Chapter 10
International Antitrust II
Harmonization and Convergence

There have been numerous attempts to create true international antitrust law through either treaties containing substantive antitrust rules or other efforts to closely harmonize existing national laws on the subject. In comparison to the substantial progress on matters of enforcement cooperation, all efforts at substantive international antitrust law makings have been unsuccessful to date. This chapter explores the past efforts, the reasons for their failure, and prospects for future progress.

As an introduction and overview of the past efforts of the last 60 years please read pages 349-52 of Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343 (1997), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=956669&high=%20Spencer%20Waller.

The International Trade Organization That Never Was

Following World War II, the victorious Allies planned out an ambitious series of multilateral international economic institutions that would regulate trade, investment, banking, and currency regulation. All of these institutions came into being except for the planned International Trade Organization (ITO). The ITO would have had comprehensive rules for trade in goods, labor and employment issues, and contained a chapter on restrictive business practices (antitrust). However the restrictive business practices rules in the original Havana Charter for the proposed ITO provide a tantalizing glimpse of what might have been and what may yet exist in the distant future.

Chapter V, Restrictive Business Practices, Proposed ITO Charter (1948), available at http://www.worldtradelaw.net/misc/havana.pdf (Pages 47-51)

Article 46: General Policy towards Restrictive Business Practices

1. Each Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives act forth in Article 1.

2. In order that the Organization may decide in a particular instance whether a practice has or is about to have the effect indicated in paragraph 1, the Members agree, without limiting paragraph 1, that complaints regarding any of the practices listed in paragraph 3 shall be subject to investigation in accordance with the procedure regarding complaints provided for in Articles 48 and 50, whenever (a) such a complaint is presented to the Organization, and (b) the practice is engaged in, or made effective, by one or more private or public commercial enterprises or by any combination, agreement or other arrangement between any such enterprises, and (c) such commercial enterprises, individually or collectively, possess effective control of trade among a number of countries in one or more products.

3. The practices referred to in paragraph 2 are the following:
(a) fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product:
(b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;
(c) discriminating against particular enterprises;
(d) limiting production or fixing production quotas;
(e) preventing by agreement the development or application of technology or invention whether patented or unpatented;
(f) extending the use of rights under patents, trade marks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subject of such grants;
(g) any similar practices which the Organization may declare, by a majority of two-thirds of the Members present and voting, to be restrictive business practices.

Article 47: Consultation Procedure

Any affected Member which considers that in any particular instance a practice exists (whether engaged in by private or public commercial enterprises) which has or is about to have the effect indicated in paragraph 1 of Article 46 may consult other Members directly or request the Organization to arrange for consultation with particular Members with a view to reaching mutually satisfactory conclusions. If requested by the Member and if it considers such action to be justified, the Organization shall arrange for and assist in such consultation. Action under this Article shall be without prejudice to the procedure provided for in Article 48.

Article 48: Investigation Procedure

1. In accordance with paragraphs 2 and 8 of Article 46, any affected Member on its own behalf or any Member on behalf of any affected person, enterprise or organization within that Member's jurisdiction, may present a written complaint to the Organization that in any particular instance a practice exists (whether engaged in by private or public commercial enterprises) which has or is about to have the effect indicated in paragraph 1 of Article 46; Provided that in the case of

complaints against a public commercial enterprise acting independently of any other enterprise, such complaints may be presented only by a Member on its own behalf and only after the Member has resorted to the procedure of Article 47.

2. The Organization shall prescribe the minimum information to be included in complaints under this Article. This information shall give substantial indication of the nature and harmful effects of the practices.

3. The Organization shall consider each complaint presented in accordance with paragraph 1. If the Organization deems it appropriate, it shall request Members concerned to furnish supplementary information, for example, information from commercial enterprises within their jurisdiction. After reviewing the relevant information, the Organization shall decide whether an investigation is justified.

4. If the Organization decides that an investigation is justified, it shall inform all Members of the complaint, request any Member to furnish such additional information relevant to the complaint as the Organization may deem necessary, and shall conduct or arrange for hearings on the complaint. Any Member, and any person, enterprise or organization on whose behalf the complaint has been made, as well as the commercial enterprises alleged to have engaged in the practice complained of, shall be afforded reasonable opportunity to be heard.

5. The Organization shall review all information available and decide whether the conditions specified in paragraphs 2 and 3 of Article 46 are present and the practice in question has had, has or is about to have the effect indicated in paragraph 1 of that Article.

6. The Organization shall inform all Members of its decision and the reasons therefore.

7. If the Organization decides that in any particular case the conditions specified in paragraphs 2 and 3 of Article 46 are present and that the practice in question has had, has or is about to have the effect indicated in paragraph 1 of that Article, it shall request each Member concerned to take every possible remedial action, and may also recommend to the Members concerned remedial measures to be carried out in accordance with their respective laws and procedures.

8. The Organization may request any Member concerned to report fully on the remedial action it has taken in any particular case.

9. As soon as possible after its proceedings in respect of any complaint under this Article have been provisionally or finally closed, the Organization shall prepare and publish a report showing fully the decisions reached, the reasons therefore and any measures recommended to the Members concerned. The Organization shall not, if a Member so requests, disclose confidential information furnished by that Member, which if disclosed would substantially damage the legitimate business interests of a commercial enterprise.

10. The Organization shall report to all Members and make public the remedial action which has been taken by the Members concerned in any particular case.

Article 49: Studies relating to Restrictive Business Practices

1. The Organization is authorized:
(a) to conduct studies, either on its own initiative or at the request of any Member or of any organ of the United Nations or of any other inter-governmental organization, relating to (i) general aspects of restrictive business practices affecting international trade;
(ii) conventions, laws and procedures concerning, for example, incorporation, company registration, investments, securities, prices, markets, fair trade practices, trade marks, copyrights, patents and the exchange and development of technology in so far as they are relevant to restrictive business practices affecting international trade; and
(iii) the registration of restrictive business agreements and other arrangements affecting international trade; and
(b) to request information from Members in connection with such studies.

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Article 50: Obligations of Members

1. Each Member shall take all possible measures by legislation or otherwise, in accordance with its constitution or system of law and economic organization, to ensure, within its jurisdiction, that private and public commercial enterprises do not engage in practices which are as specified in paragraphs 2 and 3 of Article 46 and have the effect indicated in paragraph 1 of that Article, and it shall assist the Organization in preventing these practices.

2. Each Member shall make adequate arrangements for presenting complaints, conducting investigations and preparing information and reports requested by the Organization.

3. Each Member shall furnish to the Organization, as promptly and as fully as possible, such information as is requested by the Organization for its consideration and investigation of complaints and for its conduct of studies under this Chapter; Provided that any Member on notification to the Organization, may withhold information which the Member considers is not essential to the Organization in conducting an adequate investigation and which, if disclosed, would substantially damage the legitimate business interests of a commercial enterprise. In notifying the Organization that it is withholding information pursuant to this clause, the Member shall indicate the general character of the information withheld and the reason why it considers it not essential.

4. Each Member shall take full account of each request, decision and recommendation of the organization under Article 48 and, in accordance with its constitution or system of law and economic organization, take in the particular case the action it considers appropriate having

regard to its obligations under this Chapter.

5. Each Member shall report fully any action taken, independently or in concert with other Members, to comply with the requests and carry out the recommendations of the Organization and, when no action has been taken, inform the Organization of the reasons therefore and discuss the matter further with the Organization if it so requests.

6. Each Member shall, at the request of the Organization, take part in consultations and conferences provided for in this Chapter with a view to reaching mutually satisfactory conclusions.

Article 51: Co-operative Remedial Arrangements

1. Members may co-operate with each other for the purpose of making more effective within their respective jurisdictions any remedial measures taken in furtherance of the objectives of this Chapter and consistent with their obligations under other provisions of this Charter.

2. Members shall keep the Organization informed of any decision to participate in any such co-operative action and of any measures taken.

Article 52: Domestic Measures against Restrictive Business Practices

No act or omission to act on the part of the Organization shall preclude any Member from enforcing any national statute or decree directed towards preventing monopoly or restraint of trade.

Article 53: Special Procedures with respect to Services

1. The Members recognize that certain services, such as transportation, telecommunications, insurance and the commercial services of banks, are substantial elements of international trade and that any restrictive business practices by enterprises engaged in these activities in international trade may have harmful effects similar to those indicated in paragraph 1 of Article 46. Such practices shall be dealt with in accordance with the following paragraphs of this Article.

2. If any Member considers that there exist restrictive business practices in relation to a service referred to in paragraph 1 which have or are about to have such harmful effects, and that its interests are thereby seriously prejudiced, the Member may submit a written statement explaining the situation to the Member or Members whose private or public enterprises are engaged in the services in question. The Member or Member concerned shall give sympathetic consideration to the statement and to such proposals as may be made and shall afford adequate opportunities for consultation, with a view to effecting a satisfactory adjustment.

3. If no adjustment can be effected in accordance with the provisions of paragraph 2, and if the

matter is referred to the Organization, it shall be transferred to the appropriate inter-governmental organization, if one exists, with such observations as the Organization may wish to make. If no such inter-governmental organization exists, and if Members so request, the Organization may, in accordance with the provisions of paragraph 1 (c) of Article 72, make recommendations for, and promote international agreement on, measures designed to remedy the particular situation so far as it comes within the scope of this Charter.

4. The Organization shall, in accordance with paragraph 1 of Article 87, co-operate with other inter-governmental organizations in connection with, restrictive business practices affecting any field coming within the scope of this Charter and those organizations shall be entitled to consult the Organization, to seek advice, and to ask that a study of a particular problem be made.

Article 54: Interpretation and Definition

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2. For the purposes of this Chapter
(a) the term "business practice" shall not be so construed as to include an individual contract between two parties as seller and buyer, lessor and lessee, or principal and agent, provided that such contract is not used to restrain competition, limit access to markets or foster monopolistic control;
(b) the term "public commercial enterprises" means
(i) agencies of governments in so far as they are engaged in trade, and
(ii) trading enterprises mainly or wholly owned by public authority, provided the Member concerned declares that for the purposes of this Chapter it has effective control over or assumes responsibility for the enterprises;
(c) the term "private commercial enterprises" means all commercial enterprises other than public commercial enterprises;

Notes

1) Consider how far reaching the Havana Charter's competition provisions were for their time. They covered competition issues with respect to trade in both goods and services and covered both private and public restraints of trade. What changes in United States antitrust law and enforcement would the Havana Charter have required?

2) The ambitious and comprehensive nature of the competition provisions were one of many reasons that the United States Congress never ratified the Havana Charter and the ITO never came into existence. In order to continue to liberalize international trade, President Truman used powers previously granted the Executive Branch by Congress to proclaim into being the General Agreement on Tariffs and Trade, a more limited trade agreement designed to negotiate binding tariff reductions on trade in goods only.

3) Although the Havana Charter never came into existence, note the echoes of its competition provisions in the subsequent efforts to negotiate multilateral competition rules.

4) The GATT had no direct rules dealing with antitrust matters and moreover had an informal understanding that its dispute settlement procedures would not be used for antitrust-related matters. See GATT 1960 Report on Restrictive Business Practices, available at http://www.worldtradelaw.net/misc/rbp2.pdf the text of which follows below.

Restrictive Business Practices: Arrangements for Consultations, Report of Experts, Adopted 2 June 1960, L/1015, BISD 9S/170

1. The Group of experts, appointed by the Executive Secretary, met in Geneva from 15 to 24 June 1959. The Group was composed of experts from the following twelve countries: Austria, Canada, Denmark, Federal Republic of Germany, France, Japan, Kingdom of the Netherlands, Norway, Sweden, Switzerland, United Kingdom, and United States. These are the countries which responded to the enquiry which the Executive Secretary addressed to twenty-one countries inviting them to make experts available.

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3. The members of the Group were familiar with the documentation submitted to them and with the lengthy discussions on this subject that have taken place through the past fifteen years: the work of the Preparatory Committee of the United Nations Conference on Trade and Employment, the Havana Charter, the discussions in the Economic and Social Council of the United Nations and the reports of its Ad Hoc Committee, the proposals put forward to the CONTRACTING PARTIES including those examined at their review session, the discussions of these matters at sessions of the CONTRACTING PARTIES, and the analysis of these various endeavours published by the CONTRACTING PARTIES in May 1959. All these were taken into account in their deliberations, and also the provisions of the Treaty establishing the European Coal and Steel Community and of the Rome Treaty relating to rules governing competition and the work done in this field by the Organisation for European Economic Co-operation and by the Council of Europe.

4. The Group noted the views of the CONTRACTING PARTIES that the activities of international cartels and trusts may hamper the expansion of world trade and interfere with the objectives of GATT. With these postulates the members of the Group were in full accord although they felt that sufficient evidence was not available to judge the extent of the actual damage to world trade which results from these practices. Something more than has been attempted in the past should now be undertaken and, therefore, the Group give an affirmative answer to the first question in their terms of reference, i.e., whether the CONTRACTING

PARTIES should undertake to deal with these matters. Members agreed that the CONTRACTING PARTIES should now be regarded as an appropriate and competent body to initiate action in this field.

5. In discussion of the other two questions in their terms of reference, i.e., to what extent and how the CONTRACTING PARTIES should undertake to deal with these matters, the Group agreed to recommend that the CONTRACTING PARTIES should encourage direct consultations between contracting parties with a view to the elimination of the harmful effects of particular restrictive practices.

6. The Group also agreed that further measures should be recommended to the CONTRACTING PARTIES, but despite efforts to reach a common view some differences of opinion remained on the nature of further measures to be recommended.

Notes

1) The GATT as a result of the limited nature of its express provisions and the 1960 Recommendation set forth above, proved to be unsuited for the bringing or resolution of disputes relating to competition law.

2) As a result of these limitations, the United Nations was the next significant international organization to examine competition law and policy.

3) After years of laborious negotiations, the United Nations General Assembly unanimously passed in 1980 the following voluntary principles relating to restrictive business practices. Consider these principles in light of the fact of the fact that they were enacted at the height of the Cold War and received the support of the Western developed nations, the Soviet bloc, and the group of non-aligned (primarily developing) countries.

1980 UNCTAD Set of Equitable Principles on Restrictive Business Practices, available at http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf

A. Objectives

Taking into account the interests of all countries, particularly those of developing countries, the Set of Multilaterally Agreed Equitable Principles and Rules are framed in order to achieve the following objectives:

1. To ensure that restrictive business practices do not impede or negate the realization of benefits

that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries;

2. To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through:
(a) The creation, encouragement and protection of competition;
(b) Control of the concentration of capital and/or economic power;
(c) Encouragement of innovation;

3. To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;

4. To eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries;

5. To provide a Set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices for adoption at the international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels.

B. Definitions and scope of application

For the purpose of this Set of Multilaterally Agreed Equitable Principles and Rules:

1. “Restrictive business practices” means acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises, have the same impact.

2. “Dominant position of market power” refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.

3. “Enterprises” means firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, private or State, which are engaged in commercial activities, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them.

4. The Set of Principles and Rules applies to restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing

countries and the economic development of these countries. It applies irrespective of whether such practices involve enterprises in one or more countries.

5. The “principles and rules for enterprises, including transnational corporations” apply to all transactions in good and services.

6. The “principles and rules for enterprises, including transnational corporations” are addressed to all enterprises.

7. The provisions of the Set of Principles and Rules shall be universally applicable to all countries and enterprises regardless of the parties involved in the transactions, acts or behaviour.

8. Any reference to “States” or “Governments” shall be construed as including any regional groupings of States, to the extent that they have competence in the area of restrictive business practices.

9. The Set of Principles and Rules shall not apply to intergovernmental agreements, nor to restrictive business practices directly caused by such agreements.

C. Multilaterally agreed equitable principles for the control of restrictive business practices

In line with the objectives set forth, the following principles are to apply:

(i) General principles

1. Appropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal with, restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of these countries.

2. Collaboration between Governments at bilateral and multilateral levels should be established and, where such collaboration has been established, it should be improved to facilitate the control of restrictive business practices.

3. Appropriate mechanisms should be devised at the international level and/or the use of existing international machinery improved to facilitate exchange and dissemination of information among Governments with respect to restrictive business practices.

4. Appropriate means should be devised to facilitate the holding of multilateral consultations with regard to policy issues relating to the control of restrictive business practices.

5. The provisions of the Set of Principles and Rules should not be construed as justifying conduct

by enterprises which is unlawful under applicable national or regional legislation.

6. In order to ensure the fair and equitable application of the Set of Principles and Rules, States, while bearing in mind the need to ensure the comprehensive application of the Set of Principles and Rules, should take due account of the extent to which the conduct of enterprises, whether or not created or controlled by States, is accepted under applicable legislation or regulations, bearing in mind that such laws and regulations should be clearly defined and publicly and readily available, or is required by States.

7. In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:
(a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy, and
(b) Encouraging their economic development through regional or global arrangements among developing countries.

D. Principles and Rules for enterprises, including transnational corporations

1. Enterprises should conform to the restrictive business practices laws, and the provisions concerning restrictive business practices in other laws, of the countries in which they operate, and, in the event of proceedings under these laws, should be subject to the competence of the courts and relevant administrative bodies therein.

2. Enterprises should consult and co-operate with competent authorities of countries directly affected in controlling restrictive business practices adversely affecting the interests of those countries. In this regard, enterprises should also provide information, in particular details of restrictive arrangements, required for this purpose, including that which may be located in foreign countries, to the extent that in the latter event such production or disclosure is not prevented by applicable law or established public policy. Whenever the provision of information is on a voluntary basis, its provisions should be in accordance with safeguards normally applicable in this field.

3. Enterprises, except when dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to act independently of each other, engaged on the market in rival or potentially rival activities, should refrain from practices such as the following when, through formal, informal, written or unwritten agreements or arrangements, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:
(a) Agreements fixing prices, including as to exports and imports;

(b) Collusive tendering;
(c) Market or customer allocation arrangements;
(d) Allocation by quota as to sales and production;
(e) Collective action to enforce arrangements, e .g. by concerted refusals to deal;
(f) Concerted refusal of supplies to potential importers;
(g) Collective denial of access to an arrangement, or association, which is crucial to competition.

4. Enterprises should refrain from the following acts or behaviour in a relevant market when, through an abuse or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:
(a) Predatory behaviour towards competitors, such as using below cost pricing to eliminate competitors;
(b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods and services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;
(c) Mergers, takeovers, joint ventures or other acquisitions of control, whether of a horizontal, vertical or a conglomerate nature;
(d) Fixing the prices at which goods exported can be resold in importing countries;
(e) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i. e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence and where the purpose of such restrictions is to maintain artificially high prices;
(f) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:
(i) Partial or complete refusals to deal on the enterprise's customary commercial terms;
(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;
(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;
(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee.

E. Principles and Rules for States at National, Regional and Subregional levels

1. States should, at the national level or through regional groupings, adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative

procedures for the control of restrictive business practices, including those of transnational corporations.

2. States should base their legislation primarily on the principle of eliminating or effectively dealing with acts or behavior of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on their trade or economic development, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact.

3. States, in their control of restrictive business practices, should ensure treatment of enterprises which is fair, equitable, on the same basis to all enterprises, and in accordance with established procedures of law. The laws and regulations should be publicly and readily available.

4. States should seek appropriate remedial or preventive measures to prevent and/or control the use of restrictive business practices within their competence when it comes to the attention of States that such practices adversely affect international trade, and particularly the trade and development of the developing countries.

5. Where, for the purposes of the control of restrictive business practices, a State obtains information from enterprises containing legitimate business secrets, it should accord such information reasonable safeguards normally applicable in this field, particularly to protect its confidentiality.

6. States should institute or improve procedures for obtaining information from enterprises including transnational corporations, necessary for their effective control or restrictive business practices, including in this respect details of restrictive agreements, understandings and other arrangements.

7. States should establish appropriate mechanisms at the regional and subregional levels to promote exchange of information on restrictive business practices and on the application of national laws and policies in this area, and to assist each other to their mutual advantage regarding control of restrictive business practices at the regional and subregional levels.

8. States with greater expertise in the operation of systems for the control or restrictive business practices should, on request, share their experience with, or otherwise provide technical assistance to other States wishing to develop or improve such systems.

9. States should, on request, or at their own initiative when the need comes to their attention, supply to other States, particularly developing countries, publicly available information, and, to the extent consistent with their laws and established public policy, other information necessary to the receiving interested State for its effective control of restrictive business practices.

F. International measures

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

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

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5. Continued work within UNCTAD on the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation. States should provide necessary information and experience to UNCTAD in this connection.

6. Implementation within or facilitation by UNCTAD,and other relevant organizations of the United Nations system in conjunction with UNCTAD, of technical assistance, advisory and training programmes on restrictive business practices, particularly for developing countries:
(a) Experts should be provided to assist developing countries, at their request, in formulating or improving restrictive business practices legislation and procedures;
(b) Seminars, training programmes or courses should be held, primarily in developing countries,to train officials involved or likely to be involved in administering restrictive business practices legislation and, in this connection, advantage should be taken, inter alia, of the experience and knowledge of administrative authorities, especially in developed countries, in detecting the use of restrictive business practices;
(c) A handbook on restrictive business practices legislation should be compiled;
(d) Relevant books, documents, manuals and any other information on matters related to restrictive business practices should be collected and made available, particularly to developing countries;
(e) Exchange of personnel between restrictive business practices authorities should be arranged and facilitated;
(f) International conferences on restrictive business practices legislation and policy should be

arranged;
(g) Seminars for an exchange of views on restrictive business practices among persons in the public and private sectors should be arranged.

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G. International Institutional Machinery

1. An Intergovernmental Group of Experts on Restrictive Business Practices operating within the framework of a Committee of UNCTAD will provide the institutional machinery.

2. States which have accepted the Set of Principles and Rules should take appropriate steps at the national or regional levels to meet their commitment to the Set of Principles and Rules.

3. The Intergovernmental Group shall have the following functions:
(a) To provide a forum and modalities for multilateral consultations, discussion and exchange of views between States on matters related to the Set of Principles and Rules, in particular its operation and the experience arising therefrom;
(b) To undertake and disseminate periodically studies and research on restrictive business practices related to the provisions of the Set of Principles and Rules, with a view to increasing exchange of experience and giving greater effect to the Set of Principles and Rules;
(c) To invite and consider relevant studies, documentation and reports from relevant organizations of the United Nations system;
(d) To study matters relating to the Set of Principles and Rules and which might be characterized by data covering business transactions and other relevant information obtained upon request addressed to all States;
(e) To collect and disseminate information on matters relating to the Set of Principles and Rules to the overall attainment of its goals and to the appropriate steps States have taken at the national or regional levels to promote an effective Set of Principles and Rules, including its objectives and principles;
(f) To make appropriate reports and recommendations to States on matters within its competence, including the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules;
(g) To submit reports at least once a year on its work.

4. In the performance of its functions, neither the Intergovernmental Group nor its subsidiary organs shall act like a tribunal or otherwise pass judgement on the activities or conduct of individual Governments or of individual enterprises in connection with a specific business transaction. The Intergovernmental Group or its subsidiary organs should avoid becoming involved when enterprises to a specific business transaction are in dispute.

Notes

1) Is the UNCTAD RBP Code antitrust as all in the sense that term is normally used in the US? In the EU? In developing countries?

2) Can competition law be combined with economic development goals? What does special and preferential treatment for developing countries mean in competition law?

3) Note in the definitions that the RBP Code does not apply to "intergovernmental organizations." What does this refer to? Is this provision wise?

4) Pursuant to the 1980 RBP Code, UNCTAD also drafted a Model Law for Possible Adoption by UN member countries. It has served as an inspiration for a number of laws adpted by developing countries. See 1998 UNCTAD Model Law on Restrictive Business Practices, available at http://www.unctad.org/en/docs/tbrbp81r5.pdf for the full text of the law and commentary on its provisions.

UNCTAD Model Law on Restrictive Business Practices

POSSIBLE ELEMENTS FOR ARTICLE 1

OBJECTIVES OR PURPOSE OF THE LAW

To control or eliminate restrictive agreements or arrangements among enterprises, or acquisition and/or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.

POSSIBLE ELEMENTS FOR ARTICLE 2

DEFINITIONS AND SCOPE OF APPLICATION

I. Definitions

(a) "Enterprises" means firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the State, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.
(b) "Dominant position of market power" refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a

particular good or service or group of goods or services.
(c) “Relevant market” refers to the line of commerce in which competition has been restrained and to the geographic area involved, defined to include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn in the near term if the restraint or abuse raised prices by a not insignificant amount.

II. Scope of application

(a) Applies to all enterprises as defined above, in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property.
(b) Applies to all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by the law.
(c) Does not apply to the sovereign acts of the State itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power.

POSSIBLE ELEMENTS FOR ARTICLE 3

RESTRICTIVE AGREEMENTS OR ARRANGEMENTS

I. Prohibition of the following agreements between rival or potentially rival firms, regardless of whether such agreements are written or oral, formal or informal:
(a) Agreements fixing prices or other terms of sale, including in international trade;
(b) Collusive tendering;
(c) Market or customer allocation;
(d) Restraints on production or sale, including by quota;
(e) Concerted refusals to purchase;
(f) Concerted refusal to supply;
(g) Collective denial of access to an arrangement, or association, which is crucial to competition.

II. Authorization
Practices falling within paragraph I, when properly notified in advance, and when made by firms subject to effective competition, may be authorized when competition officials conclude that the agreement as a whole will produce net public benefit.

POSSIBLE ELEMENTS FOR ARTICLE 4

ACTS OR BEHAVIOUR CONSTITUTING AN ABUSE, OR ACQUISITION AND ABUSE, OF A DOMINANT POSITION OF MARKET POWER

I. Prohibition of acts or behaviour involving an abuse, or acquisition and abuse, of a dominant position of market power

A prohibition on acts or behaviour involving an abuse or acquisition and abuse of a dominant position of market power:
(i) Where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services;
(ii) Where the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on trade or economic development.

II. Acts or behaviour considered as abusive:
(a) Predatory behaviour towards competitors, such as using below-cost pricing to eliminate competitors;
(b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;
(c) Fixing the prices at which goods sold can be resold, including those imported and exported;
(d) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence, and where the purpose of such restrictions is to maintain artificially high prices;
(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:
(i) Partial or complete refusal to deal on an enterprise's customary commercial terms;
(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;
(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;
(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee;
(f) Mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical, or a conglomerate nature, when:
(i) At least one of the enterprises is established within the country; and
(ii) The resultant market share in the country, or any substantial part of it, relating to any product or service, will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms.

III. Authorization

Acts, practices or transactions not absolutely prohibited by the law may be authorized if they are

notified, as described in article 6, before being put into effect, if all relevant facts are truthfully disclosed to competent authorities, if affected parties have an opportunity to be heard, and if it is then determined that the proposed conduct, as altered or regulated if necessary, will be consistent with the objectives of the law.

POSSIBLE ELEMENTS FOR ARTICLE 5

SOME POSSIBLE ASPECTS OF CONSUMER PROTECTION

In a number of countries, consumer protection legislation is separate from restrictive business practices legislation.

POSSIBLE ELEMENTS FOR ARTICLE 6

NOTIFICATION

I. Notification by enterprises

1. When practices fall within the scope of articles 3 and 4 and are not prohibited outright, and hence the possibility exists for their authorization, enterprises could be required to notify the practices to the Administering Authority, providing full details as requested.

2. Notification could be made to the Administering Authority by all the parties concerned, or by one or more of the parties acting on behalf of the others, or by any persons properly authorized to act on their behalf.

3. It could be possible for a single agreement to be notified where an enterprise or person is party to restrictive agreements on the same terms with a number of different parties, provided that particulars are also given of all parties, or intended parties, to such agreements.

4. Notification could be made to the Administering Authority where any agreement, arrangement or situation notified under the provisions of the law has been subject to change either in respect of its terms or in respect of the parties, or has been terminated (otherwise than by affluxion of time), or has been abandoned, or if there has been a substantial change in the situation (within ( ) days/months of the event) (immediately).

5. Enterprises could be allowed to seek authorization for agreements or arrangements falling within the scope of articles 3 and 4, and existing on the date of the coming into force of the law, with the proviso that they be notified within (( ) days/months) of such date.

6. The coming into force of agreements notified could depend upon the granting of authorization, or upon expiry of the time period set for such authorization, or provisionally upon notification.

7. All agreements or arrangements not notified could be made subject to the full sanctions of the law, rather than mere revision, if later discovered and deemed illegal.

II. Action by the Administering Authority

1. Decision by the Administering Authority (within ( ) days/months of the receipt of full notification of all details), whether authorization is to be denied, granted or granted subject where appropriate to the fulfilment of conditions and obligations.

2. Periodical review procedure for authorizations granted every ( ) months/years, with the possibility of extension, suspension, or the subjecting of an extension to the fulfilment of conditions and obligations.

3. The possibility of withdrawing an authorization could be provided, for instance, if it comes to the attention of the Administering Authority that:
(a) The circumstances justifying the granting of the authorization have ceased to exist;
(b) The enterprises have failed to meet the conditions and obligations stipulated for the granting of the authorization;
(c) Information provided in seeking the authorization was false or misleading.

POSSIBLE ELEMENTS FOR ARTICLE 7

THE ADMINISTERING AUTHORITY AND ITS ORGANIZATION

1. The establishment of the Administering Authority and its title.

2. Composition of the Authority, including its chairmanship and number of members, and the manner in which they are appointed, including the authority responsible for their appointment.

3. Qualifications of persons appointed.

4. The tenure of office of the chairman and members of the Authority, for a stated period, with or without the possibility of reappointment, and the manner of filling vacancies.

5. Removal of members of the Authority.

6. Possible immunity of members against prosecution or any claim relating to the performance of their duties or discharge of their functions.

7. The appointment of necessary staff.

POSSIBLE ELEMENTS FOR ARTICLE 8

FUNCTIONS AND POWERS OF THE ADMINISTERING AUTHORITY

I. The functions and powers of the Administering Authority could include (illustrative):
(a) Making inquiries and investigations, including as a result of receipt of complaints;
(b) Taking the necessary decisions, including the imposition of sanctions, or recommending same to a responsible minister;
(c) Undertaking studies, publishing reports and providing information to the public;
(d) Issuing forms and maintaining a register, or registers, for notifications;
(e) Making and issuing regulations;
(f) Assisting in the preparation, amending or review of legislation on restrictive business practices, or on related areas of regulation and competition policy;
(g) Promoting exchange of information with other States.

II. Confidentiality:

1. According information obtained from enterprises containing legitimate business secrets reasonable safeguards to protect its confidentiality.

2. Protecting the identity of persons who provide information to competition authorities and who need confidentiality to protect themselves against economic retaliation.

3. Protecting the deliberations of government in regard to current or still uncompleted matters.

POSSIBLE ELEMENTS FOR ARTICLE 9

SANCTIONS AND RELIEF

I. The imposition of sanctions, as appropriate, for:
(i) Violations of the law;
(ii) Failure to comply with decisions or orders of the Administering Authority, or of the appropriate judicial authority;
(iii) Failure to supply information or documents required within the time limits specified;
(iv) Furnishing any information, or making any statement, which the enterprise knows, or has any reason to believe, to be false or misleading in any material sense;
II. Sanctions could include:
(i) Fines (in proportion to the secrecy, gravity and clear-cut illegality of offences or in relation to the illicit gain achieved by the challenged activity);
(ii) Imprisonment (in cases of major violations involving flagrant and intentional breach of the law, or of an enforcement decree, by a natural person);
(iii) Interim orders or injunctions;

(iv) Permanent or long-term orders to cease and desist or to remedy a violation by positive conduct, public disclosure or apology, etc.;
(v) Divestiture (in regard to completed mergers or acquisitions), or rescission (in regard to certain mergers, acquisitions or restrictive contracts);
(vi) Restitution to injured consumers;
(vii) Treatment of the administrative or judicial finding or illegality as prima facie evidence of liability in all damage actions by injured persons.

POSSIBLE ELEMENTS FOR ARTICLE 10

APPEALS

1. Request for review by the Administering Authority of its decisions in light of changed circumstances.

2. Affording the possibility for any enterprise or individual to appeal within ( ) days to the (appropriate judicial authority) against the whole or any part of the decision of the Administering Authority, (or) on any substantive point of law.

POSSIBLE ELEMENTS FOR ARTICLE 11

ACTIONS FOR DAMAGES

To afford a person, or the State on behalf of the person who, or an enterprise which, suffers loss or damages by an act or omission of any enterprise or individual in contravention of the provisions of the law, to be entitled to recover the amount of the loss or damage (including costs and interest) by legal action before the appropriate judicial authorities.

Notes

1) One of the most ambitious efforts to craft a multilateral competition code took place in the so-called Munich Group which was a private effort of leading competition scholars to create an enforceable code of competition rules for adoption as a plurilateral (optional) code by the World Trade Organization (WTO). Although never adopted by the WTO or any other body, it shows the potential value of competition rules to support the rules of free trade enforced by bodies like the WTO. *See* Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (International Antitrust Code Working Group Proposed Draft 1993), published and released July 10, 1993 reprinted in 65 Antitrust & Trade Reg. Rep. (BNA) No. 1628 (Aug. 19, 1993) (Special Supp.).

2) One of the participants in the Munich Code process was Professor Eleanor M. Fox who has argued eloquently for a cosmopolitan view of trade and competition principles to ensure a system of market access that benefits the world trading system and not merely one country. *See* Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1 (1997).

3) The Paris-based OECD is a group of the largest market oriented democracies in the world. Originally limited to the North American and European countries in the wake of World War II, the OECD has expanded to thirty members. However, the OECD is still smaller and more homogenous than almost any other international organization dealing with international economic law and policy. It has an active agenda in the competition law area but limits itself to studies and non-binding recommendations. Long a leader in recommending cooperation in antitrust investigations and enforcement actions, the OECD in 1998 finally enacted a "substantive" recommendation aimed at eliminating "hard core" cartels in the economies of its many nations.

OECD Hard Core Cartel Recommendation, available at
http://www.oecd.org/dataoecd/39/4/2350130.pdf

Recommendation of the Council Concerning Effective Action Against Hard Core Cartels
(Unclassified C(98)35/FINAL, May 13, 1998)

1. Member countries should ensure that their competition laws effectively halt and deter hard core cartels. In particular, their laws should provide for:
a) effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and
b) enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance.

2. For purposes of this Recommendation:
a) a "hard core cartel" is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce;
b) the hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorised in accordance with those laws.
However, all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and

no broader than necessary to achieve their overriding policy objectives.
After the issuance of this Recommendation, Members should provide the Organisation annual notice of any new or extended exclusion or category of authorisation.

B. INTERNATIONAL CO-OPERATION AND COMITY IN ENFORCING LAWS PROHIBITING HARD CORE CARTELS

1. Member countries have a common interest in preventing hard core cartels and should co-operate with each other in enforcing their laws against such cartels. In this connection, they should seek ways in which co-operation might be improved by positive comity principles applicable to requests that another country remedy anticompetitive conduct that adversely affects both countries, and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries' important interests.

2. Co-operation between or among Member countries in dealing with hard core cartels should take into account the following principles:
a) the common interest in preventing hard core cartels generally warrants co-operation to the extent that such co-operation would be consistent with a requested country's laws, regulations, and important interests;
b) to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, Member countries' mutual interest in preventing hard core cartels warrants cooperation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process;
c) a Member country may decline to comply with a request for assistance, or limit or condition its co-operation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests or on any other grounds, including its competition authority's resource constraints or the absence of a mutual interest in the investigation or proceeding in question;
d) Member countries should agree to engage in consultations over issues relating to cooperation.
In order to establish a framework for their co-operation in dealing with hard core cartels, Member countries are encouraged to consider entering into bilateral or multilateral agreements or other instruments consistent with these principles.

3. Member countries are encouraged to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

4. The co-operation contemplated by this Recommendation is without prejudice to any other cooperation that may occur in accordance with prior Recommendations of the Council, pursuant

to any applicable bilateral or multilateral agreements to which Member countries may be parties, or otherwise.

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III. INVITES non-Member countries to associate themselves with this Recommendation and to implement it.

Notes

1) What does the recommendation require and permit in terms of treatment of cartels? How does it compare to the current treatment of cartels in the US, EU and other member jurisdictions?

2) How much of a breakthrough is the OECD hard core cartel recommendation?

3) Can one make a plausible argument that some form of an anti-cartel rule has reached sufficient worldwide acceptance to constitute a rule of customary international law?

4) Although the WTO contains a number of provisions in its various codes on trade in goods, service and intellectual property rights that mention competition principles, they have been rarely invoked in the WTO dispute resolution procedures. The most direct analysis of competition principles in a WTO dispute resolution panel report came in the 2004 TELMEX decision.[1] In Telmex, the United States challenged a set of Mexican laws and administrative rules that allowed the dominant Mexican telecommunications firms to set unlawfully high connection charges for long distance calls terminating in Mexico and further set up a de facto cartel with smaller carriers at that unlawfully high rate, preventing both price competition from occurring which would have benefitted the foreign firms and also interfering with market access for the foreign telecommunications companies. The United States WTO claim was based on provisions in the General Agreement on Trade and Services, the Annex on Telecommunications, and the

[1] Mexico – Measures Affecting Telecommunications Services, 2004 WL 742530 (Apr. 2, 2004 WTO). *See generally* Eleanor M. Fox, "The WTO's First Antitrust Case – *Mexico Telecom*: A Sleeping Victory for Trade and Competition," 9 J. Int'l Econ. L. 271 (2006)(praising decision as promoting links between trade and competition policy). For more critical views of the Mexican telecom case see Petros C. Mavroides & Damien Nevins, "El Mess in TELMEX: A Comment on Mexico – Measures Affecting Telecommunications Services," 5 World Trade Rev. 271 (2006); J. Gregory Sidak & Hal J. Singer, "Uberregulation Without Economics: The World Trade Organization's Decision in the U.S.-Mexico Arbitration on Telecommunications Services," 57 Fed. Comm. L.J. 1 (2004).

competitive safeguards provisions of the Reference Paper that is part of Mexico's Schedule of Commitments governing the opening of its domestic telecommunications market.

The Reference Paper stated "Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, area major supplier from engaging in or continuing anticompetitive practices." The Reference Paper further provided a number of examples of prohibited anticompetitive behavior including cross-subsidization, misusing information obtained from rivals, and failing to make available information to rivals about essential facilities, but did not contain any specific references to cartels or monopoly pricing. Despite this omission, the WTO Panel rejected Mexico's legal and factual defenses and found that TELMEX's behavior and the legal structure upon which they were based constituted a violation of the relevant competition provisions of the Reference Paper and ordered that Mexico bring its practices into compliance with WTO rules.

5) For an argument that the WTO should more actively use existing competition provisions in dispute settlement procedures see Spencer Weber Waller, 34 New England L. Rev. 163 (1999), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984490.

6) Despite the availability of WTO dispute settlement procedures for certain competition based controversies between WTO members, a more direct effort was made at introducing some form of competition law directly into the WTO through the most recent multilateral trade negotiations, dubbed the Doha Round, which were intended to address the needs of developing countries. The objectives for the trade and competition provisions were laid out in the 2001 WTO Declaration that follows.

2001 WTO Ministerial Declaration from Doha Round of Negotiations

Interaction between trade and competition policy

23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this

end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

Notes

1) The Doha Agenda created strange bedfellows. The European Union was the most consistent advocate for incorporating competition rules into the WTO system. The United States opposed such efforts. Most developing countries expressed a series of different concerns ranging from an opposition to competition law in principle, to claims that competition law was part of an agenda of forced opening of their economy to Western multinational corporation, to an objection to taking on obligations ill-suited to their economic needs.

2) What best explains the negotiating postures of the players in the trade and competition debate?

3) Are lesser developed countries correct in their suspicious attitudes toward multilateral rules requiring the adoption and non-discriminatory application of competition law?

3) By 2004, the Doha Round was in trouble for reasons that had little to do with the debates over the merits of competition policy at the WTO. In order to simplify the negotiating agenda, trade and competition and other "frontier" issues were taken off the negotiating agenda. No further negotiations or proposals regarding systematically incorporating competition principles into the WTO have ensued.

International Competition Network

The most recent multilateral body to participate in the formation of competition policy is the International Competition Network (ICN). The (ICN) seeks to provide competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical

competition concerns. It is focused on improving worldwide cooperation and enhancing convergence through dialogue. The ICN is a virtual organization with no permanent headquarters or staff.

The ICN is unique. It is the only international body devoted exclusively to competition law enforcement. Membership is voluntary and open to any national or multinational competition authority entrusted with the enforcement of antitrust laws. The ICN does not exercise any rule-making function. The initiative is project-oriented, flexibly organized around working groups, the members of which work together largely by Internet, telephone, fax machine and video conference. Annual conferences and meetings provide opportunities to discuss these projects and their implications for enforcement. Where the ICN reaches consensus on recommendations, or "best practices", arising from the projects, it is left to the individual competition authorities to decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate.

The concept for the ICN came directly out of the recommendations of the International Competition Policy Advisory Committee (ICPAC), a group formed in 1997 by then U.S. Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel Klein. ICPAC was commissioned to think broadly about international competition in the context of economic globalization and focused on issues like multi-jurisdictional merger review, the interface between trade and competition, and the future direction for cooperation between antitrust agencies. In its final report, issued in February 2000, ICPAC called on the United States to explore the creation of a new venue — a "Global Competition Initiative" — where government officials, as well as private firms and non-governmental organisations, would be able to consult on antitrust matters. ICPAC recommended that the Global Competition Initiative be directed toward a "greater convergence of competition law and analysis, common understanding, and common culture."

Recognizing that the best way to promote sound and effective antitrust enforcement in the wake of increased economic globalization is through a network of competition authorities and other specialists from around the globe, government officials and members of the antitrust bar embraced ICPAC's recommendations for a Global Competition Initiative. At a conference held to commemorate the 10th anniversary of the EC Merger Control Regulation, in Brussels in September 2000, both Joel Klein and Mario Monti, European Commissioner for Competition, expressed their support for such an initiative. Shortly thereafter, at the Fordham Corporate Law Institute's annual conference on international antitrust law and policy, A. Douglas Melamed, then Acting Assistant Attorney General for the U.S., and Commissioner Mario Monti, reiterated their agencies' support for the initiative and offered additional insight.

Following these endorsements, the International Bar Association convened a meeting of more than 40 of the world's senior competition officials and practitioners in Ditchley Park, England in early February 2001 to discuss the feasibility of a global antitrust network. The Ditchley Park discussions were positive and forward-looking, and there was great support for the idea of establishing a new organisation directed exclusively at international antitrust enforcement.

In October 2001, top antitrust officials from 14 jurisdictions – Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia – launched the ICN. As of January 2007 there were 82 member jurisdictions.

Most of the work of the ICN is done through working groups which include both government officials and representatives from the private sector and academia. **See e.g.** the Merger Group at http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/mergers.

Notes

1) How does the ICN differ from the previous attempts to create multilateral competition law?

2) Is its search for consensus and "best practices" make it more or less likely to succeed in comparison to past efforts?

3) Which jurisdictions and interest groups have the most influence in the ICN process? Is this a healthy process?

4) The European Union (EU) is the only supra-national body that has a binding set of competition policy and an effective transnational enforcement system. Competition policy has played a vital role for the EU in achieving its overarching goals of market integration and the free movement of goods, services, people, and capital. For more information about EU competition policy see ELEANOR M. FOX, CASES AND MATERIALS ON THE COMPETITION LAW OF THE EUROPEAN UNION (2002); SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD Chapter 16 (3d ed. 1997 & Annual Supp.).

5) How sui generis is the EU's competition system? Can it provide a model for other regional trading blocs or the WTO as a path for future competition policy?

6) What is the future likely to bring in terms of new initiatives and results in creating true international competition law? What remains to be done to deal with the reality of a global economy and national competition laws?