

**REPORT (2002) OF THE WORKING GROUP ON THE INTERACTION BETWEEN  
TRADE AND COMPETITION POLICY TO THE GENERAL COUNCIL**

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## **A. INTRODUCTION**

1. In the year 2002, the Working Group continued its work under the Chairmanship of Professor Frédéric Jenny (France), pursuant to the mandate provided in paragraph 25 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1). Paragraph 25 reads as follows:

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

2. As agreed at an informal meeting of the Working Group which took place on 26 February 2002, in addition to the work mandated by paragraph 25, the Working Group had a focus, at each of its meetings in 2002, on the matter of technical assistance and capacity-building as called for by paragraph 24 of the Doha Ministerial Declaration.<sup>1</sup> Following the Working Group's practice in previous years, at each meeting, consideration was also given to the matter of "Stocktaking of national legislation", as an aspect of "Other business".

3. This report provides an overview of the work done by the Working Group in 2002. It constitutes a complement to the Working Group's previous reports on its activities in 1997 (WT/WGTCP/1), 1998 (WT/WGTCP/2), 1999 (WT/WGTCP/3), 2000 (WT/WGTCP/4) and 2001 (WT/WGTCP/5).

## **B. PROCEDURAL INFORMATION ON THE WORKING GROUP'S ACTIVITIES**

### *(a) Sources and materials used in the Group's work*

4. As was the case from 1997 through 2001, the work of the Working Group in the year 2002 was based on written contributions by Members and on oral statements, and questions and answers by Members during the Group's meetings. These inputs were supplemented by information received from observer intergovernmental organizations (see subsection (c) below) and background notes prepared by the Secretariat. A tabular summary of written contributions to the Group in 2002 is attached as Annex 2.

### *(b) Meetings held in 2002*

5. The Working Group held four formal meetings in 2002. The dates of the meetings were: 23-24 April, 1-2 July, 26-27 September and 20 November. The meeting of 1-2 July was scheduled to be held back-to-back with a meeting of the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy which took place on 3-5 July 2002.

6. At the informal meeting of the Working Group which took place on 26 February 2002, it was agreed that specific elements of paragraph 25 would be the subject of focused attention at particular meetings of the Working Group in 2002, as set out below:

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<sup>1</sup> Paragraphs 23-25 of the Doha Ministerial Declaration are reproduced in Annex 1.

First meeting (23-24 April):	support for progressive reinforcement of competition institutions in developing countries through capacity-building
Second meeting (1-2 July):	provisions on hard core cartels and modalities for voluntary cooperation
Third meeting (26-27 September):	core principles, including transparency, non-discrimination and procedural fairness

The principal purpose of the meeting held on 20 November was to review and adopt the Working Group's Report (2002) to the General Council. Reports on each of these meetings have been circulated in documents WT/WGTCP/M/17, 18, 19 and 20 (to be issued).

*(c) Cooperation with other intergovernmental organizations*

7. The Singapore Ministerial Declaration (paragraph 20) encouraged the Working Group to undertake its work in cooperation with UNCTAD and other appropriate intergovernmental fora, to make the best use of available resources and to ensure that the development dimension was fully taken into account. In this regard, the IMF and the World Bank have continued to attend the Working Group's meetings in an observer capacity, pursuant to the cooperation agreements concluded between the WTO and these organizations. UNCTAD and the OECD have also continued to attend the meetings as observers, on the basis of an invitation from the Working Group. In the course of the Group's meetings, they have kept the Group updated on relevant activities of their organizations and contributed to the debate. The Working Group is highly appreciative of the valuable contributions to its work made by observer organizations.

8. As a further aspect of cooperation, the Secretariats of UNCTAD and the WTO have cooperated closely in the organization and presentation of a number of regional workshops on aspects of the Doha mandate on trade and competition policy during the year. Cooperation has also occurred with the OECD Secretariat, in the form of participation by representatives of each Secretariat in workshops or other events organized by the other organization. Additional information regarding these activities is summarized in Part D, below. During the year, the Secretariat also participated in an informal information meeting with representatives of the International Competition Network, UNCTAD and the OECD, to share information about each organizations' activities.

**C. CLARIFICATION OF ELEMENTS CONTAINED IN PARAGRAPH 25 OF THE DOHA MINISTERIAL DECLARATION**

9. This section of the Report provides an overview of the substantive work done in the Working Group in 2002, pursuant to the mandate given in the Doha Ministerial Declaration (WT/MIN(01)/DEC/1, paragraph 25). By its very nature, such an overview cannot reflect everything that was said and capture all nuances of the discussion, such as can be found in the detailed records of the Working Group's meetings during the year (WT/WGTCP/M/17-20) and in the written contributions of Members (see Annex 2).

10. This section is organized in accordance with the way in which the Working Group structured its discussion of the issues, on the basis of paragraph 25 of the Doha Declaration. It should be noted that the discussion which took place on some issues cut across more than one of the subheadings used below. This means that, in order to have a full appreciation of the discussion that took place on some of the issues, it may be necessary to refer to more than one subsection of this section of the report. It also means that some degree of repetition has been unavoidable in the preparation of the various subsections.

## I. CORE PRINCIPLES, INCLUDING TRANSPARENCY, NON-DISCRIMINATION AND PROCEDURAL FAIRNESS

11. This matter was discussed by the Working Group at its meeting of 26-27 September 2002. Written submissions on this item were provided by the representatives of New Zealand; Australia; Korea; Thailand; Switzerland; India (two contributions); Japan; the United States (two contributions); and South Africa (documents WT/WGTCP/W/210, 211, 212, 213, 214, 215 and 216, 217, 218 and 219, and 220, respectively).<sup>2</sup> In addition, the Working Group had before it a background note by the Secretariat (document W/209) on the matter or core principles, including transparency, non-discrimination and procedural fairness. The note provided a synthesis of the issues raised and points made by Members on this topic prior to the Group's meeting of 26-27 September, drawing on the Working Group's annual reports for the previous four years and on written submissions by Members. A previous note by the Secretariat on the Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency (document W/114, issued on 14 April 1999) was also made available for the meeting of 26-27 September. In addition, the OECD provided a non-paper relevant to this item (subsequently issued as document W/221). The representatives of Argentina; Brazil; Canada; China; Chinese Taipei; the Czech Republic; Cuba; Egypt; the European Community and its member States; Hong Kong, China; Indonesia; Kenya; Malaysia; Mexico, Morocco; Nigeria and Norway as well as the observers from the Russian Federation and UNCTAD made oral statements or posed questions on this item.

12. The discussion on this item spanned a range of issues, including: (i) the relevance of core WTO principles for the administration of competition law and policy and the potential benefits of incorporating them in a multilateral framework on competition law and policy; (ii) the potential scope and application of the core principles listed in paragraph 25 of the Doha Ministerial Declaration, namely transparency, non-discrimination, and procedural fairness; (iii) in relation to each of the principles, possible concerns relating to incorporation of the principles in a multilateral framework on competition policy, including with respect to their implications for national competition law enforcement processes and for national industrial and other policies of developing countries; (iv) additional principles that could be incorporated in a multilateral framework on competition policy, specifically special and differential treatment and comprehensiveness; and (v) possible means of mediating any conflicts between core principles on competition policy and other economic and social policies, including the role of exceptions and exemptions from national competition law and/or from a multilateral framework; and other matters.

13. With regard to the importance of core WTO principles, including, though not necessarily limited to, transparency, non-discrimination and procedural fairness, for the field of competition policy and/or the desirability of incorporating these principles into a WTO agreement on competition policy, the point was made that these principles were central to the credibility and effectiveness of such policy.<sup>3</sup> Without these elements, a competition regime would lack credibility, authority and respect within the community, and therefore be ineffective. The inclusion of the principles in a WTO agreement on competition policy would support domestic competition agencies in applying the principles, and in resisting pressures from domestic sources, in particular from businesses and other parts of government, which was a problem in developed and developing countries alike. Core principles were also vital in establishing a "competition culture".<sup>4</sup> The point was also made that inclusion of the referenced core principles in a WTO framework on competition policy would provide valuable assurance for traders and investors, thereby contributing to enhanced trade and investment flows.<sup>5</sup> In this way, a multilateral framework would complement the liberalization of trade in goods

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<sup>2</sup> Hereinafter in the Report, documents issued in the series WT/WGTCP/W/... are referred to as "W/..."; documents issued in the series WT/WGTCP/M/... are referred to as "M/...".

<sup>3</sup> M/19, paragraphs 5, 6, 7, 10, 39, 42, 43, 49 and 82.

<sup>4</sup> M/19, paragraphs 14 and 39.

<sup>5</sup> M/19, paragraphs 10 and 39.

and services and would enhance world economic growth and be positive for all countries, developed and developing alike.<sup>6</sup> The view was also expressed that the three principles referred to in paragraph 25 of the Doha Ministerial Declaration were closely inter-linked and mutually reinforcing; discarding any of them would weaken the remaining principles and the functioning of competition policy as a whole.<sup>7</sup>

14. The point was made that competition policy, when it affected trade, was already subject to the principles of non-discrimination, transparency and procedural fairness, at least to an extent, as a result of relevant general provisions of the GATT and the GATS.<sup>8</sup> However, given the unique characteristics of competition policy and its inherent differences from conventional trade issues, it was desirable to consider and make more explicit the application of the principles in this area, in a manner that took account of the special characteristics of the field.<sup>9</sup> The suggestion was made that a good precedent for this approach could be found in various existing WTO agreements in which the core principles had been adapted to the particularities of subjects such as trade in services, intellectual property and sanitary and phytosanitary measures.<sup>10</sup> The point was also made that incorporation of the referenced principles in a WTO agreement on competition policy would not, in any case, involve the harmonization of competition law or policy.<sup>11</sup>

15. The suggestion was made that there were two basic options for the incorporation of core WTO principles in a multilateral framework on competition policy: (i) a narrow application of principles already inherent in WTO rules, which in itself would be a relatively useful outcome; or (ii) a wider application of the principles that would inform the development of competition policies and/or laws in Member countries as well as providing a framework for the further elaboration of work on trade and competition policy within the WTO itself. The latter approach would bring a new and important dimension to the development of multilateral rules not only in respect of the field of competition policy and/or law but also in regard to related work in such areas as investment services, technical barriers to trade and trade facilitation.<sup>12</sup>

16. Delving further into the role and application of each of the principles mentioned in paragraph 25, with regard to the principle of transparency, the point was made that this principle was well-established in WTO agreements such as the GATT (Article X regarding publication and administration of trade regulations), the GATS (Article III regarding transparency) and the TRIPS Agreement (Article 63 regarding transparency). It was, perhaps, of particular importance in regard to "behind-the-border" measures such as competition law and policy, since it was a means to ensure that such measures were not used as a trade-restrictive measure. At the same time, reliance on transparency mechanisms could help to ensure that the reach and coverage of substantive disciplines in an agreement were not unnecessarily intrusive, thereby ensuring that an appropriate balance was struck. Certain aspects of transparency, including the publication of laws, regulations and guidelines of general application, might entail administrative costs, and therefore would have implications for capacity-building. Nonetheless, developing transparent procedures, and having a transparent legislative framework was a key requirement for promoting compliance with the law and for the establishment of a credible enforcement institution. To this extent, the objectives of both the multilateral trading system and of credible and efficient competition law enforcement would be served

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<sup>6</sup> M/19, paragraphs 7, 17, 39, 43 and 60.

<sup>7</sup> M/19, paragraph 14.

<sup>8</sup> For details regarding the scope and application of the principles of national treatment, most-favoured-nation treatment and transparency, see The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency (Note by the Secretariat, document W/114, issued on 14 April 1999).

<sup>9</sup> M/19, paragraph 7.

<sup>10</sup> M/19, paragraphs 7 and 13.

<sup>11</sup> M/19, paragraph 33.

<sup>12</sup> M/19, paragraph 4.

by appropriately designed transparency obligations in a multilateral agreement on competition policy.<sup>13</sup>

17. In the field of competition policy, a transparency commitment would apply to laws, regulations, and guidelines of general application. There would be an obligation upon WTO Members to ensure the publication of such laws, regulations and guidelines in a comprehensive and timely manner. This might be done either in print in an official gazette, journal or the like, or possibly on a publicly accessible website.<sup>14</sup> This "external" transparency obligation would apply not only to laws, regulations and guidelines, but also to sectoral exclusions and exemptions. Such exclusions and exemptions could be important determining factors for firms in making business decisions. Hence, transparency in regard to such matters could be one of several factors which would eventually serve to bring about an increase in FDI flows.<sup>15</sup> A further aspect of transparency would be an obligation on WTO Members to notify their laws, regulations and guidelines as well as sectoral exclusions and exemptions to the WTO.<sup>16</sup> Such notifications might usefully be made to the WTO Committee on Competition Policy that would need to be established to administer the proposed agreement.<sup>17</sup> The point was also made that, in principle, transparency should permeate all aspects of a country's competition regime, including legislation, policies, institutional structures, decision-making processes, enforcement priorities, policy and procedural guidelines, case selection criteria, exemption criteria, appeal processes, and details of all relevant outcomes and decisions made.<sup>18</sup> At the same time, transparency obligations should be defined in a way that was not overly burdensome.<sup>19</sup> In this regard, the question of public availability of individual competition law decisions which have binding precedential value arises; the suggestion was made that a way could be found to make them known to the general public.<sup>20</sup> The suggestion was also made that developing countries be given sufficient time and flexibility to progressively build transparency in the administration and enforcement of the competition law<sup>21</sup>, for instance through transitional measures.<sup>22</sup> Certain elements of an eventual transparency provision could also be identified as priority areas for technical assistance and capacity-building activities.<sup>23</sup>

18. The view was also expressed that the protection of confidential information, including commercial and business secrets, would be a key exception to an eventual transparency principle in a multilateral framework on competition policy.<sup>24</sup> In fact, existing WTO transparency principles generally included an exception for confidential information, which Members typically implemented in a manner consistent with their own laws and legal traditions.<sup>25</sup>

19. A number of questions, concerns and/or reservations were noted regarding the proposal to incorporate the principle of transparency in a multilateral framework on competition policy.<sup>26</sup> Regarding issues of scope and coverage, the suggestion was made that this required careful consideration. With regard to the possible criterion of whether an individual decision had precedential value, at least in common law jurisdictions, this was an extremely broad class of

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<sup>13</sup> M/19, paragraph 39.

<sup>14</sup> M/19, paragraph 40.

<sup>15</sup> M/19, paragraph 40.

<sup>16</sup> For further commentary on the treatment of exceptions and exemptions and exclusions from competition law, see M/19, paragraphs 5, 9, 13, 38, 40, 47 and 50.

<sup>17</sup> M/19, paragraph 40.

<sup>18</sup> M/19, paragraphs 5, 9 and 58.

<sup>19</sup> M/19, paragraphs 23, 24, 27, 28, 29 and 54.

<sup>20</sup> M/19, paragraph 62.

<sup>21</sup> M/19, paragraphs 24, 39 and 61.

<sup>22</sup> M/19, paragraph 45.

<sup>23</sup> M/19, paragraph 39.

<sup>24</sup> M/19, paragraph 5, 11, 12, 45, 48, 50, 51 and 58.

<sup>25</sup> M/19, paragraph 23.

<sup>26</sup> M/19, paragraphs 22, 23, 24, 27, 29, 53, 55 and 73.

decisions because all the court and agency decisions – at least the published ones – could have precedential effect. Thus, according to this standard, any decision by the courts of the United States – not only in government-initiated cases but also in privately-initiated ones – could potentially be caught by a notification requirement.<sup>27</sup> A requirement to publish and notify policies and decisions that were not explicitly meant to be "competition laws", but that nonetheless *de facto* bore on competition might also be burdensome.<sup>28</sup> At a minimum, the view was expressed that there was a need for more studies and discussions to enable developing countries to have a more realistic assessment of the costs and benefits of such provisions before Ministers decided on the modalities of negotiations.<sup>29</sup> However, a realistic assessment of the impact of a transparency requirement would not be possible until the Group had a good idea of the specific substantive obligations that might be required under a possible WTO agreement on competition.<sup>30</sup> Regarding confidentiality, the view was expressed that maintaining the appropriate balance in this area might be difficult given the differing legal, political and institutional environments of Members.<sup>31</sup>

20. In response to these concerns, the view was expressed that to the extent that a Member published individual decisions, some form of non-burdensome notification process could be found. With the suggestions and positive engagement of Members, it would be possible to define a practical set of transparency obligations that would be useful and yet not unduly burdensome, as indeed had been done in other areas of the WTO. The notion of focusing on case decisions with a precedential effect was only one possible solution. The key would be that, once the overall framework for transparency was set, the manner in which it would be satisfied would take account of the realities and diversity of domestic legal systems. The suggestion was made that only the existence of certain basic procedures would be subject to dispute settlement in the WTO, and not the issue of whether the procedures had been properly exercised in a particular case. In other words, the distinction between *de jure* and *de facto* violations would apply to the principle of transparency as well as to that of non-discrimination.<sup>32</sup> The suggestion was also made that an alternative approach was to establish a competition law and policy database, which could provide a convenient one-stop shop for all Members. Reference was made, in this regard, to the example of the APEC Competition Policy and Law Database developed by Chinese Taipei, which contained policy statements, competition laws, regulations, guidelines, case-handling procedures and decisions of all APEC members.<sup>33</sup> Concerning the treatment of confidential information, the point was made that this was not defined in any of the existing WTO Agreements; nevertheless, there were several references in the Agreements to the protection of confidential information as provided for in national laws. Panels had consistently deferred to national laws that were in themselves coherent and provided for this kind of protection.<sup>34</sup>

21. With regard to the principle of non-discrimination, the point was made that it involved two components: most-favoured-nation treatment and national treatment.<sup>35</sup> In the context of applying national competition laws, the suggestion was made that MFN would not pose a great problem; it was hardly conceivable that an authority would accept certain anti-competitive practices of firms originating in one country, while prohibiting those originating in other countries.<sup>36</sup> On the other hand, issues could arise with regard to the status of bilateral and regional cooperation arrangements in

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<sup>27</sup> M/19, paragraph 62.

<sup>28</sup> M/19, paragraph 28.

<sup>29</sup> M/19, paragraphs 23 and 27.

<sup>30</sup> M/19, paragraphs 28 and 62.

<sup>31</sup> M/19, paragraph 23.

<sup>32</sup> M/19, paragraph 63; see related discussion, below.

<sup>33</sup> M/19, paragraph 64.

<sup>34</sup> M/19, paragraph 68.

<sup>35</sup> M/19, paragraphs 6 and 47.

<sup>36</sup> M/19, paragraph 13.

relation to MFN treatment; these would need to be clarified. The principle of national treatment raised a range of issues that would need to be discussed.<sup>37</sup>

22. With regard to the scope and application of the principle of non-discrimination as it would be embodied in a multilateral framework on competition policy, the suggestion was made by delegations supporting development of a multilateral framework that a provision on non-discrimination should apply only to *de jure* discrimination, i.e. to discrimination embodied in laws, regulations and guidelines of general application, and not to *de facto* instances of discrimination.<sup>38</sup> This did not imply that instances of *de facto* discrimination were of no concern; however, at the current stage it was difficult to distinguish potential instances of *de facto* discrimination from the application of the rule of reason in particular market circumstances, and from reasonable exercises of prosecutorial discretion based on objective factors.<sup>39</sup> The point was also made that care would be taken to ensure that the principles embodied in a multilateral framework on competition policy did *not* spill over to other policy areas, such as industrial policy, although these might, in some cases, already be covered by existing WTO disciplines.<sup>40</sup>

23. A number of questions, concerns and/or reservations were noted regarding the proposal to incorporate the principle of non-discrimination in a multilateral framework on competition policy. With regard to possible implications of MFN treatment for existing cooperation arrangements at the bilateral and regional levels, the view was expressed that it was important to preserve the necessary scope for such arrangements. Typically, the level and modalities of international cooperation, voluntary assistance and informational exchange varied depending on a Member country's legal system, competition law enforcement system and degree of experience in the area of competition law.<sup>41</sup> Therefore, a non-discrimination clause in a possible WTO framework on competition policy should not force competition authorities to provide enforcement assistance or to exchange information with all of their counterparts on equal terms. An explicit safeguard might be needed to make this point clear.<sup>42</sup> On the other hand, to the extent that cooperation was treated as voluntary and hence not subject to binding commitments in any WTO agreement on competition policy, there might not be a need for an explicit exemption.<sup>43</sup> A related view was that certain procedural steps could be foreseen to establish positive incentives for enhancing contacts, with the aim of not excluding certain countries *a priori* from cooperation, and thus working in the spirit of MFN. This could be done, for instance, through a commitment to respond to requests by other WTO Members asking for case-specific cooperation, and to explain the reasons if the request could not be taken into consideration.<sup>44</sup> The view was also expressed that, for the sake of transparency, bilateral and regional cooperation agreements should be notified to the WTO.<sup>45</sup>

24. The point was made that the WTO non-discrimination principles were generally applied to "like" products and services; however, competition analysis and enforcement was case-specific, and no two situations were or would be wholly analogous or comparable. Thus, in practice it was difficult to determine whether *de facto* discrimination existed with respect to antitrust enforcement actions, given the individual focus of such actions. Even if the application of WTO national treatment and MFN principles was limited to *de jure* discrimination, as the proponents had now proposed, questions remained. For example, how should sectoral exemptions to competition rules be treated? Most countries, if not all, exempted certain sectors from the application of antitrust rules or regulated them through sectoral legislation instead of, or in addition to, antitrust rules. In the GATT, Article XX

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<sup>37</sup> M/19, paragraphs 14 and 53.

<sup>38</sup> M/19, paragraphs 8, 36 and 44.

<sup>39</sup> M/19, paragraphs 7, 36, 44 and 65.

<sup>40</sup> M/19, paragraph 36.

<sup>41</sup> M/19, paragraph 11.

<sup>42</sup> M/19, paragraph 6.

<sup>43</sup> M/19, paragraphs 37 and 44.

<sup>44</sup> M/19, paragraph 13.

<sup>45</sup> M/19, paragraph 15.



exceptions regarding, for example, the protection of public morals or human health, and law enforcement, would be available for such exemptions and exceptions. However, should a prospective WTO competition chapter address these; and, if so, were there particular factors in the competition context that should be addressed, for example, the state of liberalization of the national economy, or whether or not there was effective national regulatory oversight with respect to exceptions? <sup>46</sup>

25. With regard to possible implications for developing countries, the view was expressed that it was sometimes necessary, for the sake of development, to accept some anti-competitive practices (such as discrimination against a foreign firm) or mergers in order to achieve long term gains. For these reasons, developing countries should be exempted from the application of the principle of national treatment in any multilateral agreement on competition policy<sup>47</sup> or should, at a minimum, benefit from appropriate flexibility.<sup>48</sup> Flexibility was needed, among other reasons, because the economies of most developing countries were dominated by small and medium-sized enterprises whose impact on the market was insignificant. The question here was how small firms in developing countries could remain competitively viable so that they were not wiped out by the current trends of mergers and acquisitions by multinationals which tended to create monopolies and anti-competitive practices, when applying the principle of non-discrimination. The principle of non-discrimination had the potential of being abused if not properly addressed; therefore, it should be implemented, if at all, on a case-by-case basis so that it would not be applied in those cases where it conflicted with countries' development objectives.<sup>49</sup> Because of globalization, local firms were already confronted with intense foreign competition. Industries in developing countries should be given a sufficient time-frame to build up capacity to meet international competition.<sup>50</sup>

26. The view was also expressed that the reasons commonly cited as to why national treatment was an important aspect of non-discrimination in the context of trade policy were not necessarily applicable in the case of competition policy. First, national treatment was intended to ensure that concessions made by Members in respect of trade barriers at the border were not nullified by within-the-border discrimination between imported and domestically-produced goods. Mergers and vertical restraints often had anti-competitive effects both on domestic and foreign producers. However, it was difficult to see how they unfairly blocked market access to imports, which was the concern of the national treatment principle. Second, national treatment was designed to support trade liberalization, which was desirable because, on the whole, it was believed to be beneficial to the participating countries. Competition policy, however, was by definition concerned with imperfect competition, where the presumption in favour of free trade was much less clear cut. Competition policy in respect of mergers and cartels could have different welfare effects on different countries, depending on where the producers and consumers were located. Since developing countries had few products that were exported under conditions of imperfect competition, they were likely to be predominantly on the losing side of mergers and restrictive business practices with cross-border effects, and might have little to gain from the application of the national treatment principle in the competition law of developed countries. A third justification for the national treatment principle in trade agreements was that even in cases where a country could gain unilaterally from departing from free trade, the gains turned into losses if other countries act the same way. However, it had not been established that departures from an international competition policy norm could be mutually destructive in the same way. These distinctions between the national treatment principle as it applied to trade in goods and its potential applicability to competition policy cautioned against the appropriateness of carrying it over to the field of competition policy. Furthermore, much of the discussion so far in the Working Group had been based on the idea of promoting static allocative efficiency as the sole objective of a multilateral agreement. In developing countries, where both private and public resources for research

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<sup>46</sup> M/19, paragraph 22.

<sup>47</sup> M/19, paragraph 26.

<sup>48</sup> M/19, paragraphs 29, 58 and 61.

<sup>49</sup> M/19, paragraph 29.

<sup>50</sup> M/19, paragraphs 25 and 53.

and development (R&D) were limited, the promotion of investment might require a stable degree of economic concentration. Increasing exposure to international trade consequent on trade liberalization could be relied upon to keep a check on market power and limit static resource misallocation. In any case, many developing country Members had little experience or expertise in regard to competition policy. This meant that competition law principles drawn from countries with much more experience, apart from possibly being intrinsically inappropriate for developing countries, would impose greater compliance costs. Developing countries also did not yet have the kind of well-developed safety nets that existed in industrial countries to provide for those displaced by import competition. There was thus a greater need to cushion the impact of such competition through suitable industrial restructuring measures which would also enable developing countries to embrace greater trade liberalization. In this sense, a discriminatory competition policy could be a concomitant to a non-discriminatory trade policy. In the context of meeting the needs of developing countries, it was more appropriate to adopt the concept of non-discrimination in terms of the need to treat different countries with different capacities in a differential manner, and of the need and responsibility to provide assistance, positive measures and affirmative action to local firms and institutions in developing countries to ensure their viability and development so that they could become increasingly efficient and competitive.<sup>51</sup>

27. The view was also expressed that the approach that had thus far been taken to defining non-discrimination and other core principles that might be included in a multilateral framework on competition policy had been fundamentally flawed in that the focus had been on domestic rather than on cross-border trade. For example, non-discrimination had been used interchangeably with "national treatment", which referred to equal treatment between foreign and domestic firms operating within a domestic market. This was a view that would serve the interest of those with significant overseas investment that would like to ensure access to the host countries' markets. Most developing countries, however, were importers and exporters, rather than investors. Thus, priority in the application of the core principles should be focused in the first place on cross-border trade. A competition law should not discriminate between export and non-export firms. In other words, if bid-rigging and price or quantity-fixing agreements were prohibited in the national competition law, export cartels should be subject to the same provisions. The use of export cartels as a strategic trade policy to extract "rents" from foreign countries was unacceptable. If the Doha Ministerial Declaration was truly a development agenda, then unfair cross-border trade, not unfair domestic trade, should be given priority.<sup>52</sup>

28. In response, the view was expressed that not all forms of different or differential treatment were in and of themselves discriminatory; indeed, there could be plenty of reasons why a government might wish to treat different economic operators in a different manner. The point that was being made by delegations supporting incorporation of the principle of non-discrimination in a multilateral framework on competition policy was simply that, as a matter of principle, the reason for the differential treatment could not and should not be nationality. Confidence was expressed that the majority of Members shared this view, and indeed it followed from the founding principles of the WTO. It might also be the case that some of the economic operators that a government was treating in a certain manner were all foreigners. For instance, as had been pointed out by some developing countries, the economic structure of a country might not be sufficiently diversified or developed, and in certain areas firms with certain characteristics could all be foreign. Probably this would not, in itself, constitute discrimination; however, the underlying reasons for the different treatment had to be based on objective policy factors. With regard to an argument that had been made that some Members might be in a position to ensure *de facto* non-discrimination but not *de jure* discrimination, this was understood to mean that Members might not know in advance when they needed to apply differential treatment. However, *a priori* exclusions and exemption were not the only tools to permit this. There were also public interest clauses and several other policy tools that Members with a

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<sup>51</sup> M/19, paragraph 17.

<sup>52</sup> M/19, paragraph 12.

competition authority could adopt. Under the proposed rule, these tools would be acceptable provided that they were administered in a transparent manner.<sup>53</sup>

29. With regard to the argument that WTO rules should focus on cross-border rather than domestic trade, the view was expressed that such a distinction was untenable in practice. Any anti-competitive behaviour that involved cross-border trade or investment necessarily involved domestic economic factors; the only cases where this was not so were situations where there were no imports, exports or foreign direct investment with respect to a given area or product, and trade was purely domestic. If a country decided not to apply competition law to that particular situation, the WTO probably would not have anything to say about that because it was a purely national choice. However, the majority of situations would have a cross-border dimension of one kind or another.<sup>54</sup> In response to this argument, the point was made that the discussions thus far in the Working Group had seemed to concentrate mainly on situations of anti-competitive practices involving investment, meaning commercial presence. This required focusing on the nationality of companies that were already operating within the home country or the host country. However, there were many unfair practices related to cross-border movement of goods in terms of exports and imports, in particular in cartels, and thus a greater focus on cross-border movements of goods would be desirable.<sup>55</sup>

30. With regard to the principle of procedural fairness, the view was expressed that a common feature of all effective competition policy regimes was that they included guarantees that the rights of parties facing adverse decisions and sanctions would be recognized and respected. Such guarantees could vary both in content and in form, because they reflected the tools of the legal system and the traditions that had generated the competition regime. Four broad categories of guarantees were relevant. First, there should be guarantees relating to access to the system. For example, this could involve the right of firms to have notice that a formal investigation by the competition authority was pending against them, and what the authority's objections to their conduct were. A second basic guarantee related to the defence of the firms involved. Firms should have the opportunity and the time to make their views known to the authority in writing or by participating in hearings, by submitting evidentiary proof or documents, and by having an opportunity to introduce testimony from witnesses who might corroborate their views on the facts. These types of guarantees would typically include some right of access to the authority's file. A third guarantee was the right of firms involved in competition proceedings to have decisions affecting them reviewed by an independent judicial body. Finally, the protection of confidential information, including business secrets, should also be guaranteed. These basic guarantees did not need to be harmonized across regimes, but should be described in a future agreement with some clarity.<sup>56</sup> Another view was that four broad concepts could be identified that were likely to promote fairness, namely: (i) the right of access and rights to petition a competition authority; (ii) the right of a firm subject to an investigation to know the basis for an antitrust authority's objection before the authority took action, and the right of that firm to respond; (iii) the right to appeal an agency's decision; and (iv) timeliness.<sup>57</sup>

31. A number of questions, concerns and/or reservations were noted regarding the proposal to incorporate the principle of procedural fairness in a multilateral framework on competition policy. The point was made that, currently, there was no broad consensus on the meaning of procedural fairness in the context of competition law enforcement. This was partly because notions of fundamental fairness differed between legal systems, and were also influenced by the political and legal cultures in which relevant agencies operated.<sup>58</sup> As well, a number of specific questions were posed regarding how the principle of procedural fairness would work in practice, including the

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<sup>53</sup> M/19, paragraph 66.

<sup>54</sup> M/19, paragraph 67.

<sup>55</sup> M/19, paragraph 67.

<sup>56</sup> M/19, paragraph 41.

<sup>57</sup> M/19, paragraph 18.

<sup>58</sup> M/19, paragraph 18.

following questions: who should have rights of access to the system? Would everyone have equal access rights, or could more extensive rights be conferred on certain classes of parties, such as customers of the firms who were the subject of investigation? Should the competition authority be required to accord procedural rights to third parties that might, for example, be harmed by a merger transaction but not in a traditional antitrust sense? Would the agencies of Members whose legal systems allowed for broad rights of private action to pursue competition law claims directly through the use of the courts be required to provide as much formal access to the agency as those that did not? Would all Members be required to have private rights of action? Concerning the right to respond, what form should such a practice take? Would objections need to be notified formally and in writing or could this be done on a more informal basis? As to appeal rights and the role of the judiciary, what types of decisions ought to be reviewable?

32. With regard to the implications of the principle of procedural fairness for developing countries, the concern was expressed that proposals on procedural fairness could require a Member to set up and maintain a judicial framework for handling appeal cases. Similarly, requirements for comprehensive notification of competition laws and related information to both the public and the WTO might require a lot of resources. There was a need for more studies and discussions to enable developing countries to have a more realistic assessment of the costs and benefits of such provisions before Ministers decided on the modalities of negotiations.<sup>59</sup> Among other matters, it would be useful to clarify whether Article X of the GATT was an appropriate reference for discussion of this issue in the Working Group or whether a more specific concept of procedural fairness had to be developed for competition policy.<sup>60</sup> In any case, it was important to address this issue, if at all, in ways that took account of the diversity of Members' legal cultures and the established practices of national judicial systems and competition authorities, where the latter existed.<sup>61</sup>

33. In response to these concerns, the view was expressed that all competition systems – no matter how different they were – respected certain basic criteria of fairness. Furthermore, experience in other areas of the WTO had shown that procedural fairness could be addressed in ways that were simple and practical, and yet took account of the evident diversity in Members' legal cultures and systems. To take the example of judicial review, there were a number of provisions in the WTO agreements stipulating an obligation to provide for judicial review without any interference whatsoever on how judicial reviews were organized in a given country, or the scope of such judicial reviews. In practice, these provisions had not created problems of the type which had been alluded to, and had been useful in terms of reassuring traders and investors that the national systems of countries with which they often had, at best, limited familiarity, respected certain basic norms.<sup>62</sup>

34. Pursuing a specific aspect of the debate, the view was expressed that even the more basic procedural fairness rules that might be envisioned in a multilateral agreement could raise problems for national enforcement processes. For instance, one of the basic rules would involve the right to receive a notice of an investigation. There would be no problem if the required notice was supposed to be addressed to the party being investigated, but the situation was different if there was to be widespread notification, for example, to the WTO and/or its Members. Certain Members' practice was not to disclose publicly the existence of an investigation when it had not been determined that the target of an investigation had done anything wrong, out of respect for the rights of the person being investigated.<sup>63</sup> In response, the point was accepted that there was a need for a clear distinction between notification of investigations to the parties, and notification to the WTO. Nevertheless, one of the essential elements of procedural fairness was that the target of an investigation be so notified. To show compliance with a procedural fairness obligation in the WTO, Members should simply be in

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<sup>59</sup> M/19, paragraphs 27 and 28.

<sup>60</sup> M/19, paragraph 54.

<sup>61</sup> M/19, paragraphs 15, 28 and 63.

<sup>62</sup> M/19, paragraphs 41, 42 and 68.

<sup>63</sup> M/19, paragraph 69.

a position to demonstrate that they had made provision for targets of an investigation to be notified in an appropriate manner.<sup>64</sup> The suggestion was also made that any eventual multilateral framework on competition policy should be non-binding. In this context, the question of obligations relating to procedural fairness would not arise.<sup>65</sup>

35. With regard to additional principles that might be incorporated in a multilateral framework on competition policy, the suggestion was made that the principle of special and differential treatment (S&D) was a key such principle.<sup>66</sup> Possible dimensions of this principle included increasing trade opportunities for developing countries, safeguarding their developmental interests, flexibility in any commitments for developing countries and LDCs, and transitional periods.<sup>67</sup> The view was expressed that development provisions should be established that had a clear linkage to trade dimensions, so that they were closely related to the mandate of the WTO.<sup>68</sup> Further, special and differential treatment implied that time should be granted to developing countries to implement a competition regime and any related commitments; the amount of time should depend on the country's level of development.<sup>69</sup> In addition, developing countries should be given a time-frame to build transparency and due process in the administration and enforcement of the competition law.<sup>70</sup> The view was also expressed that developing countries should be allowed to exempt national and international export cartels, since most developing countries' exporters or importers were mainly small scale and might need to bind together to counter the bargaining power of larger buyers or sellers from industrialized countries. As regards mergers and acquisitions, special and differential treatment should be provided for developing countries so as to enable their economies and their enterprises to achieve a critical mass, which could enable them to compete on an equal footing with enterprises of the same size on international markets.<sup>71</sup>

36. The point was made that giving content to the principle of special and differential treatment might facilitate reaching agreement on the appropriate meaning and scope of procedural fairness and the other proposed core principles.<sup>72</sup> The view was also expressed that special and differential treatment should not necessarily be limited to developing countries. Rather, flexibility could be extended to all countries that had no competition law,<sup>73</sup> regardless of their stage of economic development.<sup>74</sup> Consideration needed to be given as to how special and differential treatment related to progressivity, flexibility, capacity-building and regional institutions.<sup>75</sup> The view was also expressed that the need for special and differential treatment in this area went further than the simple element of progressivity. The focus of work on core principles should be on promoting the developmental needs and the interest of all countries, particularly the developing ones.<sup>76</sup> Nevertheless, the point was made that if exemptions and exclusions became part and parcel of the

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<sup>64</sup> M/19, paragraph 69.

<sup>65</sup> M/19, paragraph 26.

<sup>66</sup> M/19, paragraphs 12, 15, 29, 32, 50, 52, 53, 55, 56, 61, 71.

<sup>67</sup> At the Working Group's meeting in April, the observer from the OECD drew the attention of the Group to various possible types of special and differential treatment like GATS-type approach, exceptions, exemptions and exclusions, plurilateral approach, transitional periods and technical assistance, etc. (see M/17, paragraph 41).

<sup>68</sup> M/19, paragraph 53.

<sup>69</sup> M/19, paragraph 61.

<sup>70</sup> M/19, paragraph 12.

<sup>71</sup> M/19, paragraph 50.

<sup>72</sup> M/19, paragraph 32.

<sup>73</sup> M/19, paragraph 55.

<sup>74</sup> M/19, paragraph 15.

<sup>75</sup> M/19, paragraph 34.

<sup>76</sup> M/19, paragraph 55.

general framework of the agreement, there would be less of a need for special and differential treatment at least on this ground.<sup>77</sup>

37. The suggestion was also made that consideration be given to the following additional principles: (i) the obligations of foreign firms to the host country; (ii) the obligation of home governments to ensure that foreign firms met their obligations; (iii) measures to be taken by domestic firms and governments in a possible multilateral framework; (iv) enabling local firms, especially small firms, to remain competitive and to grow; (v) impediments to competition by government actions, for example anti-dumping actions; (vi) impediments to competition by intellectual property rights' protection, global monopolies and oligopolies, and their effect on local firms; and (vii) large mergers and acquisitions by transnational companies, and their effects on developing countries. The proposed exercise would enable the Working Group to identify appropriate technical assistance and S&D measures that could assist developing countries.<sup>78</sup> The point was also made that past discussions in the Working Group had not addressed the concerns of Members having no comprehensive competition law or authority. A suggestion was made that the Secretariat should carry out further study on how the various core principles could be applied in those economies without a general competition law.<sup>79</sup>

38. The suggestion was made that the principle of comprehensiveness merited inclusion in the proposed multilateral framework. The principles of transparency, non-discrimination and procedural fairness, which were derived largely from current WTO disciplines, provided necessary but not sufficient conditions for an adequate competition policy. In particular, those principles did not adequately deal with the issue of exemptions and exceptions. An additional principle, namely comprehensiveness, which was one of the principles used in APEC to enhance competition and regulatory reforms, was needed to achieve this. Recognizing that all countries would need exemptions and exceptions in their competition policy and law, under a principle of comprehensiveness these exemptions and exceptions would be subject to periodic re-examination within the context of an overall framework or commitment to competition principles.<sup>80</sup> Comprehensiveness was not a core WTO principle, but a core principle of competition policy. Its inclusion in the proposed framework would help to avoid a situation whereby the value of the agreement was undermined by an excessive proliferation of exemptions.<sup>81</sup>

39. Returning to the subject of the possible implications of incorporating non-discrimination and other core WTO principles in a WTO agreement on competition policy for national industrial and other economic and social policies, the view was expressed that much of the debate turned on this. Developing countries needed the flexibility to resort to a range of developmental tools, including those that normally fell under the rubric of "industrial policy". In any case, the resolution of conflicts between competition and development policies should be left to each Member, subject to the transparency consideration. What should be avoided was an overly prescriptive or intrusive approach.<sup>82</sup>

40. In response, delegations supporting development of a multilateral framework suggested that, at least to an extent, the view that competition policy was at odds with developmental objectives was mistaken. This was not in any way to diminish the importance of developmental objectives - certainly, it was understandable that development was the utmost priority of economic policy in developing countries - but only to suggest that broad application of competition policy principles across national economies could be consistent with or even serve to advance those objectives.

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<sup>77</sup> M/19, paragraph 71.

<sup>78</sup> M/19, paragraph 73.

<sup>79</sup> M/19, paragraph 27.

<sup>80</sup> M/19, paragraph 4.

<sup>81</sup> M/19, paragraph 72.

<sup>82</sup> M/19, paragraph 75.

Experience had shown that competition in markets led to greater economic efficiency, thereby contributing to sustainable development in the long term and guaranteeing the interests of all market players, including small and medium-sized enterprises as well as consumers. Certainly, it was not in the interest of developing countries to subject themselves to arrangements such as international cartels – which could only be combated through the effective application of competition laws. For these reasons, an approach based on the sweeping exclusion of whole sectors of the national economy from the scope of competition principles might well damage the objectives that it was intended to promote.<sup>83</sup>

41. Notwithstanding the foregoing, the proponents also affirmed their belief that the proposed multilateral framework could and should preserve adequate "policy space" for developing countries to pursue the economic and social policies they deemed necessary for their own development. It was perfectly legitimate for a government to decide that there were policy goals that overrode the need to protect competition. Among other possible tools, the preservation of appropriate policy space might be addressed through: (i) clear delineation of the scope of the proposed core principles regarding competition policy, with the intent of ensuring that they did not spill over into related policy fields; (ii) appropriate exemptions or exceptions from national competition law and/or the proposed multilateral framework; and/or (iii) the principle of special and differential treatment, discussed below.<sup>84</sup>

42. With regard to the relevance of exceptions and/or exemptions from national competition laws and/or from a multilateral framework as a tool for managing any conflicts with national industrial policies, the view was expressed that given the diversity in stages and patterns of economic development among Members, sufficient flexibility had to be incorporated in any possible framework to make it workable among all WTO Members.<sup>85</sup> A multilateral framework on competition had to provide for the possibility of appropriate exemptions or exclusions in two respects. First, many Members – including LDCs and other developing countries, but also some industrialized countries – wished to provide greater flexibility for small and medium-sized enterprises than for other firms under their competition laws. The proposed framework should permit this kind of flexibility. Second, as mentioned above, national interests might be safeguarded simply by providing for exclusion of sensitive economic sectors altogether from the substantive provisions of a multilateral framework, or from some of the core principles.<sup>86</sup> Provisions for exemptions and exceptions would provide greater flexibility for WTO Members to achieve other national objectives such as industrial and economic development.<sup>87</sup> Exceptions and exemptions must, however, be subject to appropriate transparency procedures, in order that firms trading with a Member or investing in a Member's economy would know where they stood.<sup>88</sup> The suggestion was also made that the ability to implement exemptions should not be phased out over time, or be subject to periodic review.<sup>89</sup>

43. The view was expressed that the experience of some Members confirmed that national competition policies consistent with the principle of non-discrimination could co-exist with national industrial policies and other economic or social policies designed to address particular problems or advance particular interests. Reference was made, in this regard, to the case of Australia, which maintained a non-discriminatory approach to the administration of its competition law. At the same time, there were other government policies in Australia that co-existed with competition policy and had allowed the Government to meet other priorities and goals, e.g. foreign ownership restrictions on Australian media. Furthermore, while Australia's competition regime was non-discriminatory,

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<sup>83</sup> M/19, paragraphs 76 and 83.

<sup>84</sup> M/19, paragraph 77.

<sup>85</sup> M/19, paragraphs 9, 27, 28, 29 and 49.

<sup>86</sup> M/19, paragraph 47.

<sup>87</sup> M/19, paragraph 78.

<sup>88</sup> M/19, paragraph 78.

<sup>89</sup> M/19, paragraph 78.

provision was made for exemptions from the law through legislative means, provided that the exemptions met a public interest test, and through an administrative "authorization" process conducted by the competition authority, which was also based on a public interest test. These considerations made clear that adopting a national competition law consistent with WTO principles of non-discrimination and transparency would not negate Members' ability to implement appropriate national industrial policies, consistent with existing WTO disciplines.<sup>90</sup>

44. In a similar way, the point was made that the Constitution of the South Africa set high standards with respect to the application of the principles of transparency, non-discrimination and procedural fairness. All administrative actions, including actions taken by the competition authorities, had to adhere to them. For instance, there was a clear institutional separation between the functions of investigation and adjudication, and high standards with respect to the provision and publishing of the reasons for any decision made, including decisions that were favourable to merging parties. Although the South African decision-making body in competition cases, the Competition Tribunal, was an administrative tribunal, and a body of laypersons, rather than of judges, effectively it had the status of a high court, and had to adhere to all the principles and procedures characteristically adhered to by institutions of that nature. Notwithstanding this, the South African Competition Act contained provisions designed to advance and promote the interests of small and medium-sized enterprises and those of black-owned enterprises, in the words of the Competition Act, "to extend and promote control of those historically disadvantaged". These two objectives were not only incorporated in the broad objectives of the Act, but were taken into consideration in applications for exemptions under the legislation and constituted specific criteria to be considered in the evaluation of mergers. These aspects of the legislation had passed constitutional muster because the Constitution of the Republic of South Africa provided that in order to promote equality, legislative and other means could be taken to protect or advance persons previously disadvantaged by discrimination. Thus, the guarantees of non-discrimination and procedural fairness embodied in the Constitution and the existence of a Competition Act respecting those guarantees had not prevented the Government of South Africa from pursuing industrial and social policies even though the application of such policies required the selective promotion of particular interest groups.<sup>91</sup>

45. The suggestion was made that, as a possible way forward on this issue, a WTO agreement on competition policy could embody only general provisions with regard to the core principles, while also offering more detailed interpretations or possible approaches for the application of the core principles in the form of non-binding guidelines or a menu of options. This would foster common understanding of the core principles among Members, while also taking into consideration the diversified approaches of competition law enforcement adopted by each Member.<sup>92</sup> The view was also expressed that, although non-binding arrangements could indeed be part of a possible way forward, a purely non-binding framework would not be sufficient.<sup>93</sup>

46. The view was expressed that the principles referred to in paragraph 25 of the Doha Ministerial Declaration were the basis of the multilateral trading system and were known by all countries. To bring them over to competition legislation would not be difficult if Members engaged themselves positively in the exercise. No competition law was opposed to these principles; on the contrary, competition policy and the WTO principles were mutually supportive. Furthermore, the proposed principles would give more credibility to competition agencies. Delegations should therefore adopt a more positive stance in this area, starting with an analysis of how the principles were reflected in their own legislation. In this way, common approaches and positions could be readily identified.<sup>94</sup>

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<sup>90</sup> M/19, paragraph 6.

<sup>91</sup> M/19, paragraph 31.

<sup>92</sup> M/19, paragraph 80.

<sup>93</sup> M/19, paragraph 80.

<sup>94</sup> M/19, paragraph 82.



## II. PROVISIONS ON HARD CORE CARTELS

47. This item was discussed by the Working Group at its meeting of 1-2 July 2002. Written submissions on this item were provided by the representatives of Australia, Canada, the European Community and its member States, Korea, Mexico, Switzerland, Thailand and the United States (documents W/198, 201, 193, 200, 196, 194, 203 and 205, respectively). In addition, the Working Group had before it a background note by the Secretariat (document W/191) on the matter of provisions on hard core cartels. The note provided a synthesis of the issues raised and points made by Members on this topic in previous meetings of the Working Group, drawing principally on the Group's annual reports for the past four years and on written submissions by Members. UNCTAD and the OECD also provided written materials relevant to this item (subsequently issued, with the assent of the Working Group, as document W/197 and document W/207, respectively). In addition, the representatives of Argentina; Brazil; Cuba; Guatemala; Hong Kong, China; India; Indonesia; Japan; Malaysia; New Zealand; Pakistan; Romania; South Africa and Venezuela as well as the observer from the Russian Federation made oral statements or posed questions on this matter.

48. The discussion on this item spanned a range of issues, including: (i) the harm caused by hard core cartels, with particular reference to their effects on developing countries; (ii) the measures needed to address hard core cartels, at both the national and international levels; (iii) the relevance of existing international instruments, including those of UNCTAD and the OECD; (iv) questions, concerns and reservations regarding proposals for action at the multilateral level; and (v) definitional and other issues.

49. With regard to the harm caused by hard core cartels, the view was expressed that these arrangements undermined the potential benefits of trade liberalization and imposed heavy costs on the welfare and development prospects of poor countries.<sup>95</sup> Evidence before the Working Group, including a recent World Bank background study, showed clearly that international hard core cartels had a substantial detrimental impact on developing countries and that this impact was more extensive than had previously been thought.<sup>96</sup> The study had found that imports affected by the cartels described in that study had comprised approximately 6.7 per cent of all developing countries' imports in 1997, or a total of US\$81.1 billion in goods and services. Moreover, the mark-up attributable to the cartels had been as high as 45 to 50 per cent in several cases, implying that the impact on the cost of developing countries' imports was immense. These estimates were based only on the known cartels, described in the study, whose existence had been disclosed by competition authorities in the United States and Europe; therefore, the actual figures could be much higher.<sup>97</sup> To cite one relevant example, the graphite electrodes cartel, which had lasted at least seven years and had covered products worth a total of about €2.5 billion, had fixed prices at about 50 per cent above the competitive market price, implying illegal gains for the cartel members of about €1.2 billion within the European Community alone.<sup>98</sup> Hard core cartels also had an impact on suppliers<sup>99</sup> and on market access.<sup>100</sup> A recent OECD survey had addressed more than one hundred cases investigated in OECD member countries and about 20 non-member countries between 1996 and 2000.<sup>101</sup> The magnitude of welfare losses that had been caused by the cartels described in the OECD survey was many billions of dollars annually. Most of the reported cases were domestic cartels, though international cartels had received a great deal of attention because of their size and visibility. Purely domestic cartels probably

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<sup>95</sup> M/18, paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 47.

<sup>96</sup> Margaret Levenstein and Valerie Suslow, *Private International Cartels and Their Effect on Developing Countries* (Background Paper for the World Bank's World Development Report 2001, 9 January 2001) (available on the Internet at <http://www-unix.oit.umass.edu/~maggiel/WDR2001.pdf>). Referred to henceforth as "World Bank background study").

<sup>97</sup> M/18, paragraphs 9 and 39.

<sup>98</sup> M/18, paragraph 5.

<sup>99</sup> M/18, paragraph 6.

<sup>100</sup> M/18, paragraphs 10 and 43.

<sup>101</sup> *Fighting Hard-Core Cartels – Harm, Effective Sanctions and Leniency Programme*, OECD, 2002.

did even more harm than the big global ones. These cartels were more common in some sectors, including construction, construction materials, sales to government institutions, bulk food, electrical equipment, as well as the services sector, particularly local transport, professional services and health care.<sup>102</sup>

50. The view was expressed that international cartels were largely a developed country phenomenon, in that low-income countries and LDCs were home to none of the notorious international cartels that had been discussed in the Working Group. Nonetheless, it was clear that such cartels had inflicted heavy losses on countries in various parts of the world as had been documented in the submissions of various delegations.<sup>103</sup> The point was also made that cartels tended to operate in countries with weak or non-existent enforcement of competition laws. In the past, only cartels affecting developed economies, in particular those of the United States and the European Community, had been systematically exposed and prosecuted. While the breaking up of cartels in these jurisdictions might, in some cases, impair their operations in developing economies as well, other cartels operating exclusively in developing countries might never be discovered or prosecuted. The international steel cartel was an example of a cartel that had been known to be in existence for over a decade and was undoubtedly harmful to developing countries but had never been prosecuted.<sup>104</sup> Another view was that the magnitude of the harm caused by cartels remained far from clear. Many calculations at this stage seemed to consist of rather crude estimates.<sup>105</sup>

51. With regard to the measures needed to address hard core cartels, the view was expressed that, at the national level, what was called for was the adoption and vigorous enforcement of well-crafted national competition laws.<sup>106</sup> In this regard, the experiences of several WTO Members that had successfully investigated and prosecuted cartels, including both developed and developing countries, were referred to in the Working Group.<sup>107</sup> The point was made that so-called leniency programmes, which typically offered immunity to the first member of a cartel that came forward to the authorities to provide information on the other members, were a potentially powerful enforcement tool.<sup>108</sup>

52. The point was also made that the international scope of many cartels was at odds with a focus only on purely domestic arrangements: rather, there was a clear need for international action in this area.<sup>109</sup> It was difficult for a single competition authority to effectively address the impact of cartels that operated across multiple economies, particularly where the competition regime had only recently been established or the domestic authority had few resources. Therefore, countries needed to cooperate in prosecuting those infringements considered to be most harmful.<sup>110</sup> Cooperation had been undertaken bilaterally in a number of cases, with proven benefits.<sup>111</sup> However, the negotiation and implementation of such agreements was time-consuming<sup>112</sup>, and international cartels or other practices often affected countries other than those covered by particular bilateral agreements. Moreover, countries with more advanced competition regimes might have limited incentive to cooperate with countries whose enforcement of competition law was considered to be inadequate.<sup>113</sup> Finally, many countries were excluded from the benefits of such agreements.<sup>114</sup> For these reasons, the

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<sup>102</sup> M/18, paragraph 48.

<sup>103</sup> M/18, paragraph 33.

<sup>104</sup> M/18, paragraph 9.

<sup>105</sup> M/18, paragraph 37.

<sup>106</sup> M/18, paragraphs 5, 6, 14, 24 and 31.

<sup>107</sup> M/18, paragraphs 5, 6, 14, 30 and 31.

<sup>108</sup> M/18, paragraphs 27 and 29.

<sup>109</sup> M/18, paragraph 22.

<sup>110</sup> M/18, paragraphs 8, 9, 11, 17, 19, 22, 25, 26, 27, 28, 29, 32 and 33.

<sup>111</sup> M/18, paragraphs 8, 9 and 11.

<sup>112</sup> M/18, paragraph 8.

<sup>113</sup> M/18, paragraph 9.

<sup>114</sup> M/18, paragraph 8.

suggestion was made that the incorporation of provisions on hard core cartels in a multilateral framework on competition policy should be considered.<sup>115</sup>

53. With regard to the possible contents of provisions of a multilateral framework on competition policy relating to hard core cartels, the suggestion was made that two main elements were required: (i) a ban on such cartels; and (ii) measures to promote the exchange of information between WTO Members in relation to such cartels. More specifically, a WTO agreement should incorporate a clear statement that hard core cartels were prohibited. There should be a clear definition of such cartels; a mechanism allowing countries to grant exclusions from the definition for domestic policy purposes, while ensuring appropriate transparency regarding such exclusions; and guidance should be provided regarding the deterrence of cartel activity through appropriate penalties. The exact contours of a definition of hard core cartels could only be determined through negotiations. In regard to penalties, while these were inherently a matter for domestic law and were closely linked to the domestic legal system, a WTO Competition Policy Committee could provide guidance to countries wanting to introduce penalties in terms of identifying what had proved effective in various jurisdictions.<sup>116</sup> The suggestion was also made that a transitional period was necessary for developing countries that had not yet established competition laws to adopt such disciplines. During the transitional period, technical assistance and capacity-building relating to the adoption of legislation, as well as the enforcement process, should be provided.<sup>117</sup> The view was also expressed that any international initiative in this area should not focus unduly on domestic as opposed to international arrangements. Importance was attached to the implementation of cooperation mechanisms focused specifically on the issue of hard core cartels.<sup>118</sup>

54. The relevance of existing international instruments was discussed. With regard to the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the "Set"),<sup>119</sup> the Set had, as its primary objective, to ensure that restrictive business practices did not impede or negate the realization of benefits flowing from trade liberalization, particularly those affecting the trade and development of developing countries. It had universal applicability to all enterprises and all countries, as well as being applicable to transactions involving goods and services. As described in the Set, enterprises should refrain from horizontal arrangements such as price-fixing agreements, including export and import agreements; collusive tendering; market or customer allocation arrangements; allocation of sales and production quotas; collective action to enforce arrangements, e.g. by concerted refusal to deal; concerted refusal of supplies to potential importers; and collective denial of access to an arrangement, or association that was crucial to competition.<sup>120</sup> With regard to the OECD Recommendation on Hardcore Cartels,<sup>121</sup> essentially, the Recommendation provided that OECD member countries should ensure that their competition laws effectively halt and deter hard core cartels, in particular by providing for (i) effective sanctions, of a kind and level adequate to deter firms and individuals from engaging in cartel practices; and (ii) adequate enforcement powers and institutions including powers to obtain documents and information. The Recommendation also committed OECD members to cooperate with each other in enforcing their laws against cartels and set out a number of principles to govern such cooperation. The OECD Competition Committee was charged, among other tasks, with reviewing Members' experience in implementing the Recommendation. Non-OECD member

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<sup>115</sup> M/18, paragraphs 8, 9, 10, 11, 16, 17, 29 and 32.

<sup>116</sup> M/18, paragraph 17.

<sup>117</sup> M/18, paragraph 19.

<sup>118</sup> M/18, paragraph 22; see related discussion in Part C(III), below.

<sup>119</sup> United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Geneva: 1980).

<sup>120</sup> M/18, paragraph 33.

<sup>121</sup> OECD Council Recommendation Concerning Effective Action Against Hardcore Cartels (adopted by the OECD Council at its 921<sup>st</sup> Session on 25 March 1998 [C/M(98)7/PROV]).

countries were invited to associate themselves with the Recommendation. Accordingly, both the Set and the OECD Recommendation underlined the breadth of international concern on this issue.<sup>122</sup>

55. A number of questions, concerns and reservations were raised by delegations regarding the foregoing proposals and observations. The view was expressed that there was no generally accepted definition of hard core cartels. The OECD Recommendation focused on enterprise practices, and not on governmental measures having an impact on trade which were already covered under existing WTO Agreements<sup>123</sup>; it was acknowledged that the utility of the term "hard core cartels" was limited in the sense that countries had differing definitions, prohibitions, and exemptions relating to cartel agreements.<sup>124</sup> The definition of hard core cartels was meant to exclude arrangements that could be defended on efficiency-enhancement grounds; in this context, the question was asked whether a distinction between a hard core and a non-hard core cartel could actually be made operational, and whether there was any scope for an efficiency defence of hard core arrangements? If scope existed for an efficiency defence, what would be its extent? In this regard, differences existed in the approaches adopted by some Members.<sup>125</sup> The point was also made that the definition of hard core cartels had been the subject of considerable debate and discussion when negotiating the 1998 OECD Recommendation and the view was expressed that a similar debate should take place within the Working Group before negotiations took place. In particular, would a definition of hard core cartels be limited to price-fixing, bid-rigging, market allocation, and output restrictions, as was the case with respect to the OECD Recommendation? Alternatively, should the OECD Recommendation constitute only a "starting-point", and would the Group consider supplementing the OECD definition by further elements or practices? Another issue to be addressed related to exemptions from cartel prohibitions. Virtually every country had such exemptions, either in connection with industry-specific regulations, or because a choice had been made not to apply competition law to certain conduct or sectors.<sup>126</sup>

56. The question was raised as to whether the definition of hard core cartels would include a *per se* or rule-of-reason approach. The point was made that one Member's national legislation had adopted a *per se* approach in regard to price-fixing and bid-rigging, while the treatment of quantity fixing and market allocation activities was based on a rule of reason. If a rule-of-reason approach was preferred, the question of wide-ranging prosecutorial discretion would have to be discussed. A rule-of-reason approach could justify certain activities on an efficiency-related basis, if the domestic law was based on the size of the domestic market, whereas in the international context, output restrictions and market allocation were unlikely to be justifiable.<sup>127</sup> Another Member state had used the rule-of-reason approach for more than 15 years to evaluate the acceptability of cartel activities. Although efficiency had been the key criterion for application of the rule of reason, this was a flexible concept and depended on individual circumstances. Therefore there were several controversies regarding the use of the rule of reason and efficiency. As a result, the competition law provisions that used the rule of reason had been repealed and a "*per se* illegal" approach adopted instead.<sup>128</sup>

57. A related issue involved export cartels, and ways of dealing with cartels that might not be formally exempted, but that were either not covered by a country's cartel laws, or were sanctioned by a government.<sup>129</sup> In particular, the question was posed as to whether export cartels could be justified by efficiency considerations?<sup>130</sup> In response, the point was made that export cartels, despite their pejorative name, included a variety of possible arrangements the competitive effects of which were uncertain. For example, the origin of export cartels in the United States had simply been to facilitate

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<sup>122</sup> M/18, paragraphs 18, 19, 20, 21, 22, 25, 32, 34 and 46.

<sup>123</sup> M/18, paragraphs 33 and 39.

<sup>124</sup> M/18, paragraph 33.

<sup>125</sup> M/18, paragraph 37.

<sup>126</sup> M/18, paragraph 18.

<sup>127</sup> M/18, paragraph 22.

<sup>128</sup> M/18, paragraph 23.

<sup>129</sup> M/18, paragraph 18.

<sup>130</sup> M/18, paragraphs 34 and 37.

the ability of firms that might not otherwise have had the ability to engage in export activity to do so. In these cases, such arrangements clearly had pro-competitive effects. Care was therefore required in discussing arrangements characterized as export cartels which did not, in fact, necessarily have the same effects as hard core cartels.<sup>131</sup>

58. The view was expressed that intergovernmental or state-to-state arrangements would not likely be covered by a WTO agreement on competition policy, which would be aimed at anti-competitive practices of enterprises. In support of this, it was worth noting that, in the UN Set, there was a specific provision (Paragraph B.9) which made it clear that the Set did not apply to intergovernmental agreements nor to restrictive business practices directly resulting from such agreements.<sup>132</sup>

59. The view was expressed that hard core cartel provisions should not entail an undesirable degree of harmonization of competition laws and institutions, nor should they entail undesirable costs in terms of limiting countries' options in the area of industrial policy in the development stage. Exemptions concerning cartels involving small and medium-sized enterprises and export and import cartels, as well as cartels in specific industry sectors should be considered. On the other hand, exemptions, as a specific instrument of flexibility, should be narrowly defined in their sectoral coverage and should be transparent<sup>133</sup> and of a temporary nature, with the objective of being ultimately phased out. Besides, exemptions or sectoral exclusions were not always an effective or efficient tool for a country to strengthen the competitiveness of domestic industries. The point was made, for example, that, in a Member country, industries with strong international competitiveness such as automobiles and semi-conductor sectors had achieved their competitiveness through experiencing intense competition in the domestic market, rather than being granted sweeping exclusions from competition law.<sup>134</sup>

60. Questions were posed as to whether the WTO was the appropriate venue for international action on hard core cartels. A number of bilateral and regional arrangements already addressed problems relating to international hard core cartels. Moreover, the International Competition Network (ICN) was a fast-evolving forum in which national competition authorities could address competition issues; some considered it to be a promising forum for cooperation and the promotion of best practices. Imposing a WTO obligation on all Members to introduce laws to prohibit hard core cartels was not appropriate since some 50 or more Members of the WTO still did not have a competition law. Even among those developing country Members that had competition laws, it remained uncertain whether all of them fulfilled the standards set out in the OECD Recommendation in terms of having effective sanctions and enforcement procedures and institutions. Developing country Members needed technical assistance and encouragement rather than a burdensome obligation backed up by WTO dispute settlement machinery. If the Dispute Settlement Mechanism did not apply to a multilateral framework on competition policy, what would be left would be no more than some best-endeavour commitments, technical cooperation and perhaps a peer review mechanism. In that light, it might be preferable for such a framework to be developed by a specialized forum such as the ICN instead of the WTO.<sup>135</sup> The point was also made that the ICN was a new body which, at least for the present, was focusing on issues other than cartels.<sup>136</sup>

61. The view was also expressed that, for many developing country Members, to introduce a competition law and to put into place related enforcement institutions would be costly and burdensome. An assessment of the costs and benefits of competition law and enforcement should be

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<sup>131</sup> M/18, paragraph 44.

<sup>132</sup> M/18, paragraph 46.

<sup>133</sup> M/18, paragraphs 21 and 32.

<sup>134</sup> M/18, paragraph 32.

<sup>135</sup> M/18, paragraph 36.

<sup>136</sup> M/18, paragraph 41.

carried out.<sup>137</sup> Despite the explicit invitation in the OECD Recommendation for non-Members of the OECD to associate themselves with the Recommendation, few non-Members had availed themselves of this opportunity. It might be useful to inquire why this was the case. If the issue was institutional in nature, it would be interesting to ask whether the WTO would have any institutional advantage over the OECD and other bodies in addressing hard core cartels.<sup>138</sup> With regard to the scope of substantive rules, a doubt was expressed on the likelihood that a prohibition on hard core cartels at the national level could stand effectively without a corresponding prohibition of mergers to monopoly.<sup>139</sup> The view was also expressed that the reason that the Doha Ministerial Declaration had referred specifically to hard core cartels, in addition to their pernicious effects, was the consensus that existed among competition officials that such activities ought to be prosecuted and banned. Once consideration extended beyond hard core cartels into areas such as mergers, vertical restraints, even dominance, there was a lack of consensus even among competition authorities, and it was not clear that the WTO would be an appropriate place to attempt to provide guidance on these matters.<sup>140</sup>

62. The view was expressed that certain issues needed to be addressed to ensure that a multilateral framework on competition policy was in the interest of developing countries. First, how would any potential definition, particularly a restrictive one, influence domestic provisions in a competition law that attempted to address public policy issues? Flexibility was also important. Another issue that warranted consideration related to the approach that courts had taken in some countries when dealing with prosecutions of cartel activities. Would a definition of a cartel in a multilateral framework be of any relevance if courts tended to use a rule-of-reason approach in analysing cartels or similar conduct?<sup>141</sup>

63. With regard to additional elements relating to hard core cartels, the view was expressed that the Group should discuss possible additional features of any commitment that Member countries might undertake beyond the commitment to adopt a law. In particular, would WTO hard core cartel provisions include reference to penalties and, if so, what would be the content of the provisions in that regard? What would the situation be if a Member were to enact a law but did not enforce it? How could an agreement be crafted that provided the necessary discretion for enforcement authorities not to bring an action where supporting evidence was lacking or where an action would be against the interest of justice? The OECD's experience in negotiating the Recommendation on Hardcore Cartels provided invaluable lessons for the work of the Working Group in regard to these matters. Given the nature of the WTO, reaching a consensus on the treatment of hard core cartels might be even more challenging than it had been in the OECD.<sup>142</sup>

64. In response, the point was acknowledged that further consideration would have to be given to issues such as definitions, exemptions and other dimensions of provisions on hard core cartels in a multilateral framework on competition policy.<sup>143</sup> The point was also made that the problem of hard core cartels was a global phenomenon and not the exclusive preserve of developed countries. Such arrangements were widely recognized as the most harmful type of anti-competitive practice. In addition to the direct, negative impact of cartels on consumer welfare and user industries, they often impacted adversely on market access. For example, the allocation of national markets among cartel members had an adverse impact on market access opportunities that Members would be expected to

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<sup>137</sup> M/18, paragraph 37.

<sup>138</sup> M/18, paragraph 44.

<sup>139</sup> M/18, paragraph 41.

<sup>140</sup> M/18, paragraph 44.

<sup>141</sup> M/18, paragraph 38.

<sup>142</sup> M/18, paragraph 18.

<sup>143</sup> M/18, paragraph 42.

realize as a consequence of the work done by the WTO and GATT before it. Given this, the importance of the issue of cartels for the WTO was self-evident.<sup>144</sup>

### III. MODALITIES FOR VOLUNTARY COOPERATION

65. This item was also discussed by the Working Group at its meeting of 1-2 July 2002. The representatives of the European Community and its member States, Japan, Australia, Korea, Canada, the United States and Thailand introduced written contributions relevant to this item (documents W/193, 195, 199, 200, 202, 204 and 205, respectively). In addition, as had been requested by the Working Group at its informal meeting on 26 February, the Working Group had before it a background note by the Secretariat (document W/192) on modalities for voluntary cooperation. The note provided a synthesis of the issues raised and points made by Members on this topic in previous meetings of the Working Group, drawing principally on the Group's annual reports for the past four years and on written submissions by Members. UNCTAD and the OECD also provided written materials relevant to this item (subsequently issued as document W/197 and document W/208, respectively). The representatives of Colombia; Cuba; Egypt; Hong Kong, China; India; Indonesia; Malaysia; Norway; Singapore; South Africa; Switzerland; Tanzania and Zambia made oral statements or posed questions on this item.

66. The discussion on this item spanned a wide range of issues, including: (i) the need for international cooperation to address anti-competitive practices of enterprises in a globalizing economic environment; (ii) possible modalities for voluntary cooperation which could be incorporated in a multilateral framework on competition policy; (iii) questions, concerns and reservations regarding the proposed modalities; (iv) alternative approaches to cooperation of a more binding nature; (v) practical aspects of cooperation in the field of competition law and policy that bore on the proposed modalities; (vi) linkages to other elements of the paragraph 25 of the Doha Declaration and more general institutional questions.

67. With regard to the need for cooperation, the view was expressed that with the globalization of business activities, anti-competitive business practices increasingly occurred across a number of countries or in some cases even globally. Under such circumstances, it was difficult for a single government to correctly assess the effects of these practices and effectively prevent or remedy them.<sup>145</sup> With adequate and timely access to information, which was often located abroad, countries could increase their efficiency in detecting and investigating cross-border anti-competitive practices, and in market analysis.<sup>146</sup> Further, cooperation allowed countries with less enforcement experience to receive information on how other countries had dealt with particular situations.<sup>147</sup> Last but not least, varied national competition rules created potential trade and investment distortions and increased the costs and uncertainties for governments and companies.<sup>148</sup> In such circumstances, cooperation could expedite, for instance, merger review procedures, and lower the costs of merger transactions.<sup>149</sup>

68. With regard to possible modalities for voluntary cooperation that could be incorporated in a multilateral framework on competition policy, one approach that was suggested was that two principal types of cooperation could be foreseen in the framework of the WTO: firstly, the general exchange of experiences, views, etc. among competition authorities and their officials; and secondly, the more specific forms of cooperation that would take place between competition authorities in regard to individual cases. A WTO Committee on Competition Policy would play a key role in regard to the first category of cooperative activities. Activities of this nature could include exchanges of

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<sup>144</sup> M/18, paragraph 43.

<sup>145</sup> M/18, paragraphs 50, 53, 54, 56, 57, 70, 74 and 81.

<sup>146</sup> M/18, paragraphs 57, 60, 61 and 70.

<sup>147</sup> M/18, paragraphs 67, 72 and 76.

<sup>148</sup> M/18, paragraph 57.

<sup>149</sup> M/18, paragraph 57.

information on national competition laws, practices and developments. Another activity which could be usefully undertaken would be exchanges of experiences and discussions on specific competition policy issues that had an impact on international trade. A third activity that could be undertaken in a WTO Committee on Competition Policy would be voluntary peer reviews of WTO Members' competition laws, policies and perhaps even their enforcement record. A fourth activity would be joint analysis and discussions on global competition issues which affected international trade and global economy. With regard to the second category of cooperation, namely case-specific cooperation, two distinct types of activities were foreseen. The first would be the exchange of information and evidence relating to particular cases, while the second would comprise consultations and exchanges of views on cases which affected the important trade interests of other WTO Members. The proposed modalities for case-specific cooperation would not be limited merely to the investigation of hard core cartels; rather, they could be invoked in cases involving the full range of anti-competitive practices, including abuse of dominant position, vertical restraints and other practices. Notwithstanding this, the proposed modalities would be voluntary or non-binding in nature in that countries ultimately could not be required to cooperate if, for whatever reason, they were not prepared to or were not in a position to do so.<sup>150</sup>

69. The point was made that the tools for voluntary cooperation that, according to this proposal, would be included in a multilateral framework were practical instruments which had come from experience with cooperation at the bilateral level. A first essential tool was notification, whereby one country would inform another of certain cases which affected the other country's important interests. Second, there was the exchange of information other than notifications to facilitate enforcement activities on either side. A third tool involved the provision of mutual assistance in the enforcement process. Finally, the proposed agreement would provide for: (i) traditional or negative comity, meaning that one country would take into consideration the important interests of other affected countries when taking a decision on a case; and (ii) positive comity, which would involve a country taking enforcement action upon a request from another country which suffered from anti-competitive practices originating in the territory of the requested country. All these tools were already found in the bilateral agreements to which some Members were party; regrettably, however, for the most part, developing countries were excluded from the benefit of such agreements.<sup>151</sup> The view was also expressed that a multilateral agreement on competition policy would provide a flexible framework for cooperation in the WTO, which would be a long-term and incremental process and could include a variety of activities, e.g. related to developing institutional capacity, sharing information among competition authorities, and administering the agreement. Given the level of development of competition institutions in many WTO Member countries, it was likely that information exchange would have mainly educative purposes, at least initially. Information of this type could include national legislation, reports of competition authorities, guidelines and other enforcement policies, speeches, presentations and any bilateral cooperation agreements that had been concluded. All these would be useful to the participating Members and would contribute to the capacity-building process.<sup>152</sup> A number of related approaches were also suggested.<sup>153</sup>

70. An alternative view was that the initial commitment on cooperation in a multilateral framework on competition policy should be binding. According to this view, a purely voluntary framework would be ineffective because more advanced competition authorities, with greater information and capabilities, would have little incentive to provide information or assistance to less advanced authorities that were not in a position to offer reciprocal benefits. The initial commitment in the proposed binding framework would be focused purely on fighting international cartels and would consist of the following elements: firstly, there would be mandatory notification by authorities that were currently investigating and prosecuting international cartels to promptly alert competent

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<sup>150</sup> M/18, paragraph 51.

<sup>151</sup> M/18, paragraph 52.

<sup>152</sup> M/18, paragraph 53.

<sup>153</sup> M/18, paragraphs 51, 52, 54, 55, 61, 63, 67, 68, 69, 72 and 74.



authorities in other countries where these cartels could be operating. The notification should include at least the background and the preliminary analysis of the particular case. Authorities should also be kept up to date on a regular basis with regard to progress in the investigation. The second element would be a mandatory consultation. This would require governments that were investigating an alleged cartel to engage in discussions with other Member countries whose interests could be affected. The third element would be assistance in the enforcement process, whereby competition authorities would be required to provide analytical assistance and share experience and suggestions concerning enforcement techniques. Requests for information gathering should also be facilitated. Due to the overwhelming disparities in financial and technical resources between competition authorities in developed and developing countries, special and differential (S&D) treatment for developing Members would be necessary. As one such element, competition authorities in developing countries could be financially compensated for delivering requested services and be allowed to cooperate to the extent possible, subject to technical and financial constraints.<sup>154</sup>

71. With regard to questions, concerns and reservations regarding the proposed cooperation modalities, the suggestion was made that it was important, firstly, to clarify the precise tools that would be included in a possible multilateral framework. Another term the Working Group needed to clarify was the word "voluntary". Previous discussions in the Group had noted that cooperation, as conceived by most countries active in this area, was an inherently voluntary activity; consequently, it would be futile to try to coerce it. Nonetheless, the Group needed to consider whether there would be any obligation on the part of the requested jurisdiction to, for example, "give sympathetic consideration" to a cooperation request; whether a requested jurisdiction that for one reason or another was not in a position to cooperate might have to provide reasons or justification for not doing so; whether there would be any obligation for consultations that could arise in that context, etc. An important related question was the extent of discretion a requested jurisdiction would have, e.g. in the area of notification, if it was looking into a sensitive activity such as a cartel and it did not see fit to engage in extensive notification for fear of compromising the investigation. Still another issue concerned the scope of any obligation relating to cooperation, for example whether it would apply only to conduct encompassed by substantive disciplines that the Working Group would agree to or would go beyond these. For example, if a substantive discipline was adopted only with respect to hard core cartels, would cooperation extend only to such cartels or also to other aspects of competition enforcement?<sup>155</sup>

72. The concern was expressed that developing countries did not feel that they had derived sufficient benefits from the multilateral trading system<sup>156</sup>; without the assurance of concrete benefits from cooperation, they would have less interest in the promotion of competition law and policy at the multilateral level.<sup>157</sup> In particular, the view was expressed that the cooperative arrangements currently in place were insufficient to protect developing countries from international cartels because countries with more advanced competition regimes had weak incentives to cooperate with countries whose enforcement of competition law was considered inadequate.<sup>158</sup> Accordingly, efforts to promote cooperation in the WTO should be built around practical examples, which showed how cooperation could bring benefits to the participating countries.<sup>159</sup> The view was also expressed that cooperation was a catalyst that had brought about closer relations and a cooperative spirit among the staff of the participating agencies<sup>160</sup>; and had laid the ground for closer cooperation. Therefore, when developing countries and countries with weak enforcement regimes had more systematic access to information concerning, for example, the operations of international cartels, they would begin to see the benefits

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<sup>154</sup> M/18, paragraph 54.

<sup>155</sup> M/18, paragraph 55.

<sup>156</sup> M/18, paragraph 60.

<sup>157</sup> M/18, paragraph 70.

<sup>158</sup> M/18, paragraph 76.

<sup>159</sup> M/18, paragraph 72.

<sup>160</sup> M/18, paragraph 55.

that could be achieved from engaging in other forms of cooperation at the multilateral level.<sup>161</sup> Another concern was that, for many small countries with small companies, strategic alliances for importation were important to achieve economies of scale; yet these could be considered as harmful practices or import cartels.<sup>162</sup> The view was also expressed that case-specific cooperation could more appropriately be tackled in bilateral and regional as opposed to multilateral arrangements; if at all, the multilateral framework should be limited to more general types of cooperation.<sup>163</sup>

73. With regard to the proposal to implement binding commitments on cooperation in the framework of the WTO, the view was expressed that making "voluntary cooperation" obligatory would create a "voluntary obligation", which did not make sense.<sup>164</sup> A binding obligation to cooperate could create resource problems for developing and developed countries alike.<sup>165</sup> Further, the view was expressed that mandatory cooperation would indirectly force all countries to have a competition authority; however, taking into consideration differences in levels of development, it was important for each individual country to evaluate whether and at what stage a competition policy or competition authority was justified.<sup>166</sup> The best incentive for cooperation was not a legally binding text; it was the mutual interest of enforcement agencies to assist each other where this was reasonably possible.<sup>167</sup> Cooperation was a two-way process; if one of the two authorities had nothing to contribute, it would be difficult to envisage how an obligation to cooperate would actually work; and if both authorities had something to contribute it would be difficult to envisage how an obligation to cooperate would add value to the exercise.<sup>168</sup> The point was also made that it was important that competition authorities be in a position to decline requests for cooperation, for instance, when an agency did not see it appropriate to engage in extensive notification for fear of compromising a cartel investigation.<sup>169</sup>

74. In response, the view was expressed that a voluntary framework might work in countries with comparable levels of development; however, the same result could not be expected in a multilateral environment that was made up of the most advanced nations and the less developed ones, where the expected benefits from cooperation were not mutual.<sup>170</sup> Best-endeavour clauses appeared to serve little purpose for developing countries<sup>171</sup>, in particular because giving the requested party the ability to refuse requests would not guarantee any kind of response<sup>172</sup>; thus, voluntary cooperative arrangements would be insufficient to protect developing countries from international cartels.<sup>173</sup> Further, while the sharing of information by developed countries could not be enforced by developing countries in voluntary cooperation arrangements, given the power asymmetry between developed and developing countries, voluntary cooperation by developing countries' competition authorities would in practice become mandatory.<sup>174</sup> The view was also expressed that there was no reason why the WTO should duplicate the voluntary mechanisms that were available in bilateral and regional cooperation regimes.<sup>175</sup>

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<sup>161</sup> M/18, paragraph 70.

<sup>162</sup> M/18, paragraph 62.

<sup>163</sup> M/18, paragraph 50.

<sup>164</sup> M/18, paragraph 68.

<sup>165</sup> M/18, paragraphs 66, 67, 71 and 72.

<sup>166</sup> M/18, paragraph 62.

<sup>167</sup> M/18, paragraph 74.

<sup>168</sup> M/18, paragraph 67.

<sup>169</sup> M/18, paragraph 55.

<sup>170</sup> M/18, paragraphs 70 and 54.

<sup>171</sup> M/18, paragraph 63.

<sup>172</sup> M/18, paragraph 70.

<sup>173</sup> M/18, paragraph 76.

<sup>174</sup> M/18, paragraph 63.

<sup>175</sup> M/18, paragraph 70.

75. Reflecting further on the question of binding vs. non-binding cooperation, reference was made to the actual experience with cooperation of some developed and developing country Members. The view was expressed that formal cooperation agreements had brought about closer relations and a cooperative spirit;<sup>176</sup> however, to a large extent cooperation remained an informal process. Informal cooperation, including discussions on investigations, exchanges of non-confidential information and the sharing of relevant information, had been valuable and productive on many occasions.<sup>177</sup> It was largely a matter of making phone calls, exchanging e-mails and meeting colleagues in relevant *fora*.<sup>178</sup> The suggestion was made that it was unclear whether making such activities binding would yield any real advantage.<sup>179</sup> The development of cooperation in the Nordic region was mentioned as an example of a gradual evolution of cooperation from informal to more formal methods.<sup>180</sup>

76. As to the types of information that would be shared in the course of case-specific cooperation, the view was expressed that information that was confidential would *not* be required to be shared; however, Members would remain free to share such information to the extent this was consistent with their national legislation and enforcement practices.<sup>181</sup> In particular, countries that wished to cooperate would have to meet minimum requirements in terms of the quality of their procedures and handling of confidential information.<sup>182</sup> Given the time necessary to establish appropriate frameworks to protect confidential information, the view was expressed that the exchange of confidential information was possible only in the longer term,<sup>183</sup> and that initially, the exchange of non-confidential information was a more achievable target, which would still yield useful outcomes.<sup>184</sup> Further, the view was expressed that the exchange of confidential information should not form part of a multilateral arrangement,<sup>185</sup> as bilateral arrangements were more appropriate for that purpose.<sup>186</sup> Concerns relating to the leakage of confidential information, which among other things could jeopardize the effectiveness of cartel investigations,<sup>187</sup> were also cited.<sup>188</sup> At the same time, the view was expressed that it was important to avoid an over-extensive concept of confidentiality that would make everything that was in an investigation file impossible to exchange. While business secrets should not be exchanged without the express consent of the parties concerned, information consisting mostly of work products of the authorities might be exchanged in appropriate cases. Moreover, in appropriate cases, if authorities had a strong mutual interest, there should be the possibility of coordinating investigations in order to maximize the chances of having successful outcomes.<sup>189</sup> Another view was that Members should explore the possibility of sharing confidential information, because only this would guarantee concrete benefits to developing countries.<sup>190</sup> As to the coverage of the proposed provisions on hard core cartels, the view was expressed that domestic rules on collusive practices should be subject to the particular development needs of the individual country, whereas international cartels were not subject to a development dimension and thus would not merit exemptions, exclusions or development-related defences.<sup>191</sup>

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<sup>176</sup> M/18, paragraph 55.

<sup>177</sup> M/18, paragraph 57.

<sup>178</sup> M/18, paragraph 72.

<sup>179</sup> M/18, paragraph 72.

<sup>180</sup> M/18, paragraph 58.

<sup>181</sup> M/18, paragraphs 52, 53 and 70.

<sup>182</sup> M/18, paragraph 54.

<sup>183</sup> M/18, paragraphs 57 and 54.

<sup>184</sup> M/18, paragraphs 57 and 70.

<sup>185</sup> M/18, paragraphs 67, 70 and 81.

<sup>186</sup> M/18, paragraph 67.

<sup>187</sup> M/18, paragraph 69.

<sup>188</sup> M/18, paragraph 54.

<sup>189</sup> M/18, paragraph 74.

<sup>190</sup> M/18, paragraphs 54 and 70.

<sup>191</sup> M/18, paragraphs 79 and 80.

77. With regard to the proposal to establish a WTO Committee on Competition Policy, the view was expressed that the Working Group on Trade and Competition Policy Issues established under Chapter 15 of the NAFTA Agreement provided an illustration of how such a WTO Committee could work.<sup>192</sup> Such a body could facilitate general exchange of views and experiences<sup>193</sup>; support the exchange of information on domestic competition laws, domestic practices and developments<sup>194</sup>; provide an opportunity to exchange experience and hold discussions on specific competition policy issues having an impact on international trade<sup>195</sup>; serve as a forum for voluntary peer reviews on Members' competition laws and policies<sup>196</sup>, and perhaps even their enforcement record<sup>197</sup>; coordinate and monitor technical assistance<sup>198</sup>; and develop a long-term vision of enhanced cooperation<sup>199</sup>, in particular by discussing issues relating to procedural and substantive convergence.<sup>200</sup> The view was also expressed that while the establishment of such a WTO Committee merited discussion, it should be borne in mind that other multilateral vehicles already existed.<sup>201</sup>

78. With regard to the prerequisites of cooperation in the WTO, the view was expressed that a national enforcement structure was indispensable for meaningful cooperation.<sup>202</sup> A Member without any kind of domestic enforcement capacity could not be involved in case-specific cooperation, because it would have no competition law, no cases and no ability to engage in cooperation.<sup>203</sup> Further, it was unrealistic to expect a country to prosecute firms for conduct affecting another country without a competition law and authority.<sup>204</sup> The view was also expressed that cooperation was possible even if the participating countries had different systems of competition law, and even if a particular country did not have a comprehensive competition law or did not incorporate all the WTO principles in its national legislation.<sup>205</sup> In any case, it was neither reasonable nor fair to force the introduction of national competition laws and policies.<sup>206</sup> Cooperation should be voluntary and sufficiently flexible to allow each individual country to evaluate whether and at what stage a competition policy or authority was justified.<sup>207</sup> A multilateral framework on competition policy without an obligation to adopt a domestic competition law would still be a useful source of assistance for countries in the process of developing and/or implementing a law, and would facilitate cooperation among countries with established competition regimes.<sup>208</sup>

79. Views were expressed regarding possible alternatives to requiring the adoption of fully-fledged competition laws and the establishment of competition authorities at the domestic level. For instance, since cooperation agreements were normally government-to-government instruments, in theory, cooperation could be provided by an agency or Ministry other than the competition authority.<sup>209</sup> Alternatively, instead of each Member of the WTO having a competition law and a competition authority, regional authorities and legal instruments, such as COMESA,<sup>210</sup> could fulfil the

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<sup>192</sup> M/18, paragraph 53.

<sup>193</sup> M/18, paragraphs 51 and 67.

<sup>194</sup> M/18, paragraph 52.

<sup>195</sup> M/18, paragraphs 51 and 53.

<sup>196</sup> M/18, paragraph 53.

<sup>197</sup> M/18, paragraph 51.

<sup>198</sup> M/18, paragraph 53.

<sup>199</sup> M/18, paragraph 53.

<sup>200</sup> M/18, paragraph 53.

<sup>201</sup> M/18, paragraph 68.

<sup>202</sup> M/18, paragraphs 59 and 72.

<sup>203</sup> M/18, paragraph 67.

<sup>204</sup> M/18, paragraph 72.

<sup>205</sup> M/18, paragraph 66.

<sup>206</sup> M/18, paragraph 50.

<sup>207</sup> M/18, paragraphs 62 and 66.

<sup>208</sup> M/18, paragraphs 81 and 82.

<sup>209</sup> M/18, paragraph 82.

<sup>210</sup> M/18, paragraph 60.

requirements of a multilateral framework.<sup>211</sup> In any case, the suggestion that all WTO Members ought to have a competition law did not imply that such laws had to cover all types of anti-competitive behaviour; the only practice that would have to be addressed in some way was hard core cartels<sup>212</sup> – preferably both domestic and international cartels.<sup>213</sup> It was not strictly necessary to have an administrative body called a competition authority, but only an identified and sufficiently equipped enforcement capacity of some kind.<sup>214</sup>

80. The view was also expressed that technical assistance was not only an element, but also a prerequisite of successful cooperation, in particular as regards cooperation between a country with a competition authority and another country without such an authority. In particular, technical assistance for developing countries without competition authorities and laws could allow them to evaluate the implications of enhanced cooperation, for example as regards the types of information that could be exchanged.<sup>215</sup> Capacity-building was indispensable for such countries to choose the legal system that suited them best, which allowed them to effectively fight hard core cartels, as well as to engage in competition advocacy.<sup>216</sup>

81. With regard to the relationship between bilateral, regional and multilateral cooperation arrangements, the view was expressed that none of these arrangements should be exclusive, and that in fact they were complementary.<sup>217</sup> Bilateral and regional arrangements could serve as a starting-point for a multilateral framework.<sup>218</sup> Further, any multilateral framework would benefit from supplementary bilateral and regional cooperation arrangements<sup>219</sup>, in particular when regional arrangements, such as COMESA, served as a substitute for domestic competition regimes.<sup>220</sup> While general cooperation, discussion and joint analysis could be usefully carried out at the multilateral, regional and bilateral levels<sup>221</sup>, a view was expressed that bilateral and regional arrangements were more amenable to detailed commitments regarding case-specific cooperation than a more gradually developing multilateral framework.<sup>222</sup> The view was also expressed that existing bilateral and regional arrangements were limited to developed countries; thus, without a multilateral arrangement, developing countries would remain excluded from the benefits of cooperation.<sup>223</sup>

82. As to the suitability of the WTO as a forum for dealing with cooperation on competition issues at the multilateral level, the view was expressed that the wide membership of the organization,<sup>224</sup> and its expertise in trade issues<sup>225</sup> qualified it to deal with anti-competitive practices that undermined trade and development.<sup>226</sup> The view was also expressed that the heterogeneous membership of the WTO could interfere with the workability of a multilateral framework<sup>227</sup>, in particular, a mandatory approach backed by a dispute settlement mechanism might not take into account the different approaches taken by WTO Members in the field of competition policy.<sup>228</sup> In any

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<sup>211</sup> M/18, paragraph 67.

<sup>212</sup> M/18, paragraph 74.

<sup>213</sup> M/18, paragraph 80.

<sup>214</sup> M/18, paragraph 67.

<sup>215</sup> M/18, paragraph 65.

<sup>216</sup> M/18, paragraph 73.

<sup>217</sup> M/18, paragraphs 51, 53, 50 and 61.

<sup>218</sup> M/18, paragraph 52.

<sup>219</sup> M/18, paragraphs 59 and 68.

<sup>220</sup> M/18, paragraph 60.

<sup>221</sup> M/18, paragraph 67.

<sup>222</sup> M/18, paragraphs 50, 67 and 68.

<sup>223</sup> M/18, paragraph 52.

<sup>224</sup> M/18, paragraph 50.

<sup>225</sup> M/18, paragraph 50.

<sup>226</sup> M/18, paragraphs 50 and 70.

<sup>227</sup> M/18, paragraphs 62 and 63.

<sup>228</sup> M/18, paragraph 63.

case, the view was expressed that cooperation in the WTO was a long-term incremental process<sup>229</sup>, and only in the light of more experience could Members consider a step-by-step<sup>230</sup> development of multilateral cooperation.<sup>231</sup>

83. The view was expressed that an asymmetry of powers and interests existed between developed and developing countries; this called into question the prospects for cooperation on competition policy in the framework of the WTO and, at a minimum, necessitated appropriate safeguards.<sup>232</sup> In response, the view was expressed that the existence of such asymmetries was not only a "North-South" issue; asymmetries also existed among developed countries and among developing countries as well.<sup>233</sup> The point was also made that international cartels typically were harmful to all economies in which they operated; consequently, there was a clear symmetry of interests between developing and developed countries in addressing them.<sup>234</sup>

84. The view was expressed that positive linkages existed between the proposed modalities for voluntary cooperation in the framework of the WTO and other elements of paragraph 25 of the Doha Declaration. A key such linkage related to technical assistance and capacity-building, both as a prerequisite of voluntary cooperation and as an inherent element and benefit of cooperation. In particular, capacity-building was a form of cooperation between established authorities and countries that were in the process of establishing such an authority.<sup>235</sup> Certain general, not case-specific forms of cooperation, in particular in the WTO Committee on Competition Policy, could effectively promote capacity-building.<sup>236</sup> Linkages to the core principles of transparency and non-discrimination were also discussed.<sup>237</sup>

#### IV. SUPPORT FOR PROGRESSIVE REINFORCEMENT OF COMPETITION INSTITUTIONS IN DEVELOPING COUNTRIES THROUGH CAPACITY-BUILDING

85. This item was discussed by the Working Group at its meetings of 23-24 April 2002. Written submissions on this item were provided by the representatives of Australia, Canada, Egypt, the European Community and its member States, Japan, Korea, Romania, Thailand and the United States (documents W/190, 183, 187, 184, 186, 189, 181/Rev.1, 188 and 185, respectively). In addition, the Working Group had before it a background note by the Secretariat (document W/182) on the matter of support for progressive reinforcement of competition institutions in developing countries through capacity-building. The representatives of the Czech Republic; Costa Rica; Ecuador; Guatemala; Honduras; Hong Kong, China; India; Jamaica; Jordan; Malaysia; Morocco; Norway; Pakistan; the Philippines; South Africa; Switzerland and Trinidad and Tobago made oral statements or posed questions on this item. The observer from the OECD provided an update on relevant activities of that organization.

86. The discussion on this item spanned a wide range of issues, including the following: (i) the distinction between support for progressive reinforcement of competition agencies in developing countries through capacity-building as referred to in paragraph 25 of the Doha Ministerial Declaration and technical assistance and capacity-building as called for in paragraph 24 of the Declaration; (ii) the capacity-building needs and the challenges and difficulties encountered in implementing competition policy in developing and transition countries; (iii) characteristics and limitations of existing capacity-building programmes; (iv) the nature, design and delivery of future programmes;

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<sup>229</sup> M/18, paragraphs 53 and 66.

<sup>230</sup> M/18, paragraph 50.

<sup>231</sup> M/18, paragraphs 64 and 52.

<sup>232</sup> M/18, paragraphs 63 and 75.

<sup>233</sup> M/18, paragraph 71.

<sup>234</sup> M/18, paragraph 80.

<sup>235</sup> M/18, paragraphs 67 and 71.

<sup>236</sup> M/18, paragraph 67.

<sup>237</sup> M/18, paragraphs 55, 66, 74 and 82.

(v) the relationship between capacity-building and other elements of a possible framework on competition policy.

87. With regard to the distinction to be drawn between the element of support for progressive reinforcement of competition agencies in developing countries through capacity-building as referred to in paragraph 25 of the Doha Ministerial Declaration and that of technical assistance and capacity-building as called for in paragraph 24 of the Declaration, the Chairman suggested that in respect of the former item (i.e., capacity-building as referred to in paragraph 25), the Working Group's task was to reflect on and clarify the issues associated with reinforcing the role of competition agencies and building a competition culture in developing countries, something which had already been under consideration in the Working Group for the past couple of years. The latter item, on the other hand, was concerned with activities to be undertaken particularly in period leading up to the Fifth Ministerial Conference for the purpose of assisting developing and least-developed countries to "better evaluate the implications of closer multilateral cooperation for their development policies and objectives", as well as to contribute to human and institutional development. Accordingly, matters such as specific needs for seminars or other forms of assistance needed in the short to medium term might more appropriately be taken up in the Group's discussions pertaining to capacity-building as called for under paragraph 24 of the Doha Ministerial Declaration. He stressed that this was only a personal interpretation.<sup>238</sup>

88. With regard to the capacity-building needs of developing and transition countries and the challenges and difficulties encountered in implementing competition policy in such countries, the view was expressed that building trust in market forces and promoting understanding of the contribution of competition policy to sustainable economic development were major challenges. However, when countries with successful experiences in competition law joined these efforts, the prospects for success were much greater. The same held true for designing a framework of competition policy that was suitable for each country's specific economic situation. Technical assistance was only one of various interrelated forms of international cooperation that were contemplated in the Doha Declaration. Furthermore, it was important to note that programmes were more efficient if they were based on effective partnerships between the donor and the beneficiary. There was a growing need for access to information, transfer of competition policy know-how, competition advocacy, etc., which could only be met through increased cooperation including in the WTO.<sup>239</sup> The suggestion was made that this tendency was confirmed by a survey conducted by the OECD in 2001.<sup>240</sup>

89. A number of more specific needs and challenges were identified. First, with respect to the drafting of legislation, many countries, particularly developing and least-developed countries, lacked qualified personnel that had the skills and experience necessary to enable them to draft national competition legislation.<sup>241</sup> Secondly, in relation to the establishment of a competition authority responsible for the implementation and enforcement of national competition legislation, problems encountered included a scarcity of resources, difficulty in developing and maintaining the necessary expertise, and the lack of the necessary infrastructure, including financial and physical infrastructure.<sup>242</sup> Thirdly, for some countries, the costs associated with the implementation and enforcement of a domestic competition law were considered to outweigh the benefits.<sup>243</sup> Fourthly, many developing countries faced an absence of competition advocacy and a competition culture.<sup>244</sup> In order to address such difficulties, the scope of the required technical assistance could range from

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<sup>238</sup> M/17, paragraph 3.

<sup>239</sup> M/17, paragraph 5.

<sup>240</sup> M/17, paragraph 40. For discussion of related elements of the OECD survey, see below.

<sup>241</sup> M/17, paragraphs 6, 7, 12.

<sup>242</sup> M/17, paragraphs 6, 7, 10, 12.

<sup>243</sup> M/17, paragraph 7.

<sup>244</sup> M/17, paragraphs 7, 8, 10.

assistance with the drafting of a competition law and the establishment of competent authorities and training of their staff through to the implementation and enforcement of such law. Developing countries should have access to capacity-building activities that would result in a skilled pool of staff who were able to draft national competition legislation. Technical advice, training, assistance and cooperation from international organizations and countries that had mature, experienced competition authorities were useful resources. In particular, assistance could take the form of exchange of national competition legislation and assistance with respect to the identification of major elements that should be included in the legislation, including administrative, criminal and civil actions and penalties; identification of the administrative and judicial forums of legal actions; and procedures for information exchange. Means should be explored to ensure that the benefits of implementing a national competition law were higher than the costs associated with such implementation. This would require educating the relevant stakeholders about the benefits and drawbacks of a national competition law.<sup>245</sup> Two principles should be considered in the course of providing support for the progressive reinforcement of competition institutions in developing countries through capacity-building: first, flexibility in the sense that a "one size fits all approach" is not appropriate since each country should be free to choose how to apply a competition regime in a way that reflects its economic situation and development objectives; second, progressivity in the sense of allowing developing countries to undertake a phased approach to the discussion, introduction and implementation of competition legislation.<sup>246</sup> Truly meaningful assistance had also to be long term and focused on building in-house knowledge.<sup>247</sup>

90. Regarding the necessity of strengthening competition institutions, the view was expressed that efforts should be developed in three directions: first, it was necessary to continually advocate and emphasize the positive contribution of competition policy and law to economic development since this relationship was not yet well understood in many countries. Secondly, it was necessary to reinforce the capacity of agencies in a country or region to train the staff of competition authorities on a continuous basis. It was also necessary to involve professional training institutions in the field of law and economics that were based in the region or country in question. Such institutions would not only be able to provide training on a regular and continuous basis but would also assist in building an intellectual climate that was supportive of competition policy; would bring students into contact with competition law and economics, many of whom might eventually consider employment with the competition authority; and would provide institutional capacity for research and expert testimony. Thirdly, it was necessary to reinforce linkages between competition authorities. The most effective learning took place as a result of contact between practitioners from different competition jurisdictions. For example, in relation to long-term secondment programmes, apart from the obvious benefits of having an experienced antitrust official on site, it ensured that the "capacity builder" developed an understanding of the country which he or she was assisting and that a long-standing connection developed between competition authorities in the respective countries which, in turn, meant that assistance could continue to be sought long after the capacity builder had returned to his or her home country.<sup>248</sup> The existing technical assistance model according to which foreign experts were sent to a country or region for short seminars was criticized. The view was expressed that such seminars were often too brief and, frequently, the expert was not sufficiently familiar with the legal and economic system and the policy priorities of the country or region in question.<sup>249</sup>

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<sup>245</sup> M/17, paragraphs 7, 8.

<sup>246</sup> M/17, paragraphs 7, 13, 30.

<sup>247</sup> M/17, paragraphs 8, 9.

<sup>248</sup> M/17, paragraph 10.

<sup>249</sup> M/17, paragraph 10.



91. With regard to the specific needs of different countries, the national experiences of several Members were discussed.<sup>250</sup> These illustrated obstacles relating to human resources<sup>251</sup> and the necessity to foster a culture of competition among market actors as well as other groups involved with the application of the law.<sup>252</sup> The view was expressed that promoting a culture of competition did not necessarily require the adoption of a multilateral framework on competition policy in the WTO<sup>253</sup>; on the other hand, the view was also expressed that such a framework could be helpful in this regard.<sup>254</sup>

92. With regard to existing capacity-building programmes, various Members provided detailed descriptions of their technical assistance activities<sup>255</sup>, including Members which had been transformed over the years from recipients to providers of technical assistance.<sup>256</sup> Recognizing that "one size does not fit all", technical assistance programmes had been adapted to the different legal, economic and political environments that existed in different countries.<sup>257</sup>

93. Reference was made to the above-mentioned OECD survey, which provided information on: (i) technical assistance provided by OECD members to non-members in 1999-2000; and (ii) delegations' views regarding the most effective means of delivering such assistance. The following key points had emerged from the survey: (i) more countries and organizations were becoming involved in the area of capacity-building; (ii) this raised important coordination and funding considerations; (iii) challenges in the area of funding required a multifaceted strategy, pursuant to which providers reinforced each others' efforts at every opportunity and increased efforts to raise awareness of competition policy. The strategy needed to seize every opportunity to draw attention to the linkages between competition and areas such as the development of SMEs, infrastructure industries, deregulation, privatization, trade policy, education, health, intellectual property, etc.; (iv) increased coordination could enhance the overall efficiency of technical assistance delivery and reduce duplication through greater communication and cooperation. In this regard, the outreach unit of the OECD was looking forward to actively exploring various options for enhanced cooperation with the Working Group as well as with UNCTAD, the World Bank and individual enforcement agencies; (v) the optimum form of technical assistance and capacity-building was a function of a number of factors including the stage of development of the recipient country both generally and in the specific area of competition policy. The survey had found that, at the early stages, before a competition law had been enacted or even before there was recognition of the need for a broad competition policy, high-profile conferences and short-term visits could be helpful. In contrast, at the stage of drafting a competition law or regulation and establishing an agency, longer-term advisors as well as short-term study visits were useful. For those countries at a more advanced stage of developing a competition policy that were, for example, experiencing difficulties with enforcement due to a lack of expertise or lack of a competition culture, high-profile conferences, peer reviews and workshops were particularly valuable. The benefits to recipient countries appeared to be directly linked to the duration of technical assistance. However, the survey found that few providers of technical assistance had the resources to engage in long-term assistance given that it was particularly costly.<sup>258</sup>

94. With regard to the nature, design and delivery of future programmes, the view was expressed that: (i) the different approaches and steps undertaken by each country for the common purpose of promoting competition policy should be respected; (ii) the provision of adequate technical assistance programmes and tools, especially those reflecting the needs of developing countries, was of utmost

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<sup>250</sup> M/17, paragraphs 6, 11, 12.

<sup>251</sup> M/17, paragraph 6.

<sup>252</sup> M/17, paragraphs 11, 14.

<sup>253</sup> M/17, paragraph 14.

<sup>254</sup> M/17, paragraph 39.

<sup>255</sup> M/17, paragraphs 18, 19, 21 22, 23, 24.

<sup>256</sup> M/17, paragraphs 20, 24.

<sup>257</sup> M/17, paragraph 20.

<sup>258</sup> M/17, paragraph 40.

importance; (iii) in implementing technical assistance and capacity-building, it was desirable to share common principles and approaches for cooperation.<sup>259</sup>

95. The view was expressed that assistance in the investigatory process could take a wide variety of forms: (i) scholarships for academic/professional training; (ii) internships at competition authorities to gain experience; (iii) visits by staff from experienced agencies to guide and assist, particularly in procedural matters in the early years of newly established competition agencies; (iv) resource persons and financial assistance for training workshops targeted at specific groups, such as lawyers, economists and judges; (v) assistance with the organization of workshops for producer and consumer groups; and (vi) guidance in the development of an information database in new competition agencies. Given the problem of high staff turnover in many developing countries, a more sustainable approach to training was needed. It would also be helpful to establish an institution that would be staffed by competition experts from mature regimes. Such experts could be adjunct to the institution, lecturing on specific topics from time to time. Such an institution could organize compressed module courses on a revolving basis, targeting discrete audiences such as the legal fraternity, economists and trade experts, government officials, and others. The suggestion was also made that colleges and universities in developing countries introduce courses in competition law and policy with assistance from experts from countries with more mature competition regimes. In this way, the capacity to provide training internally would be developed.<sup>260</sup>

96. Reference was made to the duration of relevant programmes. Due to confidentiality concerns, interns could normally only be hosted for a period of a couple of weeks. However, placing advisors in new antitrust agencies for a period of more than six weeks was the most effective way to achieve the goals of technical assistance. Such assistance was particularly effective when the advisors were experienced economists or attorneys from established antitrust authorities. Over time, such advisors became familiar with a country's antitrust law, its institutions, markets and the unique challenges that were faced by that particular antitrust authority. Further, over the course of time, long-term resident advisors were more effective because they were able to earn the respect, trust and confidence of the new antitrust authority. However, in some countries, budgetary limitations or the desires of the host country were such that the use of long-term advisors has not been possible. While not as effective as long-term assistance, short-term assistance could be effective in a few key areas. In particular, short-term advisors could be effective during the legislative drafting stage and the institutional design stage of an antitrust authority. Further, short-term missions conducted by lawyers and economists on interactive investigative skill seminars and workshops had also been effective particularly when they involved sending an expert from a certain industry to a newly established antitrust authority when a case had arisen in the same industry. In general, conferences had not been as effective as the long-term or short-term assistance that had been offered, particularly where they used a lecture format that focused on broad theory as opposed to real-world application and the lecturers tended not to be familiar with the recipient country's legal system. One-stop shop programmes that lasted several days were normally ineffective since they presented major concepts or ideas that were not easily practised in different environments. However, there were a few situations where conferences were considered to be particularly effective, including case analysis seminars such as those offered by the OECD in Vienna, where members of agencies were present and analysed actual cases that they were dealing with and received feedback as well as conferences at the national level during the pre-legislative stage of a country at which local and foreign experts discussed the pros and cons of antitrust legislation or the particular details of proposed legislation.<sup>261</sup>

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<sup>259</sup> M/17, paragraph 17.

<sup>260</sup> M/17, paragraph 15.

<sup>261</sup> M/17, paragraph 21.

97. In the course of the above statements and related discussion, the view was expressed that: (i) a "one size fits all" approach to the design and delivery of technical assistance and capacity-building was not appropriate. Rather, technical assistance worked best when tailored to the particular needs and environments of the recipient country and, further, no single competition model was suitable for all circumstances. Furthermore, it was important that capacity-building be viewed as a long-term process<sup>262</sup>; (ii) systematic assessment of needs was critical to effective capacity-building activities.<sup>263</sup>

98. The qualifications of technical assistance providers were important. Enforcement experience was critical and often not possessed by private sector technical assistance providers. Outreach experience or, at least, some familiarity with and experience in dealing with the unique requirements of emerging and developing economies was important. The need for practical assistance in law enforcement, particularly regarding investigative techniques, analytical skills, case handling, etc., was also emphasized.<sup>264</sup>

99. A number of questions were posed by developing countries to the proponents of a multilateral framework on competition policy regarding proposals for an enhanced commitment to technical cooperation and capacity-building in the WTO: (i) how exactly would the institutional capacity of developing countries be strengthened? (ii) would such capacity-building be limited to competition policy as related to trade or would it also cover competition policy *per se*? Where would the line be drawn between the two? (iii) would the resources which would be made available for different forms of assistance be adequate, timely and for a sufficient period of time so as to enable countries at different stages of development to gain adequate experience and create adequate capacity? (iv) would such resources be quantified? (v) how exactly would the needs and development objectives of developing and least-developed country participants be taken into account, so as to avoid a donor-driven process? (vi) would such a process include creation of an organization that would coordinate capacity-building and technical assistance provided to developing countries on a regular basis but at the same time maintain an "arms length" relationship with donors? (vii) what forms of technical assistance and capacity-building would be provided which would enable developing countries to develop the tools and expertise and to find means of obtaining the necessary resources to: (a) know which information to obtain relating to restrictive business practices including hard core cartels and abuses of dominance or mergers originating from abroad and affecting their markets; (b) adopt procedures to obtain such information; (c) interpret and evaluate such information; (d) prove that such practices or mergers were anti-competitive in the face of the legal and economic expertise that would be at the disposal of the firms involved; (e) benefit from voluntary international cooperation, e.g. by obtaining investigatory assistance from a foreign competition authority regarding information available to them or which could be obtained by them or by obtaining judicial assistance; and (f) learn how to respond appropriately to requests for voluntary cooperation from other countries or to extraterritorial enforcement of the competition laws of other countries? Developing countries had little knowledge of what a multilateral framework on competition policy would entail. Therefore, it was perhaps too early to state comprehensively what their technical assistance needs would be. An iterative exercise of training in various aspects was unavoidable. As technical knowledge improved, the need for understanding more issues would correspondingly increase and it would be necessary to provide for such additional training.<sup>265</sup>

100. The observation was made that many tools existed to build capacity and that overlapping aims were sometimes involved. Capacity-building focused on developing and building the ability of a competition authority to enforce competition law and policy in its jurisdiction. This raised the question of how a competition culture could be built in the administration as a whole - in the

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<sup>262</sup> M/17, paragraph 26.

<sup>263</sup> M/17, paragraph 27.

<sup>264</sup> M/17, paragraph 40.

<sup>265</sup> M/17, paragraph 31.

judiciary, in the business community and in the public in general - because competition law and policy could not be enforced where the community as a whole did not have a sense of what competition rules were and what competitive behaviour was. This more long-term aspect of capacity-building was not something that would end or diminish with the end of the work of the Working Group or with the negotiation and implementation of a multilateral agreement. Further, it was not something that in and of itself was linked to multilateral rules. In that context, cooperation between competition authorities was essential if Members were to help developing countries establish competition authorities and build them up. In this respect, one of the main purposes of technical assistance was to ensure that developing country authorities were in a position to benefit from international cooperation.<sup>266</sup>

101. With regard the ways in which capacity-building related to other elements of a possible framework on competition policy, the view was expressed that international cooperation had a useful role to play in addressing competition policy implications posed by globalization of markets. However, given the diversity in scope and emphases of competition policy and implementation instruments across WTO Members, the scope and modalities of cooperation had to be carefully considered. Full account had to be taken of the needs of developing and least-developed country participants and appropriate flexibility had to be provided to address them, as had been mandated in paragraph 25 of the Doha Ministerial Declaration. This included the possibility of not having a competition law. Assistance was needed to help developing and least-developed countries better evaluate the implications of closer multilateral cooperation for their development policies and objectives.<sup>267</sup> The various technical cooperation programmes that has been outlined by Members, particularly those designed to enhance capacity and technical cooperation over the long term, only partly met the mandate contained in paragraph 25. Paragraph 25 made it clear that the WTO and other international organizations should be involved in technical cooperation and capacity-building. In this respect, the design and implementation of competition legislation, the design and establishment of the agency in charge of implementing the law and the development of a competition environment should be given priority, particularly in countries that did not have significant experience in the area. These elements should be part of a coherent technical assistance programme that surveyed the needs of recipients, that took into account the various needs of developing countries, and that established modalities to avoid duplication. An element that was important in respect of both paragraphs 24 and 25 of the Ministerial Declaration was the assessment of the impact of technical cooperation. Such an exercise should be conducted at all levels, including the multilateral level, and therefore should be included as an element of the modalities of cooperation and capacity-building. Such an element was essential since it allowed recognition of the special needs of developing countries and the fact that a "one size fits all" approach was not appropriate.<sup>268</sup> The view was expressed that a distinction had rightly been drawn between technical assistance and capacity-building aimed at enhancing the ability of developing countries to better evaluate the implications of multilateral cooperation in this area and support for progressive reinforcement of competition institutions in developing countries through capacity-building. From the perspective of developing countries, there was an inter-linkage between the two objectives sought to be achieved through technical assistance and capacity-building. The nature and quantum of obligations undertaken by Members for capacity-building in developing countries, which was aimed at reinforcing competition institutions so that they were better able to apply their national laws and to take advantage of international cooperation in anti-competitive cases with international dimensions, would have an important bearing on evaluation of the implications of closer multilateral cooperation for their development policies and objectives.<sup>269</sup>

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<sup>266</sup> M/17, paragraph 33.

<sup>267</sup> M/17, paragraph 29.

<sup>268</sup> M/17, paragraph 30.

<sup>269</sup> M/17, paragraph 31.

102. The view was also expressed that carrying out effective technical assistance and capacity-building programmes required a certain degree of common understanding about the core principles and technical assistance and capacity-building programmes facilitated clarification of the core principles through exchanges of experiences and mutual understanding among the participants. In other words, capacity-building and clarification of the core principles were mutually supportive and should be promoted together.<sup>270</sup>

**D. TECHNICAL ASSISTANCE AND CAPACITY-BUILDING, AS CALLED FOR BY PARAGRAPH 24 OF THE DOHA MINISTERIAL DECLARATION**

103. Paragraph 24 of the Doha Ministerial Declaration states that Ministers recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity-building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, it calls for work to be undertaken in cooperation with other relevant intergovernmental organizations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs. In this regard, in the course of each of its meetings in 2002, the Working Group heard reports on activities undertaken pursuant to the mandate given in paragraph 24, whether by the WTO Secretariat, other intergovernmental organizations and/or by Members acting through bilateral and regional channels.

104. In the course of the year, the following Members informed the Working Group of specific activities relevant to paragraph 24 that had taken place or would take place at their initiative or with their cooperation: Australia<sup>271</sup>, the European Community and its member States<sup>272</sup>, New Zealand<sup>273</sup>, Uruguay<sup>274</sup>, Japan<sup>275</sup>, Korea<sup>276</sup>, Guatemala<sup>277</sup>, China<sup>278</sup> and Argentina<sup>279</sup>. In addition, detailed updates on relevant activities were provided by UNCTAD and the OECD at each meeting of the Working Group.<sup>280</sup>

105. With regard to technical assistance activities undertaken by the WTO Secretariat, an important aspect of these activities throughout the year concerned cooperation with other inter-governmental organizations, especially UNCTAD. At its meeting of 23-24 April, the Working Group was informed of an inter-agency meeting that had taken place at the WTO on 25 January 2002 and that had been attended by representatives of UNCTAD, the OECD and the World Bank in addition to the WTO Secretariat. The purpose of the meeting was to exchange information on each organization's planned activities and to encourage a high degree of cooperation between the participating organizations in the delivery of technical assistance in this area, particularly in the form of regional workshops, where feasible and consistent with each organization's priorities.<sup>281</sup>

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<sup>270</sup> M/17, paragraph 36.

<sup>271</sup> M/17, paragraph 46.

<sup>272</sup> M/17, paragraph 49.

<sup>273</sup> M/17, paragraph 54.

<sup>274</sup> M/19, paragraph 92.

<sup>275</sup> M/19, paragraph 93.

<sup>276</sup> M/19, paragraph 94.

<sup>277</sup> M/19, paragraph 96.

<sup>278</sup> M/19, paragraph 97.

<sup>279</sup> M/19, paragraph 98.

<sup>280</sup> See M/17, paragraph 60; M/18, paragraphs 93 and 94; and M/19, paragraph 100.

<sup>281</sup> M/17, paragraph 58.

106. With regard to cooperation undertaken specifically with UNCTAD, the Group was informed that, in the first part of 2002, with the participation of the WTO, UNCTAD had organized a first series of regional workshops covering aspects of the Doha mandate on trade and competition policy that had taken place in Panama City, for the countries of Latin America; in Tunis, for African countries; in Hong Kong, China, for Asian countries; and in Odessa, for the countries of Central and Eastern Europe. Subsequently, a second series of workshops was being organized by the WTO, with the participation of UNCTAD. To date, this had included regional workshops organized by the WTO Secretariat in Guatemala City<sup>282</sup>, for the countries of Central America; in Libreville, for the countries of French-speaking Africa<sup>283</sup>; and in Port-Louis, Mauritius, for the countries of English-speaking Africa. In addition, UNCTAD had participated in a national workshop that had been organized by the WTO Secretariat in China.

107. Apart from its role in the organization of regional and national workshops focusing specifically on the Doha mandate on trade and competition policy, the Secretariat had participated in the following additional workshops and seminars during the year: an UNCTAD seminar in Abu Dhabi, for countries of the Middle East region; an UNCTAD seminar in Lusaka, for the countries of southern Africa; and a major conference organized by the Fair Trade Commission of Korea in cooperation with UNCTAD and the OECD, in Seoul. In addition, during the year, the Secretariat had presented modules on trade and competition policy in the following WTO seminars and courses dealing with diverse aspects of the Doha Development Agenda: (i) a national seminar for Nigeria on various trade topics; (ii) an OAS-WTO-Georgetown University course for Latin American trade officials, in Washington, D.C.; (iii) an ECA-WTO regional workshop on various issues, held in Addis Ababa; (iv) two special sessions of the WTO Trade Policy course that were held for officials of French-speaking and English-speaking African countries, in Casablanca and Nairobi, respectively; (v) a short course for senior trade policy officials organized by the WTO in cooperation with the Joint Vienna Institute, in Vienna; and (vi) several regular sessions of the regular WTO Trade Policy Course, in Geneva.

108. In the course of the discussion on this item, a number of observations and suggestions were made by Members concerning capacity-building programmes. Among many other comments<sup>284</sup>, the suggestion was made that technical assistance and capacity-building that responded to the various specific needs of developing country Members would assist not only in building up and strengthening legal systems in the competition area, but would also facilitate deliberations in the Working Group. To maximize the usefulness of such activities, the suggestion was made that they focus on the following areas in advance of any discussion of the possibility of reaching consensus on the modalities for negotiations on a multilateral framework on competition policy within the WTO: (i) assessment of the status quo in developing country Members with regard to the development of competition policies and the formulation and implementation of competition laws; (ii) helping developing country Members to develop relevant legal systems and a competition culture by providing training to national competition authorities and other related government agencies as well as the private sector and academic institutions; (iii) analysis of the interrelationship between market development and competition policies in developing country Members; (iv) analysis of the implications of a possible multilateral framework agreement within the WTO on trade and development for developing country Members with and without a mature domestic legal framework on competition policy and the market economy; and (v) information and experience sharing among Members in competition policy.<sup>285</sup> The importance of understanding how competition policy fitted within the broader framework of establishing good systems of economic governance and how it linked with other economic policies such as trade, economic regulation and consumer protection was

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<sup>282</sup> The workshop in Guatemala City was organized in cooperation with the Inter-American Development Bank/INTAL.

<sup>283</sup> Representatives of the Secretariats of both UNCTAD and the OECD participated in this event.

<sup>284</sup> M/17, paragraph 52.

<sup>285</sup> M/17, paragraph 52.

also stressed, particularly in light of the challenges posed by globalization and the increasing incidence of cross-border anti-competitive conduct.<sup>286</sup> The point was also emphasized that it would be desirable for the various organizations involved in providing technical assistance in this area to cooperate as far as possible and to reach a common understanding regarding their respective roles and areas of responsibility.<sup>287</sup> A number of more specific needs were also identified by Members.<sup>288</sup>

109. As a further aspect of technical assistance and capacity-building, during the course of the year the Secretariat was asked to undertake, with the assistance of a consultant, a study of certain elements relevant to the costs and benefits for developing countries of adopting a multilateral framework on competition policy in the WTO. The terms of reference for the study, which were agreed to at the Working Group's meeting on 1-2 July, were as follows:

**"Study of issues relating to a multilateral framework on competition policy**

The study would aim to summarize available information that might facilitate an assessment of the costs and benefits of proposals that had been put forward for development of a multilateral framework on competition policy. It would be based on existing literature and public sources, including studies and other documentation prepared by or for UNCTAD, the OECD and the World Bank, and would address the following three main elements:

- (a) Examination of issues concerning the relationship between competition policy as it relates to trade and industrial policy, including:
  - any trade-offs and complementarities that may arise between the application of competition policy and the attainment of dynamic efficiency gains in developing countries;
  - historical experience regarding the relationship between competition and industrial policy;
  - the implications of possible provisions relating to non-discrimination, transparency, procedural fairness and hard core cartels for national industrial/economic policy options, and national experience in this regard;
- (b) Examination of issues and compilation of available empirical data relevant to the resource implications of adopting and effectively implementing a multilateral framework on competition policy, including provisions relating to hard core cartels, transparency, procedural fairness and responding to requests for voluntary cooperation.
- (c) The impact of competition law and policy in tackling anti-competitive practices of firms in a developing country setting."

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<sup>286</sup> M/17, paragraph 46.

<sup>287</sup> M/17, paragraph 55.

<sup>288</sup> See M/17, paragraphs 48, 50, 51 and 53; M/18, paragraphs 87, 88, 89 and 91; and M/19, paragraphs 97 and 99.

The study was to be based on existing literature and public sources, including documentation prepared by other intergovernmental organizations.<sup>289</sup>

110. Subsequently, the Working Group was informed that the Secretariat had contracted the services of an expert consultant, Dr. Simon Evenett, who was the Director of Economic Research at the World Trade Institute in Bern, to prepare the requested study. Work had already commenced, and it was hoped that the study would be available towards the end of the year.<sup>290</sup>

## **E. STOCKTAKING OF NATIONAL EXPERIENCE**

111. Written submissions relevant to this item were introduced by Korea and Argentina (documents W/189 and 206, respectively).

112. With regard to the relationship between competition policy and development as well as the implications of financial crises, the point was made that that Korea had experienced a foreign exchange crisis in 1997. Many businesses had closed down during this period and many workers lost their jobs. A view had prevailed within the business sector that to ameliorate the effects of the economic crisis, it was necessary to relax competition law to protect Korean companies from international competitors. However, with the recommendation of the IMF and the IBRD, Korea had enforced its competition law more intensively on the grounds that one of the reasons for the Korean economic crisis had been the fact that market mechanisms had not worked effectively. The Korea Fair Trade Commission (KFTC) had played a major role in restructuring the Korean economy into a market economy. It had ensured that, in the process of privatization, competition principles were applied. As a result, currently, the Korean economy was in a significantly better state than prior to the 1997 economic crisis. On this basis, Korea's experience during and subsequent to the crisis had highlighted the need for and importance of competition policy as an underpinning of and counterbalance to industrial policy, and as a bulwark of a vigorous market economy.<sup>291</sup>

113. Also on the subject of the role of competition policy in times of financial or economic crisis, the view was expressed that the recent experience of Argentina had shown the importance of such policy in good times and in bad. In times of economic difficulty, the temptation was great for governments to intervene directly in markets or to fix prices. Indeed, reliance on the market system itself was sometimes called into question. In Argentina, extensive privatization and deregulation, particularly in the early 1990s, often carried out without due attention having been given to the need for competition and other public disciplines, had led to a concentration of the economy with many undesired results. Competition safeguards had been introduced late and with many shortcomings. In many sectors, concentration had facilitated cartelization. As a result, after the original boom resulting from deregulation and privatization, between 1997 and 2000 the economy did not grow and productivity was negative. This experience showed what happened when insufficient attention was paid to the introduction of competitive disciplines in a time of economic restructuring. The suggestion was made that, to restore economic stability, Argentina could not avoid a microeconomic revolution in both the public as well as the private sectors. Strengthening the efficient operation of markets and promoting the adoption of new technologies were the key to future success. An overall lesson from the country's experience was that macroeconomic balance was a necessary but not a sufficient condition for prosperity. Efficiency at the microeconomic level, through the application of sound marketplace framework legislation and institutions including in the area of competition policy, was also required.

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<sup>289</sup> M/18, paragraphs 95-98.

<sup>290</sup> M/19, paragraph 91.

<sup>291</sup> M/17, paragraph 62.



## **ANNEX 1**

### **TEXT OF THE DOHA MINISTERIAL DECLARATION (WT/MIN(01)/DEC/1), PARAGRAPHS 23-25**

(Adopted 14 November 2001)

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

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

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity-building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organizations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

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

## ANNEX 2

### CONTRIBUTIONS PROVIDED TO THE WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY IN 2002

<i>Symbol (WT/WGTCP/W/-)</i>	<i>Member/other source</i>	<i>Where introduced (Reference in Minutes)</i>	<i>Topic</i>
W/181 and Rev.1	Romania	M/17, para. 4-5	Core principles, including transparency, non-discrimination and procedural fairness
W/182	Secretariat	M/17, para. 4	Core principles, including transparency, non-discrimination and procedural fairness
W/183	Canada	M/17, paras. 4 & 19	Core principles, including transparency, non-discrimination and procedural fairness
W/184	EC and member States	M/17, paras. 4 & 18	Core principles, including transparency, non-discrimination and procedural fairness
W/185	United States	M/17, paras. 4 & 21	Core principles, including transparency, non-discrimination and procedural fairness
W/186	Japan	M/17, paras. 4, 16 & 17	Core principles, including transparency, non-discrimination and procedural fairness
W/187	Egypt	M/17, paras. 4, 7 & 48	Core principles, including transparency, non-discrimination and procedural fairness; Provisions on hard core cartels
W/188	Thailand	M/17, paras. 4 & 6	Provisions on hard core cartels
W/189	Republic of Korea	M/17, paras. 4, 20, 47 & 62	Core principles, including transparency, non-discrimination and procedural fairness; Provisions on hard core cartels; Modalities for voluntary cooperation
W/190	Australia	M/17, paras. 44 & 46	Core principles, including transparency, non-discrimination and procedural fairness; Provisions on hard core cartels
W/191	Secretariat	M/18, para. 3	Provisions on hard core cartels
W/192	Secretariat	M/18, para. 49	Modalities for voluntary cooperation
W/193	EC and member States	M/18, paras. 3-5, 51-52	Provisions on hard core cartels
W/194	Switzerland	M/18, paras. 3 & 8	Provisions on hard core cartels

<i>Symbol (WT/WGTCP/W/-)</i>	<i>Member/other source</i>	<i>Where introduced (Reference in Minutes)</i>	<i>Topic</i>
W/195	Japan	M/18, paras. 49-50	Modalities for voluntary cooperation
W/196	Mexico	M/18, paras. 3 & 29	Provisions on hard core cartels
W/197	UNCTAD	M/18, paras. 3, 46-47, 49 & 81	Provisions on hard core cartels
W/198	Australia	M/18, paras. 3 & 11	Provisions on hard core cartels
W/199	Australia	M/18, paras. 49 & 57	Modalities for voluntary cooperation
W/200	Republic of Korea	M/18, paras. 3, 7 & 56	Provisions on hard core cartels
W/201	Canada	M/18, paras. 3, 10 & 24-25	Provisions on hard core cartels
W/202	Canada	M/18, paras. 49 & 53	Modalities for voluntary cooperation
W/203	United States	M/18, paras. 3 & 6	Provisions on hard core cartels
W/204	United States	M/18, paras. 49 & 55	Modalities for voluntary cooperation
W/205	Thailand	M/18, paras. 3, 9 & 70	Modalities for voluntary cooperation
W/206	Argentina	M/18, para. 99	Stocktaking of national experience
W/207	OECD	M/18, paras. 3 & 48	Modalities for voluntary cooperation
W/208	OECD	M/18, paras. 49 & 82	Provisions on hard core cartels
W/209	Secretariat	M/19, para. 3	Core principles, including transparency, non-discrimination and procedural fairness
W/210	New Zealand	M/19, paras. 3 & 4	Core principles, including transparency, non-discrimination and procedural fairness
W/211	Australia	M/19, paras. 3 & 5-6	Core principles, including transparency, non-discrimination and procedural fairness
W/212	Republic of Korea	M/19, paras. 3 & 7-11	Core principles, including transparency, non-discrimination and procedural fairness
W/213 and Rev.1	Thailand	M/19, paras. 3 & 12	Core principles, including transparency, non-discrimination and procedural fairness
W/214	Switzerland	M/19, paras. 3 & 13-14	Core principles, including transparency, non-discrimination and procedural fairness
W/215	India	M/19, paras. 3 & 16-17	Core principles, including transparency, non-discrimination and procedural fairness
W/216	India	M/19, paras. 3 & 16-17	Core principles, including transparency, non-discrimination and procedural fairness

<i>Symbol (WT/WGTCP/W/-)</i>	<i>Member/other source</i>	<i>Where introduced (Reference in Minutes)</i>	<i>Topic</i>
W/217	Japan	M/19, paras. 3 & 15	Core principles, including transparency, non-discrimination and procedural fairness
W/218	United States	M/19, paras. 3 & 22-23	Core principles, including transparency, non-discrimination and procedural fairness
W/219	United States	M/19, paras. 3 & 18-21	Core principles, including transparency, non-discrimination and procedural fairness
W/220	South Africa	M/19, paras, 3 & 30-32	Core principles, including transparency, non-discrimination and procedural fairness
W/221	OECD	M/19, paras. 3 & 58	Core principles, including transparency, non-discrimination and procedural fairness
W/222	EC and member States	M/20 (to be issued)	Core principles, including transparency, non-discrimination and procedural fairness

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