CHAPTER 23

Trade and competition policy

The subject of the interaction between trade and competition policy was added to the work programme of WTO as a result of decisions taken at the 1996 Singapore Ministerial Conference. The Working Group which has been established is expected to study and analyse "issues raised by Members relating the interaction between trade and competition policy, including anti-competitive practices," and to "identify areas that merit further consideration in the WTO framework."[34] In carrying out analytical work, the Group is expected to take into account the provisions of the Agreement on Trade-Related Investment Measures, provisions in WTO law on investment and competition policy, and discussions in the Working Group on Trade and Investment.

Competition policy issues in international trade

Defining competition policy

The term 'competition policy' is used in different ways in different countries and in different contexts. At its broadest, it includes all policies relevant to competition in the market, including trade policy, regulatory policy and policies adopted by governments to address the anti-competitive policies of enterprises, whether private or public. In the narrow sense, the term is used to cover the last-mentioned aspect, i.e. laws or policies governing the anti-competitive behaviour of enterprises.

Reasons for including trade and competition in the WTO work programme

Concern at the possible adverse effects of anti-competitive business practices (often referred to as 'restrictive business practices') was expressed as far back as 50 years ago when GATT was being established. The 1947 draft of the Havana Charter contained, in addition to provisions on trade policy, provisions on restrictive business practices and the establishment of an International Trade Organization. The Havana Charter could not be implemented because of the failure of the United States Congress to ratify it. Although the trade policy provisions of the Charter were used to establish GATT, efforts to incorporate provisions on competition policy were frustrated by the divergence of views among negotiating countries on the need for their inclusion. Since then, some countries proposed international rules in this area in GATT discussions, but these proposals were not vigorously pursued.

Increasing interest in recent years in discussions on competition policy can be attributed to many factors. Four of these are noted below.

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34 Singapore Ministerial Declaration, §20.

- There is a growing perception that as governmental barriers are peeled back through successive rounds of trade negotiations, trade restrictions and distortions resulting from the practices of enterprises may be increasing in importance.
- Associated with this is the increasing integration of the world economy, spurred not only by trade liberalization but also by the vast expansion of foreign direct investment (FDI). Thus, the anti-competitive practices of enterprises acquire an increasingly transborder dimension, affecting several countries and, in some cases, the whole world.
- A further influence has been the growth of international rules, at the bilateral, regional and multilateral levels, that protect the interests of foreign companies operating within a country's territory. For example, in the WTO, as a result of the Uruguay Round, there are now international trade rules of this nature in the area of services and intellectual property and a Working Group is studying the relationship between trade and investment. Some countries feel that such international rules should be accompanied by enhanced international cooperation to control anti-competitive business practices by the companies in question.
- Lastly, an important development has been the growing convergence of views, apparently with less of the old North/South and East/West differences, that competition law is often the appropriate legal means for addressing the anti-competitive practices of enterprises even if agreement on specific details still has a considerable way to go.

Forms of anti-competitive business practices

There are four main types of business practices that can have anti-competitive effects and affect international trade. These are:

- Horizontal restraints (arrangements between competing firms producing identical or similar products to restrain competition);
- Vertical restraints (anti-competitive arrangements between firms along the production-distribution chain);
- Abuse of a dominant position;
- Mergers.

Horizontal restraints

Horizontal restraint arrangements could take three forms:

- Import cartels and related arrangements;
- Export cartels and related arrangements;
- International cartels.

Import cartels and related arrangements

Import cartels formed by domestic importers or buyers and similar measures (such as boycotts of, or collective refusals to deal with, foreign competitors) are of obvious concern from a market access perspective. Related issues are exclusions of foreign competitors from, or discriminatory terms of membership of trade associations and, in particular, the exclusionary use of standard-setting by such associations. 'Hard core' cartels such as price fixing, output restraints, market division and customer allocation are normally prohibited outright under competition law, although not always unambiguously (in some jurisdictions, they may be permitted if importers are faced with dominating foreign suppliers and competition on domestic markets is not held to be

substantially restrained). Other cooperative arrangements among competitors, such as in standard-setting and joint purchasing, are often subject to a rule-of-reason analysis.

Export cartels and related arrangements

Export cartels can be divided into two groups. 'Pure' export cartels direct their efforts exclusively at foreign markets. 'Mixed' export cartels restrain competition in the exporting country's home market as well as in foreign markets.

Pure export cartels are treated as being outside the scope of most countries' competition laws for two reasons. One is that these cartels are considered to be beyond the jurisdiction of domestic competition laws, and the other is that they are explicitly exempted from the application of the laws. Mixed export cartels are generally subject to essentially the same requirements or outright prohibitions as cartels that affect the domestic market alone, although some countries provide special exemptions for such cartels where the domestic restraint or effect is ancillary to the restraint on export trade.

International cartels

International cartels and market sharing agreements between firms in two or more countries are generally recognized as being akin to horizontal price-fixing and other collusive agreements within a single country. In both cases, competition is limited, prices are raised, output is restricted, and markets are allocated for the private benefit of firms. To the extent that their effects in a jurisdiction are similar to those of national cartels, the enforcement of existing competition law should go far in providing a remedy. For example, in the 1940s and 1950s, the United States anti-trust authorities prosecuted a large number of cartel cases involving international markets for primary products and manufactured goods. These cases involved price fixing and the direct allocation of national markets among firms that would otherwise be in competition, reinforced by prohibitions against importing and exporting by the participating firms. In many of these cases, the cartels were built around patent cross-licensing schemes. In the 1990s, there has been a new wave of prosecution of international price-fixing cartels among producers of such products as lysine, citric acid and fax paper.

Another important category of horizontal arrangements about which concerns have been expressed in relation to their possible implications for the exercise of market power in international markets is that of cooperative arrangements for research and development, particularly where the design of legislative provisions for R & D joint ventures make them susceptible to strategic use. Most jurisdictions with modern competition statutes make some form of special provision for inter-firm cooperation (joint ventures and consortia) in R & D programmes that otherwise might not be carried out. It has been noted, however, that provision for such arrangements should not take the form of blanket exemptions from competition law, since competition also has an important role to play in providing incentives for timely innovation and adoption of new technology.

Vertical market restraint arrangements

Vertical market restraint arrangements could cause trade concerns where they prevent foreign firms from having access to distribution networks controlled by domestic suppliers. The practices used include:

- Exclusive dealing requirements that prevent distributors from marketing products;
- Tied selling that makes purchase of one product of a given brand conditional on purchasing another product of the same brand;

- Loyalty or sales rebates that provide financial incentives not to distribute the products of competitors; and
- Exclusive territories that prevent distributors from selling outside certain geographical areas.

Abuses of dominant position

The classification of restrictive business practices into horizontal and vertical restraints follows an economic logic. Most competition laws, however, also distinguish between agreements among firms and the 'abuse of dominant position' or 'monopolization'. The latter is defined as a practice employed by dominant firms to maintain, enhance or exploit a dominant position in a market. The practices that can be dealt with under this rubric include:

- Exclusive dealing;
- Market foreclosure through vertical integration;
- Tied selling;
- The control of scarce facilities and vital inputs or distribution channels;
- Price and non-price predation;
- Price discrimination;
- Exclusionary contractual arrangements; and
- In some jurisdictions, even the simple charging of higher than competitive prices, or the imposition of other 'exploitative' abuses.

Mergers

One can distinguish between three fundamentally different types of mergers: horizontal, vertical and conglomerate mergers.

Horizontal mergers bring together two or more firms in the same line of business and in the same geographic market, which in itself tends to push prices upward, exactly as with a cartel. However, the competition policy decision with regard to horizontal mergers is complicated by the fact that, since a merger allows former rivals to integrate their production facilities, it may also affect the costs of production. If a merger lowers variable costs, it may actually lead to lower market prices than before the merger, and such a merger may then be desirable from a social point of view.

Vertical mergers involve firms that are engaged in different stages of production and marketing within an industry. This type of merger activity is often undertaken to achieve efficiencies by reducing transaction and other costs through the internalization of different stages of production and distribution, but may also be employed to foreclose sources of inputs or distribution channels to competitors.

Conglomerate mergers integrate firms operating in unrelated lines of business. Such mergers normally do not raise concerns from a competition policy point of view, since typically they do not increase the degree of market power that can be exercised by the firms in the relevant product markets.

Main elements of competition law

Before turning to the description of the points made in discussions in the Working Group on the problems resulting from anti-competitive business behaviour, it may be desirable to note briefly the main features of national competition laws that aim at bringing under control such behaviour.

The main objective of national competition laws in countries where they exist is to preserve and promote competition as a means to ensure the efficient

allocation of resources in an economy, resulting in the best possible choice of quality, the lowest prices and adequate supplies for consumers. In addition to promoting efficiency, many competition laws make reference to other objectives, such as the control of concentration of economic power, promoting the competitiveness of domestic industries, encouraging innovation, supporting small and medium-sized enterprises, and encouraging regional integration. Some of these additional objectives may sometimes be in conflict with the efficiency objective.

Most competition laws deal with enterprise behaviour by prohibiting such anti-competitive business practices as competition-restricting horizontal agreements, acquisitions and abuses of dominant positions, as well as substantially restrictive vertical distribution agreements. In addition, an increasing number of competition laws deal with alterations to the structure of markets, through the control of mergers and acquisitions as well as joint ventures aimed at avoiding the creation of dominant firms, monopolies, or even oligopolies. In some laws, the divestment of parts of monopolies is also authorized to change the structure of markets.

These laws also contain exceptions and exemptions to the application of their provisions. These can cover, among others, labour, regulated industries (e.g. telecommunications, defence, agriculture), small and medium-sized enterprises, and certain types of cooperative arrangements, including R & D joint ventures.

A number of countries, however, are reviewing the soundness and validity of those across-the-board exemptions. The emphasis is increasingly on applying competition law to all business practices. It is then the task of the competition authority or courts to consider business practices, and focus on those that have the highest probability of anti-competitive effects and the least justification based on efficiency.

Overview of the main issues under discussion in the WTO Working Group[35]

Main issues under discussion

The main focus of discussions in the WTO Working Group on the Interaction between Trade and Competition Policy has been on the interaction between trade policy and development on the one hand and competition policy on the other. The following provides some highlights of the discussions that have been held in the Group, *inter alia*, under the following main headings:

- Relationship of trade and competition policy to development and economic growth;
- Impact of anti-competitive practices of enterprises and associations on international trade;
- State monopolies and regulations;
- Relationship between investment and competition policy;
- Relationship between trade-related aspects of intellectual property rights and competition policy;
- Impact of trade policy on competition.

35 This overview has been taken largely from the report of the Working Group on its activities in 1997 and 1998. For fuller details, the reader should consult the report itself ["Report (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council" (WTO, WT/WGTCP/2, 8 December 1998)].

Relationship of trade and competition policy to development and economic growth

The Group paid particular attention to the analysis of the relationship of trade and competition policy to development. In this context, it was pointed out that in a number of countries competition law and policy had been implemented or strengthened not in isolation, but rather as one element of a package of interrelated reforms of policies aimed at promoting economic and social development. A central feature of these reforms had been greater reliance on market forces as an engine of development and adjustment and on the creation of a framework aimed at ensuring that such forces operate in the public interest, notably by promoting or maintaining competition in markets. The related reforms included external market-opening measures (including liberalization of trade and foreign investment regimes), privatization and sector-specific regulatory reforms/deregulation. The various elements of the package were considered to be mutually reinforcing.

A related point made in the discussions concerned the heightened importance of competition policy as a tool for development in the current globalizing economic environment, as compared to previous eras. The argument was made that, whereas in the past, countries could hope to achieve development through other (possibly more interventionist) tools and approaches, these approaches were no longer workable because of the extent to which trade liberalization and globalization of business activities had taken place and the increased importance of foreign direct investment as an engine of growth in the present economic environment. As a result of these developments, anti-competitive practices of enterprises were increasingly international in scope, and appeared to be more significant than in the past. Consequently, according to this view, a vigorous competition policy was necessary to respond appropriately to these concerns and to establish a climate conducive to investment and economic growth.

While the view that competition had a role to play in economic development received broad support in the Group, a view was also expressed that a comprehensive competition law might not be strictly necessary to ensure the desired degree of competition. This reflected several underlying considerations.

Of the 134 Members of WTO, only between 70 and 80 have competition laws. Even in countries where such laws exist, enforcement may in some cases be lax because of the lack of financial resources and of persons with expertise in competition law. Given the extremely complex nature of the law, its adoption by countries which do not have such legislation at present is going to be time consuming.

Moreover, if competition laws are to meet the objective of promoting economic growth by improving economic efficiency and making markets competitive, many Members believe that they must take into account the particular characteristics of developing countries such as low income levels, skewed distribution of wealth, low levels of education and asymmetric information. These may require them to adopt a more flexible approach and selective government intervention in the market. For instance, the competition legislation of most developed countries provide for special treatment of small and medium-sized industries. In developing countries the need to extend to these industries special treatment – by providing them tax and other incentives, and access to finance on concessional terms – may be even greater. The governments of these countries may also find it necessary to play a more active role in markets to safeguard national security (by maintaining production capacities in industries considered essential), protect labour rights, and preserve national culture (by regulating cultural industries).

Impact of the anti-competitive practices of enterprises and associations on international trade

The discussion on the impact of anti-competitive practices of enterprises on international trade focused broadly on the following three categories:

- Practices affecting market access for imports;
- Practices affecting international markets, where different countries were affected in largely the same way; and
- Practices with a differential impact on the national markets of countries.

Practices affecting market access for imports

The specific examples of practices affecting market access for imports cited by Members in the discussion included actual cases of:

- Domestic import cartels;
- International cartels that allocated national markets among participating firms;
- The unreasonable obstruction of parallel imports;
- Control over importation facilities;
- Exclusionary abuses of a dominant position and vertical market restraints that foreclosed markets to competitors, certain private standard-setting activities and other anti-competitive practices involving industry associations.

The point was made that anti-competitive practices of these types could have the effect of reducing or eliminating the potential gains from trade liberalization. As an illustration of this point, the Group was informed of a number of case studies of sectors in which conventional external trade barriers had been removed. The presumption underlying these studies was that, in general, when a country implemented far-reaching trade liberalization, there was an expectation that domestic prices should tend towards import parity levels. The case studies had however identified several situations where this response had not been forthcoming, owing to the anti-competitive practices of enterprises. Factors that tended to facilitate or underlie such anti-competitive practices included high market concentration levels, inelastic demand (reflecting a lack of substitutes), the prior existence of a cartel, and control by a dominant enterprise of scarce facilities that were necessary for imports to occur.

In reflecting on the effects of these practices and their implications for international trade, the point was made that the nature and severity of these effects would vary depending on the type of practice, the market power of incumbent firms and other circumstances.

Practices affecting international markets where different countries were affected in largely the same way

The foremost example of anti-competitive practices in this category was the problem of international cartels that affected price and output across multiple country markets. A large number of cases in which competition authorities in various countries had uncovered such cartels were brought to the attention of the Group. Cartels operating in certain service sectors such as international maritime shipping or financial services were said by some Members to be particularly harmful to trade, since they not only restrained trade within the relevant service but also raised the price of that service to exporters, introducing another level of distortion.

The point was however made that, notwithstanding the general condemnation of cartels and similar arrangements, a flexible approach to the application of competition law in regard to certain types of inter-firm practices could often be warranted. These practices might include, first, non-conventional horizontal arrangements, such as strategic alliances, joint ventures and R & D consortia, whose effects were not necessarily the same as more conventional arrangements such as mergers and cartels, and tended to be very fact-specific, and, second, certain arrangements involving small and medium-sized enterprises.

Practices with a differential impact on international markets

An example of a widely cited anti-competitive practice in this category was that of export cartels. It was said that the victims of export cartels would often include developing countries which were importing machinery or consumer products. Furthermore, it was suggested that the extent of such cartels and their deleterious effects on international trade and development might well be greater than was widely known, since most countries did not insist on registration of such cartels; they simply turned a blind eye to them. The matter of mergers which were judged to be benign or even beneficial in one market, but were not necessarily so in other markets, was also discussed. The point was made that the incidence of such cases might well be less frequent where countries employed a consumer welfare standard, rather than a total welfare standard, to evaluate mergers. The reason was that, under the latter approach, mergers that yielded significant efficiency gains in the home market might be deemed acceptable even where they entailed substantial anti-competitive effects, including effects which might be felt in foreign markets.

Factors facilitating anti-competitive practices that affect trade

The Group had an extensive discussion of factors, including government policies and measures, that could facilitate harmful anti-competitive practices by enterprises and thereby undermine the potential benefits of trade liberalization. Factors referred to in this context included:

- The existence or non-existence of a well-constituted competition law and policy;
- Statutory exemptions or protective regulatory regimes covering the conduct in question;
- A failure to adequately enforce existing laws and policies relating to anti-competitive practices;
- The existence of other government policies that implicitly or explicitly sanctioned or encouraged anti-competitive conduct; and
- The lack of effective rules governing access to essential facilities, in the context of deregulation.

Furthermore, it was noted that the problem of eradicating anti-competitive enterprise practices could be particularly challenging in circumstances where former State enterprises that had exercised self-regulatory power were privatized without steps being taken to limit their market power.

State monopolies and regulations

State monopolies and exclusive rights

In the discussion on this subject, the harm that State monopolies and exclusive rights could have on both competition and market access was widely commented on. It was noted that the WTO recognized that, in their operations, enterprises enjoying such privileges might create serious obstacles to trade. These effects could arise in the market where the exclusive rights were being exercised, upstream markets, and downstream markets. Particular reference

was made to the impact that monopoly buyers and sellers could have in restricting competition and trade, including by creating a lack of transparency and serving as a tool for the implementation of national trade policies. As a result, they could have the effect of limiting imports and introducing market distortions. Some Members referred to the positive role that State monopolies and exclusive rights had played, particularly in developing countries where market forces were sometimes still in their infancy.

Regulatory policies

Some delegations shared with the Working Group their national experience with deregulation and the benefits which had flowed from it. It was said that this experience had shown that a commitment to competitive markets, rather than regulatory approaches, as the primary instruments of economic governance yielded major benefits for competition, trade and consumer welfare, created efficiencies and promoted innovation. Results in terms of reduced consumer prices had in many cases exceeded expectations. The importance of a rigorous competition law and policy to complement market-liberalizing regulatory reforms, in order to prevent the continuation or emergence of anti-competitive practices in a deregulated market, was emphasized. The Group was informed of the results of work in OECD which had shown that there was ample evidence that regulatory reform, properly carried out and with an adequate understanding of policy linkages, could improve significantly sectoral and economy-wide economic performance, and at the same time enhance the capacity of governments to protect important public interests such as environmental and consumer protection. The Group was also informed of a recent study presented to the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy which had examined empirical evidence concerning the benefits for development of applying competition legislation. Evidence summarized in the study indicated that the replacement of administered pricing by liberal market pricing could provide importance gains in efficiency and consumer welfare.

Relationship between investment and competition policy

In the discussions in the Group, the point was made that a liberal FDI regime could increase competition in the market. A well-functioning competition policy could also help in removing obstacles to inward FDI resulting from the behaviour of incumbents and contribute towards providing an attractive legal framework for foreign investors. In this context, it was pointed out that in developing and transition economy countries in particular, FDI liberalization often constituted part of a broader policy package spanning also such areas as trade liberalization, regulatory reform and privatization as well as competition policy. It was also pointed out that a sound competition policy and law could contribute to providing an attractive environment for FDI by providing a stable and transparent legal framework of the kind familiar to many foreign investors and signalling a commitment to market institutions and mechanisms.

In the consideration of the relationship between investment and competition policy, the inconsistencies or contradictions that could arise between these policies were also discussed. It was suggested that excessive regulation of investment, for example through screening regulations or performance requirements, could harm both investment and competition. The view was expressed that not only could such measures deter beneficial flows of capital and technology with the attendant stimulation of competition in local markets, but also often proved an inferior and possibly counterproductive policy instrument when dealing with competition policy concerns. Others noted, however, that the application of a screening process for investment was not, in itself, a form of excessive regulation; rather, it was the manner in which it was applied (more liberally vs. more restrictively) which would determine whether it

constituted excessive regulation. The point was also made that competition policies that were not implemented in a transparent, stable, neutral and non-discriminatory (with regard to nationality) way could constitute a deterrent to inward investment.

The point was made that the interlinkage between trade, investment and competition was already recognized in a number of WTO instruments, such as the GATS, TRIMs and TRIPS Agreements. Reference was also made to regional arrangements where the same interlinkage was evident. The view was expressed that, apart from providing for cooperation and consultation procedures and paving the way for possibly more detailed rules, the existing WTO instruments fell short of preventing restrictive business practices or limiting regulatory abuses in the field of competition policy; the challenge was to remove the inadequacies of existing WTO rules and to increase the synergies between investment and competition policies in a more systemic manner.

Relationship between the trade-related aspects of intellectual property rights and competition policy

The relationship between intellectual property rights and competition policy raises complex issues. The aim of the exclusive property rights granted under intellectual property regimes is adequate remuneration for the assets resulting from intellectual work. The aim of competition law on the other hand is to ensure that the monopoly rights of rights holders are not exploited by them to obtain unreasonably high remuneration and that the market assigned to the property is fair and equitable.

In this context, the Group noted the change in the attitude of some competition authorities on the question of the market power of holders of intellectual property rights. There has been a reduction in the tendency of courts and competition authorities to presume that intellectual property rights such as patents necessarily give the holder market power. There is now much greater readiness to examine this issue on a case-by-case basis, recognizing, for example, that of the thousands of patents granted each year, only a relatively small minority provide significant market power.

Moreover, in the application of competition law to intellectual property issues, there is now also a much greater appreciation of efficiency benefits from the licensing of intellectual property rights, in addition to the potential anti-competitive effects that licensing arrangements can have in some cases. The national competition authorities of some countries have issued guidelines on licensing practices that would be presumed acceptable and those that might require examination by them. Where an individual licensing practice needs to be examined, this is generally done on a case-by-case basis according to a 'rule of reason' standard, by which pro-competitive benefits are weighed against anti-competitive effects.

Impact of trade policy on competition

Under this heading the Group attempted to identify aspects of trade policy and provisions in WTO law which had an impact on competition. Some delegations referred in this context to the difference in the approach to dealing with predatory pricing under competition and anti-dumping laws. 'Predatory pricing' may be defined as the practice followed by an enterprise to monopolize the market by driving competitors out of business through sales below production costs so that subsequently they can be raised above the cost level. Under competition law, complaints about anti-competitive behaviour can be made only where predatory intent on the part of the monopoly producer is established. Under the anti-dumping law, on the other hand, anti-dumping duties can be levied on imported products which are alleged to be dumped without requiring the complaining industry to establish predatory intent on the

part of exporting enterprises. However, certain other delegations felt that the purposes of anti-dumping and competition laws were fundamentally different, and that it was misguided to compare the two or to suggest that anti-dumping would benefit from the incorporation of competition policy principles.

Bilateral, regional and international agreements dealing with competition policy issues

With the liberalization of trade and investment flows on a worldwide basis, most cases raised under competition law involve the investigation of anti-competitive practices in more than one country. This has brought about the development of bilateral, regional and international cooperation agreements which aim at fostering cooperation in, and harmonized approaches to, the enforcement of competition law.

A number of regional arrangements carry provisions on cooperative arrangements for the enforcement of competition law (*see* box 58 for details).

Box 58

Regional arrangements: provisions on cooperation in the enforcement of competition law and the treatment of anti-dumping cases

Cooperation in the enforcement of competition law

The Agreement on the European Economic Area (EEA) establishes competition rules applicable to undertakings in EEA which correspond to Article 85 (general prohibition against anti-competitive practices), Article 86 (abuse of dominant position) and Article 90 (public undertakings) of the EC Treaty and to the relevant secondary legislation. The regime for merger control under the Treaty is also applied under the EEA Agreement.

The EFTA States that are contracting parties to the EEA Agreement have established a separate institutional system for the administration of these provisions. The EEA Agreement also contains provisions on the attribution of cases between the responsible EFTA authority and the EC Commission in the field of competition.

Several cooperation agreements have been set up between the competition agencies of the countries that form MERCOSUR, establishing procedures for reciprocal consultations and reciprocal technical assistance. Especially close links have been forged between the competition agencies of Argentina and Brazil; this has had a positive impact in unifying the standards used by the two agencies.

In NAFTA, the Working Group on Competition has been mandated to study the relationship between competition policy and trade in the context of the free trade area created by NAFTA. Issues so far studied by this Group on a comparative basis have included horizontal restraints, export cartels, merger control, abuse of dominance, national treatment and private rights of action. More recently, the Group has turned to studying competition cases with a transborder dimension, for instance monopolistic practices impeding market access.

Treatment of anti-dumping

Competition rules in the Closer Economic Relations Agreement between Australia and New Zealand, inter alia, provide for the non-application of anti-dumping measures on their bilateral trade. All complaints involving sales at prices below cost of production are dealt with under the competition laws of the two countries.

In the case of MERCOSUR, the Protocol for the Defence of Competition, calls on member countries to discuss from the beginning of the year 2000 how anti-dumping complaints against imports from member countries should be handled.

Among the important cooperation agreements at the international level are:

- The UNCTAD set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, adopted in 1980, and
- OECD recommendations concerning Cooperation between Member Countries on Anti-competitive Practices Affecting International Trade, revised in 1995.

Both these arrangements are recommendatory and are not legally binding. In the case of UNCTAD, implementation of the set is encouraged through regular annual meetings of a Group of Experts and related activities of the Secretariat. The OECD recommendations, on the other hand, encourage countries to establish cooperation arrangements among competition authorities in different countries. The means that have been adopted by member countries to foster such cooperation include:

- Providing notice of applicable time periods and schedules for decision-making in anti-competitive cases;
- Sharing factual and analytical information, subject to national laws governing confidentiality of information; and
- Coordinating discussions or negotiations on remedies in situations where the interests of more than one country could be affected.

Issues relating to the development of cooperation at the international level among competition authorities

Against this background, the Working Group considered the potential benefits of, and considerations that might militate against, a strengthening of international cooperation in the field of competition law and policy, to counteract the harmful effects of the anti-competitive practices of enterprises and associations on international trade.

It was recognized that cooperation already existed at a number of levels, and had been an important factor in the prosecution of a number of arrangements that had been discussed in the Group. Moreover, to be of genuine value, cooperation had to develop over time, and had to be founded on a mutuality of interest, trust and commonality of purpose. Nonetheless, the view was expressed that an expansion of cooperative approaches, including possibly at the multilateral level, was warranted. In particular, it was said that work was needed to address gaps in the remedies available to the international community in all three of the categories of anti-competitive practices of enterprises and associations that had been discussed in the Group:

- Practices affecting market access for imports;
- Practices affecting international markets, where different countries were affected in largely the same way; and
- Practices having a differential impact on the national markets of countries.

With regard to the first category, gaps could arise for the following reasons: the non-existence of a law; statutory exemptions or protective regulatory regimes covering the conduct in question; or a failure to adequately enforce a law which was applicable.

Regarding the second category, the issue was how to enhance cooperation to provide appropriate remedies for such practices, while minimizing conflicts of jurisdiction.

With regard to the third category, the question was that new arrangements for international cooperation were needed to better address these practices.

In addition, the proposals outlined below have been made for work to be done on specific anti-competitive practices, based on the degree of consensus which already appeared to exist with respect to each practice, and their clear importance for international trade.

First, regarding hard core cartels, where it was said that there was strong international consensus, there was a good prospect for adopting common enforcement efforts in this area.

Second, on export cartels, consideration needed to be given to means to strengthen the application of competition law in this area.

Third, concerning vertical agreements, it was generally recognized that a balancing of pro- and anti- competitive effects was appropriate in this area. It would be useful if the Group could identify an illustrative list of factors that might be considered by enforcement authorities in undertaking the required balancing in particular cases.

Fourth, in the area of abuse of a dominant position, the Group might usefully develop a list of abusive practices that could have the effect of foreclosing markets, and a set of criteria to be used in identifying a dominant position in a market.

Fifth, with regard to mergers, the Group might examine the scope for convergence in procedural requirements, and the feasibility of enhanced inter-agency cooperation, in order that different jurisdictions' concerns could be addressed at minimal costs.

There was, however, a divergence of views in the Group regarding the desirability and practicality of these proposals. In response to the suggestions made regarding the three specific categories of practices that had been discussed, other views expressed were as follows.

With regard to the first category of practices, in most cases, domestic competition laws should be adequate to handle this. The implication was that all countries should have, and should enforce, a well-constituted competition law. With regard to the second category of practices, it was clear that inter-agency cooperation could be helpful in addressing practices such as international cartels. At an appropriate stage, it would be helpful if agencies could deepen cooperation to the extent of sharing confidential information with each other. However, a process of mutual confidence-building and, in some cases, institution-building was needed if this was to take place. With regard to the third category, all that could reasonably be expected was that countries with overlapping interests in particular cases would consult with each other. For a variety of reasons, including different effects in different national markets as well as differing legal standards, it was inevitable that, from time to time, different jurisdictions would reach different conclusions regarding the acceptability of particular arrangements and transactions.

Focus of the Group's future work

The Group is expected to continue discussions on these and other issues raised by member countries during the deliberations it proposes to undertake in 1999. In doing such work, the General Council, has requested it to focus on:

- ❑ Approaches to promoting cooperation (on anti-competition practices) among member countries, including in the field of economic cooperation;

- The relevance of fundamental WTO principles of national treatment, transparency and most-favoured-nation treatment to competition policy and *vice versa*; and
- The contribution of competition policy to achieving the objectives of WTO, including the promotion of international trade.

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