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## **THE COMPETITION AGENDA FOR APEC, REGIONAL TRADING ARRANGEMENTS AND THE WTO**

### **Position Paper**

by

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## Abstract

This is a position paper, the first aim of which is to set the scene by reviewing the current status of 'competition policy' in APEC, Regional Trading Arrangements and the WTO, as well as in PECC. Secondly, the paper identifies some central issues that have emerged in current debate and which help explain different approaches in different international settings. Thirdly, the paper suggests why the PECC Competition Principles are integral to the aims of the Trade Forum and seeks to provoke discussion on

- ~~the~~ how the Forum can further shape the competition agenda for APEC
- ~~the~~ how the Forum can influence the competition dimension of preferential trading arrangements, and
- ~~the~~ how we can build understanding of the relatively new competition issue that has been placed on the WTO agenda.

Permeating the paper is the presumption that there is a clear interest amongst APEC and PECC economies in

- (i) giving momentum to the application of their agreed competition principles
- (ii) promoting outcomes from the Doha Development Agenda that will reinforce the competition agenda of APEC member economies; and
- (iii) promoting a culture of competition in any preferential arrangements entered into by APEC members.

We should thus expect the agreed competition principles to be influential not only within APEC, but also

- ~~the~~ in the process of setting the negotiating modalities for 'competition policy' in the WTO
- ~~the~~ in any subsequent Doha negotiations, and
- ~~the~~ in intra-regional negotiations of preferential trade agreements.

This is because of their relevance for overall strategy and policy coherence.

## **I. The Current Position**

### **(1) The Current Regional Position - APEC**

#### ***Competition Principles and Market Strengthening***

##### *Leaders' Declarations*

~~///~~ In their 1999 Auckland Declaration, APEC Economic Leaders endorsed the *APEC Principles to Enhance Competition and Regulatory Reform* [the APEC Competition Principles] in order generally to strengthen markets and to achieve the Bogor goals of free and open trade and investment by 2010/2020.

~~///~~ Initial priorities were aimed at strengthening market infrastructure and the human capacity of enterprises, especially in developing economies.

~~///~~ In 2001, Leaders adopted the goal of speeding up reforms 'which encourage efficient and well-functioning product, labor and capital markets and supportive institutional frameworks'.

~~///~~ They also sought actions, *inter alia*

- to continue APEC's dialogue 'on the establishment of effective pro-competitive policies and institutions to provide a strong disincentive to anti-competitive conduct'
- to 'instigate APEC research, dialogue and cooperation on anti-competitive conduct between APEC jurisdictions, including via the internet', and
- to encourage inter-agency interaction in respect of public or private anti-competitive practices.

##### *New Collective Actions*

New collective actions agreed by APEC's Competition Policy and Deregulation group [CPD] in 2001<sup>1</sup> were:

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<sup>1</sup> Convenor's Summary Report on Competition Policy and Deregulation in APEC CTI, 2001 *Annual Report to Ministers*, Shanghai: October.

- ✍✍Undertake capacity building programmes to assist economies in implementing the APEC Competition Principles.
- ✍✍Continue to develop an understanding of competition policies and/or laws within their respective governments and within relevant domestic constituencies, thereby fostering a culture of competition.
- ✍✍Continue support for the joint APEC-OECD Co-operative Initiative in the field of Regulatory Reform for 2002.
- ✍✍Deepening the dialogue with other APEC Fora and Subfora on the understanding and reporting of the implementation of the APEC Competition Principles
- ✍✍Develop a training programme to promote competition in APEC Economies.

#### *APEC – OECD Initiative*

Pursuant to the APEC-OECD Cooperative Initiative, an Opening Conference was held in Singapore in February 2001 and focused on

‘the exchange of information on good regulatory practices [as] an important means to fulfil the goal of disseminating [the APEC Competition Principles] and promoting the implementation of the principles by member economies.’<sup>2</sup>

This goal fits with an ongoing Collective Action to encourage all APEC economies to implement these Principles.

The first Workshop was then held in Beijing, September 2001, and examined the following regulatory reform strategies:

- ✍✍‘The design and operation of a broad and sustainable regulatory reform program that produces concrete results for consumers and businesses; and
- ✍✍The importance of building competition principles into regulatory regimes.’<sup>3</sup>

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<sup>2</sup> APEC CTI, 2001 *Annual Report to Ministers*, Shanghai: October.

<sup>3</sup> *ibid.*

Overall, the emphasis of the APEC-OECD initiative is on ‘quality regulation’ and ‘pro-competition regulations and institutions’. Competition principles are seen as a ‘guide to reform that will yield dynamic and competitive markets that foster growth and economic welfare.’<sup>4</sup>

#### *SOM I Report 2002*

In its first summary report of 2002 (27-28 February), the SOM acknowledged the joint regulatory reform initiative of APEC and the OECD as well as other CPD work, including strengthening economic legal infrastructure. It encouraged the CPD to continue to foster a ‘culture of competition’.

#### **Box 1**

#### **PROPOSED WORK PLAN FOR 2002 IN RESPONSE TO LEADERS/ MINISTERS/SOM DECISIONS**

Taking into account the mandates given by the Leaders last year in Shanghai, the CPD Work Plan for this year includes the following activities:

- 2002 CPD Workshop will be held in May
- CPD will discuss how to introduce the implementation of relevant aspects of e-APEC Strategy, and Strengthening the Functioning of Markets in the OAA chapters concerning Competition Policy and Deregulation.
- Support and encourage joint government/industry capacity building programs to improve regulatory standards, transparency and governance practices.
- Support TEL’s work to promote competition in regulatory structures, interconnection, internet development and related issues.
- Encourage the implementation of the APEC Principles to Enhance Competition Policy and Regulatory Reform through the deepening of the dialogue with other APEC Fora and Subfora.
- Continue to develop an understanding of competition policy and/or laws within the economies and their domestic constituencies, thereby fostering a culture of competition.
- Building upon the information provided in the ‘Summary Report on the Competition Policy and Law Database’ which includes information on all APEC member economies’ competition policies.

#### ***Comments***

Much has been achieved in bringing the language of competition principles into APEC’s mainstream deliberations, guided by the core principles of

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<sup>4</sup> *ibid.*

*comprehensiveness, transparency, accountability and non-discrimination.* The integrating work of APEC's Group on Services is particularly pleasing.<sup>5</sup> And, importantly, Leaders agreed in the 2001 Shanghai Accord that the Osaka Action Agenda should be broadened to reflect fundamental changes in the global economy, including strengthening the functioning of markets.

It is disappointing to note however, that the APEC Competition Principles did not emerge as a unifying theme/reference point in either the agenda or report of APEC's recent Joint Fora Meeting with its intended focus on cross-cutting issues.<sup>6</sup>

There is clearly a long way to go before these principles are visibly translated into competition advocacy and a culture of competition. Until they are, with the support of training programmes, competition-restricting actions by governments as well as by business will continue to impede economic and social progress. As has been said, competition advocacy can be regarded as a 'development tool'.

### ***APEC and the WTO and Regional Trading Arrangements***

The 2001 Collective Action Plan also encouraged APEC to:

‘... continue to respond positively to interest by the WTO Working Group on the Interaction Between Trade and Competition Policy in sharing information on APEC's competition policy/deregulation work, in accordance with the mandate given by APEC Trade Ministers.’

And, in their 2000 and 2001 Declarations, Leaders affirmed and reaffirmed that regional trading agreements should be consistent with the rules and disciplines of the WTO. Further, ‘these arrangements should be in line with APEC architecture and supportive of APEC's goals and principles’.

### ***Comment***

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<sup>5</sup> See Box 5 in Annex.

<sup>6</sup> APEC Joint Fora Meeting, 1 March 2002, Chair's Summary Record, V APEC 2002 Cross-Cutting Issues Deliverables.

APEC has a lot to offer in the multilateral and RTA processes. It has made an enormous investment in strategic thinking and consensus-building, consistent with its basic aims and principles, the region's diversity and the organization's *modus operandi*. The APEC Competition Principles are notable for their breadth of approach and especially for the guidance they can give to policies, laws and regulations that influence market entry conditions and the competitive process more generally. There is a very good case for promoting their relevance both in RTAs and the WTO, especially in view of the Leaders' call for RTAs to be supportive of APEC's goals and principles, and their call for APEC and the WTO to be mutually reinforcing.<sup>7</sup>

## **(2) The Current Regional Position - Regional Trading Arrangements**

Competition policies, consistent with deeper integration, find expression in the explicit competition provisions of some regional trading arrangements. Often there is a relatively narrow anti-trust and trade-effects motivation, i.e. where the aim of 'competition policy' is limited to ensuring that private conduct does not inhibit the transfer of trade benefits derived from government measures to liberalise trade. But, even then not all countries support the inclusion of a general competition law in their domestic policy armoury.

Three dimensions of regional competition policies can be identified:

- (1) the convergence of national competition policies
- (2) policies to deal with intra-regional cross-border competition problems, and
- (3) policies to deal with competition problems within the region that involve inter-regional issues.

One or more of these dimensions are present in each of seven RTAs studied recently by Lloyd and Vautier.<sup>8</sup> These RTAs were the EU, CER, Andean Group,

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<sup>7</sup> APEC Leaders' Declaration (1999).

<sup>8</sup> Lloyd PJ and Kerrin M Vautier (1999), *Promoting Competition in Global Markets – A Multi-National Approach*, Edward Elgar. See also, Lloyd and Vautier 'Cross-border Competition Policies' in *Regionalism and Globalization – Theory and Practice* (2001), Edited by Sajal Lahiri, Routledge Contemporary Economic Policy Issues.

NAFTA, Group of Three, MERCOSUR and the Chile-Canada FTA, and involved almost 50 different countries (33 of which are members or associated states of the EU). Also, in 1998, formal negotiations on the FTAA were launched, including in respect of Competition Policy. A regional approach to the promotion of competition was a feature of the 1990s.

Of the RTAs containing explicit competition provisions, there is considerable variation in

- ~~the~~ the degree of national convergence
- ~~the~~ the extent of region-wide rules, and
- ~~the~~ the extent of provisions for dealing with inter-regional competition issues.

In developing a broad range of policies to promote intra-area competition, including national and regional competition laws, the EU is by far the most developed. It also has a powerful supra-national enforcement authority.

CER members, too, have taken a broad approach to promoting competition, including extensive deregulation and the liberalising of trade and investment with all trading partners as well as within CER. National competition laws have wide scope and have increasingly converged (most recently in 2001) since their broad harmonisation in 1986. The trans-Tasman, i.e. area-wide, competition provisions are very limited in scope however (relating only to use of substantial market power for a proscribed purpose). In contrast to the EU, CER has pursued a decentralized approach to enforcement, although inter-agency cooperation is a feature.

Canada-Chile and the Group of Three closely followed NAFTA's competition-promoting policies, including the substantive competition law provisions. But these relate only to monopolies and state trading enterprises and, in the NAFTA and Canada-Chile Agreements, merely require that the benefits of the free trade area not be nullified or impaired.

The competition-related texts in the MERCOSUR and Andean Agreements are influenced more by EU than by NAFTA, but not all of the South American membership has comprehensive national competition laws.

Further variations amongst RTAs emerge from a detailed look at their treatment of anti-dumping rules, subsidies/state aids and countervailing duties, cartels and mergers – four areas of government policy that impact upon the competitive process internationally. For example: only the EU, CER and Canada-Chile have removed the intra-regional anti-dumping remedy.

Overall, Lloyd and Vautier concluded that, to date, RTAs have given rise to only limited development of region-wide competition-promoting policies. Probably their main contribution has been to competition advocacy and some convergence of national laws. And we can note the experience that pre-existing national competition law has not been a prerequisite for the commencement of competition policy formation at a regional level.

### ***‘New-Age’ Economic Partnerships***

The 2000 *Agreement between New Zealand and Singapore on a Closer Economic Partnership* represents one example of the changing conception of international relationships as we pursue deeper economic integration. Part 2 of that Agreement is prominently titled ‘Competition’ and is preceded only by the preamble (which itself makes reference to open, transparent and competitive markets and their role as ‘the key drivers of economic efficiency, innovation, wealth creation and consumer welfare’) and the Agreement’s ‘Objectives and Definitions’, one of which is ‘to improve the efficiency and competitiveness of [Singapore’s and New Zealand’s] goods and services sectors and expand trade and investment between each other’.

#### **Box 2**

### **PART 2: COMPETITION**

#### **Article 3**

### **Competition**

1. The Parties recognise the strategic importance of creating and maintaining open and competitive markets which maximise total welfare. The Parties shall endeavour to implement the APEC Principles to Enhance Competition and Regulatory Reform with a view to protecting the competitive process rather than competitors and ensuring that the design of regulation recognises options that minimise distortions to competition.

2. Each Party shall endeavour to ensure that under this Agreement impediments to trade and investment shall be reduced or removed through:

- a) application of fair competition principles to economic activities, including private and public business activities;
- b) application of competition and regulatory principles in a manner that does not discriminate between or among economic entities in like circumstances;
- c) reduction of transaction and compliance costs for business; and
- d) promotion of effective regulatory coordination across borders.

3. The Parties agree that they shall effectively protect the competitive process across their economies as follows:

- a) they shall endeavour to consult and cooperate in the development of any new competition measures, whether these are specific or of general application;
- b) where there are regulatory authorities responsible for competition, they shall be adequately resourced to carry out their functions, including effective non-discriminatory enforcement;
- c) where there are regulatory authorities responsible for competition, they shall endeavour to exchange information and explore the scope for further cooperation between them, with particular emphasis on transactions or conduct in one that has competition effects in the other's market, or in both Parties' markets.

*Agreement between New Zealand and Singapore on a Closer Economic Partnership*

*14 November 2000*

As a second example of the changing conception of international relationships, the *Japan and Singapore New-Age Economic Partnership* contains a competition section which focuses on cooperation between competition authorities for the purpose of controlling anti-competitive activities, etc. (notwithstanding Singapore's lack of domestic competition law).

### **Comment**

Preferential trade agreements can be viewed as providing ‘natural experiments or laboratories ... to evaluate the validity of some of the claims that are made about the feasibility of international competition policy agreements’.<sup>9</sup> Hoekman poses the following exploratory questions:

- (i) Does diversity of current anti-trust regimes imply agreement is not feasible?
- (ii) Is supranational enforcement required for rules to be effective?
- (iii) Does agreement on anti-trust rules require more general competition policy disciplines?
- (iv) Are linkages between anti-dumping and competition infeasible?

And PECC could add, for example:

- ~~///~~ To what extent can the Competition Principles guide the scope of preferential arrangements and related negotiations?
- ~~///~~ Do regional approaches to promoting competition offer something distinctive from but complementary to a multilateral approach?

Such explicit questions would seem to provide a useful basis for influencing and monitoring approaches to competition in preferential agreements.

### **(3) The Current Multilateral Position - The WTO**

GATT’s international trade law reflected concern with the trade effects of dumping, subsidized goods and state traders but did not provide for action against trade cartels. The WTO has no formal objective relating to the promotion of *competition* as distinct from liberalising *trade*. It has no substantive rules explicitly relating to competition and no obligations on members relating to national competition law. The specific trade-related competition provisions that have been agreed rely on inter-government consultation and cooperation and these are far from comprehensive in their coverage. They apply to some services, not at all to goods, and essentially to government measures.

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<sup>9</sup> Hoekman, B. (1998), ‘Competition Policy and Preferential Trade Agreements’, The World Bank.

That said, there is now an established interest in the potential role of the WTO in respect of 'Competition Policy'. At its first Ministerial in 1996, the WTO established a Working Group on the Interaction between Trade and Competition Policy [the Working Group], including anti-competitive business practices. The initial two-year work programme focused on the relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy. It included stocktaking and analysis of national competition policies and laws as they related to trade; and the impact on international trade of anti-competitive practices, state monopolies, exclusive rights and regulatory policies. At the end of two years, the General Council accepted that the Working Group should continue its educative work and focus on:

- ~~the~~ the relevance of fundamental WTO principles (national treatment, transparency, and most-favoured-nation treatment) to competition policy, and *vice versa*
- ~~approaches~~ approaches to promoting cooperation and communication among members, including in the field of technical cooperation
- ~~the~~ the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade.

During its discussions on the specified principles, the Working Group was informed of the *APEC Principles to Enhance Competition and Regulatory Reform* and their aim 'to provide a basis for policy development rather than a stringent set of specific rules'. Further, it was suggested that

'these principles would assist in the process of introducing competitive markets within Member economies and recognized the diverse circumstances of Member economies that sought to implement them.'<sup>10</sup>

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<sup>10</sup> Report (1999) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WT/WGTCP/3, 11 October 1999, para 22.

Discussion also turned to what might be included in a ‘multilateral framework agreement’<sup>11</sup>, assuming the case for adopting such a framework was ultimately persuasive.

### *Negotiations*

In establishing the Working Group, the WTO’s 1996 Ministerial Declaration stated:

‘It is clearly understood that future negotiations, if any, regarding multilateral disciplines ..., will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.’

In recognizing ‘the case for a multilateral framework to enhance the contribution of competition policy to international trade and development’<sup>12</sup> Ministers in their 2001 Declaration agreed that negotiations will take place on the basis of a decision to be taken by explicit consensus on ‘modalities of negotiations’.<sup>13</sup> Meanwhile, the Working Group is required to focus on, *inter alia*, the clarification of core principles, including transparency, non-discrimination and procedural fairness, and on provisions for hardcore cartels.

### **BOX 3**

#### **INTERACTION BETWEEN TRADE AND COMPETITION POLICY**

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

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

<sup>11</sup> Report (2000) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WT/WGTCP/4, 30 November 2000.

<sup>12</sup> Emphasis added.

<sup>13</sup> Modalities lay out the framework for how negotiations will proceed.

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

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

*Ministerial Declaration, Ministerial Conference, Fourth Session, Doha 9-14 November 2001.*

### ***WTO Working Group Meeting 23-24 April 2002***

At the most recent meeting of the WTO Working Group, technical assistance and capacity building issues were the primary focus as was a concern to focus on

‘The implications of closer multilateral cooperation [on the interaction between trade and competition policy] for ... development policies and objectives.’<sup>14</sup>

### ***WTO Symposium 29 April-1 May 2002***<sup>15</sup>

At a recent WTO symposium, the WTO Director-General described competition and the other Singapore issues as ‘development issues’, although there was scepticism that poor countries would benefit from WTO negotiations in these areas. There was also concern that the multiplicity of issues and overloading in new negotiations could impede the WTO’s organizational effectiveness.

## **(4) PECC’s Current Position**

### ***The PECC Competition Principles***<sup>16</sup>

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<sup>14</sup> BRIDGES Weekly Trade Digest Vol.6 , No.16.

<sup>15</sup> *ibid.*

<sup>16</sup> Pacific Economic Cooperation Council (PECC) (1999), *PECC Principles for Guiding the Development of a Competition-Driven Policy Framework for APEC Economies*, Auckland: June.

The PECC Competition Principles were an important input to the APEC Competition Principles. Both sets of principles were intended to endure and to have long-term strategic significance for policy developments within APEC economies. In essence, they reflect a collective mission in the region - involving both business and governments - to:

?? Grow the total supply of goods and services from all sources (not just trade).

*That means:*

- *breaking down government barriers and distortions to competition (including to competition through trade); and*
- *a broad focus on economic efficiency, including downward pressure on business compliance and transaction costs*

?? To foster a competitive process based on economic merit.

*That means:*

- *allowing relatively inefficient producers/suppliers to fail; and*
- *disciplines to prevent business actions that undermine the competitive process (noting that there is no consensus in PECC or APEC that every country should have a general competition law)*

?? To achieve more inclusive participation in economic processes

*That means the participation of:*

- *developing as well as developed economies*
- *SMEs as well as MNEs*
- *agriculture as well as industrial producers; and*
- *customers/consumers as well as producers*

?? Minimize uncertainty for business and build confidence in system fairness and predictability

*Again, in PECC terms, that means:*

- *transparency of policy formulation and implementation*
- *consistency in applying competition principles; and*
- *avoiding unforeseen or unclear rules and regulations.*

### *Competition Principles in Practice*

At the 2000 PECC Trade Policy Forum in Brunei, the central theme for the session on competition was how to shift from ‘competition principles in the making’ to ‘competition principles in practice’. In introducing that session, I said that for this shift to become a reality, there were three key requirements:

- (1) The Principles needed to be visibly integrated throughout APEC’s work programmes and Individual Action Plans. PECC also needed to demonstrate its capacity for interpreting and integrating the principles in its own Work Programme and Action Plan
- (2) Cooperation at different levels *within* as well as *between* government administrations.
- (3) Tangible connections between the *expectations* we have of policy-makers – as reflected in the Principles – and the *requirements* for capacity-building and technical assistance in individual economies.

There was general support for building understanding of the implications of the Principles for different economies (developed as well as developing) and for different sectors and policy areas; and there was certainly interest in Paul Crampton’s forward-looking contribution on delivery mechanisms and institutional and human capacity-building and technical assistance.

Since that time, there have been some important ‘competition’ initiatives under the auspices of PECC, including collaborative work for APEC’s Group on Services<sup>17</sup>; collaborative work with the World Bank;<sup>18</sup> and a collation of papers on the treatment of market power in East Asia.<sup>19</sup>

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<sup>17</sup> ‘The Implications of the APEC Competition Principles for Services, Trade and Investment’, as reflected in Phase II of the Development of the Menu of Options for Voluntary Liberalization, Facilitation and Promotion of ECOTECH in Services, Trade and Investment. See Box 2.

<sup>18</sup> Lloyd, P.J. and Associates (forthcoming), ‘Harmonising Competition Policies in the East Asian Region’, Contribution to Joint World Bank-Japan Study on East Asia’s Future Economy; Vautier, K.M., P. J. Lloyd and I-W. Tsai, ‘Competition Policy, Developing

### ***Comment***

The inaugural Trade Forum in Lima provides an excellent and timely opportunity for PECC to reconnect and remotivate its network of competition experts, especially in view of

- (a) the growing interest in regional/sub-regional partnership arrangements
- (b) the inclusion of competition policy in the Doha Development Agenda; and
- (c) the relevance of the APEC Competition Principles to regional and multilateral deliberations.

The consensus reached within APEC on these principles cannot be under-valued as a basis for advancing this region's interests in different regional and multilateral settings.

## **II. Central Issues**

It is not the purpose of this position paper to document all of the issues that have previously been raised or are likely to be raised in connection with competition agendas at multilateral and regional levels. However, as a backdrop for the Trade Forum's deliberations on how PECC can now contribute to these agendas, it is necessary to place some of these issues on the table. After all, they help explain the different perspectives and approaches that we observe in international discussions and policies. It should be borne in mind that PECC has already reached a consensus on some of these issues.

- 1) There is a considerable divergence of views amongst the three major players, the EU, Japan and the United States. The fact that those at the centre of current debate have such divergent views spells difficulties for the

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Countries and the World Trade Organization'. Martin W. and M. Pangestu (Eds) (2002) in *Options for Global Trade Reform: A View from the Asia-Pacific*, Cambridge University Press.

<sup>19</sup> Round, D. (Ed) (forthcoming), 'The Treatment of Market Power in East Asia: Law, Policy and Practice'.

multilateral agenda. The divergence largely originates from different views on:

(a) *the scope of 'Competition Policy' in an international setting*

- ~~///~~ Does this policy area go beyond competition law?
- ~~///~~ Is competition law necessarily included?
- ~~///~~ Where does anti-dumping fit?
- ~~///~~ Are both government and business actions covered?

(b) *the primary objective of 'Competition Policy'*

- ~~///~~ Is it directed at competition and efficiency in all markets?
- ~~///~~ Or is it simply to increase trade and prevent nullification of the gains from trade?

Put another way: Is the aim of Competition Policy to maximize trade and the interests of particular producers/exporters, or to maximize welfare in the interests of producers and consumers in general?

Essentially, the difference here is between a desire to respond to actual or perceived impediments to *trade*, and a broader pro-active positioning of various policies which, in combination, aim to promote competition from all sources (including trade) in all markets.

(c) *the appropriate multi-national level(s) – bilateral, regional or multilateral - for pursuing the objectives of 'competition policy'*

Relevant here is the fact that the WTO and APEC institutional models differ markedly. The WTO is a multilateral rules-based organization with a mandate to negotiate tariff and non-tariff concessions that bear on trade. These concessions are the outcome of negotiated reciprocity in each Round. In APEC, reciprocity is expected to evolve over time through a process of concerted unilateralism. As recently as 2001, APEC Economic Leaders reaffirmed their belief in the 'unique APEC Approach', based on the 'fundamental principles' of voluntarism, consensus-building, a combination

of individual and collective actions, flexibility, comprehensiveness and open regionalism.

- 2) When looking at the 'interaction between trade and competition policy', which the WTO Working Group is mandated to do, the following issue is properly raised: What is to be included as a trade-related competition issue? The most obvious areas for inclusion are:

- ?? export and import cartels
- ?? anti-dumping
- ?? parallel importing
- ?? subsidized trade.

A sensible suggestion emanating from the Working Group is to focus on those government as well as private measures with the greatest potential to impact negatively on trade and competition.

- 3) There is considerable caution amongst developing countries on a multilateral framework for Competition Policy and, in particular, the extension of WTO rules to anti-trust. And inconsistencies in standards adopted by developed countries do not go un-noticed – including permissiveness in respect of export cartels. To date, there appears to have been limited direct involvement by small developing economies in the WTO Working Group, although Latin American members, especially Peru, have been active.

~~✍~~ In particular, developing countries (amongst others) do not necessarily support the shared view of the EU, Japan and the United States, nor of the OECD membership as a whole, that domestic competition law and enforcement mechanisms based on common objectives are essential for all countries.

- The US, in resisting multilateral anti-trust rules, strongly favours the pursuit of anti-trust objectives through a combination of national

laws and a spread of bilateral cooperation agreements (notwithstanding that these agreements have major limitations and have not resulted in the withdrawal of the threat of unilateral extra-territorial action).

~~✍~~ The WTO Working Group has in fact given much attention to the sorts of competition law exemptions and phase-in provisions that could be appropriate in the context of a flexible response to the circumstances and needs of developing economies. Even so, there are clearly hurdles for developing economies if they are to set up the necessary legislative framework and independent enforcement capacity; to overcome resistance, including by State Owned Enterprises, to new concepts; and to address fears that multinational enterprises and others will use/misuse competition law for their own ends (especially given the widely-held perception that anti-dumping laws have been used in a way that is more detrimental than conducive to the competitive process).

- 4) There are no generally agreed standards for rules to address anti-competitive business conduct. And that is not for want of trying.<sup>20</sup> A significant number of the WTO membership does not presently have a national competition law. Variations in existing laws, and resistance by developed countries even to bringing procedural aspects into closer alignment, are ample testimony to the difficulties of achieving convergence in the objectives, scope and procedures and substantive provisions of these laws.
- 5) The number of substantive anti-trust rules that could be promulgated by the WTO would seem to be very limited, especially if outright prohibition is sought. This partly explains the focus of the Working Group (and of the OECD) on so-called hard core cartels where some agreement has been forged, at least amongst developed countries. The OECD definition goes beyond price-fixing and bid-rigging however; so if this definition were formally adopted, it would cover quite a range of business behaviour. Then

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<sup>20</sup> The Havana Charter, UNCTAD, OECD.

there is the question of whether an outright prohibition or ‘rule of reason’ approach should apply. A *per se* prohibition may be justified in relation to certain forms of conduct on grounds that any positive economic effects are likely to be so negligible relative to the detrimental effects, that they are justifiably disregarded.

#### **Box 4**

##### **Hard Core Cartel**

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 market by allocating customers, suppliers, territories, or lines of commerce.

OECD (1998), *Recommendations Concerning Effective Action Against Hard Core Cartels*.

- 6) The WTO’s binding trade rules are directed at *government* measures. There would be serious enforceability problems associated with multilateral rules aimed at anti-competitive *private* conduct, even if the country or countries involved each had a competition law.
- 7) The WTO Working Group has been deliberating on the relevance of fundamental WTO principles to competition policy and *vice versa*. The principles that have been identified in those deliberations are national treatment, transparency, and most favoured nation treatment.

There is a big difference between these principles for trade rules and the core principles for promoting competition in globalizing markets. In particular, non-discrimination is interpreted differently:

?? In international trade law, the principle of non-discrimination in the sense of most favoured nation treatment is directed at geographic discrimination in goods and services trade and is restricted to non-discrimination among foreign nations.

?? In PECC's competition framework, non-discrimination is used in the sense of competitive neutrality between all modes and sources of supply. It thus embodies national treatment.

?? APEC modified this and, more in line with WTO language, substituted the following:

‘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.’

The trade usage is thus much narrower than the competition usage. The WTO principles of national treatment and MFN are limited by definition and do not adequately capture the essence of either of the core PECC principles of non-discrimination or comprehensiveness.

### **III. PECC's Trade Forum Research Agenda**

- 1) Now that the WTO has agreed on the admission of ‘competition policy’ to its development agenda, PECC has an obvious interest in exploring the relevance of its competition principles in a multilateral context. We should continue to be concerned about a purely trade-related approach to competition issues, i.e. an approach dominated by *trade* objectives and *trade* analysis rather than wider *competition* objectives and *competition* analysis. A starting proposition is that the primary focus of the WTO, given its basic mandate, should be to ensure that its trade rules and disciplines are designed, applied and enforced in a manner that supports rather than detracts from the competitive process and the strengthening of globalizing markets. PECC's primary focus should thus be on how best to apply its competition thinking to the WTO's existing trade measures.

- 2) With some urgency, given the proximity of the Fifth Ministerial Session, the Trade Forum could more or less adopt the WTO Working Group's agenda as stipulated in the Doha Ministerial (see Box 3, 25) – in order to determine what consensus we can build around the very issues that the Ministers have charged the Working Group to look at in preparation for determining negotiating modalities. In the case of hard core cartels however, the Trade Forum's interest is likely to be focused on the export and import category. In the near term, we could usefully reach and examine the questions:
  - (i) What matters might properly be included in the WTO's negotiating framework?
  - (ii) What matters might be excluded, on grounds that they are not conducive to multilateral negotiation or to binding multilateral one-size-fits-all rules?
- 3) Hopefully, PECC will work closely with APEC on this same agenda, noting that APEC's Competition Policy and Deregulation group said recently that it is seeking ways to strengthen relationships with others, including PECC. The SOM too, at its second meeting in Mexico (24-25 May) - in the context of strengthening the multilateral trading system - is 'to consider APEC's possible contribution to the Doha Development Agenda', as well as to the WTO's capacity-building agenda.
- 4) The Trade Forum could play a role in helping to identify particular points of tension between APEC's approach and the WTO's approach to 'competition policy' and principles. APEC has rejected top-down one-size-fits-all rules for promoting competition in the Asia/Pacific Region and, instead, has opted for the principles approach with its inherent flexibility and reliance on concerted unilateralism. The challenge here is to influence the WTO's competition agenda in such a way that it reinforces rather than compromises APEC's aims and approach.

In conclusion, the Trade Forum with its two Task Forces is very well positioned to explore the complementarity of regional and multilateral approaches to promoting competition in globalizing markets. Armed with the PECC Competition Principles, the Forum can help inform and prioritize the competition agendas of the WTO and of parties to preferential trading arrangements. Building on our investment in the Competition Principles will help ensure better returns for the Asia/Pacific Region.

## **Annex**

### **Box 5**

#### **D. Competition policies/laws**

##### ***Ideal Situation***

A contestable economic environment that induces business investment, technological innovation and long-term economic growth.

##### **Background**

Competition policies/laws go beyond the market access principle and comprise the set of measures and instruments used by governments to promote and protect the “conditions of competition” in domestic and international markets. Important elements of competition policies/laws include antitrust laws (e.g., to sanction cartels and anti-competitive mergers and monopolies), privatization, deregulation, and policy with respect to subsidies. The main objective of competition policies/laws is to safeguard the competitive process, in order to enhance efficiency and increase consumer welfare.

#### Illustrative List of Policies to Enhance Competitive Markets

- ?? Measures to facilitate domestic entry and exit,
- ?? Deregulation of sectors,
- ?? Imposition of hard budget constraints on public enterprises,
- ?? Deregulation/privatization and encouragement of both domestic and foreign investment,
- ?? Reliance on market forces to determine the allocation of productive resources,
- ?? Observation of transparency and objective criteria,
- ?? Development of laws and independent institutions to implement and enforce competition frameworks,
- ?? Review of regulations in order to promote competition on the basis of efficiency and innovation to sectors and networks.

#### Main points of GOS discussion on Competition Policies/Laws

##### *a. APEC Competition Principles*

The “APEC Principles to Enhance Competition and Regulatory Reform” set out as their objective the promotion of merit-based business competition through four elements, namely: i) comprehensiveness; ii) non-discrimination; iii) transparency; and iv) accountability.

##### *b. Features of the APEC Principles to Enhance Competition and Regulatory Reform*

- Flexibility: the principles do not advocate adoption of a particular form or framework of competition at the national level and may draw upon various elements, such as competition law, open trade policy, IPR protection, and privatization. Such a framework can differ from economy to economy.
- Coherence: the APEC Principles to Enhance Competition and Regulatory Reform advocate coherence in policy making.
- Market-based: the principles are based on rules of market economy.
- Broad application: The principles have broad application to economic activities and to the output of both goods and services.

##### *c. Application of the APEC Principles to Enhance Competition and Regulatory Reform to services*

- Comprehensiveness: broad application in terms of all service sectors
- Non-discrimination: 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.
- Transparency: publication of competition laws, regulations and other non-confidential measures related to aspects of competition policy.
- Accountability: ensuring implementation of the APEC Principles to Enhance Competition and Regulatory Reform.

##### *d. Competition provisions for services in the GATS*

GATS contains only limited provisions on competition *per se*. Such provisions can also be found in the Reference Paper of the Agreement of Basic Telecommunications which has been adopted by some but not all WTO members.’

*e. Costs and benefits of competition policies*

- Benefits from competition policy can be realized through: (i) improved resource allocation and greater consumer welfare, (ii) the promotion of contestable markets; and (iii) the enhancement of efficiency.
- Costs from competition policy can be present in the form of: (i) transitory unemployment; and (ii) absorption of specialized and human resources.

**Areas of GOS consensus on Competition Policies/Laws**

*a. Broad application*

Competition principles apply in a broad-based way to economic activities including both goods and services.

*b. Importance of benefits of competition policy*

The benefits to be had from competition policy are important, and the lack of competition policy for an economy can carry high costs.

*c. Principles-based approach*

A general, principles-based approach to competition policy fits well with the need for flexibility. Such principles are instrumental in forming national policies that advance consumer welfare. Efficiency and optimum allocation of resources need to be high priorities for policy makers.

*d. Establishment of independent competition policy body*

Establishing an independent competition policy body assures impartiality in decision-making. The ability to do so is related to ECOTECH and the need for institutional capacity building.

*e. Regulatory Impact Analysis (RIA)*

The consideration of how to conduct a Regulatory Impact Analysis (RIA) is a good way to begin implementing the “APEC Competition Principles” and is related to the discussion of what is “good” domestic regulation.

Annex to Convenor’s Summary Report on Services, *APEC 2001 Annual Report to Ministers*, Committee on Trade and Investment, Shanghai, October, pp.40-42.

