

**APEC Training Programme on Competition Policy**

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***Latest Developments in International Competition Law/Policy***

*Introduction to Remarks and Background Materials of*

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**Introduction**

It is a great pleasure and real honor to be with you today at this important training programme, and I want to offer sincere thanks to the governments of Thailand and Japan, and to their staff members – and the APEC Secretariat – who have organised this event. I know many of you and look forward to meeting the others and participating with all of you in the discussions of the next three days. In addition to my personal pleasure in seeing and making friends and visiting a fascinating city, there are at least three reasons I am so glad to be here.

First, as some of you know, I have long had a special interest in Asia. This interest stems mainly from 1968-69, when I spent almost a year living in Japan -- and visiting other locations, including Bangkok. Almost thirty years later, when my focus at the US Federal Trade Commission switched from domestic law enforcement to international cooperation and technical assistance, I returned to Asia for consultations. And soon thereafter I retired from the FTC, became head of the OECD's programme for work with non-Members, and assumed personal responsibility for the work in Asia.

Second, my very first trip to Asia as a member of the OECD Secretariat was the first APEC-PFP training programme, which was held here in Bangkok in 1997. I found that workshop so valuable – certainly for me, and I hope for everyone – that I kept coming back. I attended four of the five APEC-PFP workshops, and know that I will learn a great deal at this first workshop in a new but similar programme.

Third, and more substantively, the increased use of competition law and policy by developing and transition countries Asia is in my view one of the most important trends in the world today. I am therefore pleased to have the opportunity to discuss with you the latest developments in this area. And because the current discussion includes matters relating to international co-operation on competition cases, as well as matters relating to technical assistance and capacity building, I hope that my experience relating to case-specific co-operation can be of benefit. At the USFTC, I negotiated co-operation agreements and supervised actual co-operation, while at the OECD, as the Secretariat member assigned to the Working Party on Co-operation, and was responsible for preparing the OECD Recommendation for Effective Action against Hard Core Cartels and several Competition Committee Reports on co-operation.

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\* From 1996 to early 2002, Walter T. ("Terry") Winslow was Head of the OECD's Competition Policy Outreach Program -- that is, its activities with non-Members. He assumed that position upon retiring from the US Federal Trade Commission's Bureau of Competition, where he initially supervised the Bureau's law enforcement -- particularly in non-merger cases -- and later oversaw international activities, including law enforcement cooperation and technical assistance to transition countries. He recently returned to the US and is working as a consultant, primarily with the OECD.

Fourth, while APEC covers much more than Asia, and the issues we are discussing affect economies throughout the world, this is a particularly important time for discussing these issues with the many Asian economies represented at this workshop.

- One reason Asia is so important is that it contains so many people, living in economies with so much economic potential. As this workshop will make clear, competition policy can be used to realise this economic potential, and to do so in ways that benefit both Asian entrepreneurs and ordinary citizens.
- Another reason Asia is so important is that particularly in Asia, there continues to be considerable misunderstanding and concern about competition policy. Many officials and private citizens confuse competition policy with what I would call “laissez faire economics.” In other words, they think that the goals and means of competition policy are to maximise competition, and they therefore fear that competition policy will leave them more vulnerable to the powerful economic forces that make up what we often call globalisation. In fact, however, competition policy does not seek to maximise competition, but rather to maximise the contribution that market forces can make to the overall welfare of society. Competition policy does not let market forces run wild, but rather is a system for regulating competition.

This workshop will focus on the two ways competition policy seeks to achieve these goals – (a) competition advocacy, which helps governments avoid and reform regulatory systems that *unnecessarily* restrict competition and thereby cause harm rather than benefit to society, and (b) competition law enforcement, which bans economic entities from practices that distort market forces and thereby lead to artificial shortages, increased prices, and reduced choice for business and individual consumers. I know that this training will be very useful to those of you that work in competition agencies or in departments that have responsibility for developing competition laws or considering competition policy issues.

However, looking at the developments in international competition policy, I hope that you will not merely use this workshop to improve your skills. It would be very unfortunate if economies of Asia and elsewhere were deprived of the benefits of competition policy because policy makers misunderstand it and therefore incorrectly see it as a threat to societal welfare rather than as a tool they can use to benefit society through promoting economic efficiency while preventing harmful anticompetitive practices. Therefore, I hope that you all will contribute to the global dialogue concerning competition policy issues by doing everything possible to eliminate this understanding.

Correcting this misunderstanding will not be easy. The message I am suggesting that you and your agencies proclaim is contained in APEC principles, and your ability to refer to those principles may ease your task. However, the fact that misunderstanding is widespread in Asia exists despite those principles should serve as a warning that really delivering the message will take a persistent effort over a long time. Another warning for you is that misunderstanding on these basic points is also fairly common in Europe and even in North America. The work will include liaison within your governments as well as speeches and other means of educating businesses, consumers, and the general public.

### **Latest Developments; Background Materials**

Even though I represent the OECD Secretariat, I think it clear that the single most important recent development in the competition policy field is the Doha declaration concerning

possible future negotiations of a WTO agreement on competition. However, as important as that event was, it is merely a part of broader developments – an increased focus by developed economies on the importance of addressing the concerns of developing economies, and a continuing increase in the attention paid to how competition law and policy can benefit developing economies. That increased attention is also reflected in the G8 resolution on assistance to Africa, the Monterrey declaration, and the communiqué recently issued by OECD Ministers.

As a general matter, developments in international competition policy can be divided into four categories.

- First, there are actual competition cases involving international cartels or mergers. That category requires no further explanation.
- Second, there is technical assistance, capacity building, and policy dialogue that are directly aimed at increasing developing economies' ability to consider, develop, and implement national competition laws and policies. Most OECD, UNCTAD, and APEC activities fall in this category, as may some activities of the new International Competition Network ("ICN"). The proposal to begin negotiations of a competition-related agreement in the WTO also has important capacity building aspects, though WTO developments also fit into my third category and in fact warrant a separate category.
- Third, there are activities aimed at making international markets more competitive through convergence, mainly by eliminating competition law provisions that impose unnecessary costs on international mergers or other business activities. The OECD engages in such activities with a focus on its Members, and it appears that the principal emphasis of the ICN is to persuade all economies to eliminate laws and policies that impose unnecessary costs on international trade. .
- Fourth, and as noted above, there are the proposals for a WTO agreement. .

In some years, the most important developments on international competition policy have related to competition cases – such as the lysine cartel -- or to the issuance of substantive competition instruments, such as the OECD's 1998 anti-cartel Recommendation. This year, however, the most important developments relate to the more general issues and themes that fit into my second, third, and fourth categories, and I will focus my attention on those areas. By way of background and clarification of the some of the issues, I will begin with a brief description of OECD activities.

### **OECD Activities**

The OECD outreach programme that I used to run is at its core a capacity building programme. The programme began about twelve years ago and focused initially on Poland, Hungary, and what was then Czechoslovakia. It rapidly expanded to include the former Soviet Union and other East European economies, and regular co-operation with Latin American economies began in 1994. I arrived on the scene in 1996, and regular, active co-operation with Asian economies began in 1997. In addition to our regular participation in the APEC-PFP programme, we have co-sponsored annual workshops with the Korea Fair Trade Commission since 1997 and with the Chinese Taipei Fair Trade Commission since 1999. In addition to these "regional" activities, we have had an active "country" programme with China since 1997.

Recently, we have begun working closely with South Africa, more generally with the Southern Africa Development Community, and still more generally with other African economies.

Like this workshop, all of these events involve what we call capacity building and some others call technical assistance. We have organised workshops for competition law enforcement officials, government officials involved in regulating natural monopoly sectors, and other officials involved in one way or another with considering competition policy issues. In addition, we have provided comments on draft laws, regulations, guidelines, etc. The goal of all these activities is to contribute to developing economies ability to (a) consider whether and to what extent it wants to adopt a competition law and/or other competition policy instruments, and (b) design and implement policy laws and policies tailored to their own perceptions of its own needs. In the last year or two, we have been working more and more on regulating natural monopoly sectors.

We believe that competition law and policy can benefit developing countries, but we have never suggested that all economies be required – by a WTO agreement or otherwise -- to enact and enforce competition law. Nor have we proposed that a WTO agreement or any other mechanism should establish minimum standards for all competition laws or require economies to accept all “requests” for co-operation. The OECD never took a position on such proposals, which were originally made by one important OECD Member – the EC – but opposed by another important OECD Member – the United States.

As a personal matter, although I have suggested that all developing economies should adopt a competition law, I have also suggested that they be wary of a WTO or other multilateral agreement *unless and until proposals to impose minimum standards and mandatory co-operation have been withdrawn*. After all, the developed economies may be confident that no dispute panel would ever find their laws inadequate under WTO standards, but developing economies cannot be confident on this score. And the concept of mandatory co-operation in law enforcement investigations raises serious sovereignty issues and could easily require developing economies to use most of their competition enforcement resources working on investigations by developed economies. Fortunately, as discussed below, it appears that these ideas may have disappeared, though some issues remain.

The OECD capacity building programme has had several important developments in the last year or so. Of course, I think all of the programme’s activities are important but will only discuss one aspect of our capacity building – our work with China. Three aspects of that programme deserve mention. First, we have continued to provide China detailed comments on its draft antimonopoly law; extensive comments were submitted in November 2001. Second, in January 2002 we held a workshop with China’s Development Research Council on how China could use competition principles to reform its railway system. Third, and most important, in March of this year, the OECD published a lengthy book discussing what kinds of actions China should take in order to realise the benefits of its recent trade and investment liberalisation. This “China study” was the main focus of China/OECD co-operation during 2001, and contains a multidisciplinary examination of many policy areas. I am not going to try to summarise the book, or even its chapter on the role of competition law and policy, but I mention it because I think it is important not merely as recommendation to China but as a discussion of many issues of concern to many economies here. For example, in addition to specific issues concerning China, the competition chapter contains a general discussion of the role of competition law and policy, including a discussion of how competition policy principles can be used to improve government regulation of natural monopolies. For your information, I am providing some excerpts from the

competition chapter. The book also contains important chapters on regulatory reform, corporate governance, and other competition-related topics.

Even more important, the OECD outreach programme has recently gone beyond capacity building to provide a forum in which high level officials with competition-related responsibilities can discuss issues of mutual concern as equals and on an informal, off-the-record basis. The first meeting of this OECD Global Forum on Competition was held in Paris in October 2001, and the second meeting was in February 2002. In October, the thirty OECD Members and the five non-Members that are regular observers of the Competition Committee met with representatives of about twenty non-Member invitees. APEC Members that were Forum invitees included Chile, China, Indonesia, Malaysia, Peru, Russia, Singapore, Thailand, and Chinese Taipei. The program began with keynote speeches from UNCTAD Secretary General Rubens Ricupero, EU Commissioner Mario Monti, and US Assistant Attorney General Charles James (delivered by DAAG William Kolasky). With the stage set by these speeches, the Forum went directly into exploration of issues relating to the role of competition law and policy in transition and developing economies. Major presentations were made by Antimonopoly Minister Yuzhanov and Indian Minister for Law, Justice and Company Affairs Jaitley, and Indonesian Competition Commission Adiwiyoto both delivered a paper and chaired one session.

I am not going to discuss the substance of the topics covered by the Forum meetings except to say that they have had – and will continue to have – a strong emphasis on competition and development. Also, the extensive materials prepared in connections with the Forum are available on the OECD's website, and will very soon be available on CD-ROM. The Forum does not seek to replicate the universality of UNCTAD or the WTO, but rather seeks to promote mutual trust and understanding through the method that has produced such benefits for OECD Members – by engaging in discussions, rather than negotiations, and keeping the meetings relatively small and as informal as possible.

### **Other Developments in Capacity Building, Technical Assistance, and Policy Dialogue; Efforts to Promote Efficiency by Eliminating Unnecessary Restrictions of International Mergers**

The OECD has certainly not been the only provider of capacity building. UNCTAD I particular has also been active in this area, and we have been pleased to co-operate with it on numerous occasions. We both have broad programs, but it is my impression that comparatively speaking, we focus more on workshops aimed at assisting new agencies to develop enforcement policies and procedures and at considering the competition policy issues relating to natural monopolies; this emphasis permits us to take advantage of our close relationship with OECD competition authorities and the fact that most of us have had extensive experience in competition agencies. In general, UNCTAD works with a broader range of economies and seems to focus more than we do on general advocacy of competition policy and on broad topics such as proposals for a WTO agreement.

The WTO also provides assistance, and all three organisations cooperate as much as possible, each taking advantage of its own experience and knowledge. In fact, Hassan Qaqaya and I both participated in a very useful WTO workshop that was held in Beijing only last week.

Although Hassan has invited me to do so, I am not going to try to summarise UNCTAD's activities except to say that the work of its International Group of Experts has produced much valuable work, and it has also held four important regional meetings concerning the meaning and implications of the Doha declaration concerning possible negotiations of a WTO

agreement on competition. I expect that he will be handing out copies of a very useful report UNCTAD has produced concerning the results of those meetings. UNCTAD's website contains a wealth of material, and some of it is available on CD-ROM.

I will have more to say about the WTO in a moment, but at this point I should note that the Doha declaration contains a very important commitment on the part of developed economies to provide technical assistance and capacity building for developing economies. That commitment, which will be met in part by the WTO Secretariat and in part by other international organisations and through bilateral activities, should be a major benefit to developing economies. Compared to the OECD and UNCTAD, the WTO is less likely to be involved in providing direct assistance on legislation or enforcement techniques, and more involved in assistance in understanding trade and competition issues. In addition, while WTO activities can also help developing economies understand how competition policy principles may be useful in regulating natural monopolies and considering other "regulatory reform" issues, I expect that it will not be providing direct on how to regulate particular sectors.

One fairly recent development that could have major significance is the creation of the ICN by many of the world's competition authorities. I sure you have read about its goals, and I hope that some ICN representative will be in Bangkok to discuss its activities. The ICN has not yet had its first meeting – that will take place in Naples this September – but it seems clear that considerable resources are being devoted to it by some competition authorities (especially Canada, the European Commission, and the United States) and by North American law firms that represent international businesses for which spread of competition law enforcement to developing and transition economies have created and sometimes unwarranted costs. The two topics that the ICN is addressing at this point are laws relating to international mergers and competition advocacy. The competition advocacy work may become an important form of capacity building; the merger work could be very beneficial to trade, though its benefits would stem from eliminating unnecessary requirements rather than increasing the capacity of developing economies.

With the world having witnessed the creation of the ICN and the OECD Global Forum at the same time that the WTO Working Group on Trade and Competition and UNCTAD are also becoming more active, there is bound to be confusion over who is doing what. Let me assure you that you should not be embarrassed by any confusion you feel. I am certainly confused, and I can tell you that no one knows exactly what all of these activities will look like in a few years. I can also tell you that the relationship of the OECD Global Forum on Competition, the WTO, and the ICN was discussed earlier this year in a speech by Frederic Jenny, who as you may know is Chair of the OECD's Competition Committee, Chair of the WTO Working Group, and (as Vice-Chair of France's competition authority), a member of the ICN Steering Committee. As background, I am providing a copy of his speech.

### **The Doha Declaration**

I have already mentioned the important commitment by developing economies to providing technical assistance and capacity building to developing economies. What about the topics that are being studied as possible parts of an agreement? The topics are (a) national treatment, non-discrimination, and procedural fairness; (b) provisions on hard core cartels and modalities for voluntary cooperation; (3) the provision of assistance (including possible some form of peer review. Everyone has his own take on this list, and I will briefly mention my personal views.

I think negotiations over national treatment, non-discrimination, and procedural fairness could be beneficial for developing and developed economies. This area will require careful analysis, however, because it will be necessary to clarify how these concepts apply in the context of law enforcement, which is quite different from the kind of things that are usually considered at the WTO. For example, decisions whether or not to cooperate with a foreign country's law enforcement actions require consideration of a host of issues, some of which are foreign policy matters and others relate to how many resources cooperation would take and whether or not the requesting government foreign government can be counted on to preserve the confidentiality of information. Therefore, not only must cooperation be voluntary in the sense that requested governments may deny requests on general national interest grounds, but accepting some but not all requests cooperation requests on a case cannot be considered discriminatory.

As the principal author of the OECD Hard Core Cartel Recommendation, I think it is very important for all economies to have effective bans on hard core cartels. Nevertheless, I have some questions and concerns about the concept of a WTO requirement that members must have a ban on such cartels. If the provision is hortatory, like the OECD Recommendation, I can see how it could be useful and I do not see any risks for developing economies. However, complications arise if one considers a truly binding requirement – that is, if dispute resolution can be invoked to test whether a country's cartel ban meets the WTO agreement's requirements. For such a process to work, "hard core cartel" would have to be defined. A detailed definition – one that would guide a dispute panel's decision – would be difficult if not impossible to achieve. Thus, it appears that a general definition would be the likely approach. In that case, the question would be whether the WTO agreement would give dispute panels essentially unfettered discretion, or would be unenforceable except in very obvious situations, such as where a country had not adopted any ban on anticompetitive agreements among competitors. The former approach would apparently create a non-transparent system for judging countries laws, and one that would be a greater risk to developing than developed countries. For example, despite the generality of the Sherman Act, no dispute panel would question the adequacy of the United States' ban on hard core cartels, but general provisions in developing countries laws would be at risk. The latter approach – under which the requirement would be unenforceable except where no law could possibly cover hard core cartels, would be far preferable to essentially unfettered discretion, but it is not at all clear that it would be preferable to an approach that would be essentially voluntary because there would be no formal dispute resolution.

Concerning cooperation, I think a WTO agreement could be a very useful vehicle for bringing about more extensive technical assistance and capacity building. Moreover, a WTO agreement could lead to improved international cooperation among competition agencies in specific cases. In my opinion, however, most advocates of a multilateral agreement tend to be oversimplify this matter to a very great extent. It sounds good to talk of having one multilateral agreement instead of thousands of bilateral agreements, but in and of themselves, the cooperation provisions of a multilateral agreement cannot be expected to bring about much increase or improvement in case-specific cooperation. The OECD Recommendation on cooperation is an agreed framework for cooperation among OECD Members, but many Members make few requests, and in sensitive cases even those Members that make a lot of requests tend to address them only to Members whose discretion and competence they have come to trust through long experience. After all, making a request creates a risk that the requested country may reveal facts or take other steps that will compromise the investigation, and laws banning the sharing of confidential information limit the value of the assistance one can expect.

In fact, I do not believe that the provisions on case-specific cooperation that might be included in a WTO agreement will have much impact. As I mentioned earlier, even in the context

of a binding agreement, such cooperation must be voluntary in the sense that countries may turn down requests on national interest grounds. I realise that this leaves some developing economies fearful that large developed economies may simply ignore their requests, but the only way I can see to deal (partially) with that problem would be to provide for mandatory consultation whenever a request is denied. Realistically, I believe that the way a WTO agreement could improve international cooperation is by increasing the mutual understanding and trust that is necessary for such cooperation. That mutual understanding and trust will take time to develop, but fortunately the process has already begun through the ongoing work of the WTO, UNCTAD, APEC, the OECD, and others. The Doha declaration is accelerating this process through its commitment to further technical assistance and capacity building, and in my view it would be a WTO agreement's technical assistance and capacity building provisions, rather than its actual cooperation provisions, that offer the real promise of increased and improved cooperation.

Finally, since peer review can be a valuable form of assistance and capacity building, and since the OECD system of peer review has been described as a model that might be considered for the WTO, let me say a few words about the OECD system. Both UNCTAD's report on its four regional seminars and an OECD report describe the current system used in the Competition Committee. That system involves extensive research and the preparation of a very substantial report by an OECD consultant, followed by a meeting in which the reviewed country makes a presentation and representatives of two OECD competition authorities take the lead in asking questions. This system has proved very beneficial for OECD countries, and the OECD Global Forum on Competition will soon provide a venue at which non-Member countries may volunteer to be reviewed. South Africa will be reviewed next February, and Israel, Chile, and the Chinese Taipei Fair Trade Commission have also expressed interest.

Both the UNCTAD and OECD reports say that this form of review may not be suited to the WTO. I agree with that conclusion, but I am concerned that both reports may give an unduly negative impression of the overall potential of OECD-style peer review in the WTO context. I say this because the current system of peer review in the Competition Committee began only a couple of years ago. The tremendous convergence brought about by the Competition Committee between the early 1960's and today is basically the result of a much less rigorous system – a system that continues to be used in many parts of the OECD. Essentially, peer review should be seen not as a particular procedure, but rather as a form of dialogue in which a country's policies may be examined and in which there may be recommendations for change but there is no "decision" on whether particular policies (or policies in general) are good or bad, right or wrong. It is a process in which change is brought about through transparency, dialogue, and reason, rather than by formal decisions that one or another policy does or does not meet international standards.

Seen in this light, I believe that peer review could be very useful at the WTO, both in the context of general policy reviews and annual reports, which is how they are done at the OECD, or as an alternative to the dispute resolution process for use, for example, in exploring WTO members' laws and policies dealing with hard core cartels. I can tell you that this view was echoed last week by Robert Anderson, the WTO Secretariat member responsible for this area. And speaking only for myself, let me go one step further and say that I think that peer review could be much more effective than dispute resolution in dealing with all but the most flagrant failures to adhere to whatever agreement might be reached with respect to hard core cartels.



Excerpts from OECD Competition Policy Analysis of China\*  
on the Role of Competition Law and Policy

**The role of competition law and policy**

1. The principal goal of competition law and policy is usually described as promoting economic efficiency. In this context, "economic efficiency" does not refer only to efficiency in using enterprises' resources -- what economists call "productive efficiency." It also includes efficiency in using society's overall resources -- "allocative efficiency" -- and in developing new processes and products that create new resources -- "dynamic efficiency."<sup>1</sup> In non-technical terms, the principal goal competition law and policy is to maximise the overall welfare of society.<sup>2</sup> **Box (1)** presents some basic points on how efficiency and growth are stimulated by competitive markets, stifled by monopoly and unduly restrictive regulation, and protected by competition law and policy. The remainder of this section expands on these concepts and seeks to provide a coherent framework for policy dialogue.

**Box III.A.2.(1) Benefits of and threats to competitive markets**

In the abstract, a competitive market may be described as one without significant impediments to entry or exit, or restrictions on price or output. In discussing China's developing socialist market economy, however, it is more useful to focus on competitive markets' functions than on their theoretical preconditions. In this respect, competition may be seen as the process in which enterprises seek to discover and satisfy consumer demand as efficiently as possible. A competitive market, then, is one in which this process operates efficiently to give enterprises incentives to develop and produce goods and services at quantity, quality, and cost levels that make the best use of society's resources. Enterprises that do so are successful; those that do not are vulnerable to take-over and reorganisation if competitive capital markets exist. This increased efficiency in innovation, production, and resource use leads to economic growth and increased aggregate welfare.

In addition to efficiency and growth, competitive markets provide economic opportunity, resiliency, and innovation. In countries with non-competitive economies, economic power is often concentrated in the hands of the few. Halting cartels, eliminating special treatment of protected businesses, and privatisation or reform of SOEs not only produces innovation and efficiency, but also gives more individuals a chance to contribute to, and benefit from, the resulting economic growth. In addition, competitive markets can produce macroeconomic benefits. Competition provides firms incentives to adjust to internal and external shocks, and these individual adjustments produce an overall response that is less costly to the macroeconomic economy. These benefits are likely to be more important as the world becomes more characterised by highly mobile capital flows.

In China and elsewhere, there are two main threats to competitive markets: monopoly power possessed by enterprises, and government regulation that imposes undue restraints

on enterprises' ability to respond efficiently to consumer demand. There appears to be wide acknowledgement in China that monopoly and inefficient regulation are generally harmful. It also appears, however, that there is not a widely shared understanding that the impact of monopolistic abuses, cartels, and over-regulation is so clearly inconsistent with China's desire for increased economic efficiency and growth. It would be beneficial if through dissemination of this Report, international conferences, or otherwise, policymakers in related fields became more aware that monopolists and cartels obtain their monopoly prices by "restricting output," *i.e.*, by deliberately creating artificial shortages. This means not only supplying restricted quantities of goods or services, but also failing to discover and supply what buyers want. Monopolies and cartels also tend to be less innovative and less likely to provide the varieties that consumers want. Regulatory barriers to competition operate in much the same way.

China is faced with excess capacity and production in many markets, and it should continue to address the soft budget constraints, exit barriers, and other market distortions that are causing that waste of resources. When permitted, bankruptcy proceedings and voluntary mergers provide a means by which the market itself addresses excess capacity - by shifting the resources of the least efficient firms to other uses. In considering other means of dealing with excess capacity problems, Chinese leaders should bear in mind that the output restrictions of monopolists and cartels, like the inefficiencies resulting from anticompetitive regulations, cause a very substantial economic waste of a country's resources.

2. To this end, competition law bans "anticompetitive" conduct by enterprises and in some cases by government entities -- that is, conduct that is likely to lead to a restriction of output and to monopoly pricing, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others. The overcharges and waste caused by such conduct can be enormous. A recent OECD Report found in the United States alone, just ten recent international cartels cost individuals and businesses hundreds of millions of dollars annually, affected \$10 billion of commerce, and caused economic waste estimated at over \$1 billion.

3. Although anticompetitive enterprise conduct causes substantial harm to the global economy and to domestic economies around the world, even greater inefficiency and waste is caused by anticompetitive government regulation, including tariff and non-tariff barriers to international trade and similar barriers to competitive conduct by domestic firms. Complementing trade and investment liberalisation, competition policy is the tool OECD countries have increasingly used over the last 25 years to reduce that inefficiency and waste without sacrificing other policy goals. Today, as underscored when the OECD Regulatory Reform Report was issued and endorsed by Ministers in 1997,<sup>3</sup> competition policy has a central role to play in all regulatory analysis. Indeed, the Regulatory Reform Report not only recommends a competition policy approach, but calls upon Member countries to authorise and equip their competition authorities to play a central role in the process.

### *The role of competition law*

4. To prevent enterprise monopolies and cartels from creating inefficiency, waste, shortages, and monopoly high prices, OECD Members and about fifty other economies have enacted competition laws. These laws typically ban (a) anticompetitive agreements -- both between competitors ("horizontal") and between sellers and buyers ("vertical") -- (b) unilateral enterprise conduct that abuses a monopoly position, and (c) mergers and acquisitions that are likely to increase the risk of such agreements or abuses. The laws generally apply to state-owned enterprises as well as private ones, and to the activities of regulated, natural monopoly enterprises except to the extent that such activities are directed or authorised by a regulatory agency. In some legal systems, competition law prohibits what Chinese officials tend to refer to as administrative monopoly – unauthorised anticompetitive action by executive bodies of government and/or their officials.

5. Competition laws generally do not contain flat bans of specified conduct, but rather ban conduct that "substantially limits competition" or "creates or maintains a 'dominant' or monopoly position." Thus, the legality of conduct generally depends on its actual or likely effects on the market as a whole, which in turn depend on whether the conduct is engaged in by an enterprise with "market" or "monopoly" power (or enterprises that collectively have such power). Different countries use differing terminology and somewhat different standards with respects to dominance and to market or monopoly power, but the differences are not important for most purposes in this Chapter, and the term "monopoly power" is used to refer all three concepts.

6. Two points merit emphasis. First, competition law does not ban the mere possession of monopoly power or its attainment by superior efficiency; it is only abuses of that power that are illegal.<sup>4</sup> Second, monopoly power is the power to increase profits by restricting output and raising price above the competitive level. It is not a function of overall firm size, but can exist only with respect to a particular product or group of products ("relevant product market") and a geographic area ("geographic market"). Economists often seek to obtain some measure of the competitiveness of markets by examining concentration ratios (the percentage of production, sales, or some other measure accounted by the leading enterprises). Even with reliable data, however, concentration is not a meaningful measure of monopoly unless it is presented on the context of a "relevant market" so that it measures the choices that are actually open to buyers.

7. The importance of defining monopoly in terms of economically valid product and geographic markets simply cannot be overstated, because if this is not done concentration ratios and other measures of monopoly are meaningless or misleading. This point is comes up again in the discussion below of the susceptibility of China's markets to monopolistic and other anticompetitive conduct by enterprises. In addition, for those not familiar with these concepts, the nature of product and geographic markets is explained in **Box (2)**.

#### **Box III.A.2.(2) Product and geographic markets**

Production or sales statistics presented on a national basis seldom reflect buyers' choices and are therefore misleading as an indicator of competitiveness. For example, as noted above, an enterprise may be only one of many Chinese producers of a product but

have monopoly power, and the only producer in China of a product does not necessarily have monopoly power.

The contours of a geographic market are determined by economic reality – the area within which a buyer may obtain a product or service. The key factor is often transportation cost in relation to the price of the product or service, a consideration that is often very important in China. Administrative or political boundaries are relevant only if they reflect an economically significant barrier, such as a mountain range or differing legal provisions, including licensing requirements. Thus, regional markets may consist of several provinces or only part of one province, and may be calculated by as the area within a certain number of kilometres from one or more locations where buyers live or do business. A local geographic market may be an area surrounding a city or small town, but the official city or town limits are seldom relevant.

Similarly, it is clear that the categories in which production data are reported do not generally describe economically sound product markets because they seldom reflect the demand side of the market. Information is usually collected on the basis of production methods or raw materials, meaning that a category might include, for example, all aluminium pots for cooking. Such a category is likely to be both over broad (including some pots appropriate for individuals, some only for restaurants) and under inclusive (including no steel, copper, or ceramic pots).

Given China's size, its inadequate transportation infrastructure, and other elements of the undeveloped state of distribution systems in China, many products and most services in China compete in regional or local markets. Shipping between Chinese cities can often be more problematic than importing from abroad. The IIE study notes that one enterprise sees its problem as not market access but physical distribution – the result of needing to rely upon a largely state-owned trucking industry that is subsidised and thus has limited incentives to operate efficiently. In addition, the inadequacy of the roads makes trucking distribution impractical outside local markets. Long distance transportation is by train, whose deliveries are subject to periodic unexplained stoppage and shrinkage. Regional protectionism is another factor that contributes to dividing the Chinese market. And since the general structure of the Chinese industry still reflects the local self-sufficiency principles advocated by Chairman Mao, it is clear that national concentration ratios tend to underestimate monopoly power in China.

8. Despite their usual focus on the effects of conduct, many competition laws accord special treatment to what a 1998 OECD Recommendation refers to as "hard core cartels."<sup>5</sup> This category is defined to include "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." Because such cartels almost by definition have no efficiency justifications and are "the most egregious violations of competition law," many countries make them illegal without regard to their actual effects (sometimes called "illegal *per*

se"). Still others require some showing of anticompetitive effects but not the rigorous showing required in other cases.

9. Until the last twenty-five years, there has not been much consensus on the goals or importance of competition law. Indeed, for much of the beginning of the last century some OECD countries encouraged cartels, others considered them unavoidable evils and sought only to prevent their worst abuses, and only a few prohibited them outright. Similarly, many OECD countries permitted and operated monopolies, and not merely in infrastructure industries where some monopoly may be "natural." It must be recalled, however, that during much of the period before World War II many countries also imposed high tariff and non-tariff barriers. It was not so much competition law that was controversial, but rather the entire notion of the value of competitive markets.

10. During the post-war period, as trade and investment barriers has fallen and the resulting competition has produced economic efficiency, innovation, and growth, consensus has grown among OECD countries concerning competition law's goals and importance. Because of the way competition law can help break down inefficient barriers to creating a unified market, the Treaty of Rome made it the *only* substantive law that is enforced directly by the European Commission. Economic efficiency became the predominant goal in most circumstances, and with this convergence on goals has come a convergence on the legal standards that competition laws should apply. Currently, all OECD countries have competition laws and many are giving them much higher priority than before. Moreover, almost all of the transition countries in Central and Eastern Europe and the former Soviet Union have enacted competition laws, and both formal studies and expert opinion consider that effective implementation of those laws contributed to the expansion of more efficient private firms.<sup>6</sup>

11. The OECD's Competition Law and Policy Committee has for decades been at the centre of this convergence process and has in the last decade worked not only with its Members, but also non-Members. Convergence has been facilitated to some extent by the fact that differences in economic conditions do not require differences in competition laws' basic standards. Since most (sometimes all) prohibitions in competition laws are based on the conduct's effect *in a relevant product and geographic market*, differences in economic conditions are automatically taken into account. For example, exclusive distribution arrangements by an incumbent firm are more likely to have anticompetitive effects in transition than developed market economies, but all countries can and usually do apply essentially the same basic statutory standard -- whether the arrangement is likely to have anticompetitive effects or create or maintain a monopoly. Moreover, even when conduct is banned without regard to its market effects -- so economic differences are not automatically taken into account -- there are relatively few variations because most countries that provide for automatic (or *per se*) illegality confine it to a few practices that are always or nearly always anticompetitive.

12. Although competition laws' basic standards need not vary based on different economic conditions, such differences do and should lead to much greater differences in countries' competition law enforcement priorities and the "rules of thumb" they use to predict whether a given practice will have anticompetitive effects.<sup>7</sup> In addition, competition laws do and indeed must contain differences reflecting differences in the legal systems of which they are a part, and other differences exist insofar as the laws reflect values other than economic efficiency (aggregate welfare). Thus, as stated in the CLP Committee's 1994 Convergence Report, the goal is *convergence without uniformity*, and "[e]ach country must have the latitude to test and refine alternative approaches to competition law and enforcement. Like the market itself, competition policy requires innovation in order to respond to the rapidly changing global economy and

changing economic thinking.”<sup>8</sup> In October 2001, this convergence process takes on a new dimension as the OECD hosts the first meeting of its Global Forum on Competition, in which China and other non-Members will participate.

### *The role of competition policy*

13. Because of the central importance of "free" entry and exit to the existence of competitive markets, competition officials and economists generally have long used competition policy to analyse the effects of explicit barriers to entry such as tariffs and quotas. In addition, because competition law dealt with monopoly power, competition officials and their modes of analysis were sometimes used when governments considered monopoly issues.

14. In the post-war period, as consensus grew among OECD countries concerning the benefits of trade and investment liberalisation and competition law enforcement, increasing and more systematic attention was paid to the relatively poor performance of economic sectors in which government regulation included rules on which enterprises are allowed or required to engage in particular activities. For example, the 1930's had seen increased regulation of entry, prices, and profits in such industries as road haulage and airlines, based on the theory that the alternative would be "destructive" competition leading to price wars, bankruptcy, and unemployment. In the 1970's, however, low productivity caused governments to look more closely and to replace broad-brush "structural regulation" with a more selective approach in which an efficient market can operate within the context of a relatively small number of basic rules.<sup>9</sup>

15. Natural monopoly regulation, both through designated regulatory agencies and through government ownership, also came under increased scrutiny due to poor economic performance in infrastructure sectors. The result has been a reduction of government ownership and a group of very beneficial improvements in regulatory policy. The traditional approach to dealing with a sector that contained some natural monopoly element was to apply entry, price, and service regulation (or government ownership) to the entire sector. The emerging concept of competition policy -- the principle that governments should permit markets to function to the maximum extent consistent with other social goals -- led to the realisation that is often possible and beneficial to reform the structure of such industries by separating out the natural monopoly element. Once that is done, market forces can be permitted to operate in the related markets; only the natural monopoly element must be controlled, as well as the access to the monopoly element by competitors in the related markets.

16. The impetus for this more rigorous analysis of regulation's effects on competition and efficiency came from many sources -- buyers demanding better quality and lower prices, potential entrants wanting a chance to satisfy that demand, and governments tired of constant drains on their budgets. In practice, however, competition officials -- and specifically the OECD's CLP Committee -- played a lead role in developing and applying this method of analysis. As competition authorities started to apply competition analysis more systematically to regulatory provisions, there was increasing recognition that entry barriers need not be explicit or absolute in order to harm competition and economic efficiency. Restrictions that are not on their face total bans may have that effect if, for example, they prevent realisation of economies of scale or scope. Also, barriers can be anticompetitive not merely by preventing "entry" in the sense of opening a particular kind of business, but also by restricting enterprises' ability to expand/enter into new product lines, start new plants or manufacturing systems, change distribution systems, etc. Competition and efficiency can also be harmed by rules that prevent effective operation/entry by banning non-deceptive advertising, limiting operating hours, or otherwise interfering with firms'

ability to respond efficiently to market forces. Thus, the concept of entry barriers expanded, and new emphasis was also placed on exit barriers, which as discussed below serve both to impede entry and to prevent efficient use of society's resources.

17. Thus, over the last 25 years, many competition law enforcers have become "competition advocates" within their governments, and competition policy has come to refer to a general approach to regulation under which a government seeks to permit efficient markets to operate to the maximum extent consistent with other social goals. All OECD Members apply a competition policy approach in many areas as a matter of discretion, and some have formalised it to a greater or lesser extent. Australia, for example, has an explicit National Competition Policy, overseen by a National Competition Council, which provides that regulations should not restrict competition unless it can be demonstrated that: (a) the benefits of the restriction to the community as a whole outweigh the costs; and (b) the regulatory objectives can only be achieved by restricting competition. And several years ago, the Korea Fair Trade Commission was given special responsibility for competition policy analysis of other Ministries' proposed regulatory schemes.

18. Competition policy's central role in regulatory analysis generally is reflected in the OECD's 1997 Regulatory Reform Report, three of whose seven policy recommendations relate directly to competition policy. Recommendation 3 concerns the "scope, effectiveness and enforcement of competition policy," Recommendation 4 urges reform of "economic regulation in all sectors to stimulate competition," and Recommendation 5 urges the elimination of "unnecessary barriers to trade and investment." Its broad application is reflected in the CLP Committee's having reviewed every chapter of that Report.<sup>10</sup> And **Box (3)** contains information from the Report on the benefits of procompetitive reform, the types of competition advocacy OECD Members' competition authorities have engaged in, and the amount of such advocacy. The topics of the "best practice roundtables" held by the CLP Committee's Working Party on Competition Policy and Regulation are another measure of competition policy's relevance to regulation in other fields.<sup>11</sup>

**Box III.A.2.(3) Procompetitive Regulatory Reform  
(1997 data)**

*Benefits of Competition Policy-Based Reform*

- Permitting entry and rate competition reduced **airline** fares by 25 per cent in the United Kingdom, 33 per cent in the United States, and 50 per cent in Spain.
- Permitting entry and rate competition reduced **road freight service** by about 20 per cent while improving flexibility and productivity.
- Opening **financial service** markets led to financing innovations that increased home ownership.
- Eliminating a regulatory monopsony buyer of milk improved prices received by **milk producers**.

*Types of Competition Advocacy Activities*

- The Australian Competition and Consumer Commission makes formal reports and submissions to other Commissions and Departments, makes appearances before Parliamentary committees, and maintains informal contacts and discussions with other parts of the government.
- The Canadian Competition Bureau offers policy and legislative advice within its own Department,

gives advice to other Departments on request, participates formally in regulatory proceedings, and makes submissions to committees and tribunals.

- The German *Bundeskartellamt* has prepared formal statements on legislation at Ministry request, and in particularly important situations, such as energy sector reform and telecommunications, *Bundeskartellamt* staff have testified to *Bundestag* committees and hearings.
- In Mexico, the Federal Competition Commission is a member of the inter-ministerial privatisation commission. In addition, it submits official statements to other bodies and uses informal means to advance competition and consumer interests.
- In Norway, the Competition Authority presents reports on regulatory issues at formal hearings and submits other presentations through its Ministry. The agency intervenes in regulatory proceedings on its own initiative, typically in response to complaints about regulatory barriers to entry.
- The Polish Anti-monopoly Office comments on all draft normative acts. Its president participates in meetings of the Cabinet and the Government Economic Committee. It provides formal advice and opinion to Parliament and informally discusses anticompetitive regulations Ministries.

#### ***Levels of Competition Advocacy Activity***

- In Finland, the Office of Free Competition has made competition policy-based regulatory reform a priority since 1988. The result has been over 900 actions in dozens of sectors, with the greatest number in agriculture, telecommunications, retail, financial services, health care, and transport.
- The Office of Economic Competition in Hungary estimates its annual output on regulatory and policy issues to be 20 comments within the government, 10 in Parliament or the Cabinet, 30 in other formal settings, and 30 informally.
- In Italy, the Antitrust Authority has since 1990 submitted 65 written reports to public authorities, participated in 3 public hearings, and prepared 12 general fact-finding reports. About half of these actions involved telecommunications, professional services, maritime transport, or electric power.

#### **Box III.A.2.(3) Procompetitive Regulatory Reform (continued)**

**(1997 data)**

- The United States Antitrust Division and Federal Trade Commission have made about 2000 comments or other appearances about regulatory issues since 1975 (not including thousands of opinions on bank mergers and acquisitions).

19. Even in OECD countries, where there is very wide consensus on the importance of this regulatory approach, inconsistent usage of the term creates occasional confusion and concern. Concern is greatest when people mistake competition policy as another name for laissez-faire capitalism; that is, they believe that it is a normative concept that places competition “above” social values.<sup>12</sup> This mistake is much more common elsewhere, including in China, and it must be addressed by stressing that competition policy is a tool that can assist governments to reach social goals. Several examples may help make this point.

- In Canada the Competition Commission pointed out, in support of electrical industry restructuring, that market-oriented reform could be done in a way that was not only consistent with environmental objectives, but could actually help to achieve them.
- Although competition policy recognises that licensing requirements and government standards can be useful protections for buyers when health or safety



considerations are involved, it also recognises that even purported health or safety regulations can harm consumers. For example, in the United States, bans on the provision of optometry services in commercial settings such as shopping centres were found to raise costs without providing offsetting benefits.

- Competition policy can help a country strengthen its “safety net” for the disadvantaged, including those who have difficulties relating to the transition process. For example, inefficient monopolies in infrastructure markets were formed because the monopolies were considered necessary to ensure universal access. Competition policy has shown ways to ensure universal service at less cost without the monopolies, thus leaving countries with more resources for the safety net.

#### *The relationship between competition-related laws and sectoral regulation*

Competition laws generally apply to all or almost all sectors of the economy, and the same is true for competition-related laws such as the Unfair Competition Law. When countries establish special regulatory systems for particular sectors, such as infrastructure industries, the question arises how those regulatory systems should interact with competition-related laws. This issue has arisen in China with respect to, for example, the Unfair Competition Law and the Telecommunications Law. It will become even more important when China adopts its competition law.

Two related propositions are involved. First, the fact that an industry or a firm is subject to price and output regulation does not mean that it should be exempt from legislative bans on unfair or anticompetitive conduct. To the extent that a regulatory agency sets firms’ prices and output, their price and output should not be subject to competition law, but there is no reason to exempt the firms or any practices by the firms that are not compelled or actively overseen by the sectoral regulator. In fact, in the transition countries of Central and Eastern Europe and the former Soviet Union, most of the competition law cases have been abuse of monopoly cases against regulated natural monopolists.

Second, even if the sectoral regulator is given general authority to prevent unfair or anticompetitive conduct for the firms it regulates, it is generally a good idea to leave the firms subject also to the general competition law. Different OECD countries have differing means of trying to deal with this situation, but there is a widespread belief that sectoral regulators should not have exclusive competition enforcement authority because they lack competition expertise and may be subject to “regulatory capture.” Co-operation between agencies can minimise conflicting policies, and the sectoral regulator may have the ability to confer immunity by adopting specific governing suspect conduct, but legislation exempting firms or industries (or giving a sectoral regulator exclusive jurisdiction) can cause real problems. In China, for example, the Ministry for Information is given exclusive authority to enforce the Unfair Competition Law against telecommunications enterprises, and the SAIC is unable to prevent such conduct as requiring users to buy hardware from designated firms and requiring them to pay a “repair fee” without providing repairs.

**Box III.A.2.(4) Competition Policy, Natural Monopoly Regulation, and Structural Separation**

Prompted by competition officials and the OECD's Committee on Competition Law and Policy, regulatory analysis has in the last twenty years recognised that industries once viewed as monolithic monopolies are composed of many parts, many of which can sustain competition if market participants are guaranteed access to the monopoly parts. For example, competition is possible between electricity generators if they each have access to the electricity transmission system to transport their electricity to consumers. Similarly, competition is possible in telecommunications networks if new operators are ensured access to the network of the incumbent operator to originate and terminate calls.

Although introducing competition into the competitive parts of these industries promotes consumer benefits through enhanced efficiency and greater innovation, participation in the competitive parts of the industry by the owner of the monopoly (or "bottleneck") tends to limit the extent to which these benefits are realised. The monopoly owner has a strong incentive and myriad ways to keep out other firms by delaying or denying them access to the monopoly element or raising the price for access. For example, an integrated railway company might restrict competition by such means as charging high prices for access to the track, denying rights to operate trains at certain times, or scheduling its own trains in front of rivals. Regulators have never been truly effective in preventing such behaviour (though they often can limit it) even when they require a regulated firm to separate its monopoly and competitive activities into different accounts or different enterprises under a single holding company.

Therefore, OECD countries have come to place increasing emphasis on preventing the owner of the monopoly facility from competing in the competitive parts of the industry. With this ownership separation, the owner of the bottleneck no longer has an incentive to discriminate between the downstream firms or to prevent the growth of competition. Of course, separation is not always the right approach. In some cases, the efficiencies resulting from integrating the monopoly and competitive activities may outweigh the benefits from separation. However, in light of the increasing recognition of the importance of full structural separation, the OECD's Council has recently adopted a Recommendation encouraging Members to give serious consideration to full structural separation in the course of regulatory decisions, especially in the course of privatisation and liberalisation. It also gives some guidance as to what benefits and costs to take into account when conducting this balancing.

\* In 2001, the OECD's Competition Division prepared a report on the role of competition policy in enabling China to realize the benefits of its trade and investment liberalization. An edited version of the report became a chapter in the OECD's major 2002 China study. The excerpts set forth below are from the Division's report, which was more detailed than the Chapter in the China study,

- i The tendency of planned economies to productive (or “technical”) and allocative inefficiency are discussed in Lin, Justin Yifu, F. Cai, and Z. Li, (1998), “Competition, policy burdens, and state-owned enterprise reform,” *The American Economic Review*, May 1998.
- ii This Chapter does not address distinctions between "consumer welfare" and "total welfare." To greater or lesser degrees, most competition law systems also have other goals, such as ensuring the existence of a large number of competitors or protecting small business. In general, however, it is increasingly recognised that such goals sometimes conflict with the "aggregate welfare" goal, and that competition principles (and the authorities that implement them) are not well suited for resolving such conflicts. Similarly, some systems include a "public interest" standard that can raise similar issues. Thus, there is a tendency in OECD countries to focus on economic efficiency (aggregate welfare) as the main criteria in competition laws and to deal with other social goals in separate laws.
- iii OECD (1997), *Report on Regulatory Reform Summary*.
- iv In the United States and some other countries, it is not considered an illegal abuse for a monopolist to exercise its power by restricting output and charging monopoly high prices. This reflects the fact that in a competitive economy with few barriers to entry, charging monopoly prices generally encourages entry that can eliminate the monopoly power. In such economies, banning "monopoly high pricing" would mean creating a complex regulatory system that would tend to preserve the industry's monopolistic structure. In the European Union and some of its Member States and other countries, the law bans monopoly high pricing but the ban is rarely applied because doing so would prolong the monopoly. In transition and developing countries, however, capital market problems and other barriers mean that competition authorities cannot rely to the same extent on new entry to defeat monopoly pricing. In such situations, competition authorities are generally advised to seek to eliminate the entry barriers, but if that cannot be done they sometimes find themselves obliged to engage in a form of price regulation for which they are not well equipped.
- v OECD (1998), *Council Recommendation on Effective Action against Hard Core Cartels*. The Recommendation also provides that "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." In addition to hard core cartels, resale price maintenance is quite often subject to stricter standards or treated as automatically illegal.
- vi Dutz, Mark A., and M. Vagliasindi, (1999), “Competition Policy implementation in transition countries: an empirical assessment, Working Paper No. 47, European Bank for Reconstruction and Development.
- vii Competitive economies tend to focus on anti-cartel enforcement and on preventing mergers that would create monopoly power or increase the likelihood of collusion; many CIS countries focus on demonopolisation; for China, the focus would presumably be on preventing exclusionary practices.
- viii OECD (1994), *Interim Report on Convergence of Competition Policies* at ¶ 6 (footnote omitted).
- ix OECD (1992) *Regulatory Reform, Privatisation and Competition Policy*, at 13.
- x The chapters included the agro-food sector, telecommunications, financial services, and international market openness, product standards, and professional services.

Another aspect of competition policy, particularly in a transitional and developmental economy such as China, is to assess and to assist in the improvement of other “framework” policies that are needed to support an efficient market economy. The enforceability of contracts, and more generally the rule of law, are examples of such framework policies, and are discussed in the following chapter of this Report.

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Among the roundtable reports of greatest potential interest to China are: *Relations between Regulators and Competition Authorities*, *Promoting Competition in the Natural Gas Industry*, *Railways: Structure, Regulation and Competition Policy*, *Application of Competition Policy to the Electricity Sector*, *Competition in Telecommunications*, *Developments in Telecommunications: An Update*, *Competition and Regulation in Broadcasting in the Light of Convergence*, *Competition and Related Regulation Issues in the Insurance Industry*, *Enhancing the Role of Competition in the Regulation of Banks*, *Promoting Competition in Postal Services*, and *Competition in Local Services: Solid Waste Management*. Other relevant reports are: *Competition in Professional Services*, *Airline Mergers and Alliances*, *Competition Policy and Procurement Markets*, *Competition Policy and Intellectual Property Rights*, *Competition Policy and International Airport Services*, and *Competition Policy and Environment*.

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In OECD countries, the term competition policy is sometimes used as synonymous with competition law (e.g., “competition policy cases”) or as referring to the policies underlying enforcement of the competition law (e.g., giving highest priority to hard core cartel cases). These alternative meanings of competition policy occasionally create confusion, but since they both relate to competition law they are easily distinguishable from competition policy as an approach to regulation and other government policies. Two other usages of the term are rarer but cause more serious confusion by incorrectly suggesting that competition policy does make normative judgements about other social and economic regulation. One problem is that competition experts sometimes use the term as a kind of shorthand to describe a particular policy response (e.g., separating electricity generation and from transmission), rather to describe the tool used to find that policy response in a particular situation. In addition, while experts would never use the term as synonymous with laissez-faire capitalism, the public do not always make this distinction.

The Conference Board

The 2002 Antitrust Conference: Antitrust Issues in Today's Economy

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**The OECD Global Forum, The ICN, the WTO, UNCTAD : who is doing  
what in the area of international competition and why ?**

Speaking Notes

**Frederic Jenny**

Chair of the OECD Competition Committee

Just before getting my marching orders for this conference from Paul Victor, I was reading an article by Paul Marsden on why after Doha there was no future for the competition issue in the WTO and why it would be better to pursue the issue of competition in the context of the ICN.

I had hardly finished this article when Paul informed me that the topic I would be expected to address at this conference was: why there should be a Global forum for Competition at OECD since there was already the ICN?

I must say that I am occasionally a bit surprised by these questions at least when they come from people who are knowledgeable about what goes on in the WTO or at OECD. However not everybody knows what is going on in these

organizations , so I will gladly try to give you some of my perspective on the work they do.

Let me start with the OECD , The OECD Global Forum on Competition, and the ICN

As you know the OECD is an institution in which the main concern is to integrate different elements of sound economic policy into a coherent framework..

Traditionally, the OECD has been more focused on macroeconomic policies than on micro policies but there has been a rebalancing of the OECD vision of sound economic policy over the last few years with a greater role given to market oriented policies in the overall process.

Thus, the OECD, at the initiative of the United States, has engaged into a regulatory reform project which has been highly successful in promoting regulatory reform in a number of OECD member countries ; it has also helped the transition of Eastern European economies and other countries such as China by focusing during the late nineties and the early 2000 its outreach programs toward those countries; it has created a group on Trade and Competition Policy to usefully contribute to the debate on globalisation; it has given prominence in recent years to the Competition Law and Policy Committee, the predecessor of

the Competition Committee, by inviting this Committee to take part in the discussions which were taking place in other committees (such as the committee on Maritime conferences); it has reinforced and focused its outreach to take in the development dimension; it has attempted to integrate micro and macro analysis in the evaluation of countries economic policies.

In short, an important feature of any activity at OECD is the promotion of horizontal complementarities between different disciplines. Thus it is not an institution in which the specialized committees stay within the confines of a narrow definition of their specialty.

If I now turn to the Competition Committee of OECD, of course it is concerned about competition law enforcement and cooperation between competition authorities but it is also concerned about the relationship between competition and deregulation, the relationship between competition and trade, the relationship between competition and economic development, the relationship between competition and macro-economic performance etc....

It is from that standpoint interesting to remember the way Charles JAMES characterized the ICN in his speech on October 25 2001 at Fordham : “ The GCN’s scope should not include trade issues, nor should it encompass non-antitrust issues that could reasonably be included under the rubric of

“competition policy”. It should be all antitrust, all the time”. The material issued when the ICN was launched last October further stated that the ICN would be result oriented, would focus on the development of recommended non-binding best practices.

The OECD’s Global Forum on Competition is a part of the outreach activity of OECD (that is the activity of the OECD directed at non members and designed to help them take advantage of the analytical resources of the members countries or of their experience). This outreach activity goes back many years and covers different committees (such as trade, agriculture, competition etc...) as well as different regions. Whereas it was mostly focused on Eastern Europe and Asia during the transition phase, it is now more geographically balanced. It was reformatted in 2000 which is the year during which some of the old activities were reorganized under the heading of Global Forums. The topics for which a Global Forum would be established were chosen by the OECD Council. One of the eight forums eventually selected was in the area of competition. The Global Forum on competition has already had two highly successful meetings and is planning on having its third meeting later this year.

What is the purpose of the OECD Global Forum on Competition ? The purpose is to exchange experience and discuss competition policy issues including but not limited to antitrust enforcement with non member countries



(mostly developing countries or economies in transition) which are either considering the possibility of introducing competition policy or already have such a policy. It is an educational, policy development, consensus building and networking exercise with the education benefiting both the developed and the developing countries and promoting mutual comprehension.

Thus the OECD Global Forum is not an organization of competition authorities but a forum of exchange in which countries such as China, Egypt and Malaysia which do not have yet a competition law or policy but are considering adopting one are active participants. This is a first difference with the ICN which is an organisation of already established competition authorities. (Charles James describes the ICN as “ network for antitrust agencies”).

Second, the OECD Global Forum is a forum in which the topics of discussion are much wider than just competition law enforcement issues and encompasses all the aspects of competition policy. In particular, at the request of developing countries (and of the Committee on Non Members which ultimately is responsible for these Global Forums), the agenda of the Global Forum on Competition has a strong developmental dimension.

For example, during the first two meetings of the OECD Global Forums one of the major topics was the question of whether competition policy and

competition law enforcement were development friendly or whether, by reducing the profitability of investments in developing countries, they might actually lead to reduced growth rates.

Another topic discussed was the types of statistical evidence that might be gathered to be presented to politicians, to governments or to bureaucrats to convince them that competition policy is a sound policy and to overcome the resistance of anticompetitive lobbies. This is of high importance in countries like Egypt or Malaysia where there has been a fight over the desirability of competition policy and law for many years with sufficient resistance to this idea to defeat efforts at reform.

For the third Forum which should take place in the fall one of the issues which has been proposed will be how one should structure a competition policy and/or a competition law enforcement system in small developing countries (ie countries with less than 5 million inhabitants).

Indeed, many people in the developing world have raised questions about the desirability or feasibility of competition policy (or of establishing a competition law regime), in such countries. What is the realistic scope for competition policy in those countries? Is it necessary to incur the fixed and other costs associated with establishing a competition law enforcement system

in small countries ? Are there examples of effective regional competition policies ( this, by the way, is where the European experience is of high interest to a lot of those countries)? and how much abandonment of national sovereignty does the regional integration of competition laws imply ?

Let me also briefly mention that Korea has proposed that we have a Global Forum on Competition roundtable on the goals of competition policy (are there, for example, benefits to linking it to consumer protection ?) and the optimal design and positioning of competition authorities within the broader government framework. This last question is of crucial interest even in developed countries but it is of particular importance to developing countries where there is an obvious trade-off between having a system where the competition authority is part of the executive branch of government ( sometimes at the level of a ministry) which allows the authority to have a better ability to advocate or to make itself respected and a system in which the competition authority is independent of government. For example, Russia, Korea and Kenya are countries in which this issue is very much alive and in which the lack of independence of the competition authority seems to be an advantage. In other countries ( such as, for example, Egypt) a close connection between the competition authority and the executive would discredit the competition authority. This is also a current issue in some developed countries , for example in Canada. Similarly there are questions raised about the benefits and the costs

of including in the competition law's objectives some non economic goals ie socio-political goals ( such as promoting the economic empowerment of some segments of the population or preventing the aggregation of economic power which could corrupt the political process)

These topics do not appear to be the types of topics which would be discussed in within the ICN. By contrast no one has suggested that the Global Forum on Competition should “ formulate and develop consensus positions on specific proposals for procedural and substantive convergence in antitrust enforcement” as Charles James has suggested the ICN should do .

In a meeting of the OECD Global Forum on competition, it is up to each participant to draw his own conclusion from the discussions or the experience of other countries as to what would be most relevant to his situation at home.

Furthermore, the topics that are discussed within the Global Forum emerge from the contributions of the preceding Global Forums. This accounts for a high degree of frankness in the exchanges. While I am aware that some believe that developing countries would feel uncomfortable at OECD, this has not been the experience so far. Quite the contrary. We had 40 countries participating in the first Forum and 62 participating in the second Forum. Furthermore South Africa asked that its competition law regime be reviewed by

the next Global Forum which clearly indicates that it considers that the OECD Global Forum is a balanced forum in which it feels comfortable. UNCTAD, which is a forum in which the specific problems of developing countries are analysed, the WTO, the WORLD BANK and about ten NGOs also participate in our debates.

To conclude on this point I would say that the main difference between the ICN and the OECD Global Forum on Competition is the fact that the ICN focuses on promoting convergence on competition laws between countries whereas the OECD Global Forum on Competition focuses on promoting dialogue, exchanging experiences, achieving a greater understanding of why competition laws, competition law enforcement and competition policies might legitimately diverge.

I am very happy that Philippe Brusick is on the panel with us representing UNCTAD and therefore I will not speak of UNCTAD. Yet I want to point out the very important role that this organization has played and is playing in the debate on competition. Starting from the perspective of developing economies, it has mightily contributed to making these countries aware of the usefulness of the competition instrument in their economic development and it has before any other organization followed the two tracks which I have mentioned promoting convergence ( through the elaboration of the model law) while at the same time

respecting national differences between developing countries. Because of its rich experience UNCTAD is an important contributor to the debate in the Global Forum for Competition.

Finally, I would like to say a word about the WTO. The WTO is not a place where all competition law and/or policy problems are discussed. It focuses only on a sub-set of these problems: ie the cases in which a trans-national anticompetitive practice may create a trade problem either by preventing international trade (thus defeating the purpose of the trade liberalization commitments that governments have provided) or by depriving trading countries from enjoying the benefits of trade. The most important of those practices are international cartels, export cartels, import cartels and possibly abuses of dominant position ( however the WTO focuses in a first stage only on hard core cartels). The WTO does not try to promote uniformity or convergence of competition laws or of competition law enforcement . The EU Commission proposal on competition, which is the main focus of discussion in the WTO, makes clear that it would be up to each country to decide what kind of competition law and or policy it wants to adopt and what the scope of such a law should be. The only obligations would be that the law prohibits hard core cartels, that the exemptions (if any) be transparent, that the law be non discriminatory and that due process be respected. The EU Commission proposal then proposes that we establish a protocol so that when international cartels

restrain trade the affected country can obtain some degree of cooperation from the competition authorities either of the country in which the violation takes place or the competition authority which is in the best position to do something about this violation.

Thus the two principal differences between the ICN and the WTO Working Group on Trade and Competition Policy are, first, that the WTO confines itself to the interface between trade and competition whereas the ICN specifically refuses to address this issue and, second , that the WTO does not look at solutions designed to promote convergence of competition laws but at solutions designed to manage the interface between diverse national competition laws.

It should be clear by now that there is a high degree of complementarity between these various activities. Exploring the reasons for differences between national competition regimes, exchanging experiences and attempting to benefit from those experiences (done at the Global Forum on Competition at OECD) is obviously important to try to identify the scope for and realistic possibility of convergence ( which is the aim of the ICN). Yet, we know that convergence cannot be total and even if it were total there would still be need to manage the interface between different competition law system in developed and developing countries (which is the work of the WTO).

This two track approach in the area of competition law and policy is particularly important given that there is not yet a consensus at the doctrinal level on the best way to address the challenges of globalisation in the context of economic development. Some consider that the integration of national regimes through hard or soft convergence or negotiations is the way to proceed so that developing countries may upgrade their legal and economic systems to make them more efficient. But some argue that this approach, inspired by the developed countries and in particular the legal antitrust community, may not fully or adequately respond to the needs of developing countries and that a more balanced policy to face the challenge of globalisation would be to “manage the interface between different national systems rather than to reduce national institutional difference” (Pr Dani Rodrick in “The Global Governance of Trade as if Development Really Mattered”, Background paper for the UNDP).

Let me in closing address a last and purely “logistical” issue.

In spite of these obvious complementarities on the substance the ICN and the OECD Global Forum on Competition run the risk of competing with each other in the sense that developing countries have only limited resources to participate in international meetings. This question of coordination needs to be addressed urgently and will be addressed at the next meeting of the OECD Competition Committee. One of the ways to solve this difficulty would be to have one meeting a year of the Global Forum at OECD in Paris and a second meeting of the Global Forum back to back with the ICN Conference wherever and whenever the ICN annual conference is held. This would mean that delegates would only have two trips a year instead of three. It would also ensure that a number of delegates from developing countries attending the ICN would have their trip paid by the OECD in the context of its outreach program.



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\* In 2001, the OECD's Competition Division prepared a report on the role of competition policy in enabling China to realize the benefits of its trade and investment liberalization. An edited version of the report became a chapter in the OECD's major 2002 China study. The excerpts set forth below are from the Division's report, which was more detailed than the Chapter in the China study,

<sup>1</sup> The tendency of planned economies to productive (or "technical") and allocative inefficiency are discussed in Lin, Justin Yifu, F. Cai, and Z. Li, (1998), "Competition, policy burdens, and state-owned enterprise reform," *The American Economic Review*, May 1998.

<sup>2</sup> This Chapter does not address distinctions between "consumer welfare" and "total welfare." To greater or lesser degrees, most competition law systems also have other goals, such as ensuring the existence of a large number of competitors or protecting small business. In general, however, it is increasingly recognised that such goals sometimes conflict with the "aggregate welfare" goal, and that competition principles (and the authorities that implement them) are not well suited for resolving such conflicts. Similarly, some systems include a "public interest" standard that can raise similar issues. Thus, there is a tendency in OECD countries to focus on economic efficiency (aggregate welfare) as the main criteria in competition laws and to deal with other social goals in separate laws.

<sup>3</sup> OECD (1997), *Report on Regulatory Reform Summary*.

<sup>4</sup> In the United States and some other countries, it is not considered an illegal abuse for a monopolist to exercise its power by restricting output and charging monopoly high prices. This reflects the fact that in a competitive economy with few barriers to entry, charging monopoly prices generally encourages entry that can eliminate the monopoly power. In such economies, banning "monopoly high pricing" would mean creating a complex regulatory system that would tend to preserve the industry's monopolistic structure. In the European Union and some of its Member States and other countries, the law bans monopoly high pricing but the ban is rarely applied because doing so would prolong the monopoly. In transition and developing countries, however, capital market problems and other barriers mean that competition authorities cannot rely to the same extent on new entry to defeat monopoly pricing. In such situations, competition authorities are generally advised to seek to eliminate the entry barriers, but if that cannot be done they sometimes find themselves obliged to engage in a form of price regulation for which they are not well equipped.

<sup>5</sup> OECD (1998), *Council Recommendation on Effective Action against Hard Core Cartels*. The Recommendation also provides that "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." In addition to hard core cartels, resale price maintenance is quite often subject to stricter standards or treated as automatically illegal.

<sup>6</sup> Dutz, Mark A., and M. Vagliasindi, (1999), "Competition Policy implementation in transition countries: an empirical assessment, Working Paper No. 47, European Bank for Reconstruction and Development.

<sup>7</sup> Competitive economies tend to focus on anti-cartel enforcement and on preventing mergers that would create monopoly power or increase the likelihood of collusion; many CIS countries focus on demonopolisation; for China, the focus would presumably be on preventing exclusionary practices.

<sup>8</sup> OECD (1994), *Interim Report on Convergence of Competition Policies* at ¶ 6 (footnote omitted).

<sup>9</sup> OECD (1992) *Regulatory Reform, Privatisation and Competition Policy*, at 13.

<sup>10</sup> The chapters included the agro-food sector, telecommunications, financial services, and international market openness, product standards, and professional services.

Another aspect of competition policy, particularly in a transitional and developmental economy such as China, is to assess and to assist in the improvement of other "framework" policies that are needed to support an efficient market economy. The enforceability of contracts, and more generally the rule

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of law, are examples of such framework policies, and are discussed in the following chapter of this Report.

<sup>11</sup> Among the roundtable reports of greatest potential interest to China are: *Relations between Regulators and Competition Authorities*, *Promoting Competition in the Natural Gas Industry*, *Railways: Structure, Regulation and Competition Policy*, *Application of Competition Policy to the Electricity Sector*, *Competition in Telecommunications*, *Developments in Telecommunications: An Update*, *Competition and Regulation in Broadcasting in the Light of Convergence*, *Competition and Related Regulation Issues in the Insurance Industry*, *Enhancing the Role of Competition in the Regulation of Banks*, *Promoting Competition in Postal Services*, and *Competition in Local Services: Solid Waste Management*. Other relevant reports are: *Competition in Professional Services*, *Airline Mergers and Alliances*, *Competition Policy and Procurement Markets*, *Competition Policy and Intellectual Property Rights*, *Competition Policy and International Airport Services*, and *Competition Policy and Environment*.

<sup>12</sup> In OECD countries, the term competition policy is sometimes used as synonymous with competition law (e.g., “competition policy cases”) or as referring to the policies underlying enforcement of the competition law (e.g., giving highest priority to hard core cartel cases). These alternative meanings of competition policy occasionally create confusion, but since they both relate to competition law they are easily distinguishable from competition policy as an approach to regulation and other government policies. Two other usages of the term are rarer but cause more serious confusion by incorrectly suggesting that competition policy does make normative judgements about other social and economic regulation. One problem is that competition experts sometimes use the term as a kind of shorthand to describe a particular policy response (e.g., separating electricity generation and from transmission), rather to describe the tool used to find that policy response in a particular situation. In addition, while experts would never use the term as synonymous with laissez-faire capitalism, the public do not always make this distinction.