

**Working Group on the Interaction  
between Trade and Competition Policy**

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## **COMMUNICATION FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES**

The following communication, dated 29 May 2000, has been received from the Permanent Delegation of the European Commission with the request that it be circulated to Members.

### The Development Dimension of Competition Law and Policy

#### **INTRODUCTION**

In previous submissions to the Working Group, the European Community and its Member States have presented overall views on the advantages of developing within the WTO a multilateral framework agreement on competition law and policy, including from a development perspective. We thought it useful, however, to discuss in a more integrated manner issues relating to the development dimension of competition law and policy.

The present submission consists of three main parts.

The first part discusses both the role which competition law can play in economic and regulatory reforms in developing countries, as well as the impact which anti-competitive practices have on developing country trade, be that imports or exports.

The second part of the submission addresses the practical difficulties that competition authorities in developing countries are faced with and how international cooperation in the competition field would assist developing countries in better addressing anti-competitive practices.

The third and final part addresses how a multilateral framework agreement on competition may reinforce the role of competition authorities in developing countries while all the time bearing in mind the need for flexibility and progressivity seen in the light of the level of development of a particular country. Additionally, this part of the submission also identifies the benefits that may be achieved through multilateral cooperation as opposed to an approach exclusively based on bilateral and regional cooperation agreements. It also offers views on the existing activities in the area of technical assistance and capacity building in the competition field and presents ideas on how such activities may be enhanced and better coordinated.

An annex to the submission provides a summary of a number of EC competition cases dealing with global competition matters and with particular impact on developing countries.

## **1. The contribution of competition law and policy to development, economic growth and sharing in the benefits of globalization**

### **1.1 The role of competition law in domestic economic reforms in developing countries**

The last 50 years of multilateral trade negotiations have brought about a significant reduction of tariff and non-tariff barriers to trade. This important development has contributed to a globalization of markets in the sense that corporations now direct their activities not only to domestic markets but to markets world-wide. This aspect of globalization has led to a number of advantages including increased competition among corporations which in turn leads to a wider choice of goods for consumers generally accompanied by a lowering of prices where markets are contestable.

However, the globalization of the marketplace also carries with it a real danger, namely the extension of anti-competitive practices beyond national borders. In the absence of effective competition laws and policies, anti-competitive practices are likely to reduce the benefits that have been obtained through trade liberalization and regulatory reforms. This provides one of a number of arguments why trade liberalization and competition laws are by no means alternatives but rather complementary elements of a sound economic policy which ideally should be implemented in tandem in order to best promote economic development through equitable and efficient growth and to enhance consumer welfare.<sup>1</sup>

A contribution from Korea to the Working Group contains an illustrative example of how failing to implement competition policy at a sufficiently early stage in the development process can necessitate costly industrial restructuring later on.<sup>2</sup> The contribution concludes that "...if competition policy had been introduced earlier, Korea's economic development would have been achieved in a more balanced and sound manner. At the early stage of development, the negative structural effects of market concentration and the distortions of the market structure were largely overlooked. As a consequence, Korea is now confronting the very difficult task of industrial restructuring. If competition policy had been introduced before the market structure was distorted, such tasks could have been avoided."<sup>3</sup> A recent UNCTAD study (UNCTAD 1997b) drawing upon the experiences of a number of OECD countries also identifies several situations where the potential benefits of regulatory reform and deregulation have been attenuated by a failure to apply appropriate competition law disciplines.<sup>4</sup>

At the UNCTAD X conference, Members, in the Plan of Action adopted, acknowledged this by specifically emphasizing that "RBPs should not impede or negate the realization of benefits arising from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries", and that "there is a need to prevent enterprises from re-establishing market barriers where governmental controls have been removed".<sup>5</sup>

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<sup>1</sup> See e.g. Communication from India (WT/WGTCP/W/24) noting that "... trade and trade liberalization are not ends in themselves..." and that competition policy would "... ensure that trade liberalization, deregulation and globalization ... maximise the benefits to consumers" and Communication from ASEAN (WT/WGTCP/W/19) noting that "... trade and competition policy contribute to creating the condition for efficient resource allocation among players in the private sector. Together they ensure the contestability of markets and improve resource allocation."

<sup>2</sup> See Submission from Korea (WT/WGTCP/W/56), para. 13.

<sup>3</sup> See also Submission from Japan (WT/WGTCP/W/52) stressing that far-reaching structural de-concentration measures that contributed to the vigorous growth and development that took place in Japan following World War II during the reconstruction phase.

<sup>4</sup> See also the 1997 OECD Report on Regulatory Reform and revised report by the UNCTAD Secretariat, "Empirical Evidence of the Benefits from Applying Competition Law and Policy Principles to Economic Development in order to Attain Greater Efficiency in International Trade and Development", TD/B/COM.2/EM/10/Rev. 1, para. 27 ff.

<sup>5</sup> TD(X)BKK.182, para. 70.

In fact, if competition laws and policies are not introduced alongside trade liberalization and overall economic reform this may in fact even serve to strengthen existing inequalities as developing countries may become subject to anti-competitive practices resulting from the privatization of a former government monopoly or the control of the market by an oligopoly. An illustrative example was presented to the Working Group by Argentina based on the results of 18 empirical case studies.<sup>6</sup> The presumption underlying the studies was that, generally, where a country implements comprehensive trade liberalization, domestic prices will tend toward import parity levels.<sup>7</sup> However, despite this presumption, the Argentine competition authorities had been able to identify a number of situations where this had not occurred as a result of anti-competitive practices of certain enterprises. Among the factors that had made these practices possible were high market concentration levels, inelastic demand (reflecting a lack of substitutes), the prior existence of a cartel, and, finally, control by a dominant enterprise of scarce facilities necessary for imports to occur. The conclusion of the Argentine representative in the Working Group was that effective national competition policies are essential to ensure that the process of adjustment to external liberalization and resulting benefits for efficient economic development are not circumvented by anti-competitive practices.

The benefits to developing countries from the introduction of sound competition laws and policies may spread more broadly as part of a more general approach to private sector reform and development. Such laws and policies would enable new innovative entrants, in particular small and medium-sized enterprises, access to the market, just as increased competition among corporations would provide a strong incentive for corporations to invest in research and development.<sup>8</sup>

## **1.2 The impact of anti-competitive practices on developing country trade – imports and exports**

The fact that corporations no longer operate within confined national borders means that anti-competitive practices are likely to also have a negative impact on other countries' ability to trade.

Developing countries' trade may be adversely affected by three categories of anti-competitive practices with an international dimension:

- Those practices that affect international markets, such as international cartels, mergers and abuse of dominant position where it affects international markets. The harmful effect of such practices is likely to be further accentuated by the fact that developing countries only have a few multinational corporations among their corporations. The Plan of Action adopted at UNCTAD X explicitly states that "developing countries ... do not have many worldwide TNCs" and that they "have a major interest in seeing that their access and entry to their major export markets is kept open and unrestricted by anti-competitive practices".<sup>9</sup> There are two reasons why developing countries may be particularly affected by international cartels. Firstly, such cartels are typically established among large developed country corporations and would tend to have a particularly negative impact on potential new entrants, including those from developing countries. Secondly, as a result of stronger

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<sup>6</sup> See Communication from Argentina (WT/WGTCP/W/63).

<sup>7</sup> Note however that prices may not necessarily tend toward import parity levels in situations where a market is purely local and therefore undisciplined from the existence of effective imports as in the case of non-traded goods or goods that are subject to high transportation costs or perishability, or, where goods are traded, competition may be adversely affected by other means such as standards and licensing requirements imposed by the importing country.

<sup>8</sup> The overall economic reasons for the adoption of competition laws and policies are set out in the Notes by the WTO Secretariat, WT/WGTCP/W/80 and WT/WGTCP/W/127.

<sup>9</sup> See TD(X)BKK.182, para. 70.

enforcement efforts in major jurisdictions, international cartels may seek to focus their activities on markets with weak competition structures or where national competition authorities are not effective participants in international cooperation efforts.

- Those practices that affect market access for imports, which would include import cartels allocating national markets among their participants, exclusionary abuses of dominant positions, obstruction of parallel imports, control over import facilities (as in the Argentine example from the Working Group), and certain vertical restraints that foreclose markets to outside competitors. During an earlier meeting of the Working Group the observer from the World Bank made the important observation that a majority of anti-competitive practices in developing countries involve the supply of intermediate products purchased by other businesses as opposed to goods purchased by the final consumers. As a result of this, competition policy was considered more likely to assist firms in such countries in enhancing their competitiveness internationally.<sup>10</sup> Moreover, as new entrants, developing country producers may also be particularly vulnerable to anti-competitive practices foreclosing access to third country markets.
- Those practices that have a differential impact on the domestic markets of a given country, such as where a merger may only have insignificant impact in one market but detrimental knock-on effects in another market. This would include a situation where a merger between two corporations would only increase the market share of the new entity in a larger market marginally, whereas a more dominant structure between its subsidiaries may be created in the developing country or countries where they also operate. Another example would be cases in which an anticompetitive practice is implemented by a foreign corporation in the market of a developing country. The competition authorities in the developing country may find it difficult to effectively apply domestic competition law in the absence of cooperation from the authorities in the home country of the foreign corporation.

## **2. Challenges faced by competition authorities in developing countries**

### **2.1 Establishing and reinforcing the domestic role of competition authorities**

Once a developing country has adopted a competition policy, this policy will obviously have to be implemented. Such implementation will consist of two steps, the first of which will be defining and drafting a competition law which corresponds to the prevailing institutional capacity of the country in question. As for the second step, it goes without saying that the adoption of a domestic competition law is not an effective response to anti-competitive practices unless accompanied by the establishment or reinforcement of a competition authority which progressively will be endowed with sufficient resources and level of expertise to effectively investigate and enforce the law.

However, as discussions in the Working Group have revealed, the establishment or reinforcement of such an authority may prove a difficult task for developing countries for two main reasons. One is the question of the overall allocation of resources and which level of priority is attached to the establishment or reinforcement of the authority. Many countries face a number of other competing priorities and the establishment of a competition authority may not be at the top of every country's list. The second reason is the fact that developing countries will often be moving into a completely new area with regard to the establishment of a competition authority as they have had no previous experience in this field.

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<sup>10</sup> See WT/WGTCP/M/3, para. 58.

A recent UNCTAD Secretariat document on Technical Assistance and Training Programmes on Competition Law and Policy sets out a number of specific requests for assistance from countries that do not have a competition law or fully functioning competition authority.<sup>11</sup> One such request states that the competition authority of the country in question "is still in its formative stages and hence needs as much help as possible in dealing with the main issues related to the adoption and efficient application of law and policy", whereas another request specifies that "assistance from UNCTAD is needed in finalizing a draft competition policy", and, "in laying the groundwork for a competition law that meets the country's requirements and in providing the necessary training in its enforcement, more particularly in developing the necessary skills to conduct investigations into restrictive business practices and the abuse of dominant position".

However, even countries that already have a domestic competition law and a competition authority in place may face considerable difficulties in the effective enforcement of such laws. The difficulties may be caused by the increasing number of market participants, the complexity of substantive issues such as vertical restraints and multi-jurisdictional mergers, and a lack of training and expertise. The above mentioned UNCTAD document also contains a number of specific requests from countries within this category of countries. As pointed out, the existing authorities for the enforcement of competition laws may often find that their staff is inadequately trained to effectively investigate the practices they are faced with. This is the situation of one country which has stated that "the capacity to carry out competition investigations needs to be strengthened ... staff working on competition matters are too few to be able to carry out a sufficient number of investigations that will have the necessary impact on the institutionalization of competition regulations", and, that "in the course of the investigations carried out procedural errors are committed which hinder the effective conduct of the investigations ... greater resources are needed in order to be able to have more and better-trained experts, which would enable the number of successful investigations to be substantially increased".

The examples quoted are merely offered for purposes of illustration. The European Community and its Member States fully realize that a number of countries will need comprehensive and targeted support for various elements of the adoption and enforcement of competition laws.<sup>12</sup> This has prompted a further development of our thinking on the issues of the benefits from international cooperation for developing countries as well as the need for a more coordinated approach to technical assistance and capacity-building. Both issues will be addressed in more detail in other parts of the paper.

## **2.2 Importance of international cooperation for competition authorities in developing countries**

The internationalization of markets and the fact that corporations are now involved in global rather than local operations is likely to also have effects in a number of countries, including developing countries. This gives rise to an increasing need for international cooperation in the competition area. Given the complexity of business operations and structures, international cooperation can help to improve the effectiveness of the enforcement while at the same time also reduce the actual costs incurred by the enforcement authorities. Both aspects are important and of clear interest to developing as well as developed countries.

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<sup>11</sup> See note by the UNCTAD Secretariat, "Review of Technical Assistance, Advisory and Training Programmes on Competition Law and Policy", TD/B/COM.2/CLP/12 and Corr. 1, para. 50 ff. This note also contains a Progress Report on UNCTAD Technical Cooperation and Technical Cooperation of Member States and International Organizations as well as a list of requests made for technical assistance.

<sup>12</sup> See also statements made by representatives of a number of developing and transitional countries during the June 1999 meeting of the Intergovernmental Group of Experts on Competition Law (UNCTAD), reported in TD/B/COM.2/19.

Experiences from cooperation under bilateral and regional agreements so far has shown that cooperation is likely to be hampered where there are major differences in substantive competition laws, procedures, or interpretations, whereas a "degree of commonality of approach" and a "shared perception of common interest and mutual benefit" is required to facilitate meaningful and constructive cooperation.<sup>13</sup> The European Community and its Member States believe that such a degree of commonality of approach will be supported by the adoption of a multilateral framework agreement on competition and that international cooperation of mutual benefit to all WTO Members would develop progressively within flexible modalities for international cooperation.

To date, cases involving cooperation with developing countries on competition issues have been few. The *French/West African Shipowners' Case*<sup>14</sup> provides an illustrative example of a case where some form of cooperation between the EC and the competition authorities of the African countries could have ensured that the anti-competitive effects that occurred not only in Europe but also in the 11 African countries in question could have been addressed. Also, in the *CEWAL Liner Conference Case*<sup>15</sup> cooperation could have facilitated the extremely burdensome fact-gathering process undertaken by the European Commission. However, cooperation was not possible as most of the countries did not have effective competition laws and/or institutions, just as there was no formal agreement for cooperation. (These and other cases involving EC competition law are further discussed in the annex).

Other reported cases which clearly illustrate situations where developing countries could have benefited from international cooperation are the cartels cases where the US Department of Justice has successfully investigated and prosecuted international cartels for lysine and citric acid. During the course of its investigation, the Department of Justice had unearthed evidence of price-fixing and market allocation relevant to other countries. However, no cooperation agreements existed with these countries and the information could not be passed on.<sup>16</sup> A cooperation mechanism would also likely have been of help for the Pakistani authorities in the *Electrolytic Tinplate Case*.<sup>17</sup> Here, a Pakistani corporation had made a call for quotations for the purchase of 4,600 metric tonnes of electrolytic tinplate. Quotations were made by six foreign firms and the lowest of the lowest three bids from corporations in Luxemburg (2,300 tonnes), in the UK (1,500 tonnes) and in Germany (800 tonnes) corresponded exactly to the 4,600 tonnes required. The Pakistani corporation eventually bought 1,500 from the UK corporation and 800 from the German corporation, and 2,300 from two Japanese corporations as the Luxemburg corporation had refused to supply. The fact that the three lowest bids exactly matched the required quantity constituted strong *prima facie* evidence of collusive tendering and prompted the Pakistani authorities to initiate an investigation. However, the non-availability of evidence within Pakistan proved an insurmountable obstacle and in the end no action was taken. Here, the Pakistani investigation would have been greatly facilitated with regard to gathering of evidence had there been access to cooperation with the competition authorities of the countries where the corporations were located.<sup>18</sup>

Finally, corporations involved in international alliances, mergers or the like may be adversely affected by a lack of international cooperation as the participating corporations will have to deal with the approval procedures and potentially conflicting provisions of a number of jurisdictions. An example of this was the *Gillette/Wilkinson Case* where a proposed merger was the subject of scrutiny

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<sup>13</sup> See report by the UNCTAD Secretariat, "Experiences Gained so far on International Cooperation on Competition Policy Issues and the Mechanisms used", TD/B/COM.2/CLP/11, para. 28 and 30.

<sup>14</sup> See case report in note by the UNCTAD Secretariat, "Restrictive Business Practices that have an Effect in more than One Country, in particular Developing and other Countries, with overall Conclusions regarding the Issues raised by these Cases", TD/RBP/CONF.4/6.

<sup>15</sup> *Ibid.*

<sup>16</sup> See TD/B/COM.2/CLP/11, para. 31.

<sup>17</sup> See TD/RBP/CONF.4/6.

<sup>18</sup> *Ibid.*

in 14 jurisdictions.<sup>19</sup> Better international cooperation could lower transactions costs for corporations by avoiding the need for duplication and thereby also reduce the likelihood of unnecessary delays in approval procedures and the like.<sup>20</sup>

Based upon these, as well as a number of other reported cases, the UNCTAD Secretariat draws a number of important conclusions that go directly to the issue of how developing countries can benefit from international cooperation. The UNCTAD document concludes that the cases with an international dimension that were successfully solved were all handled by the authorities of developed countries, whereas the cases that were solved in a less than satisfactory manner were handled by authorities of developing countries. However, the UNCTAD document sees a possible remedy for such shortcomings namely an international binding agreement on horizontal hard-core arrangements coupled with some degree of international cooperation, e.g. in the area of investigations.<sup>21</sup>

### **3. The contribution of a WTO multilateral framework agreement on competition policy for development**

#### **3.1 Importance of a WTO multilateral agreement to reinforce the role of competition institutions in developing countries: the need for flexibility and progressivity**

A WTO multilateral framework agreement would assist developing countries in the process of the progressive establishment of effective enforcement mechanisms at the domestic level and would make it easier for such countries to resist pressure often exercised by powerful domestic vested interests against the implementation of competition laws and policies.<sup>22</sup> It would also ensure that such countries can benefit from effective multilateral cooperation and contribute towards better addressing anti-competitive practices with an impact on their trade.

The European Community and its Member States have not proposed that a framework agreement should apply equally to all WTO Members from the first day of its entry into force. Rather, an approach based on a certain degree of flexibility would be the proper way forward. It is evident that for developing countries, in particular the least-developed countries, the introduction and/or effective enforcement of a domestic competition law would have to be of a progressive and flexible nature. This should apply not only to the introduction of competition law as such but also, just as importantly, to the development of structures for the effective enforcement introduction of such laws taking into consideration the widely differing institutional capacity of the WTO Members.<sup>23</sup>

The need to take the special circumstances of developing countries duly into account is also reflected in the European Community and its Member States' thinking on the elements of a WTO

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<sup>19</sup> *Ibid.*

<sup>20</sup> Similarly the need for duplication among competition authorities would be lessened and the workload eased considerably if they would notify other competition authorities known or believed to be dealing with the same transaction and would share non-confidential information with them.

<sup>21</sup> "... Primarily, it would help smaller countries, in particular developing countries, with limited or no experience in competition law enforcement; because such countries, because of their resource limitations, their relatively smaller markets, possible lacunae in competition policy frameworks, and their weaker bargaining power vis-à-vis transnational corporations, are often less able to solve their competition problems solely by vigorously enforcing national law. ... A binding international agreement outlawing hard-core horizontal restraints of competition could both facilitate the establishment of jurisdiction of a country which is the target of an international cartel and at the same time increase the willingness of other countries to assist such a country in its proceedings by cooperating, for example, in investigations." TD/RBP/CONF.4/6, p. 16.

<sup>22</sup> See Hoekman, B., "Competition Policy and the Global Trading System – A Developing-Country Perspective", Policy Research Working Paper 1735, World Bank (March 1997), p. 15.

<sup>23</sup> See also Submission by the European Community and its Member States (WT/WGTCP/W/45), p. 8, and remarks by the representative of the European Community and its Member States in Report of the Meeting of 19-20 April (WT/WGTCP/M/8), paras. 30 and 91.

framework agreement. No harmonization of substantive competition laws is envisaged. Rather, we propose to develop a multilateral framework agreement focusing on core principles of competition law and policy, basic cooperation modalities and support for developing countries. A WTO Competition Policy Committee would be established to administer the WTO basic framework agreement.

The core principles would be solidly based on non-discrimination and transparency. Non-discrimination would relate to the domestic legislative framework. Transparency would be at the centre of the core principles to be agreed in a framework agreement. Transparency of domestic competition law regimes is of great importance for firms engaged in international trade as well as for consumers. Moreover, transparency provisions should include issues of "due process" and the availability of effective domestic remedies. This would be an important contribution of a multilateral agreement to the effective enforcement of domestic competition law.

It is also suggested to give priority to developing a common principle on hard-core cartels. These cartels are among the anti-competitive practices that are most likely to be damaging to developing countries, e.g. through price-fixing, markets allocation and other practices, and focusing on this area would allow competition authorities to aim their limited resources at those practices that have a greater impact on the structure of competition in a given market. Hard-core cartels constitute one of the substantive areas where WTO Members at this point in time would agree on their harmful, anti-competitive effects. The same conclusion is reached by the UNCTAD Secretariat which notes that "Probably this is at present the only definable area where a consensus on competitive substance exists, that is a consensus that hard-core horizontal restraints are at the centre of competitive concerns and that they should be eliminated to the extent possible", and, that "... it might be worthwhile giving consideration to a more modest initiative for a binding international agreement to outlaw hard-core horizontal restraints ...".<sup>24</sup>

The European Community and its Member States also favour a flexible and progressive approach to the issue of sectoral exclusions from the application of competition law. Some exclusions of a horizontal nature – like, for instance, those which may apply to small and medium-sized enterprises – may be driven by legitimate development considerations and have only an insignificant impact on international trade. At this point in time, it would appear that a WTO multilateral framework agreement could limit itself to ensuring the necessary level of transparency concerning exclusions from the application of domestic law.

### **3.2 Cooperation**

The European Community and its Member States have been arguing in favour of agreement on modalities for international cooperation on competition issues as a key element of a multilateral framework agreement on competition.

The need for international cooperation is based on two facts. First of all, the globalization of corporate practices which may affect the interests of more than just one country, such as market allocation or price-fixing of hard-core cartels or multijurisdictional mergers, and, secondly, the fact that an ever-increasing number of countries have either adopted or are currently considering the adoption of a domestic competition law.<sup>25</sup>

The European Community and its Member States have earlier identified the significant gains that would be achieved through increased international cooperation. These gains are: addressing

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<sup>24</sup> See TB/RBP/CONF.4/6, pp. 15 and 16, Hoekman, p. 12, and Contribution from the European Community and its Member States (WT/WGTCP/W/130).

<sup>25</sup> See Communication from the European Community and its Member States (WT/WGTCP/W/129), pp. 8-9.



obstacles to market access arising from anti-competitive practices, fostering closer cooperation among competition authorities through such means as notification, exchange of information, limiting the scope for jurisdictional conflicts, and promoting a gradual convergence of competition laws and policies.<sup>26</sup>

Furthermore, for developing countries who may not yet have adopted a domestic competition law or have only recently done so there are additional gains to be achieved from international cooperation. Such cooperation would also render valuable support to the process of reinforcing the domestic capacities of developing countries in the competition area. The benefits from international cooperation on competition matters are also recognized in the UNCTAD Set which includes some provisions on consultation/cooperation.<sup>27</sup>

A multilateral framework agreement would give competition authorities of developing countries direct access to an extensive network of competition authorities to whom they could address requests for assistance on specific enforcement cases. In addition to this, they would also have access to a forum where a valuable exchange of experiences with implementation and enforcement of competition laws and policies could take place. It is worth noticing in this context that a number of world-wide price fixing or market sharing cartels in certain basic products in the last 20 years have progressively abandoned their operation in the territory of the European Community and its Member States or other countries which enforce competition rules in a rigorous and effective manner. There are indications that many of these anti-competitive practices are still in operation and continue to target developing countries and other geographical areas where the risk of detection and resulting sanctions is remote. All such international cooperation activities could be of direct help in establishing and further consolidating the role of competition authorities in developing countries.<sup>28</sup>

At present a number of bilateral and regional cooperation agreements exist, but the parties to these agreements are almost exclusively developed countries. Such agreements would usually serve to ensure that the interests of the immediate parties to the agreement were taken into account, but as for third countries affected by anti-competitive practices, such as developing countries, there is no provision on consultations and cooperation with the competition authorities of such a country.

The European Community and its Member States are party to and fully recognize the value of bilateral and regional agreements. However, despite the importance of such agreements and mechanisms they do not provide a panacea to all international anti-competitive practices. Rather, they should be supplemented with flexible modalities for international cooperation that would better address the international dimension of many anti-competitive practices, and such modalities should be designed to deliver maximum benefits for developing countries.<sup>29</sup> From a practical perspective, it must also be borne in mind that developing countries may not always have the necessary resources or expertise to enter into full-fledged bilateral cooperation agreements. The flexibility of the modalities

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<sup>26</sup> See Submission by the European Community and its Member States (WT/WGTCP/W/45), p. 7.

<sup>27</sup> UNCTAD Set, Part E, paras. 7, 8, and 9, and Part F, para. 4. Note, however, that dissatisfaction with the implementation of the relevant provisions of the UNCTAD Set has been expressed by a number of countries. See TD/RBP/CONF.4/6, p. 18.

<sup>28</sup> Seen in a broader trade policy perspective, an effective application of competition law would also serve to ensure other WTO Members access to markets in the areas of goods, services, and investment where a significant degree of liberalization has been implemented.

<sup>29</sup> See e.g. Communication from Korea (WT/WGTCP/W/124) stressing that a multilateral approach to cooperation would be preferable, but that bilateral, regional and multilateral approaches could develop in a mutually complementary and reinforcing way. See also remarks by the representative of the European Community and its Member States on a study commissioned by the EC competition authorities which had reconfirmed the complementary effects between development of both bilateral and multilateral approaches to cooperation, and remarks by the representative of India commenting upon the bilateral, regional, and multilateral facets to cooperation and the fact that each distinct type of cooperation had its inherent advantages and shortcomings reported in WT/WGTCP/M/8, para. 70 and 74.

for international cooperation on the other hand would serve to ensure that developing countries at all stages of development could somehow participate in and benefit from international cooperation.

Given the fact that a majority of developing countries now either have adopted or are in the process of adopting competition laws, the European Community and its Member States remain convinced that some degree of international cooperation within a framework agreement would, in a short-term perspective provide further support for the effective implementation of domestic competition laws. In a longer-term perspective, it would lead to more comprehensive cooperation and prove a valuable learning experience for the competition authorities of developing countries as well as contribute to a culture of competition.<sup>30</sup> It is not envisaged that international cooperation under such a framework will cover all aspects of cooperation from day-one. In fact, if anything, experience shows that cooperation is a progressive undertaking that will develop and gradually become more refined in light of the use of the mechanism and the actual experiences with cooperation.<sup>31</sup>

### **3.3 Towards an enhanced and more coherent approach to technical assistance and capacity building**

The successful establishment of an effective competition law and policy, supported by credible and transparent institutions, is a long-term project. It is integrally connected to broader private sector development strategies, and as such should be a part of a more coordinated and targeted approach to technical assistance and capacity-building.

At present there is already a considerable number of initiatives in the area of technical assistance and capacity-building, be it on a bilateral basis or through international organizations.

A written contribution from the World Bank to the Working Group has outlined how the Bank has assisted in the design, implementation or strengthening of competition legislation, institutions and enforcement in a number of developing and transitional economies, primarily in Latin America and the African Continent, just as the Bank has been organizing seminars and workshops on competition policy for officials from Latin America, Central and Eastern Europe and Asia.<sup>32</sup>

UNCTAD also has vast experience in technical assistance, advisory work and training in the competition area, and since 1986 UNCTAD's activities have expanded considerably. The activities undertaken range from studies on the effect of anti-competitive practices on countries without competition legislation to advice on drafting or amendment of competition laws and the establishment of competition authorities. In addition to this, UNCTAD has arranged a number of seminars and conferences and facilitated the placement of competition officials from one country with the authorities of other countries for purposes of valuable on-the-job training.<sup>33</sup>

As for the European Community and its Member States, the EC has provided training sessions for officials from candidate countries for EU accession and arranged conferences, just as it has provided technical assistance through its various Cooperation or Association Agreements with Latin and Central American, Caribbean, and Mediterranean countries. Some of these countries have already come forward with requests for technical assistance and the European Community and its Member States have earlier indicated their continuing openness towards requests for technical

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<sup>30</sup> See also comments made by the representative of Brazil on how cooperation should have an "educational purpose" and that cooperation could help educate the public on the benefits of competition policy. WT/WGTCP/M/8, para. 66.

<sup>31</sup> See e.g. remarks by the representative of Brazil, WT/WGTCP/M/4, para. 55.

<sup>32</sup> See Communication from the World Bank (WT/WGTCP/W/22).

<sup>33</sup> See Communication from UNCTAD (WT/WGTCP/W/17). The contribution also includes a detailed list of UNCTAD activities relevant to the interaction between trade and competition policy. See also TD/B/COM.2/CLP/12 and Corr. 1.

assistance from other countries. Also, under the ACP-EU Partnership Agreement of Suva, competition is one of the areas identified for technical cooperation.<sup>34</sup> In addition to these activities, individual Member States also provide technical assistance.

Despite the wide range of valuable technical assistance and capacity-building activities that have been undertaken in the competition area to date, the European Community and its Member States continue to believe that more may be done through a better coordinated and targeted approach.<sup>35</sup>

The current fragmentation of technical assistance and capacity building may carry with it an inherent danger of a less than optimal use of resources as the providers of such assistance – be it individual countries or international organizations – may in fact be providing assistance which is uncoordinated and perhaps even wholly or partially duplicative.

An enhanced and more coordinated approach to technical assistance should therefore be developed in parallel to negotiations on a WTO framework agreement. This should be based on closer cooperation among competent international organizations -including UNCTAD and the World Bank - and full partnership with developing countries. Once such a framework agreement has been established, a WTO Competition Policy Committee should play an important role in promoting and monitoring integrated technical assistance programmes. In this way, a framework agreement is likely to have a major catalytic effect for promoting technical assistance in the competition field which has not always earlier been regarded as a priority area, and would also ensure that the assistance provided would be based on commonly agreed objectives adjusted to the specific needs of the country in question.

A more efficient use of resources could also be achieved e.g. through the use of technical assistance such as training activities aimed at more than one country or a particular region with similar/comparable needs, rather than merely one country at a time. This would also carry with it the added-value of providing competition officials from such countries valuable exposure to their counterparts from other countries. They would be able to establish personal contacts and later discuss and compare experiences with their progressive implementation and enforcement of competition laws and policies. To this should also be added the important fact that the WTO Competition Policy Committee would also serve as a forum for promoting cooperation in competition cases and for the exchange of non-confidential information in the competition area more generally.

Finally, a more coordinated and targeted approach to technical assistance and capacity-building would also be achieved through the design and formulation of a more comprehensive programme for such assistance for a given country. One or more countries or organizations could then assume responsibility for specific elements of the programme ranging from studies, over drafting or amendment of legislation, to training of officials, rather than addressing the needs of a given

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<sup>34</sup> See Communication from the European Community and its Member States (WT/WGTCP/W/129), pp. 6-8. Article 45, para. 3 of the Partnership Agreement between the African Caribbean and Pacific States and the European Community and its Member States reads as follows: "The Parties also agree to reinforce co-operation in this area [competition] with a view to formulating and supporting effective competition policies with the appropriate national competition agencies that progressively ensure the efficient enforcement of the competition rules by both private and state enterprises. Co-operation in this area shall, in particular, include the assistance in the drafting of an appropriate legal framework and its administrative enforcement with particular reference to the special situation of the least developed countries."

<sup>35</sup> Communication from Zimbabwe on behalf of the WTO African Group (WT/WGTCP/W/126) states that "the degree of assistance provided has not been equal to the challenges faced by developing market economies", and encourages the Working Group to think about "ways in which current levels may be augmented, and made more effective through enhanced coordination between the relevant agencies."

country on a piece-meal basis as is currently the prevailing picture.<sup>36</sup> It is more than likely that the end result, i.e. the effective enforcement of a domestic competition law with the desired societal benefits, would be enhanced by such a coherent approach to the required elements of technical assistance.

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<sup>36</sup> Note e.g. that the communication from the World Bank (WT/WGTCP/W/22) and UNCTAD document TD/B/COM.2/CLP/12 and Corr. 1 both include references to a particular country which has earlier received technical assistance from the World Bank and has also requested assistance from the Spanish Agency for International Cooperation and the European Commission, Directorate-General for Competition. There is a distinct possibility that the competition law and enforcement of the country in question could have benefited further from a coordinated approach from the outset.

## ANNEX

The following is a brief summary of some reported European cases which help demonstrate the global dimension of certain competition matters and the resulting direct or indirect benefits for consumers and economic operators in developing countries:

### *French/West African Ship Owners Conference*<sup>37</sup>

In 1992 the European Commission imposed fines against members of the above Conference<sup>38</sup> for activities falling outside the exemption provided by Council Regulation 4056/86. Based on arrangements between members of these conferences, all commodities travelling between France and the eleven West and Central African States involved<sup>39</sup> were allocated on a fixed basis. The application of the shipowners' agreements had the effect of distorting competition between European shippers operating on African markets contrary to Article 81. Further, these agreements had repercussions on port activity in both Africa and Europe. In effect, they penalized west African exporters exposing them to higher freight costs than the ones they could enjoy in a competitive market situation. Furthermore, the French shipping lines were able to carry out the majority of the cargoes on these routes and the mechanisms which were set up did not foster the development of African fleets.<sup>40</sup>

### *FETTCSA (decision not yet published)*<sup>41</sup>

On 16 May 2000, the European Commission adopted a decision under Article 81 EC Treaty which imposed fines totalling just under €7m on fifteen liner shipping companies.<sup>42</sup> Only ten of these companies were members of the now defunct Far East Trade Tariff Charges and Surcharges Agreement conference<sup>43</sup>. These shipping lines, which controlled over 80% of the freight market in the routes between northern Europe and the Far East, are among the largest in the world and are based in the European Community, Japan, Korea, Singapore, Malaysia and Taiwan. The Commission found that the cartel restricted competition by way of an agreement not to discount from published charges and surcharges. It was damaging because non-conference lines were also participating in the cartel which meant that the market had few independent competitors to challenge the fixed charges. The cartel operated from June 1991 until it was abandoned in 1994, following Commission action. It must be noted that parties to the FETTCSA agreements were essentially the same as those party to Europe Asia Trades Agreement (EATA) prohibited by the Commission in 1999.<sup>44</sup>

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<sup>37</sup> Cases T-395/94R and C-149/95P [1993] 5 CMLR 446; [1997] 5 CMLR 167.

<sup>38</sup> Thirty-five shipping lines were involved in the Conference (see Annex I of Commission Decision 92/262/EEC (IV/32.450) OJ L134/1 [1992]).

<sup>39</sup> Benin, Togo, Congo, Senegal, Mali, Guinea, the Central African Republic and Cameroon.

<sup>40</sup> This was counter to the objectives of the UNCTAD Code of Conduct for Liner Conferences which sought to guarantee for carriers from developing countries a greater percentage of the markets previously dominated by carriers from the developed world.

<sup>41</sup> Rapid press release: IP/04/486 of 17/05/00 "Commission fines shipping lines for an illegal price agreement on the Europe/Far East trade".

<sup>42</sup> CMA CGM (France) Hapag-Lloyd (Germany) K Line (Japan) Maersk Sealand (Denmark) MISC Malaysia Mitsui O.S.K. Lines (Japan) Neptune Orient Lines (Singapore) NYK (Japan) OOCL (Hong Kong) P&O Nedlloyd (United Kingdom) Independent lines Cho Yang (Korea) DSR-Senator (Germany) Evergreen (Taiwan) Hanjin (Korea) Yangming (Taiwan).

<sup>43</sup> Liner shipping conferences benefit from an exemption from normal competition rules under EEC Regulation 4056/86.

<sup>44</sup> Commission Decision of 30.04.1999, OJ L 193, 26.7.1999, p. 23; Press Release IP/99/313 of 10.05.99.

CEWAL<sup>45</sup>

In this case, action was taken by the Commission against three liner shipping conferences, operating routes between Continental North Sea ports and West Africa<sup>46</sup> on the grounds of activities which were not covered by exempting Council Regulation 4056/86.<sup>47</sup> The members of CEWAL were able to use their legitimate links within the framework of the conference system to e.g. make loyalty agreements with certain customers in return for lower shipping rates. This led to a lack of choice for less restrictive discount and bonus schemes.

The European Court of Justice (ECJ) recently upheld the European Commission's findings concerning abuse of a dominant position contrary to Article 82 EC.<sup>48</sup> The initial Commission decision applied to traffic between northern European ports (except the UK) and the former Zaire. The Commission decision also found CEWAL guilty of infringing Article 81 by entering into non-competition agreements aimed at geographically sharing the liner markets under investigation. This was not appealed. Although the fines were appealed and have been set aside by the ECJ on a procedural point,<sup>49</sup> this case also highlights the benefits from EU competition policy for the economies of developing countries. In fact, since the decision, the price of liner transport in the West African region has lowered, favouring exports and imports there.

Seamless Steel Tubes (decision not yet published)<sup>50</sup>

On 8 December 1999, the European Commission adopted a decision under Article 81 EC which imposed fines totalling €99m on eight producers of seamless steel tubes. Four of the firms originated in the European Community and the other four firms were incorporated in Japan.<sup>51</sup> The cartel restricted competition by requiring producers to respect their domestic markets and not deliver elsewhere. As the firms are among the largest producers of seamless tubes in the world, the cartel had a global impact on oil and gas prospecting and transportation markets. This decision offers a good example of the indirect benefits of competition policy in the EU or elsewhere for consumers and industry in different parts of the world including developing countries. In fact, in such cases where a restrictive effect in the EU is challenged, the impact will also be felt in the global markets.

Gencor/Lonrho<sup>52</sup>

In 1996 the European Commission prohibited the proposed merger in the platinum sector between Impala Platinum and Lonrho platinum division (LPD).<sup>53</sup> The concentration took place in

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<sup>45</sup> Judgement of the Court (Fifth Chamber) of 16 March 2000. *Compagnie Maritime Belge Transports SA (C-395/96 P), Compagnie maritime belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities.*

<sup>46</sup> Commission decision of 23 December 1992 IV/32448 OJ L34/20 [1993]; CFI judgment T-24-26, 28/93 [1997] 4 CMLR 273.

<sup>47</sup> OJ L 378/4 [1986].

<sup>48</sup> Judgement of the Court (Fifth Chamber) of 16 March 2000. *Compagnie Maritime Belge Transports SA (C-395/96 P), Compagnie maritime belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities.*

<sup>49</sup> The ECJ held that the Commission was not entitled to impose fines on CEWAL members when it had addressed the Statement of Objections only to the CEWAL.

<sup>50</sup> Case IV/E.1/35.860 B of 08/12/99.

<sup>51</sup> British Steel Limited (United Kingdom), Dalmine S.p.A. (Italy), Mannesmannröhren-Werke A.G. (Germany), Vallourec S.A. (France), Kawasaki Steel Corporation, NKK Corporation, Nippon Steel Corporation and Sumitomo Metal Industries Limited (Japan).

<sup>52</sup> Case IV/M619 (1996) [1997] OJ L11/42 Rapid Press Release IP/96/346 of 24 April 1996 "The Commission opposes the merger of the platinum operations of Gencor and Lonrho".

<sup>53</sup> Impala platinum was controlled by the South African company Gencor and LPD was a subsidiary of the British company Lonrho PLC.

South Africa, but the Commission was able to establish a 'Community dimension' because it achieved the requisite turnover in the Community and the operation had an impact on competition in the Community. The proposed merger would have resulted in the two companies holding equal market share in the platinum and rhodium market with Amplats, another South African company. On appeal, the Court of First Instance (CFI)<sup>54</sup> accepted that the Commission was justified to block this merger. This was due to the fact that the merger would have led to the creation of a dominant oligopoly on a global level and therefore would have an effect on competition in the Community.

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<sup>54</sup> T-102/96 *Gencor v Commission* [1999] 4 CMLR 971.