Asia-Pacific
Economic Cooperation

The APEC Training Program
on Competition Policy

6 – 8 August 2002

Bangkok, Thailand

APEC Committee on Trade and Investment (CTI)

August 2002

Program

Key Notes Speech
"Competition Law/Policy and Industry Policy for Development" by Mr.Hassan Qaqaya,UNCATAD

Key Notes Speech
"Lastest Development of International Compeptition Law/Policy" by Mr.Walter Terry Winslow,OECD

Summary of "Competition Advocacy" group by Prof.Merit E.Janow (Mr.Walter Terry Winslow)

Summary of "Capacity Building for Effective Enforcement" group by Prof.Yoshizumi Tojo

Attachment

Welcome Address by Mr.Siripol Yodmuangchareon,DIT
Welcome Address by Mr.Tokuhiko Obata,JFTC
Close Address by Mr.Tokuhiko Obata,JFTC
Close Address by Mr.Wittayut Wongwanij,DIT

Close Windows

Country Report of "Competition Advocacy" group

Brunei Darussalam
Japan
Papua New Guinea
Hongkong , China
Mexico
Singapore
Indonesia
Thailand
China
Malaysia
Vietnam
Korea
Russia
Chile
Chinese Taipei

Country Report of "Capacity Building for Effective Enforcement" group

Australia
Mexico
Hongkong , China
USA
Malaysia
Thailand
Japan
China
Indonesia
Chinese Taipei
Singapore
Vietnam

The APEC Training Program on Competition Policy

6-8 August 2002

Program

Tuesday, August 6

Plenary Session

09:30-09:50 Opening Remarks

Mr. Siripol Yodmuangcharoen,Director General,Thailand,DIT

Mr. Tokuhiko Obata,Director,International Affairs Division, Japan,FTC

09:50-10:50 Key Notes Speech

"Competition Law/Policy and Industry Policy for Development"

Mr. Hassan Qaqaya, UNCTAD

11:10-12:10 Key Notes Speech

"Latest Development of International Competition Law/Policy"

Mr. Walter Terry Winslow, OECD

Small Group Discussion

14:00-17:30 Small Group Discussion

Group 1 "Competition Advocacy"

Moderator-Prof. ***Merit E Janow***, Columbia University

Group 2 "Capacity Building for Effective Enforcement"

Moderator-Prof. ***Yoshizumi Tojo***, Rikko University

Wednesday, August 7

09:00-17:30 Small Group Discussion (Continued)

Thursday, August 8

09:00-12:00 Small Group Discussion (Continued)

Plenary Session

14:00-14:30 Moderator's Summary Presentation on Group 1

Prof. Merit E Janow

14:30-15:00 Moderator's Summary Presentation on Group 2

Prof. Yoshizumi Tojo

15:50-16:10 Closing Remarks

Mr. Tokuhiko Obata

Mr. Wittayut Wongwarnij, Inspector General, Thailand, DIT

Program for Small Group 1

Tuesday, August 6, Afternoon

Moderator- ***Prof. Merit E Janow***

Session 1 【Introduction of Competition Law/Policy】

14:30-17:30 Presentation and Discussion

Mr. Yam PG Anak Haji Mohammad Almokhtar(Brunei Darussalam, Attorney General's Chamber)

"The position of Brunei Darussalam on Competition Policy"

Ms. Yan Zhou(China, The State Administration for Industry and Commerce)

"Further Perfecting Legal System of Competition in China by Antimonopoly Legislation"

Mr. Hirohito Amada(Japan, Fair Trade Commission)

"Strategy for Strengthening a Competition Policy in Early Stage of Economic Growth"

Mr. Mohamed Arif Abdul Hamid(Malaysia, Ministry of Domestic Trade and Consumers)

"The Current States of Competition Law and Policy in Malaysia"

Mr. Ronald George Maru(Papua New Guinea, Department of Trade and Industry)

"Competition Law and Policy in Papua New Guinea"

Ms. Nguyen Thi Hoang Thuy(Vietnam, Multilateral Trade Policy Dept., Ministry of Trade)

"Competition Law and Policy in Vietnam"

Wednesday, August 7

Session 2 【Competition Advocacy for Regulatory Reform】

9:00-17:30 Presentation and Discussion

Ms. Fung Ching Yi(Hong Kong,China, Office of the Telecommunications Authority)

"Competition Policy and Liberalization in Telecommunication Industry"

Mr. Won-Joon Kim(Korea, Fair Trade Commission)

"Competition Advocacy Role of the Korea Fair Trade Commission"

Ms. Santiago Gatica Kary Georgina(Mexico, Federal Competition Commission)

"Competition Advocacy in Regulatory reform"

Mr. Alchin Alexcy(Russia, Ministry for Antimonopoly Policy)

"The Provision of Natural Monopoly Reforms by Formation the Condition for Non-discriminatory Access in Russian Competition Legislation"

Mr. Kwek Mean Luck(Singapore, Ministry of Trade and Industry)

"Competition Framework for Telecommunication Industry in Singapore"

Thursday, August 8, Morning

Session 3 【Competition Advocacy for the Government and the Public】

9:00-12:00 Presentation and Discussion

Mr. Eduardo Pablo Escalona Va'squez(Chile, Ministry of Economy)

"Bill That Establishes the Court of Defense for Free Competence in Chile"

Mr. Ismed Fadillah(Indonesia, Commission for the Supervision of Business Competition)

"The Experience of Commission for the Supervision of Business Competition in Advocacy"

Mr. Tatsuro Masuda(Japan, Fair Trade Commission)

"Japanese Experience of Competition Advocacy"

Mr. Chien-Hsuen Liu(Chinese Taipei, Fair Trade Commission)

"Competition Advocacy : Chinese Taipei's Experience"

Mr. Wittayutt Wongwarnij(Thailand, Ministry of Commerce)

"Thailand's Advocacy on Competition Policy and the Development of the Organization Structure"

Program for Small Group 2

Tuesday, August 6, Afternoon

Moderator- ***Prof. Yoshizumi Tojo***

Session 1 【Capacity Building to Combat cartels】

14:30-17:30 Presentation and Discussion

Mr. Mark Quinane(Australia, Australian Competition and Consumer Commission)

"Hard Core Cartels"

Mr. Tokuhiko Obata(Japan, Fair Trade Commission)

"Capacity Building to Combat Cartels in Japan"

Mr. Dircio Palacios(Mexico, Federal Competition Commission)

"Investigation on Cartels in Mexico: Provisions of the law and Recent Cases"

Wednesday, August 7,Morning

Session 2 【Competition law/Policy and Regulatory Reform to Combat Cartels】

9:00-12:00 Presentation and Discussion

Mr. Tang Wenhong(China, MOFTEC)

"Discussion on Setting up Competent Antimonopoly Authority in China"

Ms. Lam Wai-Yee(Hong Kong,China, Television and Entertainment Licensing Authority)

"Competition Policy and Liberalization in Telecommunication Industry"

Mr. Darianto Harsono(Indonesia, Ministry of Foreign Affairs)

"Competition Law and Policy in Indonesia

Wednesday, August 7, Afternoon

Session 3 【Capacity Building to Combat cartels】

14:00-17:30 Presentation and Discussion

Mr. Leslie Barry Costilo(USA, Federal Trade Commission)

"Civil (Non-Merger) Antitrust Investigations and Enforcement Actions Instituted by FTC"

Mr. Kuang-yu Hu(Chinese Taipei, Fair Trade Commission)

"Determination of Concerted Actions by Companies in a Oligopoly Market: The Case of the Punishment Imposed on Domestic Airlines for their Collective Reduction of Flights"

Thursday, August 8, Morning

Session 4 【Competition law/Policy and Regulatory Reform to Combat Cartels】

9:00-12:00 Presentation and Discussion

Mr. Jayanth Govindan(Malaysia, Ministry of Domestic Trade and Consumer Affairs)

"Capacity Building for Effective Enforcement"

Ms. Eg Ee Kai(Singapore, Infocom Development Authority)

"Competition Framework for Telecommunication Industry in Singapore"

Dr. Sakda Thanitkul(Thailand, Chulalongkorn University)

"Capacity Building for Effective Enforcement"

Ms. Le Hoang Oanh(Vietnam, Legal Dept., Ministry of Trade)

"Competition Law and Policy in Vietnam"

Competition, Competitiveness, and Development*

Hassan Qaqaya[1]

Introduction

For several decades, it has been thought that industrial policy intervention would be the best way to create welfare and to stimulate firm competitiveness by means of selective support. Increasingly, however, it is argued that the introduction of free competition, thus the market mechanism, would be superior in this respect. Competitive markets are presumed to pressure firms into delivering optimal combinations of (low) prices and (high) quality while governments are increasingly believed to be unable (a) to make economic choices that are superior to managerial choices made in the interest of private capital and/or (b) to sufficiently motivate economic subjects to maximise their efforts.

Although neither the theoretical nor the empirical case in favour of either one approach has been really solved, it can be observed that over the last fifteen years or so many (in fact: almost all) developed economies have—at least formally—abandoned many of their industrial policies in favour of free competition. Developing economies and economies in transition to some extent have recently also been embracing free market approaches, sometimes quite instantaneously. Thus, instead of relying on state action to secure common

* Paper delivered at the APEC Training Program on Competition Policy fro AOEC Member economies, Bangkok, Thailand 6-8 August 2002

goals, governments have more and more stressed a resort to the market and to the private sector.

In turn, however, it can be observed that governments in developed economies have increasingly introduced—again, at least formally—regulatory and antitrust measures, both to create markets where none existed before—as in previously government-controlled utility and network industries—and to ensure that markets operate competitively indeed. These measures, when taken together, are usually denoted as 'competition policy'.

This study will investigate the effects of such policy on the competitiveness of firms in developing economies and economies in transition.

Competition policy in developed economies

Competition policies usually refer to the following cases:

1. Regulation of previously government-controlled but now privatised or semi-privatised industries, mostly industries that produce or distribute goods or services that used to be defined as public goods/services: energy, post, telecommunication, railways.

The character of some of these industries has changed as a result of technological advance thus making them, or parts of them, less easy to define as natural monopolies. For example, mobile telephony has grown into a sustainable

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alternative for fixed-line telephony. Also,
utility monopolies have frequently appropriated fringe markets that perhaps cannot be regarded as natural monopoly markets. Most telecom providers, for example, have appropriated the market for telephone sets as well, whereas there do not seem to be very good reasons for not allowing competition in this particular market. Regulation can be a very complicated matter as various combinations of regulations directed at either prices or profits, for example by limiting public utilities to a particular rate of return, are possible.

Modern network industries, moreover, have produced new sets of problems, more particularly problems of interconnectivity and access to essential facilities. As especially large operators may have no interest in providing interconnectivity with, or access to their own network to (potential) rivals, regulation may be necessary if it would be in the public interest to have various operators competing with each other. Similarly, once operators have agreed to access to each other's networks, there is an incentive to raise rival's cost so that market prices will be higher than optimal.

2. The prevention of agreements among firms that tend to reduce competition, either by purpose or by effect.

Clearly, this is the most traditional area of antitrust policy. It aims at preventing firms to reach more or less formal cartel or cartel-like agreements to the detriment of the consumer, e.g. by fixing price, quantity, and/or quality levels. However, since formal agreements do not always seem necessary to make firms

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services, Competition law and Policy Section, DITC, UNCTAD

understand that collusion may be attractive to them, tacit forms of collusion are normally also subjected to antitrust regulation. Since pro-competitive agreements among firms are also possible (e.g. agreements concerning some types of standardisation and pre-competitive R&D) competition policies normally distinguish between pro- and anti-competitive agreements.

3. Preventing the abuse of dominant market positions.

Firms that have captured a dominant position, or market power, may decide to abuse such a position by means of various strategies. They may charge prices that are either too high or too low (predatory prices), they may refuse to supply essential inputs to competitors or force consumers to buy bundled goods or services. Normally, however, the mere possession of market power is not considered illegal as it is sometimes possible that such a position is caused by superior performance (notice, though, that in '*the* antitrust case of the 20th century', the case against Microsoft during the late 1990s and 2000/2001, US and EU authorities held different positions in this respect). In the assessment of market power, the most difficult issues concern the determination of the relevant market and the estimation of potential competition and new entry.

4. Preventing the creation of dominant market positions by merger or acquisition.

Since it is normally preferable to prevent the rise of market power than to break it up after it has been observed, and merger is the pre-eminent route towards building up such power, most competition policies give a great deal of

prominence to ex ante merger control. However, since mergers may also create desirable economies of scale, some merger control systems have created the possibility to make a trade-off between increases in market power—and therefore losses in terms of allocative efficiency—on the one hand and gains in productive or dynamic efficiencies on the other. In practice, mergers are scrutinised less vigorously than agreements that do not require changes in ownership. The reason for this is not fully known, but it is likely that mergers are presumed to involve considerations of market power, if any, as well as desirable economies of scale. Recently this has been challenged. Consequently, it has been suggested to test merger proposals not just in terms of allocative efficiency but also in terms of productive and dynamic efficiency. The assumption is that non-wealth creating mergers may occur because of pre-existing market power yet may not lead to substantial increases in market power.

Purposes of competition policy

While it is still a matter of debate whether a free market approach is always superior to industrial policy, the available evidence points out that markets will become or stay free only when such freedom is created or protected by competition policy.

However, the 'real' purposes of competition policy are also subject to debate. The dominant setting—presented above—holds that competition policy is primarily, if not exclusively, directed at maximising economic efficiency (i.e. allocative, productive and dynamic efficiency). But an alternative setting holds that the actual and symbolic protection of consumers, small businesses,

competitors, and political opponents from the excessive concentration of economic power is, or should be, an equally important purpose. Some would even argue that such protection is a significant justification of every competition policy system.

Some competition policy regimes also set out other non-competition or so-called public interest criteria that should be taken into account in particular cases. These can vary from broad criteria and issues such as job losses, regional development goals, security, newspaper plurality, and financial probity to international competitiveness. In such an interpretation, competition policy approaches the goals of industrial policy, i.e. to guide the economy and its firms into directions that are deemed proper.

Thus, while competition policies are in general not directly meant to boost the (international) competitiveness of firms, in practice industrial policy considerations are not always excluded from decision-making. While this in a few cases may coincide with what is understood as the public purpose, in most cases it remains implicit.

Issues in developing economies and economies in transition

Any assessment of the effects of competition policy for developing economies and economies in transition should bear in mind, that these economies

(a) are less likely to know a significant degree of competition;
(b) are less likely to have a significant number of firms that are efficient when compared to (potential) rivals from developed economies;

(c) are relatively dependent for their development on transfer of technologies and management know-how from firms that have their origins in developed economies, thus on incoming foreign direct investment (FDI);
(d) are less likely to have sufficiently sophisticated statutes of law and law enforcement institutions.

Moreover, it is likely that the purpose of introducing competition policies would be more-encompassing than the maximisation of efficiency, i.e. would be approaching the purposes of industrial policy since the direct creation of competitiveness is an immediate issue.

Already at this instance, it is clear that developing economies and economies in transition, without effective competition policies, may encounter the following problems. First, if these economies display a move towards privatisation of previously state-owned enterprises it is possible that private monopolies are being created in the process. This would seem to be especially problematical in utility and network industries such as energy provision and telecommunications, but not exclusively so. For example, the Chinese economy presently still has some 60,000 state-owned enterprises (i.e. excluding collectives and township and village enterprises, many of which also have considerable government ownership) and most of these are active in various industrial sectors of the economy.
Secondly, since developing economies and economies in transition are typically dependent on incoming FDI, there is a danger that without effective competition policies foreign firms will dominate local markets and wipe out domestic enterprises. Of course, this consideration has been a major element in (a)

requiring incoming FDI to be organised through joint ventures with domestic firms; and (b) to typically limit the maximum share of foreign firms in these joint ventures to less than 50 per cent.

If these requirements will become less stringent (which may be necessary after having joined WTO as in the case of China) then competition policy should take over. However, this typically will be competition policy that approaches industrial policy as incoming foreign firms will normally be more efficient and thus able to move domestic enterprises into the periphery on purely economic conditions, i.e. without using predatory or other anti-competitive practices—which would not be a desirable effect.

UNCTAD current research in this area

An important study which is in progress in UNCTAD aims at assessing the potential contributions of competition policy to the enhancement of development in developing economies and economies in transition under circumstances of increasing openness of such economies, more in particular:

(a) to assess the extent to which developing countries suffer from anti-competitive practices that hamper their competitiveness and development capacities;
(b) Give specific examples and identify problems arising from anti-competitive practices affecting their economies, e.g. transport costs, insurance. Distribution systems and lack of consumer awareness.
(c) Identify ways and means in which competition policy can help tackle the

above problems and render these economies less venerable to monopolisation and anti-competitive practices

(d) to assess the relative contribution of competition *vis-à-vis* industrial policy

(e) To derive conditions which should be met in order to promote a beneficial application of the rule of competition.

While it would seem necessary to rehearse the debate on the role of competition to some extent, in order to get a clear view on what competition and industrial policies are supposed and able to accomplish, the main focus of the study is on a discussion of hypothetical and actual policy cases. For the actual cases, the study assesses (a) the underlying logics and disputes; and (b) what has been accomplished. A major source for the cases are the official case proceedings as well as cases discussed in the literature.

The following cases/issues have been selected for systematic attention:

1) Creating competitive markets
   a) In previously government-owned utility industries after privatisation of domestic firms
   b) in new network industries
2) Preventing anti-competitive agreements
   a) between domestic firms in domestic markets
   b) between foreign firms if active in domestic markets
   c) between domestic and foreign firms in domestic markets

3) Preventing abuse of dominant market positions
   a) of domestic firms in domestic markets, including formerly state-owned enterprises
   b) of foreign firms if active in domestic markets
4) Preventing anti-competitive mergers
   a) between domestic firms
   b) between foreign firms
      i) in domestic markets
      ii) in foreign markets if these firms are active in domestic market
   c) between domestic and foreign firms.

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Literature

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APEC Training Programme on Competition Policy
Bangkok, Thailand
August 6-8, 2002

Latest Developments in International Competition Law/Policy
Introduction to Remarks and Background Materials of
Terry Winslow
Organisation for Economic Co-operation and Development[*]

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 Adiwyoto 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 simplify 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 god 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."[1] In non-technical terms, the principal goal competition law and policy is to maximise the overall welfare of society.[2] **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,[3] 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.[4] 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."[5] 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.[6]

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.[7] 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." [8] 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.[9]

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.[10] 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.[11]

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.[12] 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.

xi 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*.

xii 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

New York March 7-8 2002

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 were 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 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 de addressed urgently and will be addressed at the next meting 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 means 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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[10] 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 <u>other</u> "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.

[11] 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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APEC Training Programme on Competition Policy
Bangkok, Thailand
August 6-98, 2002

Summary Presentation on Discussions in Group 1 – "Competition Advocacy"

Terry Winslow, OECD Secretariat

Preliminary Statement

As moderator of Group 1 for the morning of Day 1 and most of Day 2, Professor Merit E. Janow of Columbia University created an informal atmosphere for spirited, candid, respectful, and searching discussion, while also offering insightful comments of her own and keeping the discussions more or less on schedule. As a former U.S. competition official and head of the OECD's competition-related activities with non-Members, with continuing responsibility for co-ordinating OECD competition activities in Asia, I also participated in these discussions except for a period in which attended Group 2 in order to make a presentation on the OECD's 1998 Recommendation on Effective Action against Hard Core Cartels. When Professor Janow was unfortunately called away by an urgent family matter, I took over as moderator and delivered the summary presentation. I should emphasize, however, that Professor Janow prepared and gave me a substantial summary of the themes and issues that had been discussed while she was moderating, and her summary provided either the text or the basis for most of the points noted below. Any errors, of course, are mine. Having been privileged to attended four of the five seminars held under the previous (APEC-PFP) training programme, I focused many of my comments on the impressive developments that have taken place since 1997, when the previous programme began.

Summary Presentation

The discussion was productive and positive, and it covered a very wide range of topics. My keynote speech had emphasized the value of the APEC principles to competition advocacy, and the group reflected a good APEC spirit, with the participants showing genuine interest in learning from each other.

The participating economies were very diverse – in size (measured geographically, by population, or by level of economic development), and also in specific competition law and policy terms. Three of the world's largest economies were represented – China, Indonesia, and Russia – while some speakers – notably Brunei (here for the first time) and Papua New Guinea – emphasized the small size of their economies. Some (Indonesia and Thailand) have competition laws and enforcement agencies, but do not have a "competition culture" and little acceptance of competition policy, while some others (notably Hong Kong China and Singapore) have many pro-competition policies but have expressed doubts (continuing, at least in the former) about the possible benefits of a general competition law. Vietnam, which will host the next event in this series, is actively

working on a draft law, while the Chinese Taipei Fair Trade Commission is now relatively "senior" among Asian enforcement authorities, though less so than Japan and Korea. Most of the represented economies are in Asia, but Chile and Mexico made it clear that they face many similar issues.

Given such diversity, this programme could not – and did not try – to provide detailed training on a specific competition issue. Rather, taking advantage of the diversity, the programme's training related to broader issues, benefiting all by demonstrating that competition law and policy can and does benefit diverse economies and that competition advocates all over the world face many of the same kinds of obstacles.

In general, the arguments raised in favor of competition law and policy were based on the expected benefit to the participating economies' efficiency. Most saw competition as a useful supplement to other ongoing market-based economic reforms, but they varied on the amount of weight to be given to "competition" and on the timing and sequencing of such reforms. Some of these differences stemmed from the reflected the misimpression – particularly common in Asia, despite the APEC principles -- that the goal of competition policy is to maximize competition. In fact, as emphasized the first morning, the goal of competition policy is to maximize the overall welfare of society by taking advantage of competition's benefits while supplementing or supplanting competition with regulation to the extent necessary to achieve other social goals.

There was considerable discussion of the purposes of competition law and policy. Among the purposes mentioned were dynamic and allocative efficiency, improving standards of living, fostering a more dynamic economy, enhancing the global competitiveness of domestic firms, helping small and medium-sized businesses, and creating fair and efficient markets. These issues will be discussed further at Korea's "Seoul Forum" next November and at the February 2003 meeting of the OECD Global Forum on Competition.

The participants agreed that "no one size fits all." Moreover, while there was not extensive discussion of a possible WTO agreement on competition law issues, it was apparent there continues to be fear that such an agreement may be an attempt by some developed economies to impose rigid minimum standards. In fact, the substance of the most basic prohibitions of competition laws – bans on cartels and abuse of dominance – may be the same or quite similar even in economies with different structures and levels of development. However, law enforcement priorities sometimes vary markedly among economies based on different conditions, and it is important that the articulation of the prohibitions, as well as the design of the competition authority and its enforcement processes, reflect an economy's prevailing legal system and underlying cultural norms.

The common, though not identical challenges that were identified included the following:

- *Gaining legitimacy and influence at home.* Korea, Mexico, and others stressed the importance of competition advocacy as a means of enhancing public awareness and support.

- *Developing supportive institutional structures.* Like Group 2, Group 1 discussed whether the authority needed to be "independent" in a formal sense or could be part of a Ministry or other body, such as the Office of the Prime Minister. There was no set view on this; rather, the goal is seen in pragmatic terms – "What can be done in a particular situation to provide sufficient independence to shield a competition authority's law enforcement decisions from being colored by political considerations?"
- *What specific instruments or tools can be used for competition advocacy within governments?* It was agreed that this is a very important form of advocacy, and several instruments or ideas were mentioned.
    - *Issuing public opinions.* These may be binding or non-binding.
    - *Participating in cabinet or other inter-ministerial meetings.*
    - *Ensuring the availability of resources for such advocacy.*
    - *Hosting international events.* A competition agency advocating regulatory reform using competition principles may derive support from public demonstrating that its reform has been successful elsewhere. On several occasions, competition officials who needed to gain support for their advocacy have organized international conferences or meetings in which the OECD Secretariat and representatives of OECD competition agencies have explained the use of competition policy in other economies. Sometimes these have been large, public conference; on other occasions, the meeting has been non-public, but the agency and or the OECD has issued a public report.

Another major area of discussion was the relationship between competition law, competition policy, and sectoral regulation. Hong Kong China and Singapore discussed how they seek to have sectoral regulation of telecommunications that is sensitive to competition issues, though they have no generic competition law. In China, the telecomm regulator has exclusive jurisdiction to enforce the Unfair Competition Law against the firms it regulates, with the result that the State Administration for Industry and Commerce (which has general enforcement authority) has been unable to prevent firms from engaging in anticompetitive conduct such as tying arrangements. In Mexico, the competition authority generally shares enforcement authority of competition-related provisions with sectoral regulators; this is less problematic than is the exclusive jurisdiction situation in China, but it still creates major delays and other problems. These issues are also important to competition agencies in OECD countries, and they are addressed in several publications that are available on the OECD competition website (www.oecd.org/daf/competititon).

The special problems associated with "network industries," which have natural monopoly characteristics, were noted on various occasions. These tend to be regulated by sectoral agencies, but Australia has given much of the authority to the Competition and Consumer Commission. Russia has recently sought to use lessons drawn from Australia's "access regulation" system in proposed amendments to its Antimonopoly Law. Because natural monopolies are often very visible practitioners of very obviously anticompetitive practices (such as charging for services that are not rendered), a new competition agency

can sometimes obtain visibility for its work by bringing cases or issuing statements that relate to these practices.

To the extent there was discussion of substantive competition law violations, it focused on abuse of dominance – what constitutes dominance, and what practices are potentially abusive.

The relationship between competition policy and foreign direct investment was also discussed. The view was expressed that as more and more economies adopt competition laws, investors are increasingly likely to prefer investing where such laws exist and are enforced in a mainstream manner. For investors, the reduced likelihood of gaining monopoly profits is increasingly outweighed by the increased assurance that the playing field will be level.

While discussing foreign investment issues, Mexico provided an excellent example of what competition advocacy is all about. Despite a large amount of liberalization, Mexico's laws still require minority foreign ownership in some fields, including shipping. While the shippers are seeking even greater protection, others are complaining that the existing protection creates a shortage of investment in shipping, and the resulting price increases are felt throughout the economy. To paraphrase the representative from Mexico, "we cannot afford simply to finance inefficient industries in order to protect national firms. In considering whether to protect any industry, we must consider the impact on the whole economy, not just the industry at issue. Transportation services are used by all, and protection of shippers benefits the few while harming the many." In sum, Mexico's government is free to protect national shippers if it chooses to do so, but in making that choice the government should recognize that choosing protectionism would decrease efficiency and impose costs on Mexican society as a whole.

As I stated in my keynote address, particularly in Asia, a significant number of policy-makers seem reluctant to endorse and use competition policy because of an incorrect perception that competition policy simply maximizes competition. For me, therefore, the most important function of competition advocacy right now is to correct this misconception so that Asian economies are not deprived of competition policy's benefits due to a mistake. I view the Mexican shipping example as important because it shows that competition policy does not mandate (or seek) the maximization of competition, but rather is a tool governments can use to understand the true costs of regulatory schemes such as protectionism.

APEC Training Program on Competition Policy
Bangkok, Thailand
August 6 – 8, 2002
Summary Presentation on Discussion in Group 2 –
"Capacity Building for Effective Enforcement"

Prof. Yoshizumi Tojo

The agenda assigned to our small group is how to build up our capacity for effective enforcement against anti-competitive practices, in particular, cartels. Going through the four marathon sessions in these three days, we exchanged information on our respective institutional and legal framework, shared experiences on enforcement, and revealed several important points through lively and energetic discussion. Of course, it is quite impossible for me to summarize the whole proceedings, but I would like to mention some of the principal points that have emerged from the presentations and discussions.

The issue of Capacity Building may be largely divided into three levels. Before illustrating each level briefly, I would like to remind all participants that all of us should keep in mind that the participants' economies are different and diverse in market size, stage of development, and the amount of experience with respect to market mechanisms and competition.

The first level is the institutional issue. Some participants do not, as yet, have any comprehensive competition law, and others have only just legislated within the last few years. It goes without saying that comprehensive competition law is the first and the most important step to combat anti-competitive practices, especially hard-core cartels (HHCs). Publicizing rules of application such as guidelines which make clear, publicly, the criterion of prescription would follow as the next large step. To accomplish these tasks, various forms of international technical assistance are very important, and I believe this APEC program contributes largely to this end.

Even after enacting a competition law, there still exists the problem of the difference in scope and rigor of prescription against anti-competitive practices by the various competition laws in place. Those differences come partly from possible variation of the purpose of competition laws among our jurisdictions, and industrial policy concern would make the whole picture more complicated. Especially, from the standpoint of trade liberalization, potential conflict could be critical in some cases, and it would risk distortive effect.

Another institutional issue is how to establish competent and capable competition authorities, which is assured independence from any political body and/or other regulatory agencies' influence as well as sufficient resources such as capable staffs and budgets. Regarding this point, this is an issue which affects all participants including developed economies, but relatively speaking, developing economies would confront this problem in a much more serious way.

All of the various capacity building programs, such as technical assistance, sharing experience, etc., definitely make a fruitful contribution for bottoming-up skill and capability of the participants' competition agencies.

The second level is the issue of practical investigation and sanction. Partly because this issue relates directly to the effective enforcement of a competition law, the participants have remained interested in this issue throughout the whole session. Particular focus was given to the threshold of evidence required in establishing anti-competitive collusion by sharing our experience on investigation on some important cases. Enterprises, knowing the illegal character of HCCs, develop them in a way that makes it more and more difficult to detect them. Lots of agreements are not stated in written form. While there is some difference in the threshold of evidence required by the rule of evidence among the participants' jurisdictions, most competition authorities make use of circumstantial evidence and logical and legal presumptions based upon economic theory and analysis in addition to direct evidences.

Other useful methods for investigation include confidential hearings, whistle blower evidence, leniency programs, unannounced on-site inspections, etc. These were presented in the proceeding of our sessions, and all participants shared good understanding of these methods.

As to sanction and remedies, our small group recognized that we had a variety of enforcement measures such as: undertakings/settlement, administrative order of elimination/prohibition and surcharge, civil penalty and remedy, and criminal penalty.

Generally speaking, which sanction should be chosen as an enforcement measure depends on the degree and nature of the anti-competitive conduct. One interesting comment, while not proven by empirical studies, was that preference for a certain type of sanction depends partly on cultural or social background and mentality within a particular jurisdiction, and that might result in the difference of sanction-choice and strength of the enforcement among the participants' jurisdictions.

The third level is the issue of international cooperation. While this was not heavily discussed, all the participants have always kept in mind, throughout the whole session, the importance of international cooperation in both stages of capacity building and investigation, for the purpose of eliminating distortive effect in the domestic economy as well as international trade flows. As I already referred to the capacity building aspect, I would like to make a brief remark on the investigation stage.

To say nothing about the close linkage between trade and competition in this globalization age, there are several other compelling reasons why cooperation between competition agencies is both necessary and desirable.

Firstly, many competition problems transcend national boundaries such as international cartels, abuse of dominant position in the international market, and so on. Secondly, in order to detect HCCs, the need for gathering information and evidences located abroad becomes more and more critical. Thirdly, difference of competition rules among jurisdictions such as procedures for merger regulation could increase the cost of firms that operate in several countries. Fourthly, as I previously mentioned, the difference of prescription coverage could cause distortions .

The method of cooperation also has its variation. In addition to the importance of exchange of general information among competition agencies on a regular basis , some participants described cases where informal and/or formal request for information on some specific cases were extremely beneficial and sometimes even crucial for detecting collusion involving international market. Others mentioned bilateral cooperation agreements.

I don't think I could cover all the important points we discussed in our small group, but I am confident that our sessions were very successful and rewarding for all the participants by virtue of the energetic participation and remarkable contribution through lively and candid discussions by all the participants.

Finally, on behalf of the Small Group 2, I wish to express my deepest appreciation to both the governments of Kingdom of Thailand and Japan for hosting this APEC program, sincere thanks to APEC for inviting me to this program, and of course special gratitude to Ms. Chantida and other secretariat staff for their arrangement and warm hospitality.

Thank you.

Addressing for Opening Session of
APEC Training Program on Competition Policy
By
Mr. Siripol Yodmuangchareon
Director-General of the Department of Internal Trade
August 6, 2002

Mr.Tokuhiko Obata, Mr. Terry Winslow, Mr. Hassan Qaqaya, Distinguished Participants, Ladies and Gentlemen

It is my great pleasure to welcome you to the APEC Training Program on Competition Policy. At the outset, on behalf of the Department of Internal Trade, I wish to express our sincere appreciation to the APEC TILF Fund *(Trade and Investment Liberalisation and Facilitation Fund)* for generous financial contribution to this program. I also wish to express our most sincere thanks to the Government of Japan for giving us the honor to be the co-host of this program as well as to thank the APEC Secretariat for their gracious support and cooperation towards the organization of this program.

This program which is the first of the APEC Training Program in this issue is based on the success of the past Partners for Progress Program.. It is aimed to further develop human resources capable of effectively managing competition law and policy by changing information, sharing experience, and building capacity through lectures and case studies. This program contributes to the drafting or the review of competition law as well as to more effectively enforcement of competition law and policy in each APEC economy. We are confident that, given your expertise and interest in competition policy issue, this program will fully achieve its objectives.

To share experiences with those who are new to Thailand, let me introduce our law. The Thailand Competition law named “Trade Competition Act” has been enforced since 1999. The concept of the Act is emphasized on business conduct control. It lays down clearly on the conducts such as abuse of dominant position, merger, conspiring

or colluding that may create monopolistic power or reduce competition as well as other unfair trade practices.

Having experts in competition policy and law from APEC member economies to attend this program, I believe that it will establish the cooperation for effective enforcement of the competition law among APEC member economies in the near future.

I should also acknowledge with appreciation the substantive contributions and inputs provided for this program from the co-organizer, Japan Fair Trade Commission as well as by the resource persons. And for those participants who have come from abroad, I wish that you have a pleasant stay in Bangkok and thank you for your kind attention.

Opening Remarks on the APEC Training Program on Competition Policy
By Mr. Tokuhiko Obata

It is with great pleasure that Japan is able to contribute to the APEC Economy competition policy through the implementation of the training program with Thailand once again, following the successful completion of competition policy training forming part of the Partners for Progress which took place over a five year period starting in 1996. I wish to extend my sincere appreciation to Thailand, Vietnam and the other economies that volunteered to host this training program, all the economies that provided support in the program's implementation and all the participants.

In particular, I am very pleased to have this opportunity of being present here today at the first of the five seminars scheduled over a three year period.

The objective of this training program is to implement the 'APEC Principles to Enhance Competition and Regulatory Reform' approved at the Auckland Executive Meeting in September 1999, through the enhancement of capacity building of competition/competition related authorities of the member economies. The importance of this was recognized at the ministerial meeting in autumn last year.

The implementation of this training program received high appraisal from all APEC member economies at the CPDG, an APEC related meeting. The training program also runs parallel with the activities of the APEC/WTO related Capacity Building Strategic Plan which is aimed at increasing the level of WTO participation by developing economies.

The importance of facilitating sound economic development through ensuring a free and fair market by prohibiting anti-competitive conduct is, I believe, something acknowledged by all the participants here today.

Various approaches exist in pursuance of this goal. Some economies combat anti-competition behavior through the adoption of a comprehensive competition law, and others through the adoption of sector specific business laws or consumer protection related laws.

In the APEC region, there are varying stages of development among the member economies. For example, there exist economies that have been implementing competition laws for a number of years, alongside economies that have only recently introduced competition law or economies that are currently in the process of drafting.

Japan recognizes the varying needs and levels of technical assistance required by member economies as a result of such differences, and fully appreciates the need for varying approaches to be implemented by each economy and the importance of respecting the approaches taken.

The training program aims to increase the efficiency of each competition/competition -related authority in their enforcement of competition policy through information exchange among all member economies. It is hoped that through such discussions, developing economies will be able to adopt an approach which best suits their circumstances.

I wish also to stress that such information exchanges are beneficial not only to developing economies, but also to developed economies.

During the next three days, I look forward to active discussions that will enable all participating economies to enjoy the benefits of the training program.

Lastly, I wish to extend my deepest appreciation to Mr Hassan Qaqaya of UNCTAD, Mr Walter Terry Winslow of the OECD, Professor Merit Janow of Columbia University and Prof Yoshizumi Tojo of Rikkyo University for their long journey for this training program. I also wish to extend my deepest thanks to The Kingdom of Thailand, Ministry of Commerce, Department of Internal Trade and in particular, Ms.Chantida Kalampakorn for their overwhelming support in hosting this program in declaring the opening of this seminar. Thank you.

Closing remarks on the APEC Training Program on Competition Policy
By Mr. Tokuhiko Obata

I first wish to extend my sincere appreciation to all the participants for actively engaging in the exchange of information and opinions during this three-day training program. I also wish to thank the Thailand, the Department of Internal Trade, whose careful preparation resulted in the successful completion of this program

I am extremely grateful to Mr Hassan Qaqaya, Mr Walter Terry Winslow, Professor Merit Janow and Professor Yoshizumi Tojo, whose invaluable experience and knowledge reflected in their excellent presentations and comments, have made this training program into something which has surpassed all initial expectations.

I now wish to draw your particular attention to some of the issues not addressed in my opening remarks regarding the training program's objectives and expected outcomes.

Firstly, I wish to stress that, this training program's contribution to the encouragement of competition culture, and capacity building for each competition/competition-related authority in the APEC region, depends very much upon the actions taken by each participant following return to the respective economies.

Through the active discussions over the last three days, participating economies are likely to have absorbed such issues as the relationship between competition policy and industry policy, international trends of competition policy, as well as the invaluable experiences and data of the other economies in relation to capacity building for the effective implementation of competition policy and competition advocacy. Each participant is likely to be considering the actions required on the part of their competition authority in improving the efficiency and effectiveness of competition policy. I hope, after your return from Bangkok, all participants share the benefits of this training program with your colleagues, and based on its benefit share, have a deeper discussion to consider in which way competition policy should proceed in your economy to achieve sound economic development.

This training program is scheduled to be conducted over five seminars, including this seminar, over a three-year period. The second seminar is scheduled to be held in Vietnam in March 2003. It is my fervent hope that you will reap the benefits of the training program and engage in deeper discussions upon return to your respective economies, and that this in turn will contribute to making this training program a success, and pave the way for a fruitful seminar in Vietnam.

The next issue I would like to address, is my hope that the encounters made possible by this training program will result in the creation of invaluable relationships between participating economies.

The emergence of borderless economic activity through increased globalization has heightened the need to effectively combat anti-competitive conduct that transcends international boundaries. In the context of such economic activity, the need to strengthen cooperation between the competition authorities of each member economy and the need to engage in closer cooperation in dealing with this issue, is something which will no doubt be acknowledged by each participant here today.

I believe that a deeper relationship among competition authorities develops as a result of placing an importance on individual encounters, engaging in discussions with an attitude of respect for the other economy, and actively seeking and building upon such encounters. I urge all participants to maintain contact with each other following return to your respective economies, to actively engage in the exchange of information and opinions and as a consequence to contribute to deepening the cooperative relationship among the competition authorities. Please also do not hesitate to contact us should you have any questions regarding what I and my colleagues said at this seminar or on any other matter. We look forward to the opportunity of engaging in the exchange of information and opinions with you.

As I mentioned earlier, the next training seminar is scheduled to be held in Vietnam in March of next year. I wish to provide a high quality seminar that, as far as possible, adopts the suggestions and comments for improvement. I look forward to receiving the active participation and support of all economies.

Finally, before closing this seminar, I wish to take this opportunity to extend my appreciation to Ms Nguyen Thi Hoang Thuy, Vietnam's project overseer for the next training seminar, for her efforts in the upcoming preparation and arrangements. Thank you.

Address for the Closing Session of
APEC Training Program on Competition Policy
By
Mr. Wittayut Wongwarnij
The Department of Internal Trade
August 8, 2002

Mr. Tokuhiko Obata, Mr. Terry Winslow, Mr. Hassan Qaqaya, Distinguished Participants, Ladies and Gentlemen

On behalf of the Department of Internal Trade and all participants , I would like to offer our sincere appreciation and grateful thanks to the APEC TILF Fund *(Trade and Investment Liberalisation and Facilitation Fund)* for their generosity in funding this program. I also would like to express our most sincere thanks to the Government of Japan for giving us the honor to be the co-host of this seminar in Bangkok. Our thanks also go to all those who were involved in organizing this event.

I have been told that the past few days have been beneficial and fruitful. The conduct of the program in plenary and small group sessions was very smooth and successfully achieved its objective which was to obtain an overview of each APEC economy's competition law and policy. It was also useful in acquiring knowledge of the competition authorities' views and the policy implementation on competition law and policy. This program has been enlightening and it is indeed important for all of us, at least for developing economies, to have possession of a deeper and better knowledge of competition law and policy.

I would like to give sincere thanks to all distinguished lecturers and speakers for sharing their deep knowledge in either Competition Advocacy or Capacity Building for Effective Enforcement issues.

Those issues are quite important for creating a competitive environment in the economy. I can assure you that we shall make use of what we have learned in the

program to formulate our approach to enforce our competition law. I hope that our colleagues from APEC economies have found the program as useful as we did.

Before closing, I would like to convey our profound gratitude to all participants for the contributions that were made in the Program. I hope that the second APEC Training Program which will be held next year in Vietnam will have nominees from all of the APEC member economies attending to make as many fruitful contributions as at this one. Meanwhile, I do hope that our get together in this program will bring about a close cooperation among APEC economies in time to come.

I think it is the right time now to declare this seminar closed.

Thank you very much.

BACKGROUND PAPER ON COMPETITION IN BRUNEI DARUSSALAM

QUICK BACKGROUND

Competition is regarded as an intrinsic and inseparable part of market functions. Modern competition theory and function is widely regarded as a major part of modern economic theory on how markets function and interact both in the domestic and international context.

What actually is competition?. Competition is generally regarded as the interactive process between individual commercial entities where each entity competes against other entities that are in the same or similar course of commercial activities. The competition is of course for higher revenues in sales of commodities or the provision of services.

EXAMPLES

Competition policy and law therefore regulates and provides guidelines for the conduct of commercial entities in competing with others. For example, the practise of price fixing or tender fixing is one of the clear violations in competition law as is collusion to do these activities between commercial entities. If for example, three tire suppliers get together to fix the prices for a certain brand and model of tires, then we have collusion to fix prices. This collusion may extend to all consumers or even to a single consumer as in the case of Government tenders.

Anti-competitive practices do of course get much more complicated than the simpler price fixing cases. For example, Company A is manufacturing printed cloth for tailors, and Firm A colludes with Firm B who is the main supplier of a certain type of cloth used in the manufacturing process of Firm A and its competitors. Firm A colludes with Firm B so that Firm B sells this cloth at a higher price to all of Firm A's competitors. Firm B is therefore assisting Firm A in suppressing the commercial success of Firm A's competitors and this is anti-competitive.

These two examples are just the beginning of the many anti-competitive practices that may occur in any economy. These practices range from small SME related operations to international operations that involve multinational cartels that affect the global economy.

COMMITMENTS UNDER APEC AND THE APEC NON-BINDING PRINCIPLES ON COMPETITION

In terms of our commitments under APEC, in 1999, APEC Leaders agreed to a set of non-binding principles on Competition which are stated below;

APEC endorses the following principles:

Non Discrimination

(i) Application of competition and regulatory principles in a manner that does not discriminate between or among economic entities in like circumstances, whether these entities are foreign or domestic.

Comprehensiveness

(ii) Broad application of competition and regulatory principles to economic activity including goods and services, and private and public business activities.

(iii) The recognition of the competition dimension of policy development and reform which affects the efficient functioning of markets.

(iv)) The protection of the competitive process and the creation and maintenance of an environment for free and fair competition.

(v) The recognition that competitive markets require a good overall legal framework, clear property rights, and non discriminatory, efficient and effective enforcement.

Transparency

(vi) Transparency in policies and rules, and their implementation.

Accountability

(vii) Clear responsibility within domestic administrations for the implementation of the competition and efficiency dimension in the development of policies and rules, and their administration.

Implementation

To achieve this , APEC Member Economies will make efforts to**:**

1) Identify and/or review regulations and measures that impede the ability and opportunity of businesses (including SMEs) to compete on the basis of efficiency and innovation.

2) Ensure that measures to achieve desired objectives are adopted and/or maintained with the minimum distortion to competition.

3) Address anti-competitive behaviour by implementing competition policy to protect the competitive process.

4) Consider issues of timing and sequencing involved in introducing competition mechanisms and reform measures, taking into account the circumstances of individual economies.

5) Take practical steps to:

   - Promote consistent application of policies and rules;
   - Eliminate unnecessary rules and regulatory procedures; and
   - Improve the transparency of policy objectives and the way rules are administered.

6) Foster confidence and build capability in the application of competition and regulatory policy. This will be achieved, inter alia, by:

   - Promoting advocacy of competition policy and regulatory reform;
   - Building expertise in competition and regulatory authorities, the courts and the private sector; and
   - Adequately resourcing regulatory institutions, including competition institutions.

7) Provide economic and technical co-operation and assistance and build capability in developing economies by better utilising the accumulated APEC knowledge and expertise on competition policy and regulatory

reform, including by developing closer links with non APEC sources of technical expertise.

8) Build on existing efforts in APEC to help specify approaches to regulatory reform and ensure that such approaches are consistent with these principles.

9) Develop programmes, including capacity building and technical assistance, to support the voluntary implementation of the approaches to regulatory reform developed by relevant APEC fora.

10) Develop effective means of co-operation between APEC economy regulatory agencies, including competition authorities, and ensure that these are adequately resourced.

BRUNEI DARUSSALAM'S CURRENT POSITION

The following is a summary of our current position in terms of both competition policy and competition law.

As you can see, there is not that much to go on. There is little in the way of competition law asides perhaps from the Monopolies Act, which regulates the establishment of monopolies but is in any case like many of our laws outdated and not suited to modern economies and economic flows.

In any case, there really isn't any point in mentioning that we have a Monopolies Act, unless you are prepared to research the Act more deeply and then defend its existence probably from the point that it prevents the establishment of any monopolies without the consent of His Majesty the Sultan and Yang DiPertuan.

POSITION AS STATED IN OUR APEC COLLECTIVE ACTION PLANS

There is no specific legislation pertaining to competition policy in Brunei Darussalam. However, the economy is open and market-oriented and efforts are being undertaken to increase competition, in accordance with the domestic situation and WTO commitments. Such efforts include deregulation and corporatisation/privatisation.

Brunei Darussalam will:

- continually review the regulatory frameworks governing individual industrial sectors, with the view to boosting overall economic competitiveness;
- publish and make available any competition laws enacted in the future;
- participate In competition policy dialogues and training seminars/workshops conducted by APEC, WTO and other international economic fora; and
- facilitate the establishment of a national consumer protection body.

WHERE WE ARE HEADING AT THE MOMENT

Brunei Darussalam is currently at the stage of considering how to properly implement the regulation of competition from the grassroots level upwards. In this respect, we have a very keen interest in how the implementation of competition was started, developed and maintained in the various developing economies.

We have taken into account the various systems by which competition is regulated ranging from the comprehensive single regulatory body type system employed by Australia to the sectoral management implemented by economies like Singapore and Hong Kong China.

We have yet to decide which type of system will best suit our needs, given the small size of our market in all sectors of the economy. Our immediate interests are therefore focused upon the role of competition advocacy and the methods by which knowledge and support for competition can be instilled in the public, private and acadaemic sectors.

BILL THAT ESTABLISHES THE COURT OF DEFENSE FOR FREE COMPETENCE IN CHILE

by
Eduardo Escalona V.[•]

On May this year, the Government of President Ricardo Lagos sent to the Chilean Congress a bill that establishes, the Free Competence Defense Court as a consequence of the gradual improvement process of our legislation and economic institutionality. Unlike other matters, this process is the outcome of the consensus and coordinated work of all Chilean political forces that existed since its beginnings.

The mentioned process, had a main objective: on one hand to strengthen the existing antitrust institutions of the country, the National Economic Prosecutor Office, institution that represents public interests and, on the other hand, the Resolutory Commission, institution in charge of solving controversies arising in this field.

On its first stage, which finished in the month of May, 1999, with the official publication of Law No. 19.610, part of the objective was accomplished, by bringing new attributions and by granting a larger budget to the National Economic Prosecutor Office, increasing the number of prosecutors, position reserved exclusively for lawyers, incorporating in addition other positions that required the mentioned professional degree.

In the next three years following the reform, the outcome has been positive in general, providing a better assistance to companies and businessmen throughout the country, increasing the number of claims with successful investigations and, on the other hand, informing to a larger number of institutions the know-how of the work of the National Economic Prosecutor Office, with a resulting benefit in the preventive sphere.

[•] Legal Adviser of the Legal Legislative Division of the Ministry of Economy.

Due to a larger number of claims and, consequently, investigations on the attempts to free competence, it was soon noted the need to carry out the other part of the mentioned objective. Since day by day the resolving commission, takes more time and makes it more difficult to resolve the claims filed by a larger number of specialized prosecutors, assisted by think tanks on specific matters, in spite that the Resolutory Commission operates only once a week. Of course, the deficiencies of one of the parties of this triangular relationship of every process were made more evident when the other parties grew stronger.

These foresights, and later confirmations, allowed that during the period of negotiation of the referred Law No. 19.610, a Protocol of Agreement was signed by the main political parties represented in Congress, with the participation of the Government and the National Economic Prosecutor Office. As a result of the Protocol, a Technical Commission was established to set the main lines of the future legislative task, which concluded that the next step following to the publication of the Law on Strengthening the Attributions of the National Economic Prosecutor Office, was the transformation of the Resolutory Commission into a Court of Defense of the Free Competence.

The Bill that creates the mentioned Court is, therefore, a consequence of the commitment assumed by all political sectors, starting from the negotiation of Law No. 19.610, being its main objectives the freedom and technical excellence of the institution that resolves conflicts in competency matters, for which the current name of Resolutory Commission is changed to Court of Defense of the Free Competence. Later, on January of this year and as a result of an initiative of the Government, called "Agenda Pro-Growth," where businessmen, professionals, professors and representatives of the main ministries of the economic area participated in round table discussions, dedicating one of them to the institution of the defense of the free competence, the above mentioned agreement was confirmed, repeating the need to present a Bill within the first semester, including, as well, other matters that were considered convenient to modify.

To comply with the mentioned objectives, the Bill of May this year, proposes the following normative changes:

1. It is specifically acknowledged its condition of jurisdictional institution special and independent, made up by five members, subject exclusively to the Superintendence of the Supreme Court. This recognition, confirms its capacity as Court, an aspect frequently argued by the attorneys of the defense of the accused of conducts against the law, in order to decrease the compulsory and justice of its verdicts.

2. Demand of technical excellence of the members of the Court. On this matter, it was agreed to maintain that a Judge of the Supreme Court be part of the Court, but the other members will be assigned by public competitive bedding of records, must be university professionals experts on legal and economic competence matters. In order to guarantee their independence and full dedication, unlike de members of the Resolutory Commission, all selected persons are chosen by public competitive contest of antecedents, and all of them will receive an allowance.

3. One of the most debated aspects of the present legislation, is the lack of independence of the Resolutory Commission with respect to the National Economic Prosecutor Office, since it meets at the offices of the Prosecutor, who also provides personnel and administrative support. To put an end to this, the Court has been granted with a budget and its own staff, formed by a group of officers and professionals skilled for the proper performance of the Court, emphasizing the presence of three lawyers (in addition to the Supreme Court Judge and the two Court members, who are also lawyers): a Secretary Attorney and two Rapporteur attorneys, together with two Professionals from the Economic Field, a Chief of Budget and Court officials. These positions fulfill one of the main needs the system has now a days.

4. Due to the impulse of the Agenda Pro-Growth and the diagnosis of all the sectors, the Government decided to make good use of the initiative to improve other negative aspects of our antitrust laws, which can be summarized on the following points:

4.1 Jurisdiction scope, as well as the juridical good protected are defined in its article 1°, for which it is put in their records that the objective of defending free competence is necessary as a mean, and not as an end, to develop and preserve the right to participate in the economic activities, to promote the efficiency, and by this way, the well-being of consumers. This is due to the conviction that is a case load matter, in which it shall be the jurisprudence which will determine the unlawful conduct against free competition, being this norm a guide to resolve conflicts that may arise.

4.2 Therefore, article 3o. of the present law is modified, setting as samples of attempts to the free competence only those cases where undoubtedly exists an infringement, making clear the present inadequate statement, where we find as examples of injury to free competence acts related to transportation or to freedom of work. The core idea of this new norm is that each case should be decided by its own special antecedents, without having pre-existence rules decided in each case. Therefore, just as generic examples, the cartels, the misuse of dominant or monopoly positions and predators practices are mentioned.

4.3 The general procedure is modified in matters such as:

a) The Court can only act under party petition or by injunction of the Prosecutor. Now a days, according to the requirements of article 18 letter a) of the Decree Law No. 211, the Resolutory Commission can officially know about the violations to the mentioned body of norms. Such power is not proper of a modern system, since it tends to reduce fairness to the institution that has to decide on a matter subject to its deliberation. In those cases where the public interest is involved, the National Economic Prosecutor Office must, according to its basic duties of representing the general interest of the community (article 24 letter b) notify the injunction. Once again the proposed change follows the line to separate functions between the investigation institution (Prosecutor) and he/she, who resolves controversies (Court.)

b) The scope of the appeal for claim is extended to all resolutions issued by the Court of Defense of Free

Competence. Nowadays you can only claim of those that impose penalty, which constitutes a serious restriction to the right of parties to request revision of a judicial matter.

c) A simplified procedure is authorized for non contentious matters.

4.4 Another important aspect is the removal of Preventive Commissions. These consulting institutions fulfill their objectives by establishing the antitrust institutionality, since the Statutory Decree No. 211, is dated October 1973 (issued by the Military Junta at the time the first period of economic growth begun in Chile,) it was necessary to have Commissions that could answer questions about new and very complex matters. Fulfilled that teaching labor for almost 30 years, today there is not need to keep them. Its duties were transferred to the Court of Defense of Free Competence.

4.5 Replace regional prosecutors for assistant prosecutors as a mean to optimize such functions, due to the small number of requirements filed outside the Metropolitan Region were the city of Santiago is located, capital city with more than one third of the country's population and more than half of its companies.

4.6 The criminal feature of the law was removed, it was a type of blank criminal law, keeping just the administrative type penalties, increasing the fine and establishing common responsibility for managers and directors of the convicted juridical person.

Like any other Bill, even though it has been agreed upon during its generation, since its presentation to the National Congress it has had various favorable as well as critical comments, pointing out that there is no unanimity on some specific issues as to consider it wrong.

1. Field and independence of the members of the Court on this matter, there is a substantial change compared to the present scheme. On the first place, the assignment of the Chiefs of Services directly appointed by the Ministers of Finance and Economy has been eliminated, and it is proposed on its place members that do not have any ties or relations with Government

offices, so as to strengthen their independence during their execution. On the second place, the selection system is changed to public competitive pre-qualification contests, strengthening in this way their skills, except for the Supreme Court Judge. In addition, it establishes incompatibility with government employees and a dismissal procedure resolved by the Supreme Court, as elements that assure the members independence of their actions in relation with the assigning office, specially the Executive. The intervention of the President of the Republic on the appointments is not to choose, but only in his position as Head of the State to provide solemnity to the investing ceremony as it occurs with Judges and Ministers of the Court of Appeals, without considering to be subject to the Executive.

There has also been some criticism to the mix feature that the Resolving Commission has today, and that is kept by the new Court, grouping economists in addition of lawyers, since all the Courts in Chile, except those of administrative character, such as the Distortion Commission for Safeguard Measures and the Department of Industrial Property. From a legal point of view, there has been an interpretation that assents legality of mix integration. From a practical point of view, experience shows that the participation of professionals with an economic background has allowed pronouncements by the Commissions endowed with a strong technical background.

2. Attributions and Impartiality of the Court with reference to the consultation responses.

   The right to answer questions by a simple procedure has been valued, but it is considered that the Court could loose impartiality when, due to a consultation, the records are handed over to the Prosecutor who presents a requirement, and the Court studies again the case, now with the possibility of imposing sanctions. To this respect it can be mentioned that this would be an abnormal situation within the judicial system. As in every process, there is a series of consecutive acts that need a pronouncement from the Court - precautionary measures, accept

or deny evidences, etc.- not diminishing its independence when deciding on a case having all the information needed.
It has also come to the attention the right to dictate general instructions, since it would grant to the Court legislative rights, in spite that it was the Resolutory Commission which had among its functions, and that the faculty respond to a law that is oriented to the prevention – not only to repression – of conducts against free competence.

3. Protected Juridical Good.

The supposed multiplicity of objectives stated in Article N°1 of the Law has been criticized, and, in particularly, the inclusion of the consumers' well-being. The truth is that only one objective is stated which is the defense of free competence. Nevertheless, we believe that this does not grant a sufficient clarity as a guide, both for those that must fulfill the law, and for the Court that must resolve the conflicts. That is why the values that are behind the defense of competence are mentioned, such as the right to participate in the economic activities and efficiency and, considering that these values can still be somewhat abstract, particularly the efficiency, it is clarified that there must be an orientation towards the consumers' well-being, which is the final goal of the economic regulation. Also, there is an almost complete coincidence between the efficiency and the consumers' well-being, and in fact, both are mentioned in the preamble of the Statutory Decree N° 21 currently in force.
Definitely, this objective definition contributes to an explicit orientation which is consistent with most of the jurisprudence of the Preventive and Resolutory Commissions.

4. Elimination of the criminal feature.

We have also received here contradicting observations: whilst some support to maintaining the criminal feature, others believe that it is positive to eliminate it, which would not be achieved with the sole substitution of the imprisonment punishment with major fines. With regard to these observations, we can quote the

message that is attached to the project, where it was already said that the criminal character is incompatible with a law that can not typify crimes due to the dynamic nature of the anti-competence behaviors. Also, it was said that the penal character has not functioned as a good inhibitor of anti-competence behaviors, because practically there has never been a penal action. The substitution for a greater limit or ceiling for the fines reflects the need to have a good dissuasive instrument, adapted to a new magnitude of businesses that is very different from the one that prevailed 30 years ago. In no way it must be thought that this limit will be the general standard. In effect, the jurisprudence shows that the maximum sanction in force has never been applied.

Also, it can be stated that the procedure established in the law to apply sanctions is not of a penal nature, but has all the characteristics of a contentious civil process based in the principles of advertising, transparency and due process or bi-laterality of the audience.

Likewise, due to the fact that the D.L. Nº 211 establishes that the Resolutory Commission itself, and without the need to go to another court, has the authority and attribution of directly applying the fine sanction, it can be interpreted as of an administrative nature.

With regard to the elimination of the penal characteristic, whilst some have missed a complete typification of anti-competence behaviors, others have criticized the inclusion of examples precisely because it can be interpreted as typification. In this regard, it can be said, on one part, that all the experience in matters of defense of the free competence, including ours, clearly indicates the convenience of defining each one of the anti-competence behaviors, since the great dynamism of the business strategies can quickly leave these definitions obsolete. On the other hand, the examples submitted in Article N°3 are evidently exemplary and sufficiently general, in such a way that they can not be interpreted as anti-competence types. In fact, the idea is that nor these examples nor other general figures can be considered illegal in itself; before each case, it is the Court that must resolve at the light of the objective stated in article N°1.

With regard to the points exposed, an emblematic case can be quoted on the participation of the lawyers in the process of investigation of opposite behaviors to free competence, such as the one initiated by the Compañía de Telecomunicaciones de Chile (hereinafter, CTC), from the same year in which its tariff decree was established by applying the Telecommunications General Law N° 19.302, situation that, with the commented Law Project and with a reform to the Telecommunications General Law, it is expected to change due to the numerous conflicts that exist in the regulated sector. At the moment, and after long years of exhausting all administrative instances, the company has sued the Republic of Chile for damages, for an amount of nearly three hundred million dollars, perhaps the most onerous suit exercised against the State. Since this is an ongoing lawsuit, it is not feasible to discuss about the parties' positions, but it is possible to use it as an example of the lawyers' functions of the regulated sectors can carry out for its represented and the functions that lawyers from regulating entities exercise as counterpart.

According to the Telecommunications General Law, in Chile there is freedom in setting tariffs. Nevertheless, this declaration is only of principles, since it is established in the same regulation (Article 29), that in the case of local paid phones and long distance telephone services, excluding the mobile telephony and in the one of communication and/or transmission services of signals provided as an intermediate service or as private circuits, there would be an express qualification by the Resolutory Commission in relation to the existing market conditions not sufficient to guarantee a tariff freedom regime, the prices or tariffs of a qualified service will be set according to the bases and the special procedures established by the same law. These processes, unfortunately, have generated numerous conflicts, mainly due to the resistance of companies to accept a tariff setting as of the efficient or model company concept.

Due to the dominant position of CTC, due to the fact of being the first and single national telecommunications company in the country until de 1980's, the Resolutory Commission has estimated in two resolutions that there are no conditions in the local market to compete with free rates. Also, because it is the country's biggest company, its rates are substantially

lower, even among the other telephone companies, due to a bigger scale economy.

As it is evident, the company has refuted all the decisions of the authority, finally suing, but petitioned in a first stage to the same administrative authorities that dictated the decree, who formulated, at the end of last year, a consultation to the Resolutory Commission, so it would pronounce on the content of the previous Resolution N°515 which estimated that there were no conditions to free the telecommunication rates, thus the CTC ones should be regulated. The consultation, finally, was resolved by the Resolutory Commission, ratifying the appreciation that it had had in the year 1998.

At the same time, applications were submitted to the Comptroller?s General Office of the Republic, formulated by the Ministry of Economy and by Deputies, all of them motivated by the presentations of the company, and the existing informal lobby. The Comptroller?s General Office, definitely acknowledged the possibility of the Government of rectifying certain decrees because of nullity defects, but it decided to restrain it, so that the rights already acquired by the companies do not suffer any damages. This situation implied that the Ministry of Economy rejected CTC?s petitions, due to this, CTC suited the State.

The company lawyers appealed to the channel that in the future, with the creation of the Free Competition Defense Court, would not exist, since all resources and petitions were stated before the administrative authorities character that this new Court will not have, since it will be part of the Judicial Power.

Finally, we can conclude that the reform process started in Chile both from the public powers perspective as well as from the enterprise point of view, shall guarantee the effective guardianship for free competition, splitting completely the administrative activity from the judiciary, and allowing that public or private parties can litigate in equal conditions.

Further perfecting the legal system of competition in China by antimonopoly legislation

Zhou Yan
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Its my great honor to have this opportunity to introduce you China's current competition law and the future direction China is taking to perfect the legal system of competition. I believe that the views exchanged and shared in this situation could be of great help for member economies to perfect their competition policies and to strengthen their cooperation and coordination in the field of competition law and policy.

The People's Republic of China has made rapid progress on her way to socialist market economy, which should be safeguarded by a good legal system. The Chinese government has been taking the measures to establish and improve the legal system on competition. A perfect legal system of competition in China will conclude the anti-unfair competition law and the anti-monopoly law. The former, The Law of the People's Republic of China for Countering Unfair Competition(hereinafter refers to the Law for Countering Unfair Competition) was promulgated in September 2, 1993, and the latter, the Antimonopoly law is under intense drafting. In addition, there are some provisions regulating unfair competitions in other economic laws and regulations, such as provisions in the Law of the People's Republic of China on pricing, the Law of the People's Republic of China on bidding, the Regulations of the People's Republic of China on Tele-communications, etc.

I. The main contents and enforcement of the Law for Countering Unfair Competition

1.The Main Contents of the Law for Countering Unfair Competition

The framework of regulations: The Law for Countering Unfair Competition regulates not only the unfair competitive practice which violates the principle of

honesty and trust but also some restrictive practices on competition. It specifically includes 11 categories of conducts. (1)Transactions adopting counterfeit or obscure means (Article No.5); (2) Transactions of commercial bribery (Article No.8); (3)Transactions of issuing false or misleading advertisements (Article No.9); (4)Transactions of infringing other's commercial secrets(Article No.10); (5)Transaction of unfair prize-attached selling (Article No.13); (6)Transactions of commercial slander (Article No.14); (7) Transactions of forcing to deal of public enterprises or other operators with monopolistic position (Article No.6); (8)Restrictive practices on market competition by abusing administrative power (Article No.7); (9)Transactions of predatory pricing (Article No.11); (10)Transaction of tie in sale or sale attaching unreasonable conditions (Article No.12); (11)Transaction of bid rigging (Article No.15). Among these transactions, the former six categories belong to the behaviors of unfair competition while the others fall into the category of restrictive practices. The Law for Countering Unfair Competition stipulates civil, administrative and criminal sanctions for these conducts. The administrative sanction is the key point of the law, which includes " instructing to stop illegal practices"," confiscating the illegal income"," imposing a fine", " revoking the business license" and so on.

Enforcement agencies: According to the Law for Countering Unfair Competition, the Administrations for Industry & Commerce (AICs) are the competent authorities responsible for law enforcement. The main reason for this stipulation is that the AICs, as the administrative law enforcement authorities, have been fulfilling their responsibilities of preventing unfair competition and other illegal market transactions as well as maintaining the market order on the basis of relevant laws and regulations of the state. Meanwhile, the AICs have established a comparatively perfect market supervision system and possess rich experiences on market supervision.

2. The enforcement of the Law for Countering Unfair Competition

As the main enforcement authority on supervising unfair competition, the State Administration for Industry & Commerce and the local AICs have devoted

themselves in carrying out a great deal of effective work over these years. The AICs, which are at the three levels of province, city and county, are constructed by SAIC, an authority directly under the State Council at the central level. To enforce the Law for Countering Unfair Competition more successfully, the Fair Trade Bureau was established in SAIC in 1994. Afterwards, the local AICs have also established the corresponding law enforcement bodies in charge of the enforcement of the Law for Countering Unfair Competition under their jurisdiction. In order to improve SAIC's authority and status, in March, 2001, the State Council decided to upgrade SAIC to the ministry level.

SAIC and local AICs have endeavored to prevent transaction of unfair competition and to investigate and deal with cases concerned. Since the Law for Unfair Competition came into effect in December 1993, the AICs in the whole country have dealt with about 130,000 cases concerning unfair competition. SAIC and the local AICs have also taken a series of measures to struggle against the administrative monopoly and enterprises with a monopolistic position abusing their power, which have rectified the market economic order and improved the economic environment.

II The review of the content and enforcement of the Law for Countering Unfair Competition

In the practice of law enforcement over these years, we can say that the implementation of the Law for Countering Unfair Competition has effectively controlled the transactions of unfair competition, fairly maintained the market order and significantly protected the right and interests of the operators and consumers. The market economy in China has developed in a healthy way and has become more and more prosperous while increasing at a high growth rate.

However, we have realized that there exists, to a certain extent, some weakness in the Law for Countering Unfair Competition or in our nation's legal system of competition. First of all, there are some unfair competition transactions which can hardly be covered by the Law for Countering Unfair Competition. With the development of the market economy, different kinds of new unfair

competition, such as delimiting market, jointly limiting production, boycott, etc, are appearing. It remains to draft new stipulations on the agreements restricting competition between operators in the aspects of " sale areas", " resale price maintenance", " boycott", " sale customers", and so on. The second is the deficiency of the legal liabilities. The fact is that there are no administrative sanctions for transactions of predatory pricing (Article No.11), transactions of tie in sale and sale attaching unreasonable conditions (Article No.12),which makes the above-mentioned articles unable to be effectively used. The third is the weakness of the sanction, which can not meet the objective of punishing the illegal practice. For instance, the profit made from transaction of unfair prize-attached selling is much higher than the accrued administrative fine of 100,000RMB the highest. Also, it is without powerful supervision on the administrative and industrial monopolies. Effective regulations to regulate the restrictive practices and unfair competitive transactions of certain enterprises with a position of industrial monopoly abusing their power of natural monopoly or industrial monopoly are still in need. The fourth is the over-lapping of the regulations on unfair competition, which is spoiling the effect of the Law for Countering Unfair Competition. Some unfair competitions are beyond the regulations of the Law for Countering Unfair Competition as the result of other laws' dismemberment. For example, unfair competition in field of telecommunication shall be supervised by telecommunication authority, according to the Regulations on Telecommunication promulgated in 2000. Because of the overlap of execution authorities, it is difficult to efficiently plan the supervision on unfair competition.

In view of the enforcement of the competition law, the local and departmental protection and administrative intervention are comparatively serious. For example, a municipal government made a decision that inspection by any authority shall be approved by the municipal government. No approval, no inspection. Some local governments have established "development zones" or "key protection markets", which are not opened for on-the-spot inspection of the AICs. Some documents made by local government or industrial and commercial authorities violate the Law for countering Unfair Competition, and have been adapted as the basis of the restrictive practices by some public

enterprises. For example, Jiangsu local electrical enterprises forced the farmers to buy the electric meters and its boxes they supplied at the time of electricity network reform in rural areas. The law for Countering Unfair Competition says "public utility enterprises or other operators having monopolistic status shall not force others to buy the goods of the operators so as to exclude other operators from competing fairly."(Article 6) When Jiangsu Administration for Industry and Commerce was engaged in investigating and prosecuting the case, the electrical enterprises quoted Provision 72 in the Business rules for Electricity Supply (the 8th order by the Ministry of the Electricity) as accordance, i.e. the purchase, installation, removal, replacement, verification, demolishment, sealing up, sealing off and wiring of electricity meter and its accessories shall be handled by electricity supplier which the users shall cooperate with. According to this provision, the electricity meter, not specified as the monopoly product by the state, is described as a monopoly product, which has violated the Law for Countering Unfair Competition. Another example is that, according to the Insurance law of People's Republic of China, except that there is expressly specified in laws or regulations promulgated by the State Council, whether to insure shall base on free will of one's own, but the Regulations on Personal Mortgaged Loan promulgated by the People's Bank of China stipulates that the debtor shall by himself/herself or entrust the creditor to procure insurance before signing personal mortgaged loan contract if the real estate taken as the collateral. Such provision has breached not only the free will principle laid down in the Insurance Law but also the fair competition principle established in the Law for Countering Unfair Competition. Based on this provision, the commercial banks force the debtor to procure insurance in a designated insurance company, even procure additional insurance, such as guaranty insurance, all risk insurance, etc.

To improve the enforcement of the Law for Countering Unfair Competition requires that: firstly, the local governments as well as the industrial and commercial authorities should change their functions and keep intervention to the minimum; secondly, to perfect the law enforcement authorities gradually and train the law enforcement officials which have provided an organizational safeguard for the enforcement of the Law for Countering Unfair Competition;

finally to promote the profound advocacy of the Law for Countering Unfair Competition, so as to strengthen the legal awareness of operators and consumers, and establish a sound social ground for maintaining fair competition.

To perfect the legal system of competition is the need for safeguarding and accelerating socialist market order, being of great importance. So, the government and the legislative bodies are taking effective measures including drafting Anti-monopoly Law to perfect the legal system of competition.

III. Further perfecting the legal system of competition by accelerating the procedure of anti-monopoly legislation

After the promulgation of the Law for Countering Unfair Competition in 1993, the Chinese government has prepared to draft the Antimonopoly Law. It was defined in the Legislative Program of the Standing Committee of the 8th National People's Congress in early 1994 that the State Committee of Trade and Economy and the State Administration for Industry and Commerce were entrusted to draft jointly the Antimonopoly Law.

The leading group and working for drafting the Antimonopoly Law were established in May 1994. The drafting group has focused on collecting materials, investigating and researching afterwards. On this basis, the drafting of Antimonopoly law was taken into shape in July 1997.

Since 1998, the antimonopoly legislation in China has attracted more and more attention. In November 1998 and December 1999, the drafting group held jointly with OECD two international seminars on antimonopoly legislation successively in Beijing and Shanghai. On these two seminars, the domestic and foreign specialists, scholars and officials in the field of the Antimonopoly Law, carried out enthusiastic discussions around the topic of antimonopoly legislation in China. The drafting group has amended the draft of Antimonopoly Law according to the opinions and suggestions in the seminars. In June 2000, the drafting group finished the Text of Antimonopoly Law for Soliciting

Opinions based on another amendment and submitted it to the relevant authorities for criticisms. This year, further perfecting the draft of Antimonopoly Law and revising the Law for countering Unfair Competition have been listed as the 2th class legislation project by the State Council Office for the Legal Affair.

The drafting group has studied carefully on the feedback of each authority. Moreover, the group will carry on deeper research on the difficulties and focal points encountered in the legislation. (Such as the definition of relevant markets, the forms of abusing market dominant position, the standard and procedure of merger control, the regulations on administrative monopoly, the exception of the Antimonopoly Law, the extraterritorial effect of Antimonopoly Law and the relationship between the Antimonopoly Law and the Anti-unfair Competition Law)

We are endeavoring to promote the early issuance of the law of the people's republic of china on antimonopoly law, so as to perfect the legal system of competition in china and ensure the health development on market economy.

In the past 20 years, for the purpose of the development of her own market economy, china has been trying hard to learn and workout its own competition laws and regulations, and put them into real application. We believe that our economy and consumers are benefited from these policies and practices, and we are going to make our laws and regulations more comprehensive and complete in conjunction with international norms.

I would like to express the sincere appreciation once again to the Thailand and other nations as well as international organizations for their concern and support to the perfection of the legal system of competition in China.

Thank you all for listening.

COMPETITION ADVOCACY : Chinese Taipei's Experience

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I. Introduction

Recently we know that every country needs competition advocacy for the world economy globalization. Like other members of APEC, Chinese Taipei has adopted competition advocacy. In general, the main functions of our competition advocacy are as follows:

1. To enforce competition law in order to maintain trading order, protect consumers' interests, ensure fair competition, and promote the stability as well as prosperity of the economy as a whole,

2. To use efficiently the resources of government or competition authorities,

3. To engage in the deregulation/regulatory reform,

4. To avoid breaching the Fair Trade Law,

5. To meet the requirements of international cooperation on competition law/policy,

Chinese Taipei's competition law is primarily contained in the Fair Trade Law (hereinafter the "Law" or "FTL"), which was enacted on February 4, 1991. The enforcement began one year later to allow the business communities to adjust their practices. Based on the FTL, the Fair Trade Commission (hereinafter the "Commission " or "FTC") was established on January 27,1992 to commence the enforcement of the Law. The relevant competition policy and competition

advocacy were enforced simultaneously by the FTC. Although FTL is still a relatively new law in Taiwan and has been enforced for just ten and a half years, the FTC has made great efforts in complementing FTL enforcement activities, promoting public education, upholding and protecting the market competition function and pushing forward a variety of international cooperation.

II. The Achievements on Competition Advocacy

With constant endeavor over the past 10 years, the FTC has already had some achievements and positive experiences in competition advocacy. The achievements are stated as follows:

A. Establishing Coordination and Communication Channels

To communicate with other ministries as well as the judiciary is vital to ensure smooth and consistent implementation of the Fair Trade Law. Therefore, the FTC arranges regular programs,

seminars and activities with other administration agencies, judicial departments and local authorities to promote the Fair Trade Law, and to open up opinions from all sides. These opinions are collected as major reference for policy-making.

In terms of this communication channel, the FTC staff sometimes investigate, collect evidences and work with the police or prosecutors from other agencies. For example, several local wine and tobacco business operators/distributors hid abnormal stockpiles of rice wine in their secret warehouse last fall. When some customers went to their stores to buy some bottles of rice wine, the operators refused to sell any bottles of rice wine. The operators intended to stock the rice wine for later sale to earn extra profits, expecting that the price of rice wine would increase as a result of the wine shortage. After the FTC and relevant agencies'

investigation, these wine operators were fined for impeding market order and violating the Fair Trade Law.

B. Making Interaction with Industries

The FTC has actively engaged in publicity activities to educate the business community to comply with the Law when formulating their business strategies. In addition, the FTC has assisted the general public to understand what the Fair Trade Law regulates and enable them to recognize the Law in order to facilitate enforcement. Sixty-nine seminars on different topics tailor-made for business, specific industries and undergraduate as well as graduate students were held in 2001. For instance, to promote the liberalization of the petroleum market in Taiwan, the FTC organized a team to visit refineries and hold symposiums and meetings to discuss the issues on fair competition for petroleum industry. As a result, the FTC set up relative guidelines to guide the FTC's investigating and disposing tasks, and as a reference for the petroleum industry and business.

C. Promoting Public Education and Legal Counseling

The FTC offers many courses about the Fair Trade Law for the business community and the general public as a whole. The purpose of offering such courses is to build up a competition culture within the enterprises and to eventually prevent violations from happening. Beginning in 1994, the FTC conducted the "Fair Trade Law Education Program" to train and educate experts on the FTL for enterprises. Commissioners and director generals of the FTC lead this special training, which lasts a total of 72 hour (6 hours per week) of lecture programs for managerial-level employees of firms. 1,476 participants have completed the program in 29 sessions by the end of 2001.

In addition, the FTC set up two "service centers" to provide business firms and people with consulting services so that the general public as well as enterprises could forward their questions and complaints to the FTC directly. The staff in the service centers take turns in handling phone calls and visits from the general public every work day. According to the centers' record, both centers handle more than 10,000 phone calls annually.

D. Engaging in Deregulation Tasks

The FTC considers the advocacy process is very important by requesting relevant agencies to incorporate competition principles in their administration strategy. If competition principles can be fully taken into account when relevant agencies carry out deregulation or liberalization programs, there would be less misuse of dominant market power in the relevant markets and thus the law enforcement would be less important. The FTC set up the Deregulation Task Force in December 1996, and conducted a comprehensive review on a large scope of regulated sectors and their competition-related issues and laws in line with the overall process of deregulation. Through ongoing consultation with concerned authorities, success has been achieved in the deregulation of the specific markets and the enforcement of market competition. For instance, during the deregulation process of the salt product market in Taiwan, the FTC advocated liberalizing the import of dry and washed salt to other companies and resolving issues relating to the unlawful use of industrial salt. These suggestions were accepted by other relevant agencies. The salt product market in Taiwan has become much more liberalized than before.

E. Enhancing International Cooperation

The FTC is very keen to engage in international activities. At present the FTC has held bilateral consultation meetings with competition authorities of Australia, Canada, France, New Zealand, the EC, the Netherlands, the UK and the United States. In addition, the FTC has had extensive exchanges of visits with officials of

competition authorities in France, Germany, Japan, New Zealand, Switzerland and the United States. Beginning in 1999, the FTC joined OECD to co-host an international conference on competition policy geared toward helping developing countries to develop competition law regimes and cultivate related expertise. In May 1999,the FTC completed the initial version of a web site for the “APEC Competition Policy and Law Database”. Not only can member economies have dialogue and study other APEC member economies’ competition policies and laws through this database, but also the business enterprises and academic organizations will be able to retrieve useful information from the database for improving trade and investment.

III. Conclusion

As to competition advocacy, the FTC has got some positive experiences that can be shared with other countries and the FTC has already established a solid basis for the enforcement of competition law. Nevertheless, enhancing public awareness, promoting public education and training as well as international cooperation in competition law are still very important tasks to assist in avoiding breaching the Fair Trade Law. In order to build a better competition environment in the future, Chinese Taipei never stops promoting the competition advocacy.

APEC Training Program on Competition Policy

6-8 August 2002

Bangkok, Thailand

"Competition Policy Framework in Hong Kong"

prepared by

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Hong Kong

The Benefits of Competition

The relevant market as defined for the purpose of competition analysis is essentially a sphere of activities where suppliers of substitutable products compete for consumers. From the consumers' perspective, the relevant market includes all interchangeable products that serve their particular needs. The determination of what are close substitutes defines the boundaries of the market. In market definition analysis, the preliminary market boundary is normally established by reference to the functional characteristics of the product in question. This preliminary boundary is then expanded to include all other products that are close substitutes to the product in question.

Competition is derived from the rivalry between firms for the patronage of customers. The rivalry is driven by forces of supply and demand – the firms' interest in maximizing their profits and the customers' interest in maximizing their utility. Competition produces three distinct economic benefits:

- allocative efficiency – resources shifted to the production of those products and services more highly valued by consumers;

- productive efficiency – firms driven to adopt less costly and more technically efficient means of production; and

- dynamic efficiency – incentives for firms to gain competitive edge over time through new investment and product innovation.

Therefore, competition encourages economic efficiency of markets and gives rise to benefits in terms of quality products, continuous innovation, incentives for investment and downward pressure on price.

Sector-specific Competition Regulation

In Hong Kong, an open economy that is already highly competitive, the Government sees no need to enact an all-embracing competition law. A major reason for this is that the structural openness of the Hong Kong economy is conducive to competition, thereby reducing the need for resorting to legislation. The Government issued a Statement on Competition Policy in 1998, proclaimed its policy of adopting the principles of competition as the means to achieve the economic objectives of free trade. The competition policy framework is reinforced with sector-specific measures and minimum government intervention.

Competition regulation is considered necessary in telecommunications and broadcasting sectors. These two sectors are fundamental to an economy and indispensable for modern life. They are public utilities that are characterized by supply-side economies of scale and demand-side "network effects". With scale economies, a few firms in a small economy might be able to meet market demand more efficiently than a large number of firms. With "network effects", the value of a firm's services is augmented with the services' increasing consumption. Besides, public utilities involve considerable barriers to entry or exit, established by the incumbent's commitment to high investment costs, and erected by its control of access to scarce resources and essential facilities. It follows from this that telecommunications and broadcasting activities are performed by only a relatively small number of service providers.

The concentration of firms in the market and the high barriers to entry or exit are both not conducive to the free play of competitive forces. The incumbent is inherently endowed with concentrated market power, unconstrained by the threat of new entry while the few service providers are prone to collude on prices.

The incumbents in the telecommunications and broadcasting sectors may wield significant market power, the legacy of their dominant positions. Sector-specific regulation is therefore required to provide the necessary checks and balances.

A sector-specific regulator brings certain advantages. Principals among these are the regulator's ability to focus on the specific industry needs, expertise in technical issues and authority to regulate the incumbent's market power.

Among the specific measures adopted under dominant operator regulation, one example is the tariff approval regime that subjects the dominant operator to specific requirements regarding the approval, revision and publication of tariffs. It limits the dominant operator's ability to cross-subsidize between market sectors, to leverage its market power from non-competitive sectors to the competitive ones. It prevents anti-competitive practices such as predatory pricing and bundled or tied service offerings.

Dominant operator regulation will facilitate new entrants to establish themselves in the market. It provides a regulatory safety net to preserve competition but not to shield the inefficient players from the market discipline. Non-dominant participants by definition have less market power and will be disciplined by the market through the natural process of rationalization, consolidation and exit by the weakest players.

Competitive Safeguards

In telecommunications and broadcasting sectors, a degree of regulatory supervision is necessary to ensure fair market conditions prevail and to prevent the dominant player from abusing its market power. The regulatory response to this situation is to put in place a set of competitive safeguards. In Hong Kong, the competition provisions of the Telecommunications Ordinance and the Broadcasting Ordinance were enacted in 2000 and 2001 respectively. The following are the major competitive safeguards adopted.

(i) Prohibition against anti-competitive conduct

Anti-competitive conduct may take many forms. It may exhibit collusive behaviour such as price-fixing, cartels, bid rigging and market sharing. In some jurisdictions collusion is prohibited per se.

In Hong Kong, the relevant competition provisions dealing with anti-competitive conduct are stipulated in section 7K of the Telecommunications Ordinance and section 13 of the Broadcasting Ordinance. They prohibit telecommunications and broadcasting licensees from engaging in conduct that has the purpose or effect of preventing or substantially restricting competition in a telecommunications market or a television programme service market respectively.

In assessing whether the conduct has anti-competitive purpose or effect, the following are relevant considerations: price-fixing agreements, action preventing or restricting supply to competitors, market-sharing agreements etc.

(ii) Prohibition against abuse of dominance

In situations where market power exists, competition provisions need to be enacted to control the abuse of that power for anti-competitive purposes.

In Hong Kong, section 7L of the Telecommunications Ordinance and section 14 of the Broadcasting Ordinance prohibit licensees from abusing a dominant position in a telecommunications or a television programme service market respectively.

A firm (or a group of firms acting collectively) is dominant when it is able to act without significant competitive restraint. For example, it is able to charge prices above competitive levels without fear of new entrants undercutting its price or taking customers away.

Prohibition against abuse of dominance is designed to stop powerful firms from damaging the competitive process. The classic example is predatory pricing. While low prices are often a welcomed result of genuine competition, a drastically below-cost service could stifle the competitors before they have a chance to gain a foothold. Pricing becomes predatory when selling is below cost for the purpose of driving out competition, followed by subsequent excessive pricing to recoup the losses.

In assessing an abuse of dominance, conducts that warrant examination include but are not limited to predatory pricing, price or other forms of discrimination, harsh terms and conditions imposed by the incumbent on other operators, and conditional or tie-in arrangements.

(iii) Prohibition against discriminatory behaviour

In sectors with high sunk costs such as telecommunications and broadcasting, vertical integration can help reduce the investment risk. For example, a service provider may wish to integrate upstream into distribution to reduce the risk of being held captive to the owner of the necessary network infrastructure.

Where there is market power at one of the input levels in the supply chain, a vertically integrated operator has every incentive to hinder or foreclose competition in downstream

markets by denying access to the essential inputs. Alternatively, access may be given only on discriminatory and competitively disadvantageous terms. Indeed, the terms may be so unrealistic that they are tantamount to a refusal to provide access.

In Hong Kong, section 7N of the Telecommunications Ordinance prohibits exclusive or selective arrangements (e.g. in distribution or supply) with the intention of obstructing new entry or limiting market accessibility.

Discrimination relating to charges, performance characteristics or other terms and conditions of supply is prohibited where such discrimination has the purpose or effect of preventing or substantially restricting competition.

(iv) Prohibition against misleading and deceptive practices

To promote fair competition and to foster good trade practices, misleading and deceptive advertising or marketing practices should be prohibited. Consumers must be protected against firms employing misleading or deceptive tactics to distort competition.

In Hong Kong, section 7M of the Telecommunications Ordinance prohibits licensees from engaging in conduct which is misleading or deceptive, including (but not limited to) conduct relating to promoting, marketing or advertising the network, system, installation, customer equipment or service.

(v) Proposed legislative framework to regulate mergers and acquisitions

It is recognized that most mergers and acquisitions do not raise regulatory concerns. Indeed, mergers and acquisitions are part of normal business activities that may be economically beneficial to the society. However, when the relevant transaction gives rise to market power that may substantially lessen competition in the market, it warrants regulatory intervention.

Prohibition against anti-competitive mergers differs from other competition provisions because it addresses questions of market structure rather than questions of market conduct. It prevents the acquisition of market power from the outset. The test in a merger analysis is whether the merger has the effect of substantially lessening competition in a market.

In Hong Kong, amendment to the Telecommunications Ordinance is currently proposed to provide a clear and comprehensive regulatory framework to regulate mergers and acquisitions

in the telecommunications market with a view to promoting fair and effective competition. The regulatory framework is proposed to apply initially only to carrier licensees. A number of procedural safeguards are proposed, and the Telecommunications Authority is required to issue guidelines on the assessment criteria to ensure a transparent and efficient regulatory regime.

As to the nature of the regulatory regime, there is no universal rule as regards ex ante or ex post regulation adopted in overseas jurisdictions. An ex post regime will be adopted in Hong Kong, with a channel provided for carrier licensees to voluntarily seek the Telecommunications Authority's prior approval. In essence, the regime does not require pre-notification to the Telecommunications Authority for approval of any significant proposed changes in control of, or influence over, a carrier. But an option is available to the carrier licensees whether to seek prior approval, balancing against the risk of being penalized subsequently if the activity is found to be anti-competitive. Given such flexibility, the burden of compliance is minimized without compromising the requisites for regulation.

Conclusion

Hong Kong is renowned as a free enterprise and open market. Opportunities abound for enterprises to take advantage of Hong Kong's favourable environment for business.

Hong Kong is already served by a world-class infrastructure. The competition policy is to intervene where justified by the presence of market power and to do so in a way that minimizes the intervention so that it is proportionate to the dynamics of the market. The guiding hand of light-touch and transparent regulation is to liberalize the telecommunications and broadcasting sectors to open them to competition. Competitive safeguards are put in place to ensure the necessary conditions for competition, coupled with continued regulatory vigilance to build on the hard-earned success in the liberalizing process.

The Government has provided a dedicated forum under the Financial Secretary – the Competition Policy Advisory Group or "COMPAG" in short – to review policy issues related to competition. The Trade Practices Division of the Consumer Council is commissioned by COMPAG to conduct competition-related studies to monitor and review business practices in sectors prone to anti-competitive behaviour. This speaks for the Government's commitment in facilitating competition, while allowing the market mechanism to work.

Therefore, the framework best suited to Hong Kong may indeed be the most obvious one: a flexible, non-intrusive framework that allows the market to evolve in response to competition.

The views expressed in this paper are the personal views of the author and do not necessarily represent the views of the Office of the Telecommunications Authority or the Hong Kong Government.

THE APEC TRAINING PROGRAM ON COMPETITION POLICY FOR APEC MEMBER ECONOMIES

"The Experience of Commission for the Supervision of Business Competition (KPPU) Republic of Indonesia in Advocacy"

presented by
Ismed Fadillah
(Indonesia)

A. Overview of the Indonesia Competition Law and Policies

1. Basic of Law

During the past three decades, business opportunities in Indonesia were not distributed equally among all level of business actors. The government of Indonesia under the last regime created inefficient government policies that raised market distortion. The government policies just gave the opportunity only to a small group of business actors. The business actors who had been closed to the ruling elite acquired excessive facilities that created an opportunity gap in business. This condition improved the growing of conglomeracy and caused the economy to be very fragile and unable to compete.

As stated on the Broad Outlines of the State Policy (Garis Besar Haluan Negara-GBHN) that the development in economic sector must be directed toward the achievement of people welfare based on Pancasila and the 1945 Constitution. Democracy in the economic sector requires equal opportunities for every citizen to participate in the production process and marketing of goods and services in fair, effective, and efficient business environment so that it can support economic growth and a working equitable market economy.

Awaring situations and conditions as mentioned above that caused the weakness of the Indonesia economy and in line with the GBHN, the House of Representative of the Republic of Indonesia or Dewan Perwakilan Rakyat Republik Indonesia (DPR RI) has taken the inisiative to draft the law concerning regulation of competition (this is the first law has been inisiated by the House of Representative after more than 30 years it has never inisiated a law). As the result, in March 5, 1999 the Government of Indonesia has enacted ***Law No. 5 of 1999*** concerning ***Prohibition of***

Monopolistic Practice and Unfair Business Competition and it took into effect on ***September 5, 2000.***

The main objective of the Indonesian Law No. 5 of 1999 shall be to:

a. safeguard the public interest and to increase the national economy efficiency as one of the efforts to increase the people welfare.
b. establish a condusive business climate through the arrangement of fair business competition thus guaranteeing the certainty of equal business opportunities for large, middle, and small business actors in Indonesia.
c. prevent monopolistic practices and unfair business competition caused by business actors.
d. the creation of effectiveness and efficiency in business activities.

2. Organization Responsible for Execution the Law

The Supervisory Commission for Business Competition of the Republic of Indonesia is the agency which responsibles for execution the law (Chapter VI, Articles 30 to 37 of the Law No. 5 of 1999). It was formed to supervise business actors in conducting their business activities so that they do not conduct monopolistic practices and unfair business competition. The Commission is an independent institution free from the influence of the government and other parties. It shall be responsible to the President of the Republic of Indonesia and the people of Indonesia through the Parliament (DPR – House of Representative).

3. **Duties of the Commission are**:

a. conducting evaluations of agreements, business activities or actions of business actors, and whether there is or is not any abuse of dominant position that could result in the occurrence of monopolistic practices and/or unfair business competition.
b. taking actions in accordance with the authority of the Commission.

c. providing suggestions and consideration on government policies regarding monopolistic practices and/or unfair business competition.
d. compiling guides and publications regarding the law.
e. providing periodical reports on the activity results of the Commission to the President and the House of Representative.

4. Authorities of the Commission are:

a. Receiving reports from the public and/or business actors concerning presumption of the occurrence of monopolistic practices and/or unfair business competition;
b. Conducting research on presumption of any business activities and/or actions of business actors that could cause monopolistic practices and/or unfair business competition;
c. Conducting investigations and/or examinations on presumed cases of monopolistic practices and/or unfair business competition reported by the public or by business actors or discovered by the Commission as result of its investigation;
d. Concluding the results of investigations and/or examination whether there are or are not any monopolistic practices and/or unfair business competition;
e. summoning business actors who are presumed to have violated the provisions in this Law;
f. summoning and call to attend witnesses, expert witnesses and any person who is considered knowing of any violation to the provisions in this Law;
g. asking for assistance from investigators to summon business actors, witnesses, expert witnesses or anybody as referred to in point 5) and 6), who are unwilling to fulfil the summons by the Commission to appear;
h. asking for information from government agencies in connection with investigations and/or examinations of business actors who are violating the provisions in this Law;

i. obtaining, researching and/or evaluating letters, documents or other evidence for the purpose of investigation and/or examination;
j. deciding and determining whether or not there has been any loss suffered by other business actors or public;
k. notifying the Commission's decision to the business actor presumed of conducting monopolistic practices and/or unfair business competition;
l. imposing sanction in the form of administrative sanctions to the business actor who is violating provisions in this Law.

5. The Commissioners

Based on the Article 34 of the Indonesian Law No. 5 of 1999, the formation of the Commission and the structure of its organization, duties and functions was determined by the Presidential Decree No. 75 of 1999 dated on July 8, 1999 on the Supervisory Commission for Business Competition. Furthermore, the 11 (eleven) members of the Commission were appointed under the Presidential Decree No. 162/M of 2000 dated on June 7, 2000. The Commission consist of a chairman concurrently as a member, a vice chairman concurrently as a member and 9 (nine) members. The President upon the approval of the People's Legislative assembly appointed them. The term of office of the Commission are 5 (five) years and can be reappointed for 1 (one) subsequent term of office. If because of expiry of term of office, a vacancy occurs in the Commission membership, the term of office of members may be extended until new members have been appointed.

6. Overview of Regulations

The Indonesian Law No. 5 of 1999 concerning Prohibition of Monopolistic Practice and Unfair Business Competition consist of 11 (eleven) Chapters and 53 (fifty three) Articles.

The content of the law:

a. It prohibits agreements that leading to monopolization of the market or unfair business competition (Article 4, Articles 7 to 9, Articles 10 to 14, Article 22, and Article 23).
b. It prohibits merger of firm resulting in a dominating market position or unfair business competition (Articles 26 to 29)
c. It forbids exploitation of consumers, suppliers or buyers by abusing a dominating market position (Articles 17 to 18)
d. It interdicts obstructing competitors by discriminatory acts as to prices or terms of trade or by rejecting business dealing (Articles 7 to 8, Article 16, Articles 19 to 21, and Article 24)
e. It permits to a certain degree consumer price maintenance, exclusive agreements as well as licence and know-how contracts (Articles 5 to 6, Article 15, and Article 50 (b)).

7. Case Handling Procedure

Anybody who knows or reasonably suspects there has occured violation of the Law No. 5 of 1999 could report in writing to the SCBC, with clear information about the occurence of violation, along with the identity of the reporter. The parties that have suffered losses as a result of occurence of violation of the Law could report in writing to the Commission, with complete and clear information about the occurence of violation and the loss suffered along with the identity of the reporter.

Not only based on the report but also if the Commission knows there is a presumption of violating the Law No. 5 of 1999, the Commission shall be obligated to conduct a preliminary examination, and not later than 30 (thirty) days, the Commission must determine if it is deemed neccessary or not to

conduct further information. Then in the further examination, the Commission shall be obligated to examine the reported business actors. If deemed necessary, the Commission could listen to information from witnesses, expert witnesses and or other parties.

The Commission shall be obligated to complete further examination at the latest within 60 (sixty) days from the begining of further examination. Then if it is necessary, the period of further examination could be extended at the longest within 30 (thirty) days.

The Commission shall be obligated to decide if there has or has not been any violation occured to the Law No. 5 of 1999 at the latest within 30 (thirty) days counted from the completion of further examination. The Decision of the Commission must be read in a session declared open to the public and notified immediately to the business actors.

Within 30 (thirty) days since the business actor receives the notification of the Commission's Decision, he or she shall be obligated to implement that decision and deliver report on its implementation to the Commission. He or she could submit objection to the District Court at the latest within 14 (fourteen) days after receiving notification of the decision. If he or she doesn't submit objection within the period of time, he or she shall be deemed to have accepted the Commision's Decision.

The District Court is obligated to examine the objection of the business actor within 14 (fourteen) days since the obligation is received and after that it is obligated to decide within 30 (thirty) days since the day of the commencement of the examination of the objection. The party objecting to the District Court' s Decision may submit appeal to the Supreme Court of the Republic of Indonesia within 14 (fourteen) days and the Supreme Court is obligated to decide within 30 (thirty) days since the appeal is received.

If there is no objection to the Commission's Decision, it has become final and binding. Then the Commission's Decision is requested the executory decree to the District Court.

8. Sanction

There are 3 (three) kinds of sanction those are regulated on the Law No. 5 of 1999, as follows : administrative action, criminal penalties, and additional criminal penalties.

Administrative Action (Article 47)

The Commission is authorized to impose sanctions in the form of administrative action to the business actor who has violated the provision in the Law No. 5 of 1999. The administrative action as mentioned above shall be in the form of:

a. decree cancelling agreements
b. order to business actor to cease vertical integration
c. order to business actor to cease activity that has been proven to cause monopolistic and or result in unfair business competition and or losses to the public
d. order to business actor to cease the abuse of dominant position
e. decree cancelling merger or consolidation of business entity and acquisition of shares
f. decree for payment of compensation
g. levying a fine at the lowest in the amount of Rp. 1.000.000.000,- (one billion rupiah) and at the highest in the amount of Rp. 25.000.000.000,- (twenty five billion rupiah).

Criminal Penalties (Article 48)

a. Violations to the provisions of the Law No. 5 of 1999 in Articles 4, Articles 9 to 14, Article 16 to 19, Article 25, and Article 27 to 28 shall be subject to a criminal fine at the lowest in the amount of Rp. 25 billion (twenty five billion rupiah) and the highest in the amount of Rp. 100 billion (one hundred billion rupiah), or imprisonment as substitute of fine at most 6 (six) months.
b. Violations to the provisions of the Law No. 5 of 1999 in Articles 5 to 8, Article 15, Article 20 to 24, and Article 26 shall be subject to a criminal fine at the lowest in the amount of Rp. 5 billion (five billion rupiah) and the highest in the amount of Rp. 25 billion (twenty five billion rupiah), or imprisonment as substitute of fine at most 5 (five) months.
c. Violations to the provisions of the Law No. 5 of 1999 in Articles 14 shall be subject to a criminal fine at the lowest in the amount of Rp. 1 billion (one billion rupiah) and the highest in the amount of Rp. 5 billion (five billion rupiah), or imprisonment as substitute of fine at most 3 (three) months.

Additional Criminal Penalties (Article 49)

With reference to the provision in Article 10 of the Criminal Code concerning crime as referred to in Article 48 of the Law No. 5 of 1999, additional penalties might be added in the form of:

a. revocation of business license
b. prohibition for the business actor who is proven to have violated Law No. 5 of 1999 to hold position as director or commissioner for period of at least 2 (two) years and at most 5 (five) years.
c. Cessation of certain activities or actions that cause losses to other party.

B. Advocacy by KPPU

As mentioned at article 35 letter e which is say **"providing suggestions and consideration on government policies regarding monopolistic practices and/or unfair business competition",** so far SCBC has been given some

suggestions for government, for example concerning economic class services airfare by Indonesia National Air Carriers Association (INACA), which is guaranteed by government regulation and fix price at taxi tariff by ORGANDA, which is guaranteed by government regulation too.

In this paper I would like to present a case concerning airfare by Indonesia Air Carrier Association (INACA).

1. Background

The Regulation concerning airfare in Indonesia was based on ;

a. The Act No. 15 Year 1992 concerning Airfare.
b. The government regulation No. 40 Year 1995 concerning Air transport
c. The decision of Minister of Transportation No. KM 61 Year 1996.
d. The decision of Minister of Transportation No. KM 25 Year 1997.

The government regulation No. 40/1996 at article 35 (1) says the tariff for economic class services are decided by The Minister of Transportation. Furthermore, The Minister gives his authorities to INACA as an association of civil aviation to decide economic class services airfare tariff by decision of Minister of Transportation No. KM 25/1997.

Until 1999, tariff for airfare is single rate, but in reality a lot of airplane companies were in war discount, even some airplane companies give a price under cost of production. Based on that situation, airplane which are member of INACA agreed to make new tariff system between floor price and ceiling price. Floor price calculated by assumption US$ 1 = Rp. 4.000,- and ceiling price calculated by assumption US$ 1 = Rp. 7.500.

Based on the Minister regulation No 25/1997, INACA had made suggestion to government for raising economic class services airfare which is enacted since 1 June 2001, because the value of US$ currency has changed

sharply to rupiah. In that time value of US$ 1 equal Rp. 10.000,-. The suggestion for floor price calculated by assumption value US$ 1 equal Rp. 5.000,-, and ceiling price calculated by assumption US$ 1 equal Rp. 9.000,-. Based on that scheme, INACA gives a freedom to airplane for establishing price between floor price and ceiling price.

2. KPPU Analysis and Action

Consider to the Act No. 5 Year 1995 concerning The Prohibition of Monopolistic Practices and Unfair Business Competition, The behavior of INACA in establishing price fixing a tariff for airplane is prohibited, especially article 5 concerning price fixing, but in this case what the INACA's done is guarantied by The decision of Minister of Transportation No. KM 25/1997.

Facing of that case, KPPU do some activities, are :

a. Analyzing the whole regulations related to airfare.
b. Asking information from The Minister of Transportation.
c. Calling airplane company which is member of INACA and Head of INACA.
d. Calling airplane company which is non member of INACA.
e. Asking for information from expert, especially in airfare field and Indonesian Consumer Institution Foundation (YLKI).
f. Making public hearing, one of KPPU method for collecting information from everybody whom knows airfare case and in the same time giving information for the public.

As a result of analyzing regulation, KPPU found that The decision of Minister of Transportation No. 25/1997 for giving his authorization for deciding economic class airfare to INACA is absolutely not approriate, because The Government policy is aimed for public beneficial, but on the other hand INACA as association for airplane has purpose for making beneficial only for airplane.

Furthermore, due to minister decision, competition among airplanes are loose, because the prices are made by INACA by the agreement of all members. This situation are recognized by member of INACA and Head of INACA.

Moreover, in KPPU opinion, giving delegation of authorities from Minister of Transportation to INACA by Minister decision is breaking The House of Representative Decree No. III/MPR/2000 (TAP MPR No. III/MPR/2000) concerning Law source and regulation hierarchy, because in that decision, the minister decision is not one of regulation hierarchy.

Based on that analysis and The House of Representative Decree (TAP MPR), KPPU gave suggestion to The Minister of Transportation to abolish the regulation which give authorities to INACA for deciding of economic class airfare, and at the same time put back the role of Minister, as a public officer, establishing economic class airfare.

For this suggestion, The Minister of Transportation issued a decrees No. KM 8 year 2002 and No. KM 9 year 2002 for taking back authorities from INACA in establishing economic class airfare.

Jakarta, 22 July, 2002

ISMED FADILLAH

Competition Advocacy Role of the Korea Fair Trade Commission

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I. Introduction

Competition is both the core and the substance of the market economy in that it increases social benefits by ensuring that products or services are produced at the minimum cost, and it drives market participants to realize their maximum capacity and innovation. Competition advocacy refers to various efforts which aim to apply the competition principle in the government processes of policy decision-making and implementation.[1]

Korea's experience on competition advocacy is characterized by the KFTC(Korea Fair Trade Commission)'s pivotal role in reforming wide-range of anti-competitive regulations. In the past, the KFTC had concentrated on the enforcement of competition law, such as prohibiting cartels and abuse of market dominant power. However, recognizing that enforcement of competition law alone cannot promise a fully functioning market with the regulations by various ministries, the KFTC strengthened competition advocacy role. With well-organized institutional arrangement, the KFTC's neutral status, which is not captured by the interest groups, and its know-how which had been accumulated by long experience on market analysis made this possible.

Competition authority, mainly aims at maximizing the market performances by remedying market failures. In Korea, however, such a policy goal was hard to achieve partly owing to the old entrenched practices in private business sector accustomed to government intervention and guide. In this light, the KFTC was forced to extend its domain as a so-called 'market creator', but instead, only remained as 'market watcher'. As a consequence, the KFTC, whose primary mandate is enforcing competition law and policy, was forced to extend its concerns to intervention to the policy making procedures, regulatory reform and privatization of SOEs.

This paper aims to present the KFTC's experiences on competition advocacy and to take some lessons from it. To do this, chapter II explains

[1] It also refers to the promotion efforts which secure the people's understanding and awareness of competition policy.

KFTC's resources to play an advocacy role. Chapter III is devoted to explain institutional arrangement about advocacy and its performance. Chapter IV concludes policy implications and lessons reaped from Korea's experience on competition advocacy role.

II. KFTC's Resources to Play an Advocacy Role

The KFTC has a separate "Competition and Deregulation Division", that is wholly devoted to competition advocacy.[2] Other divisions are also involved in consultations or analyses of market structure in connection with regulatory proposals, so quantifying the resources devoted to advocacy is difficult. The most prominent achievement was the enactment of the Omnibus Cartel Repeal Act(OCRA), which was made public in February 1999. This successful enforcement of the OCRA resulted in the elimination or improvement of 20 cartels, including those that set remuneration for 9 professional occupations such as lawyers, certified public accountants, certified accountants, etc.. Although the KFTC once faced with much difficulties in enacting the OCRA, for instance strong resistance from interest groups. However, the OECD Recommendation on Prohibition of Hard-core Cartels㉾('98.4.18) provided backing for this undertaking.

Some other advocacy successes include :

- Eliminating suggested retail prices, to discourage resale
nce.
- Eliminating mandatory membership and membership
de associations
- Deregulating fees for telecoms services, and changing
stem to a reporting system
- Reducing entry restrictions in the sale of electric
te generators can enter through simple registration, rather than licensing, and have more opportunities
y to end users.

Noticeably, in the year of 2001,㉾Clean Market Project㉾ was launched as a core policy of the KFTC, with an aim to investigate the violations against the Korean competition law and improve the comprehensive market structure as well. Punishment alone cannot fundamentally improve the market structure and long-time business practices. To overcome these limitations, the KFTC has been conducting in-depth analyses, which is expected to take root competition culture in six major markets: private educational institute, information telecommunications, medical pharmaceutical, wedding funeral services and the mass-media such as newspaper and broadcasting industries. This year the KFTC is conducting "market improvement project by industry" in six major markets : energy, finance, distribution, real estate, leisure and education.

[2] The division consists of nine members : one director, one assistant director and seven offiers.

Sometimes advocacy does not prevail. Efforts to allow retail shops to sell over-the-counter, non prescription drugs failed because of opposition from the association of pharmacists. The KFTC criticized the anti-competitive features of a proposed system for joint management of liquefied petroleum gas containers, but the ministry decided that the system was required for safety reasons.

III. Institutional Arrangements

For the efficient competition advocacy role, competition authorities need to be empowered with the appropriate authorization and resources to have its own voices in the governmental decision making procedure. The KFTC`s independent and higher status in the government structure, with its techniques and experience on market analysis, makes it possible to disseminate the competition principles in the government decision-making, enforcement, and deregulation processes.

A. Competition advocacy tool in the government policy making procedure

1) Consultation on Enactment of Acts and Decrees which restrain competition

Statutory requirements for inter-agency consultation appear comprehensive. Other government agencies are to consult in advance with the KFTC, or advise the KFTC of the particulars on whether their proposed acts and decrees have any clause having anti-competitive effects on business, which is very unique as an Competition advocacy role in Korea. The consultation requirement, and hence the authority for competition advocacy, has been in the law since it was adopted in 1980. Such a role is deemed one of the core functions of the KFTC. With respect to the consultations on legislation, in the last year, the KFTC has put forth its opinions on 53 (12.3%) of the 432 requests made by relevant government agencies for the enactment and revision of legislation. Of that, the KFTC's views and suggestions were reflected in 47 (88.7%) of those changes in legislation. As such, the KFTC has helped oppose and prevent the introduction and amendment of anti-competition legislation, thereby achieving, in effect, competition policy advocacy. The percentage of acceptance(88.7%) indicates that other ministries regard the KFTC's opinions as important[3]. The KFTC's apparently superior success rate may be due in part to its institutional status, which is an independent agency with ministerial rank.

2) Cabinet Meeting

[3] In 2000, total cases of consultation were 481, those of recommendations presented were 60(12.5%) while those of recommendations adopted were 51(85%).

The KFTC consistently inputs competition perspectives into major policy making procedures such as cabinet meeting as a regular member. After the 4th Revision of the MRFTA in 1994, the KFTC gained full independence as a central administrative body under the Office of the Prime Minister and its status and functions were strengthened and the number of personnel considerably went up (number of staff was 343 as of 1995).[4] Policies, once formulated, are difficult to change. In this regard, the Chairman and Vice-chairman can present the KFTC's views in person, in deliberations at the ministerial and vice-ministerial level. The Cabinet meeting is of great importance, in that it incorporates the different opinions of ministers from the competitive point of view. Based on the authority and capacity provided by law, the KFTC has successfully fulfilled the role of a competition advocate.

B. Ensuring Competition Principles in the Regulatory Reform Procedure

1) KFTC's Experiences as Regulatory Reform Body

Since the 1990s, a number of committees relating regulatory reform were newly established. At that time, reform drive lacked specialties in market analysis and techniques for reforming the regulations having possible anti-competitive effects. To ensure competition even after regulations are once set up, the KFTC established an internal organization called 'committee on economic regulatory reform'('97.4-'98), which dedicated to the economic regulations rather than social. The committee successfully performed far-reaching reform against pervasive and deep-seated regulations with the KFTC's own staff members. This was historic in the sense that the meaningful achievements done by the committee firstly prompted the trend of regulatory reform to spread out throughout government agencies.

2) Participating Committee on Regulatory Reform as a Main Member

Afterward, the committee was expanded and elevated under the leadership of Prime Minister, and naturally the KFTC played an important role as a standing commissioner. In its efforts to infuse competition perspectives to other ministries, the KFTC have designed its own guidelines that is to eliminate anti-competitive regulations such as entrance barriers, price control and regulations on business activities.

C. KFTC's Competition Advocacy Role in the Privatization Procedure

The KFTC also has a keen interest in the privatization of state-owned enterprises (SOEs). Privatizing backbone industries that operate under state

[4] The KFTC has 453 officials including Chairman as August 2002.

monopolies could help produce private monopolies instead of state monopolies. In recognition of this possibility, the KFTC has actively pursued pro-competition policies, including those that promote deregulation.

Privatization of SOEs aims at making the market mechanism work in the public sector and thus to enhance its efficiency of the economy as a whole and ultimately to contribute to the national budget. Creating competitive conditions is the key to enhancing efficiency. Therefore, in order to prevent the transmission of public inefficiency into private monopoly, it is critical to secure market competition.

The current program for privatization and managerial renovation of state owned enterprises(SOEs) in Korea, commenced since 1998, is different from that of the past in that the task of privatization has been executed not by existing but by a newly established organization. The Ministry of Planning and Budget(MPB) played a central role in analyzing the target SOEs in advance and holding hearings. Based on this process, the MPB finalized and announced 'the 1st privatization plan of SOEs' and 'the 2nd privatization and managerial renovation plan' respectively in July 1998 and August 1998.

An organization responsible for performing privatization of SOEs, the 'Committee on privatization of SOEs' was created in the MPB. This committee is composed of Minister of MPB as a chairman, vice-chairman of the KFTC, vice-governor of Korea Development Bank and 2 commissioners from the private sector. Since its establishment in September 1998, the committee has been convened eleven times so far and dealt with major issues, such as improvement of regulation related to privatization and overseeing the privatizing process. The KFTC has performed competition advocacy role from the stage of drafting the privatization policy. On each ministry's front, a task force team headed by a high-level official is responsible for technical works related to privatization, such as the detailed time schedule and method of selling SOEs, planning strategy, etc..

From the experience on privatization of SOEs, the KFTC has learned that securing transparency in the process of privatization and the announcement of the gradual privatization schedule are important in order to provide predictability to enterprises preparing for privatization. The cases also indicate that it is desirable for competition authority to intervene at an early stage of decision-making on privatization and the importance of structural measure such as vertical separation.

IV. Policy Implications and Lessons Reaped from Korea's Experience on Advocacy Role

The experience of the KFTC as a competition advocate has several implications.

First, countries that pursue an economic policy focused on industrial policy are likely to breed anti-competitive governmental regulations. This was the case with Korea, where a government-driven growth strategy was adopted and anti-competition regulations established. Though this could be overlooked at the initial stage of development, it eventually distorted market structures and negatively affected economic development. The lesson is that every effort to build a market economy should be undertaken in the initial stage of development. This can be achieved through the introduction of competition policies, with the competition authorities taking on an active competition advocacy role.

Second, it is critical to confer full authority to competition agencies to allow them to serve as effective competition advocates. Because developing countries, in particular, are facing special challenges in the promotion of a free market, the role of such competition advocates is essential to overcoming those challenges.

Third, competition authority needs to initiate anti-competitive regulation and regulatory reform body should continuously develop its own deregulation logic for securing their regulating power. This procedure cannot be completed in a short span of time, rather it is to be proceeded in a gradual manner with consistency.

Lastly, competition advocacy role usually loses its compelling power, because advocacy efforts are often hindered by political popularity and strong resistance from the interest groups including other ministries. Thus it must be backed up by the political support from general citizen and the top government leader. Compliance program will contribute to widespread competition culture as well as to protect violation of competition law.

MALAYSIA COUNTRY PAPER

GROUP I: COMPETITION ADVOCACY

Malaysia recognizes the importance of introducing a comprehensive fair trade or competition policy and law, both for purposes of long-term economic efficiency and to address our development and growth needs. However, we do not yet have a comprehensive fair trade/competition policy or law. At the moment, separate policies are implemented by a number of government agencies involving :

(i) privatisation/corporatisation;
(ii) licensing of industries (manufacturing, services and agriculture);
(iii) domestic and international trade policies;
(iv) foreign participation/ownership policies; and
(v) sectoral regulators.

The Ministry of Domestic Trade and Consumer Affairs (MDTCA) has prepared a draft policy paper as well as a draft law on fair trade/competition in Malaysia.

2. The mandate or the formulation of a fair trade or competition policy and law is found in paragraph 16.32 (Chapter 16: Distributive Trade) of the Eighth Malaysia Plan (RMK-8). The Plan states the need for the policy and law to prevent anti-competitive behaviour such as collusions, cartel price fixing, market allocation and abuse of market power, whereby a fair trade/competition policy will, amongst others, prevent firms from protecting

or expanding their market shares by means other than greater efficiency in producing what consumers want.

3. For the immediate future it is pertinent for Malaysia to focus on competition advocacy and the need for appropriate competition policies and laws so that we may build up both institutional expertise as well as incorporate a competition culture in Malaysia before multilateral rules on competition come into effect. It is important that this type of international cooperation in the area of competition be strengthened, so that developing countries such as Malaysia will not face too many hurdles when introducing and applying a national fair trade or competition law.

4. Competition advocacy, which is essential for the effective application and adoption of a competition culture in Malaysia, can be identified as follows :-

(a) the development of strategies to create understanding and support for a regulatory framework for fair trade policy and competition law in Malaysia. This includes :

(i) Holding educational seminars and road shows on competition policy and law for government officials, as well as traders and consumers.

(ii) Developing legal commentary on competition policy and law.

(iii) Disseminating or creating a clearer understanding on how markets are supposed to work, required market structures and the market support institutions necessary to achieve market efficiency.

(iv) Educating government officials and politicians regarding the need for market institutions, especially in allowing such institutions to play its advocacy and educational roles so that subsequent legislation and conduct do not reverse the competitive environment originally intended when competition law and its regulations are enacted.

(v) General education on the concept of good corporate governance which will enable a better understanding of the concept and legal basis for competition law and its regulatory bodies.

(vi) Forming an Office of Fair Trade under the MDTCA;

(vii) Developing support for the establishment of the Fair Trade Commission.

(viii) improving international cooperation and networking on competition policy and law.

(b) To create public awareness and promote education vis-à-vis fair trade/competition law, i.e. a socialization of the law. This would include :

(i) Dissemination of information on competition to traders and consumers via the web and multimedia.

(ii) Dissemination of competition objectives and policy principles. These activities include -

- publishing educational materials such as pamphlets and other guidelines for the public;
- publishing extracts or summaries from reports presented at international seminars/ conferences;

- publication of booklets and brochures containing general information about the policy/law.

(iii) developing a more extensive library system at the MDTCA;

(iv) development of the MDTCA's dedicated competition website, which includes website design, implementation, data up-dating and website maintenance.

(c) Creating public relations programmes and media communication centres on competition.

5. Malaysia views the liberalization process as offering many potential economic benefits. It is also undeniably important for developing countries like Malaysia to create or adopt national policies and laws to complement the emergence of a multilateral agreement on competition laws. We need to take such a pro-active approach because a multilateral competition discipline prepared without sufficient input or without addressing certain concerns would prohibit developing countries from taking the following measures :-

(a) to shield industries and firms from competition from massive multinational corporations (MNC's); and

(b) from pursuing measures to promote the growth of strong domestic corporations.

Therefore, competition advocacy is essential to ensure not only a clearer understanding of the purpose and application of fair trade or competition laws, but also to determine that agreements acceded by developing countries at the up-coming multilateral negotiations on competition take on board our developmental and social obligations.

Planning and Development Division,
Ministry of Domestic Trade and Consumer Affairs,
Malaysia.

Date: 24 July 2002

C(Competition):COUNTRY PAPER ON APEC BANGKO 6 TO 8 AUGUST V 2:JG/jay.23.7.02;24.7.02

COMPETITION ADVOCACY
AND SECTOR REGULATION UPDATING
The Mexican Experience

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August, 2002

Background

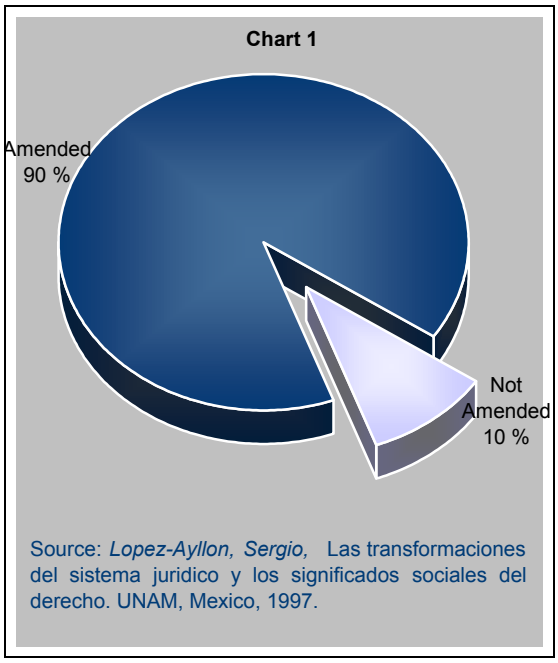
Since the early 1990s Mexico has been involved in a deep process of structural reforms with the aim to change the functioning and operation of its economic system from a state economy, closed and over-regulated economy to one privatized and open to trade and competition.

Economic liberalization and revised regulatory frameworks occupy now a central position in the reforms aimed at strengthening the role of market forces and incentives. Their main effects have consisted of freeing and expanding the private participation in domestic markets. In this way, the necessary conditions were created to increase economic competition, together with the importance of completing the deregulation and administrative streamlining processes.

The Regulatory Reform Updating

As of now, Mexico´s developing process poses continuous challenges to the existent regulatory framework in each regulated sector, which should be as flexible and dynamic as the industries with which they deal. In consequence, together with changes in regulatory rules, there have been changes in the role of regulatory institutions in many sectors.

This regulatory updating trend emphasizes the need to persevere in promoting competition and eliminating the restrictions which still prevail (see chart 1). Indeed, due to the constant evolution of the regulatory process any failure to make clear what is changing impedes an adequate response of regulators.



Source: *Lopez-Ayllon, Sergio,* Las transformaciones del sistema juridico y los significados sociales del derecho. UNAM, Mexico, 1997.

Competition Advocacy in Regulatory Reform

In consequence, the Federal Competition Commission (CFC), has adopted an proactive role in advocating for the integration of competition policy into regulatory reform to foster competition in market oriented regulations and to spread the *quality regulation* concept among decision makers.[1]

The CFC estimates that in 2001 it devoted the 30% of its annual budget and 47, 891hours to competition advocacy.

[1] As APEC Principles have pointed out, the effectiveness of the Regulatory Process must not be judged by an enumeration of regulatory policies but to the extent that regulation makes a difference in the structure and behavior of the regulated industry.

The CFC takes part at different stages of a reform process. Participates in the formulation stage when laws and regulations are discussed, then when the enterprises are privatized and finally when public properties tendering takes place.

The CFC issues opinions about public policies and their programs, laws, regulations, agreements and administrative procedures and acts ex officio or upon request of policy-makers. Through issuing an opinion, the CFC makes a diagnosis of the impact of proposed regulations on competition conditions that prevail in regulated market(s) and applies the principles of competition policy to specific institutional, legal and economic conditions that characterize each regulated market.

Sector regulation does not include the protection of competition as such, as this is the function of the Federal Law of Economic Competition and the CFC. They do, however, strengthen the Commission's preventive role by requiring it to issue a favorable opinion before concessions and permits can be granted or transferred. In addition, sector legislation allows official prices to be set on a temporary basis only when, in the Commission's opinion, conditions of competition do not exist.

The issuing of these opinions requires close collaboration with policy-makers and a timely information about what is occurring in the regulatory process. This occurs mainly within interministerial bodies.

The CFC maintains contact with other government agencies and participates in several forums in order to verify observance of the provisions contained in the LFCE and to prevent its infringement on a timely fashion, as well as to facilitate enhanced coordination with other areas of the public administration to effectively apply competition policy. The goal of this participation is to secure a robust competition culture throughout policy-makers, as well as to assess trends on several sector policies; acquire technical knowledge; and promote competition policy on a regular basis.

The CFC holds a role close to government and has participated directly in the government's major structural and sector reform programs, for example, in different processes dealing with the divestiture of state companies, participants are required to notify the Commission. This provision was included, at the Commission's request, in the new legislation on telecommunications, ports, and railroads, among others, and is applicable to requests and transfers of concessions and permits submitted by individuals. In such cases, a favorable opinion from the Commission is necessary for the interested parties to continue with or conclude their transaction. See Annex 1 for more examples.

Challenges faced by competition advocacy

Despite the achievements and advances, competition advocacy efforts in Regulatory Reform still face challenges that have to be overcome, as well as opportunities that have to be taken advantage of. The issues that are most important and urgent are mentioned below.

a) *There is no rule that establishes in which moment of a reform process the CFC opinion has to be requested.* Thus far, the criteria adopted is to invite the CFC to produce its specialized judgment since the at stages of a reform proposal by the Federal Government or by the Legislative. This *de facto* arrangement has functioned until now, but at some point, a more formal process may be necessary.

b) *Those responsible of the sector reform process establish the transparency of the process.* The executive or the legislative powers define which aspects of reform are diffused for the general public knowledge. Although the full content of CFC opinions is not always available to the general public, they are briefly described and explained through institutional means as the CFC website and Annual Reports.

c) *Lack of collaboration mechanisms with specific sector regulator.* Not formal rules or procedures govern the relationship between the CFC and sector regulators. The competition authority must look for *ad hoc* informal relationships with its counterparts in

order to address overlapped functions.

In order to have a clear-sighted vision of established jurisdiction of the competition authority and sector regulators, the CFC has been advocating for the creation of formal collaboration mechanism to exchange of information and co-ordination of action with regulatory agencies to ensure:

- statutory notification to CFC in case that the sector regulator has knowledge of acts against competition legislation.
- that the technical criteria adopted by regulatory authorities to not generate distortions or restrict competition.
- the elimination of inconsistencies and avoiding the application of divergent policies that may discourage investments.
- an enhanced the regulatory framework by including more competition-friendly provisions.

Increasing requirement of resources. An adequate advocacy role requires *adequate* resources, which includes trained competition officers and financial resources. The CFC is convinced that competition advocacy are important to increase competition culture and to gain allies that support competition and quality improvement in the regulatory process. With this aim, the CFC devotes enough resources to:

- keep its officers updated on issues related to regulatory reform and the institutional context for the application of competition policy.
- promote dialogue with the business community on competition policy and regulatory reform

Annex 1. Cases selected for further discussion

OPINION REGARDING THE DRAFT FEDERAL TELECOMMUNICATIONS LAW

During 2001, the Commission was involved in the Drafting of a new Telecommunications Law, the enactment of which is pending. The main proposals issued by the CFC entail:

- Include the CFC's participation in the granting, cession or transference of concession titles, as well as maintain and expand its participation in the cession of permits and concessions so as to include all cessions pertaining to the relevant market.
- Define the legal status of internet service providers which are currently not considered as concessionaires of public telecommunications networks.
- Allow flexibility in concession titles in order to permit a nimble use of facilities for carriers to take advantage of technological convergence.
- Increase the permitted share of foreign investment so as to reduce barriers to entry of new agents in order to enhance market competition.
- Expressly state that the CFC is exclusively empowered to declare agents endowed with substantial market power before imposing specific obligations and to suspend such declaration. In this respect, eliminate Local Service rules that contain guidelines for the CFC to determine whether a carrier has substantial market power.
- Define minimum standards for the specific regulation to be imposed on a dominant operator, upon a CFC declaration of substantial market power.
- Avoid an excessive regulatory burden for non-dominant agents.
- Expressly state that the CFC is the sole organ empowered to establish the occurrence of monopolistic practices, in terms of the LFCE and to sanction these practices accordingly.
- Increase the availability of the radioelectric spectrum for carriers to use technology that allows rendering several telecommunication services by using one band width frequency.
- Establish a transparent and efficiency-based mechanism to fund universal service obligations, avoiding cross subsidisation or unreasonable regulatory costs that may hinder the efficient development of participants.
- Settle a cooperation agreement between Cofetel and CFC.
- Establish that Telmex is dominant in five markets and will thus be subject to dominance obligations.
- Establish by law that recurrent infringement of the LFCE is a cause to revoke a concession title.

REFORMS AND ADDITIONS TO THE DRAFT NATURAL GAS REGULATIONS

The CFC issued opinions regarding competition aspects contained in the Draft modifications to the Natural Gas Regulations (RGN) put forward by the energy regulator, Comisión Reguladora de Energía (CRE). These modifications mainly concerned the

regulation of liquefied natural gas; improved conditions for exclusive distributors; enhance the regulator's powers regarding transactions involving transference of permits among agents and increased protection to companies affected by a permit holder's failure to provide open access.

In the CFC's opinion:

- the new provisions intended to improve conditions for distributors by imposing restrictions would discriminate against new entrant self-supplying firms, while
- the provisions proposed to apply rules on seriousness guarantees and to review the supply and investment commitments agreed by auction winners may affect efficacy and certainty of the auction process.

Therefore, the CFC emphasised the need for a thorough evaluation of costs and benefits of these measures, and to assess the convenience of expanding the protection of distributors in order to foster the necessary development of the natural gas market. From the competition point of view, self–supplying firms should provide access to its pipelines to distribution companies. This measure would generate competition, foster market efficiency and simplify regulation.

The CRE proposed to expand its powers so as to review transactions between firms by means of which they exchange control over a company holding a permit to provide natural gas services. This power would imply the duplication of the merger review procedure carried out by the CFC under the FLEC and thus the CFC highlighted the need to coordinate with the CFC in order to avoid duplicating work.

The CFC also proposed measures to strengthen the compulsory character of its opinions regarding the applications of agents for permits to develop storage, transportation or distribution activities granted directly.

Finally, given the lack of precision regarding the term "effective competition conditions" used to target those services that require specific regulation, the CFC suggested to change this wording for "substantial market power" in Article 12 of the RGN. The latter concept is clearly defined in the FLEC and its regulations and thus will be better understood.

ASSESSMENT OF COMPETITION CONDITIONS IN THE LIQUEFIED PETROLEUM GAS (LP GAS) INDUSTRY

The CFC undertook an ex officio investigation to determine the existence of competition conditions in the liquefied petroleum gas (LP gas) industry. It resolved that effective competition does not exist in 20 of the 35 relevant markets for distribution of LP gas. The former markets comprise the regions of Guerrero Interior, South Veracruz, South Chihuahua, La Laguna, San Luis Potosí, Yucatán, Sinaloa, Sonora, Tabasco, Jalisco, Chiapas, Oaxaca, Baja California-San Luis Río Colorado, Son., Durango, Morelos, Baja California Sur, Campeche, Colima, Nayarit and Quintana Roo.

According to the Regulations on Liquefied Petroleum Gas (RGLP), the CFC's resolution is necessary for the Ministry of Energy to apply the appropriate price regulation in the relevant market in which conditions of effective competition do not exist. Seeking to facilitate the transition from the traditional system of price controls to one of competitive prices in LP gas distribution the CFC recommended that state, municipal and federal authorities carry out a coordinated review of the regulations and practices that limit the entry of competitors into the market, in order to solve the problem represented by LP gas distribution completely.

The resolution of the CFC recommends that priority should be given to the prompt implementation of measures aimed to promote competition-friendly market structures for LP gas distribution, with a view to consolidate structural change in the LP gas industry. In its decision, the CFC recognised that the Ministry of Energy has already taken important efficiency enhancing actions regarding the transportation market, the diversification of supply sources to the private sector and the opening up of the LP gas distribution market.

The aforementioned resolution was appealed by the companies concerned and currently the CFC is also investigating monopolistic practices and prohibited mergers in the LP gas market.

COMPETITION POLICY AND LAW IN PAPUA NEW GUINEA

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PAPUA NEW GUINEA

1. Introduction

The Papua New Guinea economy saw little private sector investment outside the non-renewable natural resources sector prior to and even after independence (1975) and the public sector led the economy, particularly in infrastructure development. Private sector investment was mostly in plantation development and the service sector.

The direct result of this was that the government through its parastatals or State Owned Enterprises (SOEs) became monopolies. Papua New Guinea's competition law and policy development has come with a move towards privatizing these SOEs.

The Government in 2000 set out a competition policy framework and principles to enable competition policy and legislation review. This was made possible by uncoordinated initiatives taking place about the same time; the drafting of Consumer Affairs and Trade Practices Bill, the formulation of a draft submission on National Competition Policy and the establishment of the Central Agencies Working Group (CAWG) to carry out the Regulatory Review.

2. Competition Policy and Law

On 27th February 2002, the Papua New Guinea Parliament successfully passed the Independent consumer and competition Bill 2002. The passage of the Bill saw the abolishing of the Consumer Affairs Council Act (1993) and amendments to the Prices Regulation Act. The Bill establishing the Independent Consumer and Competition Commission (ICCC) was subsequently certified into law on the 29th April 2002.

Although attempts were made to formulate competition and particularly consumer protection policy since mid 1970s, it is not until the early 1990s that any substantive progress on pro-competitive reforms to encourage competition were made. These include:

- The setting up of a Consumer Affairs Council (CAC) in 1993, to formulate policies to protect consumers and to control prices.
- The deregulation (removal) of certain activities from the Reserved Activities List: manufacturing and construction activities
- The deregulation of the prices of certain products (food and beverage sector).
- In 1998, the implementation of the Tariff Reform Program, which rationalized and is reducing import tariff barriers and opening up Papua New Guinea firms to international competition.

In 1996, the Consumer Affairs Council began to draft trade practices legislation to replace the existing Consumer Affairs Council (CAC) Act

1993. The draft legislation (the Bill) was completed in 2000. The passage of the Bill by the National Parliament therefore, brought to conclusion work begun some 25 years to develop a National Competition Law and Policy.

3. The Independent Consumer and Competition Commission

Papua New Guinea's competition policy development and legislation has ridden the wave of corporatisation and privatization. Whether we will see all the benefits accruing from the exercise go to the community remains to be seen. We will have to accept that it will. There is always a danger that assets may be privatized into private control but the laws that have been passed provide comprehensive powers to the ICCC so there will be adequate control and surveillance.

Beginning with the passage of the Bill and the subsequent certifying of the same to enable the establishment of the ICCC, Papua New Guinea has come through its commitments in most affirmative manner. This Bill establishing the ICCC provides that the primary objectives of the Commission are:

- To enhance the welfare of the people through the promotion of competition, fair trading and consumer protection
- To promote economic efficiency in industry structure, investment and conduct and
- To protect the long term interests of the people with regard to price, quality and reliability of significant goods and services

As can be appreciated, the benefits of greater competition extend to all participants in the economy. Generally, these are:

- To consumers -through lower prices, greater product choice and better service,
- To businesses-through cheaper inputs, better service from suppliers, greater choice of suppliers and access to improved technology, all of which lead to greater competitiveness,
- To small businesses - through greater protection and in particular, greater opportunities for market entry,
- To governments -through increased revenue from expanding the economy, lower expenditure and improvements in government services and
- The economy as a whole - through lower inflation, increased growth, improved international competitiveness, greater investment, and a greater choice of jobs and improved standards of living.

4. Implementation of the Independent Consumer and Competition

The introduction of ICCC builds on the powers, functions and responsibilities of its fore-runner, the CAC, while new ones are introduced, in particular regulations relating to certain industries, entities, and goods and services, including the regulation of prices and related service standards under regulatory contracts.

As capital goods and services move more rapidly across borders, safeguarding consumer rights to product safety and information has become more complex. Additional measures and innovative approaches are needed to ensure protection in areas such as competition, cross-border information flow, and sale of financial services and standards of food, products and advertising.

The establishment of the Independent Consumer and Competition Commission's wider powers and responsibilities confirms the government's commitment to protecting and enhancing consumer welfare. Under the new entity, other agencies such as the health and policy departments would be working side by side with the ICCC with powers to recall outdated goods and check prices, and even destroy condemned goods.

This new entity must have more powerful regulations because it will introduce and implement new practice codes on its own. The ICCC and regime are the Papua New Guinea Government's response to the global influences and market place dynamics to bring about improvements in market conduct.

5. Conclusion

Papua New Guinea in enacting legislation that established the ICCC has met its commitment to the international community - WTO and APEC, to free up the market and improve impediments to competition and free trade. This will further strengthen Papua New Guinea's trade and industrial ties with the world and region and this process requires effective management.

COMPETITION FRAMEWORK FOR THE TELECOMMUNICATION INDUSTRY IN SINGAPORE

INTRODUCTION

1 A competition framework has been set in place for the Telecommunications Industry in Singapore. A similar framework is being developed and is expected to be ready sometime in 2002 for the Broadcasting and Print Industry. Concurrent efforts are being undertaken to develop a comprehensive generic competition framework, which is expected to be ready in two to three years. This report sets out in brief Singapore's competition framework for the telecommunication industry in Singapore and its experience with the framework.

BACKGROUND

2 The Code of Practice for Competition on the Provision of Telecom Services (or Telecom Competition Code), which was released by the Infocomm Development Authority of Singapore (IDA) on 15 September 2000, came into force with effect from 29 September 2000.

3 With the full liberalisation of the telecommunication industry on 1 April 2000, the number of operators increased from a handful of operators prior full liberalisation to more than 60 facilities and

services based operators overnight. The intensity and complexity of the competition in the market correspondingly increased. There was a need for a more comprehensive and robust competition framework, which would facilitate the growth of fair, effective and sustainable competition. The Telecom Competition Code sought to define the boundaries for the conduct of competition in a fully liberalised telecommunications environment. Its objective is to identify the appropriate regulatory regime conducive to the development of a competitive market place while allowing flexibility for operators to respond quickly to market developments. The Code also aims to facilitate the rapid entry of new competition and the deployment of innovative services, while ensuring a strong incentive for companies to invest in infrastructure. It will do this by ensuring that operators' build-or-buy decisions are based on reasonable and appropriate economic pricing signals.

LEGAL AUTHORITY TO PROMULGATE THE CODE

4 The IDA in the exercise of its functions under section 6 of the Info-communications Development Authority of Singapore Act 1999 (Act 41 of 1999) (‘‘IDA Act’’), issues this Code pursuant to its authority under section 26 (1) of the Telecommunications Act 1999 (Act 43 of 1999) (‘‘Telecommunications Act’’).

LEGAL EFFECT OF THE CODE

5 Every entity to which IDA grants a licence under section 5 of the Telecommunications Act is required, under section 26 (4) of the Telecommunications Act, to comply with the applicable provisions contained in this Code. The obligations contained in this Code are in addition to those contained in the Telecommunications Act, other statutes, regulations, directions, licences or codes of practice. To the extent that any provision of this Code is inconsistent with the terms of the Telecommunications Act, other statutes, regulations, directions or the terms of any licence, the provisions of those statutes, regulations, directions or licences shall prevail. To the extent that this Code is inconsistent with the provision of any prior codes of practice issued by IDA or its predecessor, the Telecommunication Authority of Singapore (TAS), the terms of this Code will prevail. If any provision of this Code is held to be unlawful, all other provisions will remain in full force and effect.

REGULATORY GOALS OF THE CODE

6 This Code is intended to:

(a) promote the efficiency and international competitiveness of the information and communications industry in Singapore;

(b) ensure that telecommunication services are reasonably accessible to all people in Singapore, and are supplied as efficiently and economically as practicable and at performance

standards that reasonably meet the social, industrial and commercial needs of Singapore;

(c) promote and maintain fair and efficient market conduct and effective competition between persons engaged in commercial activities connected with telecommunication technology in Singapore;

(d) promote the effective participation of all sectors of the Singapore information and communications industry in markets (whether in Singapore or elsewhere);

(e) encourage, facilitate and promote industry self-regulation in the information and communications industry in Singapore; and

(f) encourage, facilitate and promote investment in and the establishment, development and expansion of the information and communications industry in Singapore.

UNDERLYING REGULATORY PRINCIPLES

7 IDA's underlying regulatory principles include:

(a) maximum reliance on voluntary negotiations and market forces where effective competition exists;

(b) clear and effective regulatory requirements to promote full competition where it does not yet exist;

(c) use of regulation that is no more burdensome than necessary to achieve regulatory goals;

(d) technological neutrality; and

(e) open and reasoned decision-making.

PROCESS IN SETTING UP THE CODE

8 In formulating the Telecom Competition Code, IDA engaged the industry through two public consultation as well as two public forums to obtain comments and inputs.

The First Public Consultation

9 On 17 April 2000, IDA issued two consultation documents: a proposed Code of Practice for Competition in the Provision of Telecommunication Services and "Interconnection/Access in a Fully Liberalised and Convergent Environment." Together, these documents were intended to provide a key part of the regulatory framework for the development of a fully competitive telecommunication market in Singapore. On 15 May 2000, IDA conducted a Public Forum, which had 130 attendees, representing a wide range of interests. IDA originally requested interested parties to submit comments on the two papers by 22 May 2000. In response to industry requests, however, IDA extended the deadline for comments to 5 June 2000. IDA also committed to a second round of consultation on the revised Proposed Code prior to its adoption. Fourteen parties, representing a broad range of interests, filed comments during the first public consultation.

The Second Public Consultation

10 Following the close of the first comment period, IDA began an intensive review process. In the course of this process, IDA gave

extensive consideration to the views and proposals contained in the comments. IDA also considered several additional issues on its own initiative. Based on this process, IDA issued a revised Proposed Code on 30 June 2000. On 6 July 2000, IDA conducted a second public forum, which had approximately 200 attendees. On 14 July 2000, 13 parties submitted comments to IDA regarding the revised Proposed Code.

11 After considering all the comments and inputs received from the two rounds of public consultations, IDA formulated the Telecom Competition Code and the Code was issued on 15 September 2000 and came into effect 14 days later.

KEY PROVISIONS IN THE CODE

12 The Telecom Competition Code contains ten sections and two appendices.

13 Section One sets out the goals of the Code, explains the legal basis and effect of the Code, repeals the previous interconnection code, the Code of Practice (Interconnection, Access and Infrastructure), and specifies which categories of Licensees are subject to which provisions of the Code. Section One then sets forth IDA's regulatory principles. This Section also includes provisions for reviewing and removing provisions that cease to be necessary as competition develops. For example, IDA is to conduct a review of the provisions

of the Code not less than once every three years. Section One reserves IDA's authority to grant exemptions from, modify or suspend the Code.

14 Section Two contains provisions for classifying Facilities-based Licensees as dominant or non-dominant. A Facilities-based Licensee will be classified as dominant if it controls facilities that provide a direct connection to end-users within Singapore and: (a) the facilities are sufficiently costly to replicate such that requiring new entrants to do so would create a significant barrier to rapid and successful entry by an efficient competitor or (b) the Licensee has the ability to restrict output or raise prices for telecommunication services provided to end-users over these facilities above the levels that would exist in a competitive market. A Dominant Licensee must comply with special requirements contained in Sections Three, Five and Seven of the Code. Finally, Section Two contains standards and procedures by which Dominant Licensee can seek reclassification or can request an exemption, on a service- or facilities-specific basis, from the special requirements applicable to Dominant Licensees.

15 Section Three specifies the duties that Licensees have towards End Users. Licensees must modify their service agreements with their End Users to incorporate certain basic requirements – such as the duty to comply with minimum quality standards, the duty to render timely and accurate bills, the duty to provide fair dispute resolution procedures and the duty to protect End User Service Information. In

addition, Dominant Licensees are required to provide telecommunication service: on demand; on an unbundled basis; on prices, terms and conditions that are just, reasonable and non-discriminatory; and pursuant to filed tariffs. Section Three details the procedures that IDA will use to assess a Dominant Licensee's tariffs before allowing them to go into effect.

16 Section Four contains the Minimum Interconnection Duties of Facilities-based Licensees and Services-based Licensees that use switching or routing equipment to provide telecommunication service to the public. For example, Licensees must: interconnect, whether directly or indirectly; establish compensation arrangements for the origination, transit and termination of traffic; and provide billing information. IDA will allow Non-dominant Licensees to interconnect, without prior approval, on any mutually agreeable terms that satisfy the Minimum Interconnection Duties. Section Four also specifies additional obligations that Licensees must fulfil even in the absence of an Interconnection Agreement, such as disclosing network interfaces, complying with mandatory technical standards, facilitating number portability and refusing to accept certain discriminatory preferences.

17 Section Five contains the interconnection obligations of Dominant Licensees. A Requesting Licensee can choose any of three options in order to enter into an Interconnection Agreement. First, the Requesting Licensee can accept the provisions specified in the Dominant Licensee's Reference Interconnection Offer (RIO). Second,

the Requesting Licensee can "opt-in" to an existing agreement between the Dominant Licensee and any similarly situated Licensee. Third, the Requesting Licensee can seek to negotiate an individualised Interconnection Agreement with the Dominant Licensee. Section Five contains detailed requirements regarding the terms that a Dominant Licensee must include in its RIO. Section Five also contains detailed procedures regarding the negotiation process.

18 Section Six contains special provisions by which a Licensee can request the right to share infrastructure controlled by another Licensee. The Licensees must first attempt to negotiate a voluntary Sharing Agreement. If they are unable to do so, the Licensee requesting sharing may ask IDA to make a determination as to whether the infrastructure must be shared – either because it constitutes Critical Support Infrastructure, as that term is defined in the Code, or because IDA concludes that requiring sharing would serve the public interest. The Code designates certain infrastructure that Licensees must share at cost-based prices – such as masts, poles, and towers. Where the Licensees are unable to reach agreement, IDA will conduct a Dispute Resolution Procedure.

19 In Section Seven, IDA sets out rules that preclude Licensees from engaging in unilateral anti-competitive conduct. A Dominant Licensee may not abuse its market position. For example, the Licensee may not set prices at levels that are so low as to unreasonably restrict competition. Nor can a Dominant Licensee leverage its position in the

market to impede competition in an adjacent, currently competitive market. In addition, Licensees are subject to a prohibition on engaging in unfair methods of competition – such as false advertising or unnecessarily degrading the quality of a competitor's service.

20 Section Eight prohibits Licensees from entering into agreements that unreasonably restrict competition. This Section sets out a framework by which IDA will assess the permissibility of such agreements. Licensees are prohibited from entering into certain types of agreements, such as price fixing arrangements or group boycotts. The permissibility of a Licensee entering into other agreements, such as joint research or marketing ventures, will be assessed based on the agreements' likely or actual impact on competition. IDA will take appropriate enforcement actions against Licensees that violate these restrictions.

21 Mergers and similar consolidations involving Licensees are addressed in Section Nine. Each Facilities-based Licence issued by IDA requires the Licensee to obtain IDA's approval before assigning the licence or making changes in ownership, shareholding and management of the Licensee. This Section establishes a procedure for notifying IDA of such proposed changes, and sets forth the procedures by which IDA will seek to determine whether a proposed change is likely to unreasonably restrict competition.

22 Finally, Section Ten specifies the procedures that IDA will use, in accordance with the Telecommunications Act 1999, to enforce the Code. This Section contains two enforcement mechanisms. First, IDA can initiate an enforcement action on its own initiative. Second, IDA can initiate an enforcement action in response to a Request for Enforcement filed by a private party. This Section also addresses the sanctions that IDA may impose on Licensees found to have contravened the Code. IDA can issue warnings, directions or orders to cease and desist. IDA may also impose financial penalties and suspend, shorten the duration of or terminate a Licensee's licence. Whilst IDA reserves the right to impose financial penalties of up to $1 million, it will consider all relevant aggravating or mitigating factors in order to ensure that any financial penalty imposed is proportionate to the contravention.

23 Appendix One specifies the methodology that a Dominant Licensee must use to develop the prices at which it will offer, in its RIO, to provide IRS. In most cases, a Dominant Licensee must use FLEC, which must be determined based on Long Run Average Incremental Costs.

24 Appendix Two specifies the terms and conditions on which a Dominant Licensee must offer, in its RIO, the provision of Interconnection Related Services (IRS) Appendix Two specifies five classes of IRS that a Dominant Licensee must provide:

(a) Physical Interconnection ("PI") is the linking of two networks to enable the exchange of traffic and/or to provide access to Unbundled Network Elements or Essential Support Facilities

(b) Origination, Transit, and Termination ("O/T/T") services involve the switching, routing, and transmission of telecommunication traffic between network licensees. O/T/T services allow traffic originated on one network to terminate or transit through another network.

(c) Essential Support Facilities ("ESFs") are those passive support structures, for which no practical or viable alternatives exist, that enable the deployment of telecommunication infrastructure.

(d) Unbundled Network Elements ("UNEs") are physical network facilities and the associated services they support that may be de-coupled from the Dominant Licensee's network and connected to the Requesting Licensee's Network.

(e) Unbundled Network Services ("UNSs") are peripheral services that are not economically feasible for a Licensee to replicate but which constitute significant barriers to effective competition.

EXAMPLE OF CASES DEALT UNDER THE CODE

25 In a recent case titled "Only $38 for Unlimited, Dedicated Broadband Access" Advertisement by SingNet Pte Ltd", IDA used the framework set out in Telecom Competition Code to evaluate the case.

Case Summary

26 SCV alleged that SingNet had breached Section 7.4.1 "False or Misleading Claims" of the Telecom Competition Code ('Code") in the following ways: a) SingNet's advertisement had indicated SingNet's access speeds of 256kbps and 512kbps but not SCV's access speed of up to 1.5Mbps, thus not providing a fair and objective comparison of the two services. By then mentioning that cable modem speed was "slow" in a shared environment while SingNet's access speed was "fast" with dedicated access, it gave an impression that SingNet's servicewas better than SCV's.

27 SingNet's advertisement thus created a distorted price comparison of the two services as SingNet was comparing SCV's 1.5Mbps service with SingNet's 256kbps service. SingNet's repetition of such misleading advertisements had damaged SCVs image.

Determination

28 IDA determined that SingNet's use of the term "fast" used to describe both services under a single end-user scenario was likely to lead end-users to treat both services as equivalent in terms of access speeds/bandwidth which may not be the case. SCV could potentially offer access speeds of up to 1.5Mbps access speed whereas SingNet's broadband access plan used under its price comparison in its advertisement was up to 256kbps. Such differences in access speeds between two access platforms should be properly presented for comparison purposes and not simply be described as "fast" in

SingNet's advertisement. As such, the price and quality comparison made by SingNet in its advertisement without key information on the access speeds/bandwidth of the cable modem service in the advertisement did not provide a fair and objective comparison of the two services.

29 IDA concluded that SingNet had breached Section 7.4.1 of the Code as the advertisement had made claims and/or suggestions regarding the price and quality of its telecommunication services and that of another licensee that was reasonably likely to confuse or mislead end-users, thereby likely to restrict competition in the Singapore telecommunication market. SingNet was ordered to cease and desist the advertisement and IDA imposed a financial penalty of S$2,000 on SingNet.

Remarks of L. Barry Costilo
to APEC Training Program on Competition Policy[1]
Bangkok, Thailand, August 7, 2002

Good morning. I am delighted to speak to this APEC group today about civil (non-merger) antitrust investigations and enforcement actions instituted by the Federal Trade Commission in the United States. I have been asked to share some of our case experiences to further help develop human resources capable of managing competition law and policy. As a litigator who has investigated and tried some major antitrust cases brought by the Federal Trade Commission, I am going to use a case example to talk about some very practical issues involved in investigating and presenting a civil antitrust case. Before continuing, I should give the usual disclaimer that my remarks today are my own and are not necessarily those of the Commission or any individual Commissioner.

First, some brief background. The ultimate purpose of the United States antitrust laws is to protect consumers within the context of a free market economy. A freely working market, subject to antitrust rules, works to the benefit of consumers. Economic analysis and legal precedent guide our case selection. We look to see whether the conduct in question is likely to raise prices or reduce output in terms of quantity or quality. We also look at whether the conduct in question is designed to enhance business efficiency. I wish to emphasize that antitrust cases are very fact intensive and the best theories in the world will not save a case that is not supported by a solid factual foundation.[2]

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[1] L. Barry Costilo is a Senior Litigator in the Bureau of Competition of the Federal Trade Commission.

[2] See Prepared Remarks of Federal Trade Commission Chairman Timothy J. Muris,

Antitrust Enforcement at the Federal Trade Commission: In a Word - - Continuity , Before American Bar Association Antitrust Section Annual Meeting, Chicago, Illinois, August 7, 2001.

Second, our civil antitrust law enforcement is conducted within the following procedural framework. As you are probably aware, in our country the government has the burden of proving a civil case by the preponderance of reliable evidence. Under our adversarial system, once the matter is in the adjudicatory stage, there are procedural safeguards to make sure that defendants are treated fairly: The defense has the right to discover the government's evidence, to subpoena third parties who may have relevant information and to thoroughly cross examine the government's witnesses. If the defense loses before an administrative law judge at the Federal Trade Commission, respondents have a right of appeal to the full Federal Trade Commission (consisting of five commissioners) and, if the case is decided against them, then to a United States Court of Appeals and ultimately they can seek review from the Supreme Court of the United States. It is therefore critical that the government take great care at the investigatory stage to make sure that it can prove all of the essential details and to anticipate any holes in its case which need to be filled by evidence or expert opinion before the matter reaches the trial stage. While your legal systems and rules may differ considerably from our system and the cases you select to prosecute may differ from ours, some of the practical issues we face in investigating and developing a solid case in the U.S. may be faced by your enforcement personnel.

In the case of Toys "R" Us, Inc. vs. F.T.C., 221 F.3d 928 (7th Cir, 2000) ("TRU"),[3] in which I was co-lead counsel, there were a number of issues involved in the investigation and presentation of the case that had to be dealt with by Federal Trade Commission staff. TRU was the largest toy retailer in the U.S. and had considerable buyer power over toy manufacturers who supplied. it with product.

[3] Affirming, Toys "R" US, Inc., 126 F.T.C. 415 (1998).

TRU feared that a then evolving class of large retailers, the warehouse clubs, was selling toys at much lower prices than TRU and that competitive pressure from the warehouse clubs could force TRU to lower its toy prices. To combat this competitive threat, TRU pressured toy manufacturers (by threatening not to continue to buy their products) to agree not to sell to the warehouse clubs the identical toys that they sold to TRU. TRU did this to prevent consumers from being able to make informed price comparisons between TRU's merchandise and those sold by the warehouse clubs - - a comparison which would hurt TRU's image for having low prices.

However, TRU had difficulty convincing some large toy manufacturers to give up the large sales volume generated by the warehouse clubs and expose themselves to the risk of losing sales to competing manufacturers who continued to sell to the clubs. To overcome this resistance, once TRU received the commitment of one major manufacturer (manufacturer A) to agree orally to stop selling toys to the clubs on the condition that the rest of the major manufacturers would take similar action, TRU then went separately to each of the other manufacturers to gain their commitment to do the same thing. TRU did this by giving assurances to manufacturer B that manufacturer A said it would stop selling to the clubs if you would. It then followed the same pattern with manufacturers C and D until it secured oral commitments from almost all of the major manufacturers. When a manufacturer would occasionally cheat on its agreement, the other manufacturers would report the incident to TRU who would then seek to the manufacturer into compliance. As a result of TRU's initiation and orchestration of the toy manufacturers' boycott of the warehouse clubs, consumers had to pay higher prices (estimated to be as much as $50 million) and competition between toy manufacturers was impaired. The Federal Trade Commission and an

appellate court held that TRU orchestrated a horizontal conspiracy between the manufacturers which violated the antitrust laws. Here are some of the practical problems we encountered in the investigation and adjudicatory phases of the TRU case and how we dealt with them:

- Under U.S. antitrust law, it was necessary for us to prove an agreement that restrained trade. Since TRU and the toy manufacturers did not put their suspect agreements in writing -- which is often the situation we are confronted with in antitrust conduct cases -- we needed to establish the critical element of agreement through other direct and circumstantial evidence. Circumstantial evidence in this case included the testimony of an economic expert called by the government that it was against the unilateral economic interest of an individual company to give up sales to the warehouse clubs unless the manufacturer knew or had assurances that its competitors were also willing to give up their sales to the clubs.

- During our investigation, we had subpoenaed internal business documents from TRU and the toy manufacturers. Under Federal Trade Commission case precedent, and pursuant to agreement between the parties, we were permitted to introduce incriminating TRU documents that came from its files without the need to call the TRU officials who wrote them. In addition, we relied on Supreme Court and FTC case law that said that contemporaneous business documents are to be given more weight than after the fact self-serving testimony of witnesses. Also, we had questioned TRU's top officials

during investigational hearings and, under FTC's evidentiary rules, were able to introduce pertinent transcript excerpts of their sworn testimony without calling the officials themselves as witnesses. As a matter of trial tactics, we deemed it preferable to cross examine these witnesses if and when TRU called them during its defense - - which it did.

- However, TRU's documents and transcripts of its officials' pre-trial testimony only went so far. We additionally introduced relevant documents of the toy manufacturers and called a number of witnesses from the toy manufacturers to establish points not contained in TRU's documents. As a matter of trial tactics we believed the judge would want to see some live witnesses who were involved in dealings with TRU rather than simply decide the matter on the basis of a dry record. As you might expect, the officials of the toy manufacturers did not want to make TRU angry at them and risk its retaliation because they were heavily dependent on TRU, which accounted for the largest percentage of their sales to retailers. They often were reluctant and often hostile witnesses who had short or selective memories and, to the extent that they could, would publicly support TRU's version of events. However, prior to the filing of the FTC's official charges against TRU, we subpoenaed officials from the major toy companies to testify in confidential FTC investigatory hearings. In these non-public hearings, at least some of the officials were more forthcoming and less hostile. When we called some of these witnesses at the trial, whenever they diverged from what they had told us at the

investigational hearings, we could confront them with a transcript of their sworn testimony and, in many if not most instances, got them to reaffirm what they had originally told us.

- During the investigation stage we were interested in talking to ex-TRU employees who might have relevant knowledge and not be motivated to protect TRU. We were able to secure the testimony of one individual in this category, notwithstanding the fact that most ex-employees still remain loyal to their former employer and do not want to offend the company. In addition, we also were able to secure the testimony of a present employee of one of the toy manufacturers who is was what we in America call a "whistle blower" -- i.e., one who is willing to blow the whistle and notify authorities about wrongdoing at his or her company. Such individuals are rare, but they occasionally for altruistic or other motives have reasons to implicate their company, even though they place their jobs at risk.

In our working group, I also will be discussing another recent conduct case brought by the Federal Trade commission that you might find of interest, FMC Corp. Inc.("FMC").[4] This matter, which was settled, involved allegations that FMC entered into an unlawful conspiracy with Asahi to divide markets for the chemical microchrystalline cellulose ("the chemical"). This chemical is used primarily as a binder in the manufacture of pharmaceutical tablets. The chemical is a component of nearly all prescription and over the counter pharmaceutical

[4] FTC Docket No. C-4050, June 12, 2002 (consent order).

tablets sold in the United States. During the period in question, FMC was the largest manufacturer and seller of the chemical in the world and Asahi was the second largest seller of the chemical in the world and the dominant supplier of the chemical in Japan, according to the complaint. The complaint also alleged that FMC and Asahi unlawfully conspired to monopolize the relevant market.

In furtherance of this conspiracy, the complaint alleged that FMC entered into a non-written agreement with Asahi that FMC would not sell the chemical to customers located in Japan and certain other countries in the Asia Pacific area without the consent of Asahi and, in return, Asahi agreed that it would not sell the chemical to customers located in North America or Europe without the consent of FMC. The parties adhered to this agreement according to the complaint.

There were also additional charges that FMC attempted to monopolize the market for the chemical by seeking arrangements with two Taiwan-based manufacturers whom it believed were going to compete for FMC's customers in North America and Europe. FMC engaged in this conduct with a specific intent to monopolize, according to the complaint. In was alleged that FMC proposed to one of the companies, Ming Tai, that it grant FMC an exclusive license to distribute all of the chemical that it was going to export from Taiwan. FMC proposed to the other company, Wei Ming, that it sell the chemical to FMC on an exclusive basis, according to the complaint. Fortunately for the sake of a competitive market, neither company accepted FMC's invitation.

Finally, the case involved a charge that FMC extended an illegal invitation to collude to an American company that had recently opened a manufacturing plant to produce the chemical in the U.S. and was seeking to expand its sales of the chemical to FMC's customers. FMC proposed that the firms enter into a market

division agreement, but the American competitor declined to do so. The FTC has settled several other cases in the past on the basis of the invitation to collude theory, which is a useful law enforcement tool where an attempt to reach an illegal agreement was unsuccessful. It should be noted that by bringing civil actions here in contrast to a criminal prosecution brought by Antitrust Division of the U.S. Department of Justice the FTC has to meet a less stringent burden of proof than the "beyond a reasonable doubt" standard applicable in criminal cases.

I hope you find this discussion of the practical aspects of preparing and presenting an antitrust case helpful.

9810237

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of

DOCKET NO. C-4050

FMC Corporation and

Asahi Chemical Industry Co., Ltd., corporations

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that FMC Corporation and Asahi Chemical Industry Co., Ltd., corporations, hereinafter sometimes collectively referred to as "respondents," have engaged in conduct, as described herein, that violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

1. Respondent FMC Corporation ("FMC") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 200 East Randolph Drive, Chicago, Illinois 60601.

2. Respondent Asahi Chemical Industry Co., Ltd. ("Asahi Chemical") is a corporation organized and existing under and by virtue of the laws of Japan, with its office and principal place of business located at 1-2 Yurakucho 1-chome, Chiyoda-ku, Tokyo, Japan. Asahi Chemical does business in the United States both directly and through Asahi Chemical Industry America, Inc. ("Asahi America"). Asahi America is a wholly-owned subsidiary of Asahi Chemical, with its office and principal place of business located at 535 Madison Avenue, 33rd Floor, New York, New York 10022.

3. The acts and practices of FMC and Asahi Chemical, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. For the purpose of this complaint, "MCC" means microcrystalline cellulose. For the purpose of this complaint, "Asia Pacific" refers to the following countries: South Korea, Taiwan, Hong Kong, the Philippines, Indonesia, New Zealand, China, North Korea, Vietnam, and Australia.

5. The line of commerce relevant to assessing respondents' anticompetitive conduct is the manufacture and sale of pharmaceutical MCC worldwide. Pharmaceutical MCC is derived from purified wood cellulose, and is used primarily as a binder in the manufacture of pharmaceutical tablets (prescription and OTC drugs). Pharmaceutical MCC is a component of nearly all pharmaceutical tablets sold in the United States today. Other binders are not acceptable substitutes for pharmaceutical MCC for several reasons, including differences in quality, consistency, performance, efficacy, and stability. Entry into the relevant market is difficult and time-consuming.

6. FMC was the first, and for several years the only manufacturer of MCC in the world. To this day, FMC remains the largest manufacturer and seller of MCC in the world. During the period from 1984 to 1995, FMC's share of the relevant market has exceeded 70 percent.

7. FMC operates facilities for the production of MCC in Newark, Delaware and Cork, Ireland. FMC utilizes several trademarks in connection with its marketing of MCC. The most commonly used grades of MCC are sold by FMC in the United States and elsewhere under the trade name "Avicel."

8. Asahi Chemical operates a facility for the production of MCC in Nobeoka, Japan. During the period from 1984 to 1995, Asahi Chemical has been the dominant supplier of MCC in Japan and the second largest seller of MCC in the world.

9. FMC engaged in a course of conduct designed to neutralize or eliminate competing sellers of MCC and to secure monopoly power. FMC entered into a conspiracy with Asahi Chemical to divide territories. In addition, FMC invited three smaller producers of MCC to join with FMC in collusive and anticompetitive conduct. The three firms solicited by FMC were Ming Tai Chemical Co., Ltd. ("Ming Tai"), Wei Ming Pharmaceutical Mfg. Co., Ltd. ("Wei Ming"), and the Mendell division of Penwest, Ltd. ("Mendell").

10. In or about 1984, FMC and Asahi Chemical entered into both a written agreement governing the shared use of the trademark Avicel and a covert non-written agreement or understanding governing the sale and marketing of MCC.

11. The parties' written agreement, termed a Letter of Understanding, continued a trademark license first entered into by FMC and Asahi Chemical in 1968. In the 1984 Letter of Understanding, FMC granted Asahi Chemical, for an additional term of years, the exclusive right to use the trademark Avicel in Japan and Asia Pacific in connection with the sale of MCC products. FMC continued to reserve to itself the exclusive right to use the Avicel mark in North America and Europe.

12. In the parties' non-written agreement, FMC and Asahi Chemical agreed to a territorial

division of markets for MCC products. FMC agreed that it would not sell MCC to customers located in Japan or Asia Pacific without the consent of Asahi Chemical. In return, Asahi Chemical agreed that it would not sell MCC to customers located in North America or Europe without the consent of FMC.

13. The market division agreement was in effect from 1984 until 1995. During this period, Asahi Chemical refrained from selling MCC to potential customers located in North America or Europe. During this period, FMC refrained from selling MCC to potential customers located in Japan or Asia Pacific. For example, several of the largest multinational pharmaceutical manufacturers requested that FMC enter into "global agreements" to supply MCC to all of their manufacturing facilities worldwide. Pursuant to its non-written agreement with Asahi Chemical, FMC declined to supply MCC to manufacturing facilities located in Japan and Asia Pacific.

14. In or about 1994, two Taiwan-based manufacturers of MCC, Ming Tai and Wei Ming, emerged as significant suppliers of MCC to portions of the Asian MCC market. FMC was concerned that these Taiwanese manufacturers would next compete for FMC's MCC accounts in North America and Europe. In or about January 1995, FMC proposed to Ming Tai that it grant FMC the exclusive right to distribute all MCC exported from Taiwan by Ming Tai. Ming Tai did not accept FMC's invitation. Also in or about January 1995, FMC proposed to Wei Ming that it sell MCC to FMC on an exclusive basis. Wei Ming did not accept FMC's invitation.

15. Later in 1995, FMC joined with Wei Ming to market an MCC product that, as compared to FMC's Avicel-brand MCC, had a lower quality and a lower price. The venture targeted certain customers of Ming Tai. FMC's purposes were to discipline Ming Tai for its aggressive pricing and to pressure Ming Tai to ally itself with FMC. This arrangement was terminated by the parties in 1996.

16. In 1995, Mendell posed a competitive threat to FMC's position as the dominant seller of MCC to pharmaceutical manufacturers in North America and Europe. Mendell had recently opened an MCC manufacturing facility in the United States, and was actively seeking to expand its sales. In April 1995, FMC proposed to Mendell that the two firms enter into a market division agreement. Mendell did not accept FMC's invitation.

17. At all relevant times herein, FMC had either monopoly power or a dangerous probability of achieving monopoly power in the world pharmaceutical MCC market.

18. The acts and practices of respondents, as alleged herein, were engaged in by respondents with the specific intent to exclude competition and to achieve or maintain monopoly power.

19. The acts and practices of respondents, as alleged herein, have had the purpose and effect, or the tendency and capacity, to restrain competition in the manufacture and sale of pharmaceutical MCC and to injure consumers in the United States and worldwide.

Violations Alleged

20. As set forth in Paragraphs 12, 13, and 19 above, FMC and Asahi Chemical conspired to

divide markets and unreasonably restrained trade, in violation of Section 5 of the Federal Trade Commission Act, as amended.

21. As set forth in Paragraphs 6, 8, 12, 13, 18 and 19 above, FMC and Asahi Chemical conspired to monopolize the relevant market, in violation of Section 5 of the Federal Trade Commission Act, as amended.

22. As set forth in Paragraphs 6 through 19 above, FMC attempted to monopolize the relevant market in violation of Section 5 of the Federal Trade Commission Act, as amended.

23. As set forth in Paragraph 16 above, FMC invited its competitor Mendell to agree not to compete with FMC in violation of Section 5 of the Federal Trade Commission Act, as amended.

24. The conspiracy, acts and practices of respondents, as alleged herein constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such conspiracy, acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twelfth day of June, 2002, issues its complaint against respondents.

By the Commission, Chairman Muris not participating.

Donald S. Clark

Secretary

SEAL

Toys "R" Us, Inc., Petitioner-Appellant, v. Federal Trade Commission, Respondent-Appellee.

No. 98-4107

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

221 F.3d 928; 2000 U.S. App. LEXIS 18304; 2000-2 Trade Cas.(CCH) P72,978

May 18, 1999, Argued

August 1, 2000, Decided

PRIOR HISTORY: [1] On Petition for Review from a Decision of the Federal Trade Commission. Docket No. 9278.**

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner appealed from the final order of the Federal Trade Commission which found that petitioner had coordinated a horizontal agreement among a number of toy manufacturers in violation of § 5 of the Federal Trade Commission Act, *15 U.S.C.S. § 45,* and had entered a number of vertical agreements that did not pass scrutiny under the antitrust rule of reason.

OVERVIEW: Petitioner toy retailer was found by respondent Federal Trade Commission to have orchestrated a horizontal agreement among numerous toy manufacturers through creation and enforcement of multiple vertical agreements in which each manufacturer promised to restrict distribution of its products to low-priced warehouse club stores, on condition the other manufactures would do the same. Petitioner appealed, attacking both the sufficiency of the evidence and the scope of respondent's remedial order. The court affirmed, holding that, although other conclusions were possible, there was substantial evidence to support the finding that petitioner had created a horizontal agreement among toy manufacturers, rather than merely a series of separate, similar vertical agreements between petitioner and various toy manufacturers, as urged by petitioner. Additionally, the court held that respondent's finding of market power did not require an extensive inquiry into petitioner's market share; that petitioner had misconstrued

the concept of free-riding, and that respondent's remedial order was within it's power to restrict the business options of a company found to have violated *15 U.S.C.S. § 45*.

OUTCOME: The court affirmed the final order of the Federal Trade Commission, finding that, although reasonable persons could differ on the facts of the record before it, respondent Commission's decision was supported by substantial evidence and that its remedial decree was within the broad discretion granted under the Federal Trade Commission Act.

CORE TERMS: toy, manufacturer, club, supplier, retailer, warehouse, discounter, horizontal, vertical, boycott, competitors, customer, anticompetitive, advertising, consumer, stocking, riding, decree, remedial, mark-up, output, Sherman Act, unilateral, antitrust, coercing, FTC Act, substantial evidence, independently, concerted, widgets

CORE CONCEPTS -

Antitrust & Trade Law: U.S. Federal Trade Commission Actions: Remedial Powers

The Federal Trade Commission's legal conclusions are reviewed de novo, but its findings of fact must be accepted if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Antitrust & Trade Law: U.S. Federal Trade Commission Actions: Remedial Powers

A horizontal agreement effecting a boycott may be proved by either direct or circumstantial evidence. When circumstantial evidence is used, there must be some evidence that tends to exclude the possibility that the alleged conspirators acted independently. This does not mean, however, that the Federal Trade Commission had to exclude all possibility that the manufacturers acted independently. The test states only that there must be some evidence which, if believed, would support a finding of concerted behavior. In the context of an appeal from the Federal Trade Commission, the question is whether substantial evidence supports its conclusion that it is more likely than not that the manufacturers acted collusively.

Antitrust & Trade Law: U.S. Federal Trade Commission Actions: Remedial Powers

The standard applied in reviewing decisions of the Federal Trade Commission is the substantial evidence test which requires the court to determine whether the Commission's analysis is so implausible, so feebly supported by the record, that it flunks even the deferential test of substantial evidence.

Antitrust & Trade Law: Price Fixing & Restraints of Trade: Horizontal Refusals to Deal

Boycotts are condemned as "per se" illegal that involve joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.

Antitrust & Trade Law: Price Fixing & Restraints of Trade: Horizontal Refusals to Deal

Horizontal agreements among competitors, including group boycotts, are per se illegal. The Northwest Stationers criteria for condemnation without an extensive inquiry into market power and economic pros and cons are: (1) the boycotting firm has cut off access to a supply, facility or market necessary for the boycotted firm to compete; (2) the boycotting firm possesses a "dominant" position in the market, where "dominant" is an undefined term, but plainly chosen to stand for something different from antitrust's term of art "monopoly"; and (3) the boycott cannot be justified by plausible arguments that it was designed to enhance overall efficiency.

Antitrust & Trade Law: Price Fixing & Restraints of Trade: Per Se Rule & Rule of Reason

There are two ways of proving market power. One is through direct evidence of anticompetitive effects. The other, more conventional way, is by proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice in the case.

Antitrust & Trade Law: Price Fixing & Restraints of Trade: Horizontal Restraints

Taking steps to prevent a price collapse through coordination of action among competitors is illegal.

Antitrust & Trade Law: Price Fixing & Restraints of Trade: Vertical Restraints

What the manufacturer does not want is for the shopper to visit the attractive store with highly paid, intelligent sales help, learn all about the product, and then go home and order it from a discount warehouse or an on-line discounter. The shopper in that situation has taken a "free ride" on the retailer's efforts; the retailer never gets paid for them, and eventually it stops offering the services. Hence, antitrust law permits nonprice vertical restraints that are designed to facilitate the provision of extra services, recognizing that a manufacturer in a competitive market who has guessed wrong will eventually be forced by the market to abandon the restrictions.

Antitrust & Trade Law: Price Fixing & Restraints of Trade: Vertical Restraints

The most important insight behind the free rider concept is the fact that, with respect to the cost of distribution services, the interests of the manufacturer and the consumer are aligned, and are basically adverse to the interests of the retailer, who would presumably like to charge as much as possible for its part in the process.

Antitrust & Trade Law: Price Fixing & Restraints of Trade: Vertical Restraints

The rationale for permitting restricted distribution policies depends on the alignment of interests between consumers and manufacturers. Destroy that alignment and you destroy the power of the argument.

Antitrust & Trade Law: Price Fixing & Restraints of Trade: Vertical Restraints

The consumer is not taking a free ride if the cost of the service can be captured in the price of the item.

Antitrust & Trade Law: U.S. Federal Trade Commission Actions: Remedial Powers

The Federal Trade Commission is not limited to restating the law in its remedial orders. Such orders can restrict the options for a company that has violated § 5 of the Federal Trade Commission Act, *15 U.S.C.S. § 45,* to ensure that the violation will cease and competition will be restored.

Antitrust & Trade Law: U.S. Federal Trade Commission Actions: Remedial Powers

Where refusals to deal were the means petitioner used to accomplish unlawful results, they are subject to regulation by the Federal Trade Commission.

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For STATE OF ALABAMA, STATE OF ALASKA, STATE OF ARIZONA, STATE OF CALIFORNIA, STATE OF ARKANSAS, Amicus Curiae: Ann M. Marciarille, OFFICE OF THE CALIFORNIA ATTORNEY GENERAL, San Francisco, CA USA.

JUDGES: Before Coffey, Kanne, and Diane P. Wood, Circuit Judges.

OPINIONBY: Diane P. Wood

OPINION: [*930]

Diane P. Wood, Circuit Judge.

The antitrust laws, which aim to preserve and protect competition in economically sensible markets, have long drawn a sharp distinction between contractual restrictions that occur up and down a distribution chain--so-called vertical restraints--and restrictions that come about as a result of agreements among competitors, or horizontal restraints. Sometimes, however, it can be hard as a matter of fact to be sure what kind of agreement is at issue. This was the problem

facing the Federal Trade Commission ("the Commission") when it brought under its antitrust microscope the large toy retailer Toys "R" Us (more properly Toys "R" Us, but to avoid debate we will abbreviate the company's name as TRU, in keeping with the parties' usage).

The Commission concluded, upon an extensive administrative record, that TRU had acted as the coordinator of a horizontal agreement among a number of toy manufacturers. The agreements took the form of a network of vertical agreements between[**2] TRU and the individual manufacturers, in each of which the manufacturer promised to restrict the distribution of its products to low-priced warehouse club stores, on the condition that other manufacturers would do the same. This practice, the Commission found, violated § 5 of the Federal Trade Commission Act, *15 U.S.C. § 45*. It also found that TRU had entered into a series of vertical agreements that flunked scrutiny under antitrust's rule of reason. TRU appealed that decision to us. It attacks both the sufficiency of the evidence supporting the Commission's conclusions and the scope of the Commission's remedial order. It is hard to prevail on either type of challenge: the former is fact-intensive and faces the hurdle of the substantial evidence standard of review, while the latter calls into question the Commission's exercise of its discretion to remedy an established violation of the law. We conclude that, while reasonable people could differ on the facts in this voluminous record, the Commission's decisions pass muster, and we therefore affirm.

I

TRU is a giant in the toy retailing industry. The Commission found that it sells approximately 20% of all[**3] the toys sold in the United States, and that in some metropolitan areas its share of toy sales ranges between 35% and 49%. The variety of toys it sells is staggering: over the course of a year, it offers about 11,000 individual toy items, far more than any of its competitors. As one might suspect from these figures alone, TRU is a critical outlet for toy manufacturers. It buys about 30% of the large, traditional toy companies' total output and it is usually their most important customer. According to evidence before the Commission's administrative law judge, or ALJ, even a company as large as Hasbro felt that it could not find other retailers to replace TRU--and Hasbro, along with Mattel, is one of the two largest [*931] toy manufacturers in the country, accounting for approximately 12% of the market for traditional toys and 10% of a market that includes video games. Similar opinions were offered by Mattel and smaller manufacturers.

Toys are sold in a number of different kinds of stores. At the high end are traditional toy stores and department stores, both of which typically sell toys for 40 to 50% above their cost. Next are the specialized discount stores--a category virtually monopolized[**4] by TRU today--that sell at an average 30% mark-up. General discounters like Wal-Mart, K-Mart, and Target are next, with a 22% mark-up, and last are the stores that are the focus of this case, the warehouse clubs like Costco and Pace. The clubs sell toys at a slender mark-up of 9% or so.

The toys customers seek in all these stores are highly differentiated products. The little girl who wants Malibu Barbie is not likely to be satisfied with My First Barbie, and she certainly does not want Ken or Skipper. The boy who has his heart set on a figure of Anakin Skywalker will be disappointed if he receives Jar-Jar Binks, or a truck, or a baseball bat instead. Toy retailers naturally want to have available for their customers the season's hottest items, because toys are also a very faddish product, as those old enough to recall the mania over Cabbage Patch kids or Tickle Me Elmo dolls will attest.

What happened in this case, according to the Commission, was fairly simple. For a long time, TRU had enjoyed a strong position at the low price end for toy sales, because its only competition came from traditional toy stores who could not or did not wish to meet its prices, or from general discounters [**5]like Wal-Mart or K-Mart, which could not offer anything like the variety of items TRU had and whose prices were not too far off TRU's mark.

The advent of the warehouse clubs changed all that. They were a retail innovation of the late 1970s: the first one opened in 1976, and by 1992 there were some 600 individual club stores around the country. Rather than earning all of their money from their mark-up on products, the clubs sell only to their members, and they charge a modest annual membership fee, often about $30. As the word "warehouse" in the name suggests, the clubs emphasize price competition over service amenities. Nevertheless, the Commission found that the clubs seek to offer

name-brand merchandise, including toys. During the late 1980s and early 1990s, warehouse clubs selected and purchased from the toy manufacturers' full array of products, just like everyone else. In some instances they bought specialized packs assembled for the "club" trade, but they normally preferred stocking conventional products so that their customers could readily compare the price of an item at the club against the price of the same item at a competing store.

To the extent this strategy was successful, [**6] however, TRU did not welcome it. By 1989, its senior executives were concerned that the clubs were a threat to TRU's low-price image and, more importantly, to its profits. A little legwork revealed that as of that year the clubs carried approximately 120-240 items in direct competition with TRU, priced as much as 25 to 30% below TRU's own price levels.

TRU put its President of Merchandising, a Mr. Goddu, to work to see what could be done. The response Goddu and other TRU executives formulated to beat back the challenge from the clubs began with TRU's decision to contact some of its suppliers, including toy manufacturing heavyweights Mattel, Hasbro, and Fisher Price. At the Toy Fair in 1992 (a major event at which the next Christmas season's orders are placed), Goddu informed the manufacturers of a new TRU policy, which was reflected in a memo of January 29, 1992. The policy set forth the following conditions and privileges for TRU:

The clubs could have no new or promoted product unless they carried the entire line. [*932]

All specials and exclusives to be sold to the clubs had to be shown first to TRU to see if TRU wanted the item.

Old and basic product had to be in special[**7] packs.

Clearance and closeout items were permissible provided that TRU was given the first opportunity to buy the product.

There would be no discussion about prices.

TRU was careful to meet individually with each of its suppliers to explain its new policy. Afterwards, it then asked each one what it intended to do. Negotiations between TRU and the manufacturers followed, as a result of which each manufacturer eventually agreed that it would sell to the clubs only highly-differentiated products (either unique individual items or combo packs) that were not offered to anything but a club (and thus of course not to TRU). As the Commission put it, "through its announced policy and the related agreements discussed below, TRU sought to eliminate the competitive threat the clubs posed by denying them merchandise, forcing the clubs' customers to buy products they did not want, and frustrating customers' ability to make direct price comparisons of club prices and TRU prices." FTC opinion at 14.

The agreements between TRU and the various manufacturers were, of course, vertical agreements, because they ran individually from the supplier/manufacturer to the purchaser/retailer.[**8] The Commission found that TRU reached about 10 of these agreements. After the agreements were concluded, TRU then supervised and enforced each toy company's compliance with its commitment.

But TRU was not content to stop with vertical agreements. Instead, the Commission found, it decided to go further. It worked for over a year and a half to put the vertical agreements in place, but "the biggest hindrance TRU had to overcome was the major toy companies' reluctance to give up a new, fast-growing, and profitable channel of distribution." FTC opinion at 28. The manufacturers were also concerned that any of their rivals who broke ranks and sold to the clubs might gain sales at their expense, given the widespread and increasing popularity of the club format. To address this problem, the Commission found, TRU orchestrated a horizontal agreement among its key suppliers to boycott the clubs. The evidence on which the Commission relied showed that, at a minimum, Mattel, Hasbro, Fisher Price, Tyco, Little Tikes, Today's Kids, and Tiger Electronics agreed to join in the boycott "on the condition that their competitors would do the same." FTC opinion at 28 (emphasis added).

The Commission first[**9] noted that internal documents from the manufacturers revealed that they were trying to expand, not to restrict, the number of their major retail outlets and to reduce their dependence on TRU. They were specifically interested in cultivating a relationship with the warehouse clubs and increasing sales there. Thus, the sudden adoption of measures under which they decreased sales to the clubs ran against their independent economic self-interest. Second, the Commission cited evidence that the manufacturers were unwilling to limit sales to the clubs without assurances that their competitors would do likewise.

FTC opinion at 29. Goddu himself testified that TRU communicated the message "I'll stop if they stop" from manufacturer to competing manufacturer. FTC opinion at 30. He specifically mentioned having such conversations with Mattel and Hasbro, and he said more generally "We communicated to our vendors that we were communicating with all our key suppliers, and we did that I believe at Toy Fair 1992. We made a point to tell each of the vendors that we spoke to that we would be talking to our other key suppliers." Id. at 31.

Evidence from the manufacturers corroborated Goddu's account. [**10] A Mattel executive said that it would not sell the clubs the same items it was selling to TRU, and that this decision was "based on the fact [*933] that competition would do the same." Id. at 32. A Hasbro executive said much the same thing: "because our competitors had agreed not to sell loaded [that is, promoted] product to the clubs, that we would . . . go along with this." Id. TRU went so far as to assure individual manufacturers that no one would be singled out.

Once the special warehouse club policy (or, in the Commission's more pejorative language, boycott) was underway, TRU served as the central clearinghouse for complaints about breaches in the agreement. The Commission gave numerous examples of this conduct in its opinion. See id. at 33-37.

Last, the Commission found that TRU's policies had bite. In the year before the boycott began, the clubs' share of all toy sales in the United States grew from 1.5% in 1991 to 1.9% in 1992. After the boycott took hold, that percentage slipped back by 1995 to 1.4%. Local numbers were more impressive. Costco, for example,

experienced overall growth on sales of all products during the period 1991 to 1993 of 25%. Its toy sales increased during[**11] same period by 51%. But, after the boycott took hold in 1993, its toy sales decreased by 1.6% even while its overall sales were still growing by 19.5%. The evidence indicated that this was because TRU had succeeded in cutting off its access to the popular toys it needed. In 1989, over 90% of the Mattel toys Costco and other clubs purchased were regular (i.e. easily comparable) items, but by 1993 that percentage was zero. Once again, the Commission's opinion is chock full of similar statistics.

The Commission also considered the question whether TRU might have been trying to protect itself against free riding, at least with respect to its vertical agreements. It acknowledged that TRU provided several services that might be important to consumers, including "advertising, carrying an inventory of goods early in the year, and supporting a full line of products." FTC opinion at 41-42. Nevertheless, it found that the manufacturers compensated TRU directly for advertising toys, storing toys made early in the year, and stocking a broad line of each manufacturer's toys under one roof. A 1993 TRU memorandum confirms that advertising is manufacturer-funded and is "essentially free." FTC opinion[**12] at 42. In 1994, TRU's net cost of advertising was a tiny 0.02% of sales, or $750,000, out of a total of $199 million it spent on advertising that year. As the Commission saw it, "advertising . . . was a service the toy manufacturers provided for TRU and not the other way around." Id. (emphasis in original). TRU records also showed

that manufacturers routinely paid TRU credits for warehousing services, and that they compensated it for full line stocking. In short, the Commission found, there was no evidence that club competition without comparable services threatened to drive TRU services out of the market or to harm customers. Manufacturers paid each retailer directly for the services they wanted the retailer to furnish.

Based on this record, the Commission drew three central conclusions of law: (1) the TRU-led manufacturer boycott of the warehouse clubs was illegal per se under the rule enunciated in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985);* (2) the boycott was illegal under a full rule of reason analysis because its anticompetitive effects "clearly outweighed any possible business[**13] justification"; and (3) the vertical agreements between TRU and the individual toy manufacturers, "entered into seriatim with clear anticompetitive effect, violate section 1 of the Sherman Act." FTC opinion at 46. These antitrust violations in turn were enough to prove a violation of FTC Act § 5, which for present purposes tracks the prohibitions of the Sherman and Clayton Acts. After offering a detailed explanation of these conclusions (spanning 42 pages in its slip opinion), it turned to the question of remedy and affirmed the order the ALJ had entered.

In the Commission's words, its order:

[*934]

> . . . prohibits TRU from continuing, entering into, or attempting to enter into, vertical agreements with its suppliers to limit the supply of, or refuse to sell, toys to a toy discounter. See para. II.A. The order also prohibits TRU from facilitating, or attempting to facilitate, an agreement between or among its suppliers relating to the sale of toys to any retailer. See para. II.D. Additionally, TRU is enjoined from requesting information from suppliers about their sales to any toy discounter, and from urging or coercing suppliers to restrict sales to any toy discounter. See para. [**14] para. II.B, C. These four elements of relief are narrowly tailored to stop, and prevent the repetition of, TRU's illegal conduct.

FTC opinion at 88. TRU complained that the order trampled on its ability to exercise its rights under *United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919),* to choose unilaterally the companies with which it wanted to deal. The Commission rejected the

point, because it found that TRU had repeatedly crossed the line from unilateral to concerted behavior in illegal ways, and that it was entitled to include remedial provisions that were necessary to prevent recurrence of the illegal behavior, citing *FTC v. National Lead Co., 352 U.S. 419, 430, 1 L. Ed. 2d 438, 77 S. Ct. 502 (1957).*

Commissioner Swindle concurred in part and dissented in part. He agreed with the majority's determination that TRU had engaged in a series of anticompetitive vertical agreements, and he thus agreed with the remedial provisions designed to proscribe those practices and their effects. He was unconvinced, however, that TRU had orchestrated a horizontal combination as well, believing that the evidence was too thin to support[**15] that conclusion. TRU appealed from the Commission's final order of October 13, 1998, to this court, under *15 U.S.C. § 45*(c), as it carries on business in this circuit (as well as every other circuit, to the best of our knowledge).

II

On appeal, TRU makes four principal arguments: (1) the Commission's finding of a horizontal conspiracy is contrary to the facts and impermissibly confuses the law of vertical restraints with the law of horizontal restraints; (2) whether the restrictions were vertical or horizontal, they were not unlawful because TRU has no market power, and thus the conduct can have no significant anticompetitive effect; (3) the TRU policy was a legitimate response to free riding; and (4) the relief ordered by the Commission goes too far. We review the Commission's legal conclusions de novo, but we must accept its findings of fact if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986).*

A. Horizontal Conspiracy

As TRU correctly points out, the critical question here is whether[**16] substantial evidence supported the Commission's finding that there was a horizontal agreement among the toy manufacturers, with TRU in the center as the ringmaster, to boycott the warehouse clubs. It acknowledges that such an agreement may be proved by either direct or circumstantial evidence, under cases such as *Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* (horizontal agreements), *Monsanto Co. v. Spray-Rite Service*

Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984) (vertical agreements), and *Interstate Circuit, Inc. v. United States, 306 U.S. 208, 83 L. Ed. 610, 59 S. Ct. 467 (1939).* When circumstantial evidence is used, there must be some evidence that "tends to exclude the possibility" that the alleged conspirators acted independently. *Monsanto, 465 U.S. at 764,* quoted in *Matsushita, 475 U.S. at 588.* This does not mean, however, that the Commission had to exclude all [*935] possibility that the manufacturers acted independently. As we pointed out in *In re Brand Name Prescription Drugs Antitrust Litigation, 186 F.3d 781 (7th Cir. 1999),*[**17] that would amount to an absurd and legally unfounded burden to prove with 100% certainty that an antitrust violation occurred. *Id. at 787.* The test states only that there must be some evidence which, if believed, would support a finding of concerted behavior. In the context of an appeal from the Commission, the question is whether substantial evidence supports its conclusion that it is more likely than not that the manufacturers acted collusively.

In TRU's opinion, this record shows nothing more than a series of separate, similar vertical agreements between itself and various toy manufacturers. It believes that each manufacturer in its independent self-interest had an incentive to limit sales to the clubs, because TRU's policy provided strong unilateral incentives for the manufacturer to reduce its sales to the clubs. Why gain a few sales at the clubs, it asks, when it would have much more to gain by maintaining a good relationship with the 100-pound gorilla of the industry, TRU, and make far more sales?

We do not disagree that there was some evidence in the record that would bear TRU's interpretation. But that is not the standard we apply when we review decisions of[**18] the Federal Trade Commission. Instead, we apply the substantial evidence test, which we described as follows in another case in which the Commission's decision to stop a hospital merger was at issue:

Our only function is to determine whether the Commission's analysis of the probable effects of these acquisitions on hospital competition in Chattanooga is so

implausible, so feebly supported by the record, that it flunks even the deferential test of substantial evidence.

Hospital Corp. of America v. F.T.C., 807 F.2d 1381, 1385 (7th Cir. 1986). There, as here, the Commission painstakingly explained in a long opinion exactly what evidence in the record supported its conclusion. We need only decide whether the inference the Commission drew of horizontal agreement was a permissible one from that evidence, not if it was the only possible one.

The Commission's theory, stripped to its essentials, is that this case is a modern equivalent of the old Interstate Circuit decision. That case too involved actors at two levels of the distribution chain, distributors of motion pictures and exhibitors. Interstate Circuit was one of the exhibitors; it had a stranglehold on[**19] the exhibition of movies in a number of Texas cities. The antitrust violation occurred when Interstate's manager, O'Donnell, sent an identical letter to the eight branch managers of the distributor companies, with each letter naming all eight as addressees, in which he asked them to comply with two demands: a minimum price for first-run theaters, and a policy against double features at night. The trial court there drew an inference of agreement from the nature of the proposals, from the manner in which they were made, from the substantial unanimity of action taken, and from the lack of evidence of a benign motive; the Supreme Court affirmed. The new policies represented a radical shift from the industry's prior business practices, and the Court rejected as beyond the range of probability that such unanimity of action was explainable only by chance.

The Commission is right. Indeed, as it argues in its brief, the TRU case if anything presents a more compelling case for inferring horizontal agreement than did Interstate Circuit, because not only was the manufacturers' decision to stop dealing with the warehouse clubs an abrupt shift from the past, and not only is it suspicious for a[**20] manufacturer to deprive itself of a profitable sales outlet, but the record here included the direct evidence of communications that was missing in Interstate Circuit. Just as in Interstate Circuit, TRU tries to avoid this result by hypothesizing independent motives. *306 U.S. at 223-24.* If there were no evidence in the record tending to support [*936] concerted behavior, then we agree that Matsushita would require a ruling in TRU's favor. But there is. The evidence showed that the companies wanted to diversify from TRU, not to become more dependent upon it; it showed that each manufacturer was afraid to curb its sales to the warehouse clubs alone, because it was afraid its rivals would cheat and gain a special advantage in that popular new market niche. The Commission was not required to disbelieve the testimony of the different toy company executives and TRU itself to the effect that the only condition on which each toy manufacturer would agree to TRU's demands was if it could be sure its competitors were doing the same thing.

That is a horizontal agreement. As we explain further below in discussing TRU's free rider argument, it has nothing to do with enhancing efficiencies [**21]of distribution from the manufacturer's point of view. The typical story of a legitimate vertical transaction would have the manufacturer going to TRU and asking it to be the exclusive carrier of the manufacturer's goods; in exchange for that exclusivity, the manufacturer would hope to receive more effective promotion of its goods, and TRU would have a large enough profit margin to do the job well. But not all manufacturers think that exclusive dealing arrangements will maximize their profits. Some think, and are entitled to think, that using the greatest number of retailers possible is a better strategy. These manufacturers were in effect being asked by TRU to reduce their output (especially of the popular toys) , and as is

classically true in such cartels, they were willing to do so only if TRU could protect them against cheaters.

Northwest Stationers also demonstrates why the facts the Commission found support its conclusion that the essence of the agreement network TRU supervised was horizontal. There the Court described the cases that had condemned boycotts as "per se" illegal as those involving "joint efforts by a firm or firms to disadvantage competitors by either directly denying[**22] or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." *472 U.S. at 294* (internal citations omitted). The boycotters had to have some market power, though the Court did not suggest that the level had to be as high as it would require in a case under Sherman Act § 2. Here, TRU was trying to disadvantage the warehouse clubs, its competitors, by coercing suppliers to deny the clubs the products they needed. It accomplished this goal by inducing the suppliers to collude, rather than to compete independently for shelf space in the different toy retail stores. See also *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 142 L. Ed. 2d 510, 119 S. Ct. 493 (1998); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959).*

B. Degree of TRU's Market Power

TRU's efforts to deflate the Commission's finding of market power are pertinent only if we had agreed with its argument that the Commission's finding of a horizontal agreement was without support. Horizontal agreements among competitors, including group boycotts, remain illegal per se in the sense the Court[**23] used the term in Northwest Stationers. We have found that this case satisfies the criteria the Court used in Northwest Stationers for condemnation without an extensive inquiry into market power and economic pros and cons: (1) the boycotting firm has cut off access to a supply, facility or market necessary for the boycotted firm (i.e. the clubs) to compete; (2) the boycotting firm possesses a "dominant" position in the market (where "dominant" is an undefined term, but plainly chosen to stand for something different from antitrust's term of art "monopoly"); and (3) the boycott, as we explain further below, cannot be justified by plausible arguments that it was designed to enhance overall efficiency. *472 U.S. at 294.* We address the market power point here, therefore, only in the alternative. [*937]

TRU seems to think that anticompetitive effects in a market cannot be shown unless the

plaintiff, or here the Commission, first proves that it has a large market share. This, however, has things backwards. As we have explained elsewhere, the share a firm has in a properly defined relevant market is only a way of estimating market power, which is the ultimate consideration. *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, 784 F.2d 1325, 1336 (7th Cir. 1986).*[**24] The Supreme Court has made it clear that there are two ways of proving market power. One is through direct evidence of anticompetitive effects. See *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)* ("the finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis."). The other, more conventional way, is by proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice in the case. See, e.g., *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956); United States v. Grinnell Corp., 384 U.S. 563, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)* (suggesting that more than 90% is enough to constitute a monopoly for purposes of Sherman Act § 2 and 33% is not); [**25] *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)* (indicating that something more than 30% would be needed to show the kind of power over a tying product necessary for a violation of Sherman Act § 1).

The Commission found here that, however TRU's market power as a toy retailer was measured, it was clear that its boycott was having an effect in the market. It was remarkably successful in causing the 10 major toy manufacturers to reduce output of toys to the warehouse clubs, and that reduction in output protected TRU from having to lower its prices to meet the clubs' price levels. Price competition from conventional discounters like Wal-Mart and K-Mart, in contrast, imposed no such constraint on it, or so the Commission found. In addition, the Commission showed that the affected manufacturers accounted for some 40% of the traditional toy market, and that TRU had 20% of the national wholesale market and up to 49% of some local wholesale markets. Taking steps to prevent a price collapse through coordination of action among competitors has been illegal at least since *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940).*[**26] Proof that this is what TRU was doing is

sufficient proof of actual anticompetitive effects that no more elaborate market analysis was necessary.

C. Free Riding Explanation

TRU next urges that its policy was a legitimate business response to combat free riding by the warehouse clubs. We think, however, that it has fundamentally misunderstood the theory of free riding. Briefly, that theory is as follows. The manufacturer of a product, say widgets, has an incentive to distribute as many widgets as it can, while keeping its costs of distribution down as low as possible. In many instances, this means that the manufacturer will want to sell its widgets for a particular wholesale price and it will want its retailer to apply as low a mark-up as possible (i.e. put the product on the market for as little extra expense as possible). Sometimes, however, the manufacturer will want the retailer to provide special services or amenities that cost money, such as attractive premises, trained salespeople, long business hours, full-line stocking, or fast warranty service. But the costs of providing some of those amenities (usually pre-sale services) are hard to pass on to customers unless some form[**27] of restricted distribution is available. What the [*938] manufacturer does not want is for the shopper to visit the attractive store with highly paid, intelligent sales help, learn all about the product, and then go home and order it from a discount warehouse or (today) on-line discounters. The shopper in that situation has taken a "free ride" on the retailer's efforts; the retailer never gets paid for them, and eventually it stops offering the services. If those services were genuinely useful, in the sense that the product plus service package resulted in greater sales for the manufacturer than the product alone would have enjoyed, there is a loss both for the manufacturer and the consumer. Hence, antitrust law permits nonprice vertical restraints that are designed to facilitate the provision of extra services, recognizing that a manufacturer in a competitive market who has guessed wrong will eventually be forced by the market to abandon the restrictions. See *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 724, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988),* quoting *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n.19, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977).*[**28]

Here, the evidence shows that the free-riding story is inverted. The manufacturers wanted a business strategy under which they distributed their toys to as many different kinds of outlets as

would accept them: exclusive toy shops, TRU, discount department stores, and warehouse clubs. Rightly or wrongly, this was the distribution strategy that each one believed would maximize its individual output and profits. The manufacturers did not think that the alleged "extra services" TRU might have been providing were necessary. This is crucial, because the most important insight behind the free rider concept is the fact that, with respect to the cost of distribution services, the interests of the manufacturer and the consumer are aligned, and are basically adverse to the interests of the retailer (who would presumably like to charge as much as possible for its part in the process). See *Premier Electrical Construction Co. v. Nat'l Electrical Contractors Ass'n, 814 F.2d 358, 369-70 (7th Cir. 1987)* ("[the rationale for permitting restricted distribution policies] depends on the alignment of interests between consumers and manufacturers. Destroy that alignment and you destroy the[**29] power of the argument.").

What TRU wanted or did not want is neither here nor there for purposes of the free rider argument. Its economic interest was in maximizing its own profits, not in keeping down its suppliers' cost of doing business. Furthermore, we note that the Commission made a plausible argument for the proposition that there was little or no opportunity to "free" ride on anything here in any event. The consumer is not taking a free ride if the cost of the service can be captured in the price of the item. As our earlier review of the facts demonstrated, the manufacturers were paying for the services TRU furnished, such as advertising, full-line product stocking, and extensive inventories. These expenses, we may assume, were folded into the price of the goods the manufacturers charged to TRU, and thus these services were not susceptible to free riding. On this record, in short, TRU cannot prevail on the basis that its practices were designed to combat free riding.

D. Remedy

Last, we consider TRU's challenge to the remedial provisions the

Commission ordered. TRU's basic point here is that the Commission has commanded it to do things that it would have been free to refuse, [**30] and conversely to refrain from actions it would have been free to take, in the absence of its violation of FTC Act § 5. So that its arguments can be fully understood, we set forth Section II of the decree in its entirety here:

IT IS ORDERED that respondent, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the actual or potential purchase or distribution of toys and related products, in or affecting commerce, as "commerce" is defined in [*939] the Federal Trade Commission Act, forthwith cease and desist from:

A. Continuing, maintaining, entering into, and attempting to enter into any agreement or understanding with any supplier to limit supply or to refuse to sell toys and related products to any toy discounter.

B. Urging, inducing, coercing, or pressuring, or attempting to urge, induce, coerce, or pressure, any supplier to limit supply or to refuse to sell toys and related products to any toy discounter.

C. Requiring, soliciting, requesting or encouraging any supplier to furnish information to respondent relating to any supplier's sales or actual or intended shipments to any toy discounter.

D. Facilitating or attempting to[**31] facilitate agreements or understandings between or among suppliers relating to limiting the sale of toys and related products to any retailer(s) by, among other things, transmitting or conveying complaints, intentions, plans, actions, or other similar information from one supplier to another supplier relating to sales to such retailer(s).

E. For a period of five years, (1) announcing or communicating that respondent will or may discontinue purchasing or refuse to purchase toys and related products from any supplier because that supplier intends to sell or sells toys and related products to any toy discounter, or (2) refusing to purchase toys and related products from a supplier because, in whole or in part, that supplier offered to sell or sold toys and related products to any toy discounter.

PROVIDED, however, that nothing in this order shall prevent respondent from seeking or entering into exclusive arrangements with suppliers with respect to particular toys.

TRU makes a perfunctory, one-paragraph argument that paragraphs II(B), II(C), II(D), and II(E)(1) impose a "gag order" that contravenes the Supreme Court's recognition in *Monsanto Co. v. Spray-Rite Corp., supra,*[**32] that manufacturers and distributors have a legitimate need for a free flow of information between them. This order, they claim, will create an irrational dislocation in the market to the detriment of toy suppliers, retailers, and consumers. With respect to paragraph II(E)(2), it argues that the five-year restriction on refusals to deal impermissibly cabins its Colgate rights to choose the suppliers with which it wants to deal. In effect, it claims, the decree will force it to purchase all toys that are offered to anyone, unless it can somehow prove that its refusal was because of a safety defect or other similar flaw.

We consider first TRU's challenges to parts II(B) through II(D) of the order. (It has not mentioned II(A) in its brief, and thus it has waived any challenge to that part of the order.) In general, if a retailer had some kind of restricted distribution arrangement with a manufacturer, Monsanto holds that it is permissible for the retailer to urge the manufacturer to respect the limits of that agreement. The retailer may communicate complaints about the provision of product to discounters, if that runs afoul of the promises in the distribution agreement. Colgate indicates[**33] that the retailer would also be within its rights to tell the manufacturer that it will no longer stock the manufacturer's product, if it is unhappy with the company it is keeping (i.e. if the manufacturer is sending too many goods to discounters, stores with a reputation for rude and sloppy service, or other undesirables).

Two facts distinguish these general rules from the situation in which TRU finds itself. First, unilateral actions of the sort protected by Monsanto and Colgate are not the same thing as a retailer's request to the manufacturer to change the latter's business practice. Under paragraph II(B) of the decree, TRU must not tell the manufacturer what to do; it is still permitted to decide

which toys it wants to carry and which ones to drop, based on business [*940] considerations such as the expected popularity of the item. Second, to the extent paragraph II(B) might indirectly inhibit TRU from exercising its unilateral judgment, TRU must confront the fact that the FTC is not limited to restating the law in its remedial orders. Such orders can restrict the options for a company that has violated § 5, to ensure that the violation will cease and competition will be restored. [**34] See *National Lead Co., supra, 352 U.S. at 430; FTC v. Cement Institute, 333 U.S. 683, 726-27, 92 L. Ed. 1010, 68 S. Ct. 793 (1948); Corning Glass Works v. FTC, 509 F.2d 293, 303 (7th Cir. 1975).* See also *FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392, 13 L. Ed. 2d 904, 85 S. Ct. 1035 (1965)* (making the same point, in context of the Commission's deceptive practices authority).

The second point also applies to TRU's objections to paragraphs II(C) and II(D). In addition, we note that the retailer should not have any reason to obtain its suppliers' business records about shipments to the retailer's competitors. That is the supplier's concern. TRU is protected as long as it can ensure that it receives what was promised to it. Also, of course, the decree preserves TRU's right to enter into exclusive arrangements with respect to particular toys. In so doing, it also implicitly allows TRU to engage in communications that are necessary for the implementation and enforcement of such agreements. Paragraph II(D) directly addresses the Commission's finding of a horizontal agreement, and it orders TRU not to go out and create a new one. The Commission[**35] was certainly acting within the bounds of its discretion when it included these provisions.

Paragraph II(E) appears to be the one that causes the greatest concern to TRU. This strikes us as a closer call, but in this connection the standard of review becomes important. The Commission has represented in its brief to this court that the decree "leaves [TRU] free to make stocking decisions based on a wide range of business reasons; it must simply make those

decisions--for a period of five years--independent of whether clubs or other discounters are carrying the same item." FTC Brief at 58. The attempt to use its market clout to harm the warehouse clubs lies at the heart of this case, and so it is easy to see why the Commission chose to prohibit reliance on the supplier's practices vis ... vis the clubs as a reason for TRU's own purchasing decisions. At bottom, TRU is really just worried that it will be difficult to prove that any particular purchasing decision was free from the prohibited taint. It will be easy to refrain from announcements or communications about refusals to deal, which is what II(E)(1) prohibits. With respect to II(E)(2), if TRU implements adequate internal procedural[**36] safeguards, it should be possible to demonstrate that its buying decisions were not influenced by anything the manufacturers were doing with discounters like the clubs. These refusals to deal were the means TRU used to accomplish the unlawful result, and as such, they are subject to regulation by the Commission. See *National Lead, 352 U.S. at 425*. Under the abuse of discretion standard that governs our review of the Commission's choice of remedy, see *Siegel Co. v. FTC, 327 U.S. 608, 612-13, 90 L. Ed. 888, 66 S. Ct. 758 (1946),* this does not appear to be a remedy that "has no reasonable relation to the unlawful practices found to exist." We therefore have no warrant to set it aside. If, however, it becomes clear in practice that this provision is unworkable, TRU is free to return to the Commission to petition for a modification of the order.

III

We conclude that the Commission's decision is supported by substantial evidence on the record, and that its remedial decree falls within the broad discretion it has been granted under the FTC Act. The[**37] decision is hereby Affirmed.

Thailand's Advocacy on Competition Policy and the Development of the Organization Structure

1. Introduction

1.1 Currently, under the latest amendment Constitution of the Kingdom of Thailand, 1997, there is a provision guiding economic policy for the government of Thailand. The government has policy that provide free competition, consumer protection, and antimonopoly practice, including deregulate unnecessary rules and laws. Private businesses are allowed to conduct activities with free and fair competition in Thai region.

1.2 Competition Policy is primarily aimed at stimulate the competition in the markets which promote economic efficiency and maximize economic welfare.

The strength and efficient of the practicable process in competition policy will promote the growing of trade and investment.

1.3 Since rapidly economic expansion under the free market in last decade, the Price Fixing and Anti-Monopoly Act 1979 was not suitable the current economic system, so the PFA has been replaced by the Trade Competition Act since April 1999.

2. Advocacy for Competition Policy

2.1 Giving the information about the Trade Competition Act

The Department of Internal Trade (DIT) will continually more publicize information on the Trade Competition Act so that the business operators will more deepened understanding and acknowledge the benefit of the Trade Competition Act. In this

respect, DIT has provided the training courses, seminar for the government agencies and also businesses.

2.2 *Publicized the activities that related to the Competition Issues*

(1) Provided the mini-magazine in the title of "*Open the Competition World"* in the electronic communication of DIT (www.dit.go.th) which summarized the interesting cases over the world. This magazine usually public twice a month.

(2) Provided the leaflets that including the concept, objectives, information, etc. in public so that the people will understand and acknowledge the advantages of the Act.

(3) Provided the consideration of significant cases that judged by the Trade Competition Commission (TCC-Thailand) in public.

2.3 *The Main Provision of the Act*

The Trade Competition Commission (TCC) has established the criteria, methodology, and the conditions that related to the prescription of the law as follows:

(1) Approved forms, rules, and procedures to apply for permission of any concerted agreement amounting to monopoly, reduction of competition or restriction of competition. They were published in the Government Gazette on February 25, 2000.

(2) Approved criteria for single firm dominance which is a firm that individually accounts for a market share of 33.33% or more and last year sales volume above 1,000 million baht (in a particular market of goods or services).

Due to the change in the government, the criteria was under review before being re-submitted for Cabinet approval (It is now under the consideration of the Commission)

(3) Approved the following criteria that mergers need to apply for permission from the Trade Competition Commission.

- The post-merger market shares of the merging parties in relevant market of one-third or 33.33% and sales volume of 1,000 million baht (in a particular market of goods or services)
- A purchase of shares of another business above 25% of the total shares of that business.
- A purchase of assets of another business above 25% of the total asset value of that business.

(Since part of the merger criteria is based on the consideration of the criteria for dominant position which is now under reconsideration, it has not yet been made effective).

2.4 *Complaining*

(1) Provided column *Questions-Answers (Q&A)* in the website of DIT (www.dit.go.th) in order to give and acknowledge information about Trade Competition Act.

(2) Provided hot line no. 1569 for people to ask their problems or inform to the Office of Trade Competition Commission.

2.5 *The Development of the Act, Regulation and Procedures*

(1) DIT will continue to encourage the development of the Act Regulation and Procedure by holding the meeting training or seminar programs that will allow relevant persons or entities to participate with government agencies and businesses and deepen understanding on competition policy and law.

(2) DIT had been given technical assistance from the World Bank with regard to the drafting of guidelines and

implementation of the Trade Competition Act for the Enforcement of the Act.

3. **Institutional Strengthening**

3.1 *Organizational Structure*

(1) The Trade Competition Commission (TCC) has duties to independently enforce the Trade Competition Act and consider the case based on case-by-case.

(2) The Appellate Committee has duties to reconsider the Commission's decision of the cases.

(3) The Specialized Sub-Committee acts as expert bodies for giving advice and suggestion to the Commission.

(4) The Inquiry Sub-Committee has responsible for investigative procedure in anti-competitive cases and submit opinions to the Commission.

(5)The Office of TCC is located in the Department of Internal Trade (DIT). The Director –General of the DIT is the Secretary - General of the Commission who takes responsible for executive of the Trade Competition Act in order to monitoring competitive conducts in Thai region, including submit the cases that may violate the Competition Act to the Commission for consideration.

3.2 *Human Development*

3.2.1 Internal Training and Consultation

(1) Provided In-house Learning for the officers in the Business Competition Bureau by the lecturer and professionals from the private sector, government agencies, in order to have ability to analyze and investigate the behavior of the business.

(2) To employ the consultants who are specialize in the Industrial Economics in order to give advice.

(3) To establish an ad hoc working group in order to solve a particular case with effectively.

3.2.2 External Training and International Cooperation

(1) DIT in cooperation with JICA and JFTC had arranged the seminar *APEC/PFP Training Program on Competition Policy* for five years. (1997-2001)

(2) DIT in cooperation with JFTC arrange the seminar *APEC Training Program on Competition Policy* in 2002. This program is funded by APEC TILF fund.

(3) Receive the sponsorship from JICA, DIT will send the officer to train and practice in JFTC for one month.

(4) Taiwan Fair Trade Commission (TFTC) provided technical assistance program in the area of Competition Policy for the officer of DIT to learn an experience of TFTC for 1 month.

(5) DIT will maintain high level of participation for any activity related to competition issues such as WTO, APEC, OECD, JFTC, etc.

(6) DIT has arranged one scholarship for the officer to further study in Master program in the field of Industrial Economics in the United States

4. **Future Plan**

The office of Trade Competition Commission will continue to encourage the Competition Act and relevant acts emphasizing transparency, justification, accountability, non-discrimination, and comprehensive. The office also provide an important role on human

development, information distribution in order that the public with voluntarily imply to the law. Moreover, the office will cooperate with other competition agencies in the area of exchange information, human development, consultation and strengthening institution.

Conclusion

To be achieved in the objectives of Competition Policy and Competition Acts, concerning and supporting from the government, businesses, and consumers need to be realized. The competition organization should reliable and independent for consideration any cases with transparency, and have appropriate rules and regulations for practicality.

APEC training program on competition policy
Bangkok, Thailand, 6-8 Aug. 2002

To build competition law in the context of the transition to market economy in Vietnam

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In the former central-planned and subsidized economic structure, there were only 2 sectors, the state sector and the collective sector. Enterprises in these two sectors did not have motivation to compete with each other since all input and output factors were assigned and planned. As a result, enterprises – the foundation of any economy – lacked motive for operation, leading to stagnancy in business and production and the shortage of common commodities.

The economic reform was launched in 1986; but in the legal terms only since 1992, our revised Constitution officially acknowledged different types of ownership, acknowledged equitable competition of enterprises.

Our achievements of economic reform in the recent year have helped to realize and fully understand the role of competition. At the present, the competition is considered as an internal drive of the economy. Under the pressure of the producers and the consumers in terms of price, quality and other factors, enterprises are forced to react reasonably. Competition is one of "internal drives" to make the production forces develop for the target of increasing labor productivity, of accelerating production concentration. Especially in the context of the fact that all factors of production such as natural resources, labor force, intellectuals and so on are the goods in the market.

I/ The necessity of building competition law in Vietnam at the present

1. The nature of the market economy

Vietnam's advocacy is to develop consistently the multi-sectors commodity economy operating in market mechanism under the State

management. Competition is one of fundamental rules and principles of the market economy. Shifting the economy into the market direction forces us to continuously renovate our management structure as well as our legal system to regulate economic activities including competition.

2. The need of controlling State monopolies

At the moment, our economy is under the transition into the market economy. However, the State economic proportion in comparison with other economic sectors is still dominant, of which some goods are exclusively distributed by State-owned enterprises. It can be said that monopolistic enterprises in Vietnam market are merely established by administrative decisions, not by free and equitable competition. Therefore, it is critical for Vietnam to control and limit state monopolistic enterprises.

3. The need of international economic integration

In addition, it can be said that Vietnam economy integrated actively into the regional and global markets. In the year of 2001, export value per capita of Vietnam is 200 USD. In the field of investment, by the end of 2000, the total value of foreign direct investment tops USD 41 billions. However, the appearance of foreign-invested enterprises and branches of foreign companies in Vietnam market intrigues some problems. Those are the differences in terms of the size, experience, financial strength between these enterprise/ companies and Vietnamese partners. Vietnam, like any other transitional economies, may face the situation that foreign enterprises can abuse the advantage of market liberalization to impose their restraints such as price fixing agreement, predatory pricing and other abusive behaviors to distort fair and equitable competition environment.

4. The need of creating equitable business environment

Based on experiences gained during 15 years of the "Doi moi" (renovation), our State has been committed to "continuously creating and completing well-structured market elements; renovating and improving the efficiency of the State economic management". In the light of this statement, we are sparing no efforts to create an equal and open environment favorable for both foreign and domestic investments and responsive to the changing production and business conditions. Vietnam's economy with a low baseline has been moving towards a market mechanism while the percentage of enterprises established in the old system is still very dominant. Therefore, the compromise between paving the way for State economic sector to develop

and creating equitable competition environment forces us to have consistent principles in this field.

5. The reality of legal system for regulating competition activities at the present

The 1992 Constitution, which recognizes the right to business freedom of enterprises and the development of multi-sectors economy laid the first stone for competition environment for enterprises under all types of ownership in Vietnam. Since then, other legislations such as Civil Code, Criminal Code, Enterprise Law, Collective Law, Bankruptcy Law, Foreign Investment Law, Domestic Investment Law, Commercial Law, Ordinance on Goods Quality Management, Ordinance on Protection of Consumer Rights and the effort to restructure state owned enterprises have contributed to create equal legal framework for competition.

However, legislations that regulate the competition activities have only covered competition principles on commercial activities and fundamental rules protecting the rights of producers and consumers. These are not adequate for regulating the whole market's current competition activities.

Like any other nation, the objective of the competition policy in Vietnam is to create and to develop an equitable competitive environment, to maintain and to encourage healthy competition, to block any anti-competitive and unhealthy competition actions in the market; to protect the interest of the States, the legal rights and interests of business individuals, institutions and consumers; to contribute to the socio-economic development.

Nonetheless, due to the fact that Vietnam has just entered the market economy for 15 years, the nation is virtually lacking of experience in regulating competition activities. Unlike some suggestion supporting the viewpoint that the enactment of competition regulations will limit foreign investment, on the contrary, we are strongly with the viewpoint that the competition policy is the fourth corner stone in the economic legal framework, apart from commercial, financial and monetary instruments. This means the enactment of competition policy will help increase the attractiveness of the investment environment, toward a healthier and transparent environment. Enterprises will have a more equitable playground, small and medium enterprises are more well protected.

II. Outlines of Vietnam's Competition Act Draft

Vietnam has started the process of drafting Competition Act since the end of 1999 and planned to finish by 2003. In this process of drafting, with much attention put into the current situation in Vietnam, the Drafting committee also takes into consideration experiences from various countries. Outlines and some critical items of this draft would be presented here as follows:

At this moment, the Act is divided into 7 chapters and a preamble.

Chapter 1: General provisions.
Chapter 2: Competition constraint arrangement.
Chapter 3: Abuse of dominant position.
Chapter 4; Merger and acquisition.
Chapter 5: Unfair competition practices.
Chapter 6: Sanctions.
Chapter 7: Enforcement.

1. The preamble raises the main objectives of the Act.

2. General provisions refer to main issues such as the scope of regulation, the subject of application, the relation between this Act and other atcs, exemption and principles for competition.

Regarding the scope of regulation: this Act regulates competition activities in business and production within the domestic market of Vietnam.

Concerning the subject of application: the Act is applied to all individuals and organizations conducting business on goods and services in the market as well as associations.

Regarding exemptions

The draft regulates exemptions that apply to individuals, organizations carrying out their activities for the national and public interest under decisions of the central and local government authorities.

Regarding the application of the Law on competition and other relevant laws

It is stipulated that in case there are conflicts and differences between regulations of this Act and other professional acts relating to competition issues, the regulations of Competition Law will be applied

3. Main regulations

The Draft is regulating 4 practices, which are divided into 2 categories:

Category 1: Competition constraint practice including competition constraint arrangement; abuse of dominant position; merger and acquisition.

Category 2: Unfair competition practices

** For the first category*: this one may not be new to the world but quite new to Vietnam. The our Committee, therefore, is facing a lot of difficulties at this point.

Among 3 practices of this category, the practice of competition constraint arrangement is the most difficult to be identified. Vietnam at this stage is lacking of knowledge as well as experience in determining this practice.

For merger: firstly, among state0owned enterprises, the merger or separation so far has been based on administrative decisions following industrial development requirement and other macro-economic management. Secondly, among non-state enterprises, which are mainly small and medium-size, mergers are not big enough to have considerable impact on the supply-demand relation in the market. We, therefore, think that this kind of practice will not be able to make sufficient effect to significantly restrain competition in the coming years. However, it should be ell places in the law to make legal foundation for economic activities in Vietnam, especially in the period of integration in to the world.

The abuse of dominant position in the market should be regulated since it does exist in both state sector (big General Corporation) and foreign invested enterprises. Vietnam economic policies clearly state that monopoly control is needed to prevent big General Corporation from taking their advantages to gain privileges and do harm to social benefits as well as avoid foreign invested enterprises to take advantages of their financial strength and experience to eliminate Vietnamese enterprises from the market.

In reality, this practice is taken quite often by some foreign invested enterprises leading to the disappearance of many Vietnamese competitors. Take an example of beverage industry, by launching widespread promotion campaign such as granting "50% increase in quantity at unchanged price", (which is actually a dumping measure), foreign invested enterprises have been able to eliminates their Vietnamese competitors. Consequently, they increase the price to nearly double, not only covering all previous losses but also obtaining a great gain. Similarly, mass advertisement and promotion campaign carried out by foreign invested enterprises in cosmetics has eliminated nearly all Vietnamese enterprises in this industry (reducing the number of 13 enterprises to 3 survivals now).

Regarding the measure to regulate these three practices: the draft is formulated in the exclusive method. It means the draft provides only prohibitions to enterprises. Among these prohi9bitions, the draft also provides exemptions.

** For the second category* - unfair competition practices: the drafting Committee combines regulations in exclusive method, which only provides prohibitions, and practice listing method.

In this chapter, our committee has presented unfair competition practices, which are very common in the market of Vietnam under articles namely:

(i) Unfriendly competition practices.

This article provides unfriendly competition or discrimination practices. This approach applied here is similar to that of competition restraint arrangement and the abuse.

(ii) The denigration of competitors and the enticement of employees of competitors.

In Vietnam, these two practices have been listed in the Commercial Law but have not been specifically clarified what they actually are. So, if these are provided in detail in this draft, it would make legal basis for determining and dealing with them in reality.

(iii) Predatory price

Concerning this practice, there are two different trends: one is that the predatory price can only be taken as competition restraint when the actor

executing this practice is in a market dominant position, the other is that the predatory price is an unfair competition practice regardless of the actor possessing the market dominant position or not. Our Committee is considering and consulting foreign experts in making decision on this matter.

(iv) Comparative advertising and misleading advertising

We think that comparative advertising and misleading advertising are unfair competition practices that causing negative effect to consumers and other competitors in the market. It is necessary, therefore, to prohibit business entities in the market to do these activities.

** Regarding competition Authority*

This chapter provides an introduction on competition Authority of Vietnam including regulations on functions, duties, rights and structure. From these requirements, we introduce 2 possible types of structure of the authorities: (i) a Ministry; and (ii) a dependent department belong a Ministry. However, the drafting Committee has not decided which type is suitable. Each type of structure has its own advantages and disadvantages. In the process of drafting, we shall study strong and weak points of each type the submit to National Assemble for final decision.

** Sanction*

This chapter provides what activities can be determined as to violate this Act, sanctions and regulation on applying these sanctions for each violation. this is the first time we try a new method of regulation: each violation should be stipulated correspondently with each actual sanction. This method is very new in Vietnam and contains some aspects that are not in conformity with current law system of Vietnam. however, our committee thinks that this way of regulation is commonly used in the world and actually has its real effectiveness in enforcement. So, we should try our best to apply it in the most possible extent to ensure the most effective enforcement in reality.

APEC Training Program on
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Hard-Core Cartels

This paper describes the main features of Australia's regulatory framework for dealing with hard-core cartels, and discusses case studies drawn from Australian experience on the application of the relevant provisions of the *Trade Practices Act 1974* (TPA). It also highlights work that the OECD has undertaken on hard-core cartels as well as the advantages in Competition Law enforcement co-operation.

Prohibition of HCC's in Australia

Australia's competition law

2. Section 45 of Australia's competition law, the TPA prohibits hard-core cartels. Price-fixing, market sharing or restriction of supply agreements, exclusionary agreements and secondary boycotts all fall within this section. Price-fixing agreements are *per se* prohibited, whereas agreements to restrict dealings (e.g., agreements to limit output or production) are assessed against a 'substantial lessening of competition' test.

3. The prohibition on price fixing (section 45A) operates where a provision of a contract, arrangement or understanding has the purpose or effect of "fixing, controlling or maintaining the price for, or a discount, allowance, rebate or credit in relation to, goods or services". The agreement must relate to the supply or acquisition of goods or services by parties who are in competition with each other.

4. Secondary boycotts occur when two parties act in concert to prevent or hinder a third party from supplying or acquiring goods or services from a fourth party. Section 45D deals with secondary boycotts for the purpose of causing substantial loss or damage to the business of the person unable to supply or be supplied goods or services. Section 45DA prohibits secondary boycott activity for the purpose of causing substantial lessening of competition in any market in which the person unable to supply or be supplied with goods carries on business. Lastly, section 45DB deals with boycotts with the purpose and effect of preventing or substantially hindering trade between Australia and overseas trading partners.

Sanctions against HCCs

5. Australia's Constitution requires that judicial power must only be exercised by the courts. Accordingly, the TPA allows the ACCC to institute proceedings to recover penalties, subject to a statute of limitation period of six years, and empowers the Court to impose them. The factors the Courts refer to in determining the level of pecuniary penalty include the deliberateness of the conduct, the period over which it extended and the amount of loss or damage caused. However, like any litigant, the ACCC can make submissions to the Court as to what it considers an appropriate penalty (maximum penalties are summarised below).

6. Actions to recover penalties are civil proceedings and therefore attract the civil standard of proof. The ACCC is therefore required to establish the facts of the contravention on the 'balance of probabilities'.

7. Pecuniary penalties available for hard-core cartels are summarised below.

- Corporations that contravene sections 45A and 45DA may incur penalties of up to AUD$10 million per offence;
- Individuals that contravene sections 45A and 45DD may incur penalties of up to AUD$500 000 per offence.
- Corporations that contravene sections 45D and 45DB may incur penalties of up to AUD$750 000 per offence;
- Individuals that contravene sections 45DA and 45DB are not subject to monetary penalties.

8. In addition, the ACCC may seek interlocutory or final injunctions. Injunctions can be mandatory (requiring certain future conduct) or prohibitory (requiring the cessation of certain conduct).

9. The ACCC can also seek award of damages under the TPA. Such actions are subject to a three-year limitation period. It should be noted that such damages are designed not to punish, but to compensate for actual loss suffered.

Administrative Action

10. Apart from the judicial remedies outlined above, the ACCC may also accept court-enforceable undertakings under section 87B of the TPA, rather than pursue litigation. This approach may result in quicker and less costly resolution of the matter while still attaining the ACCC's enforcement objectives.

Case Study – Fire Protection Industry

11. The following three related cases involve illegal activity in the fire protection industry in the State of Queensland, Australia.

12. The ACCC's investigations commenced after a 'whistle-blower' provided information in relation to cartel activity in the installation of fire sprinklers and alarm systems. During the ensuing investigation, evidence surfaced about misleading and deceptive conduct in the maintenance of fire protection systems, and then about secondary boycott activity by an industry-related union.

13. The seriousness of the misconduct uncovered was exacerbated by the fact that many of the buildings affected were public facilities: schools, hospitals, retirement homes, cinemas and shopping centres.

The Cartel

14. In February 2001, after four years of investigation and an eighteen-month trial, the ACCC secured an award of AUD$15 million in penalties and costs. The case involved 38 individuals and more than 20 companies, ranging from large multinational corporations to small local operators. This constituted almost all Brisbane-based companies operating in the fire alarm and sprinkler installation service industry at that time.

15. The level of penalty reflects a number of factors, including the size of the companies, the level of management involved, and the nature and seriousness of the unlawful conduct. In his judgment, Justice Drummond noted that it could readily be accepted that substantial loss had resulted to consumers affected.

16. The ACCC alleged that anticompetitive arrangements were made at regular meetings over many years, beginning in the mid-1980s. At these meetings, the companies agreed which tenders each would win by agreeing on prices to be tendered. They also agreed they would not discount their tender prices beyond a certain range.

17. The ACCC also alleged that the parties agreed that all alarm projects would be tendered at a labour rate of AUD$40 per hour with a margin on labour and materials of 40%. This was known as "the 40/40 agreement".

Maintenance of Fire Protection Systems

18. As a result of the above investigation, the ACCC discovered sufficient evidence to allege that numerous fire protection companies had committed various other contraventions of the TPA. The evidence suggested they failed to meet Australian Standards in routine inspection, testing and maintenance of fire protection systems for approximately 11 years, and had inadequate systems to verify whether checks had been performed. (Australian Standards must be met in order to ensure the reliability and performance of these systems.)

19. The Court ordered injunctions, refunds, issuance of public notices, institution of compliance programs and undertakings to maintain management control programmes after finding the companies had engaged in misleading and/or deceptive conduct, had made false representations regarding the standard or quality of services provided, and had accepted payment without intending or being able to supply goods or services.

20. The fact that the anticompetitive conduct in this case had the potential to put human lives at risk highlights the importance of a strong and effective competition regime that prevents hard-core cartel activity.

Secondary Boycott

21. A second ‘spin-off’ from the cartel investigation was the discovery of secondary boycott activity by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union (CEPU).

22. The ACCC alleged that a number of contraventions of the secondary boycott provisions of the TPA had occurred between November 1997 and early February 1998.

23. The matter was settled between the ACCC and the CEPU by way of consent orders in the Federal Court that included:

- An injunction;
- Implementation by the CEPU of a trade practices compliance programme;
- The CEPU notifying sprinkler fitter members, fire protection contractors and builders that the conduct had ceased;
- Agreement by the CEPU to reinstate members who were suspended for involvement in subcontracting; and
- An agreed contribution by the CEPU to the costs of the ACCC's proceedings.

International Perspectives on HCC Concepts and Principles

24. Research and analysis on the nature and impact of hard-core cartels, and the need for effective sanctions against them, are embodied in the OECD's 1998 Recommendation on HCCs, and in the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

OECD Council Recommendation on HCCs

25. The OECD's work programme on hard-core cartels has been underway for a number of years. The OECD Council Recommendation on HCCs was issued in 1998. The Recommendation and a subsequent progress report by the Competition Committee noted that HCCs impose significant harm upon consumers world-wide and called for enhanced sanctions against cartel participants to deter such conduct.

26. More specifically, the 1998 Recommendation concluded that "hard-core cartels are the most blatant violations of competition law, and ... they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others".

27. The Recommendation further stated that "effective action against hard-core cartels is particularly important from an international perspective – because their distortion of world trade creates market power, waste, and inefficiency...".

28. Hard-core cartels are the most insidious form of anticompetitive conduct and must be stopped. They work to the detriment of customers and suppliers, act as barriers to the entry of new players, and undermine the benefits of trade liberalisation. The prevalence of cartels at the domestic and international level underpin the importance of having a comprehensive and effective domestic competition regime, the implementation of which can only be assisted through greater enforcement co-operation among competition agencies around the world. In an evolving global marketplace that raises new regulatory and enforcement challenges, the ACCC is actively working with its counterpart antitrust and consumer protection agencies around the world to address these challenges.

29. I would now like to canvass why co-operation and co-ordination between regulatory agencies is so important, what mechanisms and tools Australia uses to facilitate co-operation, and the Australian experience in competition law enforcement co-operation.

30. The distorting effects of anticompetitive practices at the domestic level can be minimised by co-operation and co-ordination between national competition authorities, which also benefits general corporate governance systems. Trade policy and competition policy both have the same fundamental objective of enhancing consumer welfare through more efficient allocation of resources, whether it be by lowering governmental barriers to trade or through promoting competition. Technical assistance and co-operation between agencies on competition law and policy enable authorities to share experiences, potentially reducing the time required to implement effective competition regimes.

31. In addition to this important link between trade and competition, there are several other compelling reasons why co-operation between competition agencies is both necessary and desirable.

- With globalisation, many competition problems transcend national boundaries, for example: international cartels; export cartels; restrictive practices in fields that are international by nature, (e.g. air and sea transport); mergers involving multinational corporations; also abuse of dominant position in international markets. Offshore transactions can have an effect on domestic markets: for example, offshore mergers, or anticompetitive agreements between exporters. Competition authorities have a prime interest in co-operating to solve these problems to enhance the effective enforcement of domestic competition rules.

- Effective domestic enforcement of competition rules is based on having adequate and correct information to determine whether unlawful conduct took place or whether the effects of an acquisition were anticompetitive, for example. In the global economy, the necessary information may need to be sought from sources located around the world. Furthermore, it is common to find the information in another enforcement agency that has had prior dealings with the persons or firms involved or their targets.

- In addition, firms that operate in several countries may be subject to differing national competition rules. Procedures, time limits and the criteria for assessing the competitive impact may vary considerably. These differences can increase the costs faced by firms and create uncertainties that can distort trade flows and international investment.

- One final argument in support of co-operation is that in some countries, actions against anticompetitive practices can be less rigorous than in others and may therefore cause distortions. In addition, anticompetitive practices tolerated in one country may result in reduced access opportunities to the market, even though foreign firms could provide additional competition that would benefit consumers of that country. In the absence of appropriate domestic rules, these countries may be at risk of being subject to extraterritorial application of other countries' competition laws, or being exposed to anticompetitive conduct by foreign firms.

Enforcement Co-operation – Case Examples

32. The ACCC's enforcement on particular cases may take place under the framework of a formal co-operation agreement, or informally through the personal networks that the ACCC has in place with its counterpart agencies around the world. Informal contact is by far the more common means of communication. It is faster, simpler and requires less procedural complications, for matters that are generally easily able to be dealt with by less formal means. However in the situation where specific information or assistance is required, a formal request under the umbrella of a co-operation agreement is considered to be more appropriate.

33. Informal contact regularly takes place by way of telephone calls, e-mails and video-conferencing calls to discuss issues and cases of common interest. This may include discussions about market definition; details of the companies and persons involved; information about the timing and current stage of investigations and prosecutions in other jurisdictions, including how investigations could be co-ordinated to provide more efficient or better outcomes for both parties; provision of copies of research, studies or other papers that may be useful in the evaluation of particular markets, industries or conduct; or details about cases that may have occurred in the past in the same industry or involving the same companies. Formal requests would more likely involve such things as requests to conduct interviews, collect witness statements or serve documents.

Vitamins

34. The ACCC's case on the vitamins cartel concluded on 1 March 2001 where the Federal Court imposed record penalties totalling AUD$26 million against three animal vitamin suppliers – Roche Vitamins Pty Ltd (AUD$15 million), BASF Australia Ltd (AUD$7.5 million), and Aventis Animal Nutrition Pty Ltd (AUD$3.5 million). The companies admitted they had engaged in price fixing and market sharing.

35. The parties approached the ACCC voluntarily after the US and Canadian vitamin proceedings became public in mid 1999 and fully co-operated with the ACCC's investigation. The parties promptly provided the ACCC with a comprehensive report containing critical information about both the overseas arrangements and the Australian collusive arrangements. The companies provided the ACCC with detailed information about the Australian collusive arrangements, including frank and detailed admissions of their participation in those arrangements.

36. Through solicitors, all three participants willingly participated in a series of discussions with the ACCC to bring an agreed resolution of the matter before the Court. As a result of those discussions, the parties and the ACCC reached agreement on the penalty suggested to the Court. The parties also assisted the ACCC in the preparation of the relevant settlement documents. The ACCC co-operated informally with its counterparts in the US, EU, Canada, New Zealand and Brazil in relation to this case.

DVD's

37. Australian consumers are currently suffering from an international cartel that restricts their access to digital versatile discs (DVDs). The cartel, headed by major film studios in agreement with the manufacturers of DVD players, has divided the world into regions. This ensures that DVDs on sale in Australia will only function on a DVD player licensed for region 4 that includes Australia. The stated aim is to protect cinema ticket sales by preventing people viewing movies on DVDs in their homes before distribution to cinemas. The Australian subsidiaries of US film companies have been requested by the ACCC to explain their actions. It will then decide what action can be taken.

Rothmans / British American Tobacco

38. The acquisition of the Rothmans group by British American Tobacco in 1999 provides a useful example of a number of issues in international mergers. In some countries the merger of these two cigarette companies did not generate competition concerns.

39. In Australia the market was highly concentrated. Three companies had 99 percent of the Australian cigarette market. The market share of the merged companies would have been around 65 per cent. The ACCC contacted a number of overseas competition agencies. However the merged firm did not dominate the markets in many of the countries contacted.

40. There was agreement that the boundaries of the market were manufactured cigarettes. Pipe tobacco, cigars and loose tobacco for roll-your-own cigarettes were not seen as close substitutes. While the major firms in the cigarette market were international, with operations in many countries, the market was not considered to be international. In the Australian market, imports accounted for less than one per cent of the market.

41. The ACCC took the view that in Australia, the merger would lead to a substantial lessening of competition in the cigarette market. The merger parties were informed that the ACCC would oppose the merger.

42. While the merger went ahead in a number of countries, the merger parties entered into negotiations with the ACCC to undertake certain structural remedies. As is the case with competition authorities world-wide, the ACCC has a preference for structural remedies that might enable long term competitive outcomes rather than behavioural undertakings such as price controls.

43. The merger parties agreed to divest certain cigarette brands and production and distribution facilities to an amount equal to seventeen per cent of the total market. The major British based international tobacco company, Imperial Tobacco, purchased the assets, and has subsequently increased its market share. The merger went ahead while competition in the domestic market was retained.

Coca Cola / Cadbury Schweppes

44. A proposal in 1999 by the Coca Cola Company to acquire the international soft drink brands of Cadbury Schweppes was not attempted in those countries where the merger parties considered that the merger would breach the local competition law.

45. Australia was a country where the two firms did propose to merge. In Australia, Coca Cola was the largest soft drink company with a market share in excess of sixty per cent. It had the most extensive distribution network via supermarkets and outlets such as clubs, hotels, small convenience stores, vending machines, and fast food outlets. The Schweppes soft drink brands were the second largest with a market share of around fifteen per cent. Pepsi Cola was a distant third with around seven per cent of the market.

46. The initial merger proposal was rejected by the ACCC. Coca Cola then attempted two variations of the merger proposal, involving divestiture of local brands owned by the merging parties. However the principal concern of the ACCC was the acquisition by Coca Cola of the international Schweppes brands. Coca Cola was unwilling to divest the very assets which were the purpose of the acquisition. Consequently, despite extended negotiations between the ACCC and the parent companies of Coca Cola and Cadbury Schweppes in the US and the UK, it was not possible to achieve a satisfactory outcome and the acquisition was abandoned.

Grand Metropolitan / Guinness

47. This matter involved the merger of the two companies' spirit production and distribution businesses in 1998. The ACCC held a number of telephone conferences with regulators in the European Union, USA, Canada and Mexico. Particularly useful discussion took place on the 'product aspect' of market definition, which included alcoholic beverages, spirits and individual categories of spirit as possible options about the timing of the investigations, and when decisions were proposed to be made in the different jurisdictions.

De Beers / Ashton Mining Limited

48. In assessing this proposed acquisition in 2000, the ACCC liaised with Canadian, US and European authorities. Liaison with the European Commission was particularly extensive and

useful, allowing the ACCC to develop a better understanding of the global trade in diamonds, most of which takes place in Antwerp, Belgium.

Metso / Svedala

49. Contact with overseas jurisdictions was also used extensively in the assessment of the global rock and mineral processing equipment merger between Metso and Svedala. In this case, the European Commission obtained divestiture orders from the parties that greatly reduced the anti-competitive impact of the transaction upon Australian markets. Liaison between the ACCC and other competition agencies therefore resulted in this instance in the expeditious consideration of this matter by the ACCC.

Alcoa / Reynolds

50. The ACCC liaised extensively with the European Commission and the US competition authorities on the global aluminium merger of *Alcoa* and *Reynolds* in 2000. To address concerns, Alcoa offered undertakings to the DoJ and the EC in this case to divest itself of its interest in the Worsley alumina refinery in Western Australia. These undertakings were also sufficient to allay the concerns of the ACCC. The ACCC's recognition of undertakings given to other competition authorities by merger parties as an effective remedy shows that co-operation between competition authorities can lead to very effective outcomes.

Gillette / Wilkinson Sword

51. In 1990 this acquisition was considered by fourteen competition agencies around the world, including Australia. The world-wide transaction had a different impact in each of the various jurisdictions, largely due to differences in the economic structure and merger laws of the various countries. The ACCC found it very useful to be able to discuss market issues and exchange views with its counterparts during the course of its investigation of this merger.

52. However arrangements to satisfy domestic concerns generated by international mergers do not always lead to satisfactory long term outcomes. The now famous acquisition by Gillette of Wilkinson Sword is an interesting study. The merger was assessed in many countries. In Australia, it was decided that the merger would breach the competition law. While the merger went ahead in a number of other countries, Australia required Wilkinson Sword razor brands to be divested to an independent third party.

53. The longer-term outcome, however, has not been particularly successful. The Wilkinson Sword brands have declined as Gillette technology, branding and advertising have increased Gillette's market share. It would seem that divestiture in one market after a global merger may not achieve the desired competitive outcome unless, as in the Rothmans / BAT cigarette example, the divested assets can be sold to a major market participant. Of course, this is not unique to divestitures resulting from international mergers. The same is true of domestic mergers. However, in the case of international mergers it is not possible to for one country to block the merger in its entirety. So the bargaining power of a single competition agency in a smaller country may be more limited than in domestic merger cases.

54. The cases above and expanding trade and investment flows highlight the importance of greater co-operation and co-ordination among regulatory agencies, as much of the corresponding anticompetitive activity transcends national boundaries.

55. It is increasingly recognised around the world that countries need to have a strong and effective domestic competition regime in order to be able to participate in the global marketplace. Such recognition, coupled with governments and their respective enforcement agencies' willingness to co-operate to achieve competitive markets, means that we are moving towards more competitive global markets, better access for domestic companies to international markets and better access for consumers to foreign goods and services.

Managing Investigations

56. I would like to conclude my presentation today by briefly discussing one aspect of managing an investigation. There are many issues relevant to investigation management, far too many for me to cover today. What I would like to do today is to show you one method of investigation management that is simple and helps investigators concentrate on the correct issues. It helps them plan what they need to do, and to ignore irrelevant issues. This method involves the use of what we call an evidence matrix. An evidence matrix allows us to examine an allegation, reduce that allegation to the elements of a contravention and then to assess the evidence available to satisfy each element of the contravention. It also enables us to record what avenues of inquiry might be pursued to satisfy other elements of the contravention not able to be proved.

Evidence Matrix

Investigation:	**Prepared by:**	**Date:**	**Page of**
Allegation	**Contravention**	**Elements**	**Avenues of inquiry**

57. Let us now apply this form to a hypothetical situation. Let us imagine you are about to investigate a complaint that ABC Pty Ltd published a misleading advertisement in the ASEAN Times newspaper claiming that the World Bank approved its investment accounts. You have a complaint from The World Bank stating they have never given any such approval. For the sake of simplicity, this investigation will be conducted under section 52 of the TPA.

58. The investigator should start by stating the general nature of the investigation and then state the law under which the matter is being considered. In the third column the investigator should list the elements of the offence. At that stage the form will look something like this:

Allegation	Contravention	**Elements**	**Avenues of enquiry**
That ABC Pty Ltd engaged in misleading conduct by publishing an advertisement that falsely claimed that their product had World bank Approval.	Section 52, which states: A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.	A corporation shall not in trade or commerce engage in conduct	

Allegation	Contravention	**Elements**	**Avenues of enquiry**
		that is misleading or deceptive or is likely to mislead or deceive.	

59. By reaching this stage the investigator has identified the relevant law and identified the elements that need to be proved. The next stage is to identify the avenues of enquiry. This is where the matrix really helps the investigator concentrate on the relevant evidence.

60. The matrix will then look something like this:

Allegation	Contravention	**Elements**	**Avenues of enquiry**
That ABC Pty Ltd engaged in misleading conduct by publishing an advertisement that falsely claimed their product had World Bank Approval.	Section 52, which states: "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."	A corporation shall not	Office of company registration – obtain certificate of registration. Interview with ABC Pty Ltd. Ask whether the firm is incorporated and verify name. ASEAN Times. Exactly who arranged for the ad to be published? In what account name? Who made out the cheque/electronic payment that paid for ad? What was the name of the account the payment was drawn against?

Allegation	Contravention	**Elements**	**Avenues of enquiry**
		in trade or commerce	Interview with ABC Pty Ltd. Establish that they sell services in trade or commerce. Statements from customers showing they invested with ABC.
		engage in conduct	ASEAN Times; Establish ABC caused the ad to be published. Verify wording of ad corresponded with ABC's instructions. Statements from customers showing they read the ad and answered it. Interview with ABC. Verify they caused ad to be published.

Allegation	Contravention	**Elements**	**Avenues of enquiry**
		that is misleading or deceptive	World Bank. Verify that no form of approval was ever given. Did they contact ABC? What was response? Does approval, if given, provide marketing advantage? Customers. Did they believe that ABC had WB approval? Interview with ABC. Did they derive benefit from ad? Did investments increase?

61. That matrix is somewhat general, but I hope it explains the basic principles. By completing the matrix the investigator should be able to see where the gaps in evidence are and be able to organise the investigation to get the relevant evidence from the right people.

62. Once this process is mastered, it is easy to expand the matrix concept to include issues such as staff resourcing and time needed to complete the investigation. Such a form might look like this.

Time for completion of tasks

Avenues of enquiry	Tasks	Resources Allocated	Jan	Feb	Mar	Apr	May	Jun

63. To use such a form, you merely insert the avenues of enquiry from the evidence matrix and then map out the tasks that need to be done, who will do them, and when they will be required to be completed. This is an indispensable aid for the investigator.

64. I hope you have found this presentation useful and informative. I am happy to discuss informally any of the matters to which I have referred. Thank you.

Discussion on setting up competent anti-monopoly authority in China

By Wenhong Tang, MOFTEC, PRC

China is drafting its anti-monopoly law. It is important for better enforcement of the law to set up an efficiently and fairly competent anti-monopoly authority. Then, the following points should be discussed.

1. Independence or not?

Undoubtedly, the answer shall be that the authority's independence is very important and necessary, at least because

- The different ministries have their own administrative power.
- The local governments have their own administrative power and interests.
- Some of large enterprises were changed from specific industry ministries.
- The law will always deal with the practice of large enterprises which possess of dominant market power and strong lobbying power.

2. Administrative or judicial?

Maybe an administrative authority is appreciate for China in current phase, because

- China is in the process from a planed economy to socialist market economy.
- Judicial way always seems to spend more time to deal with individual case.
- Administrative way will be more efficient.

At the same time, the law should provide for the possibility of recourse to a higher judicial body.

3. One, two or more levels?

The approach of one-level authority is not suitable for China, because

- The country has a vast territory.
- There are differences of development in different regions.

More-than-two-level way, on the other hand, setting up local authorities according to the country's government system, will reduce the reliability of the decisions. Two-level way, which the central authority directly sets up local authority in each province, may avoid the short of one-level way as well as more-level way.

4. Qualification or not?

The staffs of the central authority shall be selected from those persons who are knowledgeable about and well experienced in economics and law, and should not have any interests which would conflict with the functions to be

performed; otherwise its reliability would seriously be lost.

5. Issue of possible immunity of members from prosecution or claim

Not too clear for me. Hope to be discussed.

Determination of Concerted Action by Companies in a Oligopoly Market: The Case of the Punishment Imposed on Domestic Airlines for Their Collective Reduction of Flights

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I Origin of Investigation

The newspapers reported that passenger rates among the different domestic airlines had declined as a result of increasing domestic airline rates. In an effort to lower operational costs, Far Eastern Air Transport, Uni Air, TransAsia Airways, and Mandarin Airlines on 1 May 2000 reduced the number of their weekly domestic flights by 109 roundtrips (218 flights), or an average of about 16 roundtrips daily. Flight reductions were mainly for the Taipei-Kaohsiung route, and a total of four airline companies forwarded their flight reduction plans. The Fair Trade Commission subsequently took the initiative to investigate whether the said flight reductions were in violation of the Fair Trade Law, which prohibits concerted action among companies.

II Background

1. Market Structure

   Statistics from the Civil Aeronautics Administration (CAA) under the Ministry of Transportation and Communications (MOTC) show that there are currently six domestic airline companies, namely, Far Eastern Air Transport, TransAsia Airways, Uni Air, Mandarin Airlines, U-Land

Airlines (its flight discontinued since May 2000), and Daily Air Corp. (non-fixed wing aircraft operator). The four companies involved in the complaint are the largest among the domestic airline companies. Based on the passenger count, in 1999, the four-firm concentration ratio (CR4) is 95.55%[1], which is typical of an oligopoly market.

2. Ticket Price Increase

As domestic airlines suffered heavy losses in recent years, the MOTC on 16 December 1999 approved the upper limit of domestic airfares and allowed airline companies to offer 50% discount as the minimum fare. However, the upper limit far exceeded the then prevailing ticket fares, and the increase was in the 5% to 68% range. In addition, since consumers were no longer able to purchase tickets at 40% to 50% discounts from travel agencies, domestic airfares in effect nearly doubled from the consumers' perspective.

3. Joint Promotion and Flight Reduction

Newspapers thereafter reported that the Taipei Aviation Transportation Association planned to call on the domestic airlines to carry out a joint promotion offering free tickets starting 1 May 2000. The Commission believed that the joint promotion campaign would deprive domestic airlines of trade opportunities based on more beneficial promotional campaigns. It would thus be detrimental to market competition and was at risk of violating the Fair Trade Law, which restricts concerted actions. After the Commission issued a press release stating its position, the

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[1] Far Eastern Air Transport had the highest market share at 29.7%, followed by Uni Air at 27.8%, TransAsia Airways 23.7%, Mandarin Airlines 14.35%, U-Land Airlines 4.4%, and Daily Air Corp. 0.15%.

Association cancelled the joint promotional activity[2]. To alleviate the financial burden on their operations, however, the airline companies forwarded to the CAA a flight reduction plan, which was implemented on 1 May.

III Investigation Process

1. Legal Analysis

The case involved the Civil Aviation Law, the Regulations Governing Civil Air Transport, and the Guidelines on the Management of Domestic Airport Time Slots. Investigation showed that the relevant laws and regulations did not stipulate that airline companies may collectively apply for flight reductions. In addition, in accordance with the Guidelines on the Management of Domestic Airport Time Slots and the Regulations Governing the Quota on Aircraft Landing and Take-off in Domestic Airports, if more than 10 percent of the allotted time slot is cancelled within the a quarter, and if quota usage rate is less than 80 percent for three consecutive months, the CAA may reclaim the unused time slots and quota for reallocation. Therefore, drastic flight reductions will lead to loss of time slots and quota, resulting in adverse impact on the long-term operations of an airline company.

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[2] After the media reports, the Commission immediately analyzed the possible market impacts of the joint promotional campaign and, within one week, submitted its report to the Commissioners' Meeting for discussion. On 26 April 2000 during the 442nd Commissioners' Meeting, it was determined that if the airline companies proceeded with the joint promotional campaign, such action would be considered in violation of the fair Trade Law.

2. Visit to the Competent Authority

Since the case involved regulation policies in the aviation market, FTC investigators visited CAA, the aviation competent authority, and formally requested in writing for CAA's comments. The CAA said that flight adjustments carried out by the airline companies in May 2000 were voluntary actions based on the fleet capacities of the individual airline companies and market supply and demand; the CAA did not invite the airline companies for negotiations or moral persuasions. In other words, the CAA clearly stated that they were not involved in the coordination of the airline companies' flight reduction activities.

3. Investigations on the Airline Companies Involved

FTC investigators sent letters to the four airline companies involved requesting their presence at the Commission to explain the reason for flight reductions and whether there was concerted action. The airline companies denied having prior agreement on the flight reduction, and claimed that flight reductions in May were part of the routine flight adjustments. The airline companies claimed that the flight reductions were mainly due to the poor overall demand in the domestic market. They said that although flight reductions were detrimental to the long-term development of an airline company, they were necessary to prevent more losses to the companies. The airline companies said both the CAA and the Taipei Aviation Transportation Association did not convene meetings to discuss issues relating to the flight reductions. In addition, the flight reduction tables that the companies forwarded to the CAA for approval were confidential information and there was no way for the companies involved to know of each other's flight reduction

plan in advance.

4. Investigation at the Taipei Aviation Transportation Association

FTC investigators went to the Taipei Aviation Transportation Association for investigation. The Association said that its members began sending letters to the Association by the end of March 2000[3], hoping that the Association would request the CAA to approve their flight reduction plans and allow them to retain their time slots and flight quota after flight reduction. The Association subsequently drafted a flight reduction table of the different airline companies after inquiring with the airline companies through telephone about the flight reduction plans. The Association then forwarded the table to the CAA, requesting the CAA to approve the flight reduction plans and at the same time allow the airline companies to retain their time slots and flight quota after flight reduction. The Association said that the flight reduction plans were determine by the airline companies on their own, and that the Association was merely forwarding the intentions of the said airline companies. In addition, the Association said that it did not request its member companies to abide by the flight reduction plan.

5. Market Information Analysis

To investigate the case, the Commission gathered and compiled

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[3] In the past there were instances where trade associations took on a leading role in concerted actions by enterprises. It was thus necessary for the Commission to further investigate the role taken by the Taipei Aviation Transportation Association in this case. FTC investigator further learned that the airline companies forwarded letters to the Taipei Airlines Association on the following dates: Uni Air, 24 March 2000; TransAsia Airways, 27 March; Mandarin Airliners, 29 March; and Far Eastern Air Transport, 30 March. Since the letters were forwarded within days of one another, it was possible that a prior agreement was in place.

information on the domestic airline market, including the domestic aviation network, market demand, passenger rates of the airline routes and their changes, states of operations of the airline companies, market structure, previous flight reduction records of the airline companies, time slots, and how the airline companies used their flight quota after the flight reduction at issue. In addition, investigation showed that Far Eastern Air Transport, Uni Air, TransAsia Airways, and Mandarin Airlines each increased its fares by 29.6%, 43.1%, 35.0%, and 17.6% respectively in May 2000. Although the number of passengers declined during the period covering January to May 2000, revenues of the airline companies were up compared to the same period the previous year[4].

IV Determination of Facts

For the case at issue, Far Eastern Air Transport, TransAsia Airways, Uni Air, and Mandarin Airlines in May 2000 filed applications to each reduce the number of flights by 40 to 60 per week, for a total of 218 flights. Although the different airline companies had in the past adjusted the number of their flights to a varying degree, flight reduction seldom reached more than 50 flights per week unless mandated by the CAA or during winter flight adjustments. Thus the flight adjustments made by the airline companies in May 2000 were undoubtedly major adjustments; it could thus be deduced that the airline companies took uniform action to reduce the number of flights.

Although there was no direct evidence to show that the airline companies

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[4] Revenues of Far Eastern Air Transport, Uni Air, TransAsia Airways, and Mandarin Airliners in May 2000 were up 14.1%, 11.3%, 10.5%, and 56.9%, respectively, compared to the same period the year previous.

reached an agreement in advance to reduce the number of flights, the Commission determined that there were no valid economic reasons for the flight reductions. The Commission thus deduced the airline companies agreed to engage in concerted action, which was in violation of the Fair Trade Law. The Commission arrived at such determination based on the following reasons:

1. Due to the difficulties in obtaining flight routes, time slots, and quotas, an airline company would not easily cut down its flight schedules unless necessary to prevent the time slots and quotas from being revoked by the CAA. The flight reduction at issue violated market practice, and due to the fact that the airline companies involved wrote the CAA to apply for a retention of their time slots and quotas, it could be proven that the drastic flight reduction was a concerted action borne out of consent of the parties involved. The airline companies jointly applied with the CAA for the retention of their time slots and quotas to minimize the losses from flight reductions, and made used of the adjustments in market supply and demand after flight reductions to maintain price stability and obtain other economic benefits.

2. The airline companies argued that flight reductions were necessary due to poor overall market demand. However, investigation showed that while the airline companies planned for flight reduction in March, there were no indications of decline in the number of passengers and passenger rates of the airline companies. In addition, after the airline companies twice increased their ticket fares in recent years, the fare adjustments had added to the airline companies' gross profits despite a decline in the number of passengers. Since the fare adjustments brought substantial improvements to the companies' financial structure,

company operations had likewise improved at the time the flight reductions were being planned. It was thus difficult to argue that the flight reductions were necessary due to poor overall market demand.

3. In addition, there was less price competition after the airline companies twice raised ticket prices in recent years. As the airline companies reduced the number of flights, the Taipei Aviation Transportation Association likewise planned a joint promotion campaign in an attempt to maintain the high ticket prices. Prior to filing their respective applications for flight reductions, the airline companies also wrote the Association requesting the Association to inquire with the CAA whether the companies could retain their time slots and flight quota after flight reduction. Since the letters were sent within days of one another, and that the Association wrote the airline companies to inquire about the scale of flight reductions prior to writing the CAA, and that the Association forwarded the flight reduction plans of the airline companies in its letter to the CAA, and that the Association subsequently notified the airline companies of the adjusted flight reduction plans, such events seemed contrary to the airline companies' clam that flight schedules were business secrets. It was therefore evident that the airline companies attempted to exchange sensitive information relating to flight reductions through the Association, and reduce financial impact by filing a joint application to keep their time slots and flight quota after flight reductions.

The above explanations show that due to poor overall passenger rate, the airline companies involved in the case, aware that they were at risk of loosing

their time slots and flight quota due to drastic reductions in the number of flights, indirectly communicated their desire for flight reduction through the Taipei Aviation Transportation Association. The airline companies jointly restricted the supply of domestic air travel as a result of collective flight reductions in May 2000. In addition, the airline companies attempted to apply to the CAA, through the Association, for the retention of their time slots and flight quota to reduce the financial impact after flight reductions. The airline companies likewise attempted to maintain stable ticket fares and obtain other economic benefits through adjustments to the market supply and demand after the collective flight reduction.

Taking into account the totality of factors such as the overall market and economic situations after the airline companies reduced the number of flights, process leading to the flight reductions, pervious flight reductions in the market, regulations on time slots and flight quota, increase in ticket fares, and the intent to carry out joint promotion, there was no economic justification for the collective flight reduction, and such action was sufficient to affect market supply and demand. The action violated the regulations of the Fair Trade Law, and the Commission imposed a total fine of NT$12 million on the four airline companies that carried out flight reduction.

V Recommendations

1. Strengthen Market Information Collection and Analysis

   Collection and use of market information is critical in the implementation of anti-trust law. An investigator should be able to determine the validity of the information provided by the enterprise at

issue, and at the same time collect further information to refute false claims made by the enterprise. In this particular case, the Commission further obtained detail information on the passenger rates of the airline companies as well as operational information on these companies before and after the fare increase. The information was critical to the determination of the case.

2. International Cooperation and Mutual Assistance

Concerted actions among enterprises will significantly reduce competition and impact market mechanisms. Thus countries around the world have legislation in place to prevent and punish unlawful concerted actions; such actions are likewise among the focus of the anti-trust competent authorities. However, it is difficult to prove that enterprises in an oligopoly market have the common intention to carry out uniform actions since the enterprises are so trained by the competition law competent authority that they understand such actions should be carried out tacitly. As operations of enterprises globalize, it has become more difficult to gather evidence of such actions against vicious multi-national cartels. Therefore the competition law competent authorities should work together to exchange experience and formulate a set of guidelines on the gathering of evidence and indirect evidence in the fight against unlawful concerted actions.

The Need of Capacity Building in Competition Policy : Indonesia's Experience

by

Darianto Harsono

Introduction

Today economic liberalization is a reality and no country in the world is immune to its impacts. It has opened up tremendous opportunities, but at the same time it has also posed a wide range of challenges and risks. We must therefore strive to maximize the benefits of economic liberalization while endeavouring to minimize its costs.

Indonesia views the economic liberalization process as offering many potential economic benefits including those arising from a multilateral to regional and bilateral approach. Participation in international organizations basically requires two main reasons : representing national interest and fulfilling international obligations. Indonesia's participation in APEC and WTO is one of the strategies to develop its international trade, which has become the main activator of national economy.

In the WTO context, competition policy issues are contained in a number of areas in the Uruguay Round agreements. The GATS and TRIPS agreements contain provisions directly relating to the control of anti-competitive practices. These relate not only to questions of market access and fair condition of competition, but also to international cooperation to facilitate any control of anti-competitive practices.

The 4th WTO Ministerial Conference in Doha agreed that negotiations on a multilateral competition regime will take place after the Fifth Session of the Ministerial Conference (in Mexico in 2003), albeit there is explicit consensus among other WTO members, and with suitable modalities for negotiation.

Given this possibility, it is important for developing countries like Indonesia to create or adopt national policies and laws to complement the emergence of any multilateral agreement on competition laws.

Indonesia's New Competition Law

Indonesia has adopted competition law in 1999 as Law no. 5 on Prohibition of Monopolistic Practices and Unfair Business Competition. It lays legal and institutional foundations for establishing and ensuring a fair competition for all enterprises operating in Indonesia. More particularly, enactment of the law shows the recognition by the Indonesian government on the need for macro-economic stability, pro-competition economic policies, and human resources development to direct national development in more efficient, dynamic and competitive ways.

In Indonesia, as accur in other developing countries, government regulates many aspects of markets and industries for development purposes. In many cases, the government has no many options other than adopting policy to protect domestic industries with both high import tariffs and non-tariff barriers.

Moreover, anti-competitive behavior generally had accurred with the knowledge of the government and even with the permission of the government. The government gave monopoly rights to associations or private firms, for example, to fix price , which can be considered as cartel. We believe that these practices can be minimized when Law no. 5 of 1999 is effectively enforced.

The law no. 5 of 1999 itself has some purposes as follows :

a. to protect the public interests and to improve national economic efficiency in order to increase the people's welfare ;
b. to ensure the certainty of equal business opportunities for large, medium and small-scale enterprises ;
c. to prevent monopolistic practices and unfair business competition.

Establishment the Commission for the Supervisor of Business Competition (KPPU)

In order to ensure the implementation of Law no. 5 of 1999, Indonesian Government has established an agency is known as KPPU (the Commission for the supervision of business competition) which is not a part of the executive, legislative or judicial body. Major functions of KPPU could be divided as follows :

a. to conduct an investigation, interpretation, and enforcement law no 5 of 1999 ;
b. to provide advice on government policy related to monopolistic practices and unfair business competiton ;

c. to assist business and the public understand and comply with the law by providing written guidelines and policy statement.

In carrying out its functions, KPPU is subject to oversight in several ways : (1) by the president through reporting requirement and appointment (and possible dismissal) of the commisioners ; (2) by the house of representative (DPR) through reporting requirement and the budget process, and (3) by judiciary system through appellate review and possible enforcement of the KPPU's decision.

KPPU consists of the commissioners and the secretariat. On June 2000, eleven commissioners were appointed by the president, with confirmation from DPR. They serve for five years term and may be reappointed for one additional five years term. Each commissioner has equal authority and the commission acts through majority vote. While the chairman and vice chairman are selected by the commissioners and serve one year term.

The secretariat commission comprises four directorates : (1) directorate of investigation and law enforcement which is responsible for investigating alleged violation of law no. 5 of 1999 and litigating cases before the courts ; (2) directorate of communications which is responsible for disseminating information to business, the public and the press ; (3) directorate of research and training which is responsible for training the professional staff and providing research in support of cases under investigation and the competition advocacy program ; and (4) directorate of general affairs which is responsible for administration, finance and personnel.

According to the law no. 5 of 1999, KPPU could set up civil remedies in several ways : issue cease and desist orders, rescind unlawful agreement, require restructuring of firms, cancel mergers or consolidations and impose civil fines up to approximately USD 2,5 million.

In addition, KPPU may seek criminal penalties, for certain violation through submission to police investigators, who may refer the matter to the prosecutor. The criminal penalties can be criminal fines up to approximately USD 10 million or imprisonment to six months.

The Development of Law No. 5 of 1999

Cases may be initiated base on a report from the party complaining about a possible violation of law no 5 of 1999 or upon the initiative of KPPU. In year 2000 KPPU received some reports (complaint) suspected accurence of violation the law no. 5 of 1999 on monopoly and vertical integration practices in paper industry, insurance, oil industry, retail sector and mail-order industry. During 2001 suspected violations submitted by the parties are tender, price fixing, exclusive dealing in banking, mineral water and airplane industries. Two cases were concluded this year, the first involved abuse of dominant position in food industry.

Investigative reseaches have also been conducted to examine fair business practices on certain industries that include among others fertilizer, paper, retail, cement, and social insurance.

The Challenges

There are some challenges in implementing the competition law faced by Indonesian government especially KPPU. First, the commissioners must have a strong background, unquestioned integrity and knowledge of law, economics and finance. In order to prevent the commission from being unduly influenced by certain interests, it is important that the commission being independent which is free from external influences trying to subvert its decisions. In terms of internationl operations, provisions against possible conflicts of interests may include a ban on the participation of commission members in conducting investigation and evaluation of cases for sake of avoiding conflict of interests.

Second, KPPU needs sufficient budget, otherwise it will face problems in carrying out its duties. It is important to have enough budget for priority program such as : developing guidelines, developing organizational structure and human resources development startegy, establishing modern information system, and conducting training for the staff. Current problems faced by KPPU is its limited supporting infrastructure , such as computers, library, and accessibility to information resources.

One issue raised by observers relates to the effectiveness of KPPU in enforcing the Law no. 5 of 1999. The question is how could KPPU enforce the competition law when it has a small number in staff and budget. Not to mention, it has only one office (national office) that is in the capital. Some observers suggests that KPPU to have branch offices in several offices. To respond this proposal, KPPU should think about it

carefully since it should not be expected to have regional offices unless they effective.

To overcome such challenges, Indonesian Government, especially KPPU has adopted five strategic programs, which consists of institutional development, comunication, compliance, policy development and information system development.

Conclusion

There are high expectation from all parties to the role of Indonesian Government especially KPPU in enforcing the law no. 5 of 1999 and these are considered as challenges. However, Indonesian Government and KPPU realize that to serve a successful and efficient enforment of the competition law in order to develop a better economic welfare, there should be strong support and assistance from all parties including international competition agency and donors.

It is realized that all the activities and efforts conducted since 2000, have not been enough yet to fullfil the expectations of public society as well as private sector. With those limitation and weakness, Indonesian government and KPPU will always strongly implement the tasks and function as stated in Law no. 5 of 1999.

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2002 APEC Training Program on Competition Policy

Capacity Building to Combat Cartels in Japan

1. Prohibition of cartels

(1) Why do we prohibit cartels?

Cartels are horizontal agreement between competitors to avoid competition. If competitors join together and agree to raise prices or reduce output of certain products, the efficiency of the industry will be damaged and the users and consumers will be forced to pay more. So, cartels are strictly prohibited through the competition laws of most countries including Japan.

It is beneficial not only for the consumer but also for the industry to eliminate cartels and keep the market competitive, because efficient and strong companies are established through competition.

Recently the Japan Fair Trade Commission (JFTC) has taken various measures to combat Antimonopoly Act (AMA) violations, especially cartels.

(2) Recent cartel cases in Japan

The JFTC actively investigates cartel activities. In the fiscal year 2001, The JFTC took 38 legal measures against AMA violations. 36 of these were cartel cases including 33 bid-rigging cases. The number of the companies concerned amounts to 926.

2. Weapons to combat cartels

(1) Investigation procedures

In order to combat cartels effectively, we must have sufficient means to investigate the companies concerned.

The JFTC has the authority to conduct unannounced on-site inspections at the offices of the firms concerned and/or other necessary places, order them to submit related documents and hear from their managers and employees and/or persons concerned to make records. It can also order the companies to report the facts regarding the suspected infringement. Those who refuse to cooperate with the investigation, to submit the documents etc. are liable to criminal sanctions.

(2) Elimination of infringement

When the JFTC concludes that the suspected firms have violated the AMA, it recommends that they take necessary measures to eliminate such conduct. These measures include cancellation of the cartel and disclosure of the cartel to the firm's customers. When the firm accepts the recommendation, the JFTC issues a decision in line of the recommendation without initiating hearing procedures. This is a simple procedure for undisputed cases and is used for settling most cases. In the fiscal year 2001 the JFTC issued 35 recommendations concerning cartels and 33 of them were settled in this way. If the companies do not accept the recommendation, the JFTC initiates hearing procedures and issues a decision.

(3) Surcharge

Surcharges are imposed in cases where price fixing, bid rigging or cartels influencing prices by restricting production or sales quantity are carried out. Surcharge orders are issued to the firms and the members of the trade association that engaged in such cartels. The surcharge system constitutes an administrative measure ordering the payment of a sum calculated by a certain formula and ensures the practical effectiveness of the anti-cartel regulations by depriving unreasonable gain from cartels. In the fiscal year 2001, the JFTC ordered 285 companies to pay a total of 2,909,730,000 yen in surcharges.

(4) Criminal penalty

On top of this, when the JFTC files an accusation against serious offenses of the AMA with the Public Prosecutor General, criminal proceedings can be initiated. The managers and employees who engaged in cartels can be sentenced to penal servitude of up to 3 years and/or fine up to 5 million yen, and the firm can also be fined up to 500 million yen. Between 1991 and 2001 the JFTC accused 60 companies and 85 of their managers and employees. They were all prosecuted and were found guilty except those who are still on trial.

(5) Civil remedy

It is important not only for competition authorities but also for the victims of cartels themselves to fight against cartels.

In Japan the AMA provides victims of AMA violations with the right to claim damages against firms and trade associations who engaged in the breach. The right to claim damages based on AMA may not be exercised

until the JFTC reaches the final and conclusive decision. The civil damage suits based on the AMA are under the exclusive jurisdiction of the Tokyo High Court.

In addition to claims for damages under the AMA, the victims of anticompetitive conduct can file a civil damage suit in accordance with the Civil Code.

As I said before, the JFTC has recently uncovered many bid-rigging cases and some of the local governments and residents claim to have suffered damage by the bid-riggings and have filed civil damage suits against the companies concerned. Many cases are still pending but in some cases the court ordered the firms to pay damages.

(6) Recent Improvements

Recently the JFTC has made several amendments to the AMA in order to strengthen its capability to combat AMA violations including cartels.

The formula for calculation of surcharges were improved in 1991, the upper limit of fines imposed on firms were raised in 1992 and 2002, and the scope of the civil damage suits on the AMA was expanded in 2000. The AMA provisions concerning service of documents were also amended in 2002 so that the JFTC will be able to take appropriate measures against foreign companies that have neither affiliates nor agents in Japan.

3. Human resources to combat cartels

(1) Expansion of staff numbers

We need sufficient human resources to combat the vast number of cartels.

Prompted by the reinforcement of the implementation of the AMA, the work force of the General Secretariat rose from 484 in 1992 to 607 in 2002. The number of the staff in the Investigation Sector rose from 178 in 1992 to 294 in 2002.

(2) Staff training

Due to the increased intake of staff, there are many young and inexperienced investigators in JFTC. It is therefore very important to train these people as competent investigators. We prepare introduction courses for staffs who are posted to the investigation division for the first time. Here they learn the basics of the investigation process.

We also have various training courses according to the levels of investigators. We see to it that every investigator can have a 3 day training course every year. In the training courses for senior investigators, we make much of the discussion and collaboration between the investigators to share their experiences.

(3) Manuals about investigation technique

To do the work efficiently we have compiled several manuals concerning procedures and techniques of investigation. Such manuals must be constantly updated because the situations change rapidly and the old techniques may not work well under the new situations.

(4) Hiring outside experts

The JFTC has hired 2 lawyers, mainly to assist the investigators in charge of hearing procedures. We already have 2 public prosecutors to assist in the investigations. It may be useful to use such outside experts and utilize their

expertise.

4. Problems to be solved

(1)Further enhancement of staff

294 investigators are not yet enough to combat the AMA violations, that are becoming more complex and more difficult to uncover. The JFTC is continuously making efforts to increase manpower, especially the staff of the investigation section.

(2) Review of the current investigation system

As the AMA violations become more complex and more difficult to uncover, we are looking for new measures to combat such cases efficiently and effectively.

One of the measures discussed is the introduction of the so-called leniency system. That is a system by which the competition authorities exempt from or reduce fines against such companies that took part in cartels but report it and offer the evidence to competition authorities. Such a system is adopted in the US, EU and other countries and contributes to the success of the investigations of international cartels etc.

The other measure is to provide the JFTC with the competence to undertake searches and investigations for criminal violations to vitalize the implementation of criminal penalties.

There are pros and cons to the introduction of such systems and the JFTC is considering these issues carefully.

(3) International cooperation

As business activities are worldwide today, it is becoming more and more important to combat international cartels. But there are many difficulties to investigate and take effective measures against such cartels. For example, necessary information may need to be sought from sources located abroad. International cooperation between competition authorities is therefore necessary.

Japan has signed the cooperation agreement with the US in 1999. We are going to sign a similar agreement with EC and we are starting negotiations with Canada. Cooperation with other countries, with or without a cooperation agreement, must be very useful to combat international cartels.

MALAYSIA COUNTRY PAPER
GROUP II: CAPACITY BUILDING FOR EFFECTIVE ENFORCEMENT

Malaysia recognizes the importance of introducing a comprehensive fair trade or competition policy and law, both for purposes of long-term economic efficiency and to address our development and growth needs. However, we do not yet have a comprehensive fair trade/competition policy or law. At the moment, separate policies are implemented by a number of government agencies involving :

(i) privatisation/corporatisation;
(ii) licensing of industries (manufacturing, services and agriculture);
(iii) domestic and international trade policies;
(iv) foreign participation/ownership policies; and
(v) sectoral regulators.

The Ministry of Domestic Trade and Consumer Affairs (MDTCA) has prepared a draft policy paper as well as a draft law on fair trade/competition in Malaysia.

2. The mandate for the formulation of a fair trade or competition policy and law is found in paragraph 16.32 (Chapter 16: Distributive Trade) of the Eighth Malaysia Plan (RMK-8). The Plan states the need for the policy and law to prevent anti-competitive behaviour such as collusions, cartel price fixing, market allocation and abuse of market power, whereby a fair trade/competition policy will, amongst others, prevent firms from protecting

or expanding their market shares by means other than greater efficiency in producing what consumers want.

3. For the immediate future it is pertinent for Malaysia to focus on both capacity building and technical assistance vis-a-vis competition policy/law so that we may build up both institutional expertise as well as incorporate a competition culture in Malaysia before multilateral rules on competition come into effect. It is important that this type of international cooperation in the area of competition be strengthened, so that developing countries such as Malaysia will not face too many hurdles when introducing and applying a national fair trade or competition law.

4. Capacity building, which is required for the effective enforcement of a Fair Trade or Competition Law in Malaysia, can be identified as follows :-

(a) training or attachment programmes for key policy and enforcement level officers, especially on the following areas :-
    (i) knowledge about competition policy and law;
    (ii) competition requirements for developing countries;
    (iii) investigation and prosecution procedures;
    (iv) administration of a competition commission and an office of fair trade;
    (v) strengthening regulatory, analytical and enforcement capabilities; and
    (vi) training for judges and other law related bodies regarding anti-competitive conduct and enforcement.

(b) Attachment of competition experts at the MDTCA, to serve the following functions :-

(i) as technical advisors to assist in development of the following areas :-

- investigative skills.
- decision making skills.
- human resources management.
- generating guidelines and procedures.
- planning integrated training programmes.

(ii) for legal drafting assistance; and

(iii) conducting economic analysis.

(c) Conducting competition studies in Malaysia, especially on the following areas :-

(i) market structure and behaviour which may effect Malaysia's competitive dynamics;

(ii) the types and proliferation of restrictive business practices (RBP's) in Malaysia;

(iii) the loss to the Malaysian economy by not having a fair trade/competition law;

(iv) monopolies and the creation of market concentrations in Malaysia; and

(v) a study of M&A regulations suitable for Malaysia.

(d) Regulation of mergers, acquisitions and takeovers effectively under a competition law, including on the following areas :-

(i) conducting cost-benefit analysis of a proposed merger, acquisition or takeover; and

(ii) determining appropriate M&A threshold levels, both in terms of market share and turnover or capital.

5. Malaysia views the liberalization process as offering many potential economic benefits. It is also undeniably important for developing countries like Malaysia to create or adopt national policies and laws to complement the emergence of a multilateral agreement on competition laws. We need to take such a pro-active approach because a multilateral competition discipline prepared without sufficient input or without addressing certain concerns would prohibit developing countries from taking the following measures :-

(a) to shield industries and firms from competition from massive multinational corporations (MNC's); and
(b) from pursuing measures to promote the growth of strong domestic corporations.

Therefore, capacity building is essential to ensure not only an effective application and enforcement of fair trade or competition laws, but also to determine that the modalities evolving from up-coming multilateral rules on competition do not merely benefit developed countries or international corporations.

Planning and Development Division,
Ministry of Domestic Trade and Consumer Affairs,
Malaysia.

Date: 23 July 2002

C(Competition):COUNTRY PAPER ON APEC BANGKO 6 TO 8 AUGUST:JG/jay.23.7.02;24.7.02

INVESTIGATIONS ON CARTELS IN MEXICO: PROVISIONS OF THE LAW AND RECENT CASES

- **Provisions of the Federal Law of Competition regarding hard-core cartels**
    - Article 9 of the FLEC prohibits several practices as per se violations of the law:
        - Article 9(I) prohibits price fixing in all cases
        - Article 9(I) also prohibits the exchange of information having the aim or effect to fix the price
        - Article 9(II) prohibits output limitation
        - Article 9(III) prohibits market sharing
        - Article 9(IV) prohibits bid-rigging in all cases
    - Special provision relating to trade association activities: according to article 5 of the regulation, recommendation or instructions issued by trade or business associations aimed at carrying out conducts included in article 9 of the FLEC will give rise to the presumption of the existence of an absolute monopolistic practice.
- **Exemptions of the Law**
    - Article 7 describes the sole exemption which refers to the faculty granted to the Economy Ministry to fix maximum prices for products and services essential for the domestic economy of for mass consumption.
    - No exemption for depression cartels or agreements neither for rationalization cartels or agreements, nor for small businesses
    - Exemptions on agreements between exporters. Article 6 of the law exempts export cartels conformed by associations or cooperatives which do not trade such goods within Mexican territory conditioned to the fulfilment of certain strict requirements.

- **Provisions of the Law regarding sanctions**
    - Fine for enterprises up to 375 000 times the minimum general wage prevailing in Mexico City, which in February 2000 amounts to approximately US$1.5 milion;
    - For individuals, fine up to 7500 times the minimum general wage prevailing in Mexico City (aprox. US$30 000)
    - Order the suspension, rectification or elimination of the practice.
    - In particularly serious infringements the Commision may impose alternative fines amounting to the higher value among 10% of the violator annual sales or its assets value.
    - Article 24(III) of the FLEC empowers the Commission to report to the Federal Prosecutor Criminal Practices regarding competition matters, which are established in the Federal Penal Code and can lead to criminal actions.
- **Cases**
    - Recent cases: milk, tortilla, National Union of Poultry Farmers, surgical sutures, beer, cable television
    - Citric acid
    - Surgical sutures
        - Grupo Sutinmex vs Internacional Farmacéutica and others
        - Public auctions summoned by The General Hospital of Mexico and the Institute for Social Security for State Workers
        - In both cases, behaviour pattern among the bidders: one of the most important pieces of evidence considered was the tight difference among the bids
        - The companies involved confessed to the existence of collusive practices.
        - Sanctions: fine to each of the implicated companies

- **Bilateral agreements**

    - Cooperation agreement in order to better apply the competition laws between competition authorities of Mexico and Canada, October 2001

    - Agreement between the competition authorities of Mexico and USA regarding the application of their competition laws, July 2000. Its main purpose is to enhance cooperation and coordination in the enforcement of competition laws as well as the prevention of anticompetitive activities in both jurisdictions.

Capacity Building for Effective Enforcement

THAILAND

By

Sakda Thanitcul

The APECT Training Program

On

Competition Policy

August 6-8, 2002
Prince Palace Hotel
Bangkok, Thailand

Department of International Trade, The Royal Thailand Government Fair Trade Commission, The Government of Japan

COMPETITION LAW IN THAILAND: A PRELIMINARY ANALYSIS

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I. INTRODUCTION

A. History

Due to the rapid economic growth that occurred in Thailand from 1987 to 1990,[1] the economic structure in Thailand changed drastically.[2] Therefore, the Thai Ministry of Commerce (MOC) established a Working Committee consisting of MOC officials and university professors to examine whether the existing Price Fixing and Anti-Monopoly Act of 1979 (PFA) was still suitable for the economic structure that had gone through such a remarkable growth period.[3] The Working Committee concluded that the PFA had two serious flaws.[4] First, the primary objective of the PFA was to control the market prices of goods and services for the benefit of consumers, and its antimonopoly provisions only served as an additional measure of controlling prices.[5] Second, in order to enforce the PFA's antimonopoly provisions, it first was necessary to enforce the price fixing provisions.[6] These two flaws created tremendous legal and political difficulties for the Thai Fair Trade Commission (TFTC) to enforce the PFA. In fact, since the enactment of the PFA, the enforcement agency has taken only one action against a price fixing cartel.[7]

The author interviewed a number of high-ranking MOC officials and representatives of Thai businesses and there are conflicting views about who originally backed the current Thai Trade Competition Act (TCA). MOC officials insist that Thai officials initiated the idea of creating the TCA,[8] but representatives of Thai industries believe the Thai government initiated it under pressure from the United States.[9] The author learned from interviewing key members of the Working Committee that the Working Committee modeled substantial parts of the TCA after the South Korean Monopoly Regulation and Fair Trade Act (MRFTA),[10] the Taiwanese Fair Trade Law (FTL),[11] the Japanese Antimonopoly Law of 1947,[12] and the German Act Against Restraints of Competition.[13]

B. Statutory Framework

The Working Committee patterned the TCA largely after the antitrust statutes of more advanced

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1. *See* THE WORLD BANK, TRENDS IN DEVELOPING ECONOMIES 1996 491 (1996).

2. Pallop Rattanadara, *Kodmai Karnkaenkan Tang Kanka Khong Pratettai [Thailand's Competition Law]*, 12 CHULALONGKORN L. REV. 1, 20-21 (2000).

3. *See* Price Fixing and Anti-Monopoly Act of 1979 (Thail.), *available at* http://www.apeccp.org.tw/doc/Thailand/Competition/thcom02.html.

4. *See* Sutee Supanit, *Economic Law Reform and Competition Policy*, *in* LAW, JUSTICE AND OPEN SOCIETY IN ASEAN 301 (Piruna Tingsabadh ed., 1997).

5. *Id.*

6. *Id.*

7. CHAIYOS HEMARAJATA, KAMATIBAY KODMAI WADAUY KARN KAMNODRAKASINKA LAE KARNPONGKANKARPOOKAD [COMMENTARY ON THE PRICE FIXING AND ANTI-MONOPOLY ACT OF 1979] 169-71 (1994).

8. *See* Rattanadara, *supra* note 2, at 21 (writing that the MOC had to push for the enactment of the TCA because Section 50 of the Thai Constitution required the government of Thailand to support and maintain the market economy). *See also* THAI CONSTITUTION, *reprinted in* Sompong Sucharitkul, *Kingdom of Thailand*, *in* 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 12 (Gisbert H. Flanz ed., 1998).

9. *See* Bodin Asavanich, Ensuring Compliance and Cooperation in Competition Law Enforcement 2 (Mar. 13, 2001) (unpublished manuscript, on file with author).

10. *See* Dokjummit Gongjung Gurae Gwanhan Popryul [Monopoly Regulation and Fair Trade Act], Law No. 6043, Dec. 28, 1999, *available at* http://www.moleg.go.kr/mlawinfo/english/ htms/html/law10.html.

11. The full text of the Fair Trade Law is available at http://www.ftc.gov.tw (last visited May 20, 2002).

12. Shiteki Dokusen no Kinshi Oyobi Kosei Torihiki no Kakuho ni Kansuru Horitsu [Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade], Act No. 54 of Apr. 14, 1947 [hereinafter Antimonopoly Law], *reprinted in* HIROSHI IYORI & AKINORI UESUGI, THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN app. A, at 387 (1994).

13. *See* Gesetz gegen Wettbewerbsbeschränkungen [Act Against Restraints of Competition] (F.R.G.), *available at* http://www.bundeskartellamt.de/GWB01-2002.pdf.

market economies, particularly those of South Korea and Taiwan. The TCA reflects the Working Committee's presumption that Thailand's economic structure, where the majority of the domestic product markets are monopolistic or oligopolistic, is similar to South Korea's.[14] The TCA therefore focuses on eliminating unreasonable or anticompetitive pricing behavior from dominant firms rather than directly prohibiting monopolization or monopoly itself.[15]

The structure of the Thai economy falls somewhere in-between South Korea's economic structure, where thirty *chaebols* dominate the domestic market, and Taiwan's, where 98% of firms are small and medium-sized enterprises (SMEs). The Thai economy is closer to the Taiwanese economy because (1) there are fewer market dominant firms in Thailand than in South Korea and (2) most of the Thai firms are SMEs.[16] Furthermore, unlike the South Korean government, the Thai government never has adopted nationalist economic policies to promote national champions. The hallmark of Thailand's economic development is neo-liberalism: trade and investment liberalization with few government industrial policies.[17]

The myth about the similarity between the economic structures of South Korea and Thailand leads to an overemphasis on regulating the behavior of market-dominant firms and, consequently, an oversight of regulating the behavior (especially the unfair trade practices) of Thai SMEs.[18]

C. Administration

When a firm violates the TCA's substantive provisions, the TFTC may issue a written order to the firm to suspend, stop, or correct its actions. In the order, the TFTC also may prescribe rules, procedures, conditions, and time restraints on compliance.

The TFTC possesses almost exclusive jurisdiction to enforce the TCA. The Thai Ministry of Justice does not have a unit specifically charged with enforcing the antitrust laws, and although the District Attorney may prosecute violations of the TCA, such prosecution is contingent on a request by the TFTC.[19] A firm that is unsatisfied with the decision of the TFTC may appeal to the Appellate Committee, whose ultimate decision is final.

There are several issues currently under debate in Thailand about judicial review of Appellate Committee decisions. First, is it legally permissible for an unsatisfied firm or business operator to bring the decision of the Appellate Committee to a court for judicial review? Second, which court—the court of justice or an administrative court—has jurisdiction to review the decision?[20]

II. AN OVERVIEW OF SUBSTANTIVE LAW

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14. *See* Supanit, *supra* note 4, at 303.

15. *See* Rattanadara, *supra* note 2, at 22.

16. *See generally* UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION, THAILAND: COPING WITH THE STRAINS OF SUCCESS 66 (1992). Most Thai economists agree that more than 90% of all enterprises in Thailand are SMEs. *See* Suphat Suphachalasai et al., *Karn Dumnoen Mattakarn Sanabsanoon SMEs Khong Yeepoon, Taiwan, Italy Lae Australia [Measures to Promote SMEs in Japan, Taiwan, Italy and Australia]*, 2001 INST. OF SOC. & ECON. POL'Y (Bangkok, Thail.) 1-1.

17. *See* SCOTT CHRISTENSEN ET AL., WORLD BANK, THE LESSONS OF EAST ASIA: THAILAND: THE INSTITUTIONAL AND POLITICAL UNDERPINNINGS OF GROWTH 2-5 (1993).

18. This myth is evident in the policy goals of the TCA:

> The reasons for the promulgation of this Act are as follows: Whereas there has been a repeal of the existing law governing fixing of prices of goods and prevention of monopoly, which contains both the provisions of fixing of prices of goods and prevention of monopoly in the same law. It is appropriate to revise the rules concerning prevention of monopoly and to specifically enact a law governing trade competition so that there are systematic provisions regarding prevention of acts constituting monopoly, reduction or limitation of competition in business operations, which will promote the free operation of business and prevent unfair practice in business operations.

See Remarks of the Trade Competition Act B.E. 2542 (1999) (on file with the Washington University Global Studies Law Review).

19. *See* THAI CRIMINAL PROCEDURE CODE §§ 141-142 (1989).

20. Thailand enacted the Act on the Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 in 1999. If the decision of the Appellate Committee is considered to be an "administrative order," then it falls under the jurisdiction of the Administrative Courts. *See* Act on the Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 § 9(3) (1999) (Thail.), *available at* http://www.krisdika.go.th/law/text/lawpub/ee028/text.htm.

A. Relations with Competitors

Public education about the objectives of the TCA conducted by the Department of Internal Trade (DIT) within the MOC has helped the Thai public to understand that the TCA will promote and maintain the *process* of fair and free market competition rather than the actual market competitors. In addition, the DIT emphasized that the TCA aims to regulate the anticompetitive behavior of business operators rather than the actual structure of the businesses.

The Thai government always has tried to promote SMEs. However, its current promotional policy raises an important issue: how can the TFTC reconcile its promotion of SMEs with the TCA's objective of maintaining a free and fair competitive process without paying attention to the SMEs being wiped out by larger competitors?

B. Exemptions

The TCA does not apply to acts of:

(1) A central, provincial, or local administration;

(2) State-owned enterprises regulated under the laws governing budgetary procedure;

(3) Farmer groups, co-operatives, or co-operative groups recognized by law and having business objectives for the benefit of farmers;

(4) Businesses identified in the ministerial regulations, which may exempt the application of any or all provisions of the TCA.[21]

Of the four exempted groups listed above, the state-owned enterprises (SOEs) are the most controversial. Large Thai firms opine that it is unfair that the TCA regulates their conduct[22] but does not regulate the conduct of SOEs.[23] Thailand's SOEs are concentrated in natural monopolies (i.e. the electricity, telecommunications, and railroad industries) and gradually are being "privatized."[24] The current debate centers on whether these newly privatized firms should be placed under specific regulatory regimes similar to those in the United States and Europe or under the broad regulatory authority of the TCA. The current trend for the former SOEs doing business in the electricity, telecommunications, and railroad industries is to place them under specific regulatory regimes.[25]

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21. Trade Competition Act B.E. 2542 § 5 (1999) (Thail.).
22. *Id*. § 25.
23. *See* Deunden Nikomborirak, State-Owned Enterprises: The Last Bastion of Monopoly and the Greatest Challenge to Competition Authority 1-2 (Mar. 13, 2001) (unpublished manuscript, on file with the Washington University Global Studies Law Review).
24. *See id*.
25. *See* The Royal Thai Government, Planmaebot Karnpatiroob Ratwisahakit [Master Plan for State Enterprise Reform], *available at* http://www.mof.go.th/sepc/sepcfnmenu.htm (last visited May 20, 2002). *See also* Mitsuhiro Kagami, *Privatization and Deregulation: The Case of Japan*, *in* PRIVATIZATION, DEREGULATION AND ECONOMIC EFFICIENCY: A COMPARATIVE ANALYSIS OF ASIA, EUROPE AND THE AMERICAS 11-28 (Mitsuhiro Kagami & Masatsugu Tsuji eds., 2000).

C. Abuse of a Dominant Position

The TCA does not directly prohibit the possession or acquisition of monopoly power. However, it does proscribe unreasonable or anticompetitive behavior by large firms with substantial market shares. Section 25 of the TCA forbids "the abuse of a market dominant position."[26] Sections 3 and 8 of the TCA authorize the TFTC, with the approval of the Cabinet, to prescribe the market share and total sales above which a firm will be deemed a business operator with a market dominant position.[27] The specific standard under the proposal that is currently awaiting Cabinet approval is a large firm with (1) more than a 33% market share, and (2) whose gross domestic sales total more than one billion Thai Baht (approximately US$22 million). The TFTC specifically identifies market dominant firms using these two criteria and then publishes the names of these firms in the Royal Gazette. Thus, Section 25 does not cover monopolistic behavior by an SME that does not fall within these criteria. However, unlike its model, the South Korean MRFTA, this behavior by Thai firms may not even fall within the category of unfair trade practices prohibited by Section 29.

Any firm designated by the TFTC as a market dominant firm will receive scrutiny. The commission of the following conduct by a market-dominant firm constitutes an abuse of its dominant position in violation of Section 25 of the TCA:

> (1) unfairly fixing or maintaining the levels of sale or purchase prices of goods or services;
>
> (2) setting conditions which, directly or indirectly, unfairly compel other business operators who are customers of the Business Operator to limit the provision of services, production, purchase or distribution of goods, or their opportunity to choose to buy or sell goods, accept or provide services, or obtain credit from other business operators;
>
> (3) suspending, reducing, or limiting services, production, purchase, distribution, delivery, or importation into [Thailand] without reasonable grounds, or to destroy or damage goods in order to reduce supply to less than market demand;
>
> (4) interfering with the business operations of other people without reasonable grounds.[28]

The striking similarity between Section 25 of the TCA and Article 3 of the MRFTA[29] reflects the fundamental presumption of the Thai Working Committee: the Thai economy is similar to the South Korean economy due to its monopolistic and oligopolistic markets. However, the Working Committee's presumption was inaccurate, and it led to a wrong design of the TCA.

D. Business Combinations (Mergers and Other Combinations)

The Working Committee modeled Section 26 of the TCA after Article 6(1) of the Taiwanese FTL.[30] The purpose of Section 26 is to prevent the creation of monopolies and the lessening of competition. It empowers the TFTC to regulate "business combinations."[31] Under Section 26 of the

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26. Trade Competition Act B.E. 2542 § 25 (1999) (Thail.).
27. *See id*. §§ 3, 8.
28. *Id*. § 25.
29. *See* Seung Wha Chang, *Korea*, *in* WORLD ANTITRUST LAW AND PRACTICE: A COMPREHENSIVE MANUAL FOR LAWYERS AND BUSINESSES § 36.5 (James J. Garrett ed., 1997 & Supp. 1999).
30. *See* Lawrence S. Liu, *Taiwan (Republic of China)*, *in* WORLD ANTITRUST LAW AND PRACTICE: A COMPREHENSIVE MANUAL FOR LAWYERS AND BUSINESSES, *supra* note 29, § 37.8.
31. Trade Competition Act B.E. 2542 § 26 (1999) (Thail.).

TCA, a business combination may take any of the following forms:

(1) a merger between manufacturer and manufacturer, distributor and distributor, manufacturer and distributor, or service provider and service provider, which results in the continued existence of one business and the demise of another, or the establishment of a new business;

(2) the purchase of assets, whether in whole or in part, of another business to gain control over business management policy, supervision or administration;

(3) the purchase of shares, whether in whole or in part, of another business to gain control over business management policy, supervision or administration.[32]

The Working Committee intended Section 26 of the TCA to apply only to large business combinations. Currently, there is no official threshold for what constitutes a "large" business combination, but if the Cabinet approves the TFTC's criteria proposed in Section 25, then a "large" business combination will possess (1) more than a 33% market share, and (2) a combined sales volume of at least one billion Thai Baht.[33]

E. Horizontal and Vertical Restraints

Section 27 of the TCA prohibits the following horizontal and vertical restraints:

(1) fixing the sales price of goods or services to be the same or at an agreed price, or limiting the sales volume of goods or services;

(2) fixing the purchase price of goods or services to be the same or at an agreed price, or limiting the purchase volume of goods or services;

(3) entering into an agreement to take over or control the market;

(4) fixing agreements or conditions in a collusive manner to enable the other party to win a bid or tender for the sale of goods or services or to prevent the other party from competing in a bid or tender for the sale of goods or services;

(5) allocating areas where each Business Operator may distribute or reduce the distribution of goods or services, or specifying customers to whom each Business Operator may distribute goods or services without competition from the other Business Operators;

(6) allocating areas where each Business Operator may purchase goods or services, or specifying customers from whom the Business Operator may purchase goods or services;

(7) fixing the volume of goods or services which each Business Operator may manufacture, purchase, distribute or provide in order to keep the volume less than the market demand;

32. *Id.*
33. *See supra* Part II.C.

(8) lowering the quality of goods or services compared with the previous manufacture, distribution or provision, but maintaining or raising the price;

(9) appointing or assigning a person as sole distributor or provider of the same type of category of goods or services;

(10) fixing conditions or methods of practice in the purchase or distribution of goods or services to be of the same pattern or as agreed.

In case business reasons necessitate any act under (5), (6), (7), (8), (9) or (10) in any certain period, the Business Operator shall file an application for permission with the Commission in accordance with Section 35.[34]

The author is of the opinion that Section 27 is a mixture of South Korea's prohibition of undue collaborative activities[35] and Taiwan's prohibition of non-price vertical restraints and exclusionary practices (i.e. territorial and customer restrictions).[36]

F. Restrictions in International Agreements

Section 28 of the TCA reflects certain Thailand-specific consumer traditions that were prevalent when the Working Committee drafted the TCA. During the period of economic growth, a small portion of the newly rich Thai wanted to buy luxurious German automobiles (especially Mercedes-Benz) directly from dealers in Germany. However, the German dealers were unable to sell the cars to Thai buyers because of dealer contracts that prohibited them from doing so. The corporate headquarters of Mercedes-Benz in Germany wanted Thai buyers to buy directly from dealers in Thailand. Hence, Section 28 of the TCA exists for the very specific purpose of forbidding Thai dealers from entering such contracts:

> A Business Operator having a business relationship, whether by contract, policy, partnership, shareholding, or any other relationship of like nature with a business operator outside [Thailand], is prohibited from performing any activity which will restrict the freedom of a person in [Thailand] desirous of purchasing goods or services for his/her own use, to purchase the goods or services directly from the business operator outside [Thailand].[37]

Section 28 of the TCA differs from Article 32(1) of the MRFTA, which applies specifically to agreements or business dealings between Korean firms and foreign firms.[38] Unfair trade practices in import agency agreements under Article 32(1) include:

> (1) unreasonably restricting the agent from handling competitive products; (2) imposing unreasonable requirements on the agent to purchase parts or supplies for the contract products from the foreign party or from a supplier designated by the foreign party; and (3) unreasonably restricting sales quantities or designating an unreasonably high minimum sales target.[39]

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34. Trade Competition Act B.E. 2542 § 27 (1999) (Thail.).
35. *See generally* Stanley P. Wagner, *Antitrust, the Korean Experience 1981-85*, 32 ANTITRUST BULLETIN 471, 471-522 (1987).
36. Liu, *supra* note 30, § 37.15.
37. *Id*. § 28.
38. *See* Monopoly Regulation and Fair Trade Act art. 32(1) (1999).
39. Chang, *supra* note 29, § 36.8.

In essence, Article 32(1) of the MRFTA aims to protect South Korean import agencies from unfair exploitation by foreign manufacturers while Section 28 of the TCA aims to enable wealthy Thai to buy luxurious automobiles directly from foreign dealers.

G. Unfair Trade Practices

The author is of the opinion that the Working Committee patterned Section 29 of the TCA after Article 24 of the Taiwanese FTL. Both contain a catchall rule prohibiting other methods of unfair competition.[40] In addition, both provide that firms may not engage in any act that adversely affects orderly functioning of the markets.

Section 29 of the TCA states: "A Business Operator is prohibited from performing any act contrary to free and fair competition and which results in the destruction, damage, obstruction, hindrance or restriction of the operations of other business operators, in order to prevent them from operating their business or cause the dissolution of their business."[41]

The South Korean MRFTA focuses primarily on regulating the behavior of the thirty largest Korean *chaebols*,[42] but it also aims to regulate the unfair trade practices of a number of medium-sized firms. Article 23 of the MRFTA (Prohibition of Unfair Trade Practices) is patterned closely on the Japanese Antimonopoly Law. Between 1981 and 1990, there were only eleven complaints of abuses of market dominant firms while there were 2,592 complaints against unfair trade practices.[43]

One of the substantive flaws in the TCA lies in Section 29: it is too vague to be enforced. To remedy this flaw, the TFTC should adopt guidelines similar to the Japanese Fair Trade Commission's (JFTC) 1982 General Designations of Unfair Trade Methods. This would clarify for the Thai business community the types of business behavior that are anticompetitive and likely to violate Section 29. However, there is one legal obstacle to adopting similar guidelines: unlike Section 2(9) of the Japanese Antimonopoly Law, Section 29 of the TCA does not empower the TFTC to designate unfair business practices.[44]

H. Special Issues Involving Intellectual Property Rights

Industrial policies receive more attention in Japan and South Korea than they do in Thailand. Section 6 of the Antimonopoly Law and Articles 23-25 of the MRFTA reflect the Japanese and South Korean governments' great concerns over the importation of technology. Both governments set up screening schemes to eliminate unfair clauses contained in technology inducement contracts.[45] The TCA, however, contains no similar provision, and Thailand benefits from its omission. Officials in charge of enforcing the TCA would encounter too many difficulties if they had to screen unfair clauses contained in technology importation agreements between Thai buyers and foreign technology suppliers.

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40. Liu, *supra* note 30, § 37.16.
41. Trade Competition Act B.E. 2542 § 29 (1999) (Thail.).
42. *See* discussion *supra* Part I.B.
43. KOREA FAIR TRADE COMM'N, COMPETITION POLICY IN KOREA: THE FIRST TEN YEARS 9-10 (1992) (copy on file with the Washington University Global Studies Law Review).
44. *Compare* Antimonopoly Law § 2(9) *with* Trade Competition Act B.E. 2542 § 29 (1999) (Thail.).
45. *See* SAKDA THANITCUL, INDUSTRIAL LADDER AND TECHNOLOGY IMPORT REGULATION: EXPERIENCES OF JAPAN, SOUTH KOREA, MEXICO, AND LESSONS FOR THAILAND 135-91 (Nititham Publ'g House 1999).

I. Other Exemptions

Unlike the Antimonopoly Law,[46] the TCA does not exempt the following activities from its purview: export/import transactions; export cartels; import cartels; depression cartels; small business cartels; and insurance.

The lack of depression cartels and small business cartels led to criticism of the TCA by the Federation of Thai Industries (FTI), the most powerful interest group in Thailand. The FTI strongly criticized the TCA on the grounds of its bad timing (each member of the FTI experienced serious difficulties after the 1997 economic collapse), lack of safeguard measures, and substantial restriction of the Thai government's current policy of promoting SMEs.

III. ENFORCEMENT

A. The Thai Fair Trade Commission

The TFTC is the only administrative agency in Thailand with direct enforcement authority over the TCA. The Public Prosecutor's office holds certain functions in the enforcement scheme as well, but these functions are narrowly drawn.

The TFTC is composed of the Minister of Commerce (who serves as Chairman), the Permanent Secretary for Commerce (who serves as Vice Chairman), the Permanent Secretary for Finance, and between eight and twelve experts appointed by the Cabinet to serve as commission members. The Cabinet must appoint at least half of the experts from the private sector, and they must have knowledge and experience in law, economics, commerce, business management, or government administration. Currently, the TFTC is composed of sixteen members, with three representing the FTI and three representing the Thai Chamber of Commerce. This gets to the heart of the TFTC's serious flaws: (1) there are too many TFTC members; (2) many of the members are not qualified competition law experts; (3) the members only work on a part-time basis and convene only two meetings every eight months; (4) there is a vast overrepresentation of the private sector; (5) TFTC members receive an extremely low level of compensation; (6) there are no rules regarding how proceedings are conducted; and (7) the TFTC has weak administrative and secretariat support.[47]

The Office of the TFTC is anchored in the DIT within the MOC. The director-general of the DIT is the secretary-general, in charge of the performance of the Office. The Office of the TFTC has a few serious flaws. First, there are only about forty-five officials who work within the Office, all of whom were transferred from the DIT while they were still government officials. The TFTC is supposed to be independent, but the Office and its staff are an administrative agency and therefore not independent. Second, the mentality of the officials in the Office cannot switch from market intervention to market promotion automatically. Most of them enforced both the PFA and TCA before their transfer to the Office of the TFTC. In addition, most are unfamiliar with the concept of competition law and never received adequate training. Third, there are no formal hearing or investigative procedures that the officials can follow.

The composition of the TFTC and its weak secretariat and administrative support make enforcement of the TCA ineffective. The decision making process is extremely long while the actual decisions are extremely short and provide almost no explicatory rationale.

B. Sanctions

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46. MITSUO MATSUSHITA & JOHN D. DAVIS, INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW 88-94 (1990).

47. *See* Nipon Poapongsakorn, Kodmai Kaengkan Tang Kanka: Naewtang Karnpattana Bangkab Chay Kodmai [Competition Law: Ways to Develop Its Enforcement] 1-6 (July 12, 2000) (unpublished manuscript, on file with author).

Section 51 of the TCA appears to follow the pattern of the Taiwanese FTL.[48] The TFTC may impose a maximum three-year term of imprisonment, or a criminal fine of up to six million Thai Baht (approximately equal to US$120,000), or both for either any violation of Sections 25 through 29 of the TCA or a failure to comply with Section 39. The serious flaw with the penal provisions of the TCA is that the TFTC may impose a maximum three-year term of imprisonment for either failing to apply to the TFTC for permission to merge businesses[49] or violating the unfair trade practices provision.[50] The TFTC should punish violators of these particular provisions with nothing more than monetary fines.

C. TFTC Enforcement Procedure

Any person who discovers a violation of the TCA may report it to the Office of the TFTC. The secretariat of the Office of the TFTC conducts investigations, but if necessary, designated staff members may take appropriate measures, including collecting information from the alleged violator's business premises or summoning the parties for an investigative hearing.[51]

Japan's enforcement procedure is well developed and is quite similar to a court proceeding.[52] In contrast, Thailand's enforcement procedure is still in the early stages of development. Although Sections 8(11) and 8(12) empower the TFTC to prescribe enforcement procedure, the TFTC has made no progress in doing so.[53]

IV. CURRENT DEVELOPMENTS

The Office of the TFTC currently employs independent researchers for four specific research projects:

(1) Research on the one hundred most important products in the domestic market in order to build a database necessary to enforce the TCA;

(2) Research on unfair trade practices in order to clarify the vague wording of the catchall provision of TCA Section 29;

(3) Research on independent agencies in order to change the legal status of the Office from an administrative agency closely associated with the MOC to an independent agency like its counterparts in Japan, South Korea, and Taiwan;

(4) Research on business practices in Thai industries in order to identify business practices that might violate the TCA.[54]

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48. *See* Liu, *supra* note 30, § 37.7.4.
49. *See supra* Part II.D.
50. *See supra* Part II.G.
51. Trade Competition Act B.E. 2542 § 19 (1999) (Thail.).
52. MATSUSHITA & DAVIS, *supra* note 46, at 81-83.
53. *See* Poapongsakorn, *supra* note 47, at 5.

54. *See* Department of Internal Trade, Summary of the Work on the Trade Competition Act, *available at* http://www.dit.go.th/english (last visited May 20, 2002).

V. CONCLUSION

The purposes of the TCA are to prevent monopolization and the reduction or limitation of competition in business operations. Unfortunately, the TFTC's enforcement of the TCA has been rather disappointing. A wrong design of the substantive provisions (primarily an overemphasis on monopoly and the abuse of a dominant position), a poor institutional design (i.e. too many members of TFTC with a lack of experience), weak secretariat support, the lack of well developed procedural rules, and imprisonment for all violations regardless of their seriousness all have contributed to the TFTC's lack of success. However, the secretariat's recent action to obtain its budget from the Thai government and subsequently spend a substantial portion of it to commission independent research is a good sign. The knowledge and experiences of many advanced industrial countries on how they deal with similar problems certainly will prove helpful for Thailand.