council Member of Consumers International**

Nevertheless, the establishment of a legal framework, similar to that existing in other jurisdictions, is not to be seen as the fulfilment of an ambition that has arisen from a void. Neither is the establishment of a law to be considered as an immediate panacea,

or even necessarily appropriate in all circumstances for the cultural conditions that apply in Hong Kong, and possibly other East Asian economies.

The benefits of a rigorous competitive economy have long been accepted in Hong Kong, which in some respects has a world wide reputation of epitomising the spirit of a free marketplace. In addition, a government administered competition policy has existed in Hong Kong for many years, without the backing of legislation, but with a process designed to examine and resolve problems that might occur through administrative, rather than legal means.

This history of reliance on administrative means to resolve problems is in fact grounded in Confucian values, which set the basis for the way in which much of Chinese society functions. One of the more prominent Analects of Confucius states: "If the people are led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they are led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good."

It is this deeply ingrained dependence on 'rules of propriety' and inculcating a sense of shame in the face of virtue that has characterised the manner in which problem solving has been attempted in the past. In fact, another landmark achievement by the HKCC in the development of competition and consumer safeguards in Hong Kong was the creation of a 'Good Corporate Citizen's Guide', which was also assisted through reference to the UN Set and the Guidelines.

The Guide which has the basic functions of promoting industry self regulation, boosts consumer confidence in the marketplace, and enhances the quality of corporate service delivery. The Guide is recognized as a resource for trade associations to use as a basis upon which their members can conduct themselves in the marketplace in harmony with the wider community, for mutual benefit, through observing association codes of conduct.

As noted above, Hong Kong is in a transitional stage of introducing new laws that are compatible with the UN Set and Guidelines. This new law will bring about change in the marketplace to address existing problems that cannot be solved through industry self regulation. However, notwithstanding the introduction of a new competition law, and the deficiencies that are found in using self regulation as a means of achieving the objectives in the UN Set, the principle of inculcating values to promote the objectives through means other than legislation is something that will continue to play a part in Hong Kong society.

The manner in which UNCTAD has conducted its work in the past has shown an ability to adapt to different cultural situations and recognise the different paths that need to be navigated in order to achieve its objectives. UNCTAD also serves as a valuable forum at which ideas can be exchanged, and support provided as to best practice in the areas of competition and consumer protection policy.

The HKCC wishes UNCTAD great success of its Sixth UN Review Conference in November 2010, and continued achievements in its future endeavours.

A handwritten signature in black ink, appearing to read 'Connie Lau', is positioned above the printed name and title.

Connie Lau  
Chief Executive  
Hong Kong Consumer Council



## ***Japan: Japan Fair Trade Commission***

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Kazuhiko Takeshima  
Chairman  
Japan Fair Trade Commission

It is a great pleasure for me to send a congratulatory message to the United Nations Conference on Trade and Development (UNCTAD), on this memorial occasion: The 30th anniversary of the United Nations Set of Multilaterally Agreed Equitable Principals and Rules for the Control of Restrictive Business Practices (UN-Set).

For the past 30 years, the landscape of the world economy has dramatically changed. The speed of globalization has been accelerated and international trade has rapidly grown. The competition law and policy community, together with significant changes in the world economy, also has changed. At the time of the adoption of the UN-Set, there were only about a dozen competition authorities. Now we see more than one hundred competition agencies across the globe.

It is absolutely true that UNCTAD has played an imperative role in these developments. Here I would like to look back at the history of UNCTAD and the relationship between UNCTAD and the Japan Fair Trade Commission (JFTC) over the last 30 years.

First of all, “technical assistance” is a key phrase which links the JFTC to UNCTAD. Since the 1990’s many newer competition authorities have been established. As globalization has developed, these younger agencies had to establish sound and vigorous competition law and policy in a short period of time. Under the circumstances, the JFTC has been providing technical assistance to younger agencies, in particular those in the East Asia region. With respect to these activities, we frequently referred to the work products of UNCTAD, such as the Model Law on Competition and the UN-Set. In that sense UNCTAD has been a good advisor for donor agencies, as well as a direct provider of technical assistance.

Second, communication among competition agencies is a high priority. In order to promote it, the Inter-governmental Group of Experts on Competition Law and Policy (IGE) hosted by UNCTAD has been the most useful venue. The IGE is where both established and newer competition agencies discuss issues of common concern, learn experiences from one another, and exchange experiences and best practices. It is

notable that the IGE has continued to serve as the venue for discussion and dialogue - not for negotiation- on competition matters. The JFTC has participated in the IGE meetings since its creation and has witnessed the great success of the IGE.

Third, “competition advocacy” is also an important key phrase in this globalized economy. To facilitate open and competitive markets for the benefit of businesses and consumers, competition advocacy is indispensable for not only developing countries but also for developed countries. In that regard, UNCTAD has provided a very valuable forum for both established and newer competition authorities.

Forth, Voluntary Peer Review is a unique tool for younger competition agencies to use to build up their capacity. This activity provides newer agencies with motivation for them to devote their energy to further develop, and a good opportunity for self-assessment utilizing the outcome of the review. The JFTC participated in the peer review of Indonesian competition law and realized how successful the program was.

These activities are just a small portion of UNCTAD’s operations. But through these efforts UNCTAD has been contributing to national, regional, and global efforts to promote competition for development and welfare at national, regional, and global levels.

In concluding, I would like to briefly touch upon future prospects. At this moment, the world economy is facing tough times, such as the financial crisis and problems stemming from global warming, and is experiencing significant structural change, including the emergence of developing economies. We will continuously see many changes and encounter big challenges in the future. There is, however, an unchanged principle that free, fair, and vibrant competition in open and well-functioning markets sustains stable economic growth and benefits consumers. The UN-Set is clearly consistent with this principle and the JFTC is committed to sound and vigorous competition policy under this principle. The JFTC looks forward to working with UNCTAD in various opportunities toward this common goal.

## *Jordan: The Competition Directorate*

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Hussein Al-Hamadani  
Competition Directorate  
Jordan

In regards to the rightful instructions of His Majesty King Abdullah the Second Bin Al Hussein to face the economic and cultural challenges, the Ministry of Industry and Trade has adopted the policy of open economy in order to merge the Jordan Economy within the World Economy abiding by the national interests, based on positive healthy competition of worldly basis, depending on the market forces and free pricing in order to attract international investments and achieve economic growth and consumer protection. The healthy competitive economic environment is important for economic growth, and essential to motivate companies to increase their competitive capabilities through increasing productivity and guarantee quality strategies.

Consequently, the Hashemite Kingdom of Jordan has therefore worked on a modern competition law since the early 1990s. These efforts cumulated in the ratification of the Provisional Competition Law of 2002, which was confirmed by Royal Decree as the Competition Law No. (33) in September 2004. Jordan is thereby the first Arab country in the Middle East region having put competition issues on a solid legal basis. So, for the purpose of implementing the Competition Law, the Competition Directorate was established by the end of 2002 as a part of the Ministry of Industry and Trade, and it was the entrusted authority with implementing the Competition Law.

Since the Competition Directorate was established, it has always aimed at strengthening its experience and knowledge in competition matters through participating in international events such as conferences, workshops, seminars and training courses. Therefore, it has started to build up strong relations with international competition authorities such as the United Nations Conference on Trade and Development "UNCTAD".

On this anniversary, the Competition Directorate/Jordan wants to take the opportunity to thank the UNCTAD for the great arrangements, and for all of the time and effort that you routinely put into organizing these international events. We appreciate all of the work you do for these events and always look forward to attend them.

The UNCTAD is one of the main entities that the Competition Directorate has embedded strong relations with. This relation started by attending the

"Intergovernmental Group of Experts on Competition Law and Policy Sessions" which is a yearly international event organized by the UNCTAD.

Each session is considered a great opportunity to exchange experience with the international relevant bodies and to learn more about the international best practices that would help in improving our mandate in competition policy and law. These sessions have always encouraged the increase of cooperation between competition authorities in order to strengthen effective international action against anticompetitive practices on both the international and national levels. Consequently, these sessions have covered many competition aspects such as; competition policy treatment of cartels, abuse of dominance/ monopolization, abuse of buyer power, techniques for gathering evidences in competition cases and many other issues that can implant the competition culture and policy in the developing countries.

Furthermore, the UNCTAD has effectively supported our second national competition conference that was held in 2006, and the UNCTAD was represented by Mr. Hassan Qaqaya "Officer in charge of the Competition Law and Consumer Polices Branch at UNCTAD". He added a great value to our conference and he gave our Directorate a great push to move on the right track.

Mr. Qaqaya made a comprehensive presentation about the role of competition in promoting competitiveness, building entrepreneurship, facilitating market access and entry, enhancing the equity of trading system and ensuring that trade liberalization brings about development gains.

Moreover, he elaborated on the relation of competition and its derived benefits on consumers. Consequently, he stated the relation of competition and subsidized companies and the impact on influencing competition policy on subsidized companies. Also, he revealed the role of competition in facilitating market entry by small and medium enterprises.

Other forms of technical assistance were given by the UNCTAD through the organization framework of institutional capacity building for effective law and policy enforcement. The UNCTAD has supported a training course that was held in Amman in 2006. This course aimed at elaborating on investigative tools for competition cases. This course illustrated that investigation of alleged breaches of competition rules is a vital element of competition enforcement and is the prime vehicle which competition law is usually enforced. The main objective was to equip competition case handlers with knowledge and skills to properly conduct investigations of competition cases in accordance with the specifications of Jordan's competition law.

On the other hand, the UNCTAD is pleaded to continue its role in supporting the developing countries to improve its laws and regulations to be in line with the international best practices.

Accordingly, the UNCTAD is highly recommended to finance the participation of the candidates of the developing countries that can not support the participation of a sufficient number of participants due to budget deficits. As a result, this participation will improve the knowledge and experience of a greater number of competition employees and judges who are in charge of implementing the competition law.

Beyond a shadow of a doubt, the UNCTAD has excelled in organizing international competition events. It was obvious to all who attended that the UNCTAD employees revealed great exposure in their accountability into making these events a big success.

The competition directorate/Jordan really appreciates the great information and knowledge that was seized by your contribution in developing Jordan's competition policy. These developments wouldn't be the same without your abnormal support.

## ***Korea, (The Republic of ): UNCTAD Technical Assistance in Asia and Suggestion on its Future Role***

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On behalf of the Korea Fair Trade Commission, I offer my deepest congratulations on 30th anniversary of UN Set and 25th anniversary of creation of UN Guidelines on Consumer Protection. Since the Set was adopted in the 35th UN General Assembly in 1980, UNCTAD has been serving as a focal point for UN activities on antitrust policies and consumer protection. We highly value great contribution of UNCTAD to development of antitrust law and policies in developing countries with its competition advocacy activity, support for introduction of antitrust law and capacity building for strengthened antitrust enforcement for those countries.

### **1. UNCTAD Technical Assistance for Asia**

Given that Asia has enormous growth potential as well as diverse and high demand for development, successful entrenchment of antitrust law and policies in the region will greatly help promote trade and investment, thereby contributing to development of the global economy. In this regard, UNCTAD technical assistance for Asia in adopting antitrust law and policies and enhancing enforcement capacity is recognized for its profound significance for spreading competitive policies around the world.

UNCTAD has been providing consistent and various technical assistance for Asian developing countries which had yet to adopt antitrust law or consumer protection law. One of the good examples is active technical assistance for Cambodia(2009), Malaysia(2006) and Bhutan(2007) to raise awareness of the need for antitrust law and policies. It also provided support for these countries in drawing up draft of antitrust law and consumer protection law.

In addition, UNCTAD is also fully committed to strengthening antitrust enforcement for countries which recently introduced competition and consumer protection laws. For example, it has been conducting capacity building programs in Indonesia, which adopted antitrust law in 2000, to enhance capability and expertise of the country's competition authority, KPPU, in antitrust enforcement. At the same time, various competition advocacy efforts have been made in the country to promote understanding on antitrust law of relevant sectors of society, including the highest court.

I believe that strong technical assistance of UNCTAD for Asia is the driving force that has led to increased awareness on antitrust enforcement and active introduction of competition law and consumer protection law in the region.

## **2. Enhanced Effectiveness of Technical assistance under Collaboration with UNCTAD**

Korea has achieved sustainable economic development by introducing antitrust law in 1980, the transition period when the country was shifting from the government-led to private-led economic growth. So we are striving to share the experience of successfully conducting economic growth along with antitrust enforcement with emerging economies and transition countries that are vigorously pursuing economic development.

The KFTC believes that collaboration with UNCTAD has made its technical assistance activities much more effective.

The KFTC started to send experts on antitrust law to UNCTAD since 2002 when the two agencies signed an MOA, and so far four experts were dispatched from the KFTC. Dispatched experts participate in various programs of UNCTAD to review and suggest opinions on draft antitrust law, provide advice in the course of introduction and implementation of antitrust law, and share Korea's experience in antitrust enforcement. Thanks to this expert dispatch program, the KFTC has been able to share its enforcement experience with wider world in various ways.

The close cooperation between the KFTC and UNCTAD was well shown in International Workshop on Competition Policy co-hosted by the two agencies in 2002 and 2006. The Workshop is an annual occasion held by the KFTC for working-level officials of competition authorities from emerging countries. With the support from UNCTAD, the two workshops were able to attract the increased number of participants and touch on wide-ranging issues in discussion. Building on this achievement, the KFTC will continue to cooperate with UNCTAD to enhance the effectiveness of our technical assistance activities.

## **3. Suggestion on Future Role of UNCTAD**

Technical assistance programs of UNCTAD have contributed to establishing desirable market order in recipient countries. My hope is that the technical assistance will be brought to the next level and help reduce restrictive business practice such as cartel conspiracy, discriminatory treatment and anticompetitive merger, which are prescribed in the Set, encouraging international trade and investment in the long run. This will result in further developed global economy.

Now that antitrust law and consumer protection law were introduced into many countries, the need for capacity building program for young competition authorities will be heightened. Capacity building activities of UNCTAD for Indonesia can be a good

guideline in this sense. Raising awareness on competition and consumer protection laws of judicial and legislative agencies as well as competition officials is a good way to go. In addition, various programs and guidelines need to be provided for competition officials for effective antitrust enforcement.

I hope UNCTAD will continue to provide strong technical assistance for Asia. And we, the KFTC, will spare no effort to offer collaboration for UNCTAD programs.

A handwritten signature in black ink, reading "Ho Yul Chung". The signature is written in a cursive, flowing style with a large initial 'H' and 'C'.

Ho Yul Chung  
Chairman  
Korean Fair Trade Commission



## *Malaysia*

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Shila Dorai Raj  
Ministry of Domestic Trade Cooperatives and Consumerism  
2010

Malaysia has a Competition Law 2010 and a Competition Commission Law 2010. This was passed in May 2010 and gazetted on 10 June 2010. It will become enforceable on 1 January 2012.

UNCTAD has assisted Malaysia since the early days when Malaysia began contemplating a policy on fair trade and competition. Mr. Philip Brusick and then Mr. Hassan Qaqaya, of the Competition and Consumer Division, UNCTAD provided technical assistance to the then Ministry of Domestic Trade & Consumer Affairs, now known as Ministry of Domestic Trade, Cooperatives and Consumerism, in many of the policy issues related to Competition. In the initial stages when Malaysia was deliberating on this policy, UNCTAD assisted us as to the suitability of a policy for Malaysia as a developing country. In 2004, a team of officers from the Ministry had a week of intensive consultation with Mr. Hassan Qaqaya, at the headquarters of UNCTAD in Geneva to draft the policy (Fair Trade Practices Policy which is now known as Competition Policy). It was this draft policy which eventually was approved by the Malaysian Cabinet in October 2005. This then became the policy framework for Malaysia's Competition Law.

In the area of consumer policy, we have so far not sought assistance from UNCTAD. We would like to see more involvement of UNCTAD in this area in the form of advisory services and perhaps some technical assistance for the Consumer NGOs to assist them play a more active role in society as consumerism in Malaysia is developing rapidly. The legal infrastructure for consumer protection is being further strengthened and this is an area too where UNCTAD could also assist Malaysia.

## ***Maroc : Le droit marocain de la concurrence et la CNUCED***

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Abdelali Benamour  
Maroc

Le Maroc a engagé le processus d'élaboration de son droit de la concurrence dans la dernière moitié des années 80 du siècle dernier à l'issue d'une politique d'ajustement structurel qui avait pour dessein de passer d'un modèle économique où l'Etat prétendait régenter l'essentiel des activités économiques et financières à une économie ouverte et libérale orientée par le marché.

Ce processus a été engagé au lendemain de l'adoption et de la diffusion par les Nations Unies et la CNUCED de « L'Ensemble des principes et des règles équitables convenus au niveau multilatéral pour le contrôle des pratiques commerciales restrictives » et de « la loi modèle des Nations Unies sur la concurrence »

Ces documents élaborés au sein des Nations Unies et de la CNUCED ont largement inspiré les travaux entrepris par le Maroc pour édifier son droit et sa politique de la concurrence, comme l'on instruit les expériences des pays et des organisations avec lesquels le Maroc a développé un large espace de coopération et une proximité économique et juridique.

Cette riche ouverture a permis au Maroc d'élaborer un droit de la concurrence autour d'un ensemble cohérent de règles centrées sur les caractéristiques suivantes :

- Le Droit marocain de la concurrence, inscrit dans la loi marocaine n° 06/99 sur la liberté des prix et de la concurrence, se concentre délibérément sur le principe de la détermination des prix par le libre jeu de la concurrence dès lors que sont réunies les conditions de son bon fonctionnement.
- Ce Droit traite de toutes les formes de restrictions ou de distorsion de la concurrence qu'il s'agisse de comportements ou de structures, que les auteurs en soit de droit privé ou de droit public et quel que soit le secteur d'activité concerné. Cette universalité est toutefois restée respectueuse de la spécificité de certaines activités économiques et de la nécessité de garder sous le contrôle de l'Etat certains prix comme ceux relatifs aux services publics monopolistiques par exemple.
- La loi marocaine sur la liberté des prix et de la concurrence a également réussi à concilier entre plusieurs impératifs
- La loi a formulé des règles de fond en termes assez large et assez souples pour pouvoir être appliqués dans la durée; mais aussi suffisamment précis pour

garantir une sécurité juridique minimum aux agents économiques dans un domaine nouveau et qui est par nature complexe et mouvant.

- La loi marocaine de la concurrence tend aussi à préserver entre les mains des autorités politiquement responsables la prérogative d'arbitrer entre l'intérêt public qui s'attache à la défense de la Concurrence et d'autres intérêts publics lorsqu'ils sont en conflit.

- La loi marocaine a en plus le mérite de mettre l'accent sur l'intérêt et l'importance d'une plus grande discipline de l'Etat envers la concurrence que ses multiples interventions dans la vie économique peuvent affecter ou menacer.

Dans la foulée de la promulgation de la loi marocaine n°06/99 sur la liberté des prix et de la concurrence le Maroc a organisé en partenariat avec la CNUCED le premier « Séminaire Euro-méditerranéen sur le droit et les politiques de concurrence » les 18 et 19 juillet 2000 à Casablanca. Cette manifestation s'est tenue dans le cadre de la préparation de la mise en œuvre de la politique marocaine de concurrence et a vu la participation de l'ensemble des pays du bassin méditerranéen du monde arabe, de l'Union Européenne et certains pays africains et a regroupé d'éminents experts internationaux et nationaux, des représentants d'institutions régionales et multilatérales, des associations et chambres professionnelles, des associations de consommateurs, du monde politique et universitaire.

Ce séminaire qui a puisé son inspiration et ses orientations dans message royal que SA MAJESTE MOHAMMED VI Roi du Maroc a bien voulu lui adresser à l'ouverture de ses travaux avait également pour objectifs de développer la coopération régionale et internationale en matière de concurrence et de préparer la quatrième Conférence des Nations Unies pour le Commerce et de Développement de révision de l' « ensemble des principes et des règles équitables convenues au niveau multilatéral pour le contrôle des pratiques restrictives du commerce » et la « loi modèle des nations unies sur la Concurrence ».

Les travaux de ce séminaire ont été conclus par la «Déclaration de Casablanca» élaborée sous l'auspice de la CNUCED et adoptée le 19 juillet 2000 au terme de ce séminaire euro-méditerranéen. La déclaration de Casablanca a souligné la pertinence et la justesse des enseignements suivants pour la mise en œuvre d'un droit et d'une politique de la concurrence :

- La promotion de la concurrence est une action complémentaire de toute opération de modernisation et de mise à niveau d'une économie ouverte dans le contexte de la mondialisation croissante des marchés. La liberté des prix passe par le libre jeu de la concurrence au profit de l'innovation technologique, du développement et du bien être social.
- Le suivi du bon fonctionnement des règles du marché par la surveillance des pratiques anticoncurrentielles et restrictives de la concurrence ainsi que de l'évolution des structures économiques dans le sens de la concentration et de la cartellisation est fondamental pour la régulation du marché.
- L'élaboration et la mise en œuvre du droit de la concurrence débordent de plus en plus des limites des cadres nationaux. La mondialisation des marchés milite en faveur de la mise en place d'une plate-forme multilatérale dans ce domaine et de l'intensification de la coopération entre autorités responsables de la concurrence.

- La nécessité de mettre en place un cadre euro-méditerranéen de promotion de la concurrence parallèlement au développement des accords bilatéraux sur la base de principes communs de non discrimination, de loyauté, de transparence et de lutte contre les cartels durs est aujourd'hui une conviction largement partagée.
- Le droit et la politique de concurrence doivent être des instruments du développement économique tenant compte des spécificités nationales propres à chaque pays, la concurrence créant, dans tous les cas, un environnement favorable au commerce et incitateur à l'investissement.
- Le rôle de la CNUCED est fondamental pour le renforcement de la coopération multilatérale, pour l'harmonisation et la convergence du droit et des politiques de concurrence, de la diffusion de la culture de la concurrence dans le monde en vue d'assurer un partage équitable des avantages de la mondialisation et de limiter ses effets pervers.

C'est à la lumière de ces conclusions et des recommandations qui en découlent, et qui sont inscrites dans la Déclaration de Casablanca, que le Maroc conduit la mise en œuvre de son droit et de sa politique de la concurrence.

Le Maroc œuvre pour la promotion de ces principes, en particulier dans les réunions annuelles du groupe d'experts gouvernementaux de la concurrence auxquelles il participe dans le cadre de la CNUCED. La cinquième Conférence des Nations Unies chargée de revoir tous les aspects de l'ensemble des principes et des règles équitables convenues au niveau multilatéral pour le contrôle des pratiques commerciales restrictives réunie à Antalya en Turquie en 2005, cinquième conférence dont le Maroc est vice-président, a été une opportunité pour promouvoir et enrichir les conclusions et les recommandations énoncées dans la « Déclaration de Casablanca »

Cette œuvre de longue haleine a été poursuivie, de concert avec des pays du pourtour méditerranéens, l'UE, l'OCDE et la CNUCED lors du colloque international accueilli par le Conseil de la Concurrence marocain à Marrakech les 3,4 et 5 décembre 2009 sur le thème « Concurrence et régulation économique, vecteurs d'émergence ». Ce colloque a été l'occasion de souligner la nature complexe des relations entre régulation économique et régulation concurrentielle de l'économie ainsi que la nature spécifique fondamentale du Droit et de la politique de la concurrence dans cette régulation. Il a également confirmé l'importance cruciale qui s'attache aux aspects institutionnels des autorités de la concurrence pour leur permettre de réaliser les finalités qui sont celles du Droit et de la politique de la concurrence dans le but de parvenir à l'efficacité économique et au bien être des consommateurs. Le Conseil de la concurrence marocain conscient de ces exigences œuvre avec constance et volition afin de s'affranchir des obstacles et limites qui peuvent circonscrire son action.

Cette œuvre sera continuée et enrichie lors des « Assises Marocaines de la Concurrence » convoquées par le conseil de la concurrence marocain en décembre 2010 à Fès pour débattre des problématiques relatives à la dérégulation et à la libéralisation des marchés et des interrelations entre autorités judiciaires, administratives et concurrentielles. Elle le sera également pendant les travaux de la sixième conférence des nations unies chargée de revoir tous les aspects de l'ensemble des principes et des règles équitables convenues au niveau multilatéral pour le contrôle des pratiques commerciales restrictives au sein de laquelle le Maroc entend prendre pleinement sa place.

## ***Mauritius: Competition Commission of Mauritius***

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Mauritius has a remarkably successful economy. Manufacturing, tourism and services have long since displaced agriculture as the main economic activities<sup>16</sup>, due to a consistent approach of liberalizing the economy. Until quite recently, competition policy was largely absent from this successful policy mix. However, it is recognized that competition policy can allow consumers to benefit more from the fruits of growth, provide a predictable climate for foreign investment consistent with international norms and promote economic development of this increasingly sophisticated economy<sup>17</sup>. There have also been concerns that long-established business groups dominate the domestic economy to the exclusion of smaller rivals. Competition policy is seen as a way of providing greater economic opportunities for all.

A Fair Trading Act has been on the statute books since 1979, but Mauritius did not introduce a Competition Act until 2003. That Act was never brought fully into effect, because a new Government came to power in 2005, committed to bring in new legislation with a simpler institutional structure and stronger teeth. This became the Competition Act 2007.

In formulating the Act, Mauritius looked to best practice overseas. Officials attended UNCTAD's IGE meeting, for example, in the early stages of drafting, and discussed possible UNCTAD assistance further down the line. The Act is based on international best practice but with features to reflect the circumstances of a relatively small (but open) island economy. For example, concentration in domestically-traded goods produced by industries with fixed costs will naturally be higher than in a larger economy, so the focus is more heavily on conduct than on structure. This requires a competition authority with the independence and analytical capability to apply effects-based competition principles, with strong powers to remedy any problems it finds. The Competition Commission of Mauritius (CCM) was the result of such thinking.

In the year following passage of the Act, a senior competition specialist from UNCTAD, George Lipimile, visited Mauritius to advise on establishing the CCM. His report, which ranged from high level principles to a staffing plan with specific role descriptions for senior posts, was essentially the only item in my in-tray when I arrived to take up my post as Executive Director in January 2009. I followed the

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<sup>16</sup> Indeed, in 2009 the Minister of Finance noted in his budget speech that the IT sector exceeded sugar as a component of GDP – an announcement rich in symbolism, given the country's economic history.

<sup>17</sup> I have found UNCTAD to be a particularly useful source of evidence on these links, notably its 2008 report on The effects of anti-competitive business practices on developing countries and their development prospects: [http://www.unctad.org/en/docs/ditclp20082\\_en.pdf](http://www.unctad.org/en/docs/ditclp20082_en.pdf)

recommendations in some areas. I found that I disagreed with a few others. But all of the advice was well thought-out and highly relevant to the specific conditions we faced. When you start an entirely new institution, everything is a blank sheet of paper. It was useful to have some sheets of paper with wise advice written on them.

Once Commissioners were appointed in June 2009, things moved quickly. We published guidelines and procedural rules, drawing upon international precedents, and also used the public consultation on these drafts to engage the business and legal communities. We recruited about 20 staff and carried out initial inquiries, talking to stakeholders in business, government and elsewhere, to identify our first cases. The Competition Act came fully into effect on 25th November 2009, and the Competition Commission of Mauritius launched its first investigations in December 2009, almost exactly six months after it was established. This was a remarkable rate of progress by any standards.

Today, in 2010, the Competition Commission of Mauritius is an established agency: fully staffed and dealing with a steady flow of cases. We still need support and advice from the more experienced agencies and from organizations such as UNCTAD. Smaller organizations especially will typically have a thin base of their own experience to draw on in casework. UNCTAD will continue to play a vital role in helping us tap into the expertise of the global competition community. We look forward to peer review in due course!

I would make two suggestions for the future.

First, there could be better co-ordination internationally among the global agencies concerned with competition: notably UNCTAD, OECD and ICN. I think there is quite a lot of duplication across their work, especially from the perspective of a new agency seeking materials and advice on competition. More could be done if each specialised more, and produced complementary, rather than substitute, materials. UNCTAD, I would guess, has a comparative advantage in focusing on competition that is broader than ‘antitrust’ and located clearly within a framework of economic development. The three organisations should also cross-refer to one another’s work at a detailed, topic-specific level. From my perspective, leading a new authority, there is a lot of potential support out there but it could be better co-ordinated.

Secondly - and very tentatively - I would suggest a shift of emphasis from quantity to quality in advocating competition policy. Competition policy is important, for reasons UNCTAD has enunciated so well. But bad decisions to intervene by competition agencies can do more harm than good and I sometimes think that there is a bias to action in the international debate. My personal view is that the longer-established agencies often sound much less ready to intervene than their newer, typically less well-funded counterparts. This might be well-justified: the issues are often clearer and more blatant in countries for which competition law is new. But it might also reflect caution derived from experience and analytical expertise. The more you know, the more you are aware of how much you do not know. As Chief Economist of the UK Competition Commission, I had access to far more analytical resources than I have now, but I was still very uncertain indeed about our ability confidently to assess the effects of many types of conduct, or of mergers.

In resisting the temptation to intervene too much, competition agencies are not helped by requests for inappropriate action. Businesses try to characterize their rivals’

low prices as 'predatory pricing', for example, and consumer advocacy groups seek more and more regulation. Agencies should have the confidence to resist calls for action, where such action cannot be shown to be beneficial. I think that UNCTAD and other agencies can help promote sound decision-making - including decisions to leave things alone - in countries where the debate about the value of competition policy per se has already been won.

A handwritten signature in black ink that reads "John Davies". The signature is written in a cursive, flowing style.

John Davies  
Executive Director  
Competition Commission of Mauritius

## ***Nicaragua: Instituto Nacional de Promoción de la Competencia***

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Dr. Luis Humberto Guzman Areas  
Instituto Nacional de Promoción de la Competencia  
Nicaragua

### **Una contribución significativa:**

El programa COMPAL, ha contribuido de una manera significativa en la creación de las Agencias de Competencia en sociedades que en lo fundamental carecen de una cultura de competencia. Lo especial del programa, es que han colaborado en sensibilizar a líderes sociales, gubernamentales y empresariales en el proceso previo a la aprobación de la legislación, apoyo al proceso de lobby con los tomadores de decisión en los poderes del Estado en Nicaragua, involucrados con la implementación de la Ley y con las etapas iniciales de apoyo a las autoridades nombradas para ejecutar la legislación de competencia.

Nicaragua ha sido beneficiada oportunamente por el programa COMPAL ya que contó con la ayuda del proyecto en las etapas fundamentales que permitieron lograr la aprobación e implementación de la legislación de competencia, desde la gestación de la Ley, el programa COMPAL colaboró con la discusión de las distintas versiones de la Ley de Competencia, capacitó a profesionales del sector público y sector privado para mejorar la comprensión de la importancia de contar en el país con una legislación de libre competencia, a través de Foros, Seminarios y apoyo en un programa de Postgrado para otorgar a través de una universidad local, capacidades académicas de alto nivel a profesionales de las ramas de la economía y el derecho en Nicaragua; por otro lado COMPAL ha contribuido decididamente para dotar al Instituto Nacional de Promoción de la Competencia (PROCOMPETENCIA) de las herramientas jurídicas necesarias para la administración de la Ley.

El programa COMPAL a través del apoyo brindado a PROCOMPETENCIA desarrolla un amplio programa de abogacía de la competencia, lo cual ha contribuido para que agentes económicos de todo nivel, con especial atención en las PYMES tengan a su disposición información oportuna de cómo la Ley de Promoción de la Competencia puede beneficiarlos y ser utilizada para aumentar su potencial competitivo, exponiendo las distintas conductas contrarias a la Ley que podrían actualmente afectarlas en el desarrollo de sus actividades económicas.



Estas capacitaciones brindaron sus primeros frutos al recibir en el segundo semestre de 2009 y primer semestre de 2010 las primeras tres denuncias por prácticas y conductas de las indicadas en la legislación nicaragüense de competencia, demostrando así la utilidad práctica para la sociedad de la administración y aplicación de la Ley 601.

## *Pakistan: Implementing the UN Set: the Pakistan experience*

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Khalid Aziz Mirza

Chairman

Competition Commission of Pakistan

Adopted in 1980, the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the UN Set), is meant to ensure that the benefits of market-oriented liberalization reforms, which have gathered momentum globally, are not eroded through restrictive measures (e.g. cartels, price fixing and anti-competitive practices). It is vital that the interests of the consumer and wider development goals are safeguarded by governments and the appropriate public agencies against restrictive practices by businesses.

### **Competition Law in Pakistan: 1970 to 2000**

Pakistan promulgated its first competition law in 1970 in the form of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (MRTPO). The MRTPO was promulgated with a view “to provide for measures against undue concentration of economic power, growth of unreasonable monopoly power and unreasonably restrictive trade practices,”<sup>18</sup> Under the MRTPO the Monopoly Control Authority (MCA) was established and entrusted with the responsibility of enforcing the law.

It needs to be remembered that shortly after the MRTPO was promulgated the Pakistan Government embarked on a massive programme of nationalization and acquired a dominant role in the economy. Apart from widespread public ownership of firms, numerous restrictions on imports and exports and many interventions in the form of administered prices of goods and services were put in place. Thus, what the MRTPO could essentially aim at was reducing the concentration of ownership in private hands and, to this end, the law prescribed strict benchmarks against which the prevalence of a dominant firm had to be acted against.

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<sup>18</sup> The Preamble of the MRTPO reads as “An Ordinance to provide for measures against undue concentration of economic power, growth of unreasonable monopoly power and unreasonably restrictive trade practices.”

Effectively, the MRTPO was severely limited in its scope being not applicable to government-owned entities and with only limited powers to impose penalties (primarily for not carrying out its directives). By the 1990s it was clear that the MRTPO had outlived even its limited utility in the face of a more liberalized and globalized world economy.

## **The New Competition Law in Pakistan**

Beginning in 1997 the Government of Pakistan appointed several task forces and committees to review the MRTPO and draft a new law. Given that Pakistan was a signatory to the UN Set, the objectives contained therein as well as the UNCTAD Model Law on Competition were used as a basis for changing the existing law. More fundamentally, articles 81/82 of the Treaty of Rome (101/102 after the Lisbon Amendment) and the OECD best practices for competition law provided substantive guidance in the drafting of the new law.

As a consequence, the MRTPO was repealed in October 2007 and replaced by the Competition Ordinance, 2007 (now in the process of being passed as an Act by Parliament). The preamble states that the Ordinance is “to provide for free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviour”.

While the MRTPO was normative and prescriptive it had also become dated over the years. In contrast, the new Competition Ordinance is flexible and modern. Unlike the MRTPO which aimed at tackling dominance per se, the Ordinance takes a reasoned approach by addressing the abuse of dominance rather than just its prevalence. Benchmarks for determination of dominance are not as definitive as was the case with the MRTPO. While an undertaking with a market share of more than 40 per cent is deemed to be dominant, it is possible to determine dominance at lesser market share levels. Further, while the MRTPO prohibited only “restrictive” trade practices that “unreasonably” lessened competition, the new law prohibits any agreement that reduces competition within the relevant market. In line with its overarching theme of flexibility and the rule of reason, the Ordinance allows considerable leeway for exemptions from prohibited agreements in the event of genuine efficiency gains by the enterprise or wider economic merit.

The Ordinance provides for the establishment of the Competition Commission of Pakistan (CCP) as an independent organization, and entrusts it with the mandate and powers to enforce the Ordinance. Among other things, the CCP has been given powers to enter and search premises (section 34) and of forcible entry (section 35), which are important tools in collecting crucial evidence especially in cartel investigations. Under the ordinance, CCP can impose substantial penalties based on the degree of violation and its impact on the public. This was not the case with the MCA.

Across the world there has been a steady increase in the number of countries that have enacted competition laws. This means that transnational enterprises now face issues of compliance with competition laws in many jurisdictions. From the perspective of Pakistan, the applicability of the Competition Ordinance is much wider than that of the MRTPO. The Ordinance applies “to all undertakings and all actions or matters that

take place in or outside Pakistan and prevent, restrict, reduce or distort competition within Pakistan<sup>19</sup>". The MRTPO contained no such provision. This is in line with the scope of application of the UN Set which is applicable to transnational corporations and applies to enterprises irrespective of their involvement in more than one country. The Ordinance in essence endorses the stated objective of UNCTAD's Principles and Rules for States at National, Regional and Sub-regional Levels.

While there is clearly a marked difference between the effectiveness of the competition regime under the MRTPO and the 2007 Ordinance, the difference alone cannot, however, be attributed to the incorporation of the principles laid out in the UN Set. The effective implementation of the law, for the most part, is a result of the new powers available with the CCP, the body responsible for the enforcement of the law and the expertise available to it in the form of high quality human resources trained in competition law and economics. CCP: Relevance for Consumer Protection and Social Development

Emerging from an environment of former government ownership and a strong nexus between business and political decision-making, the prevalence of anti-competitive practices to extract economic rent is entrenched in the business ethos of Pakistan. In numerous industries, producers tend too easily to opt for anti-competitive practices such as cartelization. Such collusive behaviour has become particularly endemic in sectors where final products are homogenous in nature such as cement and sugar. In such cases, managing a cartel is relatively easy, while detection and prosecution is complex, more so in the case of a new competition regime as in Pakistan. Furthermore, former state-controlled monopolies have on certain occasions abused their dominant position through practices such as price discrimination, unreasonable price increases and refusal to deal.

It has to be stressed that the victims of such practices are the consumers, who are not only forced to pay higher prices for the goods or services in question, but also suffer from a lack of choice due to the minimal efforts at innovation by the relevant producers. In addition to the consumers, businesses also bear the brunt of non-competitive behaviour, especially when they are part of a value chain prone to anti-competitive practices.

Against this background, the CCP since its creation in November 2007 has acted promptly and decisively against anti-competitive practices in a wide array of sectors, covering almost the whole economy. These include airlines, banking, cement, steel, sugar and telecommunications amongst others. The actions taken by CCP have been in response either to complaints received by the Commission or on a suo moto basis.

The CCP is determined not to ignore egregious conduct wherever it occurs but it needs a reservoir of strong support in the wider public to deal with it effectively. To this end, advocacy of its activities in the media is a vital element in building a pro-competition culture in Pakistan.

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<sup>19</sup> Sub-section (4) of Section 1 of the Ordinance

## **Conclusions and Recommendations**

As a signatory to the UN Set, Pakistan has benefitted by following the principles of the Set in drafting its new competition law. However, it is not the drafting of the law alone that ensures and promotes competition in any country. The authority entrusted with the responsibility of implementing the competition law has to be an effective one in order to achieve its stated goals.

In this regard, there is an urgent need for facilitating and regularly upgrading the technical capacity of competition agencies in developing countries. Competition law and economics are rarely taught at universities in developing countries. Only an agency staffed with human resources trained in these disciplines can effectively enforce the law.

In addition, the positive externalities arising from sharing experiences and information between regional competition agencies cannot be over-emphasized. UNCTAD needs to play an active role in facilitating networks that encourage competition agencies from developing countries to learn from each other in conferences, seminars and workshops.

## ***Peru: The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices***

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Upon taking my first assignment abroad as a Foreign Service officer of my country at the Mission of Peru to the United Nations in New York, in 1980, I was assigned to work in the section that dealt with economic issues. One of my first tasks in this area was to participate in the final stage of the negotiation of the Set of Equitable Principles and Rules for the Control of Restrictive Business Practices.

The mandate to negotiate that international agreement had emerged from two instruments of the United Nations, Resolution 33/153 from 1978, and Decision 34/447 from 1979, which called for the convening of a conference on restrictive business practices, between September 1979 and April 1980, in order to decide on a set of principles that had been previously prepared by a Group of Experts.

If we go back in time to 1980, the outlook at that time in regard to international economy and development was that of a dramatic North-South confrontation. The Paris conference had failed in 1977, frustrating its primary objective of achieving a fair and comprehensive program of international economic cooperation, as claimed by the developing countries, as well as the aspiration of the G7 to reach an agreement to incorporate the pressing energy issue.

In New York, one of the subjects that occupied our attention was the so-called Global Negotiations, launched by Resolution 34/138, which sought to make concrete the concept of establishing a New International Economic Order, through negotiation in the UN, on issues related to commodities, energy, trade, development, money and finance.

The tone of the relationship between the divergent views on economy, international investment and development processes could be set by another negotiation taking place also in New York at that time: the text of a Code of Conduct for Transnational Corporations; there, issues as the nationalization of foreign companies or the control of the benefits obtained by them, relentlessly confronted the Group of 77 with developed countries.

Despite all this, it was possible to conclude in 1980 the negotiating process of an instrument that was based on national standards -primarily in developed countries- which rationally sought to limit private businesses anticompetitive practices, which harmed the promotion of an equitable environment for open and fair competition and generated a loss to countries, either developed or developing, by creating higher costs

and lower revenues. Those elements were much more harmful to the Third World, whose development of a domestic regulatory policy was still limited.

This Set proposes principles and rules applicable to companies so as to control restrictive practices relating, among others, to price fixing, collusion in bidding, allocation of markets or customers, allocation of quotas or production, collective action to enforce arrangements, refusals to supply, as well as a collective rejection to participation in an agreement or association which is crucial to develop competence. Similarly, the Set bans acts or behaviours that involve the purchase or abuse of a dominant market position, developing predatory activities of price fixation or supply of goods, or restriction on the import of goods, among others.

It seems almost paradoxical that at a historical moment in which views on the international economy, trade and development were so divergent among different groups of countries at the United Nations, it was possible to reach a consensual agreement on restrictive business practices. Perhaps the explanation of this achievement lies in the fact that the Set did not immediately sought to impose its rules in the diverse countries, but had a recommendatory nature instead, which notwithstanding, has become over 30 years of existence the yardstick by which many countries have developed their national legislation on inter-enterprise competition. Also its concepts are now an integral part of the international negotiations to promote free trade and better access to various world markets.

Along with the development of the Set, in many developing countries began the creation of organizations that took an active role to regulate and proscribe anticompetitive practices. In the case of Peru this is so with the creation of the Institute for the Defense of Competition and Intellectual Property Protection (INDECOPI), whose function is to promote the free market and the protection of consumer rights, as well as promoting a culture of fair and honest competition within the economy of my country.

INDECOPI has incorporated the concepts contained in the Set into Peruvian law, especially with the creation of the Commission on Unfair Competition, whose functions is to provide the economic operators with the knowledge of the rules established in order to safeguard consumer's right to information, the promotion of proper market functioning with the aim to generate prosperity through fair and honest competition, as well as to promote conciliation and self-regulation in the market.

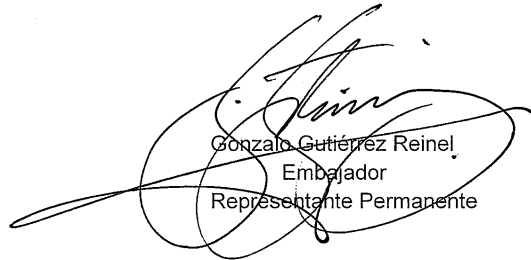
The United Nations Conference on Trade and Development (UNCTAD) has played a key role in the provision of technical cooperation for the consolidation of entities such as INDECOPI and the promotion of regulations on restrictive business practices. In this context, the Technical Assistance Program on Competition and Consumer Protection Policies (COMPAL), which is funded by the Swiss Government and implemented by UNCTAD, has been instrumental in strengthening institutional capacities in many Latin American countries.

In the various international trade agreements that Peru has developed in recent years, the concept of promoting competition and preventing restrictive business practices has taken a substantive part. Maybe one of the most emblematic for its coverage, and because it is an agreement with the largest economy in the world, is the Free Trade Agreement with the United States of America. It includes a chapter on

competition policy, which recognizes the possibility of penalizing companies that engage in anti-competitive practices. It also regulates natural or designated monopolies to prevent discrimination in respect of suppliers or market-distorting effects, and establishes rules on transparency and access to information about those monopolies. Additionally, the Agreement provides for a flexible process of cooperation and communication between the agencies responsible for competition in Peru and the United States.

All this ultimately means that proper regulation to prevent restrictive business practices is a key element in the process of development of all countries. The UNCTAD Set of Rules and Principles for Equitable Multilateral Control of Restrictive Business Practices has proven to be a very useful instrument in its 30 years of existence, by creating a general awareness that these regulations are not harmful to the promotion of entrepreneurship, but are instead a necessary step for the market to act equitably and fairly, sensitive to the interests of small and medium size companies and, above all, by respecting and protecting the consumer's interests.

New York, July 2010.



Gonzalo Gutiérrez Reinel  
Embajador  
Representante Permanente

Gonzalo Gutiérrez  
Ambassador  
Permanent Representative of Peru to the UN  
New York



## *Peru: UNCTAD and the promotion of Competition*

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Efforts to stop national and international anti-competitive practices have typically adopted three approaches: 1) one based on antitrust laws to limit the power of large business concentrations and sanction companies that unduly restrain competition, thus impairing economic efficiency in the short term; 2) efforts related to international trade that seek fostering access to markets and investment though simultaneously recognizing that the latter may in some cases distort internal competition, hurt trade and increase prices to the detriment of consumers, and in other instances, efforts are made to discipline companies and change domestic regulations that restrain access to free competitive markets; and 3) concerns for national progress and the different levels of national development with a view at striking a balance among business cooperation practices, industrialization policies and free competition, adopting thus a dynamic and long term view of economic efficiency.

When the United Nations approved the principles to check restrictive practices against competition 30 years ago, it implicitly adopted a position at the intersection of the three approaches: cross-border antitrust initiatives, market access and economic development. The agreement restrains international trusts and a long list of anticompetitive and domination practices (although it failed to check internal price fixing among independent related companies). The rules foster market access and trade liberalization, and bestows differential treatment upon developing countries by allowing a series of exceptions and taking account of territorial and sovereignty issues, or the so called comity principle. The agreement included government owned companies but excluded inter-government anticompetitive agreements, like the OPEC and others.

Unfortunately, no binding regulations were approved but rather general voluntary compliance principles. Nor was a supranational world authority established that would oversee and regulate the abuse of dominant position and anticompetitive practices. UNCTAD was designated to act as focal point for this non-binding agreement and as such, conduct studies and convene meetings to assess progress and the damage caused by restrictive practices, offer technical assistance, build national and regional capacities, disseminate information and provide training in this subject matter.

UNCTAD's activities ever since have been diverse. In its first decade it prepared some studies and a model framework competition law. Developed countries paid scant attention to and showed little interest in the implementation of the Agreement. Structural adjustment, deregulation and privatization programs throughout Latin America and Asia, and the transition Eastern European countries to market economies, with a first wave at the end of the eighties and a second round in the early nineties, eventually made the World Bank to change course direction and start

proposing policies to counter restrictive practices and in favour of competition. This turn around rekindled interest at UNCTAD since 1990-95 to start providing technical assistance, help in building capacities and devising national competition policies, as well as in experience sharing.

The Annual Intergovernmental Experts Group's meeting, and the five-year, United Nations Conference to review progress made in implementing the Principles Against Restrictive Practices were launched. Since the beginning of the new century, UNCTAD has gained increasingly wider recognition for its role in supporting developing countries to enact their own laws but also establishing their own competition agencies.

In the last five years, UNCTAD's tasks have evolved to suit the domestic needs of developing countries. In countries lacking competition or consumer laws or agencies like Angola, Ghana, Swaziland or Bolivia, efforts were deployed to create awareness and provide education about the need to face monopolies, trusts and restrictive agreements. Efforts have included national seminars for government agencies across various relevant government branches, and reflecting about the competition and consumer protection model framework laws. In countries with new competition laws and authorities like Nicaragua, Malawi, Uruguay, and others, efforts aimed instead at supporting professional and case analysts' training on methodologies suitable for reviewing key issues (like market power, relevant markets, dominant position, concentrations, mergers and acquisitions, etc.), fostering studies on individual industries or entire industrial branches, building technical and organizational capacities to challenge the power of trusts, and providing technical assistance and training on specific topics.

In countries with some expertise, like Peru, Indonesia, Zambia, Costa Rica and Colombia, efforts focus on supporting innovative studies to gain a better understanding of specific issues, such as informal economies and concessions, conducting advanced sector-specific studies, and on how to expand the scope of the law and competition and consumer policies to wider geographic areas in these countries. UNCTAD also responds to specific queries from governments concerning the review and enforcement of new laws and their related codes. In the international arena, UNCTAD promotes information sharing and cooperation programs. It facilitates consensus building and the dissemination of best practices, although both the OECD Competition Forum and the International Competition Network, ICN, have been more active in these last two fields.

Every year the competition laws and policies of a member country are subject to a voluntary peer review. In a recent development worth mentioning, academic research and development was included in UNCTAD's studies and debates through UNCTAD's Research Partners' Platform that presently groups 25 academic institutions from around the world.

UNCTAD's efforts are however hampered by a series of weaknesses. In the first place, its failure to actively provide technical assistance so developing countries can limit cross-border anticompetitive practices, and also its failure to perform studies demonstrating the damaging impact of trusts on international markets. Secondly, UNCTAD has failed to support and walk developing countries along their free trade agreement (FTA) negotiations. These agreements have failed to include appropriate competition tools to counter the threat of restrictive and dominant position practices that

result from tariff reductions, overwhelming protection to investments and the expanded protection afforded to intellectual property rights. Nor do they advise against the adverse effects of subsidies on competition, and the remedies against, or the compensation and conditions for using such subsidies.

In the third place, almost no technical assistance has been provided to strengthen schemes against restrictive practices within regional integration agreements. Fourthly, both surveys and opinion are lacking about new issues relating to excessive land concentration now underway in many developing countries, and the absence of competition in, and entry barriers to, the labour market. While the former is a consequence of changes in capital flows resulting from the international meltdown, the latter results from differences in human resource allocation worldwide.

UNCTAD performs an outstanding role in providing assistance to enforce domestic competition and consumer protection regimes. Its educational role and the progress it has made in this field are beyond question. Its flexible approach somehow reconciles the objectives of development and free competition, while remaining aware that the predominance of one above the other depends on each country's relative development and specific circumstances. Competition laws and policies involve issues of a wider scope than just those relating to trade and include regulatory, power, poverty and social issues. Consequently, UNCTAD's approach may sometimes seem ambivalent, as it also adopts human wellbeing and development considerations.

Work already done must be strengthened in future as it moves into a new stage. The world economy is changing. Although large scale production and the global supply chains that connect them are still paramount, the revolution in information and communication technologies allows the emergence of myriad of hyperfragmented networks, markets and production technologies. In turn this provides new opportunities and advantages to millions for small and medium size companies that will now be able to connect to world markets, while developing country trade flows start to grow more rapidly than among developed countries. This will in turn lead to changes in market structures and behaviour patterns.

The above scene is quite different from the one 30 years ago. What is the role of competition laws and policies in this new environment? We need flexible international competition provisions which under the new conditions will update the three approaches described initially. An agenda is needed that will conveniently combine market access issues for thousands of small businesses, international anti-trust efforts to counter larger corporations and/or supply chains hampering competition, and the differential competition conditions relating to formalization of gray economies, industrialization and the advancement of lower relative development countries and sectors.

Developed countries should cooperate to make the principles and features of competition and consumer protection a mandatory component of the rules that will govern the emerging national and world economic scenes. In addition to reviewing the regulations to align them with competition principles, new thinking is needed on the need to set up a multilateral competition authority that will cooperate with regional and

domestic competition agencies, and that should operate under the principles of subsidiarity, cooperation, transparency, non-discrimination and due process.

A handwritten signature in black ink, appearing to read 'Santiago Roca', written over a horizontal line.

Santiago Roca <sup>20</sup>

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<sup>20</sup> Profesor Principal y Director del Centro de Propiedad Intelectual, Competencia, Consumidor y Comercio, Escuela de Administración de Negocios para Graduados, Universidad ESAN; Senior Economic Officer (2008) de la Oficina de Políticas de Competencia y Consumidor, UNCTAD, Ginebra; Presidente (20004-2006) del Instituto Nacional de Defensa de la Competencia y Protección de la Propiedad Intelectual, INDECOPI; Ph.D en Economía, Cornell University, USA.

***Saint Lucia: An Appraisal of UNCTAD's Contribution toward the Advancing of Consumer Protection and Competition Issues in Saint Lucia and the Caribbean Region***

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By Philip McClauren  
Director of Consumer Affairs  
Ministry of Commerce, Industry and Consumer Affairs  
Saint Lucia

In February 2003 at a Regional Workshop in Kingston Jamaica which was organized by the World Trade Organization (WTO) to discuss the proposed Multilateral Framework on Competition Law and Policy that I first met Hassan Qaqaya of the United Nations Conference on Trade and Development (UNCTAD) Secretariat. The proposed Multilateral Framework on Competition Law and Policy was one of the mandates that emanated from the Singapore Ministerial Declaration of the WTO. This workshop in Jamaica brought together a number of trade experts from the Caribbean Community (CARICOM) to discuss this subject matter. Mr. Hassan Qaqaya was one of the presenters invited by the WTO to speak at this workshop.

During that workshop, I discussed with Mr. Qaqaya some of the areas where Saint Lucia was in need of technical assistance from UNCTAD in order to effectively promote consumer welfare. Coincidentally, Saint Lucia was the host of the fifth (5th) Caribbean Consumer Conference which was slated to be convened in June 2003. While the Government of Saint Lucia had given a commitment to host this conference, the economic situation that prevailed post 911 posed some challenges as some expenditure tightening measures were implemented by central Government to address the sharp decline in revenue inflows from the vital tourism sector.

At that point, some discussion was held with Mr. Qaqaya on the possibility of UNCTAD providing financial assistance to Saint Lucia towards hosting this conference. Mr. Qaqaya promised to look into the matter upon his return to Geneva and gave an undertaking to provide some feedback once there was consensus at the UNCTAD Secretariat. In light of this development, the Ministry of Commerce, Industry and Consumer Affairs prepared and submitted a proposal on this subject to UNCTAD for consideration. Subsequently, the UNCTAD Secretariat informed the Ministry that the proposal was approved and that UNCTAD was making available US\$10,000 towards the hosting of the 5th Caribbean Consumer Conference along with the Government of Saint Lucia and Consumers International (CI). UNCTAD also promised to provide technical assistance at the conference.

This initial intervention was the beginning of UNCTAD's involvement in the promotion of Consumer Welfare in the CARICOM Region. After the June 2003 conference, Mr. Qaqaya returned to Saint Lucia to speak with Government Officials in order to explore areas for further collaboration in Consumer Protection and Competition Issues. The Ministry articulated some of the areas where assistance would be required in advancing consumer welfare and interests in Saint Lucia and the Region.

The UNCTAD Secretariat immediately started working on developing a manual on consumer protection which would serve as a training tool for consumer experts and advocates. A nineteen (19) chapter manual was developed and designed on a number of critical areas in consumer protection which include inter alia: consumer education, consumer redress, consumer protection in health care and consumer protection in banking and insurance services.

UNCTAD again collaborated with the Government of Saint Lucia in April 2005 to test this manual at a train the trainer workshop for officials from consumer agencies and organizations throughout the CARICOM Region. The facilitators for that workshop were drawn from a number of regional and international institutions including: the CARICOM Secretariat; the US Federal Trade Commission (USFTC) and Consumers International – Regional Office for Asia Pacific (CI-ROAP).

Further, UNCTAD has been involved in a number of consumer initiatives in the CARICOM Region including participation in the sixth (6th) Caribbean Consumer Conference held in Barbados in September of 2005 and a Regional Workshop on Consumer Redress and Investigation Techniques held in Saint Lucia in October 2006.

UNCTAD also signaled its intention to the Government of Saint Lucia in assisting in the area of competition law and policy to help Saint Lucia fulfill its mandate in that area under the obligations set out in Chapter Eight (8) of the Revised Treaty of Chaguaramas. However, since Saint Lucia's obligations would be advanced under the Organization of Eastern Caribbean States (OECES) arrangement, UNCTAD officials had some initial discussions with OECES Secretariat officials in 2006/07 to explore ways and means through which UNCTAD could channel its technical assistance. UNCTAD has during that period facilitated Saint Lucia's participation at the Inter-Governmental Group of Experts (IGE) meetings which have in the main been held in Geneva annually. The author has also prepared some papers and working documents for UNCTAD on the status of consumer protection in the CARICOM Region and Competition Issues in certain sectors.

### **Future Areas for Intervention by UNCTAD**

I think consumer protection and competition issues will be critical in any single market or common market arrangement. The underlying objective of the single market is to promote trade. Therefore measures must be put in place to deal with practices that are intended to inhibit competition. Concomitantly, consumer interests are best served in competitive markets and where enforcement of the rules of competition is effective. At the same time, measures must be in place through adequate legislation, regulations and

other legal and institutional means to ensure that consumers are protected from harmful products and sub standard services that are available on the market.

Therefore, in moving forward UNCTAD may have to be involved in helping the Region and its Members in this hemisphere in the following areas:

Institutional strengthening in consumer protection and competition issues so that competition and consumer agencies can have the capacity both human and physical to discharge their mandate effectively

UNCTAD may have to provide assistance to smaller states in the Caribbean Region in putting in place the legislative and regulatory framework and institutional norms in order to fulfill their commitments in the area of consumer protection and competition law and policy

Technical assistance would be required to develop cooperation programmes and agreements with regional and international consumer enforcement consumers agencies and organizations to jointly address cross-border issues that impact on regional consumers

Technical assistance would be required to help develop appropriate programmes in tertiary level institutions and universities so that consumer experts and advocates can be formally trained in these areas. Consequently, consumer education programmes should be integrated in the school curriculum at the primary and secondary schools

UNCTAD should consider providing assistance to the Caribbean Consumer Movement in particular the Caribbean Consumer Council (CCC) in advancing the Regional Consumer Agenda.

The UNCTAD Secretariat should play a more meaningful role in the CARICOM Region so as to ensure that the UN Members in that part of the hemisphere can meet their commitments in protecting and promoting consumer interests as enshrined in the UN Guidelines for Consumer protection as well as Chapter Eight (8) of the Revised Treaty of Chaguaramas. In that regard, it may be prudent for the UNCTAD Secretariat to work closely with the CARICOM Secretariat to jointly achieve this objective.

## *South Africa: South African Competition Tribunal*

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David Lewis  
Professor  
Gordon Institute of Business Science  
Former Chairperson of the South African Competition Tribunal

The United Nations General Assembly took a prescient step when, in 1980, it adopted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, and mandated UNCTAD to monitor its implementation. Prescient because, although the world was at the beginning of the era that has become synonymous with the term ‘globalisation’, competition law and policy was not generally practiced in the developing world. It was a technically complex field of applied economics and law that made great demands on scarce, skilled human resources and on over-stretched law enforcement agencies and judiciaries. It was the province of a small handful of rich developing nations. It was the ultimate ‘luxury’ that developing countries could not afford.

It remained this way for a long time. I recall vividly when, in the mid 1990’s, a South African team responsible for drawing up a new competition policy and law visited the large multilateral agencies in Washington, it was difficult to find anyone to talk to about the implementation of competition law in developing countries. Much has changed. Since the early ‘nineties, competition law and policy have moved to centre stage in the developing world and in the transition economies. Attend an international conference on competition law and one will not only find developing country agencies and practitioners represented, but there will inevitably be conference sessions devoted to discussing the particular issues, obstacles and opportunities that confront those working in this still technically complex field in developing countries. Very few of the UN member countries do not have a competition law, and have not set up the institutions responsible for its implementation.

Clearly, back in the 1970’s somebody, somewhere in the UN system, inevitably in UNCTAD itself, saw the coming of markets, the increase in trade among nations, and the opening up of markets within national economies. For all I know the same far-sighted individuals may have seen the writing on the Berlin Wall and have recognised that the spread of markets was going to be more rapid and far-reaching than most anyone would have predicted at the time.

Already in these early days of globalisation it was apparent that the increase in trade, largely prompted by the trade reforms supported by the major development agencies, had the potential to generate major gains for the developing nations. But many economists had been urging acceptance of this view for a long time. The real prescience of the United Nations and UNCTAD lay in recognising that markets were



both imperfect and fragile institutions. Their imperfections were capable of generating significant costs and inequality; and their fragilities portended the possibility of failure. Hence, while it was all very well to welcome the rise of markets and their rapidly increasing reach, while it was appropriate to celebrate the resulting gains from freer trade, it took real foresight and practical experience to recognise that markets, like any institutions required rules, rules that would ensure the necessary approximation of private and social gains from trade and development, rules that would limit market failure.

With the benefit of hindsight these may seem like self-evident propositions, but they were not so obvious then. In fact, after the collapse of the Berlin Wall – a full decade after the adoption of the UN Set - many specialists in development, many who should have known better, were propagating ‘big bang’ privatisation and deregulation in the newly emerging market economies, without pausing to consider the damage that thoroughly unregulated markets could do, and without considering the damage that unrestrained market participants could do to the very fabric and functioning of markets themselves.

Of all of those interest groups that are implicated in the rise of markets, few stand as much to gain as do consumers. Indeed the promise that markets offer are greater consumer choice, better products and lower prices. These are the real, socially evident gains to be derived from trade. However with increased gains from trade, with increasingly competitive global and domestic competition, come pressures on fiercely competing producers to ignore product safety considerations and to engage in practices that mislead and misinform vulnerable consumers.

While producers are often well organised and politically powerful, consumers are atomised and poorly organised. Hence, the paradox that while consumers may stand to gain the most from increased trade, and their interests are frequently invoked in support of lower trade barriers, they are, of all social groups, least able to defend themselves against unscrupulous practices of producers and distributors. Once again the United Nations proved far sighted in the adoption by the General Assembly in 1985 of the UN Guidelines on Consumer Protection.

In the intervening years since 1980 and 1985, the baton has been picked up by other multilateral and international institutions. The WTO has had far-reaching discussions on the interface between trade and competition; the World Bank has increased its capacity and interest in competition law; the OECD has reached out way beyond its membership and worked at facilitating the adoption of competition rules in developing and transition economies.

Of great significance, national competition authorities have used their extra-territorial jurisdiction to attack international cartels and regulate cross border mergers. This experience and their burgeoning informal contact has led national competition authorities to form their own institution, the International Competition Network, to promote greater harmony in legal instruments and approaches to competition enforcement and merger regulation, and to promote greater understanding of those necessary differences in approach between countries with their unique histories and contemporary circumstances. At many of these international forums discussion of the interface between competition law and consumer protection has been paramount.

UNCTAD and the Set have continued to occupy a central place in both the international developments as well as in the still difficult task of building new national competition authorities. UNCTAD has distinguished itself by its willingness to assist the least developed countries in overcoming the often considerable obstacles that confront them in the development and enforcement of competition laws. UNCTAD has done this through training and capacity building, through its peer reviews, through the model legal framework that is provided by the Set and, simply, through putting the good name of the United Nations behind the development of a competition law and consumer protection framework. A recent UNCTAD peer review in which I participated has persuaded me, once again, of the important role played by international support and internationally accepted standards in overcoming often significant domestic hurdles.

Competition law and policy is a dynamic field, as are markets themselves. Tastes change and technologies change, new scientific methods emerge, as do new sources of data. In the very recent past, significant new challenges arise from the massive market failures that have characterised the recent economic turmoil. UNCTAD will, I am certain, once again play a central role in formulating the responses of competition authorities and consumer protection agencies to these new circumstances.

While the Set has been under regular scrutiny, it is particularly timely that after 30 years of UN attention to competition matters, the Set's historic record and future evolution should, once again, be celebrated and subject to detailed scrutiny by UNCTAD, the agency mandated to represent the United Nation's presence in this important field of economic policy.

## ***Sweden: Swedish Competition Authority***

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Thirty years have passed since the adoption of the UN Set of Principles and Rules for the Control of Restrictive Business Practices (the Set). Notably, it is still a valid multilaterally agreed instrument on competition law and policy, as reconfirmed by five UN Review Conferences.

Since the adoption of the Set, economic developments around the world have completely changed the scenario for competition law and policy. In 1980, relatively few countries had competition policy and law enforcement compared to more than one hundred countries today. In this regard, UNCTAD has no doubt played an important role, with the support of donor countries and programmes, in preparing developing countries from all parts of the world in drafting competition legislation, in training of competition authority officials and in promoting advocacy and a competition-oriented culture in the society.

The annual meetings of the Intergovernmental Group of Experts on Competition Law and Policy are an important platform for exchange of information and sharing experience among competition officials. Over the years, the meetings have changed in character, merely due to the fact that many more countries now have competition policy and laws. Topics discussed at the meetings have become more oriented toward substantive issues on policy and law enforcement, such as abuse of a dominant position, vertical restraints, competition and intellectual property rights and the relationship between sector regulators and competition authorities, to give some examples. There has also been a trend during the last ten years towards increased convergence about the basic competition rules and the instruments required for effective enforcement of the rules.

In recent years, voluntary peer reviews have become an important component of the agenda at the annual meetings. This instrument is, in my view, particularly valuable for countries and competition authorities with only a few years experience of applying competition policy and rules. The reviews undertaken so far have been a thorough examination of the institutional setting and performance of the respective countries, resulting in valuable support and guidance for their further endeavours. The peer reviews have also given the participants at the meetings useful information about the challenges faced by new competition authorities and the solutions they have found. The peer reviews have demonstrated the need for adapting the competition law and policy to the judicial system and the political and economic environment in every individual country. These reviews are also an important part of the technical cooperation activities provided by UNCTAD.

Cooperation between competition authorities is nowadays not only an instrument for mutual support and sharing of experiences. In a more globalised world, where business is no longer merely a national matter, cooperation between competition authorities in different countries has become a requirement for effective enforcement of the competition laws. Several annual meetings in recent years have had this important topic on the agenda. Different models for cooperation have been discussed, such as those applied within the European Union, in the Caribbean area and in Africa. In one session the cooperation and dispute settlement mechanisms relating to competition policy in regional free trade agreements were discussed, taking into account issues of particular concern to small and developing countries. Depending on the objectives of the existing free trade agreements around the world containing competition provisions, the construction of those provisions varies considerably. However, the benefits from trade liberalization may not be guaranteed in the absence of a region-wide competition regime. Regional free trade agreements may also be catalysts in the development and adoption of competition laws. But the discussion also showed that there is no one-size-fits-all approach to cooperation, as in other areas of competition enforcement.

UNCTAD provides a forum for exchange of experience and discussions on a great variety of issues of importance to new competition authorities or countries considering introducing competition policy regimes. This is the unique feature and the strength of the organization. The UNCTAD forum is open to all countries regardless of their level of economic development and it is a forum with special consideration to those countries that do not have a long experience, or have no experience at all, of competition policy and law.

A handwritten signature in black ink, reading "Monica Widegren". The signature is written in a cursive, flowing style.

Monica Widegren,  
Director,  
Swedish Competition Authority.

## ***Switzerland: Swiss Competition Commission***

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UNCTAD, established in 1964, with its 194 members, offers a unique forum for a worldwide discussion on competition issues, including both industrialised countries and emerging economies. This organisation promotes the development-friendly integration of developing countries into the world economy. In the words of H. Qaqaya, UNCTAD has a unique position as a fully international body and long-standing experience in competition law and policy issues related to development. To this end UNCTAD prepared a “UN Set of Principles and Rules on Competition” as a multilateral agreement on competition policy tending in particular the following aims: to provide a set of equitable rules for the control of anti-competitive practices, to recognize the development dimension of competition law and policy and to provide a framework for international operation and exchange of best practices.

The fundamental paradigm is the functioning of the market economy. It is rooted in the classical liberal theory of state and economy, and it is based on the principles of freedom of contract, of a clear attribution of property rights (attribution of profits and losses to the operator who caused them). The result is the optimal allocation of resources and consumer welfare, the ultimate aim of economic production.

And I would like to add, as a citizen, that it does more than that. The market economy does not only allow the economy to run efficiently. A market economy also stays for a society in which the spheres of the State and the spheres of the economy are separated, as a safeguard against the accumulation of powers, vital in a liberal society.

The market paradigm calls for strong and independent enforcement of competition. Although generally recognised today as an abstract principle, competition was not always here. Outside of the United States, it only emerged in Europe after World War II, first in the Rome Treaty, the founding text of the European Union, and in Gesetz gegen Wettbewerbsbeschränkungen (GWB) in Germany in the wake of the rebuilding of this country after the war.

Before that, cartels were the rule rather than the exemption in Europe, especially but not only in Germany, France, the Netherlands and Switzerland. It took another 30 years until competition laws were enacted in practically all European States. Not more than 14 countries gathered in England in 2001 to found the International Competition Network (ICN). Today, the ICN counts 112 members.

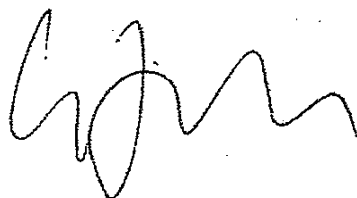
This extraordinary success did not fall from heaven, nor is it a matter of natural law. It is the result of a choice, and this choice is, and must be, made by a democratically legitimated rule maker which is the legislator.

This means that competition law is exposed to the expectations of politics and of the society at large, and it also means that the choice could be a different one altogether. Enforcement agencies are therefore exposed to different calls for intervention, often based on concerns of daily politics, sometimes even contradictory ones.

This is especially true in the times of the current crisis, which is seen by many as a failure of the market system. But the crisis is not the result of too much competition. Rather, competition – in the form of attribution of losses – brought it to light, within a few years, too late for all of us, but more rapidly than regulation did. As often, the messenger is blamed for his message. Yet, there are entrepreneurs out there who lay the foundations of the next period of prosperity. Competition lets it happen.

Democracy calls for accountability. It is not for competition agencies to make public choices, but it is their work which will – or will not – convince politicians and the society to confirm the choice for a market economy, and to improve its enforcement wherever necessary.

The UNCTAD forum was instrumental in this development.

A handwritten signature in black ink, appearing to read 'W. Stoffel', with a stylized, cursive script.

Walter A. Stoffel  
President of the Swiss Competition Commission  
Switzerland

## ***The Netherlands: Netherlands Competition Authority Competition policy and developing countries***

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### **Introduction**

In most industrialized countries, competition policy is aimed towards consumer welfare. This means that weighing non-economic objectives in antitrust assessments is usually not part of competition discourse. However, more and more often, one hears the question of what competition policy actually is all about, and of what it should be about. And more and more often, the answer is to somehow take into account public interests. This essay argues that the presence of strong competition oversight combined with an effective regulatory regime in developed countries can have a positive effect on developing countries. Cartels here have the potential to significantly harm consumers over there.

### **Public interests**

The Social and Economic Council of the Netherlands (SER) has recently released an advisory report, entitled: Governments and the free market: it's the result that counts [in Dutch: 'Overheid en markt: het resultaat telt']. This report primarily tackled the question of how the government can safeguard public-interest objectives (also known as 'general interest'), particularly in those industries where traditional government intervention has been reduced, or from which the government has withdrawn itself and where it has introduced competition. The SER uses the following definition for public interests: 'interests whose promotion is desirable for society as a whole, and which the government is therefore concerned about.' In practice, it means that the SER advocates broadening the definition of the concept of consumer welfare, the objective most regulators worldwide aim for (see table 1). The SER calls for giving more attention to the importance of government interventions that could support this broadened concept of consumer welfare, though, at the same time, it also emphasizes the fact that one needs to take into account government failure as well. The SER argues an effect analysis should be incorporated into market structure policies. Such an effect analysis consists of the following six steps: (1) analyzing the current situation, (2)

defining the objectives, (3) drawing up policy alternatives, (4) analyzing the effects of the policy alternatives, (5) comparing the policy alternatives, and (6) setting up monitoring and evaluation processes. In principle, this general analysis model is, apart for semi-public industries, also relevant for industries in which some form of competition has already been introduced.

Development objectives for Third World countries have not been included in the SER report as part of the planned effect analysis. This does not come as a surprise, as governments and regulators do not consider themselves primarily responsible for the effects of competition policy on emerging markets' development opportunities. Table 1 lists the objectives of several competition authorities, which illustrates the diversity of their objectives. In most cases, it is the promotion of competition and the free market for the benefit of their citizens that comes first. Sometimes it is about more general objectives (see Finland), but it are often the citizens or consumers that come first, illustrated by the mission statements of Australia, the European Commission, Ireland and the UK, in which these are explicitly mentioned.

Table 1. The mission statements of various competition authorities<sup>21</sup>

Country	Authority	Mission [translations in italic]
The Netherlands	Nederlandse Mededingingsautoriteit	Making markets work
United Kingdom	Office of Fair Trade	Make markets work well for consumers
Belgium	Dienst en Raad van Mededinging (direction générale de la concurrence et conseil de la concurrence)	Promoting and ensuring the presence of real competition in Belgium
Germany	Bundeskartellamt	Responsible for the protection of competition
Finland	Finnish Competition Authority	Objective is to protect sound and effective economic competition and to increase economic efficiency in both private and public sector activity
Denmark	Danish Competition Authority	encourages prosperity and innovation through effective competition and effective, transparent markets
France	Conseil de la concurrence et D.G. de la concurrence, de la consommation et de la répression des Fraudes,	Mission is being regulator of market competition

<sup>21</sup> taken from Van Sinderen and Kemp (2008a)



	Ministère de l'économie, des finances et de l'industrie	
Ireland	Irish Competition Authority	Mission is to ensure that competition works for the benefit of the consumer throughout the Irish economy
Norway	Competition Authority	Vision: sound competition for increased welfare
Sweden	Swedish Competition Authority	Vision : Economic welfare through effective markets
Australia	Australian Competition & Consumer Commission and Australian National Competition Council	To improve the well being of all Australians through growth, innovation and rising productivity, by promoting competition that is in the public interest
Japan	Japan Fair Trade Commission	For Fair and Free Market Competition
Europe	Directorate General for Competition	To enforce the competition rules of the Community Treaties, in order to ensure that competition in the EU market is not distorted and that markets operate as efficiently as possible, thereby contributing to the welfare of consumers

Consumers and the consumer surplus are thus important variables in competition policy's objectives.

None of the competition authorities in table 1 has included 'public interests' in their mission statements. Yet, there is an increasing discussion to also take into account ambitions of general economic interest, next to competition policy objectives, when weighing having more free-market solutions against having less. This weighing process could be in the form of a cost-benefit analysis (for example, see Baarsma and Theeuwes (2009)). A more model-based analysis to assess the effects on competition could be another option (for example, see Van Sinderen and Kemp (2008b)).

However, this raises the question of exactly what objectives that we believe are of public interest should be taken into account? Issues that directly affect consumers, such as safety, the environment, and public health, are relative no-brainers. But how about issues such as public space, biodiversity, etc?

## **Development objectives?**

Taking into account development objectives in the broad definition of welfare is hard. Yes, there are consumers who deliberately buy fair-trade coffee, but most consumers will mostly base that purchasing decision on price and quality, rather than on development objectives. That is why development objectives are primarily considered the responsibility of the government. At the same time, those in charge of the development programs are not too thrilled to consider themes such as competition, deregulation and privatization as potentially important elements in a development strategy<sup>22</sup>.

Yet, most agree that competition and development policy have a lot more in common than you would think at first glance. In the so-called Monterey Consensus, the OECD stated that having sound competition policies are vital to balanced global development. In addition, agreements have been concluded, laid down in the so-called Doha Development Declaration (DDD), in which it has been agreed upon, among other things, that: ‘the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in [ the area of competition policy] , including policy analysis and development.’

## **What is important to take into account in these analytical assessments?**

First of all, with regard to the mission statements, it is important to not just take into account domestic consumers, but also consumers in other countries. When tracking down national and international cartels and other anti-competitive impediments, it is essential to also look at the harm that these impediments inflict on a global scale, and not to only focus on the harm that these impediments inflict on the country of the regulator in question. According to the Connor study (2009), 516 international cartels between 1990 and 2008 have been broken up, with a combined global turnover of USD 16,000 billion. These cartels have had an average price-increasing effect of 20 per cent. Total damage has therefore been at least USD 3,000 billion, which is USD 100 billion per year. Developing countries suffer a substantial share of this damage, which are therefore considered development aid deductions.<sup>23</sup> Having regard to these substantial damage effects, I would like to suggest keeping a number of things in mind:

- that tracking down international cartels is a responsibility of both developed and developing countries;
- that, when deciding whether or not concentrations can go through, the concentration’s effects on developing countries should also be taken into consideration same goes for remedies;
- that developed countries should realize that the effects that cartels in their jurisdictions have on developing countries is many times greater than the effects that cartels in developing countries have on developed countries;

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<sup>22</sup> See Peter A.G. van Bergeijk (2009), p. 165.

<sup>23</sup> It is estimated that this is at least 5 to 15 per cent of the OAD (See Van Bergeijk (2009)). At the same time, Van Bergeijk believes this is a considerable underestimation of the effects.

- that developing countries should have competition authorities to officially safeguard these processes, but also to ensure that domestic competition is properly managed;

that cases of abuse are often much more important in developing countries than in developed countries. 24

## **Conclusion**

Given these important questions, there are a lot of arguments in favour of UNCTAD also striving for promoting competition authorities in the countries it is active in. However, damage suffered by consumers in the Third World resulting from international cartels should also be taken into account.

A handwritten signature in black ink, consisting of a stylized 'P' followed by a horizontal line that curves upwards at the end.

Pieter Kalbfleisch  
Chairman of the Board  
Netherlands Competition Authority

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24 Approximately 32 per cent of cases in Latin-America and 23 per cent of cases in Sub-Sahara Africa are cases of abuse, such as predatory pricing, tying etc.

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## ***Turkey: Turkish Competition Authority Competition Law and Policy and Development perspectives***

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Since the introduction of “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices” by the UN in 1980, UNCTAD has played a special role in the development and improvement of competition law and policy in member countries, in particular developing ones. In doing this, UNCTAD has perfectly set an agenda for its meetings where developed and developing agencies came together and exchanged experience. Thus UNCTAD meetings (both Review Conferences and IGEs) have become a highly prestigious international platform, which provides equal and free voice to its members. Additionally, UNCTAD has conducted country-based capacity building projects considering their specific needs. Here an important concern of UNCTAD has been not to introduce a one-size fits all approach. However, it can be argued that in such capacity building project UNCTAD has professionally brought together expertise from both developed and developing jurisdictions. Thus, UNCTAD has applied a balanced approach in its technical assistance projects in developing countries. While UNCTAD plays a major role in capacity building in individual countries, it has also spent efforts in improving cooperation among countries at regional level.

Turkish Competition Authority (TCA) has paid attention to UNCTAD events and activities since its establishment in 1997. Together with other international platforms such as OECD, WTO and International Competition Network (ICN), the TCA has closely followed works and events by UNCTAD. It is important to mention that our cooperation with UNCTAD has significantly contributed to development and improvement of competition law and policy in Turkey. The most important joint activity between Turkey and UNCTAD was hosting of 5th Annual UN Review Conference by the TCA from 13th to 18th of November 2005 in Antalya. It was the 5th UN Review Conference that was organized for the first time outside Geneva. This was a great and eye-opening experience for Turkey in many respects. This conference also paved the way for more cooperation between UNCTAD and Turkey in the area of competition law and policy.

Being honoured to be invited to take part in this invaluable workbook, I would like to refer to two important issues on the basis of the Turkish experience. These two issues are believed to be quite relevant for developing countries in terms of their ability to enforce competition rules.

While the very first issue concerns the creation of a realistic relation between the stakeholders and competition agencies, the second issue is concerned with the impacts of increasing globalization on effectively dealing with cross-border

infringements and the increasing need for more cooperation both among different jurisdictions. While discussing these issues, a possible role in dealing with the issue for UNCTAD will also be discussed.

It is a well-known fact that in countries where market economy is preferred as the economic model, competition functions as the main engine for maximizing social welfare. Thus, if all the benefits from market economy are to be grasped as expected, then competition should be protected and improved with patience. In this regard, Competition law is generally considered as the constitution of market economy. It is no doubt that competition law and policy has a direct role in the economic development of the countries with market economy. The dynamic as well as static effects which result from the existence of competition in markets for goods and services, contributes to the objective of increasing social welfare.

While competition law and policy is directly linked to economic development, it is important to keep in mind that the expected benefits may not emerge soon. In other words, competition law and policy should be considered as mainly a medium-term and long-term project that would bring not sudden but lasting and sustainable benefits and improvements for the economy. Thus, competition agencies should have a clear idea of what they are doing and importantly should have a proper communication policy towards all stakeholders to make them perceive and understand the true benefits of competition law and policy in a realistic manner. Otherwise, there are two important dangers for the competition agencies. The first one is the underestimation of the true role and function of a competition agency and the second one is the over expectation of the stakeholders from a competition agency. As regards the first one, stakeholders may not see the expected benefits soon and therefore may be disappointed and withdraw their support. As regards the second one, stakeholders may refer all cases that they regard to be a competition related issue to the competition agency, as a result of which the agency may have to deal with such cases by wasting its limited resources and it may have to intervene in cases where its involvement is not necessary.

It seems that UNCTAD (with a special and historical role in the development and improvement of competition law and policy in many developing countries) may contribute more to the creation of a realistic expectation framework based on a proper communication policy. In particular where UNCTAD conducts a specific capacity-building project, special attention should be paid on constructive initiatives to direct the stakeholders to have a realistic perception and understanding of competition agencies.

The second issue to be discussed is the impacts of globalization on the coverage of competition law in each jurisdiction. While competition law and policy plays an important role in development, it is also important to be aware of the fact that globalization has the potential to curb the abilities of competition agencies in particular those in developing countries by making infringements more internationalized. In other words, competition restrictions have a cross-border nature. Under these circumstances, it has become more difficult for the developing countries to deal with such international anti-competitive issues. Dealing with cross-border infringements requires cooperation among agencies of developing countries. However it is not enough to have cooperation merely among developing countries, it is also important for the developing countries to have cooperation with developed countries.

The main problem is that while the impact of cross-border restriction may be felt inside the borders of the country in question, the companies being involved in the infringement may reside in other countries, particularly in developed ones . In such cases the needed cooperation framework has two folds within the framework of so-called hard cooperation:

- The need for procedural cooperation (servicing of official documents via proper mechanisms to companies located abroad ),
- The need for actual case-handling cooperation with a proper agency in the countries where companies are located (to collect evidence that would be used to detect the infringement).

There are certain international legal frameworks such as Free Trade Agreements, Customs Union Agreements, which have specific chapters on competition policy. Furthermore, competition agencies might conclude MOUs with their counterparts. However such international texts fail to provide sufficient ground for the needed cooperation. It is our belief that in addition to the competition rules found in such international agreements, there should be concrete efforts to find a permanent and viable solution for the improvement of international cooperation . To this end, UNCTAD, as an official UN agency, can have an important intermediary role in the improvement of cooperation among its member states. Thus UNCTAD could be a perfect platform to endorse member countries to come together to discuss on minimum standards on substantive and procedural cooperation.

The above-mentioned issues represent just two of possible problems that might be faced by UNCTAD members, in particular developing ones. Moreover, such problems remind us the fact that UNCTAD still has a significant role in dealing with such problems effectively.

On the other hand, today UNCTAD is not the only international platforms in the area of competition law and policy. As mentioned above, OECD and ICN play also a major role in this area. Each platform has a differing and varying set of rules, habits and working methods. However the key common characteristic objective of these platforms is to improve cooperation in the area of competition law and policy. UNCTAD has an official link with OECD. But this link seems to be not sufficiently strong for a better coordination of possible joint works. Similarly UNCTAD's relation with ICN needs to be significantly improved. Considering the importance of synergy among these agencies, UNCTAD should be in close contact to both of these platforms in order to contribute to/benefit from their works and activities. It is our belief that UNCTAD, OECD and ICN have many things to learn from each other and importantly their differences and diversities can perfectly constitute a wealth for their members.



Yaşar TEKDEMİR  
Turkish Competition Authority  
Turkey

## *United Kingdom: UK Competition Commission*

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### **THE GROCERY SUPPLY CHAIN, Should competition authorities intervene?**

Everyone needs to eat and central to all economies is the task of ensuring the purchase or production of basic foodstuffs, their processing, distribution and sale to consumers.

In the UK, which has a highly developed agricultural sector but which also imports a significant proportion of its food,<sup>25</sup> the retail sector is also highly developed.<sup>26</sup> The focus of the competition authorities' interest in the groceries sector has, over the past decade, tended to concentrate on retailing; how retailers compete with each other and how that competitive activity affects both consumers and suppliers, both intermediate and primary.<sup>27</sup>

The most recent major intervention is the UK Competition Commission's (CC's) report on Grocery Retailing.<sup>28</sup> The investigation, made at the instigation of the UK's Office of Fair Trading (OFT), lasted two years and covered a wide field, including planning and zoning restrictions, possible discriminatory or predatory pricing activity and competition at a local level, particularly in highly concentrated local markets.

But an important strand of the inquiry was the supply chain. It was argued strongly by producers and suppliers, both domestic and foreign, that major retailers exercised their buyer power in a way that damaged the supply chain, threatened the livelihood of primary producers and placed smaller retailers at a disadvantage. There was said to be a 'climate of fear' in which suppliers declined to raise complaints against major retailers for fear of being punished commercially or in an extreme case being delisted. The CC's investigation in 2000 had found that the behaviour of the largest grocery retailers towards their suppliers was operating against the public interest. A code of practice had been negotiated that regulated the conduct of the four largest grocery retailers with respect to their suppliers and was overseen by the OFT but the perception was that this was ineffective partly because of uncertainty as to its interpretation and partly though the lack of any reliable enforcement mechanism.

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<sup>25</sup>UK imports of food, feed and drink in 2008 were £31.6 billion compared with exports of £13.2 billion. The UK is 59 per cent self sufficient in food. Source: DEFRA, <http://www.defra.gov.uk/evidence/statistics/foodfarm/general/auk/latest/documents/AUK-2009.pdf>.

<sup>26</sup>In 2007, large grocery retailers accounted for an estimated 85 per cent of total grocery sales. The four largest grocery retailers accounted for just over 65 per cent of total grocery sales (increased from 57 per cent in 2002).

<sup>27</sup>See, for example, the CC investigations into (1) Supermarkets (2000) (2) Safeway plc (2003) (3) Somerfield/Morrison Supermarkets (2005).

<sup>28</sup>The report can be found on [http://www.competition-commission.org.uk/rep\\_pub/reports/2008/538grocery.htm](http://www.competition-commission.org.uk/rep_pub/reports/2008/538grocery.htm).



The CC received a great deal of evidence from retailers, suppliers large and small, and representative organizations including from primary producers outside the UK. It assessed data on entry and exit at producer level and on innovation. It considered the mechanisms for compliance with the existing code of practice and the possible impact of the ‘climate of fear’. It also assessed the position of smaller retailers compared with larger, and of the wholesale supply chain to them. Finally it examined some 100,000 emails between the major retailers and their suppliers over a random six-week period as a spot check on actual practice.

The conclusion was that whilst the existing code of practice was having some effect, a large number of practices identified in the previous report were still current. The main concerns were in relation to unexpected, retrospective changes to agreed price terms (leaving suppliers suddenly saddled with liabilities) and in the inappropriate placing of risk on to suppliers. Cutting agreed prices if the retailer was unable to sell produce and asking suppliers to bear the cost of theft and wastage at the retail level were illustrations of these practices. Overall the Report considered that unless checked, these practices would act to reduce investment and might threaten the viability of UK food supply to a degree that could damage the interests of consumers. The CC concluded that a new Grocery Supply Code of Practice (GSCOP) was needed, which was a strengthened and clearer version of the existing code, which would apply to more retailers and would include a dedicated enforcement mechanism to be operated by an Ombudsman.

These conclusions were controversial. The retailers argued that trying to control retailer/supplier interaction was futile and wrong; provided the results of the lower supply prices retailers were obtaining were passed on to consumers, and retail competition ensured that they were, any harm done to suppliers was irrelevant. Retailers also argued that they were complying with the existing code of practice, which was a sufficient level of intervention and which was effective.

The UK system gives the CC competence to enact on its own authority measures such as the GSCOP and, after an extensive period of consultation,<sup>29</sup> it did so on 4 August 2009. However, the CC is not a tax-raising authority and the establishment of the enforcement Ombudsman either had to be agreed to voluntarily by the retailers, or imposed by Government. Again the CC consulted extensively and sought agreement, but this was not forthcoming.<sup>30</sup> The CC accordingly made a formal recommendation on 4 August 2009 that the Government establish the Ombudsman. The relevant department (Business, Innovation and Skills) received extensive representations as to the need for such a body, who should pay for it and whether it should be part of, or separate from, the OFT (which had referred the industry to the CC in the first place and which was responsible for overseeing the existing code of practice).

Although the issue was affected by the imminence of a general election, the Government announced on 13 January 2010 that it accepted the principle of the Ombudsman recommendation and proceeded to consult publicly on various aspects of its implementation, particularly as to whether it should be treated within or outside OFT


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<sup>29</sup>The CC consulted on drafts of the GSCOP order on 26 February 2009 and 29 June 2009 before issuing a final version of the order on 4 August 2009.

<sup>30</sup>A draft of the Ombudsman undertakings was published for consultation on 28 April 2009. The major retailers did not offer suitable undertakings so the recommendation was made to Government to set up the Ombudsman as quickly as practicable.

and whether or not it should have power to impose penalties. That consultation expired on 30 April 2010, six days before the general election, but all major political parties declared their support for the Government's decision. The position of whatever new government is formed after 6 May 2010 remains to be seen.

There the matter rests, at least for the UK. Elsewhere, however, the CC's initiative has received considerable support. Several countries in the EU and elsewhere<sup>31</sup> are creating or have created national initiatives to address retailer buyer power, with some adopting measures similar to the GSCOP. The EU is also undertaking a number of investigations into the food supply chain.<sup>32</sup> The idea that consumers' interests should be protected solely by retail competition has been subject to some scrutiny, as has the notion that competition authorities should not interfere in relations between suppliers and retailers. Of course the UK competition law framework, with its regime for investigating whole markets and imposing binding remedial measures to them, is particularly suitable to address this kind of issue. But the degree of support internationally for the stance taken in the CC's 2008 Report suggests that there will be more developments in this field, which is an important issue for many countries worldwide, and something in which UNCTAD may wish to maintain a close interest.

A handwritten signature in black ink that reads "P. J. Freeman". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

© Peter Freeman, 2010  
Peter Freeman QC  
Chairman, UK Competition Commission

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<sup>31</sup>Including Poland, Hungary, the Czech Republic, Russia, and Australia.

<sup>32</sup>See, for example, [http://ec.europa.eu/economy\\_finance/publications/publication16061\\_en.pdf](http://ec.europa.eu/economy_finance/publications/publication16061_en.pdf), which discusses a better functioning food supply chain in Europe and <http://ec.europa.eu/enterprise/sectors/food/competitiveness/high-level-group/>, which includes the report, recommendations and a roadmap of key initiatives of the high level group on the competitiveness of the Agro-Food industry.

***United States of America: Federal Trade Commission***

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Congratulations to UNCTAD for its thirty years of service to the world competition community! The Intergovernmental Group of Experts on Competition Law and Policy and the United Nations Conference for Review of the Set of Mutually Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices have provided a valuable forum for the exchange of experiences and views for the United Nations members.

When UNCTAD adopted the Set in 1980, only a few dozen countries had competition laws. Today, with the important support of UNCTAD, over 100 jurisdictions have adopted a competition law and established a competition enforcement agency. This is a tremendous vote of confidence in the power of markets and competition to protect the welfare of our consumers. At the same time, it raises the risk that the benefits of global commerce can be dissipated by inconsistent application of national rules. By providing a forum where agencies from countries at all levels of development can meet and discuss issues relating to the development and implementation of competition law and policy, UNCTAD has provided a great service to the international competition community.

We look forward to the next 30 years!

Sincerely,



Randolph W. Tritell

Director

## ***Zambia: ZCC write-up to UNCTAD***

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Thula Kaira  
Executive Director  
Zambia Competition Commission  
Lusaka Zambia

The Zambia Competition Commission has been in existence since 1997 during which time the United Nations Conference on Trade and Development (UNCTAD) has played a pivotal role in directly assisting and/or facilitating technical capacity building of the Commission and its constituent stakeholders such as the judiciary, lawyers and academicians. While in our developmental stage, UNCTAD's role has been irreplaceable in view of its baseline research work, closer ties and effective collaboration on matters affecting less developed countries. UNCTAD has assisted in championing the cause for the development, implementation and review of effective institutional arrangements for competition law-policy in countries such as Zambia.

UNCTAD's assistance approach of getting to the ground to understand the historical trends, existing situations and economic interdependencies in our region assisted in 2001 in the proclamation of the "Livingstone Declaration" that advanced the formation of a regional system for competition regulation within the Common Market for Eastern and Southern Africa (COMESA). Over the years, UNCTAD's origination and facilitation of a repository system for expert documents on competition law and policy have been a useful source of reference material for the ZCC and have assisted in continuous staff training and development as well as provided useful comparative benchmarks for us.

The foremost documents that stand out are perhaps the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the UN Set), the UN Guidelines on Consumer Protection, the Model Law on Competition, and the UNCTAD Manual on the Formulation and Application of Competition Law. The ZCC has proactively and reactively used the Guidelines for Consumer Protection, the Model Law and the UN Set as advocacy tools to market the domestic competition law as a law that is not far-fetched or unique to Zambia but one that actually has a UN backing. The documents have also assisted in major review of the competition and consumer protection policy and legal framework. As we celebrate and review the UN Set, we have no doubt that UNCTAD's role is unique, peculiar and shall remain indispensable to the current and future development of competition law and policy in developing and less developed countries.

## ***Zimbabwe: Zimbabwe Competition and Tariff Commission***

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It is a noteworthy milestone that the Sixth UN Review Conference marks the 30th anniversary of the adoption of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the United Nations Set or the Set). In December 1980 the United Nations Set was unanimously adopted by the United Nations General Assembly (GA Resolution 35/63), and remains the only multilateral instrument on competition policy. The importance of the Set is that it: (i) provides a set of equitable rules for the control of anti-competitive practices; (ii) recognises the development dimension of competition law and policy; and (iii) provides a framework for international operation and exchange of best practices. Of particular interest to developing countries, the Set also provides for the provision of technical assistance and capacity building for interested member countries.

The United Nations Conference on Trade and Development (UNCTAD) was given the task of reviewing all the aspects of the United Nations Set every five years. For that purpose, an Intergovernmental Group of Experts (IGE) on Competition Law and Policy was set up for consultations on competition issues of common concern to member States and exchange of experiences and best practices. In particular, the IGE was established with specific functions that are outlined in the Box below:

To provide a forum and modalities for multilateral consultations, discussion and exchange of views between States on matters related to the Set of Principles and Rules, in particular its operation and the experience arising therefrom;

To undertake and disseminate periodically studies and research on restrictive business practices related to the provisions of the Set of Principles and Rules, with a view to increasing exchange of experience and giving greater effect to the Set of Principles and Rules;

To invite and consider relevant studies, documentation and reports from relevant organisations of the United Nations system;

To study matters relating to the Set of Principles and Rules and which might be characterised by data covering business transactions and other relevant information obtained upon request addressed to all States;

To collect and disseminate information on matters relating to the Set of Principles and Rules to the overall attainment of its goals and to the appropriate steps States have taken at the national or regional levels to promote an effective Set of Principles and Rules, including its objectives and principles;

To make appropriate reports and recommendations to States on matters within

its competence, including the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules;  
To submit reports at least once a year on its work.

Source: UNCTAD Document TD/RBP/CONF/10/Rev.2

The adoption of the United Nations Set in 1980 coincided with the attainment of political Independence in Zimbabwe. The coincidental importance of the two incidences is that Zimbabwe in the implementation of its national competition policy and law was to benefit a lot from the provision of the Set, in general, and the assistance given to it by UNCTAD, in particular. This paper provides a testimonial on those benefits.

Zimbabwe formally adopted competition policy and law in 1996 with the enactment of the Competition Act, 1996 (No.7 of 1996). In doing so, Zimbabwe became the fifth country in East and Southern Africa after South Africa, Kenya, Tanzania and Zambia to have formalised its competition policy and law. The Government of Zimbabwe had however always been wary of the ability of big business to engage in abusive practices of both exploitative and exclusionary nature, and had used a myriad of regulatory policies to limit restrictive business practices and control the exercise of market power by monopolies and other undertakings in dominant positions. The private business community in Zimbabwe had also been greatly concerned over the issue of restrictive business practices in the country, and there had been growing concern within that community that there was a lack of competition in Zimbabwe domestically and that the country's industries were not competitive internationally. The need for a formal competition policy was heightened with Zimbabwe's adoption in 1992 of an Economic Structural Adjustment Programme (ESAP). The programme called for the establishment of a Monopolies Commission to monitor competitiveness and regulate restrictive business practices in the economy.

Zimbabwe's Competition Act came into force in 1998, the same year that the Act's implementing agency, the Industry and Trade Competition Commission (now called the Competition and Tariff Commission), was established. The Commission was established as an independent statutory body with the object of promoting and maintaining competition and competitiveness in the economy of Zimbabwe through: (i) the prevention and control of restrictive practices, including monopoly situations; (ii) the regulation of mergers and acquisitions; (iii) the prohibition of unfair business practices; (iv) the assessment of the effects of tariff charges and unfair trade practices in foreign trade; and (v) the provision of assistance or protection to local industry. The Act applies to "all economic activities within or having an effect within the Republic of Zimbabwe". The Act also applies to the activities of statutory bodies, and binds the State to the extent that the State is concerned in the manufacture and distribution of commodities.

Since its effective coming into operation in 1998, the Zimbabwean competition authority has handled over 1 000 competition cases, of which about 53% involved restrictive and unfair business practice and 47% were merger and acquisitions.

In addition to the normal benefits of competition of the provision of wider choice of goods and services at lower prices, the implementation of competition policy

and law in Zimbabwe has generated many other benefits of a socio-economic nature for the country. These have included: (i) employment generation and/or retention; (ii) continued availability of goods and services on the domestic market; (iii) increased export earnings; (iv) promotion of foreign direct investment; and (v) indigenisation or localisation of control of economic activities.

UNCTAD's capacity-building and technical assistance on competition law and policy programme under the Set33 was instrumental in developing Zimbabwe in the effective implementation of the country's competition policy and law. Even though UNCTAD only held one national training programme in Zimbabwe, the country benefitted from numerous other regional training programmes organised by UNCTAD. In November 2002, UNCTAD held a TrainForTrade Course on Competition Law and Policy at Kariba (Zimbabwe), being the sole national training programme held by UNCTAD in the country. Beneficiaries of the course included members and staff of Zimbabwe's competition authority, as well as officials of the country's sectoral regulators.

The numerous regional training programmes organised by UNCTAD that Zimbabwe attended and benefitted from included those held in Zambia (July 2000, December 2002, May 2003, October 2004 and May 2008), Kenya (March 2001), Malawi (December 2004), Ghana (July 2001), and Tunisia (March 2002). The courses were both for competition investigators and adjudicators.

The knowledge and expertise in the field of competition policy and law that Zimbabwe got from participating in the above UNCTAD training programmes enabled the country to participate as resource person in a number of other UNCTAD training programmes in other countries, such as Kenya (February 2005), Malawi (August 2005 and September 2006), and Zambia (February 2007).

Zimbabwe's competition authority has attended and actively participated at all sessions of the IGE since 1999. The participation improved the authority's competition case handling from lessons learned from other countries' best practices. The review of some of Zimbabwe's competition cases in the IGE's annual publication 'Recent Important Competition Case Involving More Than One Country' has also greatly improved the country's competition analyses. Participation at the IGE has particularly assisted Zimbabwe's competition authority in its dealings with sectoral regulators and in the handling of competition cases involving intellectual property rights.

In 2001, Zimbabwe's competition legislation underwent substantial amendments from the practical experience gained in the enforcement of that legislation. The amendments were aimed at widening and strengthening the Commission's implementation of competition policy, particularly in the area of merger control and investigation of restrictive practices. UNCTAD's publication, 'Model Law On Competition', was extensively used in the formulation and drafting of the amendments.

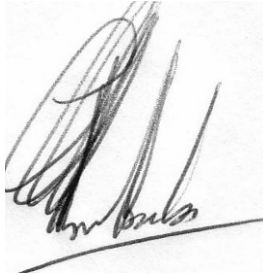
UNCTAD's involvement in the development of competition policy and law in East and Southern Africa has not been limited to its organisation of national and regional training programmes, and work under the IGE. It played a leading role in the

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<sup>33</sup> The United Nations Set calls on UNCTAD and its member States to provide technical assistance and advisory and training programmes on restrictive business practices, particularly for developing countries.

establishment in 2002 of the Southern and Eastern African Competition Forum (SEACF), and continues to give the Forum valuable technical assistance.

In conclusion, the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and the United Nations Conference on Trade and Development, in particular, have played a pivotal role in the development and effective implementation of competition policy and law in developing countries, particularly in Zimbabwe. It is hoped that the valuable work in this field will continue.

A handwritten signature in black ink, appearing to read 'Alexander J Kububa', written over a horizontal line.

Alexander J Kububa  
Director  
Competition and Tariff Commission  
Harare, Zimbabwe



*Part II: International organisations  
and special guests*



## ***CARICOM***

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Kusha Haraksingh  
Chairman,  
CARICOM COMPETITION COMMISSION

### **Contribution on the occasion of the 30th Anniversary of UNCTAD's work on Competition Law and Consumer Protection Policies**

The Caricom [Caribbean Community] Competition Commission (CCC) was inaugurated in January 2008. It is thus one of the youngest competition authorities in the world. Its initial years coincided with a period of intense difficulties for the global economy when in some quarters the very logic of competition was subject to scrutiny. The CCC has been assisted in meeting the challenges of this period by the exposure obtained from the UNCTAD Experts conferences held in the last two years, and by the access provided at these settings to information and UN publications as well as to the experiences of more established agencies. In particular, of direct relevance to the concerns of the CCC at this early stage of its existence, is the work of UNCTAD on the following: the relationship between regional and national competition authorities, the analysis of the role of competition in harsh economic times, the interplay with consumer protection and welfare, the exploration of the use of economic analysis in competition cases, the development dimension in competition policies, and the possibilities of a relevant competition jurisprudence for small developing countries.

The mandate of the CCC is to apply the rules of Competition in the Caricom Single Market and Economy, established under the Revised Treaty of Chaguaramas. As a community body its authority extends to business conduct that has cross border implications, but it is also required to work closely with national competition authorities in the Caricom region, and to promote their establishment in countries where they do not now exist. The UNCTAD report on the allocation of competence to community and national competition authorities was thus an immensely useful resource to the CCC, with its comparative illumination of this issue in other regions. Continued focus on this matter will assist the CCC in its duty to foster harmonized laws and practices in the member states of the region and to fructify the realm of cooperation between authorities.

The robust application of competition law in a time of financial crisis is a matter that needs careful consideration. The views surrounding this problem have been more or less well ventilated, but for small economies like those in the Caribbean there are additional considerations, including the proper role of state aid especially to small and nascent enterprises, the real meaning to be attributed to the concept of public interest, and the choice of the most efficient strategies to stimulate the desired recovery. UNCTAD's focus on this area was useful in tailoring the relevant advocacy, and helping policy makers to overcome the attractions of the quick fix.

The general aim of the Revised Treaty of Chaguaramas which contains the legal basis of the CCC is to promote the sustainable development of the member states of the community. In this task, competition law and policy must obviously play its part, though there are strong arguments in some quarters that the special role of competition must not be confused with the deliverables expected of general economic policy. In this respect, the deliberations at the Intergovernmental Experts meeting on the interplay between the two provided a particularly relevant perspective for the Caribbean, and a frame of reference to modulate the weight of advocacy emanating from more developed countries.

Given the primacy attributed to the goal of sustainable development in Caricom, it is understandable that the litmus test of a successful competition policy would come to reside in the benefits delivered to the consumer. The CCC is responsible, in conjunction with relevant authorities in member states, for safeguarding and promoting consumer interests in the community. UNCTAD has explored the tension between promoting competition, on the one hand, and consumer welfare, on the other. This is extremely useful for small developing countries where myriad choices may not always be available, and where economies of scale and the small number of economic operators may pose peculiar challenges.

All of this leads into the creation of a relevant jurisprudence on competition for small developing countries. With this in mind, the CCC has sought over the last two years to expose the judiciary of the Caribbean to several intensive training sessions on the relevance of economic analysis and also on new developments in competition law in a variety of jurisdictions. This work is continuing, and is also contributing to the enhancement of public awareness of the importance of competition. Promoting the virtues of a competition culture among citizens as a whole is not an overnight task, and in this endeavour the legitimacy and prestige provided by the UNCTAD seal of approval is an immeasurable asset.

## **Législation Communautaire de la concurrence de la Communauté Economique des Etats de l'Afrique de l'Ouest**

### **I. INTRODUCTION**

La Commission de la CEDEAO se saisit de cette occasion pour féliciter la Commission des Nations Unies pour le Commerce et le Développement (CNUCED) pour son 30ème anniversaire et témoigne de la bonne collaboration dont elle fait montre durant tout le processus d'élaboration de sa législation communautaire dans le domaine de la concurrence.

De nos jours, la politique de la concurrence occupe une position centrale parmi les instruments essentiels des économies modernes. Elle est tout aussi incontournable pour la réussite de l'intégration régionale en Afrique de l'Ouest, qui passe par la création d'un marché unique ouvert et concurrentiel, que pour la mise en place d'un environnement juridique harmonisé.

Dans le cadre de l'économie de marché, la réglementation de la Concurrence soutient la réussite économique, à la fois en protégeant mieux les intérêts des consommateurs et en assurant la compétitivité des entreprises, des produits et services, sur les marchés régional et mondial. La politique de la concurrence devient alors un instrument indispensable pour la promotion d'une économie de marché, car, elle contribue à la constitution d'un marché unique élargi dans lequel, les opérateurs économiques auront des opportunités plus importantes et équitables et les consommateurs, un choix plus vaste de produits et services de qualité.

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Par ailleurs, à la veille de la signature de l'Accord de Partenariat Economique (APE) entre l'Afrique de l'Ouest et l'Union Européenne, la politique régionale de la concurrence s'avère une dimension indispensable, qui doit dans un premier temps, préparer nos entreprises à la compétition internationale et dans un deuxième temps, constituer un gage de qualité et de sécurisation de l'environnement juridique des affaires.

## **II. ACTES ADDITIONNELS SUR LA CONCURRENCE DE LA CEDEAO ET LA MISE EN PLACE PROCHAINE DE L'AUTORITE REGIONALE DE LA CONCURRENCE DE LA CEDEAO**

Conformément aux engagements des Etats membres de la CEDEAO contenus dans les dispositions de l'article 3 du Traité Révisé de la CEDEAO qui prescrivent l'harmonisation et la coordination des politiques dans l'ensemble des activités socio-économiques, la Conférence des Chefs d'Etat et de Gouvernement de la CEDEAO, a, au cours de sa trente cinquième session ordinaire tenue à Abuja le 19 décembre 2008, adopté trois Actes additionnels suivants :

Acte additionnel A/SA.1/12/08 portant adoption des Règles Communautaires de la Concurrence et de leurs modalités d'application au sein de la CEDEAO ;

Acte additionnel A/SA.2/12/08 portant création, attributions et fonctionnement de l'Autorité Régionale de la Concurrence de la CEDEAO ;

Acte additionnel A/SA.3/12/08 portant adoption des Règles Communautaires en matière d'investissements et de leurs modalités d'application au sein de la CEDEAO

Ces Actes additionnels de la CEDEAO en matière de Concurrence ont été adoptés il ya plus d'un an, il devient urgent de veiller à leur mise en œuvre après leur publication, d'enclencher le processus de leur divulgation, ainsi que de la mise en place des structures chargées de gérer et de contrôler le respect des règles de concurrence et d'investissements au sein de l'espace CEDEAO.

Les Actes additionnels ont été notifiés aux Etats membres en octobre 2009 par la Commission de la CEDEAO et ont été publiés dans le Journal Officiel N°54 de la Communauté en décembre 2009.

## **III. PRESENTATION DES OBJECTIFS DES ACTES ADDITIONNELS**

Ces Actes ont pour objectifs d'une part de réglementer un certain nombre de préoccupations liées aux accords et pratiques concertées, aux abus de position dominante, aux aides publiques, aux indemnisations des victimes des pratiques

anticoncurrentielles, aux autorisations et exemptions, etc. et d'autre part, de promouvoir, préserver, stimuler la concurrence, renforcer l'efficacité économique, d'interdire les pratiques anticoncurrentielles, d'assurer le bien-être des consommateurs, défendre leurs intérêts et d'accroître les opportunités des entreprises des Etats membres pour participer aux marchés mondiaux.

L'Acte additionnel A/SA.1/12/08 portant adoption des Règles Communautaires de la Concurrence et de leurs modalités d'application au sein de la CEDEAO

Afin de doter la CEDEAO des règles communautaires de la concurrence conformes aux normes internationales dont la mise en œuvre servira à promouvoir l'équité et la transparence dans les échanges et à favoriser leur libéralisation, la CEDEAO a adopté l'Acte additionnel sus mentionné. Cet Acte règle un certain nombre de préoccupations liées aux accords et pratiques concertées, aux abus de position dominante, aux aides publiques, aux indemnisations des victimes des pratiques anticoncurrentielles, aux autorisations et exemptions, etc.

Il a pour objectif de promouvoir, préserver, stimuler la concurrence et renforcer l'efficacité économique, d'interdire les pratiques anticoncurrentielles, d'assurer le bien-être des consommateurs et la défense de leurs intérêts, et d'accroître les opportunités des entreprises des Etats membres pour participer aux marchés mondiaux.

Pour atteindre ces objectifs, il est indispensable de mettre en place une Autorité Régionale chargée de veiller au respect de ces règles, d'où l'objet de l'Acte additionnel sur l'Autorité Régionale de la Concurrence de la CEDEAO (ARCC).

L'Acte additionnel A/SA.2/12/08 portant création, attributions et fonctionnement de l'Autorité Régionale de la Concurrence de la CEDEAO

Cet Acte a pour objet de créer l'Autorité Régionale de la Concurrence de la CEDEAO (ARCC). Il définit sa composition, ses attributions, ses prérogatives, les modalités de financement de ses activités, etc.

L'Acte additionnel A/SA.3/12/08 portant adoption des Règles Communautaires en matière d'investissements et de leurs modalités d'application au sein de la CEDEAO

L'objectif de cet Acte additionnel est de fixer les règles communautaires en matière d'investissements en vue de promouvoir les investissements qui soutiennent le développement durable de la région.

Cet Acte fixe les règles dans le traitement des investisseurs des Etats membres, prescrit des obligations des investisseurs et des investissements, ainsi que les droits et obligations de l'Etat d'accueil et de l'Etat d'origine, régit les relations de cet Acte avec d'autres accords, définit les modalités du règlement des différends, etc.

#### **IV. CONCLUSION**

Conformément à la pratique en vigueur, les Etats membres de la CEDEAO auront à publier ces Actes additionnels dans leurs journaux officiels et l'étape suivante

déterminante serait la mise en place prochaine de l'Autorité Régionale de la Concurrence de la CEDEAO (ARCC), dont les démarches pratiques pour atteindre cet objectif sont en cours pour l'exercice 2010 - 2011.

La Commission de la CEDEAO saurait compter sur ses partenaires naturels dont la Commission des Nations Unies pour le Commerce et le Développement (CNUCED) et l'Union Economique et Monétaire Ouest Africaine (UEMOA) pour leur soutien et la franche collaboration dont elles ont toujours fait montre dans le processus de la mise en place de l'Autorité Régionale de la Concurrence dans l'espace CEDEAO.

Quant à la CNUCED, elle mériterait d'avoir une attention particulière dans le concert des Nations Unies, eu égard aux succès qu'elle a remporté durant ces dernières décennies et d'être doter des moyens conséquents pour poursuivre sa noble mission en matière d'appuis aux Organisations Economiques Régionales, aux pays en développement et aux moins avancés, dans la vulgarisation et la maîtrise des outils modernes en Politique Commerciale.



## **COMESA**

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By Sindiso Ngwenya<sup>34</sup> and  
Mwansa J Musonda  
COMESA Secretariat<sup>35</sup>

### **Competition Law and Policy and Regionalism: the case of COMESA**

The Common Market for Eastern and Southern Africa (COMESA) is a regional integration organisation with nineteen (19) member countries covering north, east and southern Africa. COMESA's agenda is to fully integrate the economies of its member countries into a single, internationally competitive and prosperous economy. COMESA undertook to fulfil its integration agenda gradually by establishing a Free Trade Area in October 2000 and a Customs Union in 2009. Beyond that, the regional organisation seeks to become a Common Market in 2014 and an Economic Community in 2018.

As regional economic integration progressed, particularly after establishing the Free Trade Area, COMESA observed that the opportunities arising from integration were not being shared equitably, and worse still, the benefits arising from integration were not being equitably distributed nor enjoyed. It became apparent that a few economic operators were amassing most the benefits of integration to the detriment and chagrin of most other stakeholders in the regional integration process.

In the area of trade, COMESA invoked the provisions of the Treaty which seeks to ensure that regional integration is, at best, beneficial to all and at worst, the opportunities that it generates are presented to all stakeholders equally. For example, in the COMESA FTA, the absence of tariff and non-tariff barriers in regional trade increased and improved the flow of goods and associated services. It presented a wider array of choice among various products for consumers and contributed to lowering prices of goods as competition among producers stiffened. With increased competition, the region noticed the emergency of cartels in various sectors, indications of abuse of dominance and market segmentation.

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<sup>34</sup> Sindiso Ngwenya is Secretary General of COMESA at the helm of economic integration of the 19 COMESA countries. He is also working with the CEOs of SADC and EAC in spearheading the integration of EAC, COMESA and SADC through a Tripartite Free Trade Area.

<sup>35</sup> Mwansa J Musonda is Senior Trade Policy Advisor responsible for the development of COMESA's competition law and policy.

The Treaty establishing COMESA provides, in Article 55, for fair competition within the region by prohibiting any agreement between undertakings or concerted practice whose objective or effect is the prevention, restriction or distortion of competition within the Common Market.

The Treaty adequately provides for anti-dumping, countervailing measures and safeguards in cases where national economic development initiatives and programmes are in jeopardy.

With regard to the resolution of trade-related disputes, COMESA has a Court of Justice which shall play an important role in interpreting the provisions of, and ensuring compliance with, the regional competition law.

COMESA therefore, sought to ensure that fair competition and transparency among economic operators in the region prevailed. In this regard, COMESA formulated and is now implementing a regional competition law and policy. Thanks to support and contribution of the United Nations Conference on Trade and Development (UNCTAD) which shared the UN Set of Principles on Competition, the COMESA regional competition law is consistent with internationally accepted practices and principles of competition.

Some COMESA countries have national competition laws while others are being encouraged to enact such laws. Existing national laws are being harmonised and brought in line with the regional policy to ensure consistency in regional policies, avoid contradictions and provide a regionally predictable economic environment.

The COMESA regional competition law addresses all the main competition law concerns including control of restrictive business practices, abuse of a dominance, prohibited practices, other anti-competitive practices, and authorisations. It also provides for mergers and acquisitions, and merger control.

COMESA's competition law also covers consumer protection as a related discipline though it is not, strictly speaking, a competition law discipline. The consumer protection provisions have enhanced equitable distribution of the benefits of integration and have contributed to making regional integration to be seen as a positive force in national and regional development by ordinary citizens of the region.

**A tribute to UNCTAD on the 30<sup>TH</sup> Anniversary of the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and on the 25<sup>th</sup> anniversary of the UN Guidelines on Consumer Protection**

**Introduction**

Given the allowed length of the contribution, one can only say a few things. But first, one must congratulate UNCTAD on the 30th anniversary of the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and on the 25th anniversary of the UN Guidelines on Consumer Protection.

**Review of UNCTAD's Work**

Having served in the past as the Chief Executive Officer of Kenya's competition authority and currently occupying the position of the Chairperson of the COMESA Competition Commission, which is a regional body handling competition and consumer welfare matters in 19 developing countries in Southern and Eastern Africa, I have palpable experience of the indubitable positive effect UNCTAD's efforts in the competition and consumer welfare areas have achieved. I will outline some of UNCTAD's beneficial activities which took place in Kenya and in the Southern and East African region during my tenure at the helm of Kenya's Competition Authority and during my Chairpersonship of the COMESA Competition Commission.

For the Southern and Eastern Africa region, the 1990's and the early part of the first decade of the 21st century marked a period of untrammelled deregulation and liberalization of the region's economies. The new measures were put in place without concomitant instruments to obviate inimical business practices including exposure of the region's consumers to unsafe products and services. Promotion of apposite competition and consumer policies was veritably necessary. UNCTAD rose to the occasion.

In addition to many other activities, UNCTAD organized many regional seminars meant to build capacity as well as to advocate the benefits of competition and consumer welfare laws, policies and institutions. It will be recalled that between July

and October, 2001, four regional seminars were held as a prelude to the Expert Meeting on Consumer Interests, Competitiveness, Competition and Development Policy held in Geneva from 17 to 19 October, 2001. For Africa, the regional seminar was held in Accra, Ghana between 21st and 22nd August, 2001. The other regional seminars were held in Cartagena (Colombia), Goa (India) and Bishkek (Kyrgyzstan). In the southern and Eastern African Region, two similar seminars had been held a little earlier in Livingstone (Zambia) and in Mombasa (Kenya). These seminars proved effective tools in the areas of capacity building and advocacy. In the case of the African seminars, it was stressed that competition and consumer policies should embrace the goals of poverty reduction, the satisfaction of the needs of the people, the reduction of inequality, sustainable development and the obviation of the possibility that liberalization benefits would be lost due to lack of proper supervisory-cum-regulatory institutions. The seminars also acknowledged the necessity of ensuring that inappropriate constraints were not foisted upon business enterprises.

UNCTAD also conducted National seminars where representatives of other countries within the Southern and Eastern Africa region were invited. It can be stated, without equivocation, that these seminars proved effective tools for promoting competition and consumer welfare. Stakeholders, including business owners, government representatives, sector regulators, civil society organizations, media representatives, competition authorities and consumer authorities participated. Ubiquitous in these seminars were experts from UNCTAD including Phillipe Brusick, Hassan Qaqaya and Elizabeth Gachuiiri (in the recent past we can add George Lipimile as well). There were immediate positive results. For example, in Kenya a trade association of Cyber Café operators entered into a cartel requiring all members to impose uniform charges per minute for internet services. Following a complaint, which was attributable to better knowledge of competition provisions by the general public brought about by advocacy work supported by UNCTAD, this cartel was dismantled by the competition authority. Nine years down the line, Kenya has some of the lowest charges in the region. Indeed, by and large, internet charges are lower than they were in 2001, the lower value of the shilling notwithstanding.

Another example is in the area of mobile telephony. At the end of the nineties, there was only one mobile services provider in Kenya. To acquire a mobile phone and line, one needed the equivalent of upwards of 2700 US dollars. Citizens had to undergo the bureaucratic rigmarole of filling and filing application forms, obtaining type approvals, payment of unconscionable deposits etc. The mobile telephone was a unique status symbol. In 2010, one can obtain a better mobile phone at the equivalent of 40 dollars or lower. A line today costs one dollar or less. Due to competition, charges have come down and even the poor are able to have and operate mobiles phones. Due to effective competition, innovative services including money transfer and banking services for the poor have been introduced. One firm, Safaricom, which has been the most innovative, is regularly recognized as being the most profitable business enterprise in the East and Central African region.<sup>36</sup> UNCTAD should be saluted for having played a role in this achievement, and in many other African successes, through its advocacy activities.

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<sup>36</sup> Daily Nation, 27 May, 2010, pg 1. The firm raked in 280,000,000 US dollars (21b K.Shs) in profits in 2009.

## **Peer Review and Importance of Competition and Consumer Policies**

When I was Chief Executive of Kenya's competition authority, I had the privilege of witnessing Kenya being among the first two countries peer reviewed by UNCTAD at the Fifth UN Review Conference in Antalya, Turkey in November 2005. The other country was Jamaica. Apposite studies were undertaken by the peer researchers and their report and recommendations were used in the peer review process. The peer review was of immense benefit to Kenya's competition authority. All the recommendations arising out of the peer review were accepted by the Government of Kenya. Following the peer review, UNCTAD fully supported the Task Force formed by the Government of Kenya, which I Chaired, that reviewed Kenya's Competition law. UNCTAD generously facilitated study tours to South Africa, Indonesia, Zambia and the United Kingdom. The resource centre of the competition authority also benefited from generous contributions donated by UNCTAD, thanks to the peer review. Peer reviews should continue.

Coming from a developing country, I wish to opine that competition and consumer welfare institutions may be more important in developing countries than they are in developed nations. In developing countries, governments provide most of the essential services including education, health, water etc. In many cases, where the government does not provide such services, there are no services whatsoever. In any case, a dollar lost through corruption or through anti-consumer and anti-competitive means may be the only dollar the poor citizen has. Many citizens thrive on less than one dollar a day. It is therefore necessary that UNCTAD is facilitated to continue performing its salutary work.

## **Future Work**

Regarding future work, it is necessary that UNCTAD continues to assist countries which do not have competition and consumer policies to put them in place. It is also necessary that UNCTAD continues to strengthen the effectiveness of competition and consumer authorities already established in developing countries. Having said that, it is clear that due to UNCTAD's effective work, more and more countries are establishing competition and consumer authorities. There is, therefore, a danger that at some point in time, UNCTAD's resources will be spread too thinly across the infinity of deserving needs. It is, a priori, necessary to consider regional institutions such as COMESA, SADC, CARICOM, UEMOA, EAC, SADC etc as the focal points for initiatives aimed at capacity building, advocacy and technical assistance. In preparation for such an eventuality, COMESA has provisions for both competition and consumer welfare. As Chairperson of the COMESA Competition Commission, I wish to acknowledge UNCTAD's offer of assistance to our Commission immediately after its inauguration in 2008.

When the Interaction between Competition and Trade was a negotiation issue at the WTO talks, UNCTAD was at the forefront of capacity building in the developing world. It facilitated the holding of seminars and workshops in various parts of the world. For example, two regional workshops were held in Africa. The first one was held in

Tunis (Tunisia) in 2002 and the other one was held in Nairobi (Kenya) in 2003. It is recommended that in multilateral matters such as the WTO talks, UNCTAD should continue to support developing countries, many of which are not represented at the headquarter cities of multilateral organizations. This support should embrace, among other things, capacity building and analysis.

Furthermore, as it has done in the past, UNCTAD should continue to facilitate the participation of developing countries at IGE and Review Conferences as well as at other fora convened to discuss issues germane to competition and consumer welfare. UNCTAD should continue to support, deepen and strengthen the sharing of information among the competition and consumer welfare fraternity as it has done in the past through initiatives such as the Southern and Eastern Africa Competition Forum. Initiatives such as the Competition Programme for Africa (AFRICOMP) should be continued and be spread to the other developing regions of the world. In these programmes, UNCTAD may find it useful to cooperate with civil society organizations such as CUTS which has done a lot of useful work in, among other areas, Eastern, Southern and Western African regions

## **Conclusion**

UNCTAD deserves to be commended for its successful achievements over the past thirty years. The support UNCTAD has been accorded by countries and organizations hailing from the developed world should be recognized and appreciated. Without this assistance, very little achievement would have been realized in the developing countries in the areas of competition and consumer policies. It is mainly due to that support that appropriate competition and consumer policies are aiding the achievement of the Millennium Development Goals.

Some cynics may be tempted to incline to the position that: “Plus ca change, plus c’est la meme chose”. (“The more things change, the more they stay the same”). With the success of UNCTAD’s work, this cynicism has been debunked. The proliferation of new authorities in the areas of competition and consumer welfare is glaring testament to this reality. Other positive developments are apposite. For example, for the first time in Kenya a proposed constitutional dispensation has unequivocally embraced competition and consumer welfare policies. There is promising light at the end of the tunnel. Long live UNCTAD!



Peter Muchoki Njoroge  
Chairperson,  
COMESA Competition Commission

### **Contribución a la publicación de la UNCTAD sobre la contribución de la política de competencia y de consumidores al crecimiento económico**

La UNCTAD desarrolla una tarea muy importante: promover la integración de los países en vías de desarrollo en la economía mundial de una forma favorable para ellos. Al cumplir este objetivo, la UNCTAD aspira a contribuir de forma importante a la reducción de la pobreza y al aumento del nivel de vida de centenares de millones de personas en los países en vías de desarrollo.

La integración de un país en la economía global es más fácil cuanto más se beneficia de un alto nivel de competitividad en la producción y venta de sus productos, ya sean bienes o servicios. Crear un tejido productivo que sea capaz de integrarse por sí solo y de forma ventajosa en la red de intercambios globales requiere un esfuerzo nacional. Hacen falta antes que nada recursos humanos y de capital. No existen economías que hayan generado un crecimiento equilibrado, aumentando la prosperidad a sus ciudadanos, que no hayan invertido en educación y formación. También todas ellas han tenido que encontrar fuentes de capital. Pero estos requisitos, aunque necesarios, no son suficientes para el éxito económico. El marco institucional en el que opera la actividad económica juega también un papel fundamental en el grado de éxito de una economía. El mejor entorno para el desarrollo económico es una economía abierta y justa donde la iniciativa emprendedora de cualquier ciudadano tiene posibilidades de prosperar y triunfar.

Una economía que permita y promueva la creación y entrada de nuevas empresas en el mercado es una economía que se asegura el dinamismo y la capacidad de adaptación necesaria para responder a los retos económicos actuales. Una industria nacional no debe estar basada en la protección de intereses particulares que privilegian unos pocos, sino que debe promover la igualdad de oportunidades para todos los actores económicos. De esta manera tendrá muchas más posibilidades de triunfar. Empresas que han sido sometidas a la disciplina de la presión competitiva en el mercado doméstico tienen más posibilidades de ser competitivas a nivel global.

Una economía basada en la libre competencia reporta grandes beneficios a sus ciudadanos. La protección de determinadas empresas o actores económicos

preseleccionados genera ineficiencias que acaban resultando costosas para el ciudadano. En este caso, el ciudadano subvenciona y se pone al servicio de los agentes productivos cuando lo que se debe hacer es precisamente lo contrario. En un mercado competitivo, las empresas compiten en términos de precio, surtido y calidad lo que aumenta el bienestar y las oportunidades del conjunto de la población.

Pero también hay que señalar que una buena política de competencia debe complementarse con una política de protección de consumidores sólida. En los mercados donde hay presión competitiva, puede existir la tentación de defraudar, presionar o manipular a los consumidores y usuarios para que compren determinado producto. Deben existir normas que prohíben este tipo de prácticas y estas se deben complementar con una vigilancia del mercado por parte de las autoridades nacionales.

La Comisión Europea reconoce el papel esencial que representan las políticas de competencia y consumidores para el bienestar de sus ciudadanos. Por lo tanto, mantiene el bienestar del consumidor como criterio principal en sus decisiones de política de competencia. La Comisión Europea también ha hecho realidad y puesto en práctica una cooperación entre los países miembros de la Unión Europea que ha permitido desarrollar un marco legal homogéneo que contribuye claramente a una mayor integración económica.

La labor de la UNCTAD en este aspecto es aún más ambiciosa. Hoy más que nunca, en un contexto de crisis económica que hace renacer instintos proteccionistas, es importante que la UNCTAD persevere en su misión de promover un marco internacional que promueva el desarrollo de economías dinámicas abiertas e integradas. En su defensa de la política de competencia como herramienta de desarrollo social y económico la UNCTAD defiende la idea incontrovertible de que la prosperidad sostenible de un país se basa en las posibilidades que ofrece a sus propios individuos y empresas para emprender, invertir, innovar y crecer.



By Pradeep S Mehta  
Secretary General  
CUTS International  
Jaipur, India

**Together we have, together we can**

UNCTAD'S role in contributing to efforts to promote a healthy competition culture and consumer welfare throughout the developing world over the last three decades has been exemplary. In terms of value for money the return on investment can not even be estimated in dollar and cents...it is invaluable. However, as the developing world liberalises and integrates with the global economy the demand for better regulation in the market continues to be a challenge for UNCTAD and the international community.

Our tryst with UNCTAD's role in competition policy area began more than fifteen years ago. In January, 1995, when the WTO had come into being, we at CUTS organised our first ever international interaction in New Delhi with the support of UNCTAD and others, titled: "International Conference on Competition Policy in the Context of Liberalisation".

"The involvement of a consumer body in the organisation of this conference is very appropriate, as it is the fundamental aim of competition policy to protect and promote consumer welfare, and competition policy cannot be properly implemented without feedback from consumers. This is recognised in both the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set) and in the UN Guidelines for Consumer Protection, two instruments which were adopted by the General Assembly in 1980 and 1985 respectively. As 1995 is an important anniversary year in terms of both consumer protection and competition policy, it would be appropriate to initiate a process of reflection on the way forward in these two interrelated areas", said Philippe Brusick, Chief, Restrictive Business Practices Unit, UNCTAD at the opening of the conference.

More importantly, the other attendees at the conference included Frederic Jenny, Chairman of the OECD Committee on Competition Policy and Allan Asher, Chairman of the OECD Committee on Consumer Policy among other international experts. To a large extent, it was the support of UNCTAD to the event that led to a lasting relationship which has helped to build a competition culture in over 30 countries

of Asia and Africa through active support. The relations were cemented when UNCTAD asked CUTS to co-organise the Asia-Pacific Regional Seminar on Competition Law & Policy in Jaipur (India) in April, 2000 in association with the Government of India.

This event also witnessed the beginning of a new chapter of cooperation between UNCTAD and CUTS in providing technical assistance to other developing countries in Asia and Africa. It was also realised that while UNCTAD works with member states, the work of CUTS will be with non-state actors and thus creating huge synergies and complementarities. This partnership was actively pursued in many countries such as Botswana, Kenya, Zambia, Ghana, Bhutan, Bangladesh and Lao PDR. The collaboration continues and will deepen over time.

In terms of what UNCTAD should do in future to expand the envelope, I would suggest the celebration of a World Competition Day...a recommendation made in the Jaipur Declaration, April, 2000 and given boost at the Fourth United Nations Conference to Review the UN Set, held at Geneva later in September, 2000. A resolution adopted said, that the IGE (constituted by UNCTAD) should, "Study the feasibility of establishing a UN World Competition and Consumer Day as a means of publicizing benefits to consumers of competition policy and educating the public at large".

Since 15th March is already being observed as the World Consumer Rights Day under the aegis of the UN, it would be better to focus on Competition as a stand alone issue. Therefore CUTS proposed that 5th December be declared World Competition Day, because the Set was adopted by the UN General Assembly on 5th December in 1980.

UNCTAD has contributed immensely since then in pursuing the process of developing competition laws across the world not only by providing a framework (as suggested by the UN Set), but also refining legislations and empowering enforcement agencies to combat restrictive business practices.

CUTS appreciates the need for popularising adoption and effective enforcement of competition regimes in developing countries. Rallying relevant stakeholders around the World Competition Day would not only popularise competition issues among common citizens, but also help convince governments of the need to view competition reforms from the perspective of national development.

UNCTAD is best placed to facilitate adoption of World Competition Day, and CUTS would utilise its presence/network across the world to popularize the same thereby complementing UNCTAD's efforts. CUTS would therefore like to urge UNCTAD to place a call for adoption of the World Competition Day in the agenda of the forthcoming review conference (6th review conference) of the UN Set in November 2010 at Geneva. The ideal location of where it all began!

## **Commemorating the 30th Anniversary of the UNCTAD Competition Principles**

In December 1980 I was modestly aware that negotiations for UN principles on competition had been concluded and the Set had been adopted. In the next three decades I would become involved in UNCTAD's competition work. Now, on the eve of the 30th anniversary of the Set, I am an admirer.

There are many ways in which the Set and its emanations deserve high praise. I call attention to two. Second, I note four contributions of UNCTAD that I find especially useful. Third, I list six project-paths for the future.

### **Background**

I begin with a word regarding background. The 1970s was the decade of negotiations for the Set. In that decade and for some years after, the needs and contributions of developing countries were not well recognized by the industrialized world. I recall a self-centered perspective. In matters of trade and competition, it ran something like this: The developing countries have commodity cartels for their exports and they block their import markets, hurting the rest of the world. A second stage came in the late 1990s and its can be summarized as the Washington Consensus: If only the developing countries would liberalize their economies and act like the West, they would achieve development, they would integrate into the fast globalizing world, and, as well, they would get relief from financial crisis.

With the coming of the new millennium, we reached a third and healthier stage: consciousness that the developed world is part of the problem, and recognition, as in the Spence/World Bank Growth Report (2008), that developing countries need inclusive growth. Distribution—of resources for food, health and education, and of economic opportunities—matters. Competition is one vital policy in support of inclusive growth.

UNCTAD has been instrumental in priming the new consciousness. It has helped to inspire the work of Frédéric Jenny, Simon Evenett and others in mustering the facts that show the extent to which developed country cartels, no less than dumping complaints and subsidies, hurt developing country consumers and keep developing country entrepreneurs from making and selling what they do best, and at lower cost than the West.

The millennium has ushered in a new consciousness that growth and development of developing countries is good for the rest of the world, and that,

contrariwise, stultified development not only means a smaller pie and less economic opportunity for the citizens of the world but severely increases alienation and threatens a shared peaceful future. If altruism is not a sufficient driving force, private interest may be.

## **Two Vitally Important Attributes of the Set**

I would call attention to two aspects in particular of which the drafters of the Set should be proud. First, although adopted in the midst of enormous social and economic change, the Set's substantive principles have been remarkably durable. The language has sufficient precision to be meaningful and sufficient flexibility to adapt to the changing economic conditions and the changing perceptions of what good competition policy requires.

Second, the drafters presciently adopted modern institutional machinery. With its provisions for consultations, cooperations, peer reviews, experience-sharing and other feedback loops, UNCTAD is a network worthy of the modern networking world.

Some of the terminology of the Set is not the most modern language. For example, it speaks in terms of restrictive business practices rather than anticompetitive practices. But this is not much different from the U.S. Sherman Act, which prohibits restraints of trade rather than anticompetitive practices, and it is well recognized that the Sherman Act has the flexibility and durability of a Constitution.

## **Among the Major Contributions**

UNCTAD's competition arm has made many major contributions. I would count among them the following: (1) The fora in which UNCTAD brings together its members – in view of the substantive content of the programs; the thousands of interactions, both planned and chance; the information and ideas distilled; the experiences shared; the cultivation of a voice, and of voices, of the developing world. (2) The peer reviews, offering knowledge, knowhow, and support. (3) The projects to provide and refine a model law that responds directly to the experiences of developing countries. (4) The published work, often conference books, that tell the stories of restraints and conduct, private and public, that harm the developing world. I have been particularly impressed by stories from Zambia, Kenya, Zimbabwe, and Côte d'Ivoire; stories that illuminate the facts; success stories of enforcing the law, and sometimes non-success stories that underline the challenges.

## **The Future**

I am happy to see the initiatives of Hassan Qaqaya, head of the competition and consumer branch, moving UNCTAD forward. My law school, New York University School of Law, is especially pleased to be part of the UNCTAD Research

Partnership Platform, which is a network within networks to engage in research and policy analysis, technical assistance for capacity building, and consensus building among member states. UNCTAD would do well to move forward on the paths it has thoughtfully laid out for itself. This would entail:

- Research and policy analysis, which might, for example, help anchor the “Spence Consensus” in place of the Washington Consensus.
- Conferences and meetings, creating and transferring knowledge, knowhow and perceptions and furthering confidence-building. Substantive agendas can drill into new ground and drill more deeply into commonly staked-out ground, highlighting, for example, how authorities with scarce human and capital resources can work to achieve economically sound and progressive results.
- Publication of materials. I am a fan of facts; the stories from the ground. The stories, in turn, influence the policy analysis, the formation of legal principles and their application.
- Training and training materials.
- Building of consensus among members; illuminating their synergies.
- Networking, within and without, including with the International Competition Network and the OECD. For a start, UNCTAD might develop a proposal for common cause with the ICN.

My good wishes for many more anniversaries of the Set.



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New York University School of Law  
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***Professor Shiying XU, East China University of Politics and Law, China***

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**My Experience**

I was greatly flattered by this invitation from the United Nations Conference on Trade and Development (“UNCTAD”) to participate in the review of the great efforts made by UNCTAD on the competition and consumer protection. The year 2010 is the 30th anniversary of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (“UN Set”) and UNCTAD will host the 6th United Nations Conference to Review all Aspects of UN Set.

Since the 1980s, the Reform and Opening-up Policy towards Market Economy has been adopted in China, thence as a scholar, I’ve been feeling it all import for China to establish a system of law on completion with view to our future developments. Because in those days we did not have competition law in China, during my study program in the United States I availed myself of the opportunity to apply to participate in the 2nd United Nations Conference to Review all Aspects of UN Set. That unexpected application was strongly supported by Mr. Philip Brusick (the former head of Competition and Consumer then) and I was finally permitted to participate in the Conference as a UNCTAD intern, these did help much to a young Chinese scholar who’s passionate but has neither permit as an official delegate nor experience in International Competition. I was deeply impressed by UNCTAD’s attention on PRC completion policy as well as its concern on the competition law research in China. At the conference the Delegates from different counties expressed their expectation with one accord towards legislation in competition area in China, which inspired me, with range of international vision at the very beginning, to devote myself to establishment and research of PRC competition regulations as well as promotion of our regional competitive culture based on pith of Asian competition law.

Twenty years has passed away and even the PRC Antimonopoly Law has come into effect in 2008. For the past three years, I’ve been experienced the whole process of pre-legislation preparation, enactment and implementation, and meanwhile, I had the privilege to witness the great help from UNCTAD in promotion of the development of competition and consumer protection legislation in China.

In August 2007, PRC Legislature passed the Antimonopoly Law. Mr. Hassan Qaqaya and Mr. Philip Brusick, representing UNCTAD, repeated close attention to enactment of PRC Antimonopoly law, and at various international conferences held from place to place such as Seoul, Hong Kong and Beijing, they expressed that for UNCTAD it was a significant action and aim to promote implementation of

Antimonopoly Law in China. To a large extent this boosts up the scholars as well as the law enforcement agency in China with the confidence to implement the Law and to strengthen international and regional collaboration.

During the forum hosted by PRC State Administration of Industry and Commerce (“SAIC”), I was encouraged by the Mr. Hassan Qaqaya from Competition Law and Consumer Policies Branch of UNCTAD and published the English version of my work “Competition Law and Competition Policy : China's Perspective” by Sino Media Holdings (HK) Limited. The publication was intended to attract the worldwide attention to the development of Chinese competition policy bearing the sign of the times with Chinese characters, as well as the competition policy and competition law under the globalization trend and the circumstance of economic development in China. UNCTAD helps a lot to spread abroad PRC legislations and the scholars’ understanding of competition law among the international society, and what’s more, it provides China with better channels to communicate with the world for competition policy and competition law. Many scholars of various nations like the United States, Korea and Japan put a premium on this Publication.

UNCTAD has been making sustaining efforts on PRC competition policy and competition law. PRC Antimonopoly law calls forth worldwide concern especially for the implementation after its enactment. In order to learn more international experience in this area, founded and charged by myself, the Competition Law Research Centre of East China University of Political Science and Law hosted the Asian Competition Law Forum. Though very busy Mr. Hassan Qaqaya still spent his time attending the Forum in Shanghai and shared valuable experience of UNCTAD promoting implementation of antimonopoly law in other developing countries, he also made treasured reference and recommendation directed towards China, which were well reputed and appreciated by Chinese scholars and government officials.

On 18th July 2008, the eve of the implementation of PRC Antimonopoly law, after twenty years I was back to the long parted UNCTAD conference hall to attend the 9th meeting of Intergovernmental Group of Experts on Competition Law and Policy hosted by UNCTAD and to give the speech entitled “Should Developing Countries Worry About Abuse Dominant? A Perspective from China”. My speech was highly concerned, not for personal reason but because the international society wanted to show their congrats to such a neogenic but important law, just like they did to congratulate China to host the 2008 summer Olympic (which opened at 1st August 2008, the same day as the effective date of the Law).

Besides as favourably disposed toward PRC Antimonopoly Law implementation concerns as ever, to meet the possible difficulties during civil litigation in this field, UNCTAD advised to hold Judge training courses and forums. Through unremitting efforts from all sides the “International Symposium of AML Civil Litigation” was successfully held in Shanghai in September 2009. During the Symposium the first training was conducted to the judges and lawyers involved in the Chinese judicial system of implementation of PRC Antimonopoly law, and this training was accepted and supported by PRC Supreme People’s Court. UNCTAD conducted revolutionary consequence and historic significance to the competition law development in China.

As a Chinese scholar who sees and hears the whole progress as above mentioned, I believe that the great efforts made by UNCTAD are really significant to the economic and social development in China. I was deeply moved and inspired by UNCTAD for its endeavour devoted to the development of competition and consumer protection, and I hope we can continue our concerted efforts to promote the fair competition and to contribute benefiting mankind.



## ***SADC Secretariat***

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### **Personal views on UNCTAD’s work on competition and consumer protection**

UNCTAD has been instrumental in the development of competition and consumer laws and policies, particularly in developing countries. My contribution is based on UNCTAD’s work in SADC region, particularly Southern Africa.

At a personal level, I benefitted tremendously from participating at training seminars and workshops organized by UNCTAD in our region. I found the courses very practical and relevant, for instance, training courses on “investigation and analysis of competition cases.

UNCTAD’s model law remains an extremely valuable tool in national policy development and in the design and implementation of competition law. The development dimension it has taken on the issue of competition law and policy is most welcome considering that competition policy is regarded as a development tool in most countries. The UN Guidelines for consumer protection have played a similar critical role.

UNCTAD’s extensive research work in the area of competition policy and related areas is commendable, particularly its numerous publications which have contributed immensely to the understanding of competition law and policy. The critical issues of the interface of competition policy and consumer policy and other areas such as development, trade, investment have been well articulated in these publications.

I wish to suggest that, in the area of technical assistance, UNCTAD’s work should also include provision/deployment of short-term competition experts to newly established competition agencies. New agencies need experts to “walk them through”. My personal experience has shown that it is more effective to deploy/attach a competition expert to a newly established agency for two weeks or so than to send people out for regional training workshops and seminars. Regional training workshops and seminars are good, but a competition agency needs to have developed to a certain

level in order to benefit from such interactions. I am advocating for country-specific or tailor-made technical assistance/intervention.

I also wish to suggest that UNCTAD should support activities of regional economic groupings, and where possible implement joint programmes or organize joint events.

## **LA POLITICA DE COMPETENCIA EN EL CONTEXTO DE AMERICA LATINA Y EL CARIBE**

A medida que han crecido las economías latinoamericanas y del Caribe, se ha diversificado su estructura productiva y se han profundizado sus relaciones comerciales internacionales. Como respuesta a esta transformación, evidente en las dos últimas décadas, se ha requerido la adopción de nuevos y más complejos instrumentos de política comercial, entre los cuales cuentan cada día con más fuerza los relativos a las políticas de competencia. Es notorio el apoyo recibido en los ámbitos nacional, subregional y regional por la Secretaría de la UNCTAD, por intermedio del Programa COMPAL, para hacer que la región avance en el tratamiento de estos trascendentales temas. Actualmente, ante la tendencia creciente hacia la convergencia regional y en virtud de la cada vez más profunda participación de América Latina y el Caribe en los flujos internacionales de comercio e inversión, el Programa de Cooperación UNCTAD-SELA, adoptado en 2009, constituye una importante respuesta institucional a repetidas y frecuentes solicitudes de cooperación de los países y organismos de la región.

Como conclusión se puede indicar que las políticas de competencia cada vez son más importantes dentro del proceso de desarrollo de la economía interna y el bienestar de los países de ALC, así como dentro de sus relaciones comerciales regionales e internacionales. De ahí el reconocimiento de la importancia del apoyo técnico de la UNCTAD para con los países y organismos de la región, así como de la necesidad de fortalecer y profundizar la cooperación y la convergencia normativa e institucional en el conjunto de países y organismos América Latina y el Caribe.

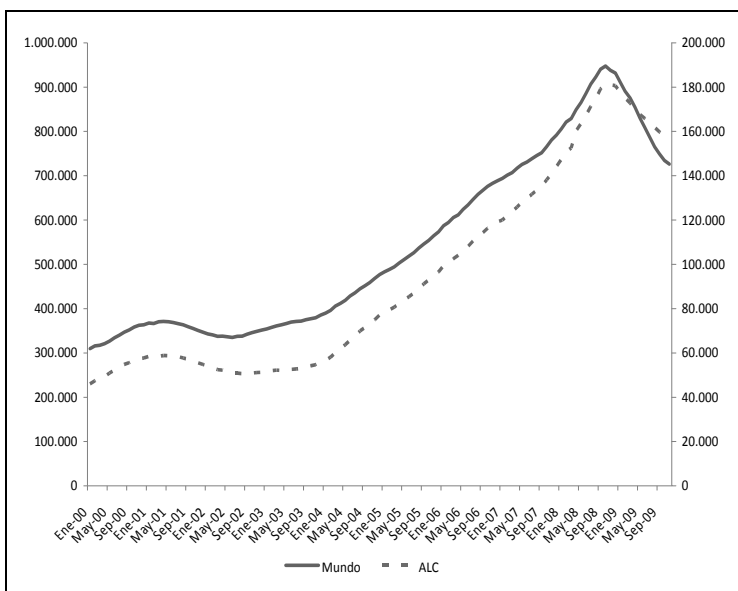
En el ámbito latinoamericano y caribeño se puede constatar la existencia de un creciente mercado intrarregional de bienes y servicios, que tiende a fortalecer los bloques subregionales e incluso las interrelaciones entre los mismos, debido a la eliminación de las barreras comerciales y a la inversión, subregionales y bilaterales y con países y regiones de fuera de América Latina y el Caribe (ALC), la ampliación de la conectividad física y virtual, el acercamiento político y la creciente inserción dentro de los circuitos internacionales de comercio e inversión.

Conforme al gráfico siguiente, se puede apreciar que la integración económica de América Latina se mantiene en permanente evolución, con algunas disminuciones en su ritmo de crecimiento en las épocas de crisis internacional, pero con tendencia positiva en el mediano y largo plazo. Por ello, los países andinos, caribeños, centroamericanos y del Mercado del Sur (MERCOSUR) profundizan y perfeccionan continuamente sus mecanismos, acuerdos e institucionalidades para la integración comercial, política, social y cultural, todos con sus propios ritmos y posibilidades de aplicación.

La presencia de reglas y de institucionalidades en permanente desarrollo, entre las cuales se cuentan las relativas a la protección de la competencia, pretenden asegurar la existencia de un mercado competitivo que propicie la entrada de las empresas al mercado, facilite la permanencia de otras que en una situación diferente no podrían competir, incentive la formalidad de la economía y favorezca la aplicación de las demás normas comerciales, aduaneras, cambiarias, así como el desarrollo sectorial, la defensa del consumidor y la transparencia en la contratación gubernamental.

Desde la fundación del Sistema Económico Latinoamericano y del Caribe (SELA), en octubre de 1975, se vienen desarrollando relaciones de cooperación entre su Secretaría Permanente y la Secretaría General de la UNCTAD, la cual tiene estatus de Observador en el Consejo Latinoamericano, máximo órgano de decisión del SELA. A lo largo de estos 35 años, esta colaboración interinstitucional SELA-UNCTAD ha permitido la participación conjunta de ambas instancias en proyectos, reuniones, y el desarrollo de actividades de capacitación sobre diversos temas vinculados al comercio, las negociaciones comerciales y el desarrollo económico de América Latina y el Caribe (ALC).

**AMERICA LATINA Y EL CARIBE. EXPORTACIONES TOTALES E INTRARREGIONALES  
MILLONES DE DOLARES. ENE 2000 – NOV 2009  
(EXPORTACIONES INTRARREGIONALES EJE DERECHO)**



**EL PROCESO DE INTEGRACIÓN REGIONAL Y LAS POLÍTICAS DE COMPETENCIA**

A lo largo de 50 años de integración, se ha conformado una sofisticada red institucional para la integración económica y comercial: asociación Latinoamericana de Integración (ALADI), Comunidad Andina (CAN), Comunidad del Caribe (CARICOM), Mercado común del Sur (MERCOSUR) y Sistema de Integración Centroamericana (SICA), respaldada por la AEC en materia de cooperación mutua en el Gran Caribe, los Proyectos Mesoamérica e Iniciativa para la Integración de la Infraestructura Regional Suramericana (IIRSA) sobre integración física y el Sistema Económico Latinoamericano y del Caribe (SELA) para la cooperación, la consulta y la coordinación entre todos los países latinoamericanos y del Caribe. En el plano político se cuenta con la Unión de Naciones Suramericanas (UNASUR) para Suramérica y el Grupo de Río y la Cumbre de América Latina y el Caribe (CALC) para la región en su conjunto.

Las normas sobre competencia y defensa del consumidor son en interés público, por lo que el alcance de los acuerdos sobre estos temas no se limita a su aplicación bilateral o subregional, a pesar que su origen haya sido de esa naturaleza, sino que hacen parte de la política general de un país, por el carácter transversal de la política de competencia sobre el comercio de bienes y servicios, las inversiones y la propiedad intelectual.

Se estima que ya existen unas 19 autoridades nacionales de competencia en los países de ALC, conforme a la siguiente distribución (Cuadro 1):

CUADRO 1  
AUTORIDADES NACIONALES DE COMPETENCIA DE ALC

CAN	MERCOSUR	OTROS ALADI	CARICOM	SICA
Colombia	Argentina	Chile	Barbados	Costa Rica
Ecuador	Brasil	México	Jamaica	El Salvador
Perú	Uruguay	Venezuela (R.B.)	Trinidad y Tobago	Guatemala
				Honduras
				Nicaragua
				Panamá
				República
				Dominicana

Varios países están tramitando leyes nacionales o vienen conformando sus autoridades de competencia. Por ejemplo, Bolivia, Paraguay, República Dominicana y el grupo de 7 países que conforman la Organización de Estados del Caribe Oriental (OECS)<sup>37</sup>. Respecto a la OECS, en virtud de su conformación como unión económica, tiene previsto establecer una única autoridad de competencia para todos sus estados miembros, a partir de las normas sobre competencia del Tratado de Chaguaramas del Mercado Común del Caribe (CARICOM).

Las normas subregionales de la CAN (Decisión 608 Normas para la Protección y Promoción de la Libre Competencia), CARICOM (Capítulo Octavo sobre Política de Competencia y Protección del Consumidor del Tratado de Chaguaramas Revisado) y MERCOSUR (Decisión 18/96 Protocolo de Defensa de la Competencia) constituyen el marco para la atención de los asuntos transfronterizos de competencia entre sus miembros e, incluso, el instrumento andino puede ser tomado por Ecuador como normativa nacional. En tanto que la norma andina está vigente y es de obligatorio cumplimiento para los 4 países miembros de la CAN<sup>38</sup>, las de MERCOSUR<sup>39</sup> y CARICOM<sup>40</sup> tienen pendiente su ratificación.

Los tratados de libre comercio entre los países latinoamericanos y del Caribe y los de estos con países de fuera de la región tienen disposiciones sobre competencia. Dentro de este grupo se incluyen Chile, Colombia, México, Perú, República Dominicana, CARICOM y SICA.

Todos los países de ALC son miembros de la OMC y por lo tanto aplican el GATT de 1994 y las normas especiales sobre competencia de los acuerdos AGCS y

<sup>37</sup> La OECS está compuesta por las islas de Antigua y Barbuda, Dominica, Granada, San Vicente y las Granadinas, Montserrat, Santa Lucía y San Cristóbal y Nieves como miembros plenos. Anguila e Islas Vírgenes Británicas participan en calidad de asociados.

<sup>38</sup> La CAN está conformada por el estado Plurinacional de Bolivia, Colombia, Ecuador y Perú.

<sup>39</sup> En MERCOSUR participan Argentina, Brasil, Paraguay y Uruguay.

<sup>40</sup> Hacen parte de CARICOM, los siguientes países: Antigua y Barbuda, Bahamas, Barbados, Belice, Dominica, Granada, Guyana, Haití, Jamaica, San Vicente y las Granadinas, Santa Lucía, San Cristóbal y Nieves, Surinam y Trinidad y Tobago.

ADPIC. Igualmente participan en algún instrumento subregional o bilateral de competencia, dentro de la región o con países y regiones extrarregionales (Cuadro 2).

CUADRO 2

AMERICA LATINA Y EL CARIBE

INSTITUCIONALIDAD NACIONAL Y SUBREGIONAL Y COMPROMISOS INTERNACIONALES SOBRE POLITICAS DE COMPETENCIA

REGION/PAIS	INSTITUCIONALIDAD NACIONAL /SUBREGIONAL SOBRE COMPETENCIA	ALADI	CAN	CARICOM	MERCOSUR	SICA	ACUERDOS CON PAISES DENTRO DE ALC	ACUERDOS CON PAISES FUERA DE ALC
CARICOM	X						X	X
Antigua and Barbuda				X			X	X
Bahamas								
Barbados	X			X			X	X
Belize				X			X	X
Dominica				X			X	X
Grenada				X			X	X
Guyana				X			X	X
Haiti				X			X	X
Jamaica	X			X			X	X
Saint Kitts / Nevis				X			X	X
Saint Lucia				X			X	X
Saint Vincent /Grenadines				X			X	X
Suriname				X			X	X
Trinidad and Tobago	X			X			X	X
SICA	X							X
Costa Rica	X					X	X	X
El Salvador	X					X	X	X
Guatemala	X					X	X	X
Honduras						X	X	X
Nicaragua	X					X	X	X
Panama	X					X	X	X
Dominican Republic	X					X	X	X
ALADI								
MERCOSUR	X							
Argentina	X				X			
Brazil	X				X			

Paraguay					X		
Uruguay	X				X	X	
CAN	X						
Bolivia (P.E.)			X				
Colombia	X		X			X	X
Ecuador			X				
Peru	X		X			X	X
RESTO ALADI							
Chile	X					X	X
Cuba						X	
Mexico	X					X	X
Venezuela (B.R.)	X						

En todos los foros y estudios que se realizan sobre el tema en América Latina y el Caribe, se resalta que coexisten experiencias muy disímiles en materia de enfoques de política, normativa, institucionalidad y compromisos internacionales sobre competencia, que exigen la intensificación de la cooperación y la eliminación de las notables diferencias normativas e institucionales en la región.

El Banco Interamericano de Desarrollo (BID), la Comisión Económica de América Latina y el Caribe (CEPAL), la Organización para la Cooperación y el Desarrollo Económico (OCDE), el Sistema Económico Latinoamericano y del Caribe (SELA) y la Conferencia de las Naciones Unidas sobre Comercio y Desarrollo (UNCTAD) organizan foros regionales y estudios sobre la importancia del tratamiento de la competencia en la política comercial, el desarrollo normativo, los avances de la temática abordada y el intercambio de experiencias.

## **ACTIVIDADES REGIONALES SOBRE COMPETENCIA EN EL SELA**

La participación dentro de la OMC y el relacionamiento comercial más profundo con Norteamérica, Europa, Asia y Oceanía han ampliado la capacidad de participación de ALC en el comercio, las inversiones y las negociaciones mundiales. En todo este contexto los análisis, la consulta y la coordinación dentro del SELA reafirman a este organismo como patrimonio público de ALC, en el que únicamente se oye la voz de sus países miembros.

En materia de actividades regionales relativas a las políticas de competencia, el SELA ha organizado cuatro eventos especiales:

- I Reunión sobre Políticas de Competencia en América Latina y el Caribe, Caracas 23 a 24 de octubre de 1995
- II Reunión sobre Políticas de Competencia en América Latina y el Caribe, Caracas 27 a 29 de noviembre de 1996
- I Seminario Regional sobre Competencia y Desarrollo. Caracas, 20 y 21 de abril de 2009
- II Foro Regional sobre Comercio y Competencia. Brasilia, Brasil, del 26 al 28 de mayo de 2010 VI Revisión del Conjunto de Principios de la ONU



sobre Prácticas Comerciales Restrictivas que se llevará a cabo en Ginebra del 8 al 12 de noviembre de 2010.

Cabe mencionar que el enfoque de los dos primeros eventos contrasta con el de los segundos. En los dos primeros, realizados a mediados de los 90, se resalta la importancia y la conveniencia de disponer de normas y autoridades de competencia en América Latina y el Caribe, tomando como ilustración la experiencia existente en varios países de la región y de regiones como la europea, con miras a fortalecer la competitividad nacional, la ampliación de los mercados y la participación en las negociaciones hemisféricas y de la OMC. Los dos últimos, efectuados en 2009 y 2010, se centran en el fortalecimiento de la normatividad y la institucionalidad desarrollada, así como en la importancia que se eliminen las asimetrías entre las mismas y se genere un profundo trabajo en materia de cooperación, asistencia técnica y acercamiento entre las autoridades, nacionales y subregionales, bajo un enfoque de convergencia de la integración regional.

**1. I Reunión sobre Políticas de Competencia en América Latina y el Caribe, Caracas 23 a 24 de octubre de 1995**

La realización de este foro tuvo como objetivo analizar desde diferentes ópticas y experiencias el tema de las normas y políticas de competencia en América Latina y el Caribe desde los puntos de vista regional, hemisférico y multilateral, a fin de promover su aplicación en toda la región de ALC.

**2. II Reunión sobre Políticas de Competencia en América Latina y el Caribe, Caracas 27 a 29 de noviembre de 1996**

Este evento fue dividido en tres módulos: 1. un taller sobre cómo garantizar la competencia en una economía abierta, 2. un seminario técnico para profundizar el conocimiento y el análisis de varios temas, tales como: comparación de experiencias extrarregionales, instrumentación de políticas de competencia en ALC e intercambio de información sobre los marcos legales en varios países de la región y sobre cooperación internacional y 3. una reunión de funcionarios gubernamentales sobre el avance y las perspectivas de las negociaciones de los foros regionales, hemisféricos y multilaterales.

**3. I Seminario Regional UNCTAD – SELA sobre Competencia y Desarrollo. Caracas, 20 y 21 de abril de 2009**

Organizada por la UNCTAD y el SELA, con el apoyo del Gobierno Español. Este Seminario contó con la presencia del Secretario General de la UNCTAD, Sr. Supachai Panitchpakdi. La agenda incluyó el análisis de la interrelación entre los temas de comercio, política de competencia y desarrollo; igualmente, se revisaron los intereses y las necesidades regionales en materia de cooperación. Al respecto, se espera que las Secretarías del SELA y la UNCTAD continúen organizando actividades de debate, actualización y capacitación para el mejoramiento de los recursos humanos y de las instituciones nacionales y subregionales de ALC. Con este fin, se respaldó el programa de cooperación de la UNCTAD con el SELA.

#### **4. II Foro Regional UNCTAD – SELA sobre Comercio y Competencia y Preparación de ALC para la VI Revisión del Conjunto de Principios de la ONU sobre Prácticas Comerciales Restrictivas que se llevará a cabo en Ginebra del 8 al 12 de noviembre de 2010. Brasilia, Brasil, 26 al 28 de mayo de 2010**

Organizado por la UNCTAD y el SELA, el evento se realizó en cooperación con el Sistema Brasileño de Competencia y el apoyo del Gobierno Español. Se anotó que en ALC se tiene una amplia variedad de iniciativas y experiencias, con distinto grado de evolución, pues mientras unos pocos países tienen normativa e institucionalidad comparativamente desarrollada, la mayoría hasta hace muy poco la han puesto en vigor y algunos apenas empiezan a tramitar su establecimiento normativo y/o su conformación institucional. Por otra parte, el ámbito subregional se ha limitado a eventuales acciones en el caso de posibles prácticas transfronterizas.

Por estas razones, existen múltiples y muy diferentes necesidades de fortalecimiento institucional, las cuales deberían abocarse tomando en consideración la tendencia a la profundización de la integración actualmente en vigor dentro de la región y que se facilitaría mucho más la posibilidad de cooperación entre autoridades nacionales si las mismas y los subregionales presentan niveles similares de fortaleza y capacidad jurídica y de análisis económico. Por ello, América Latina y el Caribe debería tener el propósito que todos los países y subregiones tengan normas e instituciones de competencia de tal naturaleza, que prácticamente no existan asimetrías y brechas entre las mismas. En este punto, se requirió a la UNCTAD y el SELA la generación de programas de trabajo para la conformación de espacios de consulta y cooperación permanente, que tome en cuenta especialmente las necesidades específicas de cada país y subregión.

#### **5. Grupo de Trabajo sobre Comercio y Competencia del SELA**

Con la conformación de un Grupo de Trabajo sobre Comercio y Competencia se pretende fomentar el fortalecimiento institucional, facilitar el intercambio de conocimientos, promover la consulta regional y facilitar la identificación y consecución de cooperación económica y técnica proveniente de la región, de organismos internacionales y otras fuentes. Este Grupo tendría carácter intergubernamental, en el cual pueden hacer parte los siguientes funcionarios de ALC:

- Titulares de las instituciones nacionales encargadas de la aplicación de las normas sobre competencia
- Responsables de los temas de competencia en las instituciones nacionales de comercio exterior
- Responsables nacionales en materia de negociaciones comerciales internacionales
- Expertos de Organismos regionales y subregionales de integración de ALC

## **COOPERACIÓN UNCTAD – SELA EN MATERIA DE POLITICAS DE COMPETENCIA**

La participación de la UNCTAD para la construcción de la cultura y la institucionalidad de las políticas de competencia viene desde la propia época de negociaciones que condujeron a la elaboración del conjunto de Principios sobre Prácticas Comerciales Restrictivas en la década de los 70.

El Programa COMPAL ha sido verdaderamente un importante apoyo en la organización de las normativas nacionales y subregionales, la capacitación de los recursos humanos y la organización de foros regionales y subregionales de ALC.

En el marco del programa de cooperación UNCTAD-SELA 2010 – 2011 se prevé la organización de cursos a distancia sobre competencia y comercio, un taller regional sobre la aplicación de la Sección F del Conjunto de Principios, el análisis de prácticas transfronterizas y que el III Seminario Regional incluya el sector de los servicios. En materia de institucionalidad regional para la cooperación y la consulta, se apoyó la conformación de un Grupo de Trabajo del SELA sobre Comercio y Competencia.

Adicionalmente, con relación al Grupo de Trabajo sobre Comercio y Competencia del SELA, se espera que la UNCTAD proporcione el apoyo técnico requerido, de conformidad con el mandato de la UNCTAD (2008 - Acuerdo de Accra), el Conjunto de la ONU sobre Competencia y bajo el marco del Programa COMPAL. Además de canalizar dentro de este Grupo las actividades convenidas en el mencionado Acuerdo de Cooperación UNCTAD – SELA. Adicionalmente, se espera que la UNCTAD contribuya con las siguientes actividades de investigación:

- Evaluación cooperativa de técnicas de investigación de casos; ampliar a los demás países el proyecto piloto iniciado por Colombia y Perú.
- Estudio de prácticas transfronterizas. Identificar metodologías de investigación de este tipo de prácticas, como división de mercados entre países.
- Estudio de mercados relevantes: Identificando metodologías para definir mercados relevantes en economías latinoamericanas. (examen de las particularidades de economías latinoamericanas (como ser mercados con alta concentración, barreras de entrada distintas a las de países desarrollados por la apertura de mercados que, a partir de los TLC's, caracteriza a Centroamérica) y, a partir de ahí, definir las metodologías de definición respectivas.
- Estudio de leyes sobre Competencia en la región ALC incluyendo análisis jurídico comparativo
- Organización de cursos de capacitación, presenciales y a distancia
- El Acuerdo de cooperación UNCTAD – SELA adoptado en 2009, tiene los siguientes objetivos:

El propósito general de este programa es consolidar un foro regional en el marco del SELA, con el apoyo de la Secretaría General de la UNCTAD, para el intercambio de experiencias, la elaboración de propuestas, y el desarrollo de proyectos de cooperación entre países latinoamericanos y caribeños, acerca de los principios,

normas e instituciones sobre políticas de competencia y sus implicaciones para el proceso de desarrollo económico y social.

Las acciones a desarrollar dentro de este programa tienen los siguientes objetivos específicos:

Impulsar un diálogo permanente entre las entidades gubernamentales de los Estados Miembros del SELA, los distintos órganos subregionales de integración, y la Secretaría General de la UNCTAD, así como otros actores públicos y privados, para la discusión de las experiencias nacionales y regionales existentes en relación al tema de las políticas de competencia y su incidencia sobre el desarrollo.

Examinar experiencias extrarregionales existentes en materia de políticas de competencia, que pudiesen ser relevantes para la superación de los desafíos que en relación al diseño de políticas sobre esta temática, enfrentan los gobiernos de América Latina y el Caribe.

Promover un espacio regional para el intercambio sistemático de información y la elaboración de proyectos de cooperación – con instituciones regionales e internacionales – en beneficio de los Estados Miembros del SELA, sobre la interacción entre políticas de competencia y desarrollo económico y social.

Promover proyectos con vistas a realizar actividades de fomento de capacidad y asistencia técnica para las instancias gubernamentales latinoamericanas y caribeñas encargadas del diseño, implementación y evaluación de las políticas de competencia.

## **GLOSARIO**

AEC	Asociación de Estados del Caribe
ALADI	Asociación Latinoamericana de Integración
ALC	América Latina y el Caribe
CALC	Cumbre de América Latina y el Caribe
CAN	Comunidad Andina
CARICOM	Mercado Común del Caribe
CEPAL	Comisión Económica de América Latina y el Caribe
MERCOSUR	Mercado Común del Sur
OCDE	Organización para la Cooperación y el Desarrollo Económico
OECS	Organización de Estados del Caribe Oriental
OMC	Organización Mundial del Comercio
UNASUR	Unión de Naciones Suramericanas
UNCTAD	Conferencia de las Naciones Unidas sobre Comercio y Desarrollo
SICA	Sistema de Integración Centroamericana
SELA	Sistema Económico Latinoamericano y del Caribe
UE	Unión Europea

**CONTRIBUTION AU LIVRE D'OR POUR LA SIXIEME CONFERENCE  
MINISTERIELLE**

**I. Bref aperçu sur les interventions de la CNUCED, en soutien à la politique de  
concurrence de l'UEMOA**

Pour consolider les acquis de la construction du Marché commun de l'UEMOA, il est apparu nécessaire que des règles de concurrence soient appliquées avec comme objectifs principaux :

d'empêcher que les avantages de la libéralisation des échanges intracommunautaires soient amoindris par les agissements des entreprises publiques ou privées qui sont tentées de vouloir sauvegarder des marchés initialement protégés par des mesures étatiques,

de protéger le cadre concurrentiel régional contre les interventions publiques tendant à conférer des avantages particuliers à des secteurs ou à des entreprises en activité sur le territoire national,

- de lutter contre les cartels internationaux,
- d'assurer une plus grande sécurité juridique à l'investissement,
- de promouvoir l'innovation et le progrès technique,

- de protéger les intérêts des consommateurs en leur donnant plus de possibilités de choix de produits et de services de meilleure qualité à des prix accessibles.

Trois règlements et deux directives ont été adoptés, le 23 mai 2002, conférant la primauté de compétence à la Commission qui, toutefois, doit s'appuyer sur la coopération avec les autorités nationales, dans la mise en œuvre des règles communautaires de concurrence.

Le retard dans la réalisation des réformes prévues à cet effet a limité les possibilités d'une pleine application des règles de concurrence au sein de l'Union, malgré les efforts déployés et les décisions rendues par la Commission.

Pour faire face à ces contraintes, un projet de renforcement des capacités a été élaboré en collaboration avec la Conférence des Nations Unies sur le Commerce et le Développement (CNUCED), avec comme objectif principal de permettre à la Commission de l'UEMOA et aux Etats membres de se doter de moyens d'intervention adéquats.

Dans ce cadre, une série de séminaires nationaux et régionaux ont été organisés dans les Etats membres, avec comme cibles les cadres des administrations, les juges et les membres de la société civile.

A l'occasion de ces différentes manifestations, la CNUCED a fourni une importante contribution scientifique et une riche documentation qui servent encore de références à beaucoup de personnes s'intéressant à la politique de concurrence (avocats, universitaires et agents de l'Etat.)

En appui à la mise en œuvre de ce projet, l'examen collégial volontaire de la politique de concurrence de l'Union Economique et Monétaire Ouest Africaine qui s'est déroulé à Genève, lors de Réunion du Groupe Intergouvernemental d'Experts de la CNUCED sur le Droit et la Politique de Concurrence du 17 au 19 juillet 2007, a constitué un grand moment dans la vie de notre institution.

La qualité du rapport préparatoire et le haut niveau des échanges, lors de cet examen, ont permis à la Commission de l'UEMOA de recentrer ses interventions et d'envisager des réformes du cadre institutionnel de mise en œuvre des règles communautaires de concurrence.

Cependant, davantage de profits auraient pu être tirés de cet exercice, si le suivi de l'application des recommandations était fait de façon plus régulière et rapprochée.

En particulier, il aurait fallu établir un calendrier de restitution des résultats de l'examen collégial au niveau des Etats membres, afin de disséminer les fruits de la réflexion qui a été menée. Des démarches auraient dû être faites également auprès des autorités politiques, pour s'assurer de leur implication dans la mise en œuvre des recommandations.

De même la mobilisation d'appuis auprès des bailleurs de fonds n'a pas été facile, dans un premier temps, malgré les efforts déployés à ce niveau par la CNUCED, pour accompagner les démarches de la Commission.

Toutefois, à l'heure actuelle, l'Union bénéficie d'un financement de l'Agence Française de Développement au titre du Projet de renforcement des Capacités de la Commission et des Etats membres, pour la mise en œuvre des règles communautaires de Concurrence.

## **II. Perspectives :**

Le travail appréciable accompli par la CNUCED, pour la promotion de la politique de concurrence dans les pays les moins avancés, devrait mettre davantage l'accent sur la Régionalisation qui est devenu l'élément central dans les politiques de développement.

A ce titre la loi- type devrait faire l'objet d'une adaptation, prenant en compte les réalités des organisations régionales dont la viabilité dépend en partie de la levée des entraves aux échanges.

En effet, les définitions classiques des pratiques anticoncurrentielles ne permettent pas de cerner ces entraves ni d'envisager des mesures pour les corriger. Or il est impératif que les autorités de concurrence dans les regroupements régionaux des pays en développement disposent d'instruments juridiques à même de juguler les résistances à l'intégration des marchés.

Il en est de même des pratiques observées dans le secteur informel que d'autres notions devraient permettre de qualifier et de sanctionner, pour assurer à la concurrence des chances de se dérouler correctement au bénéfice des consommateurs.

En plus de ce travail législatif, la CNUCED devrait aider à densifier la coopération technique entre autorités de concurrence, en servant de facilitateur dans l'organisation des voyages d'études et la mise à disposition temporaire de cadres.

Enfin, l'approche « Agence d'exécution » pour la mise en œuvre des projets de renforcement des capacités des PMA devrait être développée par la CNUCED, afin d'améliorer les capacités d'absorption des pays ou groupements bénéficiaires de financements qui ont rarement des ressources humaines suffisantes.



Pascal Lamy  
Director-General  
World Trade Organization

**UNCTAD publication to commemorate the 30<sup>th</sup> anniversary of the UN Set of principles and rules on Competition**

The UN Set of Principles and Rules on Competition has been an important benchmark and touchstone for the evolution of national competition policies during the past thirty years, particularly in the developing world. It has also been a key point of reference for international deliberations on competition policy, and on the interaction between international trade and competition policy, for example the work of the WTO Working Group on the Interaction between Trade and Competition Policy in the years 1997 through 2003<sup>41</sup> and related work in UNCTAD and the OECD.

The UN Set itself captures very effectively the significance of competition policy for the international trading system. The preamble to the Set refers, *inter alia*, to:

the need to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries.<sup>42</sup>

I have often thought that this is a particularly acute and prescient statement of the appropriate goals of international work on the interaction of trade and competition policy. Of course, the substantive provisions of the Set contain a range of elements relevant to this concern.

Experience has provided ample confirmation of the ability of anti-competitive practices of firms to impede or negate the benefits that should flow from trade opening. Perhaps the most obvious example relates to the impact of international cartels. While trade opening would normally be expected to expand production and supply while putting downward pressure on prices, and thereby improving the welfare of consumers, cartels have precisely the opposite effect: they reduce supply and increase prices above competitive levels. While in the past, we may have had doubts about the actual extent of such practices, there is now ample evidence of their existence and harmful effects. A number of studies have found that international cartels have raised the costs of developing countries' imports by a factor of billions of dollars annually.<sup>43</sup>

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<sup>41</sup> The records of this work are available on the WTO website at [http://www.wto.org/english/tratop\\_e/comp\\_e/wgtcp\\_docs\\_e.htm](http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm).

<sup>42</sup> The United Nations Set of Principles and Rules on Competition (TD/RBP/CONF/10/Rev.2).

<sup>43</sup> See, e.g., Margaret Levenstein and Valerie Suslow, "Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy," 71 *Antitrust L.J.* 801 (2003-2004).

To be sure, international cartels are by no means the only example of anticompetitive practices with an international dimension that can have an impact on trade and development. Access to markets by foreign suppliers can be undermined by exclusionary vertical market restraints (contractual linkages between manufacturers and their suppliers or distributors), import cartels and other forms of anticompetitive conduct. The empirical significance of such practices and the appropriate policy response have been much debated in relevant literature. In its comprehensive assessment of the available evidence and commentaries on this issue, the US International Competition Policy Advisory Committee concluded that private, governmental and mixed public-private restraints that inhibit market access are a problem worthy of the attention of policymakers in both national and international contexts.<sup>44</sup>

More broadly, in many cases failures of trade opening to generate sustained development and growth can be traced to a failure to introduce complementary domestic policy reforms. For example, countries may not be well poised to take advantage of the potential benefits of trade opening unless they simultaneously take steps to reduce costs and enhance the efficiency of infrastructure sectors such as telecommunications and transportation; to promote flexibility by eliminating artificial restrictions on entry, exit and pricing in manufacturing and other industries; and to establish and strengthen incentives for investment, innovation, the creation of efficient management structures and productivity improvement. Competition policy has a role to play in all of these areas.<sup>45</sup>

While there is no dedicated agreement on competition policy in the WTO, it is (contrary to some perceptions) incorrect to suggest that the subject is currently outside the WTO altogether. Rather, the subject of competition policy is incorporated in or otherwise dealt with under existing WTO agreements and related instruments in a number of specific ways. First, under the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Intellectual Property Rights (TRIPS), there are procedures for consultations and co-operation on anti-competitive practices.<sup>46</sup> Second, each of these three Agreements also contains broad rules on non-discrimination, transparency and procedural fairness which are applicable, at least in some measure, to national competition policies.

Third, standards relating to specific anti-competitive practices are contained in certain of the WTO Agreements and related instruments – notably the GATS (Article VIII) and the commitments entered into by a large number of WTO Members in regard to basic telecommunications services in the form of the "Reference Paper" on anti-competitive safeguards and regulatory principles in this sector. Fourth, a number of WTO agreements contain provisions authorizing particular remedies in cases of enterprise behaviour that impacts adversely on trade and/or competition. These include

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<sup>44</sup> US International Competition Policy Advisory Committee, Report (2000).

<sup>45</sup> Robert D. Anderson and Frédéric Jenny, "Competition Policy, Economic Development and the Possible Role of a Multilateral Framework on Competition Policy: Insights from the WTO Working Group on Trade and Competition Policy", in Erlinda Medalla, ed., *Competition Policy in East Asia* (Routledge/Curzon: 2005).

<sup>46</sup> In the case of the GATT, the relevant provision is contained in a sometimes-overlooked Decision by the GATT Contracting Parties on Arrangements for Consultations on Restrictive Business Practices. See Decision on Arrangements for Consultations on Restrictive Business Practices, BISD 9S/28-29. In the case of the GATS and the TRIPS Agreement, relevant provisions are included in the texts of the Agreements themselves.

the plurilateral Agreement on Government Procurement and the Agreement on Trade-Related Intellectual Property Rights (TRIPS).<sup>47</sup> Fifth, the WTO Dispute Settlement Understanding is potentially applicable in certain situations involving anti-competitive practices – for example, in cases of a failure to adhere either to the above-noted broad rules on non-discrimination or to the minimum standards with respect to the treatment of anti-competitive practices which are embodied in the GATS and the Reference Paper.<sup>48</sup>

Two current activities of international organizations highlight the relevance of competition policy disciplines for practical work on aspects of the WTO agreements that have particular relevance for developing countries. First, competition policy is an important element of the "Development Agenda" of the World Intellectual Property Organization (WIPO). The WTO Secretariat is pleased to be cooperating with WIPO in regard to aspects of this work programme. Second, currently, there is growing interest in the role of the plurilateral WTO Agreement on Government Procurement as an aspect of international governance and in regard to maximizing value for money in public procurement activities. It is clear, however, that the benefits of transparent and competitive procurement regimes may be undermined if effective laws and policies are not in place to deter collusive tendering practices.

As the foregoing makes clear, the Set was right to call attention to the possibility that anti-competitive practices of firms, if tolerated, could undermine realization of the benefits that are intended to flow from international trade liberalization and related instruments and activities. UNCTAD is to be commended for the work that it does in response to this concern, which provides an important service for the international trading system and the developing world. The WTO Secretariat is pleased to cooperate in relevant aspects of this work.

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<sup>47</sup> World Trade Organization, 'Special study on trade and competition policy', in Annual Report of the World Trade Organization for 1997 (Geneva: WTO, 1997), chapter IV.

<sup>48</sup> An important example is the report of the panel in Mexico: Measures affecting Telecommunications Services, WT/DS204/R, adopted 1 June 2004.