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**Work programme, including the effectiveness of
capacity-building and technical assistance to
young competition agencies**

Effectiveness of capacity–building and technical assistance extended to young competition agencies

Note by the UNCTAD secretariat

Executive summary

An effective competition agency requires certain essential conditions such as (a) independence; (b) adequate financial resources; (c) skilled staff to carry out complex investigations of competition cases; (d) leadership; (e) the ability to advocate compliance with competition law among business and government agencies to take competition objectives into account; and (f) effective cooperation with sector regulators. Most competition agencies in developing countries and economies in transition have 5 to 10 years of existence, and continue to face challenges in establishing strong foundations. UNCTAD peer reviews of competition policy of a cross-section of young competition agencies show that, in addition to these challenges, there are conflicting objectives of the competition law with other economic policies, a lack of good governance, a lack of political will on the part of policymakers and a lack of a competition culture. Since the early 1990s, international organizations and more advanced competition agencies have provided capacity-building and technical assistance to young competition agencies to help them overcome these challenges. This note assesses the assistance provided to young competition agencies and shows the progress achieved so far, and the challenges that remain in providing effective capacity–building to interested agencies.

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Foreword

1. As recommended at the Sixth United Nations Conference to Review all Aspect of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, 8–12 November 2010 in Geneva, the eleventh session of the Intergovernmental Group of Experts on Competition Law and Policy (IGE) is to hold a round table discussion on “Capacity-building and technical assistance”. The present background note will assist member States in structuring their discussions around this topic.

2. The primary sources for information in this note include UNCTAD studies, submissions we have received from Members in response to a questionnaire¹, the contributions to the Sixth United Nations Conference to Review all Aspect of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,² publications of the International Competition Network (ICN)³ Working Groups, the Organization for Economic Cooperation and Development(OECD)⁴ round table held on the topic and the report of a conference organized by United States Federal Trade Commission in February 2008 on capacity–building extended to young competition agencies.⁵ The note also draws on competition authority websites as well as academic literature on the topic.

3. This note is divided in five chapters. Chapter I sets the scene by focusing on the needs of young competition agencies to establish strong foundations. Chapter II describes the main actors involved in providing technical assistance and capacity-building. Chapter III focuses on the effectiveness of these assistances in building up efficient competition agencies in the recipients’ countries. The challenges encountered in providing these assistances are discussed in chapter IV. Selected issues for discussion are contained in chapter V.

¹ The following member States and organizations responded to the questionnaire: Australia, Austria, Burkina Faso, Benin, Bulgaria, Bhutan, Cameroon, Chad, Chile; Colombia, Cyprus, European Commission, France, Greece, Hungary, Indonesia, Iraq, Japan, Republic of Korea, Malaysia, Mexico, Morocco, Philippines, Portugal, Russian Federation, Senegal, Serbia, Slovak Republic, Spain, Sudan, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United States of America, Uruguay, Zambia and Zimbabwe.

² See, in particular UNCTAD (2010). Review of capacity-building and technical assistance on competition law and policy. TD/RBP/CONF.7/7. Geneva. 30 August 2010.

³ ICN (2010). Report on Technical Assistance and Capacity–Building Activities conducted by International Organization, Vice Chair for International Coordination, (First working draft), December 2010.

⁴ OECD (2009). Challenges faced by young competition authorities. Note by the Secretariat.

⁵ United States Federal Trade Commission, A Conference on Charting the Future Course of International Technical Assistance, February 6, 2008, available at <http://www.justice.gov/atr/public/reports/250908.pdf>.

Introduction

4. The significance of competition law in dealing with potential anti-competitive practices that may arise post-liberalization has been widely accepted. Yet the enactment of competition law is recent and the enforcement record is mixed for most young competition agencies. An effective enforcement of the competition law requires certain essential conditions such as independence of the competition agency, adequate financial resources; skilled staff to carry out complex investigations of competition cases, leadership, and ability to advocate compliance with the competition law among business, and among government agencies to take competition objectives into account, and effective cooperation with sector regulators. Most young competition agencies face challenges in these areas.

5. Among the most difficult tasks that developing countries face in developing their national competition legislation is the task of drafting such legislation. Many developing countries – especially least developed countries – lack the experience or the necessary trained human resources with the skills necessary to draft national competition legislation which (a) promotes competition principles in a manner relevant to the country concerned and (b) responds to the development needs of the country concerned. This point has been addressed by, for example UNCTAD experience in developing the non-binding United Nations Set of Principles and Rules on Competition Policy, which has proven instructive in this regard.

6. In terms of concrete capacity-building requirements, this therefore requires:

(a) Guidelines and descriptions of the roles, functions, powers and responsibilities of relevant national competition authorities from those countries that have such legislation and competition authorities;

(b) Provision of legal assistance and policy advice, supported by domestic experts who are well-versed in their own national legal system and political-administrative structure, with respect to:

(i) Identification of the statutory structure and substantive elements that should be included in the legislation;

(ii) Legal concepts relating to competition – i.e. anti-competitive practices, mergers, hard-core cartels, abuse of dominance, consumer protection, State monopolies, regulatory objectives, etc.;

(iii) Autonomy and administrative structure of the competition authority, including clarification of the concept of administrative independence from the executive branch of the government, budgetary sourcing and application of civil service regulations to the staff of the competition authority, etc.;

(iv) Administrative, criminal and civil actions and penalties, including the allocation and extent of criminal and civil responsibility and liability for violations of the national competition legislation, the applicable rules of procedure and the appellate process, etc.; and

(v) Procedures for information exchange and cooperation with competition authorities of other countries.

7. In this regard, technical assistance and capacity-building are of importance to overcome these challenges in order to help the recipient countries building up effective and efficient competition agencies. For more than two decades, UNCTAD and other international organizations such as OECD, and ICN and the more advanced competition

agencies have been striving to improve the capacity of young competition agencies around the world. Chapter II reviews the capacity–building activities of these actors.

I. Capacity–building and technical assistance by international organizations and other actors

A. Capacity–building by OECD

8. OECD has a specialized Competition Division within the Directorate for Financial and Enterprise Affairs.⁶ The competition agencies from the member countries participate in the technical assistance and capacity–building conducted by this organization. In addition, non-members can participate in events such as the Global Forum on Competition, the Latin American Competition Forum and the events organized by the OECD regional Centres for Competition in Hungary and the Republic of Korea.

9. Most of OECD’s capacity–building is delivered in the form of seminars and workshops.⁷ A full range of service is also provided by the OECD, including case studies, seminars on cartel prosecution, bid rigging and public procurement, merger analysis, abuse of dominance, legislative drafting, studies in sector specific regulation, judicial training, and high-level policy briefings on topics such as reducing unnecessary restraints on competition laws and regulation.⁸ Moreover, since 2003 the OECD secretariat has conducted peer reviews of competition policy of several member and non-members States.⁹

B. Capacity–building by ICN

10. Created in October 2001 by officials from 14 jurisdictions, the International Competition Network (ICN) is an informal network of 107 of the world’s competition agencies with the common aim of addressing practical competition enforcement and policy issues.¹⁰ ICN does this through interactive workshops on ICN tools, techniques and recommended practices. In addition, it has developed projects related to technical assistance and to the challenges facing newer agencies.

11. ICN provides the competition agencies’ heads and senior officers with a forum to discuss the operational mechanisms of competition agencies, recognizing that operational and organizational details can affect substantive outcomes. ICN launched an Agency Effectiveness Project in 2007–2008, the aim of which is to analyse the relation between the definition of priorities, resource allocation and the effectiveness of the agency decisions with an agency’s overall effectiveness. At a high-level seminar on the effectiveness of competition law enforcement on 22–23 January 2009, ICN members discussed different approaches and methods to organizational planning and their relative merits.

⁷ OECD (2003). Capacity–Building for Effective Competition Policy in Developing and Transitioning Economies. *OECD Journal of Competition Law and Policy*. Vol. 4. ISSN 1560-7771, 2003.

⁸ Further information on the OECD capacity building activities can be found on its website at: http://www.oecd.org/pages/0,3417,en_40382599_40382958_1_1_1_1_1,00.html.

⁹ ICN, Report on Technical Assistance and Capacity Building Activities conducted by International, op cit for the OECD peer review exercise.

¹⁰ ICN, A Statement of Achievements through April 2010 available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc630.pdf>.

C. Capacity–building by the World Bank and other regional development banks

12. The World Bank Group promotes economic growth and reduces poverty by fostering broad based and sustainable development.¹¹ To achieve these objectives, it is necessary to increase investment and productivity. Encouraging competitive markets and mobility of resources from lower to higher value productive uses is critical. In this regard, the World Bank is active in policy research and capacity–building on competition policy issues. Several publications on competition law and policies have been published by its Development Research Department. These publications are used to promote policy dialogue with its clients. The World Bank also conducts advocacy workshops and training seminars in developing countries around the globe. In addition, competition policy concerns are nested in most of the projects and programmes crafted to assist its clients to enhance their economic development.

13. The Asia Development Bank provides support to its member States in competition law and policy. This support consists of training and workshops related to competition policy, and projects to help the beneficiaries build up their capacity to effectively enforce their competition law.¹² The Inter-American Development Bank provides assistance to individual member States on competition law and policy. Since 2003, it organized a forum which brings together competition policymakers and sector regulators of more than 25 countries, mostly from the Latin American region. This forum is organized in cooperation with OECD.¹³

D. Capacity–building by APEC

14. The Asia–Pacific Economic Cooperation (APEC) has a Competition Policy and Law Group (CPLG) within its Economic Committee (EC). Its members participate in its capacity–building activities and also generate the reports and studies, and the information is available to all of them.

E. Capacity–building by CUTS

15. Consumer Unity and Trust Society International (CUTS) is a non-governmental organization that has a functional area devoted to Competition, Investment and Economic Regulation issues. Through its “7–Up” projects CUTS undertook research and advocacy on competition policy in developing countries that had adopted competition law in sub-Saharan Africa and in South Asia.¹⁴

F. Capacity–building and technical cooperation activities of member States

16. This section provides a summary of the replies received from member States to the UNCTAD secretariat, which requested information on technical cooperation activities in

¹¹ Shyam Khemani (2004). “Peer Review” and Other Assessment Mechanism Relating to Competition Policy, Ad Hoc Meeting of Inter-Governmental Experts on Competition Policy, UNCTAD, Geneva, Switzerland July 15–16.

¹² <http://www.adb.org/documents/reports/law-policy-reform/report-proceedings.pdf>.

¹³ http://www.oecd.org/pages/0,3417,en_40382599_40393122_1_1_1_1_1,00.html.

¹⁴ CUTS (2003), Pulling Up our Socks, Jaipur, India.

the area of competition law and policy from 2009 to 2011. Details of the questionnaire can be found on the UNCTAD website devoted to the Eleventh Session of the Intergovernmental Group of Experts on Competition Law and Policy.

1. Assistance provided by donors

17. This section reviews the reported activities by donors and institutions over the period 2010–2011.

18. **Australia** provided assistance to Hong Kong (China), Papua New Guinea, the Philippines and Viet Nam. Assistance provided consisted in study tours organized for officials from the recipient countries, and training seminar on investigations.

19. A twinning of competition authorities is envisaged between **Austria** and the Republic of Moldova.

20. A twinning of competition authorities is envisaged between **Austria** and the Republic of Moldova.

21. Since 2009 the **European Commission** has expanded its assistance to recipient countries in order to strengthening their capacity for an effective enforcement of competition law. In this regard, the following countries benefited from the European Commission's assistance: Albania, Bosnia and Herzegovina, China, Croatia, Egypt, Georgia, Kosovo, India, the Libyan Arab Jamahiriya, the Republic of Moldova, Montenegro, Serbia, Singapore, Tunisia, Turkey and Ukraine. Assistance included workshops and training seminars on competition law and policy issues (cartel, dominance, State aid, leniency programme and guidelines for imposing fines, merger control, etc.).

22. A twinning project has been established by **France, Germany** and **Italy** to strengthen the Algeria Directorate capacities in competition law and policy. **France** envisages providing assistance to emerging countries in strengthening the relationships between their competition agencies with sector regulators institutions and judiciaries.

23. **Germany** reported that the *Bundeskartellamt* frequently participates in technical assistance or capacity-building projects. This agency is especially involved in so-called "twinning projects" which are initiated and funded by the European Union (EU). These projects support partnerships between the administrative authorities of EU member States and non-EU member States, aiming at the establishment of efficient public structures, exchange of know-how and the development of long-term cooperation. Thanks to these projects, the *Bundeskartellamt* recently provided assistance to China, Mongolia, Malaysia, Morocco, Romania, Serbia and Thailand.

24. **Hungary** contributed in twinning projects of strengthening the enforcement of competition law and policy in Albania and Ukraine respectively.

25. **Japan** indicated that its assistance to recipient countries is conducted through training courses and seminars, group training, teleconference and secondment of residential advisors. In this connection, China, Indonesia, Philippines and Viet Nam have been the beneficiaries of its assistance. This year Japan has planned to organize the following activities: (a) an APEC training course on competition policy (Oct. 2011); (b) a group training course on competition law and policy for several countries (Aug.–Sep. 2011); (c) a training course on competition law and policy for Indonesia (Feb.–March 2011) and Viet Nam (May–June 2011); (d) a lecture by residential advisor at the seminar in Indonesia (Jan. 2011); and (e) a presentation by residential advisor sent from Japan at the seminar in Viet Nam.

26. **Portugal** assisted Mozambique in the process of drafting its competition law. Portugal is also active in the Portuguese Competition Authority International Training

Programme (PCA–ITP). Launched in November 2010, the PCA–ITP is a training programme which combines training in the Portuguese, European and international competition systems, the structure and activities of the PCA, as well as the policymaking and regulatory environment of Portugal. This pilot programme hosted two competition officials from CADE for a two-week training programme and received very positive feedback. PCA plans to hold a seminar with FAS Russia in Lisbon on the Portuguese and Russian competition rules for Russian Federation companies operating in Portugal, and for Portuguese exporters to the Russian Federation, respectively. During the 2011 Iberian Competition Forum, the PCA, in collaboration with CNC Spain, seminars will be held on the competition systems of Portugal and Spain, with focus on the respective leniency programmes. A meeting with a delegation from the Chinese State Administration of Industry and Commerce is also to be held within the PCA in 2011.

27. **Spain** has been providing assistance to Ibero–American countries, China, Egypt and Morocco. This assistance includes training courses and workshops on competition law and policy issues (e.g. introduction to the competition defence, the leniency programme and the calculation of the sanctions) and organization of a study tour for officials from the Moroccan competition agency.

28. **Switzerland** continues to provide assistance to Latin American countries and Viet Nam in competition law and policy. Its assistance to Latin America is provided through the UNCTAD–COMPAL programme. In 2011, it plans to provide the Viet Nam Competition Authority with a toolkit on abusive behaviour and assist in the preparation of a market study for the Vietnamese pharmaceutical sector.

29. **The United States** has great experience in competition law and policy, which continues to be used to equip young competition agencies to enhance their work around the globe. This assistance consists of provision of information on anti-competitive practices, including studies on these practices, assistance in the process of drafting competition legislation, assistance in the revision/reform of competition legislation, advisory services for the establishment of competition authorities, introductory seminars on the role of competition in promoting development, seminars and workshops on enforcement of competition legislation and conduct of voluntary peer reviews of competition law and policies. In this regard, the following countries have benefited from the United States' assistance: Barbados, Brazil, Bulgaria, Cambodia, China, Costa Rica, Kenya, Viet Nam, Hungary, Turkey, Senegal, India, the Russian Federation, Zambia, the Philippines, the United Republic of Tanzania, Indonesia, Pakistan, Paraguay, St. Lucia, Peru, the Republic of Korea, Singapore, Mexico, Egypt, Ghana, Panama and Hong Kong (China). In 2011, assistance is planned to be provided to India, Dominican Republic, Indonesia, Viet Nam, the Czech Republic and the Russian Federation.

2. Assistance reported by recipient countries

30. Burkina Faso praised assistance received from UNCTAD and indicated that more assistance was needed from other partners to enhance its capabilities to enforce its competition law.

31. The Competition Commission of Cameroon is putting a lot of expectation on a study funded by UNCTAD this year on the state of competition in its economy. The outcomes of the study will be used for a better enforcement of the national competition law.

32. Malaysia has recently organized several workshops and training seminars in competition law and policy, namely (a) a training workshop on cost and benefits of competition policy (May 2009); (b) a workshop on approaches, methodologies and techniques of competition law (Aug. 2009); (c) a workshop on challenges in the implementation of competition law (Nov. 2009); (d) training on how to measure the impact

of competition agencies on economic development (Dec. 2009); (e) a workshop on the interface between competition policy, industrial policy and the role of competition authorities in public procurement (2010); and (f) a training seminar on approaches, methodologies and techniques for investigation and for enforcement by competition regulatory bodies (2010).

33. The Moroccan Competition Council has benefited from technical assistance from the *Bundeskartellamt* thanks to a twinning project between Morocco and this institution. The project was signed in 2007 for three years duration. This assistance consisted in organization of several workshops and training seminars in competition law and policy and study tours (in France, Spain and Poland) for officials of the Moroccan competition agency.

34. Officials from all member countries of the Association of South-East Nations (ASEAN) attended the ASEAN Experts Group on Competition (AEGC) capacity workshop on approaches, methodologies, techniques and related best or replicable practices in investigation and enforcement co-funded by Germany. They also attended to the Trans-regional EU–ASEAN Trade Initiative (TREAT) workshop on competition policy in Singapore (2010).

35. Senegal indicated that its competition agency was assisted by the West African Economic and Monetary Union (WAEMU) Commission in cooperation with UNCTAD.

36. A 36-month project funded by the European Union was established to assist the Commission for the Protection of Competition (CPC) of Serbia. The aim of this project was to assist the Serbian Government, Ministry of Trade and Services and the CPC in their efforts to meet the requirements of the Stabilization and Association Process in the field of competition and to assist the Serbian society in establishing a new competition philosophy and culture with all benefits that they might bring along. OECD also provides capacity-building assistance and policy to Serbia through courses organized at the regional center in Hungary for officials in competition enforcement agencies and other parts of government, sector regulators, judges and others.

G. UNCTAD’s technical assistance and capacity–building approach

37. Since the adoption of the UN Set in 1980, UNCTAD provides capacity-building and technical assistance on competition law and policy to developing and least developed countries as well as economies in transition in accordance with requests received, the needs of the countries concerned and resources available. UNCTAD technical assistance is also conducted as a follow up to the recommendation deriving from the Voluntary Peer Reviews on Competition Policy (VPR) launched in 2005.

38. In 2007, member States directed UNCTAD to review the “need of consolidation of technical cooperation projects and requested the secretariat to initiate... in consultation with member States” the process of the establishment of “thematic trust funds within and among divisions”.¹⁵ In response to this decision, and in order to streamline UNCTAD’s technical assistance activities and increase impact, two initiatives were taken by the secretariat: (a) an extension of the COMPAL programme, with increased country coverage from 5 to 10; and (b) launch of the Competition Programme for Africa (AFRICOMP). In addition UNCTAD set a multi-pronged approach to capacity–building and technical assistance:

¹⁵ UNCTAD (2010). Assessment of the application and implementation of the set. Note by UNCTAD secretariat. Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, 8-12 November 2010.

1. The Intergovernmental Group of Experts on Competition Law and Policy

39. For the last 30 years, the Intergovernmental Group of Experts (IGE) on Competition Law and Policy requested the secretariat to prepare an updated review of capacity-building and technical assistance, taking into account information supplied by member States. Accordingly, member States are requested to provide the secretariat with information on technical cooperation activities and advisory and training services in the area of competition policy in order to enable it to prepare the updated review. In particular, information is requested on:

- (a) Technical cooperation provided or planned by States and international agencies, bilaterally or multilaterally, with identification of priorities and the potential for providing this assistance;
- (b) Bilateral or multilateral assistance received by States; and
- (c) Technical assistance requested by developing countries and countries with economies in transition, identifying specific competition law and policy areas or issues that they wish to receive priority attention.

2. Ad hoc request

40. In addition to the two regional programmes, COMPAL and AFRICOMP, UNCTAD's assistance is provided on an ad hoc basis. With respect to this assistance and advice, UNCTAD conducts a yearly questionnaire which seeks, among other things, descriptions of technical assistance activities, the mode of delivery and funding, as well as assessments of the need for these activities and of the most effective delivery mechanisms.

41. The questionnaire asks beneficiary countries information about the following:

- (a) Information regarding the types and frequency of technical assistance that they had received and their current needs in this area;
- (b) Their views on the most helpful types of assistance, the necessary attributes for technical assistance providers on the relative attributes of public and private sector providers; and
- (c) Their views on the need for enhanced co-ordination among providers.

42. In summary, beneficiary agencies confirm the view that they need more, not less, technical assistance. In this regard, they express the desire for virtually all forms of assistance, although the identified needs varied according to the country's stage of evolution in developing a competition policy. Thus, countries currently drafting competition laws identify a need for assistance with that task. Interestingly, a few more experienced countries also requested such assistance, as they undertake amendments to their law or draft secondary legislation. Some countries, again predominantly those new to competition enforcement, identify a need for assistance in designing their enforcement institutions. Many agencies identify the following as areas of importance to them:

- (a) Handling of investigations, especially with respect to multinational corporations;
- (b) Development of competition-related information database;
- (c) Competition advocacy;
- (d) Relationship of competition legislation with other competition-related laws, such as those relating to consumer protection, business incorporation, intellectual property rights, public utilities, trade and tariffs, etc.

43. An important and sometimes overlooked element of technical assistance in competition policy is the provision of written materials geared to developing countries. Among UNCTAD's contributions in this field are the Model Law on Competition, Handbook on competition legislation with commentaries, Manual on the formulation and enforcement of competition policy, Handbook on investigative tools for competition cases, and reports prepared for the IGE on competition policy. (Chapter IV below provides more details.)

44. At the national level, UNCTAD provides technical assistance related to preparation, adoption, revision or implementation of national competition and legislation, by building national institutional capacity to enforce effective competition legislation. UNCTAD therefore organizes:

- (a) Assistance in the preparation of competition and consumer protection laws and related legislation;
- (b) Consultative meeting to review of draft competition laws with representatives of governments. These activities represent an essential step on the way of competition legislation adoption;
- (c) Intensive courses on competition laws and policies including training courses on evidence-gathering in competition cases;
- (d) Training courses for judges on issues related to competition laws and policies;
- (e) Training courses on the implementation of competition law for newly appointed commissioners; and
- (f) Studies and reports on a possible framework for cooperation on competition policy, trade and related issues for regional integration groupings.

3. Cooperation with regional groupings

45. The Competition and Consumer Policy Branch has an extensive network of cooperating partners with whom many of the analytical and capacity-building activities are implemented. Through the IGE, the Branch has established long-standing cooperation with national competition authorities and competition experts worldwide. This is being further strengthened with selected countries through its national-level capacity-building activities and recently the conduct of voluntary peer reviews. Cooperation with non-governmental organizations, civil society and the private sector is also undertaken by the Branch. As UNCTAD technical cooperation and capacity-building activities were provided both at the national level and within the framework of regional and subregional activities, the relations with regional integration groupings of developing countries have been strengthened to support the development and implementation of regional competition policy.

46. In this regard, UNCTAD worked closely with many regional organizations on issues related to competition and consumer policies. These groupings include CARICOM, CEMAC, COMESA, ECOWAS, SACU, SADEC and WAEMU. UNCTAD provides it support to these institutions in the following area:

- (a) Preparation of competition rules;
- (b) Organization of training courses on competition law and policy;
- (c) Training of judges;
- (d) Training workshop on investigative techniques in assessing competition cases; and

- (e) Training workshop on investigative tool for consumer complaints, etc.

(a) Assistance through regional-specific project

47. As indicated in the introduction, in order to streamline UNCTAD's technical assistance activities and increase impact, two initiatives were taken by the secretariat: an extension of the COMPAL programme and the launch of a regional programme for Africa AFRICACOMP.

(i) COMPAL

48. COMPAL is a programme on competition and consumer protection policies for Latin America, supported by the Swiss State Secretariat for Economic Affairs (SECO). COMPAL is aimed at ensuring the sustainability of competition and consumer protection systems in beneficiary countries. The fundamental goal is to contribute to the improved competitiveness of local enterprises, including those in the informal sector, as well as promoting consumer welfare. The programme provides technical assistance in the area of competition and consumer protection as tools for sustainable development. Five Latin American beneficiary countries (the Plurinational State of Bolivia, Costa Rica, El Salvador, Nicaragua and Peru) benefited from this project during its first phase (2005–2008). Under its second phase (COMPAL II: 2009–2013), it has been enlarged to 10 Latin American countries, including Colombia, Ecuador, Paraguay, Uruguay and the Dominican Republic.¹⁶ An external evaluation of the programme found it a “model for technical assistance”.

(ii) AFRICOMP

49. The new Competition Programme for Africa (AFRICOMP) was officially launched in Geneva on 22 June 2009. AFRICOMP is an effective approach for meeting the increasing demand for assistance in the drafting and enforcement of competition and consumer laws and policies, and the increasing demand for support institutions and capacity-building, and advocacy in the fields of competition and consumer protection. It consists of both national and regional activities and emphasizes the building and use of national and regional expertise.

50. At national level, this includes:

- (a) Support to developing legal institutional frameworks on competition and consumer protection;
- (b) Support to establishing or strengthening national competition and consumer protection institutions;
- (c) Assistance in developing the skills and expertise needed to effectively enforce competition and consumer protection laws and policies; and
- (d) Assistance to the development of competition and consumer protection oriented business and service delivery cultures.

51. At the regional level, this includes:

- (a) Support to integrating regional competition and consumer protection frameworks into their national legal systems; and

¹⁶ For more information about the COMPAL Programme, see “Review of capacity-building and technical assistance in the area of competition law and policy.” Study by the UNCTAD secretariat TD/B/C.I/CLP/5 27 April 2009. Available at http://www.unctad.org/en/docs/ciclpd5_en.pdf. In addition, see the website of COMPAL at <http://compal.unctad.org>.

(b) Support for the operation of effective regional competition and consumer protection institutions.

52. The AFRICOMP programme is open to sub-Saharan African countries (subject to availability of funds). So far, an initial group of five countries is participating in the ARFRICOMP programme (Ghana, Lesotho, Malawi, Swaziland and Zambia). A further group of five countries is actively associated with the programme based on other sources of funding.

4. Peer reviews and follow-up

53. With a view to ensuring coherence between overall governmental approaches to privatization and liberalization of trade and investment regimes, UNCTAD has initiated the organization of ad hoc voluntary peer reviews on competition law and policy. Such reviews provide an ideal forum to review how economic reforms can promote development and ensure that markets work for the poor. Since the Fifth United Nations Conference to Review all Aspect of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, the following countries were reviewed: Kenya and Jamaica (2005), Tunisia (2006), Costa Rica (2008), Indonesia (2009) and Armenia (2010). Serbia's competition policy is planned to be reviewed during the eleventh session of the Intergovernmental Group of Experts on Competition Law and Policy in July 2011. The eighth session of the Intergovernmental Group of Experts on Competition Law and Policy provided a framework within which UNCTAD could carry out a voluntary peer review on competition law and policy of WAEMU and its eight member States. It was the first-ever review of a regional grouping's competition policy and it highlighted the challenges and opportunities which developing countries face in strengthening their regional cooperation and integration schemes. The peer reviews have become an appreciated part of UNCTAD work on technical assistance. It gave rise to a range of recommendations on how the application of the legislation might be made more effective at regional and national levels and through UNCTAD to build capacity for the enforcement and advocacy of competition policy.

II. Assessment of effectiveness of capacity-building

54. Determining how best to design technical assistance programmes to interact with nascent and financially constrained competition agencies is a difficult and complex task. This exercise requires information and data that can be difficult to collect to conduct this type of exercise. Meanwhile, efforts have been undertaken by actors in this field and academics to carry out *ex-post* evaluations of programmes implemented in the early 1990s. Among these actors, the United States Federal Trade Commission (FTC) and the Department of Justice have attempted to conduct an assessment of their more than 100 experiences in providing technical assistance to their counterpart around the globe. Other international organizations and scholars have also begun to address this issue.

A. United States Federal Trade Commission and Department of Justice experiences in capacity-building and technical assistance in competition law and policy¹⁷

55. In February 2008, the FTC and the Antitrust Division of the Department of Justice held a public workshop on technical assistance programmes to help foreign jurisdictions develop their laws and policies on competition and consumer protection. This workshop was the first comprehensive, public self-assessment of their technical assistance programmes. It yielded many valuable insights, including the importance of planning, the vital role cooperative relationships play in the delivery of technical assistance, the need for long-term engagement (including the importance of providing assistance to competitions agencies even as they mature), and the value of comprehensive programmes that include training for supporting institutions (e.g. judiciary, regulators and private sector) that play a critical role in ensuring the success of a competition regime. The workshop recommended five general themes that should guide the agencies' future technical assistance activities:

(a) A good technical assistance programme is one that focuses both on what is being provided to recipients as well as what can be learned from them. Importantly, technical assistance from agency providers can serve as a critical first step to build an effective, long-term relationship in which the provider and recipient agencies cooperate on matters and issues of common concern after the formal technical assistance programme has ended;

(b) Technical assistance is most effective when there is long-term engagement between the provider and recipient. At least 10 years are needed in order for providers to adequately acquire knowledge of local conditions, establish credibility, and support the formation of strong personal relationships;

(c) The provision of technical assistance to more mature agencies and supporting institutions should not be ignored. Agencies that have been in existence for at least several years, but are still not at a level comparable to provider agencies, can benefit substantially from targeted technical assistance;

(d) Cooperation between donors, providers, and recipients is beneficial, and more and more can be done in this regards. Agency providers and recipients should work together with non-governmental advisors;

(e) Planning and ongoing evaluation of the effectiveness of technical assistance programmes are essential. Donors, providers and recipients should be actively engaged in this process.

B. Studies conducted by international organizations

1. OECD¹⁸

56 In 2004, OECD issued a note on "Challenges/obstacles faced by competition authorities in achieving greater economic development through the promotion of

¹⁷ See United States Federal Trade Commission, A Conference on Charting the Future Course of International Technical Assistance, February 6, 2008, available at <http://www.justice.gov/atr/public/reports/250908.pdf>.

¹⁸ This section is based on OECD (2009). Challenges faced by young competition authorities. Note by the secretariat.

competition”. This note included an extensive discussion of a condition facing all new competition agencies – the lack of a competition culture in the country.

57. OECD conducted several peer reviews of “young” competition agencies since 2001. What emerged from these reviews is that in virtually every country the original competition law was found to be inadequate in some regard.

58. Other problems were common but not universal. Several countries, but not all, suffered from inadequate financial resources, causing high staff turnover. Some whose laws included merger review lacked efficient procedures for dealing with them, either because of low notification thresholds or the lack of pre-merger notification or an inefficient institutional structure.

59. Some countries experienced delays and inefficiency in judicial review. Some agencies that had responsibilities in addition to competition enforcement – including unfair competition, anti-dumping, State aid, public procurement and consumer protection – found themselves devoting too much time and resources to these activities and not enough to competition, at least in the early years.

60. Several countries were slow in developing working relationships with sector regulators, while a few excelled in this area. A lack of independence was a problem for some of these agencies at the outset, but the situation improved over time, either through new legislation creating structural independence or by acquiring it de facto.

2. The International Competition Network

61. The ICN Working Group on Capacity–Building and Competition Implementation has undertaken a detailed study of technical assistance provided to newer competition agencies to identify how the technical assistance provided to newer competition agencies to identify how the technical assistance needs of newer competition agencies can best be assessed, and which models of technical assistance work best at the various stages of a competition agency development.¹⁹ The following summary emerged from that effort:

(a) Design of a successful programme of technical assistance requires a process of flexible and active collaboration between the recipient, the donor, and the provider of the assistance;

(b) An assessment of the needs of a new competition agency and the environment within which it will operate is an important preliminary step in the design of an effective technical assistance programme;

(c) Activities selected as part of technical assistance project should be clearly linked to the goals and objectives of the programme;

(d) Providers of technical assistance should be knowledgeable and experienced in the application of competition law. Current or prior employment in competition agency is valued highly;

(e) The mix of technical assistance should reflect the present capacity of the agency to absorb such assistance, and should evolve in line with changes in the agency’s absorptive capacity;

(f) Long-term advisors and internships or study missions abroad can be very effective components of technical assistance programme for a more mature agency;

¹⁹ ICN (2007). Finding related to technical assistance for newer competition agency, May.

(g) Shorter-term intervention such as providing advisors and attendance at national, regional, or international workshops can be a useful form of technical assistance for agencies with a limited degree of absorptive capacity and in countries with modest levels of socio-economic development. As the conditions improve, however, the benefits from such interventions decline and consideration should be given to eventually phasing out;

(h) Assistance with legislative drafting can be an especially useful form of technical assistance for countries with young competition authorities, authorities with inexperienced staff and those experiencing turnover in senior leadership, or for countries experiencing modest levels of socio-economic development;

(i) Technical assistance is more likely to be successful in jurisdiction with a higher degree of market freedom, and less likely to be successful in a more controlled economy;

(j) Technical assistance can help improve the standing of the competition authorities, in relation to the government, the judiciary, civil society, the community of competition professionals and the business community.

3. World Bank

62. In 2004, the World Bank realized a report based on the result of a needs assessment questionnaire issued to 48 competition agencies in transition and developing countries.²⁰

63. The analysis of the needs assessment questionnaire showed there are significant heterogeneities among competition agencies' mandates, exempted sectors, professional personnel endowment and capacity needs.

C. Academic studies

64. Using a survey data on technical assistance projects that was collected by the International Competition Network's Competition Policy Implementation Working Group during 2004 and 2005, Evenett (2006)²¹ examined whether the impact of each type of technical assistance varies with the capacity of a recipient authority to absorb technical assistance and the socio-economic development of the recipient country. He found that not all forms of technical assistance are alike in their effects and the impact on recipient authority performance appears to vary systematically with absorptive capacity and socio-economic development.

65. In a study relating to the means of improving competition agencies, Sokol (2009)²² concluded that (a) international antitrust institutions play an important role in improving agency capacity; (b) more resources should be put to long-term assistance provided by developed-world antitrust agency staff; (c) technical assistance will be more effective when the requirements for such assistance are better understood by both donor and recipient; and (d) improved coordination across agencies has proven to be incredibly effective as a way to transmit antitrust norms and improved capacity. Working on the nuts and bolts of everyday

²⁰ Tomas Serebrisky (2004). What we know about competition agencies in emerging and transition countries? World Bank Policy Research Working paper 3221.

²¹ Simon J. Evenett (2006). "The effectiveness of technical assistance, socio-economic development, and the absorptive capacity of competition authorities". University of St. Gallen and CEPR, 31 August.

²² D.D. Sokol (2009). "The future of international antitrust and improving antitrust agency capacity". *Northwestern University Law Review*. Vol. 103, N°2.

coordination and cooperation across different antitrust issues can improve the effectiveness of younger agencies.

66. Using a data set of responses from 38 competition agencies that have received technical assistance for the period 1996–2003, Nicholson, Sokol and Stiegert²³ demonstrate that issues of timing and absorptive capacity of particular forms of technical assistance within a larger political economy consideration maximize the impact and effectiveness of technical assistance provided to competition agencies.

67. Another recent study attempted to assess the effectiveness of long-term advisors (LTAs) and short-term interventions (STIs) in technical assistance and capacity.²⁴ Based on a survey of competition agencies that received LTAs and STIs, conducted by the ICN in 2005, the study found that recipient agencies absorb LTAs and STIs best when the agency head has a rank of minister or higher and/or when agencies has prosecutorial discretion. The study also found that bilateral donor relationships did remarkably better in helping the agencies with their strategic mission.

68. A common theme of the studies is that the status of the competition agency within the domestic political environment positively affects the value of technical assistance. One study found that technical assistance itself raises status. Long-term relationships between donors and recipients also are important, and within those long-term advisors can be more effective than short-term interventions. But different methods are appropriate for different objectives and at different stages in the development of a new competition agency.

III. Challenges

69. In addition to the issues identified by the reports reviewed above, and given that most competition agencies are in the early stage of enforcing their laws, they have to overcome many other challenges in order to create strong foundations that would allow them to fulfil their legal obligations effectively.²⁵ Some of these challenges are related to the functioning of the competition agency. Others are inherent to the environment within which the agency operates.

70. As regards the functioning of the competition agency, in a seminal study on how new competition agencies enforce their law, William Kavacic (1997)²⁶ insisted that transplantation of Western-style of competition law into a developing economy would be a risky initiative. Indeed, the challenges faced by these countries do not exist in those countries that had long experience with competition policy, namely, the meagre resources available for the new competition agencies; the limited indigenous expertise on competition law and policy, the lack of competition culture, a deficient judicial systems and a limited access to business information.

²³ Nicholson MW, Sokol DD and Stiegert KW (2006). “Technical Assistance for Law and Economics: An Empirical Analysis in Antitrust/Competition Policy”. Legal studies research Paper Series, Paper N° 1024, University of Wisconsin Law School, November 2006.

²⁴ Sokol DD and Stiegert KW (2008). “An Empirical Evaluation of Long term Advisors and Short term Interventions in Technical Assistance and Capacity Building”. The Global Competition Law Centre Working Papers Series, College of Europe. GCLC/02/08.

²⁵ This issue is discussed in-depth in UNCTAD Secretariat report “Foundations of an effective competition agency”. Note by the secretariat, 2011.

²⁶ See Kovacic WE (1997), Getting Started: Creating New Competition Policy Institution In Transition Economies, 23 Brooklyn Journal Of international Law 403 (1997). Quoted in OECD, Challenges Faced by Young Competition Authorities, Note by the Secretariat (2009), Global Forum on Competition, 19-20 February 2009.

71. As regards the environment within which the competition agency operates UNCTAD identified the following²⁷:

(a) Conflict with other policy objectives – In some developing countries, the governments are reluctant to enforce competition law because they, rightly or wrongly, believe that these actions unnecessarily constrain the ability of the governments to exercise their sovereign rights to achieve other policy objectives. For example, given the fact that one of the major development objectives of developing countries is to generate employment opportunities, they would be hesitant to expose their small and medium-sized enterprises to foreign competition because of the former's potential to provide employment opportunities;

(b) Resistance from vested interests – Business people are understandably reluctant to see profitability eroded by increased competition. Thus, it is not unusual for them to petition government in order to maintain barriers to entry and practices that facilitate collusion. For example, a business association may act to oppose every application filed with a regulatory body by its members' competitors without regard to the merits of the applications, as a way to protect its members' profits. An important capacity to develop early in a new competition agency is to effectively counter-lobby in such situations;

(c) Lack of good governance – One of the reasons for the failure of most developing countries to implement policy measures aimed at spurring economic growth is the lack of good governance. In these countries, a politics-business nexus, fuelled by the attitude of the people in power to make decisions based on their personal preference and connection, rather than on merits, has further exacerbated this problem. In the smaller developing countries, where people tend to know each other fairly well and there is a strong cultural tradition to favour the relatives, friends and cadres, it is almost impossible to root out corruption and mal-governance;

(d) Tension with sector-specific regulators – Despite massive changes in technology, several segments of the infrastructure in developing countries are natural monopolies, because of the limited size of markets and the lack of entrepreneurial zeal to make risky investments in sectors with high gestation periods. Moreover, competition authorities do not have the required competence to deal with such complex issues as redistributive policy (through cross-subsidization) and universal service obligations. Therefore, sector-specific regulators will continue to play a major role in ensuring that natural monopolies do not abuse their position in the market, and make optimal arrangements for the supply of public goods, for which they were created. While simultaneous jurisdiction is not uncommon in developed countries, this is a source of tension in least developing countries because of a lack of clear-cut demarcation of authorities and responsibilities;

(e) Resource and capacity constraints – Resource and capacity constraints are perhaps among the most significant problems facing competition authorities in developing economies. Whilst the dismal resource base is linked to the fiscal crunch that confronts least developing countries and the need to balance and prioritize competing demands on the government budget, it is also a reflection of an absence of political backing for competition policy and law. Exclusive dependence on State funds has a disastrous impact on the capacity of the competition authority in terms of quality and quantity of staff, opportunities

²⁷ Adhikari R (2004). "Prerequisite for development-oriented competition policy implementation: A case study of Nepal" in Brusick, P. at al. (eds.) (2004). "Competition, Competitiveness and Development: Lessons from Developing Countries". UNCTAD, Geneva.

for training and human resource development, and support facilities and infrastructure, while also undermining its independence to a large extent. But dependence on, for example, merger filing fees can provide incentives to set thresholds too low;

(f) Lack of political will and independence – A common feature in most developing economies is the absence of political ownership and support for competition policy. This follows both from the power of vested interests and from poor governance more broadly, as cited above. The absence of political ownership translates to political interference in the activities of the competition agency, undermining its independence as a professional “watchdog” of competition. Several features of the environment in which competition agencies in developing countries operate have been identified. Many relate to the political environment and to resistance to the possible redistributive effects of effective competition policy. Flowing from these conditions, the competition agency is often weakly resourced and under-empowered. However, as noted in the earlier section, while technical assistance is more effective in situations where the competition agency has higher domestic political status, the technical assistance itself can raise the status

IV. Issues for discussion

72. Delegates may wish to consider the following issues for consultation during the round table:

(a) Are there types or timing of technical assistance that are more effective in raising the domestic political status of a competition agency?

(b) The optimal duration for a technical assistance project in competition law and policy to be effective has been estimated at 10 years based on the United States’ experience in providing this type of assistance. Do member States share the same experience?

(c) Cooperation between donors, providers and recipients is beneficial. What can be done to make this cooperation win–win for each stakeholder? How can coordination be done in a context where there seems to be competition among providers of technical assistance to developing countries and economies in transition?

(d) Given that the impact of technical assistance on recipient authority performance appears to vary systematically with its absorptive capacity and socio-economic development, how can the absorptive capacity of the recipient agency be improved?

(e) Planning and evaluation of the effectiveness of technical assistance programmes have been pointed out as essential to enhance the enforcement capabilities of a young competition agency. What should be evaluated, that is, what are the indicators of success or failure? When is evaluation most useful, either for the recipient or the donor? Do member States have experience of changes made as a result of earlier evaluations?

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