

*Report of the Rapporteur**

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Under the co-chairmanship of Professor Allan Fels and Mr. Stefan Amarasinha (Australia and the European Commission, respectively), the Joint Global Forum on Trade and Competition was held on 15-16 May 2003 in Paris. In addition to several opening and concluding remarks, this Forum comprised of five sessions; each devoted to one important aspect of the interface between trade and competition policies. Representatives from OECD member countries, from 33 other economies including many developing countries, from the business community and consumer organisations, and officials from several international institutions (UNCTAD, World Bank, WTO, among others) attended this Forum and contributed extensively to the discussions in each session. The OECD Secretariat provided sixteen background documents for this Forum.¹

During the opening remarks, a number of related goals for the Joint Forum were advanced. The first was to share with non-OECD members the main findings and key points made during discussions that have taken place in the OECD's Joint Group on Trade and Competition since it was formed in 1996. With the WTO Ministerial meeting in Cancún close at hand, the second goal of the Joint Forum was to stimulate discussion of the efficacy and elements of a potential multilateral framework on competition policy. In doing so, it was noted that the Joint Forum was contributing to the policy dialogue on trade and competition policy matters that was mandated by the Doha Declaration of WTO Ministers. The third goal was to further discussions on the needs and concerns of developing countries in regard to technical assistance and capacity building. Moreover, donors of technical assistance would be offered an opportunity to share with participants their thoughts on this important matter.

Although later sections of this Report summarise the key points made in each of the five sessions of the Joint Forum, it is worth noting a number of key inter-related themes that recurred throughout the discussions. The first theme was the widespread recognition of the various interconnections between international trade and competition more generally and between trade policies and competition policies, in particular. For example, it was often noted that active and appropriately enforced competition laws were needed to secure the benefits of open borders. A second matter on which there was considerable discussion, but no apparent consensus, was the extent to which the principles that are central to trade policy formulation and the multilateral trading system can be readily and appropriately applied to competition law and its enforcement. Given the roles that disciplines on core principles and that compliance mechanisms might play in a multilateral framework on competition policy, this issue takes on a certain immediacy and relevance in the run up to the WTO Ministerial meeting in Cancún.

* To be published in an OECD publication titled **Trade and Competition: from Doha to Cancún**.

¹ Available at : <http://webdomino1.oecd.org/comnet/ech/tradecomp.nsf> or through <http://www.oecd.org/competition>.

A third theme of the Joint Forum, in respect of which there appears to have been a general consensus, was that hard core cartels are the most egregious anticompetitive practice and an important threat to national and international commerce. The view was expressed by many present that negotiations on a multilateral framework on competition policy provided an opportunity to take concrete steps against these cartels. Many representatives from developing countries also expressed the concern that they do not have the means to tackle this anti-competitive practice at present; consequently, the discussion turned to the potential that any international initiative might have to buttress national enforcement efforts in this regard.

A fourth theme that emerged from discussions at the Joint Forum was the need for much more technical assistance and capacity building programmes and the need for more input into the design of such programmes by developing countries. Last, but not least, was the widespread recognition of the interconnections between the elements that have been identified for potential inclusion in a multilateral framework on competition policy; namely, core principles, hard core cartels, voluntary cooperation, and technical assistance and capacity building. For example, it was argued that cooperation between national enforcement agencies was essential if developing countries are to effectively prosecute hard core cartels. Similarly, the link between capacity building/technical assistance and both co-operation and as well as enforcement against hard core cartels was identified. However, some contended that only those jurisdictions with sufficient enforcement experience and capacity would benefit from potential multilateral provisions on voluntary cooperation. It would seem that a multilateral framework that did not fully take into account these interconnections and others—by, for example, focusing solely on provisions against hard core cartels—might fall short of its potential.

The discussions during the Forum also highlighted the matters of special and differential treatment and the coverage of competition law. One lead discussant from a developing country made the point that developing countries should be provided with flexibility regarding the timing of their obligations as well as the nature and scope of exceptions. Another lead discussant and proponent of the multilateral approach commented by saying that flexibility should take account of different levels of development. One expert from a small island country noted that flexibility ought not to be linked to capacity building.

The remainder of this report describes various points made during each of the five sessions of the Joint Forum. It should be noted that the points reported here are those that the rapporteur felt to be pertinent to an accurate characterisation of the discussions at the Joint Forum and is necessarily based on his recollection of the observations made during this event. The following summary does not necessarily represent the views of the OECD Secretariat, the member countries of the OECD, or those present at the Joint Forum.

The Joint Forum comprised five substantive sessions on the following subjects: the Clarification of Core Principles (specifically transparency, non-discrimination and procedural fairness); Effective Action Against Hard Core Cartels; Voluntary Co-operation in Competition Law; Capacity Building and Progressive Reinforcement of Competition Institutions; and Peer Review and Other Possible Compliance Mechanisms: Merits and Approaches in a Trade and Competition Context. The discussions in each session are summarised in turn below although, as will become clear, many interventions in any given session drew upon points made in preceding sessions.

Session I. Clarification of Core Principles

This session began with a description of each of the three core principles that some have argued should be included in a multilateral framework on competition policy. Multilateral disciplines on transparency could include obligations to publish all relevant laws and procedures as well as to notify the World Trade Organisation of those laws and of various aspects of the national enforcement practices and policies. Potential provisions on procedural fairness were said to cover matters such as timely and effective access to courts and to other domestic review mechanisms as well as to the rights of firms before competition enforcement agencies, e.g. the right to know the case against them and to make representations. Finally, while recognising that WTO members might negotiate exceptions and alike, potential provisions on non-discrimination would seek to ensure that the treatment of foreign firms in national competition law was no worse than that for domestic firms. The latter amounts to a commitment to national treatment in the statement of national competition law; a commitment which it appears need not extend to the application of that law. (Put another way, the proponents of a

multilateral framework on competition policy are seeking to ban *de jure* discrimination in national competition law but not *de facto* discrimination that can arise in the application of that law.)

In the ensuing discussion the point was frequently made that transparency and procedural fairness were characteristics of competition law and enforcement regimes that have universal merit. Having noted this, many participants went on to observe that the codification of these principles in an international trade agreement might pose particular problems. In the case of transparency, some asked: what precisely would have to be notified to the WTO? Would all enforcement decisions—including those not to take enforcement action against a firm or firms—have to be notified to the WTO? Indeed it was noted that, in jurisdictions with common law systems, any judgements by courts on competition law matters could affect the rights of parties. Would each of these judgements have to be notified to the WTO and, if so, would this be too burdensome? Others were concerned that allowance be made for small economies and more generally, poorer developing economies which may not have the capacity to make such notifications. In the case of procedural fairness, some wondered how the considerable differences in national legal traditions and regimes could be reconciled with universal multilateral provisions.

Notwithstanding the important points made above, much of the discussion in this session was concerned with various implications of potential multilateral disciplines on non-discrimination. Several speakers from developing countries were concerned that a national treatment provision would unduly curtail national development strategies. Since not a single concrete example was given of a national development policy or practice that would be banned by a commitment to national treatment, this objection might be more hypothetical than rooted in national experience. The point made was that firms in developing countries must reach a certain size in order to compete in world markets and, that it might be appropriate for competition law to contain provisions that discriminate in favour of such firms.

Many speakers from developing countries also noted that any disciplines on non-discrimination could and should be linked to notions of flexibility, progressivity, and special and differential treatment. In the view of some, faithful implementation of the mandate contained in the Doha Development Agenda requires due account of the latter in the formulation of any multilateral framework on competition policy. Moreover, the inclusion of longer transition periods for developing countries, exemptions and the like, were not enough. What matters, it was argued, is the relevant capacity of developing countries—both in terms of the ability of their firms to withstand international competition and of their national enforcement capabilities—not the length of time granted to meet any binding multilateral rules. For a wide majority of participants, whatever be the future of a multilateral framework, it was important for any country to adopt a competition regime as early as possible.

Those in favour of multilateral disciplines on core principles noted that their purpose was to guide nations that are enacting new and revising existing competition statutes (as dozens of nations have done since 1985). Moreover, such provisions were said to provide firms operating across national borders with some assurances about their rights in the enforcement of competition law. As far as the disciplines on transparency and procedural fairness are concerned, it was argued that any well-functioning competition agency and court system would almost certainly meet the minimum standards laid out in the proponents' proposals. Indeed, it was recognised that although national legal traditions and practices differ markedly across WTO members, the intention was to identify the common elements of all such systems that are conducive to the sound enforcement of competition law and the appropriate respect for the rights of parties involved.

On the matter of potential provisions for non-discrimination, it was argued that restrictions on *de jure* discrimination do not prevent differentiation in national competition law nor discretion in the application of that law. For example, a competition law which contained exemptions for all small and medium sized enterprises (SMEs) would not fall foul of a multilateral requirement of non-discrimination, whereas an exemption for only certain SMEs might. Moreover, provisions in competition law that permitted authorities to weigh any social or other benefits of a corporate practice against its anti-competitive effects need not, it was argued, contravene the potential multilateral provisions on non-discrimination.

Session II. Hard core cartels

Throughout this session there was a strong consensus that hard core cartels are the most egregious anticompetitive practice and they should be severely punished since they represented a substantial threat to the operation of market forces and undermine what one participant referred to as a “level playing field.” Another participant equated price fixing with theft and went on to note the link between bid rigging and corruption. For these reasons, and others, a consensus emerged that effective enforcement against hard core cartels should be a priority for national enforcement efforts. It was also noted that, in recent years, many OECD member states and non-members have stepped up their enforcement actions against cartels. Reference was frequently made to the OECD’s ongoing work programme on hard core cartels and, in particular, to the OECD’s 1998 Recommendation of the Council concerning Effective Action against Hard Core Cartels. (The most recent OECD report “Hard Core Cartels – Recent Progress and Challenges Ahead” was also discussed.)

Several speakers described their nation’s enforcement actions against hard core cartels. This discussion highlighted a number of domestic cartels that were the target of enforcement measures; a point which some felt should be borne in mind in the light of the considerable attention given to international hard core cartels in discussions at fora such as this. It was noted that domestic cartels were much more numerous than international ones and that they affected sectors of crucial importance for the growth of developing countries.

A number of views were expressed as to the efficacy and potential nature of multilateral provisions on hard core cartels. Several participants noted that these cartels tended to “migrate” to or to target jurisdictions without competition laws or the requisite enforcement capacity. So serious was this matter that, in one intervention, the view was expressed that multilateral provisions on hard core cartels and associated measures to tackle them should be the primary focus of a multilateral framework on competition policy.

While many participants recognised the need to address hard core cartels in a multilateral agreement, several concerns were expressed as to the appropriate definition of these cartels. It was said that any definition would have to be very precise if it is to be part of a binding international agreement. Moreover, even though the definition contained in the OECD Recommendation provided a useful starting point, many questions remained. For example, would the definition cover vertical as well as horizontal inter-firm agreements? Would the definition of hard core cartels only refer to agreements between actual competitors rather than agreements involving potential competitors? Would export cartels—or rather exemptions from national competition laws for cartels whose effects are entirely felt abroad—fall within the definition of hard core cartels? In response, it was argued that these matters should be resolved once negotiations on a multilateral framework begin.

Several participants raised matters concerning developing countries and their enforcement actions against hard core cartels. Although it was recognised that such cartels often targeted non-industrialised countries, the view was expressed that these countries could do little to effectively prosecute multinational corporations engaged in price-fixing or other cartel conduct. Here the lack of enforcement capacity is not the only consideration. In addition, there is a fear that a multinational corporation fined for cartelisation would simply refuse to attorn to the jurisdiction and pay any fines imposed on it. Moreover, such a firm could simply stop supplying needed products to any developing country that had taken enforcement action against it.

Others suggested that developing countries are unlikely to be able to collect the information needed to prosecute an international cartel. It was suggested that this underscores the need for cooperation between enforcement agencies; however, the voluntary nature of that cooperation has to date yielded few benefits for developing economies. Another concern expressed was that a multilateral ban on hard core cartels might require WTO members to take enforcement actions against every single cartel uncovered, however small or inconsequential. With respect to the latter concern, one proponent of such a ban noted that the relevant multilateral provision could be crafted in such a way as to avoid this contingency. Other complex issues were raised such as *per se* versus *rule of reason* approaches and the appropriate burden of proof. A consensus also emerged regarding the difficulties that would be encountered in attempting to ensure that the definition of what constitutes “hard core” cartel conduct is not over-inclusive.

Even if the case for a multilateral ban on hard core cartels was accepted, some expressed the fear that WTO Panels and the Appellate Body might intrude on the prosecutorial discretion of national competition officials.

More generally, the question was raised as to whether an international initiative outside of the WTO could not accomplish the same goals as a multilateral ban, especially in the light of the fact that many developing countries do not, as of yet, have competition laws. In contrast, one participant from a developing country wondered what harm could be done by multilateral provisions that complemented and strengthened national enforcement efforts against hard core cartels.

Session III. Voluntary cooperation in competition law

There was widespread agreement that voluntary cooperation was helpful in supporting the enforcement of national competition laws. Such cooperation was said to include general exchanges of views and best practices; case-specific cooperation; and, in the views of some, technical assistance and capacity building. As is discussed below, many linkages were drawn between voluntary cooperation and the matters discussed in other sessions, notably hard core cartels and the progressive reinforcement of competition agencies in developing countries.

It was argued by some developing country speakers that voluntary cooperation takes place only after domestic enforcement capacity has been established and, therefore, the primary beneficiaries of a multilateral provision on voluntary cooperation will be industrialised nations with considerable enforcement experience. This observation led to two other points being made. First, developing countries were entitled to ask what they might get in return for signing a provision that offered them so little in the near to medium term. Second, it was argued that the lack of enforcement capacity and experience in developing countries should be remedied before any multilateral provisions on voluntary cooperation be adopted; a point that has implications for both the sequencing and content of any further international initiatives on competition law and policy.

There was some disagreement as to the nature of cooperation between enforcement agencies that is needed to effectively prosecute hard core cartels. Several interventions were made to the effect that the information and assistance provided through *voluntary* cooperation mechanisms would be insufficient to tackle these cartels. Some went so far as to suggest that cooperation be mandatory, at least as far as industrialised vis à vis developing countries were concerned. (The fact that so many of the members of international cartels had their headquarters in industrialised countries provided, it was argued, the rationale for this asymmetric obligation on richer jurisdictions.) Others countered that mandatory cooperation mechanisms would lead to formalistic exchanges of information, would frustrate convergence of national practices, and would fail to meet its stated objectives. A related point made was that the extent rather than the form of cooperation should be the focus on discussions. In addition, it was pointed out that much currently is being achieved with voluntary cooperation and that one should continue to build on this experience before embracing more formal obligations within a multilateral framework on competition policy.

Differences of view were also expressed as to the merits of sharing confidential business information by enforcement agencies. It was stated that, as a factual matter, such information is protected by national law in many jurisdictions as well as by a number of international agreements. Having said that, some national enforcement agencies can exchange such information under conditions that are set out in bilateral cooperation agreements, mutual legal assistance treaties, and the like.

Several participants argued that developing countries should have access to confidential information acquired during investigations into hard core cartels in industrialised economies. Without denying the value of such information to enforcers, others questioned whether non-confidential information might be sufficient to prosecute hard core cartels. The latter information might include publicly-available information about the markets and industry in question, observations on the so-called “theory of the case,” and agency-specific information that is not covered by the confidentiality provisions in national laws.

Concerns were also expressed that adhering to multilateral provisions on voluntary cooperation might entail substantial resource costs and, indeed, one participant suggested that such provisions should only be entertained in so far as they had no resource implications. Others noted that such provisions would provide a legal framework in which voluntary cooperation could occur, increasing confidence and, subsequently, the extent of inter-agency collaboration. Moreover, it was said that non-binding approaches had been tried before and had yet to produce the desired degree of cooperation. The view was also expressed that, as far as younger competition agencies were concerned, perhaps the most important form of cooperation from abroad was the designation of a

specific foreign enforcement official to answer telephone inquiries and electronic mail messages. On this view, voluntary cooperation did not have to be too grandiose or subject to formal agreements to be effective.

Session IV. Capacity building and progressive reinforcement of competition institutions

A number of commonalities in view emerged during the fourth session of the Joint Forum. It also was generally accepted that the substantial differences in national enforcement capabilities provided an important rationale for technical assistance and capacity building and that this is an important element of paragraph 25 of the Doha Declaration. Moreover, such initiatives should not be confined to competition enforcement agencies and their officials as the awareness of competition policy-related matters by the press, consumer organisations, other members of civil society, the judiciary, and government departments and ministries was seen as being critical to the development and sustenance of a “competition culture.” In addition, capacity building efforts could take place at the regional level (the case of COMESA was mentioned) as well as the national level. Consequently, technical assistance and capacity building initiatives should be approached along a number of distinct yet related tracks.

A distinction was also drawn between the technical assistance provided under paragraph 24 of the Doha Declaration, whose goal is to enable WTO members to arrive at a considered judgement on the merits of a potential multilateral framework on competition policy, and the type of assistance that seeks to strengthen and progressively reinforce competition enforcement agencies in developing countries, which is what is contemplated by paragraph 25 of that Declaration. The latter, it was noted, has been provided for many years and will continue into the future irrespective of the decisions taken by WTO Ministers at Cancun. An associated point is that some questioned the merits of “one-off” short term seminars about competition policy-related matters, especially when contrasted to the benefits of long-term “residencies” by experienced foreign enforcement officials.

Various aspects of effective technical assistance and capacity building programmes were highlighted in the discussion, in particular, the need to engage the recipient government as well as the competition enforcement agency; the importance of tailoring any initiatives specifically to local needs; the importance of longer term programmes organised within a partnership of equals; the merits of bolstering the long term supply of people with the skills that competition enforcement bodies require (through, it was mentioned, university courses and the like); the importance of conducting a so-called needs assessment before programmes are established; the value of sharing views on enforcement strategy and tactics as well as on pertinent law and economic analyses; and the importance of building the capability to undertake policy analyses and competition advocacy.

With respect to the type of assistance contemplated by paragraph 24 of the Doha Declaration, the role that technical assistance and capacity building already plays and might play in a multilateral framework on competition policy was the subject of some participants’ remarks. It was observed that not enough has been done to date and that negotiations on, and the potential adoption of, a multilateral framework would require considerable amounts of technical assistance and capacity building; and that this point had been taken on board in discussions on these matters in Geneva. Others recalled the earlier discussions on voluntary cooperation and noted that technical assistance and capacity building measures would be essential to ensure that more WTO members could reap the benefits of multilateral provisions on inter-agency collaboration. One participant wondered if technical assistance and capacity building measures should precede negotiations on a multilateral framework on competition policy, and whether the latter should occur once sufficient capacity was in place in all WTO members. The view that technical assistance and capacity building are important elements in the successful development of competition law and enforcement in developing economies was not disputed.

Session V. Peer review and other compliance mechanisms

In summarising the contributions to the final session of the Joint Forum it is important to differentiate between the role of peer reviews of competition agencies more generally, and the role that peer reviews and other compliance mechanisms might play in a multilateral framework on competition policy. With respect to the former, a detailed account was given of South Africa’s experience during its peer review at the OECD. (It is

worth noting that South Africa was the first non-OECD member to be the subject of a peer review of its competition agency at the OECD. Subsequently, Chile has been subsequently reviewed in this manner.)

The South African peer review was found to be particularly rewarding. Despite the initial misgivings by some as to whether reviewers from the industrialised world could appreciate local circumstances, it was felt that this review gave South African competition the benefits of constructive and well-intentioned observations of the reviewers and other participants in the exercise. This experience suggested that peer review could be a valuable instrument encouraging dialogue about and the adoption of better practices. Moreover, to maximise the benefits of peer reviews, participation in them should be voluntary. It was further observed that an agency that decides not to participate in a peer review would be sending a clear signal to the competition community at home and abroad.

In the ensuing discussion many participants agreed that voluntary peer reviews offered considerable promise. Some reiterated the point that the reviewing process is a “two-way street” with reviewers learning from the reviewed and visa versa. This process was also seen as not impinging on national sovereignty. Moreover, peer reviews could be seen as contributing to capacity building and to strengthening competition enforcement institutions more generally. The transparency of existing peer review processes was also seen as a desirable trait, as are the roles that the private sector and civil society could play in such reviews.

There was less agreement on the merits of different types of compliance mechanisms in a multilateral framework on competition policy. Some questioned whether formal dispute settlement procedures were needed should a multilateral framework be negotiated; others noted in this regard that much depended on what binding disciplines were adopted in such a framework. The observation was made that WTO commitments typically are subject to dispute settlement and that it is difficult to understand why binding multilateral disciplines on competition policy should be treated differently. One participant went so far as to suggest that there was little point in signing a multilateral agreement on competition policy if its disciplines were not subject to dispute settlement.

An alternative position advanced in this session was that a peer review mechanism be incorporated into a multilateral framework on competition policy. Such reviews, it was argued, would have an educative and informative role. Moreover, as these reviews are non-binding, it was said that they would be non-confrontational and would promote dialogue and compliance. This form of non-binding compliance mechanism was preferable to conventional WTO dispute settlement as competition law and policy is a new or relatively new concept for many countries, and because there is little agreement on the potential elements of a multilateral framework on competition policy. It was further argued that the WTO’s Trade Policy Review Mechanism, APEC’s reviews of national Individual Action Plans, and the OECD’s own peer reviews of regulatory reform might offer helpful precedents as to the modalities for a peer review mechanism within a multilateral framework on competition policy.

The foregoing remarks prompted some to ask whether a non-binding peer review mechanism could, in fact, hold WTO members accountable or ensure their compliance with the provisions of a multilateral framework. Others made the case that dispute settlements for certain elements of a multilateral framework should be buttressed by a peer review mechanism within the WTO, seeking to secure the benefits of the latter without abandoning the standard means for promoting compliance with WTO disciplines. More generally, a variety of views were expressed as to the desirability of applying dispute settlement in the competition law and enforcement arena, especially given concerns about prosecutorial discretion and the desire to avoid “second guessing” national enforcers. Others raised the concern that any understandings that might be reached regarding the inapplicability of any dispute resolution regime would not survive the negotiations process.

The Joint Forum concluded with a report from the Rapporteur (which involved a summary of the observations described here) and with some thoughts from the Chairman of the OECD’s Competition Committee (which are summarised below).