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**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES
IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH
THE PROMOTION OF COMPETITION**

Note by the Secretariat

-- Session II --

This postscript note by the Secretariat supplements the Background Note for Session II. It is submitted FOR DISCUSSION under Session II of the Global Forum on Competition to be held on 12-13 February 2004.

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

-- *Postscript Secretariat Note* --

1. This Note is intended to serve as a “postscript” to the Secretariat’s Background Note for Session II. First, it discusses in general terms the extent and the implications of the correspondence between the kinds of obstacles identified in the Secretariat Note and those in the contributions that have been submitted as of 21th January. Second, it sets forth a very brief analytical summary of each of the individual contributions.

1. Analysing obstacles in general and in specific fact situations

2. The Background Note contains two main parts. First, it proposes and discusses four categories of obstacles to achieving economic growth through competition policy. Its first category is obstacles resulting from the lack of competition culture, which the note defines as political support for, and the use of, competition policy as the “default” or “normal” way of organising economic activity. This is the broadest of the categories – in a sense the “default” category that contains all obstacles other than certain additional obstacles that are specific to (a) small developing economies, (b) informal sectors, and (c) institutional adaptation to the introduction of pro-competition laws and policies.

3. Second, the Background Note¹ provides brief examples of how competition authorities in all kinds of countries have dealt with a variety of specific problems or types of problems. In addition to providing examples that could be discussed at the GFC meeting, that discussion was intended to encourage GFC participants to provide and discuss additional examples from their own experience.

4. The contributions submitted make clear that some participants found the Secretariat’s categorisation useful. At the same time, the submissions also show that additional, somewhat different categories may be as or more useful. For example, China² describes problems in halting anticompetitive action by regional and local governments. Very similar problems have been experienced in Canada, Indonesia³, Mexico⁴, Russia⁵, the United States, and (within Europe) the European Union and these might be deemed specific to *large* economies. By contrast, the obstacles discussed by Jamaica appear to relate more to its degree of development than to its size, and some of the same obstacles are also discussed by economies that are much less small in a conventional sense. This raises the question whether it might be more useful, for example, to have a category of developing economies with “large” and “small” subcategories.

5. In any event, the Background Note’s categories can certainly serve the main purpose of the note – to stimulate and help organise the discussion of the obstacles competition authorities have faced in using competition law and policy to promote economic growth. In this regard, it is noteworthy that while the contributions contain a wealth of information on how competition authorities have sought to deal with resource issues and legal and economic problems, they do not contain many specific examples of their experience in dealing with specific attempts by other government agencies to prevent the introduction of competition in particular situations. For example, the Secretariat note refers to a variety of specific fact situations (*e.g.*, paragraphs 74-79, 81-82, 85-86, and 88-89). Since GFC participants have said that they tend to find it more useful to discuss competition issues using concrete examples than general propositions, it may be useful for those who will attend the February meeting to consider what examples along these lines they may be able to share.

6. As part of the discussion during this session, participants may wish to consider whether the Secretariat should pursue these issues through a further paper that (a) incorporates points made during the meeting and/or (b) reflects additional, follow-up contributions by participants. Two kinds of issues might be pursued. First, the Secretariat might give additional consideration to the categorisation system. Second, if participants are prepared to submit additional contributions describing specific instances in which they have had to deal with attempts by other government entities to thwart the introduction of competition, the Secretariat might seek to compile a collection of “stories” that might be useful. For example, China’s submission states that as a state-created entity, a competition authority has little ability to deal with anticompetitive state intervention. This may in fact be the case in China, but it might be useful to Chinese officials to know, for example, that the Russian competition authority can and does bring cases to halt anticompetitive intervention by Government Ministries.

2. Contributions received

7. While referring to challenges created by economic conditions, Russia’s⁶ contribution focuses on problems it has had with its law. Despite a 2002 amendment that doubled the assets threshold that triggers a merger pre-notification requirement, the Ministry’s resources were stretched – and misallocated – by the need to review about 10,000 notifications in 2003. About 100 transactions were rejected, and many more were approved with unusual conditions that may themselves be a reflection of Russia’s economic history. The conditions mentioned in the contribution are requirements that the merged firm either (a) inform MAP concerning its production and sales levels, with justifications for changes in those levels, or (b) inform MAP in advance concerning any plan to change its production and sales policies.

8. Jamaica⁷ begins its contribution by referring to the special problems faced by “small developing economies,” which it describes as limited resources and pressing social problems. Interestingly, both this description and the note itself focus on problems associated with the developing aspect of its economy rather than with its small size. There is no discussion, for example, of specific problems relating to the difficulty of firms being able to achieve economies of scale. The economic factors given most emphasis concern the history of protectionism and state control, which apparently contribute to continuing protectionist tendencies and to an unwillingness of consumers to shop around. The contribution emphasizes the serious resources issues that face the competition authority, but it regards deficient legislation as its biggest obstacle. Jamaica’s initial competition law created a commission structure similar to that used in many other countries and its Supreme Court struck down the system as contrary to natural justice because the Commission acted as investigator and adjudicator.

9. Like Jamaica, South Africa⁸ notes past policies of protectionism, but South Africa’s new law and institutions had significant public support because they were created as part of a broad-based commitment to reform on a variety of fronts. Its contribution focuses on the competition institutions’ need to operate in a manner that would earn the respect of a skeptical business community and injecting a measure of realism into the expectations of the public. It has pursued these goals with some success by maximising transparency and accessibility. Also, whereas some new competition authorities countries find that their attempts to implement an enforcement programme are frustrated by judges who lack understanding and perhaps sympathy with competition law concepts, South Africa’s independent Tribunal has both expertise and a useful stake in the competition system while at the same time contributing to the perception and reality for fairness and due process.

10. Romania’s⁹ contribution starts with the basic proposition that the source of the main challenge is the attitude of resistance that exists among those who expect to lose from economic and administrative change. The contribution divides the challenges into two categories – those relating to the external environment and those relating to internal, intra-organisational matters. External challenges relate, for example, to the need to create relationships with other public authorities, including the Parliament, and to

amend the Competition Law and the Law on State Aid. Internal challenges relate to the shortage of financial and human resources, as well as the lack of information for both research and cases.

11. The report by Kenya¹⁰ touches upon a variety of legal, economic, and cultural obstacles. For example, Kenya's Tribunal has not been very busy, apparently because the court system is seen as slow and uncertain. When complaints are made, they are often settled through some sort of agreement among the parties. Such settlements can be efficient ways to end illegal conduct, but they may sometimes resolve matters in ways that serve the interests of the parties rather than those of the public. Also, Kenya's shortage of investment capital sometimes means that firms ordered to divest assets may not be able to find buyers. The report also notes that some members of Kenya's Parliament thought that the law should be applied to curtail the economic predominance of a certain group of Kenyans in relation to another group that was deemed to be indigenous. This appears to be an example of what scholars cited in the Secretariat note as "the phenomenon of the market-dominant minority." (Indonesia¹¹ is another country in which some proponents of competition law apparently thought that it should be to reduce the power of a minority, not merely to end market abuses. It would be interesting to know more about what pressures competition authorities in this situation have faced, and how they have dealt with them).

12. Tunisia's¹² contribution focuses mostly on legal problems its "Conseil de la Concurrence" has faced. Due to Tunisia's economic conditions and desire to take into account various socio-economic considerations, the law originally exempted products and services "de première nécessité" and in sectors where price competition was limited due to monopoly or other reasons. The Conseil has sought to reduce concern about the potential conflict between competition law and other public goals by stressing that competition is not an end in itself, but a means of promoting consumer welfare. The Conseil has also dealt in a creative way with various gaps and ambiguities in the law, for example by finding the law applicable to public entities when they engage in economic activity, promoting knowledge about the law, and expanding its ability to protect the public interest even though it lacks the authority to bring competition cases on its own.

13. Brazil's¹³ lengthy contribution addresses a multitude of topics, including scarce resources and an inefficient institutional structure. With respect to anti-cartel enforcement, the note refers to the competition authority's inability to impose criminal sanctions and to a national tradition of tolerating cartels. These are common problems, and the contribution's stress on the importance of international co-operation is a consensus position, but its statement that cartels are usually international could use some clarification. The contribution also mentions the results of a recent meeting at which mostly private-sector participants identified the three requirements for increased Brazilian competitiveness as strengthening the legal system as a whole, simplifying bureaucratic rules and procedures, and improving infrastructure. In a section devoted to balancing public policy goals for economic development, the contribution explains that for a two-year period the competition authority sent the Secretary of Labour an estimate of the number of jobs threatened by each merger, and over time it has been shown that mergers have increased employment. It also discloses an apparent concern over the "denationalisation" that occurs when a foreign enterprise obtains a majority interest in a domestic enterprise. While it is clearly correct that foreign investment can in some circumstances be anticompetitive, it is unclear how Brazil's competition authority regards denationalisation in and of itself.

14. The report by China¹⁴ discusses a number of interrelated obstacles. It begins by noting that despite recent liberalisation, there is a tendency for the state to intervene too much in markets. This is a common problem, but compared to some other transition countries, China seems to regard itself as powerless to deal with this situation. It may be true that competition authorities in China will remain relatively powerless to halt anticompetitive state intervention, because the report later points out that all officials and agencies must accept guidance from higher authority. On the other hand, Russia and some other transition countries have given their competition agencies specific authority to prevent Ministries and

other government bodies from taking certain types of anticompetitive action, and that experience might be useful to China. Moreover, it is noteworthy that of the two state interventions described in China's report, it appears that the first – a reorganisation of the petroleum sector by the State Council – would be exempt from challenge under all or most competition laws, whereas the second – a price fixing arrangement facilitated by a subsequently invalidated government warning against charging less than average industry cost – would be illegal under most competition systems. China also refers to the problems it has with anticompetitive action by regional and local governments – conduct that is currently banned by the Unfair Competition Law but remains largely unchecked because the only remedy is to make a report to the administrative department that supervises the offending entity or official. Various other countries apply real sanctions to offending officials or local/regional government entities, and it could be interesting to discuss whether and to what extent their experience could be useful to China.

15. Pakistan's¹⁵ contribution exemplifies several of the points made in previous GFC meetings concerning the application of competition principles in developing countries. For example, it mentions the tendency of government policies to seek immediate benefits – a tendency that can reflect either short-sightedness or a real need to alleviate human suffering. It also discusses how even after privatisation, state regulation of markets can distort competition, and it notes in particular a tendency to undervalue currencies, thereby facilitating exports but reducing the domestic competition that greater imports could produce. The contribution also offers an interesting insight into the resource problems that face most new competition authorities, noting that the weakness resulting from under-funding makes it difficult to demonstrate the kind of beneficial impact that would demonstrate the value of competition.

16. The contribution of Albania's¹⁶ Competition Department addresses obstacles in each of the four categories identified in the Secretariat's Background Note. The lack of a competition culture is described as the most fundamental obstacle, manifested in deficient legislation among other things. In addition, the contribution notes "small economy" problems, the presence of a substantial informal sector, and slow adaptation by some institutions to the principles of competition. The Department had little or no staff for many years, but although this precluded implementation of a law enforcement programme, the Department has proved itself a useful competition advocate. As those who attended the second GFC meeting may recall, in 2001 the 2-person Competition Department staff was able to defeat a Ministry proposal to reduce competition in the banking sector by persuading the Central Bank to oppose the proposal. A new competition law went into effect on 1 December 2003, and work is underway to make competition policy a more prominent aspect of Albania's approach to economic issues.

NOTES

1. Background note by the Secretariat, CCNM/GF/COMP(2003)7.
2. Contribution from China, CCNM/GF/COMP/WD(2004)16.
3. Contribution from Indonesia, CCNM/GF/COMP/WD(2004)22.
4. Contribution from Mexico, CCNM/GF/COMP/WD(2004)24.
5. Contribution from the Russian Federation, CCNM/GF/COMP/WD(2004)12.
6. Contribution from Russian Federation (cf. note 5).
7. Contribution from Jamaica, CCNM/GF/COMP/WD(2004)9.
8. Contribution from South Africa, CCNM/GF/COMP/WD(2004)10.
9. Contribution from Romania, CCNM/GF/COMP/WD(2004)6.
10. Contribution from Kenya, CCNM/GF/COMP/WD(2004)8.
11. Contribution from Indonesia (cf. note 3).
12. Contribution de la Tunisie, CCNM/GF/COMP/WD(2004)15.
13. Contribution from Brazil (CADE), CCNM/GF/COMP/WD(2004)4.
14. Contribution from China (cf. note 2).
15. Contribution from Pakistan, CCNM/GF/COMP/WD(2004)17.
16. Contribution from Albania, CCNM/GF/COMP/WD(2004)20.