Competition Law and Policy in Egypt

December 3, 2006
The Trade-Related Assistance Center (TRAC) was established by the American Chamber of Commerce in Egypt (AmCham) in October 2005 to serve as a trade resource for both local and international businesses on issues related to Egypt’s bilateral and multilateral trade agreements, as well as its agreements with the World Trade Organization (WTO). Through its four components, the USAID-backed TRAC project works to:

- Establish a working channel between the private sector and the government and convey private sector standpoints and concerns to policymakers to be taken into consideration at the negotiating table (Ad Hoc and Awareness component).

- Establish a user-friendly document repository, which provides the business community access to reliable trade information (Help Desk component).

- Help enhance Egypt’s competitiveness, through institutional and trade capacity building and upgrading human resources in relation to the key areas of foreign trade (Training component).

- Maintain a web portal that provides information on trade agreements, trade regulations and the impact of these agreements on various sectors of the economy (IT component).
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With the aim of promoting a competition culture and tackling anti-competitive behavior, Egypt ratified a competition law in February 2005. The Trade-Related Assistance Center (TRAC) of the American Chamber of Commerce in Egypt dedicated its 2006 annual conference to the topic of “Competition Law and Policy in Egypt.”

Having held a brainstorming session a few months earlier with the Egyptian Competition Authority (ECA) on “Abuse of Dominance and Competition” (TRAC Report, September 2006), TRAC felt bound to take the issue a step further. The conference encouraged a free and open discussion between the Egyptian business community, the ECA, academics, NGOs and consumers on this highly sensitive and critical issue in an effort to utilize the law to its fullest potential.

One point made clear throughout the conference was that the competition law could not thrive on its own, but rather required a more conducive liberalized environment to flourish. It was felt that a supportive culture of competition still had a long way to go before making the private sector and consumers cognizant of the benefits of enforcing competition law in Egypt. It was important to stress that the government is not exempt. Gone are the days when public sector companies were at liberty to abuse their position in the Egyptian market with monopolistic practices. Private and public sector companies are held equally accountable under the competition law. The sole objective of ECA, which is responsible for applying the law, is to safeguard against any abusive practices and to allow fair and productive competition to prevail in the market for consumers’ welfare.

A well-enforced competition law will attract more foreign direct investment to Egypt without necessarily crowding out existing competitive players—notably among the small and medium enterprises, which need to preserve their niche in the domestic market. Lastly, it was made clear that the competition law was not carved in stone and as the economy is continuously reforming itself into a market economy, the law should be allowed to evolve and be refined in accordance with the developments of the Egyptian market and the requirements of its private sector growth.

Ambassador,

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Director,
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In recognition of the growing importance of preserving a healthy, competitive business environment to sustain trade liberalization reform in Egypt, the Trade-Related Assistance Center (TRAC) of the American Chamber of Commerce in Egypt (AmCham) dedicated its annual conference to “Competition Law and Policy.” The conference took place on December 3, 2006 at the Semiramis InterContinental Hotel, and was organized in cooperation with the Egyptian Competition Authority (ECA) and the Commercial Law Development Program of the US Department of Commerce. The conference brought together numerous international experts and practitioners in the field of competition policy, and attracted some 400 attendees from the private sector, government and academia.

The conference addressed the private sector, the relevant segments of the public sector and regulatory bodies with the purpose of raising awareness of both the opportunities competition law offers and the restrictions it imposes. In general, it sought to drive home the notion that the issue of competition law is a complex and dynamic one, constantly evolving in tandem with the evolution of the market. In this spirit, it was stressed that while international and regional trade cooperation and building on the experiences of others will facilitate an increasingly robust competition authority, competition law must be enforced in a manner relevant to domestic conditions. Conversely, as vital as the enforcement of the law is, priority must simultaneously be given to spreading a competition culture in general, and to raising the awareness of the private sector in particular, in order to generate higher levels of voluntary compliance.

However, it was also noted that another reason why raising awareness has become so important was that competition law and policy are being increasingly incorporated in bilateral and regional trade agreements, including US free trade agreements and European partnership agreements. The private sector, in particular, needs to be well informed and regularly updated on the substance of these provisions.
After welcoming participants, keynote speaker and AmCham President Taher Helmy commented on the long road to appreciating how crucial competition is to private sector development in Egypt. Competition law was on the agenda of the People’s Assembly for ten years before it was finally ratified in 2005. It is now widely acknowledged that competition policy, which aims to enhance free trade, forms an essential and integral component of the economic reform process. Competition policy and law, according to Helmy, intends to ensure that the disintegration of government monopolies through privatization does not result in private sector monopolies.

Additionally, the competition law in Egypt has development goals of raising the general standards of living and promoting the interests of consumers. According to the World Bank, competition policy has four main objectives:

1. The maintenance and protection of effective competition
2. Eliminating restraints on competition
3. Promoting the freedom of trade and market access
4. Protecting the welfare of the consumer

Helmy also noted that effective competition authorities form the cornerstone of any market economy. These are the bodies charged with enforcing competition law with a view to maintaining a healthy and fair business environment while enabling small and medium-size enterprises to thrive. On this note, he introduced the next speaker, Mona Yassine, chairwoman of the Egyptian Competition Authority (ECA).

Egypt’s competition law, the Law of Protection of Competition and Prohibition of Monopolistic Practices, was ratified in February 2005, the executive regulations for this law were issued in August 2005, and the executive director of the ECA was appointed in January 2006. The ECA serves as a government advisory body focusing primarily on issues related to the privatization process and how companies stand with respect to the competition law. The agency received its first complaint in April of the same year, which can be regarded as its operational commencement date. Since then, the ECA has received seven complaints, four of which have been resolved.
To better acquaint her audience with the ECA’s work, Yassine offered a quick summary of the nature of the complaints it has handled to date. These included complaints against companies accused of exploiting their dominant positions in the market: one through price discrimination, another by selling below market prices, and a third complaint against an alleged cartel. The ECA received two more notifications from the Minister of Trade and Industry requesting investigations into price hikes by the cement and steel industry. These investigations are currently in progress.

Another important task of the ECA is to raise public awareness of its mission. To date, the authority has organized 25 seminars and workshops intended to better acquaint the private sector, the media and consumers with competition law and the ECA’s role.

Of the 15 members on the ECA board of directors, the overwhelming majority are from the private sector, with four government representatives. The ECA has engaged a young staff with diverse skills and a group of highly qualified administrators, lawyers, market analysts and economists. It operates in as unbiased and scientifically objective a manner as possible, said Yassine. When a complaint is received, it is thoroughly researched before submission to the board for a decision. Cases recommended for litigation are referred to the competent minister, who initiates prosecution procedures—if a settlement cannot be reached with the offending party. While acknowledging the role of the media in raising public awareness about violations of competition law, Yassine said she thought it would be more constructive if complaints concerning alleged violations of the law were brought directly to the ECA rather than aired in public.
QUESTION & ANSWER SESSION

Q: How does one file a complaint with the authority? Is there a specific form to fill out or format that should be followed? How long does it take for a complaint to be processed?

Yassine: All you need to do is to write a letter, stating the name of the company concerned, the allegation and an account of the relevant details, and to submit this to the ECA along with any available corroborative documentation. After receiving it, the authority conducts initial research to determine whether the allegation in question falls under the Competition Law and whether there are, indeed, grounds for complaint. The ECA is obliged to notify the complainant within a period of at most a month as to whether or not the complaint falls under its competence.

The period needed to resolve a case depends heavily on the nature of the allegation and the information available. Sometimes, however, the ECA may be able to resolve a complaint relatively quickly on the basis of a decision taken on a previous case of a similar nature. Precedents definitely shorten the amount of investigation required and the decision-taking period. The ECA is also empowered to determine whether investigative action should be halted immediately or whether, instead, a case should be referred to the minister for possible litigation or imposition of a fine.

Q: What is the distinction between dumping and predatory pricing?

Yassine: Dumping is about selling products abroad at prices lower than those at which they are sold in the country of origin, whereas predatory pricing is to charge rates below production costs in the domestic market. Under certain circumstances, a new company that is just starting up might sell at below-market prices in order to carve a niche for itself in the market. However, it is intolerable for companies that already have been in the market for some time do the same.

Q: Why did it take ten years for the competition law to come into effect? Are public utilities exempted from this law?

Yassine: The competition law has to be consistent with other government policies, so the law could not come out at the time of a state-controlled economy. Although public sector companies are not exempted, public utilities, such as electricity companies, are.
Baha Aley Eldin, associate professor of commercial law at Menoufia University, moderated the first session. He opened by drawing attention to the ten year long process it took to realize Egypt’s new competition law, beginning with the production of the first draft of this law in 1995 and culminating with the passage of the competition law bill in 2005 and the establishment of the ECA in 2006. About midway during this period—in 1999 and 2000—the media increasingly drew attention to the continued existence of cartels in certain fields, especially in the cement industry. This issue has yet to be fully addressed, Eldin said, and debate is still raging on why the cartels have not been abolished. This would allow prices to decrease, which many had expected to be the natural and immediate result of the competition law’s ratification. Although he sympathized with this sense of disappointment, Eldin reminded the audience of the very short time that the competition law and the ECA have been in operation. It was precisely with such issues and sentiments in mind that the conference was being held and it was the organizers’ hope to help clarify prevailing misconceptions and to explain the role of competition law and the ECA. Eldin then introduced the first speaker of this session, Khaled Attia, executive director of the ECA.

### 1.1 The Scope and Application of the Egyptian Competition Law

Attia’s presentation was divided into two main sections: explaining the law in detail and describing the operations and principles of the ECA.

#### A. The Egyptian Competition Law

(i) Prevailing misconceptions about the law:

One of the more common popular misperceptions about the Competition Law, according Attia, pertains to the definition of “dominant position.” Contrary to the commonly held view, a dominant market share alone does not constitute abusive dominance. Rather, violation is a question of conduct and specifically the abuse of dominance.
In Article 4 of the law, a firm is said to occupy a dominant position in the market only when the following three conditions apply simultaneously:

1. The firm owns more than 25 percent of the market share.
2. The firm has the power to manipulate the prices and the volume of supply of the product within its relevant market.
3. The firm’s competitors lack the ability or fail to curb these manipulative practices.

Attia underscored the following points:

1. The law exists to protect fair competition, not the competitors themselves. Its purpose is to create and safeguard a climate in which competitors have an equal opportunity to compete.
2. The law addresses restrictive practices resulting from the abuse of dominance, as opposed to market dominance itself. A firm can own 100 percent of the market share and yet not be guilty of abusing this dominance. It is not the size of the firm or its share of the market that counts, but how it conducts itself in the market.

As a result of the general lack of clarity with regard to whom the competition law addresses, Attia cited Article 2, Paragraph A, which defines the “persons” that fall under the jurisdiction of this law. These are “natural and juristic persons, economic entities, unions, financial associations and groupings, groups of persons (whatever the means of their incorporation), and other related parties as set forth in the executive regulations in a manner consistent with the objectives and provisions of this law.” In other words, almost anyone who engages in economic activities, even a philanthropic society, is subject to the competition law.

Attia also addressed the question surrounding public utilities. Public utilities are not subject to the law unless the utility is privately owned and operated. However, a privatized utility is eligible for a two-year exemption period upon submission of a proposal requesting such an exemption. In addition, the ECA may renew the two-year exemption period, if it deems it appropriate and necessary.

Attia explained some of the terminology used in the law. For example, “related parties,” which appears in Article 2, is defined in the executive regulations as a group of people that either owns the majority of shares of a company or controls the administration, or both. “Products” refers not just to goods, as is commonly thought, but to both goods and services, including such services as banking and insurance. “Geographical area” is generally confined to the market in which the complaint is lodged.
If an identical substitute of a product that is the subject of a complaint is found in a nearby area, then the authority will inspect this area as well.

(ii) Violations of the law and the law’s inherent flexibility:
Unlike competition laws in other countries, Attia said the Egyptian version of the competition law is very specific about the actions that are considered violations. These are as follows:

1. Horizontal agreements (between competing persons), as covered in Article 6 of the law.
2. Vertical agreements (between a person and his/her clients or suppliers), which is the subject of Article 7 of the law.
3. Abuse of a dominant position, as covered in Article 8 of the law.

Violations are deemed criminal offenses to be handled by the public prosecutor’s office. Violators are subject to fines ranging from LE 30,000 to LE 10 million. On the other hand, Attia said he believes the Egyptian Competition Law is more flexible than others on mergers and acquisitions. The law contains no rules or regulations controlling mergers and acquisitions, apart from the provision requiring official notification to the ECA within thirty days after a merger or acquisition takes place.
B. The Egyptian Competition Authority

(i) The independence and impartiality of the ECA:
As Attia pointed out, the ECA was established in accordance with the provision of the competition law calling for the creation of a regulatory body to safeguard a competitive environment and prohibit monopolistic practices. The ECA was originally affiliated with the prime minister’s office, which issued Decree No. 571/2006 authorizing the Minister of Trade and Industry to exercise the Prime Minister’s powers stipulated under the law.

Nevertheless, Attia stressed that the authority is a fully independent body with powers separate from those of the minister. He explained that this autonomy derives from the decision-making process of the ECA board of directors. Its resolutions are passed by a majority vote from 15 members. A board member may not take part in the deliberations or voting on a case under consideration if he/she has an interest in it, if he/she is related up to the fourth degree to any of the parties involved in the case or if he/she currently represents or has represented any of the concerned parties.

(ii) Non-disclosure of information and transparency:
A recent survey reported that a vast number of people fear the disclosure of the information they provide to the ECA when submitting a complaint. Attia said the information provided is strictly confidential and may not, under any circumstances, be disclosed to any other authority or governmental agency. Confidentiality, he said, is guaranteed under Article 16, which states:

1. The employees of the authority are prohibited from disclosing any information, data or the sources thereof in relation to cases falling under the scope of this law which are submitted or circulated during the review, action-taking and decision-issuing phases of such cases.
2. Such information and data and their sources shall not be used for any purposes other than those for which they were submitted.
3. Employees of the authority are prohibited from working with persons subject to examination or in the process of examination for a period of two years from the end of their employment.
The transparency of the ECA’s operations is embodied in:

1. A regular publication covering the decisions and recommendations taken by the authority, the procedures and measures it adopts and related matters.
2. An annual report on the activities of the authority and its future agenda. These reports are presented to the competent minister after having been adopted by the ECA board. Copies of both are then sent to the People’s Assembly and the Shura Council.
3. The executive director must notify the person or persons concerned with the decisions taken by the board on a particular case.

To conclude his presentation, Attia stated that by adopting the competition law and establishing the ECA, Egypt had taken two major leaps toward enhancing a free market economy.

1.2 The Impact of Implementation of the Competition Law on Economic Performance

The next speaker was Hassan Qaqaya, chief of capacity building and advisory services at United Nations Conference on Trade & Development (UNCTAD), whose presentation was entitled “The Impact of Implementation of Competition Law on Economic Performance.” The thrust of the presentation was twofold: to highlight the repercussions of the competition law on the business community, and to enumerate the expectations of the business community on ways the ECA can make the law effective.

A. Implications on the business community

Competition law, Qaqaya explained, encourages innovation and production efficiency and simultaneously helps promote consumer welfare through inter-firm rivalry. However, because fierce rivalry may possibly lead to unethical competitive practices, the primary task of the ECA is to safeguard fair competition.

Because of the challenges involved in introducing competition law and policy in Egypt, it must be tailored to the economic, political and legal system of the country. Qaqaya stressed that competition has the most implications in markets that lack effective corporate control. Competition law in such cases tends to reduce managerial slack, improve selection (closure of poorly managed firms) and spur innovation. The most
salient problems in Egypt that Qaqaya mentioned are a business infrastructure that obstructs access to new players, a minimal legal and regulatory framework hampered by low implementation capacity and a legacy of excessive governmental intervention. When such inadequacies are identified and remedied, it will be possible to level the playing field at the domestic level, he said.

Qaqaya also pointed to the role of civil society in this process. Unfortunately, civil society in Egypt is poorly organized and insufficiently informed. Few NGOs have the necessary awareness of the benefits of competition. These shortcomings, said Qaqaya, must be addressed in order to promote the greater and more effective participation of civil society. The competition law alone is not sufficient to guarantee a flourishing domestic market. He therefore urged the development of a complete and comprehensive policy to ensure that competition law and policy are consistent with the larger framework of the economic liberalization process.

B. The expectations of the business community
The ECA started small to better enable the build-up of technical and human expertise needed to enhance its roles as a both a monitor of competition law compliance and promoter of competition among consumer groups, the business community and state enterprises. Nevertheless, as with any transitional period, the effective implementation of the new law will require time. He compared the transition to a free market economy to the introduction of universal suffrage. Democracies do not emerge overnight; similarly businesses, consumers and state enterprises must reorganize and change the way they interact, in addition to the establishment of institutional structures for a free market economy.

Qaqaya made a number of recommendations for the transitional period of the law: all parties concerned should set their sights on advocacy, achieve voluntary compliance and increase competition culture. At the same time, he emphasized that the transition will have costs and will adversely affect some players in the market. But the competition law will also ensure that government businesses do not enjoy a net competitive advantage (such as tax exemptions or lower financing costs) as a consequence of public sector ownership. This principle is fundamental to what should be regarded as a key strategy of this phase: to promote entrepreneurship, since the entry into the market of new enterprises will help the new competition law take root and yield its intended results.
1.3 Observations on the Egyptian Competition Law Compared with Competition Regimes in Other Countries

The third speaker in session one was Samantha Mobley of the London office of Baker & McKenzie law firm. Her presentation examined a wide range of issues that fall within the scope of competition law. She offered an overview of competition law and policy in Europe and America. Taking a comparative approach, Mobley outlined the strengths and weaknesses of the competition law in Egypt with respect to several areas of concern: extraterritoriality, public utilities, the definition of competition law, the application and reach of competition law, exhaustive and non-exhaustive activities, vertical and horizontal agreements, the sovereignty of the competition authority, criminalization and penalties under competition law as well as price and merger controls.

A. Extraterritorial reach

If the ECA is to be able to handle international cartels, it must have an extraterritorial reach, Mobley said. While the competition law stipulates in Article 5 that “Provisions of this act are applicable to all actions committed overseas…on the ground that such actions prevent, restrict or damage free competition in Egypt,” Mobley maintained that the ECA was not yet equipped to deal with issues of extraterritoriality. Therefore, she said, at this phase the ECA should confine its focus to domestic anti-competitive behavior. By contrast, the US Department of Justice (DOJ) is capable of invoking harsh measures, including imprisonment, against foreign-based corporations that breach its anti-trust law (Sherman Act, Section 7). The DOJ has imposed fines of $10 million or more on Dutch, German, Japanese and US companies based abroad. Since 1999, 20 foreign nationals from Japan, France, Germany, the Netherlands, Norway, Sweden, Switzerland and the UK have served jail sentences in the US, in connection with DOJ international cartel investigations.

B. Exhaustive and non-exhaustive activities

One of the main positive features of the new competition law in Egypt is that it provides a detailed list of the exhaustive activities that are considered anti-competitive (horizontal and vertical agreements and abuse of dominant position). This differs from competition law in the EU and US anti-trust law, neither of which provides such an exhaustive list.

Mobley said that the relevant articles in Egypt’s competition law are very useful to help the public understand the types of acts and practices that are anti-competitive and offer market players a set of explicitly defined codes of conduct that they can adhere to.

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1. These are Articles 6, 7 and 8, respectively.
C. Criminalization and penalties

Mobley expounded on the concept of criminalization of anti-competitive behavior, the rigidity of the penal process and the appropriate degree of harshness of penalties imposed against those found guilty of anti-competitive practices. For instance, the competition law in Egypt applies a criminal law method, which she regards as advanced. US competition law also falls under criminal law, whereas the EU takes a more administrative law approach, although it is gradually moving towards criminalization. The UK, for example, passed the Criminal Cartel Offence Act in 2002. However, Mobley added that no case has been prosecuted under this act because of what she referred to as the capacity-building process, or the need to accumulate sufficient experience and competence before bringing such cases before a criminal court.

Mobley praised Article 20 of the Egyptian competition law because the ECA may allow violators to rectify their position before taking legal action against them. The great advantage of this provision is that it promotes fuller cooperation between market players and the ECA, whereas imposing a very strict regime from the outset might discourage competitors from cooperating with the authority.

Mobley also noted that cartel activities are punishable by very stiff fines in both the EU and America, and these levies are constantly increasing. Cartels are a primary concern for both the EU and the US competition authorities.

D. Case presentation

Although some maintain that the press is an appropriate avenue for bringing cases to the attention of the ECA, Mobley said this could be potentially detrimental to business because it may damage the reputation of competitors before evidence has been presented. She said she prefers other methods, such as a party claiming injury filing a complaint with the competition authority. Another is for the authority to initiate an investigation on its own. Here, however, the authority’s case might remain weak due to the difficulty of collecting concrete evidence from actual complainants. Mobley used an example from America to illustrate a third method: an employee of a given company comes forth with evidence of anti-competitive practices undertaken by his company, in retaliation for having been fired or having been involved in a dispute with his former employer. Furthermore, the US and EU systems offer offenders “leniency programs,” whereby a company presents evidence of its anti-competitive practices in return for immunity.
In regards to ECA autonomy and government intervention in anti-competition policies, Mobley noted that it was not uncommon for governments to intervene on occasion in order to influence certain aspects of policy, especially in the early stages of competition regimes.

E. Vertical agreements, monopolies and mergers
Mobley examined the nature of vertical agreements and their relation to competition law. She explained that Egypt’s method of tackling vertical agreements under the competition law is in line with international standards because it is prohibited for a supplier to dictate the cost and quantity of a product to be sold to a distributor.

As to what constitutes a monopoly, Mobley explained that under Egyptian competition law, holding a dominant position of 40 percent or more is not prohibited; monopolistic behavior is.

Egypt’s approach to merger regulation was unusual, Mobley remarked. Apart from the provision requiring post-deal notification to the Ministry of the Trade and Industry, the competition law does not encompass merger controls. Elsewhere, she said, merger control was generally a part of competition law.
Q: Regarding the new Neighborhood Agreement that Egypt will be negotiating with the EU, will Egypt have to review its competition law or make any substantial changes to bring this law into harmony with that of the EU?

A: Qaqaya and Khaled Attia were both of the view that Egypt will not have to introduce any substantial changes in its law. Nor did they foresee any conflicts arising between the two laws. Attia explained that that in the course of drafting its law, Egyptian lawmakers had given careful study to the EU and US competition laws, since both are major trading partners of Egypt.

Q: Does Egypt use international “best practice”?

A: Attia affirmed that the ECA has started using international best practices and is collaborating with agencies and research centers from all over the world on this matter.

Q: Why are public utilities exempt from the competition law?

A: Public utilities are not engaged in commercial activities—they work for the communal public welfare, Attia explained. If, however, public utilities were run by a private sector concern and were in the business to make a profit, they would be subject to the law. Even so, Attia added, they could be entitled to an exemption if they met certain criteria, as he had explained earlier in his presentation.

Q: If a person is in a dominant position, how does he stand with respect to the law?

A: Attia responded that the ECA puts this person under supervision so as to ascertain that he does not abuse his dominance. If it comes to light that he is abusing his dominance he would undoubtedly become subject to one of the penalties mentioned in the law. The purpose of criminalizing breaches of the law and setting relatively high fines (ranging from LE 30,000 to LE 10 million) is to make the penalties serious enough to deter companies from violating the law. On the other hand, he stressed, the intention is not to intimidate companies. Rather, competition law and policy aim to entice them to adapt progressively to the regulations, rather than to fear them, and to encourage investment and to promote competition rather than to scare off competitors.
Hassan Qaqaya moderated the second session of the conference on “International and Regional Cooperation on Competition Policy.” Following some brief introductory remarks he presented the first speaker of the session, Frédéric Jenny, chair of the OECD competition committee.

2.1 Interrelationship between Trade, Investment and Competition Policy at the International, Regional and National Levels

Jenny’s presentation dealt with the interrelationship between trade, investment, competition and economic development. On the basis of a database he had developed together with a fellow economist, he discussed some allegations of anti-competitive practices in developing countries.

A. International competition is not detrimental to domestic competitiveness

Jenny established that allegations of anti-competitive practices in developing countries tend to arise primarily in sectors sheltered from international competition, such as local agriculture and fishing industries, local telephony, construction, electricity, water, bus and rail transportation and local retail trade. He cited examples from Turkey, Jordan, Kenya and several developing countries. In essence, he contested the notion that international competition diminishes the competitiveness of local industry. Trade liberalization forces international competition on the economies of small countries and as trade liberalization progresses, local competition increases. He was also of the opinion that increasing exposure to international trade forms a powerful incentive to monitor market power and reduce resource misallocation.

B. Economic competition does not necessarily work to the detriment of small firms

Jenny next turned to the subject of whether economic competition works in favor of economically powerful and rich firms, to the detriment of small firms. For example, does promoting competition at the multilateral level work against the interests of locally based firms in developing countries because they are weaker and smaller than firms in developed countries? According to his database, he said, in some sectors multinational firms have indeed displaced or attempted to displace local firms, noticeably in the beverage industry, the cement industry, telecommunications and transportation. On the other hand, there are many sectors alleged to be in anti-competitive but in which weak domestic firms and
powerful multinational firms do not compete. This may be either because large multi-national firms heavily dominate the sector (for example, the petroleum industry) or because the sector is more heavily populated by small local firms (for example, the food and road transportation industries).

However, according to Jenny, the more crucial issue is anti-competitive practices among small domestic firms themselves and their victims, who are frequently small entrepreneurs, farmers, fishermen and ultimately the consumer. To illustrate, he cited the fish processors and exporters in the Lake Victoria region who are constantly abusing and exploiting the small fishermen. The former are accused of forming cartels to control the fishing industry, enabling them to reap fortunes while investing nothing back to improve the welfare of the people living around the lake. It is alleged that these processors export the fish at three times or more the price that they pay to the fishermen.

C. Anti-competitive practices by domestic cartels are detrimental to local industries and economic growth

Jenny maintained that there was no conclusive evidence of a positive correlation between competition law and economic development. Countries like Japan, South Korea and Singapore have demonstrated that a sound industrialization policy spurs economic growth. Rather than promoting competition in the domestic market, these cases suggest that what developing countries need to achieve faster growth rates is an active policy of concentration and protection so as to build national champions able to compete on the world market. Nevertheless, he also held that conflict may often arise between the objectives of competition policy and those of development policy. His database on developing countries indicates that anti-competitive behavior, whether domestic or international, occurs frequently in the sectors of the intermediate goods or services, which are vital inputs to any production process, such as:

1. Fertilizers: input for agriculture
2. Oil: input for agriculture and manufacturing
3. Construction and construction materials: input for manufacturing
4. Transportation: input for all production activities
5. Telecommunications: input for all production activities
6. Banking and financial services: input for all production activities and wholesale trade
Jenny went on to argue that even if economic growth is a more important objective than improving the static allocation of resources through competition in developing countries, eliminating anti-competitive practices is a necessary condition for potential growth. The cases that his database yielded illustrated that the international competitiveness of key domestic industries was severely hampered by anti-competitive practices. It followed, therefore, that limiting these practices would improve the competitiveness of these industries. It further illustrates that even if competition law is not the only tool for economic development, it nevertheless can play a useful role in promoting growth by eliminating the exploitative practices of firms with individual or collective market power.

D. Developing countries suffer from abusive behavior by multinational firms based in developed countries

Multinational firms operating in developing countries are the subject of numerous allegations of abusive behavior. However, according to Jenny, such allegations cannot be handled at the local level; international cooperation is a must. Many developing nations’ economies are vulnerable to competition through imports and foreign investment. As these activities are heavily dominated by multinational corporations, developing economies are particularly susceptible to the negative effects of anti-competitive behavior of foreign firms, whether resident in the country in question or through the dominance of imports from these firms. Jenny asserted that developing countries undoubtedly had cause for concern over transnational abuse of dominance or monopolization and that international cooperation in competition enforcement against transnational anti-competitive practices was vital for developing economies.

Nevertheless, he continued, his database revealed that only about a third of allegations of anti-competitive practices pertained to abuse of dominance or detrimental monopolistic behavior. The proportion of allegations of cartelization and collusion was considerably higher. More significantly, only one-third of allegations of abuse of dominance and monopolistic practices targeted the practices of foreign-based firms. In other words, abuses of dominance are more frequently practiced by local firms or foreign-owned local firms. To Jenny, the telecommunications sector offered a prime example of an industry rife with such abuses. In Turkey, the board of the competition authority concluded that Turkcell and Telsim, the two telecom firms in Turkey, exercised joint dominance over the ‘essential facility’ infrastructure necessary to provide national roaming capability. He cited a similar example in Nigeria.
With regard to Egypt, two companies of joint foreign and local ownership (Mobinil and Vodafone) had long dominated the mobile phone market. In December 2003, the prospect of opening the field for greater competition was temporarily eliminated when Telecom Egypt (TE), the state-owned fixed-line phone monopoly, bought 25 percent of Vodafone Egypt and abandoned the idea of founding a third mobile network. However, in early 2004 the duopoly in Egypt’s telecom sector, which had maintained two virtually identical sets of prices and services, came under such heavy criticism, mainly from a consumer group, that the government felt compelled to open a bid for a third mobile-telecom license. Etisalat, a UAE-based telecom firm, won the third Egyptian mobile license in July 2006.

But the telecom sector was not alone in engaging in monopolistic practices. Bringing to bear numerous examples cited in the press, Jenny discussed the concentrations of these practices in certain other areas, notably the steel, cement and beverage industries. In addition, he said, there is the issue of the considerable market power exercised by some firms. He wondered, for example, whether the abuse of such power was responsible for influencing the recent hike in the price of steel. The steep rise in steel prices from LE 1,400 in January 2003 to LE 2,300 per ton in January 2004 led to monopoly accusations against Ezz Dekheila, the private sector steel giant that controls about 75 percent of the local market.

Another area of concern is the Egyptian cement industry, in which prices soared to LE 350 per ton in October 2006, exorbitant by Egyptian standards. Although the Secretary-General of the Construction Material Traders Union had stated that Minister of Trade and Industry Rachid Mohammed Rachid had succeeded in reversing the rise, the price reduction, according to Jenny, was not intended. Clearly, he concluded, cement companies have much more power over prices than the government, all the more so since, in many cases, the privatization agreements for cement plants stipulated that the government should not interfere with selling and marketing policies.

E. Competition and FDI in developing countries: A complex relationship

It has been argued that a strict competition law enforcement regime would reduce profit rates and thus discourage foreign direct investment. According to Jenny, this belief has persuaded governments to restrict competition in favor of foreign investors. For example, in the 1990s, western firms invested heavily in Eastern Europe on the condition that local governments would prevent subsequent entries in their lines of business. Clearly, therefore, competition laws should be also designed to prevent anti-competitive practices or transactions resulting from FDI.
An efficient, transparent, well-enforced and predictable environment attracts foreign direct investment, Jenny continued. Foreign investors do not want to be held up by bureaucracy and arbitrary decisions. A just and efficient legal system guaranteeing equal treatment for domestic and foreign investors is a priority for encouraging foreign direct investment. In particular, he added, a fair and effectively enforced competition law is indispensable to developing countries seeking to attract FDI, firstly because it signals these countries’ willingness to eliminate exclusionary practices by domestic firms and secondly, because it allows developing countries to remedy the potential negative effects of FDI on consumers.

2.2 Effective Cooperation in the Area of Competition Policy at the International and Regional Levels

The next speaker, Magda Shahin, director of the Trade-Related Assistance Center, addressed “The Effective Cooperation in the Field of Competition at the National and International Levels.” She opened her presentation by explaining the relevance of her paper to the private sector and the reasons behind the upsurge of interest in the last five years in expediting the passage of national competition laws in developing countries. She then turned to the potential risks that developing countries fear the newly integrated competition laws might pose to their domestic industries. Finally, she addressed the main obstacles to international consensus on rules of competition and the possibility of overcoming such obstacles through regional trade agreements and cooperation between competition authorities worldwide through the International Competition Network (ICN), which is also known as ‘soft cooperation.’

A. International rules and regulations to curb restrictive business practices

Competition policy has long been perceived as an issue of special concern to developing countries. They have been particularly interested in international rules aimed at curbing the restrictive business practices (RBPs) of giant transnational corporations. As Shahin noted, one of the main reasons behind the failure to establish the International Trade Organization (ITO) at the same time as its two sister institutions, the IMF and the World Bank, in the late 1940s was the fierce resistance of the US Congress to integrating a list of prohibited practices for TNCs in the ITO charter. The list should have included such practices as price fixing, restricting market access, orderly market arrangement and
predatory pricing. But even much later, in 1981, she continued, UNCTAD issued the non-binding “Set of Multilaterally Agreed Principles and Rules for the Control of RBPs-UN/RBP Set,”\(^2\) which TNCs largely ignored.

She then elaborated on the reasons underlying the failure of the WTO working group on trade and competition to reach an agreement on international competition rules, outlining the diverse views and positions of the countries or groups of countries involved in these talks as follows:

1. The US confines the perception of competition to nationally pursued competition policies. Ultimately, this boils down to the enforcement of anti-trust law by national authorities, even if that might necessitate extraterritorial measures. From the American perspective, market distortions are caused not so much by private companies as by government practices.

2. Developing countries hoped to include the question of restrictive practices on the agenda of the working group. Yet their efforts were frustrated by the differences among the participating states over this issue and ultimately by the US’s adamant refusal to negotiate on international regulations for curbing the restrictive practices of TNCs.

3. Japan and other Asian countries voiced their skepticism over the anti-competitive effects of some of the trade-remedy laws recognized by GATT/WTO almost half a decade ago. Of particular concern to them were anti-dumping laws. This group of countries, therefore, insisted that the work program should examine whether current WTO rules are actually conducive to remedying market distortions and promoting competition. Essentially they felt that competition rules should replace the anti-dumping ones.

4. The EU explicitly acknowledged that liberalization and globalization had given competition policies a definite international dimension. It urged the WTO to adopt a balanced approach, that addresses the international ramifications of competition policies, competition laws and enforcement systems at the national level. Developing nations, on the other hand, were suspicious of this stance. They charged that the EU was attempting to link domestic competition law enforcement procedures to the WTO dispute settlement mechanism with an eye to forcing compliance with WTO provisions.

\(^2\) UNCTAD doc. TD/RBP/Conf/10/Rev.1
B. The importance of national competition laws and policies

Shahin observed that with the increase of globalization and liberalization, developing countries were becoming increasingly aware of the need to adopt national competition laws and to establish an appropriate competition authority. She cited two main reasons for moves in this direction. The first was to counter anti-competitive practices by both foreign and domestic monopolies and by dominant firms and/or state enterprises. The second was to attract FDI, since investors would be reassured that they would not encounter anti-competitive practices in the host country market.

On the latter point, Shahin added an important word of caution. Liberalization entails both potential benefits and dangers, both of which should be clear to national policy and lawmakers. By adopting a national competition law and opening their markets to more intense competition from foreign firms while simultaneously dismantling their own state monopolies, developing countries take an immense risk. She raised in this context the specter of de-industrialization and the potential negative impact on small and medium enterprises (SMEs). Therefore, Shahin argued, when these countries liberalize they must also ensure that domestic privatized firms can find a niche in the market so as to develop and be able to survive against the onslaught of competition. For example, governments can help by negotiating for an optimal transition period for firms that had previously been sheltered by protectionist policies. Economic planners and officials should also endeavor to come up with proposals for how best to level the playing field between foreign and domestic firms in the domestic market, while bearing in mind that some gap between the two is bound to persist.

Governments always have an element of leeway to play with, Shahin stressed. South Africa tailored its competition law towards what it regarded as the key industrial objective of promoting small and medium enterprises (SMEs). Even EU competition law contains a number of de minimis clauses which exempt small firms (up to specified thresholds) from prohibitions against certain restrictive practices.

The objectives of competition laws differ considerably from one country to another. For developing countries, competition legislation has had to serve a variety of purposes that overlap heavily with the social domain. In addition to enhancing economic efficiency, protecting SMEs and safeguarding consumer welfare, the framers of competition law also sought to address such issues such as poverty and unemployment. Governments may also take the liberty to exempt certain sectors from competition laws when they deem it appropriate. For instance, the US Supreme Court has exempted 16 sectors from
its anti-trust law. Among these are agriculture, defense, energy, transport, banking and insurance. The EU has exempted air transport, insurance, agriculture and several other sectors from its competition law.

C. Regional cooperation as an alternative
When the WTO proved unable to reach an agreement on multilateral competition rules, both developing and developed countries began to introduce competition regulations into their bilateral and regional trade agreements. It was thought that such provisions were needed to prevent the benefits of trade and investment liberalization from being compromised by cross-border anti-competitive practices. Countries cannot reap the benefits of free trade if trade barriers are substituted by other forms of restrictive private-sector practices such as market-sharing or price-fixing agreements, she stressed. Currently, there are 317 regional trade agreements, out of which over 100 now include commitments in the field of competition law and policy. Among the focal areas for regional cooperation among anti-trust authorities is the exchange of information and the facilitation of effective and efficient enforcement of anti-trust laws, both of which are seen as vital to safeguarding fair competition in the market. She added that regional cooperation also helps developing countries contend with international and export cartels as well as with mergers and acquisitions, which are difficult for national competition law to address single-handedly.

She then discussed the conflicting interests between the US and the EU when integrating competition policy provisions into their regional trade agreements. Whereas the US confines itself to the enforcement of the laws and their application to state monopolies, the EU aims more at bringing the laws in the partnership agreements of member states into harmony with EU laws and regulations. Under ‘special and differential treatment’ provisions more commonly found in EU/RTAs, developing countries are given technical assistance and longer transitional periods to improve national capacities and upgrade their industries.

On cooperation between developing countries in the realm of competition law, Shahin noted that Article 55 of the Common Market for Eastern and Southern Africa (COMESA), for instance, calls for a halt to any practice that restricts or distorts competition or that might have a diminishing effect on the trade liberalization process between member countries. The competition laws of COMESA aim to promote fair competition, protect consumer welfare, inhibit restrictive practices, promote dialogue between the national competition agencies of member states and assist member states in dealing with the repercussions of mergers and acquisitions.
Shahin went on to observe that globalization and the rapid pace of trade liberalization have pressed national competition agencies to step up their level of cooperation and open more direct channels for communication. Many countries have opted for what has been termed the “Agency-to-Agency Agreement,” which is believed to sufficiently to track any restrictive practices taking place at either the national or international level. The agreement helps realize the benefits of cooperation between national competition agencies, without imposing any additional commitments or requiring cooperating agencies to synchronize their laws into line with one another. Countries have long been eager to establish such a mechanism for cooperation, she said. Evidence of this desire could be seen in October 2001 when 14 nations combined their efforts to form the International Competition Network (ICN). Since then, the membership of this network has grown to more than 80 different countries, making it by far the largest forum for discussion and deliberation on a diverse array of competition-related issues. Its recommendations are non-binding.

Shahin concluded her presentation with the assertion that competition law and policy is a double-edged sword. Although competition forms the engine for economic progress and innovation, competition authorities must nevertheless remain alert to the ways in which it impacts on domestic industries and especially on SMEs, which are much more vulnerable than the larger and more powerful market players. As a result, Egypt must develop an overall competition policy that strikes a balance between encouraging investment and competition in the domestic market on the one hand, and maintaining a developmental agenda that will permit domestic SMEs to grow and prosper in a competitive environment on the other hand.
2.3 The Competitive Environment in the Beverage Industry in Egypt: The Coca-Cola Perspective

Curt Ferguson, president of Coca-Cola’s North & West Africa Division, spoke next. He recalled that in 1991, Egypt had adopted a comprehensive reform program in collaboration with the World Bank and the International Monetary Fund, and said that the Egyptian government had enacted the “Protection of Competition and Prohibition of Monopolistic Practices Law,” No. 3 of 2005 to further the aims of this reform initiative.

A. Competition law is part of competition policy

Ferguson held that competition law is only one plank of an effective competition policy. Other important aspects are: effective, impartial enforcement institutions, the provision of economic incentives to encourage greater investment and trade, and market policies that help strengthen competition in all industries. He argued that if Egypt administers competition law with the aforementioned goals in mind, it will be better poised to seize this unique opportunity to foster economic growth and provide lasting leadership in the region. The more progress Egypt makes in this direction, the more neighboring countries will draw on Egypt’s insights and experience, and the more they will work together to build greater regional cooperation.

Coca-Cola, he said, competes in the broad non-alcoholic beverage market, which includes a range of products or segments of the market such as carbonated soft drinks, juices, sports drinks, energy drinks, instant coffees and teas, water and milk. Many players are active in this market in Egypt. They include such multinational brand-owners as Coca-Cola, Pepsi-Cola and Nestle, as well as a myriad of strong local brands and industry players in carbonated soft drinks. He stressed that while the non-alcoholic beverage market is highly competitive and follows no easily predictable patterns, the market is highly accessible since, unlike other industries, barriers to entry into this market are relatively low.

B. Trade liberalization encourages competition

Low barriers to entry, he continued, enable new entrants and new product introductions. In Egypt, the costs of entry into certain sectors, such as packaging, are also not prohibitive. Such are the factors that combine to create a dynamic competitive environment, which ultimately benefits the consumer. According to Ferguson, a healthy competitive environment is one that guarantees this. Even when having a large share of the market, no single beverage manufacturer can dominate the market by acting independently of its
competitors, customers and consumers. He added that this is why Egypt must have an effective regulatory mechanism. Only then can it ensure a level competitive field for players in this market, diversity of choice for the consumer and, more importantly, greater protection for the competitive process, as opposed to the competitors themselves.

C. Recommendations for effective competition in the beverage market in Egypt
Ferguson then presented his ideas on some of the steps that Egypt could consider in order to foster a more competitive environment in the beverage market. They include:

1. Amending the uneven and discriminatory taxation of carbonated soft drinks versus other soft drinks.
2. Easing the restrictions in the advertising and media sectors that give state entities a strategic and unfair advantage over rivals.
3. Greater access to raw materials for producers of beverages.
4. A fairer regulatory process for all players.
5. A more intensive privatization drive to encourage entry into the non-alcoholic beverage market.
6. Streamlining of customs procedures so as to prevent delays in the clearance of imported goods.
7. Benchmarking against relevant macro-economic and legislative trends in similar markets elsewhere.
In conclusion, Ferguson stated that the Coca-Cola Company supports the efforts being undertaken by the Egyptian government towards promoting further liberalization of the economy and fostering a favorable climate for foreign investment. He commended initiatives such as this conference, which demonstrate the government’s readiness to enter into dialogue with the private sector.

2.4 Building Bridges for Development of Cooperation Between Competition Authorities

The last speaker of the session was James Hamill, Senior Counsel for International Affairs and Director of International Technical Assistance Organization, whose paper was entitled “Building Bridges for the Development of Cooperation between Competition Agencies.” His presentation focused on the incentives for cooperation, forms and forums for cooperation, and its strengths and limitations.

A. Incentives for cooperation
As Hamill observed, one of the significant movements for worldwide economic cooperation has been the expansion of competition law. In the early 1900s, only the US and Canada had anti-trust laws as an integral part of their legislation, and it was not until the 1960s and 1970s that a handful of European countries joined them. Since then, however,
the spread of competition law has been rapid. Today, more than 100 countries have competition laws, with Egypt becoming the 113th when it enacted its law in February 2005. Another movement is the international reform of commercial laws and institutions formed in political economy over past 20 years. Hamill explained that it had been difficult, at the time of the communist order, to jumpstart commercial law reform. The concepts of private property as well as that of competition culture had not been well established.

Now, given the similarities in the principal elements of anti-trust laws worldwide, there is an added incentive to work together toward improving the domestic enforcement of these laws.

B. Three foundations of competition law violations
Hamill outlined the three primary sources of competition law violations throughout the world:

1. Cartels, which in the US are often referred to as “price-fixing” or “collusion.” These, he explained, are marketing agreements between competitors on price and/or allocation of markets, although there are also state-supported cartels. Cartels, he stated, are the main evil targeted anti-trust law in the US. Because they are almost always harmful, US law treats them as economic felonies punishable by jail time.

2. Abusive monopolization, or the “abuse of dominance,” implies the power to control prices and exclude other competitors from entry into the market. According to Hamill, this is rarely prosecuted under the US system because of the prevalence of the powerful argument that monopolization is unlikely to succeed, since increased prices would attract the entry of new competitors and result in a lowering of prices. The concept and practice of monopolization is undergoing intensive rethinking in America as well as in Europe.

3. Mergers and acquisitions. This has become an area of great international concern, he said, due to the enormous number of foreign firms that are active in acquisitions, increasing the likelihood of anti-competitive practices. Nevertheless, in spite of the fact that more than 60 percent of American anti-trust resources are spent on investigating the impacts of mergers and acquisitions, these are not necessarily harmful. In fact, he added, mergers can be beneficial, although there should at least be a mechanism, such as a pre-merger notification system, to facilitate government monitoring and investigation.
C. Forms and forums of cooperation

Hamill explained that the collegiality of the global enforcement community facilitates the exchange of information needed to enhance our understanding of competition laws. Training workshops on case investigation offer venues for the discussion of concepts of competition law and their evolution. There are also joint endeavors to promote the convergence of anti-trust laws, the transparency of laws and the adoption of stricter procedures, such as the compulsory process or pre-merger notification, in order to strengthen compliance with merger law.

He also held that substantive cooperation reiterates the general understanding of the principle of national sovereignty, even though as a result of globalization, anti-competitive effects may transcend national borders. The most basic form of enforcement cooperation is for one country to notify another that it is investigating an interest of the other. If, for instance, a European firm is under investigation in Egypt, the Egyptian authorities notify their European counterparts via diplomatic channels that an investigation is under way. At a higher level of cooperation we may see parallel case investigations or other forms of mutual enforcement support.

One of the tools available for cooperation is the International Competition Network (ICN), a 100-member international institution formed in 2001 to tackle the challenges raised by the globalization of anti-trust law. The two main areas of focus of the organization are the multi-jurisdictional merger review and the development of competition advocacy. The ICN aims to promote best practices across its member agencies. Another option, Hamill noted, is the Organization for Economic Cooperation and Development (OECD), which addresses a variety of competition issues and offers a forum for the informal exchange of ideas at roundtables. The same applies to its affiliate, the European Regional Center for Competition agency. In addition, an annual global forum is held in Paris to discuss issues such as the ongoing project to review individual competition laws through a voluntary peer reviewing process. Participants include many non-member states from the developing countries with newer competition laws and agencies.

Beyond these are such private organizations as the American Bar Association, the International Bar Association, various NGOs, academic research centers and think-tanks, in addition to the works of many scholars in the field. Hamill gave specific mention to CUTS International (the Consumer Unity and Trust Society) and Consumers International, and advised the Egyptian Competition Authority to follow their work.
D. Strengths and limits of cooperation
Among the major advantages of cooperation, according to Hamill, is that it promotes the convergence and transparency of competition laws, which heightens confidence that commercial transactions in one country will be subject to the same legal standards elsewhere. It encourages commercial law reform, which generally promotes the expansion of trade by making commercial transactions faster and safer. Cooperation also promotes the culture of competition and therefore spurs entrepreneurship and the willingness to enter and compete in existing markets. Competitive domestic economies ultimately enjoy higher productivity and economic growth, Hamill argued.

On the limitations, Hamill pointed out that cooperation might not be fully attainable where legal differences and political disagreements on competition issues prevent nations from reaching a common ground. But, he stressed, even in such cases cooperation in the form of continual dialogue and discussion holds the promise of change.

In his closing remarks, Hamill emphasized that successful cooperation is contingent upon a commitment to open markets and the independence of competition enforcement from the political process. The less autonomous enforcement agencies are and the more substantial the sectors of the economy that are immune to the jurisdiction of competition authorities, the less likely it is that the full benefits of cooperation will be realized.
Is there a correlation between the behavior of firms with a dominant position and R&D?

A: Jenny responded that there is a correlation between dominant firms and additional expenditure for R&D, innovation and training, etc. Moreover, horizontal agreements could be eligible for an exemption if the goal of the agreement is to foster innovation rather than to exploit the dominant position for price-fixing or market-sharing. In the EU, some anti-competitive behavior might even receive an exemption if, ultimately, it can be demonstrated to contribute to overall economic progress. However, this falls in a different category from green price-fixing and allocating market shares with no redeeming value apart from the profits that accrue to certain companies. This is a situation that must be treated differently.

Competition policy was incorporated in the four Singapore issues and was later discussed in relation to the Doha Development Agenda. Do you think the issue will be listed on the agendas of upcoming WTO talks?

A: Jenny responded that eliminating regulatory barriers was useful to encourage FDI. In the trade world, the WTO exists to eliminate trade barriers and increase the volume of trading interaction in the world. However, the existence of international rules on competition will hopefully help eliminate even more barriers to trade and investment, and will contribute to fostering better resource allocation and worldwide growth. We can talk about regulatory barriers and trade barriers, he said. But if government succeeds in eliminating those barriers only for other private barriers to crop up, then government has not achieved much. This is why eliminating trade barriers has been linked to discussing the elimination of privately established barriers to trade. A lot of the bilateral trade agreements now include a competition provision because competition is seen as a natural complement to trade liberalization.

As to whether the issue will arise again in the WTO, he said it is possible. The question of the interface between trade liberalization and competition is here to stay. One type of solution is voluntary interagency cooperation, which does not require going to the WTO. Whether on a regional or bilateral basis, this type of cooperation is on the rise. However, it is not that efficient, because voluntary cooperation is not binding. This is why the WTO is, perhaps, a better place for competition policies because it has a dispute settlement mechanism. The challenge is to promote effective cooperation, and this requires a set of disciplined commitments. These should take place within the framework of the WTO.
Talks in the WTO have raised worldwide awareness on competition issues and generated the urge to push for competition policies. So in the long run, the issue may well re-emerge on the WTO’s agenda.

Shahin added that the question of the correlation between international trade and competition dates back to the 1940s and has not vanished. Initially, discussion of the problem, which has been raised in WTO negotiations, focused on the lack of national competition laws in developing countries. Today the situation is different, with the majority of developing countries incorporating competition laws through internal legislation. But the problem persists because national competition laws are still not strong enough to fight the restrictive business practices of transnational companies. This is why internationally binding competition rules are needed. However, this does not obviate the fact that voluntary cooperation at the international level has been growing stronger. For example, the International Competition Network (ICN), which began with only 14 governments, has grown to include more than 80 countries today.

However, it is doubtful whether negotiations on this issue can take place within the WTO. The national laws of developing countries are unable to handle the restrictive practices of international and/or export cartels on their own. It is therefore critically important for developing countries to have an international forum on such issues. The ICN might be a suitable venue for such a discussion. Maybe, too, instead of being an essentially consultative organization, the ICN should institute a set of binding rules upon competition authorities. For its part, the WTO will lose focus if it is compelled to institute rules on such a vast diversity of issues, covering labor, environment, investment, competition and so forth. Still, there is no escaping the need for internationally binding rules on restrictive business practices, regardless of whether these are set by the competition authorities themselves or trade specialists.

**Q: In relation to vertical agreements, does it constitute a violation if a sole supplier does not supply to other local distributors or a single agency representing a foreign company?**

**A:** Qaqaya answered that it was not a violation if competition exists between international substitute brands supplied to other distributors. Still, the law considers these matters on a case-by-case basis. The decision has to be founded on the many different factors that pertain to the individual case, which is to say that a certain act might constitute a violation in one case whereas it would not trigger objections in another. In other words, one cannot generalize as to whether or not vertical agreement, per se, constitutes a breach of law.
The third session was on “The Impact of Privatization and Reform on Competition in the Telecom Industry.” It was moderated by Professor Frédéric Jenny, who introduced the first speaker, Omar El Sherif, advisor to the Minister of Communication and Information Technology.

3.1 Competition in the Telecom Sector

El Sherif provided a comprehensive overview on competition in the telecom sector. The sector is growing daily, but it represents the best example of the application of competition in the public sector. In his presentation, he elaborated on some general concepts of competition, after which he addressed the relationship between the telecom sector and competition in light of Law No. 10 of 2003.

A. General concepts of competition

Sherif began with an explanation of the general concepts of competition and their relevance to the telecom sector. Competition can be understood from the dual perspective of supply and demand, he stated. From the supply side, it encourages competing companies or corporations to produce goods and services that offer alternative products; from the demand side, it provides consumers with the opportunity to make multiple choices from a variety of options. When competition is applied correctly, its benefits should accrue to competing firms, the state and the consumer. As companies vie to maximize the factors of production through creative design, the application of new technologies and innovative marketing techniques, they profit, national revenues rise and consumer satisfaction with prices and quality increases.

El Sherif delineated the factors that might combine to restrict competition:

1. Companies sometimes establish agreements among themselves that restrict competition in order to maintain their position in the market. Examples are Mobinil and Vodafone. Such agreements often determine the price of the product or service offered to the consumer. This is a way to ensure that prices do not fall below a certain margin, and thereby guarantee an attractive profit margin.

2. Although the market economy system represents the ideal method for managing the economy, there are cases, however, in which the state must intervene to ensure that products and services reach all users or consumers equally in all geographical regions, such as inaccessible urban areas, rural and other remote areas, or underprivileged and deprived areas. The purpose here is to realize social justice.
B. Telecom and competition

El Sherif proceeded to expound on the status of the telecom sector in relation to competition, opening with a brief historical overview of the telecom sector. Telecommunications fall under the scope of public utilities. The state dominated the telecom sector until the promulgation of Law No. 19 of 1998, which resulted in the creation of the “Egyptian Joint Stock Company,” now Telecom Egypt, and the establishment of an authority to organize the telecommunications sector, the National Telecommunications Regulatory Authority (NTRA). The telecommunications sector is operated and managed through a system that authorizes licenses to private sector companies (there are now three mobile companies in operation).

In 2003, Law 10 was issued with the purpose of establishing the organizational framework of the communications sector. Some of its articles pertain to the NTRA’s obligation to protect free and fair competition. In this regard, El Sherif pointed out that Article 9 paragraph 1 of the competition law provides that the jurisdiction of the competition law does not extend to publicly owned utilities. Hence, the telecommunications sector is run and regulated by the NTRA, a state run entity. To further clarify the extent to which the role and competence of the telecom authority and its board of directors are separate from those of the ECA and its board, he cited a number of articles from Law 10/2003, notably:

1. Article 4: States that the NTRA aims to regulate the communications sector, to develop and disseminate all its services and to keep up with the latest technology. It must meet all user requirements through providing appropriate prices, while encouraging national and foreign investment in the field of telecommunications within the framework of competition laws.

2. Article 5: Stipulates that in order to achieve its objectives, the authority shall oversee all the behavior and actions necessary to achieve the above. In particular, it shall also determine the general principles to which operators and service providers shall adhere.

3. Article 24: The board of directors of the authority determines the levels beyond which actions are considered restrictive practices within any of the related fields under Law 10/2003. The board also sets the rules that should be implemented to counter those practices.
4. Article 25: The license issued by the authority determines the obligations of the licensee, particularly in the provision of services under the rules of free competition.

5. Article 26: The authority also determines the prices of the services. The studies and recommendations submitted by the license applicants are taken into consideration in this process. If the council of ministers specifies a price for any of these services that is lower than the approved economic price, the service provider is compensated from the general fund for services.

6. Article 27: The council of ministers may allow the licensed service provider to provide some services below their actual approved prices within a given timeframe. The council has the right to terminate the agreement with the licensee in the event of a violation of the telecom competition law or a decline in the standard of service.

3.2 What can Competition Authorities Learn from the Telecom Sector and Vice Versa

The second speaker for the session was Martin Taschdjian, NTRA advisor. His presentation was entitled, “What Can Competition Authorities Learn from the Telecommunications Sector and Vice Versa?” He first established that the goal of liberalizing the telecommunications sector is to allow market forces—backed by general competition principles—to prevail wherever possible. In this regard, he stressed the importance of implementing rules and regulations that prevent “major suppliers” from behaving in ways that would deter competition.

On the basis of this principle, the NTRA was created with the objective of regulating competition in the telecommunications sector. Following the lead of telecom regulators in other countries, it developed a regulatory approach to competition policy, based on its examination of the experiences of the European Union, Canada, Australia and America.

He went on to explain that competition between telecom firms revolves around new high-tech products and services rather than prices. He further held that while the telecom sector is moving gradually, though very slowly, from a monopoly to a competitive structure, this transition is an uphill drive because unlike most industries, liberalized telecom markets must contend with a dominant incumbent that controls essential facilities.
Moreover, telecom incumbents have a pricing system in place that is not cost-oriented and that involves extensive cross-subsidization. Because these structures distort entry and investment signals, regulators must also address ‘rate-balancing’ in order to enable competition.

Taschdjian then tackled the ‘market force’ dilemma. The crucial question that both the telecom regulator and competition law must contend with is when to let market forces work and when to intervene in order to regulate competition in the market. The answer to this question, he said, depends heavily on the kind of failures in the market. Some failures are transitory and self-curing, whereas others tend to be durable and persist even as the market evolves toward more competitive behavior. Durable failures require regulatory intervention on the part of the government and regulator, though the nature of that intervention may vary. Often such interventions consist of what is termed ‘universal service:’ measures undertaken to provide affordable services for all customers equally throughout the country. Government may also have to intervene to set certain standards where market forces cannot. For example, certain sets of standards have to be set if networks are to be able to communicate with one another at the national, regional and international levels. Emergency services as well are the type of services that require government intervention.

Transitory market failures, by contrast, are those that can be corrected over time by market forces. Regulatory intervention here is required only to the extent that is necessary to allow market forces to play their role. He cited dominance and consumer protection as examples of transitory market failures.

Regulatory bodies are there to identify and penalize wrongdoers, Taschdjian said. As noted above, the telecom regulatory authority uses the ex-ante approach. This approach implies that ‘significant market power’ triggers regulatory obligations to ensure that a company with a large market share does not abuse its dominance. It is also used to establish rules for fair play. In this process, the regulator must have an ongoing close relationship with the operator, and one role it plays is that of checking and balancing. In contrast, the ECA penalizes abuse of dominance, i.e. the operators who do not play fairly. It thus, follows an ex-post approach. Taschdjian then elaborated on the various challenges facing competition in the telecom sector, discussing in this regard ‘market definitions,’ ‘essential facilities’ and various pricing issues.
A. Market definition
Market definition, he said, is difficult to study and pin down in a sector that is as subject to rapid and continual technological changes as the telecom market. This, in turn, hampers the conduct and analysis of competition policy. Further complicating matters is the fact that whereas the norm in the past was to have separate networks for voice (telephone), video (television) and data (Internet) services, today we are moving towards a convergence of networks in which a single network covers all these services. Consumers are following suit and are looking for these services combined in a single product. Laws and regulations are, unfortunately, the ones that are lagging behind.

He added that rapid technological changes were driven by digitalization, and that digitalization undermines market boundaries. Technical barriers to entry are crumbling, the number of potential competitors is rising and market definitions are in constant flux. Incumbents often attempt to hold their ground in this growing and fluctuating market by resorting to legal defenses such as regulatory protection and intellectual property law to justify anti-competitive practices.

B. Essential facilities
Taschdjian defined essential facilities as “a facility where one operator or a cartel of operators controls an asset that is essential for the survival of competition.” He observed that under American law a plaintiff must prove:
1. Control of the asset by a monopolist.
2. The inability to practically or reasonably duplicate the essential facility.
3. The denial of the use of the facility to a competitor.
4. The feasibility of providing the facility to a competitor.

Essential facilities bring the question of ‘call termination’ to the forefront. This is a key component to the interconnection between networks that meet certain standards. While new entrants can construct their own networks for local access and transport, he said, they must always rely on other operators to complete calls between their customers and the customers of another network.

3. Digital signals are a series of zeroes and ones. The coding can represent any information: financial, data, newspapers, voice signals, e-mails, etc.
C. Pricing issues
Under this heading, Taschdjian briefly enumerated the different kinds of pricing methods for keeping new entrants out of the market: price discriminations,\(^4\) abuse of competitors, ‘lock in’ pricing to prevent entry, local versus long distance,\(^5\) peak/off-peak prices,\(^6\) business versus residence, etc.

Taschdjian summarized his presentation as follows:
1. Competition authorities and telecom regulators use many of the same tools and have much to learn from one another.
2. Competition authorities operate ex-post, i.e. after the abuse has occurred.
3. Regulators in the telecom sector operate both \textit{ex-ante} and \textit{ex-post}, i.e. they set conditions to prevent abuse of a priori and punish violations \textit{posteriori}.
4. The key to a successful competitive market is multiple choices for both operators as well as consumers.

The last speaker of the session was Mohamed El Hamamsy, president of MegaCom, who gave a presentation entitled “Competition in the Telecom Sector: A View from the Private Sector.” El Hamamsy focused on three main issues: Egypt’s telecom market, the impact of competition and the regulatory system. On the status of the mobile telecom market, he observed that the mobile phone has now become an essential commodity, as indispensable as the watch. It has revolutionized the way people communicate with each other and the way they deal with new technologies that operate over today’s phones, such as Internet and e-mail access. It has also revolutionized jobs and has promoted work on the move.

El Hamamsy then listed the major players in the Egyptian telecom sector: the Ministry of Communications and Information Technology (MCIT), NTRA, and the only landline service provider, TE. Under the MCIT there are three mobile operators, the third only having obtained its license in December 2006.

On the institutionalization of the relevant bodies in this sector, he clarified that the MCIT was established in 1999 and NTRA was established in 1998, when the second mobile license was issued, in order to allocate spectrum and regulate the market. He stressed that it was important to separate the role of the regulator from that of the service providers.

\(^4\) Price discrimination: charging different prices to different market segments irrespective of underlying costs; different from the monopoly prices, which are based on users’ willingness to pay, or ‘value of service.’
\(^5\) Long distance is lower in cost than local, but prices are reversed.
\(^6\) Peak/off-peak prices: day, evening and weekend pricing.
provider (TE). TE has, one hundred and fifty years after its establishment, about 15 percent penetration and about 11 million subscribers, while mobile telephony has about 22 percent penetration in the country and 16 million subscribers after only ten years of existence. Vodafone and Mobinil have been on a competition spree since 1998. With the third operator, he added, competition has escalated, confirming that competition fosters innovation.

When there was only one operator, penetration increased at about 75,000 per year, while with the addition of a second operator subscription increased penetration at a rate of 2 million per year. Similarly, the connection fee for a new subscriber was LE 2,500, whereas following the entry of a competitor connection fees dropped to their current level of only LE 100. Similarly, the fee for prepaid calls dropped from LE 1.25 per minute to LE 0.35 per minute. Competition has also improved the quality of the service providers. Efficient call centers have been established to ensure customer satisfaction. All operators are also keen on providing the most up-to-date technologies. They have introduced GPRS, Blackberry and 3G, while achieving high cost efficiencies.

El Hamamsy stressed it was precisely due to competition driving lower prices and higher-quality services that penetration soared to 22 percent of the market, exceeding most predictions, which estimated 18 percent penetration by 2008. Competition has also led to the introduction of new management technologies, such as call centers, network rollouts and new distribution models (covering stores, methods of marketing, etc). Competition has also had various indirect impacts, which are embodied in the exportation of services, El Hamamsy said. Among these are call-center outsourcing (which brings revenues to Egypt), network rollouts in other countries and network ownership (by Egyptians in other countries, e.g. Orascom Telecom. These examples illustrate how competition spurs businesses to look for foreign markets in which to invest.

On the regulation of the telecom sector, El Hamamsy explained that the NTRA was established when several players were competing. The regulatory body was founded to counterbalance government control over the telecommunications sector. For Prime Minister Ahmed Nazif, who was minister of the MCIT at the time, the NTRA was to perform two main roles:

1. A supportive role, whereby it would act as a neutral body to ensure that competitors adhered to health and safety norms. Essentially, it would serve to protect consumers in the absence of a specialized agency for this purpose.
2. A controlling role, whereby it would supervise the quality of network performance and approve price alterations.
In his summation, El Hamamsy said that Egypt needed to consider the following points:

1. Free competition in the telecom sector is determined by the board of the NTRA according to Article 3 of Law 10/2003. The role of the NTRA is to monitor the telecom sector, provide licensing, determine rules for free competition and identify the violations of these rules. Submitting its report to the competent minister underscores its autonomy and enhances its credibility.

2. It is vital to strike a balance between the country’s need for revenues and its need for technology that can be made available to all. Therefore, high initial connection fees paid up front in order to possess a mobile operating license might be regarded as inappropriate, since profits will eventually be accrued at later stages from consumers/subscribers by raising prices.

3. The requirement that the NTRA approves price alterations does not allow market forces to work properly. Whereas the intervention of the regulatory agency may have been tolerable when there was a duopoly, today, with a third player in the market, market forces should allowed to determine the pricing of products and services.
Q: Regarding the high fee the third operator had to pay, do you think that it will be able to survive and enhance consumer welfare?

A: El Hamamsy agreed that it could survive. But the only way for it to do so in the market is through innovation. Innovation comes hand-in-hand with competition, which means that the third operator has to compete in order to survive. It is true that the existing providers are doing a great job, but it has been observed that in some instances, they have reached a sort of agreement to keep prices above a certain level. In order to prevent price controls by a duopoly, the way was cleared for the entry of a third company in the hope of stimulating a genuinely competitive market.

Q: Do you have any laws that are going to limit the prices of overseas calls? Are there plans for a regulator for this purpose (if it is possible)?

A: Taschdjian explained that, as a result of the GATS/WTO Agreement, there is no longer any area of exclusivity after 2006 for any telecom service in Egypt; i.e. the exclusivity of international services no longer exists. However, licensing issues to deal with that are still under consideration. NTRA is currently working on refining the existing licensing framework with a view to fully liberalizing services. In the course of this refining process, it will be essential to figure out how we can open ourselves to international competition, while taking into consideration the existing licenses. There will definitely be a transitional period to accommodate these changes.

Q: How will the ministry deal with problems of jurisdiction between the NTRA and ECA when it comes to the telecom sector? How will jurisdiction be allocated?

A: El Sherif maintained that there is no overlap between the two authorities. In many countries the relationship between the competition authority and the sector-specific regulator is one of very close cooperation. The industry/sector regulator usually provides the technical expertise on how the market works and it is usually the first to identify a problem. At the next stage, after a problem is identified, coordination takes place between the two authorities; it is a relationship that has usually worked. NTRA is in the process of refining its policies, and is currently producing a White Paper, based on the collection of input from market operators, regulators and users, on the issues and contours of its potential scope of work. The past period can be considered as having been a learning stage. Now the NTRA is building its own framework, though, of course, it will consult constantly with ECA on the matter.
The final session, chaired by Ahmad Ghoneim and including Jenny and Qaqaya as panelists, summarized the conclusions reached by the workshop as follows:

1. The high level and active participation of the audience and the many questions raised throughout the conference clearly indicated the growing eagerness among members of the private sector to comprehend the ramifications of competition law and policy on their business activities. It was strongly sensed that a new competition culture was in the making.

2. The conference proved relevant to promoting an open and transparent dialogue with the private sector, a fact that was stressed and commended. It was generally underscored that the more the private sector comprehends the law, the more it will voluntarily comply with and actively benefit from it.

3. Competition law is not written in stone and should be allowed to evolve and be refined in accordance with the development of the Egyptian market and the requirements of its growth.

4. Competition law cannot be of much use as stand-alone legislation. It must be complemented by an effective competition policy and an environment conducive to free trade and economic openness.

5. Competition law has to be enforced in a manner that is relevant to domestic conditions. On the one hand, the law ensures opportunities for new entries into the Egyptian market; on the other, its application may initially place additional burdens on the economy, with profound social repercussions. For example, its implementation may precipitate the closure of uncompetitive businesses and/or small and medium enterprises which may have a negative impact on important segments of society. It is therefore incumbent upon the government of Egypt to curb the negative effects that may result during the first stages of implementation of the law.

6. The autonomy of the ECA is an essential prerequisite for the authority to discharge its responsibilities effectively and productively. In order to be better poised to thrive and succeed in its tasks, the ECA must also engage in a transparent dialogue with the private sector.

7. It is incumbent upon the ECA to participate effectively in cooperative endeavors with other competition authorities at the regional and international levels, so as to facilitate the acquisition of the skills and expertise needed in this early stage of its development.

8. The ECA has to adjust to local conditions and meet best practice standards through a learning process in the course of which it strives to benefit from international experiences and cooperation.
ANNEX: LIST OF SPEAKERS

Taher Helmy
President, American Chamber of Commerce in Egypt, and Partner, Helmy, Hamza & Partners

Mona Yassine,
Chairwoman, Egyptian Competition Authority

Baha’a Aley Eldin
Associate Professor of Commercial Law, Menoufia University.

Khaled Attia
Executive Director, Egyptian Competition Authority

Hassan Qaqaya
Chief, Capacity Building and Advisory Services, DITC, UNCTAD

Samantha Mobley
Chair of European Competition Practice, Baker & McKenzie Law Firm

Frédéric Jenny
Judge, Court de Cassation, France

Magda Shahin
Director, Trade-Related Assistance Center, American Chamber of Commerce in Egypt

Curt Ferguson
North & West Africa Division President, Coca-Cola Atlantic Industries

James Hamill
Senior Counsel for International Affairs and Director of International Technical Assistance

Eric Schmidt
Chairman of the Executive Committee and Chief Executive Officer, Google

Omar El Sherif
Advisor to the Minister of Communication and Information Technology

Martin Taschdjian
Regulatory Expert, Information and Communications Technology Program, NTRA

Mohamad El Hamamsy
President, MegaCom

Ahmed Ghoneim
Associate Professor, Faculty of Economics & Political Science, Cairo University

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