

**Working Group on the Interaction
between Trade and Competition Policy**

REPORT ON THE MEETING OF 26-27 MAY 2003

Note by the Secretariat

1. The twenty-second meeting of the Working Group on the Interaction between Trade and Competition Policy took place on 26-27 May 2003, under the Chairmanship of Professor Frédéric Jenny.

2. As had been agreed at the informal meeting of the Working Group on 17 January 2003, the agenda for the Working Group's meeting consisted of the following items:

- Elements contained in paragraph 25 of the Doha Ministerial Declaration, including matters raised and questions posed in 2002 to which delegations wish to revert;
- The nature and scope of compliance mechanisms that might be applicable under a multilateral framework on competition policy
- Possible elements of progressivity and flexibility that might be included in an eventual multilateral framework on competition policy
- Technical assistance, as called for in paragraph 24 of the Doha Ministerial Declaration; and
- Other business, including stocktaking of national experience and legislation.

I. ELEMENTS CONTAINED IN PARAGRAPH 25 OF THE DOHA MINISTERIAL DECLARATION, INCLUDING MATTERS RAISED AND QUESTIONS POSED IN 2002 TO WHICH DELEGATIONS WISH TO REVERT

3. The representatives of Australia, Kuwait, Kenya, Malaysia and China introduced written submissions relevant to this item (documents WT/WGTCP/W/232, 237, 238, 239 and 241, respectively). In addition, the Working Group had before it the final text of a Study prepared under the responsibility of the Secretariat, with the assistance of a consultant, on Issues Relating to a Possible Multilateral Framework on Competition Policy (document WT/WGTCP/W/228). The Group also had before it a background note by the Secretariat on Provisions on Procedural Fairness in Existing WTO Agreements (WT/WGTCP/W/231). The representatives of the European Community and its member States; Hong Kong, China; Morocco; Nigeria; Canada; Switzerland; India; Egypt; Cuba; Venezuela; Thailand; Norway; Chinese Taipei; Tanzania and Indonesia made oral statements or posed questions on this item. The observers from the UNCTAD and the World Bank provided updates on relevant activities of their organizations.

4. The representative of Australia, introducing document WT/WGTCP/W/232, said that the Doha Ministerial Declaration had recognized the case for a multilateral framework on competition policy to enhance the contribution of competition policy to trade and development (paragraph 23);

Australia supported this. Its own experience was that competition law and policy had provided an important underpinning of Australia's economic welfare by enhancing its efficiency, productivity and consumer welfare. The strengthening of Australia's competition policy framework in the 1990s had contributed to strong economic performance at a time when much of the world had been faced with significant economic challenges. The importance of competition policy to Australia's performance had been recognized by all of the major international organizations including the IMF and the OECD; for Australia, this underscored the compatibility of competition policy with economic growth and development; and would reinforce an open multilateral trading system that raised the growth and development potential of all its participants.

5. Continuing, he said that the Study of Issues Relating to a Possible Multilateral Framework on Competition Policy prepared by the Secretariat (document WT/WGTCP/W/228; discussed further below) had systematically addressed the benefits and costs of a possible multilateral framework on competition policy and had presented strong evidence that such a framework would have significant net benefits. It had also shown that there was no fundamental incompatibility between such a framework and the objectives of national industrial policies, including the promotion of dynamic efficiency gains. In addition, expert presentations at the Symposium that had been organized by the Secretariat in conjunction with the Working Group's meeting of 20-21 February had provided a number of complementary perspectives. In his view, some of the key observations to be drawn on the basis of the expert presentations at the Symposium were the following: first, the harm caused by cartels and other anti-competitive practices was substantial. The costs were even heavier for developing as compared to developed countries, in that developing countries often lacked the tools necessary to deal with such practices. This was a key consideration underlying the need for a multilateral role in this area. Second, the costs of enforcing competition legislation would be minor as compared to the benefits. Third, cooperation in the context of a multilateral framework offered the prospect of significantly shortening the time frames that developing countries would need to build and embed competition laws and policies that would support their development goals; a key consideration in this regard was the more supportive environment it would provide for better-targeted assistance and capacity building. Notwithstanding this, the need for flexibility and progressivity in the implementation of such a framework was obvious. Furthermore, the need for technical assistance and capacity building in this area could not be over-stated and clearly outstripped existing capabilities; multilateral organizations had a key role to play in this area, with the support of developed countries acting in their individual capacities.

6. With regard to key themes of the discussion to date in the Working Group regarding the proposed multilateral framework, he noted that the question of binding vs. non-binding commitments in a multilateral framework was an important threshold consideration which would have implications for the extent of guarantees of flexibility and progressivity that would be necessary in relation to such a framework. The proposal of the European Community and its member States, as it was understood by Australia, was that the main elements of the provisions regarding core principles and hardcore cartels would be binding in nature, but with the significant qualification that the framework would address only *de jure* instances of discrimination. Even so, a number of questions had been put by Members as to the appropriateness of binding commitments in this area. Further to this point, Australia agreed with the view that had been expressed by Hong Kong, China that Members needed to have information on the breadth and depth of possible obligations that they were being asked to assume. On the question of whether a multilateral framework would imply a commitment to have a competition law and a related enforcement capability at some point in the future, it was noteworthy that a large and growing proportion of WTO Members had by now adopted or were in the process of adopting competition laws and enforcement capabilities; moreover, no Members were going in the opposite direction in the sense of abolishing such laws. Supporting reasons for this trend were the significant net welfare gains that could accrue to countries from adopting such legislation as had been reflected, for example in the Study of Issues Relating to a Possible Multilateral Framework on Competition Policy (document WT/WGTCP/W/228; discussed below). Significant support for the adoption of such legislation was already being provided by various international organizations and

individual Members. The proposal for a multilateral framework on competition policy offered the opportunity to endorse and enhance this trend. For those Members that currently lacked such laws, the question was whether there was any evidence of adverse effects from the adoption of such laws that would cause them to oppose a commitment in this area, particularly if due provision was made for flexibility and progressivity in its implementation.

7. With regard to the proposed elements concerning core principles and hardcore cartels, while operational details remained to be worked out, no one had argued that competition law and policy were fundamentally consistent with these elements; rather, they were widely viewed as being central to any effective competition regime. There was also a wide recognition that these elements could involve an administrative burden for developing countries currently lacking these tools; the solution to this was in appropriate flexibility and progressivity frameworks supported by continuing commitments with regard to technical assistance and capacity building. A key aspect of the current proposal for a multilateral framework that would limit any unforeseen repercussions was that it would deal only with obligations concerning general laws and regulations, and would not seek to limit Members discretion in respect of individual cases. With regard to hardcore cartels, Australia supported a clear prohibition of such arrangements that was sufficiently broad to cover both domestic and international cartels. A rule of reason (case-by-case) approach should apply to any arrangements with the potential for significant efficiency benefits. The OECD Recommendation on Hardcore Cartels provided a useful source of guidance for WTO Members in this regard.

8. Regarding the types of information that would be shared within a multilateral framework, Australia agreed with other Members that a WTO framework should not require the sharing of confidential information; this would be counter-productive and potentially damaging to existing enforcement capabilities. Bringing together the foregoing points, he offered the suggestion that, in addition to the by now well-established mantra in the Working Group that "Competition is good", a second mantra should be adopted, namely that "cooperation [in the implementation of competition law and policy] is good". A question that Australia wished to pose, in this regard, was whether it was possible for developed country Members to give assurances to developing country Members that, in the course of exercising their enforcement capabilities, careful attention would be given to international dimensions of decisions taken, for example in the context of existing leniency programmes.

9. The representative of the European Community and its member States said that the paper submitted by Australia (WT/WGTCP/W/232) had raised a number of pertinent questions, some of them along the same lines as those raised by the submission of Hong Kong, China (WT/WGTCP/W/224) to the Working Group's meeting of 20-21 February. With regard to the various issues concerning international cooperation that were raised in the paper, he reiterated for the record that in the view of his delegation, the modalities for cooperation that were referenced in paragraph 25 of the Doha Ministerial Declaration should be voluntary in nature. Furthermore, his delegation was *not* suggesting that a multilateral framework should provide for the exchange of confidential information, which would be inappropriate and counter-productive in the context of the WTO. As had been discussed in previous meetings of the Working Group, important benefits could be achieved merely through the exchange of information which was non-confidential in nature. On the other hand, the protection of confidential information was a value that was recognized in various existing WTO Agreements, for example the GATS and TRIPS Agreements. If individual Members wished to go as far as exchanging confidential information, this was a matter to be pursued in their bilateral relations with other Members interested in this possibility. With regard to the costs of implementing an effective competition regime, while agreeing with the observation that had been made by the representative of Australia that the costs were likely to be minor in comparison to the benefits, he also recognized the need for flexibility and progressivity to ensure that any attendant costs could be effectively managed.

10. Another representative of the same delegation said that the Australian paper (WT/WGTCP/W/232) was useful in providing concrete examples of how competition policy and industrial policy operated in a complementary fashion, and thereby helped to show that the concerns that had been expressed on many occasions in the Working Group about possible conflicts between competition policy and industrial policy were, in fact, not justified. In particular, the examples cited in the paper showed that it was possible to achieve specific industrial policy and market development goals without going so far as to grant a total exclusion from competition policy to particular sectors. In fact, competition itself provided an important stimulus to dynamic efficiency and productivity enhancement. The experience of the European Community also confirmed these points.

11. The representative of Hong Kong, China affirmed that, as had been recognized by Australia, it was necessary to know the breadth and depth of the obligations that would arise under a possible multilateral framework on competition policy in order to enable Members to make an informed decision regarding the launching of negotiations in this area. Australia had also made the argument that, with appropriate guarantees of technical assistance in addition to flexibility and progressivity such that no-one was forced to make changes before they were ready, a commitment to having a competition law and enforcement agency at some point in time might not be demanding. While Hong Kong, China agreed with the need for appropriate guarantees of flexibility and progressivity in any possible multilateral framework, it wished to highlight that a Member's decision not to have a competition law did not necessarily reflect only considerations such as capacity constraints. Rather, it could reflect other valid public policy considerations relating to the Member's economic situation or other circumstances. Given this, the domestic policies and concerns of individual Members should be fully respected in framing any possible multilateral obligations. In this regard, he enquired whether the phrase "enhanced flexibility of commitments" in paragraph 31 of the Australian paper (WT/WGTCP/W/232) would provide for flexibility to be applied across all Members or only to a selected group of Members? In response, the representative of Australia said that his delegation did not have a particular approach in mind; it was seeking to stimulate discussion by setting out a menu of possibilities and relevant considerations.

12. The representative of Morocco said that the contribution of Australia (WT/WGTCP/W/232) embodied a pragmatic approach that took account of the needs of developing countries. He agreed, in particular, with the emphasis that had been placed on the importance of flexibility and progressivity and the need for continuing, long term technical assistance as key elements of a multilateral framework. As had been pointed out by Australia, there was not a one size fits all approach in this field and the advocates of a multilateral framework on competition policy were not seeking this. The forging of appropriate links with civil society and consumers was vital to creating a viable culture of competition.

13. Reflecting on the comments of the European Community and its member States, the representative of Australia agreed that cooperation under a multilateral framework should *not* go as far as requiring the sharing of confidential information. In this context, he posed the question as to whether mechanisms could be developed to ensure that, in the course of relevant enforcement actions such as in the context of leniency programmes, consideration could be given to the international ramifications of particular courses of action. In other words, could mechanisms be developed to at least ensure that information regarding the effects of anti-competitive practices on other countries was not suppressed? He recognized careful consideration was required in this regard – leniency programmes were an important enforcement tool that the advocates of a multilateral framework would not wish to undercut.

14. The representative of Nigeria, referring to paragraph 19 of the contribution of Australia (WT/WGTCP/W/232), said that there were many reasons for the reticence of some developing countries in regard to the adoption of competition law and the establishment of relevant enforcement agencies. These included not only the fact that, for some countries, competition policy was overshadowed by higher priorities but also a concern as to the extent to which the current proposals

would allow for the preservation of policy space in regard to developmental objectives as opposed to promoting market access and market presence or harmonization objectives; difficulties arising from disparities between countries and/or their firms in respect of levels of development and competitiveness, experience in the adoption or implementation of competition laws and the capacity to implement such legislation; and the lack of clarity of and operational difficulties pertaining to the current proposals relating to core principles, hardcore cartels and related matters. Moreover, there were questions concerning the relationship between existing WTO principles of transparency, non-discrimination and procedural fairness and the proposed multilateral framework on competition policy. Similar questions arose regarding the relationship of existing WTO provisions regarding confidentiality, consultations and safeguards, on the one hand, and relevant provisions of a multilateral framework, on the other hand. Questions regarding the nature and treatment of *de jure* vs. *de facto* discrimination, the role of exceptions and the implications of the principle of non-discrimination for the treatment of local firms as compared to transnational corporations and the industrial policies of developing countries required clarification. In addition, clarification was needed regarding the responsibility of exporting countries to take action in respect of export or international cartels; the scope of confidentiality provisions; modalities and experiences relating to voluntary cooperation; the relationship between cooperation in a multilateral framework and efforts to facilitate cooperation at the bilateral and regional levels; the balance and sequencing of commitments regarding the adoption of competition legislation and international cooperation in relation to exports, imports and the role of bilateral competition or trade pressures; compliance mechanisms in a multilateral framework, including dispute settlement and peer reviews; implications for national sovereignty and the balance of rights and obligations of WTO Members; the scope and content of any provisions regarding special and differential treatment, flexibility and progressivity; the appropriateness of the WTO as a forum for cooperation in this area. The representative of Australia had made the point that more and more developing countries had adopted or were in the process of adopting national competition laws; while this might be true, it seemed that a period of perhaps ten years was needed to establish the required enforcement agencies. Within this period, it would be impossible to undertake the obligations that a multilateral framework on competition policy would entail. He noted that the multilateral framework that was contemplated in the contribution of Australia (WT/WGTCP/W/232) would seek only to enforce a minimum set of principles in regard to general laws and regulations, and not specific cases; in this respect, a set of general principles that would guide the application of competition law and policy would be a better idea than a multilateral framework.

15. The representative of Malaysia, referring to relevant paragraphs of the contribution of Australia (WT/WGTCP/W/232), said that it both highlighted the perceived requirement of a compliance mechanism in any multilateral framework and underscored the need for flexibility and progressivity in this area. The relationship between these two aspects of the proposed framework would be need to be clarified.

16. In response to the foregoing comments, the representative of Australia said that the issues and questions that had been set out by the representative of Nigeria were important and legitimate ones and were precisely the kinds of issues that needed to be clarified in the course of the Working Group's meeting. The representative of the European Community and its member States agreed that the points that had been set out in the various interventions were reasonable ones on which reassurance needed to be provided. In fact, the submissions that had been provided for the meeting by his and other delegations provided a significant degree of clarification on most of these questions. The problem, in his view, was that it was difficult to provide definitive and categorical reassurance on these points outside the scope of a negotiation since, to do so, one would have to look at specific textual proposals. In this context, he asked colleagues to bear in mind the stage of the process in which Members were currently engaged and the limitations inherent in this stage. He acknowledged that, in the course of negotiations, it would be incumbent on the proponents to provide clear and convincing answers to the kinds of questions that had been posed - and that, in the absence of such answers, Members would not be in a position to reach agreement.

17. With regard to the Study on Issues Relating to a Possible Multilateral Framework on Competition Policy (document WT/WGTCP/W/228), the representative of the Secretariat recalled that it had been requested by the Working Group at the Group's meeting on 1-2 July 2002 (WT/WGTCP/M/18, paragraphs 96-98), had been circulated in preliminary form prior to the Working Group's meeting of 20-21 February (JOB/03(31), circulated 18 February 2003) and had been the subject of an initial discussion at that meeting (WT/WGTCP/M/21, paragraphs 51-60). Concerning the main differences between the two versions of the study, although the current (final) version was somewhat amplified as compared to the previous one, it had the same overall structure. The revised text took into account comments that had been provided in the course of the initial discussion at the meeting in February in addition to written and oral comments that were received subsequent to the meeting. In addition, it had been possible for the consultant who had prepared the study (Dr. Simon Evenett, Director of Economic Research at the World Trade Institute, University of Bern) to incorporate additional coverage of existing literature and factual developments, particularly in Part III of the study.

18. The representatives of Canada; the European Community and its member States; Switzerland; Hong Kong, China and Australia said that the Study had collated useful information and provided insights into many of the questions before the Working Group. Continuing, the representative of Canada said that the analysis in the study of the ways in which competition policy and a possible multilateral framework on competition policy might contribute to the realization of dynamic efficiency gains was particularly useful. Supplementing the coverage of the Study, it was worth highlighting that competition policy, in addition to embodying the policy considerations that were set out therein, was based on empirical methods and data analysis. The history of competition policy, particularly in the past 20 years, had been extensively influenced by the branch of economics known as industrial organization; without this theoretical and empirical underpinning, competition policy would be just another legal or regulatory regime. In particular, the usefulness of competition policy was derived from its empirical orientation in relation to anti-competitive effects, its capacity to adapt to advances in the understanding of the operation of markets and its principled "rule-of-reason" approach. It would be desirable to give greater attention to such methodological issues in both the Working Group's discussions and related capacity building activities. From this standpoint, the Study could be looked at as a living document; when delegations came across relevant information and studies, these could be brought to the attention of the Working Group and would enrich the Group's understanding. As an example, he made reference to a recent study prepared for the World Bank¹ which had looked at the magnitude of benefits arising from the application of competition law on domestic economies. Essentially, the study had found that competition law and enforcement yield benefits at least commensurate with their costs. More specifically, some of the key findings of the study were as follows: first, the implementation of competition policy generally results in lower prices for consumers and user industries; this is confirmed for a large sample of developed and developing countries. In addition, competition policy encourages a larger number of firms and therefore a greater degree of consumer choice in most markets. For the most part, competition law is also more cost-effective in achieving these ends than industry-specific regulatory regimes. The authors caution, nonetheless, that such regimes may still be needed in so-called natural monopoly situations (markets which are more efficiently served by a single supplier).

19. The representative of the European Community and its member States noted that, although the discussion in the Working Group had highlighted the role of exceptions from competition law as a tool for managing any possible conflicts between competition and industrial policy, the Study (document WT/WGTCP/W/228) had identified five ways in which such conflicts had historically been managed. These were: (i) the use of industrial policy instruments which, even where they tend to restrict competition in markets, are not actionable under the competition laws of most countries

¹ Hoekman, B. and H.L. Kee, Imports, Entry and Competition Law as Market Disciplines (World Bank, 2003); also discussed in Study on Issues Relating to a Possible Multilateral Framework on Competition Policy (WT/WGTCP/W/228), paragraphs 278-281.

(e.g., tariffs, subsidies, training programmes and public ownership); (ii) the explicit incorporation of these goals in national competition laws; (iii) the explicit taking into account, by responsible officials, of dynamic as well as static efficiency considerations in the application of national laws, which was increasingly common in countries having such laws; (iv) where necessary, the provision for exemptions, exceptions, and exclusions from competition law; and (v) allowing for a governmental body to overrule a decision made by the competition enforcement agency in the event that national development priorities might be compromised. Furthermore, the study showed that, by and large, the adoption of a multilateral framework on competition policy along the lines that had been proposed was consistent with and would not jeopardize the ability of Members to continue to use these five tools through which any possible conflicts between competition policy and industrial policy objectives could be managed. Of course, the study had also shown that, in the main, competition policy was likely to contribute positively to the attainment of dynamic efficiency gains and other developmental objectives.

20. Another representative of the same delegation affirmed that, as had been outlined in the Study, there were a large number of ways in which competition policy could be integrated with industrial policy. One of the ways in which this should *not* be done was through the toleration of hardcore cartels, in view of the clear harmful effects that such cartels had on consumers and user industries, and the lack of any significant welfare benefits. Continuing, he said that, in the terminology of European Community competition policy, the term "exemption" corresponded to that of "authorization" in some other jurisdictions, in that it referred to a decision that an agreement or practice be allowed to stand notwithstanding its potential anti-competitive effects, because it provided compensating welfare benefits of the type referred to in paragraph 150 which outweighed its anti-competitive effects. Such an "exemption" would never be given to a hardcore cartel, since by definition in such a case the harmful effects outweighed any conceivable welfare benefits. Concerning outright exclusions from competition law, the Community had few of these. Even in the agriculture sector, anti-competitive agreements were excluded from the scope of article 81 of the Treaty only if they were necessary for the implementation of the Common Agricultural Policy. This was not the case for hardcore cartels in this sector; as an illustration, the Commission had recently imposed a fine on a price cartel among beef producers in one member State.

21. The representative of Switzerland said that the Study (WT/WGTCP/W/228) provided a systematic overview of the costs and benefits of a possible multilateral framework on competition policy. As had been made clear in the Study, the costs of such a framework could not be meaningfully assessed in isolation from the benefits that would flow from it. The examples and other evidence presented particularly in Part III of the study had shown the feasibility of attacking cartels, including in developing countries, and the important benefits for economic and consumer welfare that would flow from this. The recent Vitamins cartel was a particularly telling example of the costs that cartels had been shown to inflict on both developed and developing economies, particularly those that lacked effective competition laws.² In order for the potential benefits of a multilateral framework to be realized, effective implementation of the framework was necessary. To ensure this, a commitment on long run technical assistance and capacity building would be a key element of the proposed framework. The amount of technical assistance that would be required should not be under-estimated.

22. The representative of Hong Kong, China said that, as had been pointed out at the Working Group's meeting of 20-21 February (WT/WGTCP/M/21, paragraphs 52 and 54), in discussing the competition situation in Hong Kong, China, the Study had relied heavily on a recent IMF paper.³

² See Study on Issues Relating to a Possible Multilateral Framework on Competition Policy (document WT/WGTCP/W/228), paragraphs 299-302 and Table III.T7 "Estimated overcharges from the vitamins cartel, 1990-1999, in year 2000 US dollars; by importer".

³ International Monetary Fund, [*Hong Kong, China*]: *Selected Issues* (Washington, D.C.: 2000).

The conceptual approach adopted in the IMF paper was debatable. In particular, the different measures of profit margins used in the paper gave results which were not entirely consistent. On this basis, his delegation did not agree with the IMF's suggestion that competition in Hong Kong, China had become less intense as a result of the shift toward services during the past decade. The revised version of the study continued to rely on the IMF paper and even seemed to imply there could be entry-impeding private anti-competitive practices in Hong Kong, China. However, no evidence was cited in the paper to substantiate such an inference. Certainly, his colleagues dealing with competition policy in Hong Kong, China had not been able to find any concrete evidence to suggest the existence of extensive cartels or other entry impeding private anti-competitive practices. Nevertheless, Hong Kong, China remained vigilant against the existence of any such practices.

23. In response to a suggestion by the representative of Australia, the Working Group requested that the Secretariat issue a revised version of the tables summarizing the contributions of Members (document WT/WGTCP/W/228, Annexes II(A-D)).

24. In response to the suggestion by the representative of Canada (paragraph 18, above), the representative of the Secretariat said that, if delegations became aware of studies or other documentation that would be of interest to the Group, these should be communicated to the Secretariat which would bring the appropriate references to the attention of Members.

25. The representative of the Secretariat, introducing the Background Note on Provisions on Procedural Fairness in Existing WTO Agreements (WT/WGTCP/W/231), said that the Note attempted to summarize various provisions on procedural fairness that could be found in existing WTO Agreements. As was reflected in paragraphs 5 and 16 of the Note, it had been deemed useful in preparing the Note to divide the various provisions into two broad categories. First, there were certain broad principles of procedural fairness which could be found in each of the three main WTO agreements (the GATT, the GATS and the TRIPS Agreement); the main characteristics of these principles were summarized in subparagraph 16(a) of the paper. Secondly, a number of more detailed provisions on procedural fairness could be found in certain WTO agreements, notably the Agreements on Anti-dumping, Subsidies and Countervailing Measures, Safeguards, TRIPS and Government Procurement. Much of the paper was concerned with summarizing those more detailed provisions. In particular, the paper sought to focus on provisions that were relevant to situations in which there was an allegation that a private party was engaged in conduct that involved some measure of wrongdoing (e.g., infringement of intellectual property rights) or was otherwise actionable (e.g., dumping or subsidization) and where remedies were being sought. As was pointed out in paragraph 5 of the Note, although these provisions were summarized in the Note in some detail, it was important not to over-generalize them in the overall scheme of the WTO Agreements. In particular, these provisions had been negotiated in response to the specific needs of individual agreements and subject-matters, rather than as part of any common overall design or pattern.

26. The representatives of Switzerland; the European Community and its member States; and Hong Kong, China said that the Secretariat Note (WT/WGTCP/W/231) provided a comprehensive summary of Members' previous discussions on procedural fairness as well as identifying and categorising relevant provisions in existing WTO agreements. The Note made it clear that there was there was no single model of procedural fairness in the WTO which was applicable to all subject-matters. Rather, in regard to each of the agreements which had been surveyed in the Note, basic principles of procedural fairness had been adapted as Members saw fit, having regard to the requirements of the particular subject-matter addressed by the agreement. Continuing, the representative of Switzerland said that the Note (WT/WGTCP/W/231) showed that provisions on procedural fairness had been incorporated in several existing Agreements dealing with subject-matters that were as complex as that of competition policy. These provisions set certain basic guidelines while taking account of the reality of diverse legal and political cultures and not attempting to enforce a harmonized approach across different legal systems. Second, the particular issues that were addressed in the various agreements were similar to those that were likely to come up in the context of

a multilateral framework on competition policy. These included, for example, issues regarding access to justice by private parties; procedures for informing the targets of an investigation; the protection of confidential information and other legitimate interests of parties; and the rights of defendants in relevant proceedings. In this context, it appeared that the same kinds of elements that would have to be considered in providing assurances of procedural fairness in a multilateral framework on competition policy had already been considered in framing relevant provisions of existing WTO Agreements; in other words, appropriate reference points existed and there was no need to start from scratch. What remained to be done was to identify the relevant elements and adapt them to the subject-matter of competition policy, as needed. Another point to note was that the elements discussed in the Note were basically elements of good governance, which should be reflected in one way or another in any legal system, regardless of its specificities. In this sense, it was unlikely that ensuring appropriate elements of procedural fairness in national competition regimes would require an overhaul of the overall legal system, at least in most cases.

27. The representative of the European Community and its member States said that the Note (WT/WGTCP/W/231) showed clearly that issues of procedural fairness could be addressed meaningfully in a WTO agreement – there were ample precedents for this in the various Agreements that had been surveyed in the Note. Furthermore, this could be done even in complex fields of law without unduly intruding on the operation of national legal systems. As the Note had shown that, in regard to each of the Agreements which had been surveyed, the basic principles of procedural fairness had been adapted to the requirements of the particular subject-matter addressed by the agreement, there appeared to be no barrier to adapting the same principles to the needs and operational exigencies of competition policy.

28. The representative of Hong Kong, China said that the relevance of some of the provisions in existing WTO agreements that were set out in the Note was unclear and needed to be considered carefully in the context of the work of the Working Group. As his delegation had repeatedly stressed, given the diversity in legal or legislative infrastructure among Members, it was important that any possible multilateral framework on competition policy should avoid prescriptive provisions and retain Members' discretion to choose the appropriate instrument in implementing any obligations. In this connection, the Note (paragraph 31) indicated that the GATT and GATS required that "judicial, arbitral or administrative tribunals or procedures" be available for the prompt review and correction of administrative action relating to customs matters and matters affecting trade in services, respectively. The fact that these provisions did not specify the means through which individual Members implemented the obligation did not hamper the effectiveness of their enforcement. Other Agreements such as the plurilateral Agreement on Government Procurement, the Anti-dumping Agreement and Agreement on Subsidies and Countervailing Measures were also flexible in regard to the characteristics, judicial or otherwise, of relevant domestic bodies or procedures. His delegation had confidence in the practicability and desirability of such general and non-prescriptive multilateral obligations on procedural fairness. On the other hand, it was of the view that some of the more specific provisions in existing WTO Agreements would be too prescriptive and burdensome if applied in the context of a possible multilateral framework on competition policy. This was the case, for example, with regard to provisions prescribing the types of information to be contained in public notices of the initiation of investigations, specifying the kinds of factors to be taken into account and the criteria to be used in determining the magnitude of seriousness, and requiring the preparation of non-confidential summaries of confidential information. His delegation would be opposed to the adoption of provisions of this type in a multilateral framework. Overall, he emphasized that, since Members differed extensively in their socio-economic development levels, competition cultures, legal and institutional infrastructure, it was important that sufficient flexibility be built into any possible procedural fairness obligations in this area, and the domestic policies and concerns of individual Members should be fully respected.

29. The representatives of India; Egypt; Kenya; and Cuba said that, notwithstanding the view expressed by the representative of the European Community and its member States regarding the

difficulty of specifying more precisely the scope and content of an eventual multilateral framework on competition policy outside a negotiating context, such clarifications were a prerequisite for confidence-building. Continuing, the representative of India said that the application of national treatment in the area of competition policy raised a range of issues requiring clarification. Some of the proponents of a multilateral framework had suggested that a provision on non-discrimination would apply only to *de jure* and not to *de facto* discrimination. However, even with such a limitation, questions remained. For example, there was the question of the compatibility between national treatment and the pursuit of certain economic or other policies, particularly when there were articulated so as not to be facially non-discriminatory, but could be applied *de facto* in a way that would only benefit national firms, e.g. special regimes for SMEs based on sales thresholds. A key proponent in this area had earlier reacted to this statement by accepting that the questions raised merited attention and could be addressed effectively once the nature of obligations to be undertaken become more clear.

30. Continuing, he said that 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 context of meeting the needs of developing countries, in his view 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 competitiveness. For these and other reasons, the principle of non-discrimination had the potential of being abused if not properly addressed. In addition, many legal systems interpreted the concept of non-discrimination as permitting affirmative action in favour of the disadvantaged in order to promote equality in outcomes. Developing countries needed the flexibility to resort to a range of developmental tools, including those that normally fell under the rubric of "industrial policy". Consequently, the resolution of conflicts between competition and development problems needed to be left to each Member, whilst a prescriptive or intrusive approach was to be avoided. Sufficient clarification had not been provided in response to these questions. Accordingly, serious concerns remained that a binding multilateral commitment with regard to national treatment could seriously limit the flexibility and policy space of developing countries. Therefore, it was India's view that the national treatment principle was inappropriate and was likely to lead to undesirable effects where applied in the context of a multilateral framework on competition policy.

31. The representative of Egypt said that legitimate differences in the social, cultural, political and economic policy objectives of countries would require specific and flexible policy measures and mechanisms to achieve them. Differences in competition policies were significant, and were often reflected in the goals of competition laws. Furthermore, in the pursuit of their policy objectives, countries might differ in their assessment on whether and to what extent non-efficiency goals (such as fairness, opportunities for SME's market integration, etc.) should be taken into account in the context of competition policy. This was one area where countries should be free to choose the nature of rules and the scope of their application; accordingly there should not be identical competition rules across the board, for all countries. With this background, the speaker offered the following set of concerns and questions regarding the core principles mentioned in relevant paragraphs of the Doha Declaration. With regard to the principle of non-discrimination, a uniform application of this principle could produce severe inequalities between developing and developed country Members. The thrust of the non-discrimination principle was to give all nationals no less favorable treatment than that given to another, either on a most-favoured-nation (MFN) or national treatment (NT) basis. The latter principle (NT), if applied to competition rules, would give large multinational corporations unlimited access to the developing countries' domestic markets. Therefore, a uniform application of this principle in relation to competition would be to the detriment of local host country firms which, if not

able to sell and produce domestically on a competitive basis, would, ultimately, exit the market. Another difficulty for developing countries relating to the non-discrimination principles was the lack of ability, in some cases, to adopt a competition law which could be due either to a lack of resources, or to concerns that a competition regime would have encroached on the scope of implementation of development-oriented industrial policies – i.e., concerns about "policy space". Nonetheless, core principles were fundamental and should be reflected in the competition regime of every jurisdiction that chose to adopt one. His delegation was convinced that any competition regime should apply the MFN principle and that government should not engage in "*de jure*" discrimination between foreign firms in similar situations, whereas "*de facto*" discrimination in many instances was justifiable.

32. Continuing, he said that, as had been noted by the International Chamber of Commerce (ICC),⁴ *de jure* discrimination should not be viewed from the broad angle of requiring all countries to abide by common rules. A distinction should be made between discrimination based on corporate nationality or ownership, which was unacceptable, and discrimination based on the location of a firm's activities and the nature of the market in which a competition regime was applied. The aim of this distinction was to enable countries to take into consideration, when enforcing a competition regime, their respective needs and levels of development. Moreover, important questions remained to be answered before any binding principle could be adopted even with respect to *de jure* discrimination, such as those related to the treatment of bilateral and regional cooperation agreements whereby two or more governments might set more favorable terms for cooperation with each other than those of a prospective multilateral framework on competition policy.

33. The application of a rule against *de facto* discrimination could result in a number of complexities such as those related to the investigative powers of competition authorities (which varied from one country to another) and the availability of data. Besides, there could be no like "business transactions" since the circumstances and facts relating to each transaction were not wholly comparable or analogous. Moreover, *de facto* discrimination, if required to be justifiable, would create enormous difficulties for developing countries. Justifying discrimination on a case-by case basis would, in itself, require countries to apply a rule of reason approach (which would require complex case-by-case analysis) and, as such, would put developing countries in the position of either sacrificing large resources for the purpose of analysis and proof or else being inconsistent with their prospective obligations. Developing countries might well opt to choose a straightforward kind of a rule as it involved lower costs, personnel and time for enforcement. In this context, the Working Group would need to examine the issue of whether *de facto* discrimination should be allowed, and if so under what criteria? As far as the NT principle was concerned, developing countries, while pursuing their policy objectives, might need to discriminate in favor of their domestic firms, in particular small and medium-sized enterprises. (In Egypt, SMEs constituted over 90% of the businesses in the market and, as such, were the major source of most citizens' livelihood). Applying the non-discrimination principle in a uniform manner would result in relative "*de facto* discrimination" between domestic firms and MNEs, simply because the latter were more economically powerful. Therefore, in order to take the developing countries' concerns on board, it was necessary to leave to them the right to assist their local firms either directly, for example by granting them subsidies, or indirectly by allowing for mergers, acquisitions, export cartels, resource pooling or otherwise as each country deemed appropriate for its policy objectives. With regard to other issues related to the principle of non-discrimination, many developing countries were of the view that a future multilateral framework on competition – if any – should include provisions for home government obligations to prevent restrictive business practices of MNEs operating in host developing countries and RBPs taking place within their jurisdiction having an impact on developing countries (e.g., export cartels). These obligations should be subject to non-discrimination and other core principles.

⁴ Competition policy in the WTO: Doha Declaration issues (International Chamber of Commerce, 9 April 2003).

34. Continuing further, he said that application of the core WTO principle of transparency to competition law and policy should be dealt with carefully. Members had different legal and administrative systems. The proponents of a multilateral framework were of the view that transparency should apply to all aspects of competition regime. This was a source of concern, as it might open the door for pressures on developing members to change their legislations or enforcement practices or even the scope of exemptions within their domestic laws. In addition, some developing country Members lacked domestic laws/regulations/policies relating to competition *per se*; this compounded the complexities that could be involved in applying transparency provisions in this area. The following were some specific questions that remained to be answered: (i) what was the nature and scope of the transparency commitments or obligations of countries which lacked competition regimes?; (ii) how and to what extent would transparency commitments on home country obligations be satisfied, given that such obligations were a core demand of developing countries in this area? Unless convincing answers to these questions were provided, it would be difficult to judge the extent to which binding transparency obligations were required in the context of any future agreement on competition policy; moreover, the nature and scope of any transparency obligation was dependant on the nature and scope of the substantive provisions of the agreement that was contemplated. In addition, developing countries had to be convinced that the proposed transparency requirement offered them more benefits than costs.

35. With regard to the potential application of the principle of procedural fairness in this area, the theory of competition policy held that "due process" or "fair administration" of such policy/law was essential to provide stakeholders, consumers, the public and competitors the assurance that the competition regime would produce fair results. It was, therefore, an enforcement tool, according to which relevant authorities were required, while making a decision, to use fair procedures; if they do not, courts may step in and render the decision void. More precisely, procedural fairness consisted of a set of rules that the courts will imply into legislative schemes. Countries have different legal systems tailored to respond to their different economic, social, political and cultural realities. Given this fact, developing countries should have the right to implement the legal system that suits their specific conditions and needs. Proposals had been put on the table by the proponents to deal with the following specific aspects of procedural fairness: mechanisms for bringing matters before a competition agency; rights of parties to be notified of investigations; rights of parties to be advised of progress and reasons for decisions; the right to make submissions; rights to have access to a system of appeal and/or review; timeliness of decisions; and the ability to challenge investigatory measures. In thinking about how these components might be applied in the context of a multilateral framework on competition policy, a number of complex issues may arise. These include the following: if it is proposed that each country sets its own mechanism, then to what extent will this be subject to the transparency provision, i.e. what is it that the country will be required to publish or notify? On the right of parties to be notified of investigations, what is the definition of "parties" and what information should a notification carry? Will the content of the notification differ according to the nature and level of interest of the relevant parties concerned? Could the provision of differential right to access the system for different parties be considered to be discriminatory? What are the parameters, which, if satisfied would indicate that the right of parties to be advised of progress and reasons for decisions, has been maintained or violated? On the right to make submissions, would it be possible that competition authorities set rules regarding the content of submissions by different parties? What is a "timely decision"? On the ability to challenge investigatory measures, could a competition authority be accused of being unfair or discriminatory if it decides to take no action where a complaint by a foreign firm does not fit in with its list of enforcement priorities, given its resources? Countries may set fair procedures without stating on their substantive content or way of application, which could result in de facto discrimination. How would a multilateral framework address this matter? Last but not least, developing country members, which do not have competition policy or law in place, question the relevance of procedural fairness provision to their situation. Finally, he emphasized that, like many other developing countries, his delegation considered special and differential (S&D) treatment to be the fourth element in the discussion on core principles. This additional element was

needed to balance the costs and benefits of any prospective agreement on competition policy in the WTO.

36. The representative of Kenya, in an intervention the text of which was subsequently issued as document WT/WGTCP/W/238, said that the requirement in paragraph 25 of the Doha mandate that "full account shall be taken of the needs of developing and least developed country participants and appropriate flexibility provided to address them" implied that the right of a country to choose whether and when to have a competition law and the kind of competition policy to adopt must be preserved. In particular, countries should have the right to adopt a phased approach in terms of discussion, implementation and enforcement of a competition law, concomitantly ensuring an appropriate role for national industrial policies. Sufficient clarification had not been provided as to whether the proposals by the proponents in this area would allow such flexibility to be preserved, or would restrict it in the interest of promoting market access for developed country enterprises and the harmonization of competition regimes. The core principles of transparency, non-discrimination and procedural fairness, as they had been developed in the context of trade policy, were not intended as universal principles applicable to all issues including competition policy. In this context, it was not self-evident that it would be appropriate or desirable to apply these principles to competition policy. Clarifying the manner in which the so-called core principles would operate in practice in the area of competition policy was of critical importance in order to assess the effects on development.

37. Turning to the topic of transparency, he pointed out that the application of this principle required that careful consideration be given to differences that existed in national legal systems as well as to issues of the scope, coverage and the nature of obligations. In particular, he was concerned that transparency requirements could impose an unnecessary burden on developing countries. A realistic assessment of transparency would not be possible until all substantive issues had been satisfactory clarified, enabling developing countries to have a more realistic assessment of the costs and benefits of proposals in this area. For example, the applicability of transparency to case-specific information in the possession of national or regional competition authorities needed to be clarified. In addition, secret registers of export cartels were kept in certain countries on grounds of confidentiality. It appeared that the regulators might be bound by the transparency principle but not the firms they were supposed to regulate. In other words, vital evidence on the practices of foreign firms was "protected" by their governments in the name of commercial confidentiality. This potential contradiction required clarification.

38. Continuing, he suggested that, in a trade policy context, "non-discrimination" was normally taken to mean the application of most-favoured nation (MFN) and national treatment principles in regard to "like products" or services. The application of these concepts to competition analysis and enforcement, which was case – specific, remained unclear. For instance, it had been pointed out that difficulties could be experienced in determining whether de facto discrimination existed with respect to anti-trust enforcement actions given the individual focus of such actions. Even if the application of non-discrimination principles was limited to de jure discrimination, as the proponents had proposed, questions remained. For example, how would sectoral exemptions to competition rules be treated? Would GATT Article XX exceptions be available in this area? With regard to national treatment, there was a need to clarify how it would apply with regard to anti-competitive practices or mergers among small and medium scale producers in developing countries, which could be intended to achieve efficiencies, as compared to mergers among big firms and multinationals in developed countries which could result in anti-competitive practices and the exercise of market power. Furthermore, the application of the national treatment principle could easily spill over and introduce distortions in other areas of economic policy formulation including industrial policies and development strategies. With respect to the application of MFN, it remained unclear as to what would be the status of bilateral and regional cooperation arrangements in relation to administration of competition law.

39. Concerning procedural fairness, as had been pointed out in previous discussions in the Working Group, no broad consensus existed on the meaning of this concept in the context of competition law enforcement. This reflected differing notions of fundamental fairness, which were also influenced by the political and legal cultures of different countries. A number of specific questions had been posed regarding how this principle would work in practice, including with respect to its implications for developing countries and the resources implication that it would entail. As had already been stated, 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; 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 would have to be developed for competition policy.

40. With regard to provisions on hard core cartels, there was indeed a growing recognition among the Members that their harmful effects undermined the potential benefits of the multilateral trading system and, therefore, should be addressed on a priority basis. However, there was a lack of consensus among Members on the definition and scope of possible obligations in this area, which need to be further clarified. In particular, detailed analysis of the definition of hard core cartels was needed in order to establish their relevance in the case of developing countries. Lack of such clarification would give rise to significant operational problems and costs for developing countries while jeopardizing the potential benefits. The appropriateness of the WTO as the venue for international action on this issue also needed to be clarified, taking into account that it was already being addressed in various bilateral, regional and plurilateral arrangements.

41. Concerning modalities for voluntary cooperation, an important observation had been that purely voluntary cooperation might be ineffective because more advanced competition authorities, with greater information and capabilities, would have little incentive to provide information or assistance to less developed authorities that were not in a position to offer reciprocal benefits. Furthermore, 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. In this context, the proponents were called upon to clarify the precise cooperation tools that would be used and the nature of potential obligations in this respect. Concomitantly, further clarification was sought on how developing countries without competition law and competition authorities would participate in voluntary cooperation arrangements at multilateral level. A further, general question concerned how a multilateral framework on competition policy would address development needs and concerns of developing countries was also highlighted by the speaker as insufficiently addressed. The Group should continue working until sufficient clarification was provided regarding these important questions.

42. The representative of Cuba, in an intervention the text of which was subsequently issued as WT/WGTCP/W/242), reminded delegations that paragraph 25 of the Doha mandate referred specifically to the needs of the developing and least developed country participants and required that appropriate flexibility be provided to address them. Three specific issues that needed to be addressed were as follows: (i) clarification of the implication of competition policy for trade and economic development, which was indispensable in order to permit members to carry out an effective evaluation of proposals submitted to the Group; (ii) resolution of the developmental needs and interests of developing countries; and (iii) clarification of the kinds of flexibility needed to accommodate these needs and interests. A key element of flexibility involved preserving the sovereignty of each developing country, allowing it to choose when and how to adopt competition policy and what type of competition policy it required. Importance was also attached to the ability to adapt policies and measures to strengthen and protect the international strength of domestic enterprises, and to modify and amend these policies as required. In this regard, numerous questions remained unanswered; for example, no consensus had been achieved on the application of core WTO principles in this area which was a matter of capital importance in evaluating their effects on development. As a further

example, in the absence of a concrete definition of procedural fairness or the scope and meaning of transparency, the requirements of countries that had little experience in the field of competition policy had not been clarified. A Secretariat study was needed on this subject, given the lack of experience of many countries in this area and the disadvantage they might find themselves at if negotiations were to commence. Continuing, she said that what might be considered anti-competitive behaviour by one country might be a necessary means of achieving a central objectives in another (developing) country. This compounded the difficulty of introducing uniform multilateral rules in this area. Current technical assistance was inadequate, given that over 50 countries had neither legislation nor functioning competition regimes. Studies were needed on each of the subjects before the Working Group before decisions could be made on modalities for negotiations in this area.

43. The representative of China, in an intervention the text of which was subsequently issued as document WT/WGTCP/W/241), said that his delegation believed that an effective multilateral solution to the problem of hardcore cartels could be achieved only when the anti-competitive practices covered by this term were clearly defined. Related to this, some developing countries, like China, did not yet have a comprehensive competition law. Although some anti-competitive practices were addressed by various existing legislations, there was no single definition of a hardcore cartel. Consequently, further reflection was needed before Members could decide, for example, whether the definition in the OECD Recommendation on Hardcore Cartels⁵ could be incorporated in the future multilateral framework on competition policy. From the perspective of developing economies, it was also important to note that excessive competition in certain sectors could sometimes have negative effects. Consequently, as had been stressed by a number of Members, it was important that adequate flexibilities be incorporated into any provisions regarding cartels in the future multilateral competition framework. For example, provision should be made for exemptions for small and medium-sized enterprises for industrial development purposes.

44. Continuing, he said that full-fledged cooperation at the multilateral level would be possible only when all Members had realized the harmfulness of hardcore cartels, established adequate domestic regulatory systems and accumulated sufficient administrative experience. To this extent, he agreed with views expressed in the contribution of Hong Kong, China to the Working Group's meeting of 20-21 February (document WT/WGTCP/W/224). For this reason, it was vital that the future multilateral competition framework take into consideration the current situations of developing countries, including the disparity of experiences in this area. In fact, one of the main tasks of the multilateral framework would be to promote the sharing of information and experience among Members through capacity building, facilitate the formation of consensus and establish a good basis for further cooperation. In other words, capacity building was not only an important method but also an integral part of the future framework.

45. Continuing further, with regard to some specific issues, he said that developing countries suffered from their weak positions in market access and international technology transfer which hampered their effective participation in economic globalization. If developed countries continued to permit the operation of export cartels, it would put developing Members at an even worse position in international trade. Given this, he shared the view that had been expressed by Thailand that the future multilateral framework on competition policy should incorporate restrictions on the maintenance of export cartels by developed country Members. Concerning international hardcore cartels, it was clear that these had negative effects on both developing and developed Members. At the same time, he agreed with the view of other developing Members' that such 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. Given this, China called for developed Members to expand their efforts in combating international cartels since developing Members frequently lacked adequate domestic legislation or enforcement experience to do this.

⁵ OECD Council Recommendation Concerning Effective Action Against Hardcore Cartels (adopted by the OECD Council at its 921st Session on 25 March 1998 [C/M(98)7/PROV]).

Clearly, the sharing of experience and provision of technical assistance in this area was important to enable developing Members to initiate their own anti-cartel programmes. China also believed that attention should be given in the Working Group to anti-competitive practices relating to intellectual property rights (IPRs). The TRIPS Agreement provided, in principle, for control over the abuse of such rights by rights holders. The future multilateral competition framework could also make a contribution in this area, consistent with better protection for IPR, realization of social and public interests and the balancing of rights and obligations in this area.

46. Another representative of the same delegation said that, with globalization, the negative effects of cross-border anti-competitive practices on the economic and trade development of WTO Members had become more and more obvious, especially to developing Members. Given this, WTO Members needed to strengthen their ability to undertake meaningful cooperation in this area. The required cooperation had two dimensions: first, cooperation in the enforcement of competition law; and second, cooperation in capacity building and the formation of a competition culture. As had been noted, cooperation in the enforcement of competition law was only possible when the participating Members had established their own competition law and enforcement system; consequently, the two aspects of cooperation were closely linked. Experiences with cooperation at the bilateral or regional levels would be useful in promoting cooperation under a multilateral framework. Nonetheless, the diversity that was evident among Members with regard to legislation and enforcement of laws, especially between developed and developing Members, had to be taken into consideration in framing any commitments on cooperation in the WTO. For example, implementation of "positive comity" in a multilateral framework would pose significant difficulties. He noted that China was working hard on the development of its own anti-monopoly law, and attached much importance to receiving cooperation and assistance in this area. In fact, it had already benefited from bilateral cooperation with some WTO Members. The major part of this cooperation involved capacity building and information exchange, for example joint studies and expert consultations on the drafting of the anti-monopoly law and other relevant legislation.

47. In view of the foregoing, China suggested that voluntary cooperation be incorporated into the future multilateral framework of competition policy in the WTO. The major aspect of such cooperation would be cooperation in capacity building and the construction of a competition culture. In the implementation of voluntary cooperation, the following points merited attention by Members. Firstly, cooperation should be undertaken progressively, with the precondition of not over-burdening developing Members. The scope of cooperation could be expanded gradually, as developing Members improved their capacity. Secondly, future arrangements on cooperation should be flexible enough to reflect the variety of different approaches to competition policy and legal cultures. In particular, the establishment of a single competition authority should not be a pre-requisite for international cooperation, although it was considered optimal. Rather, developing Members should be allowed flexibility with regard to the establishment of their own competition authorities, considering the extent of diversity among Members in levels of economic development, legal cultures and conditions of market competition. Thirdly, as a key element of cooperation, China envisaged that Members would exchange information and experiences with regard to laws, regulations and enforcement issues at the multilateral level, on the voluntary basis and through mutual trust. Fourthly, it would be worthwhile to discuss closer international cooperation, for instance on specific cases. However, careful attention must be given in such discussions to the diversity of Members experiences in this area; in any case, cooperation should not be mandatory, i.e. if a Member was not yet prepared to undertake cooperation with other Members, it should not be susceptible to being forced to cooperate, for any reason.

48. The representative of the European Community and its member States, responding to the foregoing concerns, reiterated the difficulty of going beyond the degree of specificity that had already been introduced in the discussions in the current phase. He acknowledged that the questions posed and views expressed by delegations were legitimate, even if he did not reach the same conclusions in some cases. In any case, to say precisely how provisions on procedural fairness would work, how far

would it go, would involve specifying the elements of a provisional agreement – something which could only be done meaningfully at the negotiation stage. Responding to questions that had been posed as to the application of national treatment in this area, he affirmed that his delegation had recognized the concerns that had been expressed by various delegations about unreasonable interference in the implementation of their national competition policies. Certainly, there was no intention that principles adopted in a multilateral framework on competition policy should constrain national industrial policy options. The approach that had been proposed by his delegation and, in particular, the distinction that had been drawn between *de jure* and *de facto* violations was intended to respond to this concern. In particular, as his delegation envisioned it, the principle of national treatment would apply only to discrimination that was evident on the face of a national competition law. This would limit the scope of dispute settlement and avoid intrusion on enforcement practices at the national level.

49. In parallel, he reminded Members that non-discrimination did not imply "no differentiation". In particular, WTO jurisprudence made it clear that differential treatment based on objective circumstances not related to nationality was perfectly acceptable. For example, differential treatment based on firm size had nothing to do with discrimination as it was dealt with in the WTO. Furthermore, as had been emphasized by his delegation, no constraints other than transparency were proposed to be placed on the ability of Members to implement exceptions and exclusions from competition law. Affirmative action policies, in particular, should not be interfered with by a competition or any other WTO agreement. More broadly, he agreed with the point that had been made by various delegations that a multilateral framework should *not* attempt to impose uniform approaches to competition law and policy. This was emphasized in his delegation's paper on flexibility and progressivity (WT/WGTCP/W/234; discussed below in Part III). The point of a multilateral framework was not to impose uniformity or harmonization but to enable the WTO's Membership to help each other in an area in which they faced well-documented problems and had many interests in common.

50. Continuing, he said that, in the view of his delegation, countries could fulfil the requirements of the proposed multilateral framework through a national or a regional competition regime. Certainly, the framework would provide for the possibility of a phased-in implementation of competition law, with the timing of implementation to be a function of the level of development. As to whether there would be a need for a comprehensive competition law of any type, he remained open to the possibility of finding a means of giving effect to competition principles without a law, but did not currently see how this could be done. On the concern about a market access agenda, the proposal for negotiation of a multilateral framework on competition policy was of a different character from work under way in the Organization on market access. Competition policy was important not principally for reasons related to market access, but to ensure that markets functioned efficiently and that the benefits of liberalization for development and growth were not undermined by practices such as cartels. Nonetheless, it was also true that anti-competitive practices could have the effect of restricting market access. To this extent, a multilateral framework on competition policy would not entail new market-access commitments but could help to ensure that existing commitments were not impaired through the growth of anti-competitive practices. Finally, he accepted that a WTO agreement would not be a panacea; rather it was one element of ongoing efforts to enhance cooperation on competition policy at the international level. Although other efforts also had their place, work in the WTO had the advantage of being conducted in a fully multilateral organization, and of engaging the support of national governments in the struggle against anti-competitive practices that undermined economic welfare.

51. The representatives of Venezuela, Nigeria, Thailand, Malaysia, and Tanzania, building on the views that had been expressed by India, Kenya and other delegations, affirmed that further clarifications were needed regarding the scope and content of a possible multilateral framework on competition policy, taking account of the needs of developing countries and LDCs and the flexibility that they needed in this area. Addressing the matters of core principles and modalities for voluntary

cooperation, the representative of Venezuela said that it the relevance and benefits of the these principles in the case of competition were less clear than in relation to trade. Furthermore, more sophisticated questions cropped up from this process, increasing uncertainty, for example with respect to the principle of non-discrimination. On the other hand, the dimension of international cooperation, including the modalities of voluntary cooperation, was seen as both necessary and important. Referring to the statements of the other delegations, the representative said it was not clear how the principle of non-discrimination would function in relation to sectoral exemptions in developing countries who would like sectoral exemptions. The development process was often slow, sometimes unequal and erratic; in this context, although competition policies could undoubtedly play a positive role on the national level, concerns might arise regarding the maintenance of adequate policy space for developing countries. In particular, a multilateral framework might lock developing Members into the core principles and prevent them from using necessary policy tools in the future, tools which were not in evidence today due to the evolution of productive structures. For example, developing countries might need to rely on industrial policies; the decision on the relevance of such tools should, in his opinion, remain in the hands of these countries. On the issue of hardcore cartels, there was no consensus on the definition of this concept in the WGTCP. The interests of all WTO members, including the developing countries, needed to be taken into account (the particular concern of import-related activities of SMEs was cited in this regard). In addition, a need was expressed for the inclusion, in any multilateral framework on competition policy, of an explicit exemption of state-to-state agreements and related anti-competitive practices. (see paragraphs 66-68, below).

52. The representative of Nigeria said that the Doha Development Agenda contained a whole section devoted to implementation issues, which appeared to have since been largely ignored. Under paragraph 25 it had been agreed that, in the period until the Fifth Session, the Working Group on the Interaction between Trade and Competition Policy would focus on clarifying the following issues related to the interaction between trade and competition policy: (i) core principles of transparency; (ii) non-discrimination and procedural fairness; (iii) provisions on hardcore cartels; (iv) modalities for voluntary cooperation; and (v) support for progressive reinforcement of competition institutions in developing countries through capacity building. Paragraph 25 also explicitly required that full account be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them. On this basis, he set out three topics that needed to be addressed: (i) a process of clarification of these issues and their implications for trade, competition policy and development so as to enable Members to make an effective and satisfactory evaluation of the proposals which had been presented to the Working Group; (ii) as part of 'i', a central focus should be on how to meet the objective of fulfilling the development needs and interests of developing countries; and (iii) identifications of the types of, and approaches to flexibility that were needed to reflect those needs and interests. Referring to earlier interventions in the Working Group in the course of the meeting, he expressed his view that it was necessary for Members to know the breadth and depth of possible obligations, as well as of related flexibility, in order to assess the interests of developing countries and the LDCs.

53. Continuing, on the issue of transparency, he said that given differences in national legal systems, issues of scope, coverage and the nature of obligations, he felt that careful considerations was necessary, and until further clarification of substantive issues, a realistic assessment of transparency was not possible. The speaker expressed the concerns of his delegation about the potential burden of transparency requirements. On non-discrimination, in the GATT context the concept was normally taken to mean the most-favoured nation (MFN) and national treatment principles. Therefore, the main focus here was identified as the application of national treatment, which raised a range of issues requiring clarification. Raising some, the representative was not convinced that sufficient clarification had been provided in response to the questions that were raised earlier. Consequently, serious concerns remained - binding multilateral commitments with regard to national treatment had the potential to seriously limit the flexibility and policy space of developing countries. In conclusion, it appeared that the national treatment principle was inappropriate and was likely to lead to undesirable effects where applied in the area of competition and competition policy.

Citing the similarity of the Nigerian views on Procedural Fairness, Provisions of Hard Core Cartels and Modalities for voluntary Cooperation to those expressed earlier, these were not read-out by the speaker to save time. His emphasised that these issues could only be properly considered within the overall context of the discussions on all elements of the clarification process. In order for the special needs of developing countries to be taken into account, and adequate flexibility provided, the developing countries should be enabled to choose their own approach to competition law and policy which in their opinion is suited to their developmental needs and national objectives, without being constrained by obligations in a multilateral framework. With the relevance and applicability of such a framework to those WTO Member developing countries without competition laws remaining to be clarified, Nigeria did not want to see the options of such countries limited in this area limited by multilateral obligations entered into before careful consideration in the light of their national interests and concerns. Developing countries should be allowed to choose whether to establish a competition law, and the nature of such a law together with the timing of its establishment, without this flexibility being constrained by a multilateral framework.

54. Addressing the interests of developing countries, six additional issues and/or principles arose: (i) the obligations of foreign firms to the host country; (ii) the obligations of home governments to ensure that foreign firms meet their obligations; (iii) measures to be taken by domestic firms and governments to enable local firms, especially small firms, to remain viable, to become competitive and to grow, particularly in the context of liberalisation and globalisation; (iv) impediments to competition caused by government actions, for example anti-dumping actions and agricultural subsidies; (v) impediments to competition by intellectual property rights protection; (vi) impediments to competition caused by global monopolies and oligopolies, and their effect on local firms in developing countries; and (vii) large mergers and acquisitions by transnational companies, and their effects on developing countries. In closing, he informed the group that Nigeria was in the process of establishing a competition law and requested the assistance of other delegations in doing this.

55. The representative of Thailand said that she believed that there was not yet sufficient convergence in views concerning a possible MFC, making an explicit consensus on modalities of negotiations difficult to achieve at this point of time. She also believed that, to date, developing countries' concerns had not been properly addressed and responded to. Hence, the Working Group should be allowed to extend its mission until it was clear how developing countries would benefit from the proposed multilateral framework on competition policy and how "full account of the needs of developing and least developed countries" had been taken in pursuant to the paragraph 23 of the Doha Ministerial Declaration. As had been stated in paragraph 17 of the Report on the Meeting of 20-21 February 2003, (WT/WGTCP/M21) "with regard to *hardcore cartels*, the discussions on this point had revealed a substantial divergence of views". For example, concerns had been raised as to whether the OECD Recommendation on hardcore cartels that prescribed a voluntary cooperative framework in fighting international cartels would be equally effective in the context of developing countries. Certain developing Members believed that they could not offer reciprocal benefits from cooperation and therefore might be treated discriminatorily. Proposals had been made to have export cartel exemptions removed from national competition laws. On the issue of core principles, most developing Members had misgivings as to the requiring of a competition regime by a multilateral rule as no substantive and comprehensive cost and benefit analysis of the establishment of a competition regime had been done taking into account the needs of countries of various sizes and economic and social structures and backgrounds. Concerns had also been raised about compliance cost associated with such an agreement since certain Members would have to promulgate a competition regime and to establish administrative and enforcement procedures that would satisfy the principles of non-discrimination and due process. In contrast, most developed Members would already have the prescribed principles installed and thus, incur little or no compliance cost.

56. With regard to progressivity and flexibility, it was not seen how these elements would provide an advantage to developing Members. Progressivity meant transition periods in complying with an obligation. Transition periods of any length would not be of use if the imposed obligation, such as a

requirement to have a national competition law, was not to the benefit of developing countries to begin with. On the other hand, flexibility meant the ability to exempt certain sectors or industries from national competition laws. In reality, this was "equal treatment" rather than "special treatment" since developed members would continue to exempt certain sectors, such as export or shipping cartels. Meaningful special and differential treatment would need to involve non-reciprocity on the part of developed Members. For example, it had been proposed that developed Members might offer unilateral binding commitments to core principles or cooperation. However, that the discussion thus far had been narrowly focused on "market access" aspects of competition policy, while little attention had been paid to the more important trade-related competition issue, in particular cross border cartels. This orientation was clearly reflected in the proposed compliance mechanism, which was strong on the application of core principles to domestic regulations and weak on cross border cartels which would be addressed through voluntary cooperation. As the work went forward, the discussion should concentrate on issues at the "interaction between trade and competition policy" and not on competition policy *per se*. The issue of modalities for negotiations and the drafting of these modalities would also need to be discussed.

57. The representative of Norway said that the purpose of his intervention was to illustrate how the Nordic countries had gradually developed their cooperation in the field of competition. Nordic cooperation in the field of competition dated back to the late 1970s and early 1980s, at the time when the Nordic countries first started implementing modern competition laws. The heads of the competition authorities of Denmark, Finland, Iceland, Norway and Sweden had, for many years, met biannually to discuss topics of mutual concern. More recently, they had been joined by the Faeroe Islands and Greenland. From this platform a much broader and more structured cooperation had developed. This was due, for instance, to the fact that throughout the latter part of the 1990s, there was a steady increase in the number of mergers and acquisitions that affected the markets of more than one of the Nordic countries. Also, Nordic enterprises increasingly formed cartels with other Nordic partners, and these often had effects outside national markets. It was therefore gradually acknowledged that a more formalised basis for cooperation was needed to deal more effectively with anti-competitive practices in one Nordic country that could affect markets of other Nordic countries. In this context, while the legislation of all Nordic countries provided for the sharing of confidential information with the European Commission and its EEA counterpart, the EFTA Surveillance Authority, there were at the time no provisions in their national legislations allowing for such exchanges between the Nordic countries themselves. In 1998 a committee consisting of representatives of the five Nordic countries was established with a mandate to propose increased cooperation between the national competition authorities in their application of national law. In the short term, the committee made its recommendations on the basis of what could be achieved under existing legislation. As a first step, it proposed that its recommendations should be formalised in a set of non-binding guidelines which the five countries adopted in 2000. In the guidelines, the parties agreed to the exchange of non-confidential information of general interest or concerning specific cases under investigation. If domestic legislation prohibited the sharing of confidential information, any such sharing was subject to the consent of the individuals who supplied the information in the first place. The guidelines also recommended increased consultation and co-ordination between authorities to make investigations more effective and to avoid contradictory decisions. To the extent that national law permitted, a party might carry out investigations ("dawn raids") on behalf of another Nordic country. The guidelines contained procedures for consultation and the exchange of information related to negative and positive comity. The committee appointed in 1998 proposed that in the longer term, the Nordic countries should enter into a binding international agreement in the areas covered by the guidelines. It suggested that under the agreement, national legislation should allow for the exchange of confidential information, without the consent of the individual concerned. Compulsory assistance in investigations for the collection and securing of evidence on behalf of another Nordic country was also proposed. Denmark, Iceland and Norway concluded an agreement on 16 March 2001 containing provisions to this effect which entered into force on 1 April 2001. Sweden signed the agreement on 10 April 2003. So far, the experience of Nordic cooperation was encouraging. In all important competition cases of Nordic interest, contacts were now established at

the earliest possible stage in order to exchange views and, when appropriate, case-specific information. Moreover, enforcement activities, including investigations, were routinely co-ordinated. Particularly with respect to hardcore cartel cases, the results have been positive. So, both the guidelines and the agreement have led to more efficient use of resources. Finally, the following observations might be drawn from the Nordic experience: (i) any kind of cooperation arrangement should be allowed to develop gradually; (ii) a country needed a minimum of enforcement structures at the national level - along with the political will to use them - in order to participate effectively in a network that exchanges any type of information on competition; (iii) much could be achieved by exchanging basic non-confidential information. This could be information of a general nature or information in relation to specific cases or sectors. Until two years ago, practically all information exchanged between the Nordic countries was non-confidential; (iv) any cooperation arrangement should be founded on complete mutual trust; (v) cooperation on enforcement at the region level was an important supplement to national enforcement, which in turn contributed to more effective overall enforcement.

58. The representative of Malaysia, introducing document WT/WGTCP/W/239, said that there was a growing awareness of the importance of regulatory controls to deal with anti-competitive conduct of firms and multinational companies as such practices unnecessarily burdened consumers with inflated prices for goods and services and adversely affected the trading environment. Consequently, concerted efforts needed to be undertaken to counter the effects of these practices on developing countries. The primary objective of a domestic competition policy or law was to improve market efficiency and to enhance consumer welfare. Malaysia, however, remained concerned with the application of the core WTO principles to competition policy. Paragraph 25 of the Doha Ministerial Declaration gave the following mandate to the Working Group: "to focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least developed country participants and appropriate flexibility provided to address them." The Doha Conference thus sought only clarification of the above-mentioned elements and not to discuss negotiations. If one were to agree that the proposed core principles were those that had been discussed in the Working Group, these principles should not be allowed to impose additional burdens on developing countries. With respect to the principle of non-discrimination, the Working Group had considered how the principles of MFN national treatment might apply in the context of competition rules. A number of issues had been raised. On procedural fairness, Malaysia believed that each Member should be entitled to design, establish and maintain its own procedural fairness system consistent with the normal checks and balances inherent within the legal structure of the economy in question. The issue of Special and Differential treatment (S&D) had to be given more emphasis and due consideration. Exemptions, including possible carve-outs, were absolutely necessary for developing countries as they strove towards a higher level of economic development. The much needed policy space for attaining developmental objectives including affirmative action programmes had to be an integral element of the structure of any agreement. Transparency considerations should be implemented in stages in pace with developmental needs as S&D requirements varied and were often country-specific.

59. Continuing, he said that the case for a multilateral discussion and consensus on hardcore cartels was stronger. It was accepted that there should be no place for hard core cartels in any country, regardless of its level of economic development. Thus, it was more appropriate for the Working Group to concentrate its efforts on discussing anti-competitive practices, particularly those related to hardcore cartels. Malaysia recognized that hardcore cartels were a developed country phenomenon that had burdened developing countries with excessive costs. As yet, there was no generally accepted definition of a hardcore cartel. Although the OECD had one, a clear and precise definition was necessary. Considering the enormous burden that hardcore cartels had created, Malaysia was of the view that concerted action should be undertaken to tackle these practices. However, many if not most developing countries, and even countries which had introduced

competition law over the last few years, lacked both the experience and capacity to tackle anti-competitive practices. In this context, modalities on voluntary cooperation and their impact on developing countries must be explored. The discussions on hardcore cartels should not prejudice the outcome as regards the ultimate form of an agreement - be it a multilateral, regional or bilateral framework. Cooperation through a multilateral framework was not necessarily the only appropriate and effective way to address hardcore cartels. It was also necessary at this juncture to build capacity in terms of effective legislation and cooperation mechanism. Bilateral and regional cooperation among competition authorities to address hardcore cartels had proven to be beneficial. Bilateral cooperation could be a starting point for voluntary cooperation in a wider context and a step towards building capacity. Capacity building and technical assistance to developing countries should not be time bound. Countries with established competition regimes and authorities had the benefit of decades and even a century of experience in competition policy and law enforcement. On the other hand, many developing countries, like Malaysia, did not have a comprehensive competition policy and law regime. The start-up process was beset with problems and was difficult to maneuver, with capacity constraints abounding as both the government and private sectors were confronted with the prospect of a new business environment. Consequently, the international community had to continue to focus and give priority to providing technical assistance to developing countries.

60. Continuing further, he emphasized that negotiations on competition law-related matters were not part of the Doha work programme. Domestic competition policy-law might or might not be a major consideration for developing countries, implying that national priorities and limited capacity might require that scarce resources were allocated for the implementation of other policies. Alternative domestic approaches to enhance competition in the form of regulatory reform might be needed. With this in mind, developing countries had to be given time and flexibility to implement competition policies. As had been pointed out by some Members, it was premature at this juncture to assume that all WTO Members would eventually adopt a competition law. In seeking to implement competition policy, factors such as exemptions and exceptions within the domestic economy required in-depth discussion and research before any conclusion could be drawn. There was also a need to clarify core principles and modalities for voluntary cooperation, ensuring that deliberations in the Working Group kept the perspective of the special needs of developing countries. Although ideas and suggestions had been floated, the Working Group had yet to achieve any concrete decisions that could be said to constitute a consensus. Malaysia did not want to be locked into an agreement whose implications were not clear and in which the application of specific rules and disciplines could undermine efforts to build domestic industries to face globalization. In closing, he noted that Malaysia was in the process of preparing a competition policy and fair trade law and required international in this regard.

61. The representative of Chinese Taipei said that the "explicit consensus" referred to in paragraph 23 of the Doha Declarations was the key to a multilateral framework on competition policy. An "explicit consensus" was needed to determine the "modalities of future negotiations" after the Cancun Ministerial Conference. His delegation supported the launching of negotiations on a multilateral framework on competition policy at Cancun in order to facilitate trade and development among Member economies and hoped that an "explicit consensus" could be reached on this matter at the coming Ministerial Conference. The modalities of negotiations on competition policy could be multilateral or plurilateral. A plurilateral approach had been suggested for competition policy, for example in the 1995 European Union group of experts report on "Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules".⁶ As contemplated in that report, a plurilateral agreement on competition and trade (PACT), open to all countries, could also be annexed to the WTO, enabling complementary interaction between trade and competition rules. Nevertheless, a plurilateral approach might encounter a problem: if a major trading country was unwilling to participate, it undermine regulatory efforts concerning anti-competitive practices in other countries.

⁶ Competition Policy in the New Trade Order: Report of the Group of Experts (Brussels: 1995; http://europa.eu.int/comm/competition/international/strenght_en.pdf).

On the other hand, if a multilateral approach was used, more extensive regulation might be difficult due to dissimilar market structures and legal differences among countries. In order to resolve these concerns, a two-tier approach was proposed: (i) establishment of a set of principles that was acceptable to all Members (core principles, prohibition of hardcore cartels, technical assistance, etc.) in a multilateral agreement. Minimum standards would be set, and all Members would participate in the negotiation; (ii) a more comprehensive regulation and cooperation framework, dealing, for example, with cross-country merger regulation, voluntary cooperation, peer review and dispute settlement, could be addressed in a plurilateral negotiation. The presence of competition laws in a Member economy would not be a precondition to participating in such a negotiation.

62. Continuing, he said that, it was important to minimise time and cost burdens for Member countries in relation to a commitment on transparency. In this regard, the WTO should consider establishing a competition policy database in order to facilitate inquiries, reduce the cost of information, and offer the convenience of a "one-stop shop". The Fair Trade Commission of Chinese Taipei, had had a good experience in building a Competition Policy and Law Database for APEC countries, and was willing to offer its experience to the WTO. With the experience of GATS in mind, he suggested that the WTO might request all Members to set up information centers to take charge of notifications and answer questions from Member countries on measures relevant to competition policy. Regarding non-discrimination principles (national treatment and most favoured nation), he said that the basic requirement was to have non-discriminatory procedures – i.e. investigation and appeal procedures of cases should be the same for all concerned and should not differ on the basis of nationality. Special and differential treatment should be available for developing and least developed countries. However, such treatment should be transparent to all Members and subject to periodic review. On hardcore cartels, the following suggestions were made: (i) all Members should pay close attention to the OECD Recommendation which provided a worthy model for reference; (ii) it was appropriate to use clear and simple, enumerated list of conducts to define hardcore cartels, and to extend the coverage of the list gradually. A "minimum standard" approach including the adoption of a rule of reason should be considered; (iii) each country could address hardcore cartels with flexibility based on its level of domestic social and economic development. However, exemptions should be transparent and be reviewed periodically to assess whether they were still necessary; (iv) all Members should improve their domestic law enforcement capacity vis-à-vis hardcore cartels. International cooperation should be pursued, observing the principle of positive comity and sharing documents or information. Developed countries, in turn, should provide technical assistance to developing countries, and provide them with the necessary resources to facilitate the fight against hardcore cartels. As regards voluntary cooperation, he suggested an asymmetric approach. Developed countries should bear more obligations than developing countries. This would entice developing countries to willingly join the multilateral competition structure, and establish the foundation for regional cooperation. In the short term, technical assistance and capacity-building would help developing and least-developed countries to develop the capacity to partake in the benefits of the multilateral competition framework. In the long term, emphasis should be placed on assisting countries to effectively implement competition law and policy by building a "competition culture" and develop a "tailor-made" law. To achieve these goals, developing and least-developed countries should be given a guarantee of "flexibility" (application of exemptions and exclusions, adaptation period, etc.) and countries should be encouraged to join the international trade framework. Concerning compliance mechanisms, a peer review system was more appropriate to a WTO framework on competition policy and facilitate beneficial sharing of experience among Members. In the long run, strengthened international cooperation was vital to the successful enforcement on competition law. A voluntary peer review system would contribute to this goal by helping all Members to strengthen their enforcement capacities and build a competition culture. Finally, he noted that trade policies promoted by the WTO were focused on issues concerning market entry; competition policy was concerned with the related goal of building and maintaining a fair, open, and competitive market. The WTO's focus was on competition policies as they related to trade, and it would be unrealistic to expect the WTO to resolve all competition policy issues.

63. The representative of Tanzania, associating itself with the views expressed by the delegations of India, Egypt, Kenya, Cuba, China, Nigeria and Venezuela, underlined the need for more time for the Working Group clarify the different issues that had been raised, especially with regard to the practical implications for developing country Members of applying the core WTO principles of transparency, non-discrimination and procedural fairness in a multilateral framework on competition policy. Like other delegations, he did not consider tenable the proposition that the issues raised could be clarified after entering the negotiations mode. Developing countries needed to understand and gain confidence regarding the long term effects of a possible multilateral framework on competition policy before plunging into a negotiation process that would almost invariably be dominated by those with a deeper understanding of the issues and stronger institutional capacities for negotiations. He wondered whether the whole process was not replicating a framework that already existed under the auspices of the United Nations, namely the United Nations Set. A question to be addressed then was what were the shortfalls in the United Nations Set, especially in so far as it provided a mechanism for dealing with restrictive business practices? A clear answer to this question would provide unambiguous testimony as to the need for and efficacy of a WTO agreement. There was also the question of procedure which was brought into focus by the intervention of the representative of the European Community and its member States when a draft of the multilateral framework on competition policy was held out. His understanding of the Doha mandate was that a decision whether or not to proceed with negotiations would be based on consideration of their modalities which should define the scope and breadth of the negotiations, as well as the procedural aspects. Because these modalities were not yet agreed upon and the process that would be used to develop them was not clear, to suggest looking at a draft of the multilateral framework on competition policy implied departing from the terms of reference of the Working Group.

64. The representative of Indonesia said that the principles mentioned in paragraph 25 of the Doha Ministerial Declaration were central for the credibility and effectiveness of any competition policy. In his country, these principles were considered at the heart of the current democratisation process. Within this process, the key obligation of domestic authorities was to provide the climate to ensure that the rights of the people in general would be respected. This involved many adjustments and reforms in the administrative system. It also entailed educational measures to offset certain imbalances in the community. This process was complex as well as time and resource consuming. The same considerations applied within the competition policy context. Regarding a possible multilateral agreement, the situation was even more complex. In the light of Indonesia's domestic experience, it was not seen as desirable for such an agreement to put additional burdens on the authorities. It would be counterproductive for developing economies and, in the end, would put people's rights in jeopardy. Therefore, it was hard to see how a multilateral framework on competition policy would be beneficial.

65. The representative of the European Community and its member States, responding to a point made by the representative of Tanzania, said that his delegation did not offer to table a draft agreement because the Membership would not allow it to do so. On the other hand, it was difficult to provide the degree of precision in the clarifications requested by a large number of Members without going into negotiations. If the Membership was not able to collectively offer Members like Tanzania the assurances they sought, they would anyway have the option to oppose initiating negotiations. But it was contradictory to require, on the one hand, more precision on how certain elements would work in practice and also require that the discussion be limited to general study and reflection. Also starting a negotiation did not mean concluding it.

66. The representatives of Venezuela and Kuwait called for inter-governmental agreements and restrictive business practices implemented pursuant to such agreements to be explicitly excluded from the ambit of any multilateral framework on competition policy. Continuing, and introducing document WT/WGTCP/W/237, the representative of Kuwait said that hardcore cartels posed a serious threat to competition, and should not be condoned. The OECD Recommendation on hardcore cartels provided a useful point of reference in this regard. However, for developmental and related purposes,

it would be important to ensure, in any future multilateral framework on competition policy, that inter-governmental agreements and restrictive business practices implemented pursuant to such agreements were explicitly excluded from the ambit of such an agreement and the definition of hardcore cartels. In addition, the multilateral framework on competition should address the negative impact of mergers and acquisitions on competition – especially in developing and least developed countries. The merger rules of developed countries intended to safeguard against abuses in their domestic markets, seldom considered the impact of such mergers and acquisitions on foreign markets. Certain merging companies were so powerful that in several developing and least developed countries no domestic company or even the government had a chance to compete with them. Quantitative evidence on this issue was provided in the submission of his delegation. The representative of Venezuela said that good precedent for the exclusion of intergovernmental agreements and related anti-competitive practices could be found in the United Nations Set. In particular, 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. Such an exclusion was particularly important in regard to the marketing of commodities. Commodity markets could not always be left to be free operation of market forces because of the nature of the product and required a more active participation by the governments and international coordination. The stabilisation of these prices, said the speaker, went hand in hand with legitimate developmental objectives, for example productive diversification, the backing to depressed regions and sustainable development.

67. The representative of Hong Kong, China reiterated that any obligation to be included under the possible multilateral framework for competition required consensus amongst Members and all Members could be brought onboard only when sufficient flexibility was provided. Further examination of hardcore cartels would be necessary to see whether and how, possible obligations could be developed in this respect. One possibility was to have non-binding or optional obligations. On Kuwait's paper, clarification was sought on the term 'restrictive business practices relating to inter-governmental agreements' that Kuwait had proposed to be excluded from the definition of hardcore cartels. In response, the representative of Kuwait stressed that a definition of hardcore cartels should exclude agreements between governments and states even where the business was actually carried out by private companies on behalf of such governments and states.

68. The observer from the World Bank said that the primary goals of the World Bank Group were to assist member countries to reduce and eliminate poverty, and foster broad-based sustainable economic development. In this regard, trade, investment, and competition were intertwined and played critical roles. Drawing on empirical analysis contained in the 2003 Report on Global Economic Prospects ("GEP Report")⁷ and other research conducted by the World Bank Group, he made the following points: (i) while FDI was important because it often brought with it new products, skills, technologies and organizational methods, it was on average about one-fifth of domestic investment across countries. Both foreign and domestic investment tended to move in parallel directions and were highly correlated. The prevailing business conditions determining investment in the domestic economy were as important for domestic firms as they were for foreign firms; (ii) the level and the rate of growth of per capita GDP of countries were positively correlated with the degree of competition: the more intense was competition in the domestic economy, the greater were the levels and rates of increase in per capita income; (iii) the level and growth of per capita GDP was also positively correlated with the entry of new firms in the market. In other words, new business formation, which resulted in greater income and wealth, was positively determined by the degree of prevailing competition; (iv) surveys of individual firms (including domestic firms) indicated that many barriers to entry and related costs of doing business arose from government policies, associated corruption and bureaucratic red tape. The higher were government policy-based barriers, the lower was the productivity of firms. Moreover, the greater were the regulatory costs of entry (in the form of time and number of procedures required to obtain licenses), the lower was the level of FDI;

⁷ World Bank, Global Economic Prospects and the Developing Countries (Washington DC: 2003).

(v) economies that could be characterized as being more open to competition tended to be more integrated into the global trading system in terms of exports and imports. The greater was the relative exposure to international trade, the higher were the levels of per capita income.

69. The World Bank Group, in cooperation with member countries, was conducting "Investment Climate Assessments" and "Doing Business Indicators" which presented standardized measures, identifying the constraints and track changes in the investment climate conditions prevailing in and across countries. These indicators were useful in identifying the principal impediments to investment and competition, and could assist in the formulating of policy initiatives such as competition advocacy. However, developing countries also faced significant challenges relating to international anti-competitive practices—some "legally" sanctioned by industrial nations. The 2003 GEP Report found that: (i) developing nation exporters faced higher barriers exporting to industrialized countries than industrialized country exporters exporting to developing nations; (ii) illegal international hardcore cartels consisting of firms based primarily in industrialized countries had substantially raised the costs of developing countries imports and (iii) industrial countries' competition laws contained exemptions for export cartels, and for liner shipping conferences, which also affected the welfare of developing countries.⁸ Finally, it was emphasised that industrialized countries could do much to foster the economic growth of developing countries by addressing these anti-competitive practices. The World Bank Group had assisted several member countries in developing competition law and policy. Such assistance had ranged from providing advice on the appropriate design of competition law and policy to training workshops and seminars. Such assistance was often provided in collaboration with other multilateral organizations such as the WTO, OECD and UNCTAD as well as with bilateral donors.

70. On the issue of peer reviews, the observer of UNCTAD drew attention to the UN Set on Principles and Rules on Competition, which under Section F, para.4 provided for consultations procedures taking place annually during UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy. In this respect, for developing countries interested in voluntary peer reviews of their competition authority, UNCTAD would be in a position, if requested, to organize such reviews, in a similar manner as those undertaken by the OECD.

II. THE NATURE AND SCOPE OF COMPLIANCE MECHANISMS THAT MIGHT BE APPLICABLE UNDER A MULTILATERAL FRAMEWORK ON COMPETITION POLICY

71. The representatives of European Community and the member States, Australia, United States, Korea and Japan introduced written submissions relevant to this item (documents WT/WGTCP/W/229, 232, 233, 235 and 236, respectively). The representatives of Canada, India, Switzerland, Brazil, the United States, Egypt, Korea, Tunisia, the European Community and its member States, Nigeria, Venezuela, Hong Kong, China and Kuwait made oral statements or posed questions on this item. The observers from the UNCTAD and the OECD provided updates on relevant activities of their organizations.

72. The representative of the European Community and its member States, introducing document WT/WGTCP/W/229, said that it dealt with two issues; dispute settlement and peer review, although it had a doubt on whether peer review should be properly classed as a compliance mechanism, since it had a much broader scope and purpose. His delegation had proposed both mechanisms for inclusion in a Multilateral Framework for Competition. Dispute settlement had been proposed because the framework should contain a number of basic, narrowly crafted, but legally binding rules. If it contained that kind of obligations, it was normal that these were enforced through dispute settlement. Many of the questions that had been raised in the group on dispute settlement were largely concerned with the underlying legal obligations. There was a close correspondence between the scope of legal obligation that the WTO Members chose to undertake under a competition agreement and their

⁸ World Bank, *ibid*, chapter 4.

actions being subject to dispute settlement. Peer review was a concept which came from the OECD but it was not new in the WTO. It was an instrument that should help Members to better understand how to write their laws, how to implement their policies and make them more effective. The written submission described this procedure without proposing a model. Instead, it proposed questions and answers from which the membership could construct a model of peer review for the WTO.

73. A second representative of the same delegation said that the purpose of his delegation's written contribution was to stimulate debate on dispute settlement. On qualification, the WTO had at its disposal a well known and well functioning dispute settlement mechanism. Only governments had access to it. The proposal on competition would not depart from this model. In other words, private companies would not have access to dispute settlement mechanism. Secondly, on the question of the scope of jurisdiction of dispute settlement, the actual negotiated commitments and binding obligations of an agreement would dictate the scope of jurisdiction, and only *de jure*, and not *de facto* discrimination would be covered by the dispute settlement. In other words, the task of any WTO dispute settlement mechanism would be one of assessing merely whether a domestic competition law regime was in conformity with the obligations relating to the core principles and the prohibition of hard core cartels. On the other hand, individual decisions by domestic competition authorities and pattern of individual decisions would not be covered. This guarantee could be expressly included in the agreement, which would also include the usual provisions on consultations helping to minimise recourse to formal settlement proceedings. With regard to participation of competition experts, Article 13 the DSU provided for a general authorization for panels to seek the information they needed and this provision could be easily applied to competition matters. However, in order to provide an additional guarantee that appropriate level of expertise was available, the establishment of a permanent group of experts on competition policy and law could be considered. Similar approaches could be found in existing WTO agreements that dealt with other technical and complicated matters like such as agreement on subsidies and countervailing measures. Concerning the terms of reference for any dispute settlement panel, Article 7 of the DSU contained a standard terms of reference. Further, as was pointed out in paragraph 23 of his delegation's submission, any panel hearing a dispute relating to a WTO agreement on competition would be under the obligation to read the terms of reference in light of the substantive provisions of that agreement. This would rule out the intervention of a panel in individual decisions and in *de facto* discrimination. Regarding the role of the appellate body, consistent with current WTO practices the scope of the any review would be strictly limited to issues of law covered in the panel report and legal interpretation developed by the panel. Consequently, the appellate body could not examine or gather new evidence because it was bound by the initial panel proceeding.

74. The third representative of the same delegation said that peer review also had an important role to play in a WTO agreement on competition policy. As concerns peer review, document 30 was much an option paper, and was not prescriptive. In particular, her delegation did not wish to lay down any rules about how often peer review should take place, how it should be triggered for a particular country, who should carry out the review, and what follow-up there should be? However, peer review could cover a wider range of issues than those which would be subject to dispute settlement; that is, it would even cover matters where no commitments were made. In particular, it could look at the successes and difficulties which a country experienced in enforcing its competition regime, with a view to identifying good practices which could be disseminated and aspects where further improvement would be welcome. However, peer review, like dispute settlement, should avoid looking at decisions in individual competition cases, which involved judgements on legal and economic questions, and at questions which concerned prosecutorial discretion.

75. One important question was, how could peer review in the WTO be distinguished from peer review in the OECD, in order to avoid any overlap? Part of the answer was that it could be focused on those areas linked to a WTO agreement on competition. For example, for a developed country, this could include the question of how well it cooperated with competition authorities in other countries, particularly developing ones, and its provision of competition-related technical assistance and

capacity building to those countries. For a developing country, it could include how well a culture of competition was being established and whether knowledge of the competition law and regime had been successfully propagated in the public and private sectors. She had heard with interest the suggestion made by the representative of UNCTAD about how peer review for developing countries could be carried out by UNCTAD, and by the OECD for developed countries. This suggestion could be explored, the purpose being to take advantage of the different synergies available. Peer review could play an important role in identifying technical assistance and capacity building needs, and for encouraging cooperation. Because peer review was non-conflictual, and not linked to any dispute settlement process, it would be a positive experience for developed and developing countries alike.

76. The representative of Australia, introducing document WT/WGTCP/W/232, said that his delegation agreed that some form of compliance mechanism would be an important element of a Multilateral Framework on Competition. Earlier discussions in the Group had shown some divergence of views about the potential application of the DSU and, initially, Australia had reservation about it, although ultimately its position would depend of the negotiated proposal that was being considered for inclusion in a multilateral framework on competition policy. A fuller understanding of the form of dispute settlement mechanism being proposed would be important for Members to refine their views on this issue. Australia also considered that a peer review mechanism could be a useful component of a multilateral framework on competition policy that would encourage the adoption of best practices, and facilitate the delivery of technical assistance to developing country Members. In implementing a peer review mechanism, there was a number of issues for consideration including definition of a peer, frequency of reviews, and whether reviews were voluntary or mandatory. Naturally, resource implications would also be a consideration. Australia supported the suggestion of the European Community and its member States that individual decisions or questions relating to the strategy or priority of a competition enforcement body would be excluded from peer review. On the definition of a peer, Australia had no preference on whether countries should be reviewed by the whole membership or by selected Members, although in the latter case, selection of peers would need to be defined. The peer group should include competition experts, since a multilateral framework on competition policy would involve the distinct areas of both competition and trade, and it would be important to ensure coherence between them. When a developing country was reviewed, the panel should involve other developing countries Australia also saw advantages in a review approach that used an independent assessor to prepare an initial draft review that followed an agreed template. Subject to appropriate resourcing, the WTO Secretariat could be a key participant in such a process. On the sequencing of reviews, Australia agreed with the European Community and its member States that in the early days of a possible multilateral framework on competition policy, a voluntary selection process could apply, although Members that had recently implemented or were in the process of implementing domestic competition law and policies could be given priority if they wished. Subsequently, Australia would prefer a peer review mechanism to progressively attain comprehensive participation. A related question might be whether there should be any capacity for complaints or disputes to trigger a review mechanism. The frequency of reviews would need to be discussed at the appropriate stage. The Trade Policy Review Mechanism (TPRM) might not provide relevant guidance for competition reviews. For larger developed countries, the TPRM approach of reviews every two years appeared excessive as underlying competition frameworks normally changed little in such a timeframe. Conversely, while most developing countries were currently reviewed by the TPRM every six years, there might be an advantage in a more frequent competition review when competition frameworks were first commenced. To facilitate engagement of developing countries in the process, the links with technical assistance funds and capacity building activities would have to be emphasised.

77. The representative of the United States, introducing document WT/WGTCP/W/233, said that as the Fifth Ministerial approached, the Group must consider how best to carry forward the work that had been done, taking into account the different needs and different levels of experience and institutional capacity of WTO Members. The best way to proceed forward at this point, to help enhance the worldwide culture of competition for the benefit of all Members, was to begin with a

WTO competition peer review process. He welcomed the submission of Canada after the February Working Group meeting (WT/WGTCP/W/226), and the recent submissions by the European Community and its member States, Korea, Japan, and Australia as well as the remarks of Chinese Taipei earlier in the meeting, which reflected the interest of other Members in a WTO Competition peer review process. His delegation's contribution described the benefits of a peer review system, drawing on experience in other competition fora in which it had been successfully employed. (i) peer review facilitated learning through sharing of experience and expertise. The system of competition laws that existed today developed organically through cross-fertilization of ideas, with many jurisdictions in drafting their laws considering models used in other jurisdictions, and then adapting them to the particular needs of their jurisdiction. As with drafting a competition law, agencies dealing with implementation and enforcement of the law could benefit from drawing on the experiences of those in other jurisdictions. Peer review provided a mechanism to ensure that participants got regular feedback on their own laws and policies, while learning from others' experiences. This not only improved domestic enforcement but, because competition agencies often dealt with cross-border issues, might also result in benefits to the international trading system; (ii) peer review could contribute to the transparency of competition laws and policies and their implementation; (iii) peer review promoted convergence. Peer review brought out how different approaches to competition policy and enforcement had been successful or unsuccessful. Participants acquired a shared base of knowledge that was likely to help shape how they would approach competition issues in their jurisdictions. While harmonization of approaches was neither feasible nor desirable, over the long term, this shared experience was likely to result in greater convergence in competition enforcement, with corresponding benefits to the international trading system; (iv) peer review promoted international cooperation. Through participation in peer reviews, competition policy officials from different countries not only learnt more about one another's policies, they also made increased personal contacts, which could facilitate increased international cooperation in implementing competition laws and policies; (v) peer review encouraged constructive problem-solving. Peer review provided a forum for Members who have concerns about the reviewed Member's laws or practices to raise those concerns. However, peer review was conducive not only to identifying problems but also to finding solutions, in that participants might include countries that had confronted similar problems in the past and could recommend practical solutions from their own experience. In this setting, Members were likely to be responsive to constructive suggestions to address problems that had been identified; (vi) peer review contributed to fulfilling the capacity building objectives of the Doha mandate.

78. Continuing, he said that while all Members could benefit from peer review, developing countries could especially benefit, both from being the subject of a review and from participating in reviews of other jurisdictions. There was a high degree of commonality of issues facing competition agencies – *e.g.*, institutional design, independence, setting priorities given scarce resources, handling of cross-border issues, etc. – so that most of the issues relevant to developed country authorities would also be relevant to developing country authorities as well. Taking part in peer reviews was likely to be a highly efficient way for developing countries to increase their knowledge base, without a burdensome resource requirement. By participating in peer review sessions, developing countries could broaden and deepen their understanding of competition issues, and put that knowledge to work toward improving their domestic systems. Over time, the peer review process would contribute to a key goal of developing countries seeking to establish competition policy: the dissemination of a culture of competition. A peer review mechanism could be flexible, recognizing the needs of developing countries. It could differentiate among Members based on, for example, their levels of development or their experience with competition law and policy. From the experience from the OECD, sponsored peer review of competition authorities in its Competition Committee showed that recommendations from a peer review process, and the accompanying international support, could be a welcome stimulus for a reviewed member to making needed and desired changes to its domestic competition regime. The US submission discussed the example of Greece, which had endorsed the OECD's recommended improvements to its competition regime, and implemented substantial changes based on the OECD report. OECD peer review had recently been applied to two non-OECD

developing countries: South Africa and Chile. Based on the successful experience with these two reviews from the point of view of the examiners and the examined parties, other non-OECD members had expressed interest in being reviewed. Introducing competition peer review into the WTO would make the benefits of such reviews available to a much wider range of countries, and particularly to developing countries. There were many issues as to how a peer review system could be structured, but the US submission focused on highlighting the benefits of peer review in general. In conclusion, he said that peer review could be an effective tool in enhancing national competition regimes, and by helping disseminate the culture of competition to all Members, could benefit the world trading system as well.

79. The representative of Korea, introducing document WT/WGTCP/W/235, said that in its previous submission to the Working Group (document WT/WGTCP/W/225) Korea suggested the implementation of peer review as a compliance mechanism in the WTO Competition Committee. As a follow-up, his current paper provided specific implementation guidelines of peer review under a multilateral framework on competition policy in the WTO. Given that the WTO was an international organization based on binding rules, it would be more meaningful for peer review in the WTO to be of binding nature than purely voluntary as in other international organizations, such as the OECD. In the multilateral framework on competition policy in the WTO, peer review should aim at helping to facilitate sharing of information and experience between Member countries, to enhance transparency in enforcement of competition law and policy, thereby enhancing international cooperation. Such a process would have the following features (i) targeting all Member countries - in principle, all Member countries should be subject to peer review thereby bolstering the role of peer review as a compliance mechanism. However, developing countries, which had not yet developed institutions or measures to deal with competition policy related issues in some way, or are in beginning stages, should be given a grace period; (ii) periodical review of implementation of the policy recommendations suggested in peer review: it could help promote compliance to review periodically the level and degree of implementation by the Member countries under review of the policy recommendations suggested by peer review; (iii) increasing the level of peer pressure by publicizing final reports and information through publication and the Internet, compliance by peer pressure could be strengthened. Korea had no objection to applying WTO dispute settlement mechanism to obligations in a WTO competition agreement to complement the peer review process. However, given wide differences in competition policy institutions and in the levels of experience with competition policy, it was of the view that it might be more practical to begin with competition policy-specific peer review. The goals of peer review were: (i) promoting compliance by the Member countries of the multilateral framework on competition could be placed as the priority; (ii) by sharing and exchanging experience and related information of competition policy enforcement, Member countries could enhance the effectiveness of competition policy enforcement; (iii) the process of peer review itself could help enhance the enforcement capability of developing countries and the least developed countries, which had no or less experience in competition policy implementation. Peer review could be carried out in three stages: (i) at the investigation stage, a Member country under review would be required to draw up a report including a brief overview of its competition law and policy enforcement, in accordance with a standard preliminary review list, and to present it to the Secretariat. The Secretariat would draw up the Secretariat Report mainly based on the Government Report; (ii) at the examination stage, all Member countries in the Competition Committee would discuss competition law and policy enforcement of the given Member country on the basis of the Government Report and the Secretariat Report. After collecting and reflecting the opinions and recommendations from Member countries, the Secretariat would produce the final report by revising the Secretariat Report; (iii) at the dissemination stage, the final report would be drawn up and publicized by disclosing the government report, the final Secretariat report and minutes, transparency and confidence in peer review could be enhanced.

80. Continuing on related matters, he said that considering peer review mechanism's positive effects upon technical assistance to developing countries, it was desirable to select countries with sufficient experience in competition policy enforcement to be reviewed first. In this way, more

experienced countries could provide developing countries with useful information on their experience in enforcing competition law and policy, which could contribute to easing developing countries' concerns about introduction and enforcement of a domestic competition law and policy. Factors to be examined in the Peer Review should include at least core principles, hardcore cartels, voluntary cooperation and technical assistance stipulated in the Doha Development Agenda. TPRM was a peer review mechanism that covered a wide range of trade policy of a given WTO Member. Therefore, its goal and scope were different from those of peer review on the competition law and policy. TPRM aimed to enhance transparency in overall trade policies and practices of Member countries. A separate peer review in competition sector enabled an effective competition-specific peer review in a detailed manner. It would also enhance transparency in competition law and policy enforcement and promote compliance of a multilateral framework on competition policy.

81. The representative of Japan, introducing document WT/WGTCP/W/236, said that the following four points should be taken into account when discussing the issue of compliance: (i) a discussion should take place, at the subsequent negotiations, about the approach to be taken to ensure compliance under a MFC; (ii) at the present meeting of the Working Group, therefore, it was desirable that the Group discuss the pros and cons of several approaches that were currently used for compliance of the WTO and other multilateral rules. Such discussions would greatly contribute to the future negotiations; (iii) peer review was one of the possible approaches for compliance, being multi-purpose, it could serve as a useful mechanism to encourage compliance of a MFC; (iv) with regard to application of dispute settlement to competition policy, however, there were various views at the present stage. Dispute settlement was a cornerstone of the multilateral rule-based system, as the European Community and its Member States described in its paper. He shared the views expressed by the latter delegation on the merits of dispute settlement. However, individual cases should not be brought into a dispute settlement procedure under a MFC. At any rate, compliance approaches should be determined in accordance with the rules and principles that the Members were subsequently going to negotiate and multilaterally agree upon.

82. The representative of Canada said that the submissions from the European Community and its member States, the US, Japan, Korea and Australia provided a source of optimism about areas of commonality and a basis for moving forward in the area of compliance mechanisms. The US submission outlined the key benefits of peer review effectively. Canada had long been an advocate of this mechanism in the context of a WTO competition agreement and had spent some time during the meeting of the Group in 20-21 February, 2003 outlining the key benefits of such an approach. The benefits of peer review would transcend the specifics of any methodology. Her delegation believed the work done by Japan, Korea and Australia on this issue would provide an excellent starting point for the design of a peer review mechanism when negotiations would begin. As had been suggested in the US submission, peer review in the WTO would be a starting-point for advancing the objective of a world-wide culture of competition while taking into account different needs and the level of experience of WTO Members. Nonetheless, in her delegation's view, a system of peer review in the WTO must be appropriately grounded in or guided by a clear set of provisions or non-binding obligations, towards which Members could shape their developing competition systems. The Doha elements, in particular to the core principles of non-discrimination, transparency and procedural fairness as well as to provisions on hardcore cartels, voluntary cooperation and capacity building, should provide the basis for such a framework or set of guiding provisions. She therefore envisaged the post Cancun negotiations as focusing not only on the details of a strong and robust system of peer review as had been described by the US delegation, but on the clarification and clear articulation of these important guiding elements, which would form a necessary part of a Multilateral Framework on Competition.

83. Referring to the submission by the European Community and its member States (WT/WGTCP/W/229), she saw merit in many of their suggestions contained therein regarding the objectives and procedures of a peer review mechanism, in particular it would act as a valuable "service-check" on a WTO Member's competition law and policy and help identify areas where

improvement could be made. With regard to scope, while her delegation had argued for a multilateral framework on competition policy made up of a set of non-binding obligations, she agreed that peer review should cover a wider range of competition law and policy matters than would be the subject of obligations in the multilateral framework. The paper of the European Community and its member States also made reference to the effectiveness of a consultation and cooperation mechanism, distinct from the consultations under the DSU Article 4, that might consider a range of issues. She also agreed with the effectiveness of such a consultative process or dialogue, outside of the existing DSU, acknowledging that it would provide an essential complement to the more public processes of discussions on peer review. In fact, Canada would support a complementary system of peer review with a consultative process or dialogue, whose collective aim would be to address specific concerns of Members and to facilitate information sharing, capacity building and compliance, while furthering the objectives of creating a culture of competition and promoting convergence over time on competition policy matters. A peer review mechanism, coupled with provisions for consultations or dialogue between Members could effectively apply pressure for compliance, particularly if backed by a sophisticated system of follow-up. On the issue of dispute settlement, her delegation struggled to see the value or need for the DSU at this stage in the competition context, particularly given the vast gap in the level of experience and differing needs of WTO Members in the area of competition policy. In sum, her delegation's preference would be for a non-confrontational approach aimed at capacity building and sharing information and experience with a view to creating a culture of competition and forum for eventual policy convergence, coupled with a means of addressing particular concerns of Members in a cooperative environment.

84. The representative of India, commenting on the efficacy of voluntary cooperation, said that along with other delegations, India feared that economically weak countries would be forced to comply with a multilateral framework through peer and other pressure, whilst there would not be any mechanism in place to make the more powerful players comply. On the proposal by the European Community and its member States to apply dispute settlement procedures to core in relation to domestic competition laws of Members, concern was expressed that this would penalise Members who had put in place a comprehensive competition law on an autonomous basis. Those Members whose laws had a wider coverage of competition law provisions, specifically agreements, both horizontal and vertical, dominance and mergers and acquisitions, would have to apply non-discrimination on a binding basis on all the provisions of domestic competition law. With reference to the EC's earlier comment that competition policy *per se* would not be covered under the proposed WTO framework, limiting coverage to trade-related competition policy, it seemed that the European Community and its member States sought application of the core principles not only to provisions related to hardcore cartels, but to the entire scope of the national competition laws. On the subject of the peer review mechanism and a general consultation process in the pattern of the TPRM, India did not see the need for such a general review mechanism. This would put pressure on the limited resources of Members. Other fora, like the UNCTAD where such reviews and formulation of modern law were being undertaken, were available. As such, issues like comprehensive competition law *per se*, including issues of dominance, mergers and acquisitions did not belong to the WTO, and the proposal to have such matters addressed in reviews in the WTO was difficult to understand. Continuing, he said that anti-competitive practices of a cross-border nature could not be addressed effectively in the absence of information-sharing among competition authorities concerned. Prohibition in the domestic jurisdiction would not have any real effect unless effective implementation procedures, including requirements for the sharing of information were in place, especially sharing of information already available. There should be an element of mandatoriness even for sharing of confidential information. Resource and capacity constraints faced by developing countries needed to be taken into consideration and flexibility provided.

85. Responding to the foregoing comments, the representative of the European Community and its member States suggested that the issue of application of a dispute settlement mechanism had two basic elements: to what it was applied and how was it applied? There were several examples in the WTO agreements of special provisions to adapt the DSU to a specific policy area – in this regard

competition would not be an exception. With regard to the argument that countries which had already adopted laws would be penalised, in the presence of an agreement there must be concurrence on the substantive obligations in that agreement. Agreement on the utility of the core principles in such an agreement, should lead to their application across the board. In this context, the European Community and its member States proposal not to have dispute settlement in individual cases or not to have dispute settlement apply to *de facto* discrimination was not a variation on the mechanism of the DSU but an extension of the fact that the obligation itself was framed in qualified terms. The European Community and its member States believed that if the agreement was properly drafted to apply only to *de jure* instances of discrimination, a panel would not be in a position to extend this to *de facto*. However, if necessary, a fail-safe to this provision can be added. Concerning sanction, although it was especially difficult to apply counter-measures or to calculate the amount of counter-measures outside pure market access issues, this was not a novel phenomenon in the WTO. Similar issues arose in services and intellectual property.

86. Carrying forward the subject of Dispute Settlement, the representative of Hong Kong, China said that it must not be assumed that this must apply in a possible MFC. The use of the term "multilateral framework" instead of "multilateral agreement" in the Doha Ministerial Declaration implied the possibility of a different approach. This responded to the EC's concern that non application of dispute settlement in an multilateral framework on competition policy was an anomaly from a systemic and institutional point of view. "Framework" was less definite and did not necessarily include binding and justiciable rules, unlike an 'agreement'. The dispute settlement system for the multilateral framework on competition policy proposed by the European Community and its member States could also be regarded as an anomaly, because it insisted that the dispute settlement should apply only to the letter of the law and not to their application. Prof. Ehlermann, the former Chairman of the Appellate Body, had observed in a recent paper that "already under existing trade rules, national competition law and practice are not exempt from, but rather subject to, the application of the dispute settlement system. Both competition laws as such and their application in individual cases must comply with the substantive standards of the WTO Agreement [an example is Art. III.4 of GATT on national treatment], and complaints can be brought against both."⁹ If new binding rules were to be developed under a possible MFC, it would only be logical that the application of laws, regulations, and guidelines would be subject to such rules. Such application would impose significant and far-reaching obligations on Members, which underlay Hong Kong, China's strong reservations against the application of the DSM in this context. The proposal of the European Community and its member States to set up a permanent group of experts might have the effect of expanding the scope of dispute settlement down the road. Article 13 of the DSU already empowered panels to seek technical advice should the need arise as had been pointed out. The establishment of a permanent expert group could only be justified if the substantive obligations in an multilateral framework on competition policy were to cover the application of laws and regulations in individual cases which would be fact-intensive, complex, and technical. In other words, it was not clear why the European Community and its member States wanted a permanent expert group if its delegation did not want to address individual cases.

87. Continuing, he sought clarification on the proposals in paragraph 11(b) of the submission by the European Community and its member States which suggested that certain provisions in a domestic competition regime which were not substantive requirements of the framework (such as provisions on monopolies or mergers) could become subject to the overriding core principles such as non-discrimination and transparency. If the overriding core principles were binding and subject to dispute settlement, would the proposal not bring these domestic provisions under the scrutiny of dispute settlement? What would be the rights and obligations of Members in respect of these provisions? Members were duty-bound to clearly define the limits of an agreement. On the idea of a general consultation mechanism, paragraph 41 of the EC paper stated that, "a range of issues could be raised

⁹ Claus-Dieter Ehlermann and Lothar Ehring, WTO Dispute Settlement and Competition Law (European University Institute Florence, Policy Paper 02/12 (2002)).

under the consultation provisions" including assessment of whether a Member's domestic legislation met the standards contained in the MFC. Furthermore, the terms of reference of the consultation provision would be "any matter relating to the operation of the Agreement or the furtherance of its objectives". Clarification was required on this point – would the consultation mechanism be confined to the obligations of the possible multilateral framework on competition policy or would it extend to issues outside the scope of the framework. In the latter case, what would be the rights and obligations of the Member requesting the consultation and the Member being requested and how would duplication with the proposed peer review mechanism be avoided?

88. On the issue of peer review, there was no doubt that it could bring benefits to Members, regardless of their levels of development and experiences in implementing competition policies or laws. However, it was essential for Members to know exactly what was intended to be achieved under the proposed system and what were the rights and obligations of Members. For the TPRM, it was clear that "the purpose ... is to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements. It was not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members." Turning to the Korean paper, its proposals for periodic peer review, the policy recommendations of which would be binding on the Member under review, seemed to depart from what Korea had said at the Working Group's meeting 20-21 February, 2003. There, it had been suggested that Members would not be required to change their policies based on the outcome of the review. In regard to the paper by Japan, it was accepted that the peer review mechanism should be based on a voluntary request. Nevertheless, it appeared that Japan envisaged exerting pressure on the Members under review through policy recommendations and a follow-up procedure to evaluate implementation of the recommendations. In the paper by the European Community and its member States, the following aspects were highlighted: "the *effectiveness of enforcement* of domestic competition laws over a period of time"; helping "identify ways of *improving the legislative framework*"; and "attaining a greater degree of *international convergence* in competition policy on a range of issues". The question here was what standards or benchmarks would be set? Developing Members were apprehensive that the multilateral framework on competition policy would be used to put pressure on them to align their policies with those of the developed Members.

89. Continuing, he suggested that the vast diversity in socio-economic development across the WTO Membership, together with the additional resource burden that a competition-specific peer review mechanism would entail, called into question its desirability. Perhaps, peer review for trade and competition policy could be folded-in to be a part of the existing TPRM. Further questions were posed: on what basis did a possible multilateral framework on competition policy warrant special treatment as compared to other WTO agreements? How would duplication with the TPRM be avoided? What was the cost effectiveness of having a separate mechanism if the TPRM did not prohibit interested Members from raising questions and providing information on issues relating to trade and competition policy? How could the proposed Competition Policy Committee ensure that the process would be resource effective? How would the idea of drawing upon relevant work from other fora, including the OECD Global Forum on Competition, the International Competition Network (ICN) and UNCTAD work in practice? Finally, he noted that some Members might be reluctant to provide information to, and be scrutinised by an outsider, other than the Secretariat or other Members.

90. The representative of Switzerland concurred that dispute settlement and peer reviews should be seen as complements rather than substitutes. A competition framework which was part of the WTO should indeed have similar compliance mechanism as the other agreements. To exclude certain areas of the rules-based system from Dispute Settlement (DS), which was one of the core functions of the system, set an undesirable precedent. With reference to the observation by Hong Kong, China on the terms "competition framework" and "competition agreement", the content rather than the term used had to be decisive. Binding provisions would necessitate some form of mechanism to settle

eventual disputes. To be sure, having recourse to dispute settlement in relation to national competition policy should be a matter of last resort and limited only to the severest breaches of a WTO agreement, which would be rare. This approach would be consistent with the main thrust of the agreement which was to promote the culture of competition throughout the world, through cooperation and know-how transfer, and avoid disputes. The obligation regarding the core principles would only be violated if the law were worded in a way contrary to these principles. This was something which seemed unlikely in any competition law. In any case, individual cases would not be looked into. Third, recognition of the role of prosecutorial discretion and the right of agencies to set priorities in the light of limited resources would minimise the likelihood of disputes regarding hardcore cartels.

91. Addressing points made in the submissions of various other delegations, he affirmed the usefulness of peer review as the most important compliance mechanism in a multilateral framework on competition policy in facilitating the exchange of information and experiences on best practices, and its general educational benefits. Reviewed countries had a chance to have the quality and effectiveness of their policies, laws and institutions assessed, helping to achieve voluntary convergence of competition laws and enforcement practices. This was a 'soft compliance' mechanism because it was non-binding. Given this, the effectiveness of the peer review process depended greatly on effective participation. This was a key matter to be taken up when negotiating on peer reviews, taking account of budget and political constraints. One possible solution might be to hold group peer reviews of various countries, so that a number of countries would be examined at the same time.

92. The representative of Brazil said that it would be easier to discuss the application of dispute settlement procedures once a clear idea of the precise set of obligations to which Members would be bound was established. Without prejudging Brazil's position on this issue, he attached importance to non-application of specific cases, as opposed to assessing the overall conformity of the actual legislation as well as possible substantive provisions to be adopted, such as on hard core cartels. He saw merit, in principle, in the proposal of peer reviews. A voluntary mechanism as far as the decision of the country to submit itself to the review is concerned was preferred. There were several models for a possible future WTO peer review system and the details of the process could be devised at a later stage. Brazil wanted to see the discussion of peer review mechanisms prioritised. Other issues to which he attached importance were: a) the future implementation of an information exchange system; b) the possibility of joint analysis of cases in the cooperation provisions; and c) the disciplines on repression of international cartels.

93. The representative of the United States expressed his agreement with key aspects of Section 2, of the submission of the European Community and its member States, pertaining to peer review. In particular, the US concurred with the paper's endorsement of the application of peer review to the competition-related work of the WTO and, in particular, as a vehicle to assist Members in developing and implementing their competition laws and policies. It also agreed that peer review could promote greater international convergence in competition policy and could contribute to the efforts of the WTO and others in competition capacity building. The papers by the European Community and its member States and other delegations went further than that of the US' in suggesting specific ways in which a competition peer review could be organized. The US remained open-minded on these practical issues. Merit was seen in the suggestion that peer review be organized under a WTO Competition Policy Committee, as was also set out in the US delegation's paper. Peer review should extend to the full range of a Member's domestic competition laws and policies, rather than being limited to the specific issues in the Doha Declaration. Examination of the OECD's competition peer review process supported the conclusion that such reviews could provide valuable input on a wide range of competition-related issues including legislative and regulatory frameworks, institutional design, and enforcement policies and practices. With regard to the idea that the peer reviews would be conducted on the basis of a report provided by the reviewed country, as contemplated in the papers by Korea and Japan, in any case it would be useful to have an independent report prepared by the WTO Secretariat. If such were the case, was there any further utility to have a self-reporting system

basis for peer review? On the issue of dispute settlement which was addressed in part 1 of the EC paper, the most appropriate course for the WTO to follow at this point was to focus on a peer review mechanism. Establishing a dispute settlement mechanism for competition raised a number of questions. The appropriateness of applying the dispute settlement to competition policy should be assessed on its own merits in an open-minded way, without pre-conceptions drawn from other fields. As had been pointed out by Canada and others, the wide disparity of Members' experiences with competition law and policy, and the gaps in their institutional capacities called into question the usefulness and feasibility of dispute settlement in this area. As to the EC's emphasis on idea that dispute settlement would be limited to *de jure* violations, the US questioned the ability to build into the terms of reference sufficient safeguards on this point. Moreover, the EC's paper was silent about the consequences that would ensue once a WTO Panel had found that a Member had not complied with its obligations under a WTO Competition Agreement. In this regard, it would be important that any sanctions applied in a multilateral framework on competition policy would have a pro-competitive effects. Overall, he felt that there was broad support for implementing a peer review mechanism as the next stage of work in the trade and competition area in the WTO, whereas significant questions remained about the role, if any, of dispute settlement in this area.

94. The representative of Egypt said that, like other developing countries, he had reservations as to whether applying dispute settlement to core principles was beneficial to developing countries. This was particularly so given the fact that these countries were in the process of drafting their competition laws and that there were wide disparities between them. On the other hand, Egypt wished to see elaborations on how the DSU would be applied to the obligations of developed Members under a WTO framework. Continuing, he said that the discussion of peer review had to take into account the interests of developing countries, for example when facing the TPRM. For example, developing countries suffered from resource and other constraints which might prevent them from participating effectively in, and realising the benefits of, a peer review process. In this regard, note was taken of the suggestion, that had been made, of granting grace periods to countries without developed relevant institutions. Finally, with regard to the voluntary nature of the OECD review raised by the US, this was the correct path to follow, whilst doubt was voiced about the WTO taking over this responsibility.

95. The representative of Korea identified three goals of the proposed peer review process: (i) promoting compliance; (ii) sharing of information and experience and (iii) technical assistance. Korea emphasised that the implementation of the multilateral framework for competition should not be excessively burdensome on the WTO Members, in particular on the developing countries. The proposed system of peer reviews was consistent with this objective and would contribute importantly to the implementation of the multilateral framework and to the promotion of the a culture of competition internationally. The effective incorporation of the multilateral framework for competition into the domestic framework was seen as equally important. In this respect, an obligatory system of peer review was a balanced way forward. This would involve subjecting all Members to a peer review with certain flexibilities, such as a grace period. Korea also recognised the difficulties faced by developing countries, and was open to discussions of necessary special treatment to ensure smooth implementation of the multilateral framework into domestic legislation. In closing, he asked how it would be possible to monitor the implementation of the multilateral framework without some form of review mechanism.

96. In response to the comment by Hong Kong, China based on Korea's previous statements, he said that the DSU was a strong legal enforcement mechanism, whilst peer review was a different kind of mechanism. It was a non-binding in the sense of that a Member could not sanction another who did not follow the recommendations of the peer review. A peer review was consequently less than the DSU, but more than nothing. With regard to the point raised by the US, regarding preparation of the Secretariat report, mainly based on the country's own input, Korea's suggestion reflected limited resources of the Secretariat. Hence the Secretariat's report should be based on the information of the reviewed country.

97. The representative of Tunisia noted that none of the previous statements had referred to the UNCTAD Set of Multilateral Agreed Rules on Competition Law and Policy, which were not compulsory but had been in existence for over twenty years and questioned whether and how these could be capitalized on, in particular in light of their implementation. The relevance of these rules had been well established in work undertaken in UNCTAD, which had shown the importance of these rules in promoting a culture of competition at the international level as well as helping to improve national legislation and implementation. Whilst recognizing the advantages of a peer review system, many of these aspects needed further study. For example, the mechanism of peer review would focus on national approaches while the problems were of an international dimension. He acknowledged that an improvement in national capacity to implement competition rules would contribute to development and a more healthy market economy, but it would not solve all the existing problems, especially those related to extraterritoriality and the difficulty in investigating trans-border anti-competitive practices, especially since cooperation between the national authorities was on a voluntary basis. Given this, the suggestion was offered that competition authorities assessing anti-competitive practices with an international dimension, (in particular hardcore cartels) should consider not only the harm caused in their internal domestic market but also the simultaneous effects on other countries' markets, especially in the imposition of sanctions.

98. The representative of the European Community and its member States said that the WTO was based on binding rules, necessitating application of dispute settlement. All covered WTO agreements were subject to dispute settlement, albeit with slight modifications. In reflecting on the appropriate scope of compliance mechanisms in the area of competition policy, some important questions were offered: Compliance with what? Was it necessary? How should it be adopted? Addressing these questions, the paper by his delegation had looked towards existing agreements, including the DSU and a number of specific agreements dealing with particular subject areas, which had stood the test of time. In response to a point made by the representative of Switzerland, he acknowledged that jurisprudence relating to general provisions of the WTO agreements made it clear that they were potentially applicable to law enforcement procedures as well as substantive laws and requirements, and could indeed give rise to dispute settlement proceedings in particular cases involving the administration or enforcement of competition law. However, by definition, cases brought under the existing WTO agreements as opposed to a possible multilateral framework on competition policy would be decided principally according to the principles embodied in those general provisions and related jurisprudence. In contrast, a multilateral framework as had been proposed by his delegation offered the advantage of explicitly taking into account the operational exigencies of competition law. In response to the concern raised by the US delegation regarding the possibility of 'slippage' in dispute settlement proceedings, he felt that it could be avoided through an adequately phrased agreement. Turning to the questions posed by Hong Kong, China, he suggested that the nature of compliance mechanisms in this area should be based on what was necessary to achieve appropriate compliance and not on semantic distinctions. As to whether there was any precedent in the WTO agreements for focusing on *de jure* rather than *de facto* violations, he cited the Agreement on Subsidies and Countervailing Measures, Article 3.1(a) which referred to 'in law' or 'in fact' whereas 3.1(b) did not; as a result, the latter provision had been consistently interpreted as applying only to *de jure* violations. On the purpose of a general consultation provision which would be included in the multilateral framework, this would afford WTO Members an opportunity to consult bilaterally and privately on matters important to them but were felt to be inappropriate for discussion in a broader context of a Competition Policy Committee. As an example of such a general consultation clause, the delegate cited Article 17.2 of the Anti-Dumping Agreement.

99. Another representative of the European Community and its member States addressed the concern that reliance on a permanent roster of competition experts could lead to panels looking into individual competition decisions of national authorities. First, the EC paper was not prescriptive on the exact form of the involvement of competition experts in the dispute settlement process; a permanent roster of competition experts was only one option. Second, given the specificities of competition policy as compared with other subjects in the WTO, involvement of competition experts

would be useful even for "*de jure* only" dispute settlement. Finally, the involvement of competition experts would be also a safeguard against slippage in that competition experts had the best appreciation of the delicacy of enforcement procedures, as well as the fact-intensity involved in decisions on individual cases. As an example, if a panel wanted to look at *de facto* non-discrimination it would have to look at two different specific competition cases, one involving a domestic and one a foreign company, where the facts were identical but interpretations were different – something that would be difficult or impossible in a context of a panel. The second example concerned a situation where company A asked company B for a document but was refused on the grounds that it was a business secret. Competition experts would be appropriately sensitive to this situation; hence their involvement would safeguard against slippage.

100. The representative of Nigeria said that, notwithstanding the discussion that had taken place, important questions remained to be clarified. Panel remedies in the context of a competition agreement could be anti-competitive rather than pro-competitive. The partial application of dispute settlement could upset the balance of rights and obligations accruing to different Members and reduce the incentives to cooperate. Countries undergoing peer review risked being criticised and having their competition regimes disapproved with consequent multilateral or bilateral pressures to abolish exemptions which they were legally entitled to maintain. Concerns remained on implications of the proposed multilateral framework for industrial policy. There was a need to clarify many issues, including the extent of the effects of the reviewed country's competition policy on other countries, the effects of other countries' policies on the reviewed country and experiences with international cooperation in this connection as well as any unilateral or bilateral trade or competition pressures.

101. The observer from UNCTAD expressed support for peer reviews, especially as they seemed to provide an excellent means of exchange of experience and capacity building, and enhanced the dissemination of a culture of competition, one of UNCTAD's long-term objectives. As for the use of peer reviews as a means of compliance, he said that in his view peer reviews should rather be used as means of soft convergence, especially with regard to developing countries, which were new in the field. He reiterated his proposal to offer UNCTAD's premises as a forum for peer reviews, along with OECD and WTO, as this was in accordance with existing provisions in the UN Set of Principles and Rules on Competition. He also drew attention to the forthcoming session of UNCTAD's annual Intergovernmental Group of Experts on Competition Law and Policy, on 2-4 July 2003, at which a secretariat paper on "Roles of Possible Dispute Mediation Mechanisms and alternative Arrangements, including Peer Reviews, in Competition Law and Policy" would be discussed.

102. The observer from the OECD introduced three papers (subsequently issued as documents WT/WGTCP/W/240, 243, and 244), which had been discussed in the OECD Joint Group on Trade and Competition, examining a series of issues surrounding peer review and compliance mechanisms. The first paper, entitled "Peer Review: Merits and Approaches in a Trade and Competition Context", examined the merits of peer review in promoting convergence, transparency, information and experience sharing and improved domestic policy-making as well as functioning as a policy examination mechanism and to determine TA/CB needs for developing countries. Part two of this paper examined strengths and weaknesses of various peer review mechanisms, including the TPRM and OECD regulatory reform exercises. These techniques were the 'bread and butter' of the OECD committee approach to government policy areas. The second paper, entitled "Practical Modalities of Peer Review in a Multilateral Framework on Competition", dealt with several options for implementing a peer review mechanism in a possible future multilateral framework. Part one of the second paper provided a comparative analysis encompassing a range of criteria and issues for a Competition Policy Review Mechanism, including: (i) frequency of reviews; (ii) appropriate review criteria for a CPRM; (iii) treatment of previous recommendations; (iv) who should compose the peer group; (v) role of lead examiners; (vi) voluntary or compulsory participation; (vii) costs and resource implications; (viii) role and duties of Secretariat and Members; (ix) relationship with TPRM. The second part of the paper provided details about each of these issues-criteria for a much wider range of existing mechanisms

103. Continuing, he said that the Joint Group having looked at peer review mechanisms, wished to address the larger question of compliance mechanisms. Consequently, the third paper canvassed a range of generic compliance and/or enforcement mechanisms that feature in multilateral, regional and bi-lateral agreements. The paper asked whether these could be adapted or transposed into a multilateral set of rules negotiated within the WTO. This paper covered 4 general sets of compliance mechanisms: (i) the "soft" compliance mechanisms of good offices, consultation, mediation and conciliation; (ii) arbitration; (iii) peer review and (iv) WTO Dispute Settlement Understanding. These approaches were not mutually exclusive and could be combined. The analysis suggested that it could be necessary to tailor the compliance mechanism(s) to fit the kinds of compliance issues which might arise. Without suggesting that a consensus existed at present, the following types of issues might be relevant: (i) the non-existence of a national competition law; (ii) the inadequacy of an existing competition law (e.g. due to non-inclusion of agreed core principles); (iii) the non-application/non-enforcement of a competition law; (iv) the discriminatory or non-transparent application of a competition law and (v) the non-enforcement of a ban on hard core cartels.

104. In response to a suggestion by the Chairman, the Working Group agreed that the three papers presented by the OECD observer be issued as "W" documents.

III. POSSIBLE ELEMENTS OF PROGRESSIVITY AND FLEXIBILITY THAT MIGHT BE INCLUDED IN A MULTILATERAL FRAMEWORK ON COMPETITION POLICY

105. The representatives of Australia and the European Community and its member States introduced written submissions relevant to this item (documents WT/WGTCP/W/232 and 234, respectively). The representatives of Hong Kong, China, Brazil, India, Philippines, the European Community and its member States and the Secretariat made oral statements or posed questions on this item.

106. The representative of Australia, introducing the relevant part of document WT/WGTCP/W/232, expressed the view that there was a clear agreement in the Working Group that, in the area of competition policy, "one size did not fit all". The concepts of progressivity and flexibility would be a crucial element of a potential multilateral framework on competition policy, particularly in respect of developing countries and those that did not have a law or an enforcement structure. The principle of flexibility and the possibility of exemptions would apply to all Members that had a competition law, subject to requirements for transparency and periodic review. As to whether progressivity and flexibility themselves should be a core principle – these were different concept from those elements that had been discussed as core principles in the Working Group. The Australian paper treated core principles as absolute, while progressivity and flexibility dealt with transitional issues and comparative relative issues. This did not diminish their importance. Regarding the relationship between competition policy on the one hand and social and industrial policy priorities on the other hand, the attachment to Australia's paper provided a range of practical examples of how some of these issues operated. In particular, the example showed that a vigorous competition policy can coexist comfortably with policies designed to achieve specific social and industrial goals.

107. The representative of the European Community and its member States, introducing the relevant part of document WT/WGTCP/W/234, said that since the Doha Conference, developing and less-developed Members had raised extensive concerns about the capacity constraints that would need to be addressed in relation to the implementation of a WTO agreement on competition policy. She also acknowledged that many Members felt it necessary to identify ways to adapt a WTO framework and related domestic law to special situations. The concepts of 'flexibility' and 'progressivity' addressed these concerns. Equally, this discussion could be held under the heading of 'special and different treatment', which would not change the content. It was noted that the issues of 'flexibility' and 'progressivity' affected in a disproportionate way the developing or least-developed countries.

108. Another representative of the same delegation, responding to the comment by Australia, agreed that there was a fundamental difference between "flexibility" and "progressivity" and the three core principles that were under discussion. His delegation also had reservations with regard to elevating S&D to be a fourth core principle; it was different concept, cutting across the entire WTO system and a belief that permeated the EC proposal throughout. In fact, the current proposal for a multilateral framework already embodied a high degree of flexibility. Essentially, it only called for incorporation of the three core principles as well the ban on the hardcore cartels into domestic legislations, accompanied by sanctions that had a sufficient deterrent effect. This was a modest but still meaningful level of ambition. In response to the concern raised by India that a multilateral framework would penalise Members for autonomously implementing competition law, the EC delegate pointed out that the such autonomously-adopted competition laws would *ipso facto* meet the standards set out in the proposed framework – hence the question of penalty did not arise. Exclusion and exemptions also fell within the discussion of flexibility and progressivity, but went under different names in different jurisdictions. As had been pointed out earlier on the day, the Secretariat study on Issues Relating to a Possible Multilateral Framework on Competition Policy had identified five different ways in which industrial policy objectives could be accommodated in a domestic policy frameworks and any conflict with competition law could be avoided. This reinforced his delegation's belief that a multilateral framework on competition policy would not limit the policy space available to developing countries to implement other important policies that also responded to their social, economic and developmental objectives.

109. Continuing, he said that another dimension of flexibility under the WTO agreement would be the use of regional, as opposed to national legal instruments. The Community had a natural propensity towards this approach – as was well known, regional competition rules were central to the original EC treaty and it was only recently that the Community reached a point at which all individual member states had their own regimes. Two additional examples of innovative regional arrangements were CARICON and COMESA. Resource implications of implementing competition regimes were addressed in both the Evenett study as well as the last World Bank GEP Report 2003, provided numbers and arguments and considered questions of cost and net benefits that would arise in the medium and longer term. Both documents suggest that significant benefits will arise in the medium and long term. With respect to progressivity, this was a concrete form of differential treatment, applying to those countries that either had not, or were in the process of, adopting domestic competition law or establishing a related authority. Two further points were emphasised: there would be a need for more traditional transitional phases and secondly, a new and more progressive approach to the provision of technical assistance and capacity building, to ensure benefits from as early stage as possible. In particular, the WTO competition policy committee would play a key role in implementing and generating support for technical assistance and capacity building.

110. The representative of Hong Kong, China agreed with the view expressed by the European Community and its member States (WT/WGTCP/W/234) that any core principles should remain general and a multilateral framework should not dictate how they were going to apply in the domestic competition framework. He welcomed the reference in the paper to a minimal set of multilateral provisions which would influence and guide the WTO Members' policies rather than imposing compulsory requirements. However, this approach had not been consistently applied throughout the paper. In regard to hardcore cartels, the European Community and its member States was suggesting that the WTO dictates how each and every Member should apply its own domestic framework. In particular, all members would have to enact domestic competition law that banned hardcore cartels. Yet even the definition of 'hardcore cartels' had not been agreed on by the Group. In fact, the same non-prescriptive approach should apply consistently to all elements of the possible multilateral framework and Members should be free to choose appropriate means, legislative or otherwise for implementing any related obligations, taking into accounts their own domestic economic situation and policy objectives.

111. The representative of Brazil said that the notions of progressivity and flexibility were intrinsically linked with special and differential treatment for developing countries. This concept was a central feature of the WTO and should be applied in the area of competition. The issues of capacity constraints and the scope and applicability under the overall heading of flexibility and progressivity affected exclusively or disproportionately developing countries. In particular, the discussion on exceptions must take into account, in a fair manner, the different needs for flexibility of developing and developed countries. Quoting again the text: "exclusions and exceptions constitute a question of great sensitivity and complexity both among developing countries as well as OECD Members, including the European Community and its member States", the representative said that this was of particular significance for those developing countries that did not yet have a domestic competition law or whose law was still relatively recent and untested. On a technical level, progressivity could be understood as a form of flexibility. Therefore it was essential for developing countries to be entitled to transition periods to implement any new obligation that might stem from the process, indeed, this was a common practice in the WTO and should also have been applied to competition. Yet transition periods should not be the only aspect of S&D. The question of sectoral exceptions might be particularly important to developing countries whose industries might present specific vulnerabilities. The group had to bear in mind that developed countries with a long tradition in the area of competition frequently excluded several sectors from the application of their legislation. A proper treatment of the question had to take into account these different needs for exclusions among developed and developing countries. Turning to the issue of export cartels, which were discussed earlier but having an impact on the current discussion, these were tantamount to a licence to hurt other economies, especially developing countries. Therefore the group had to be careful that this sort of practice did not find a safe haven under a broad umbrella of exceptions. He emphasised an underlying assumption in the process – transparency had to be a principle guiding the establishment of exceptions. Proper treatment of these concepts would be fundamental to adequately address the development dimension of competition policy.

112. The representative of India noted that there was particular reference to India by the European and Australian papers. India was making a point related largely to the application of non-discrimination, if it were to be a binding principle, to other areas of domestic policy a country may have dealt with autonomously.

113. The representative of the Philippines accepted that the core obligation the European Community and its member States proposes on flexibility was for the WTO Members to enact in their domestic competition law a ban on hardcore cartels, and any additional substantive provisions would have been a matter of policy choice of each Member. Note was taken of the EC's plan for substantive provisions in domestic law to be rooted in the three core principles. With respect to transparency, he agreed with the EC's point that any multilateral obligation could not prescribe the means to achieve this. The representative of the European Union and its member States had said that the Community was only interested in seeing obligations in respect of what was in the law. Nevertheless, the European Community and its member States needed to elaborate on transparency in respect of the de facto aspects of competition policy, law and enforcement. Regarding non-discrimination, the Philippines attached particular to the point that this principle would not be applied to individual decisions of national competition authorities or governments. Further clarification was requested as to how this approach would relate to the broader concept of economic, industrial and developmental policy space, a matter of overriding concern for the Philippines. Flexibility as to how competition law was enforced was also vital. Whether competition law was enforced through administrative decisions, or judicially, there could be enormous costs and difficult institutional adjustments, especially for countries in the early stages of implementing a law. The European Community and its member States was asked therefore, to provide other examples clarifying what it envisaged with respect to core principles in a multilateral framework for competition.

114. Continuing, on the subject of exclusions and exemptions, the qualification on agriculture, referring to "authorization" rather than "exclusions and exemptions", was a disappointment for the

Philippines. The European Community and its member States appeared to downplay competitive realities in this sector. The agricultural sector was not only an important carve-out, it was a huge one, perhaps too large to justify the use of exclusions as the fourth way in the Evenett study to manage tension between competition policy and industrial policy. Consequently, the group was recommended to look at subsidies as an important instrument of competition policy and law. On progressivity, there was a reference to tiering of WTO Members with the EC's use of concepts like "principally WTO Members who have yet to adopt a competition law and/or establish a competition agency." It was asked how the European Community and its member States viewed those Members who already had institutions but which were fledgling, untested and in need of experience and resources? The use of concepts like "individualised time periods" and "indicative implementation plans" gave rise to concerns. He felt it was premature to discuss the subject of a WTO competition policy committee, at this stage. Finally, he noted a conceptual contradiction in the paper submission. On the one hand, the European Community and its member States spoke of core principles and provisions that would guide the actions of Members. On the other hand, it underscored that no harmonisation was envisaged. Yet once a common set of core principles was enshrined, no matter how minimalist, a certain degree of harmonisation would have been imposed in the process.

115. The representative of the European Community and its member States, responding to concerns raised by Hong Kong, China, said that in the example of judicial review, his delegation was not proposing a prescriptive approach. Certainly, his delegation's view was that judicial review would have to be made available somehow, but the European Community and its member States was not proposing to dictate *how* it would be carried out. Similar considerations applied on the issue of transparency. This mirrored the approach taken in a number of other WTO agreements. In other words, his delegation was simply trying to ensure that basic elements of transparency and procedural fairness were present in relevant national legislation, but was not going as far as saying what specific form those elements should take, and was certainly not trying to impose a harmonized approach.

116. Another representative of the same delegation, responding to the comments of Hong Kong, China, discussed three possible dimensions of flexibility in the context of the proposed ban on hardcore cartels: first, the use of horizontal vs. sectoral approaches; secondly, with respect to implementation and enforcement; and thirdly, a legislative vs. an administrative approach. Looking at the horizontal vs. sectoral approach, there was no reason why a WTO Member should not implement a ban on hardcore cartels sector by sector. Whilst admittedly this would involve more work for the WTO Member compared with a horizontal law, *a priori* no reason existed why this should not be the case. If a ban on hardcore cartels was introduced for certain sectors before others, then the sectors which were not covered by a ban on hardcore cartels would logically be exclusions. Yet this was felt to be a question for the negotiations phase; if the Group started talking about exclusions now, it would effectively be starting negotiations. Similarly, there was no reason why implementation and enforcement had to be taken via the creation of authority called an anti-trust or competition authority, though an increasing number of countries found this to be an efficient approach. There was a variety of other ways, for instance through the granting of additional powers to some existing body or again, on a sector by sector basis. On the question of legislative vs. administrative approach, the question by Hong Kong, China as to whether the ban on hardcore cartels would always have to be implemented by legislation was taken up. The representative of the European Community and its member States asked, in turn, whether if a ban on hardcore cartels was implemented via an administrative and not a legislative approach, how could it be guaranteed vis-à-vis parties and vis-à-vis other WTO Members that the core principles would be clearly and verifiably respected? More specifically, if there was no legal document which said the parties had the right to appeal, how could parties be confident that they had such a right? This argument also applied to other procedural rights. Indeed, it was difficult to conceptualise how such guarantees could be provided by other than legislative means.

117. With regard to the comments made by the representative of the Philippines concerning the agricultural sector, she suggested that the European Community wanted to see competition rules applied to the agricultural sector except where specific regulations established limitations in the way

that such rules applied to this sector. She referred to a particular case example in which firms had been sanctioned for engaging in a cartel in relation to a particular agricultural product. She further clarified that, in the Community, the term "exemption" did not refer to an outright "exclusion" from the application of the competition rules but was used more in the sense of an "authorization".

118. The European Community and its member States representative, responding to a question from the Philippines as to what specifically would be covered by the proposed transparency obligation, said that his delegation had already dealt with this question at some length in its submission tabled in November 2002 (document WT/WGTCP/W/222). In general, the intention was that it would apply to laws, regulations and guidelines which were of general application.

119. The Secretariat, responding to a question posed by Australia on the implications of broader discussions under way in the WTO on the issue of S&D, said that these discussions had delved into different overall approaches to the issue of special and differential treatment in the WTO Agreements. In addition, they had been concerned with a number of specific proposals or suggestions regarding special and differential treatment in the WTO framework. There did not appear to be any specific proposal or suggestion regarding the area of trade and competition policy that had been made in those discussions, outside the context of the Working Group.

120. The Chairman, reflecting on the discussions that had taken place in regard to agenda items I, II and III, drew attention, *inter alia*, to the following points, emphasizing that they were not in any way implied to be comprehensive and were simply personal impressions which had no official standing:

- There had been a number of requests for clarifications on questions regarding the depth and breadth of possible obligations under a multilateral framework on competition policy and their compatibility with development agenda included some of the following specific queries. A number of explanations had been provided;
- A fruitful discussion had taken place on issues concerning discrimination, and transparency and procedural fairness, including with respect to the application of these principles;
- Although the discussion had been carried on principally with respect to the four elements of a possible multilateral framework on competition policy that were set out for clarification in paragraph 25 of the Doha Ministerial Declaration, references had also been made to possible alternative approaches to a WTO agreement in this area. For example, reference had been made to the possibility of instituting a system of peer reviews in the WTO as a way of carrying forward the WTO's work in the area of competition law and policy. The possibility of non-binding approaches to cooperation and a WTO committee that would encourage but not require the adoption of national competition laws had also been noted. As well, reference had been made to the possibility of a two-tiered approach, which could involve asymmetrical obligations, the establishment of competition policy database and also the integration of technical assistance and capacity building through countries which had already began the process of development.
- In relation to making the potential agreement more effective it was asked if cooperation was to be mandatory – the degree of competition policy and developmental heterogeneity made discussion difficult.
- On the matter of possible compliance mechanisms in a multilateral framework on competition policy, a wide-ranging and penetrating discussion had taken place. Many delegations had referred to the potential benefits of a system of peer reviews in the

WTO, not only as a compliance mechanism but also as a tool for facilitating capacity building and the exchange of national experience. Some concerns had been expressed about the burden that such a system might place on developing countries, and a variety of approaches to managing this burden had been discussed. A range of views had been expressed on the role and desirability of applying the WTO Dispute Settlement Understanding in this area. Developing countries, in particular, continued to express concerns about this.

- Turning to the matter of flexibility and progressivity, as had already been evident in previous meetings of the Group, all sides of the debate had emphasized that a one-size-fits-all approach was not appropriate in the field of competition law and policy. In any possible agreement in the WTO, much attention would have to be given to the evident diversity of national approaches in this area and to the related diversity in stages of development, institutional endowments and legal cultures. In this context, a range of views had been expressed with regard to the feasibility and desirability of (potentially) binding obligations in relation to core principles, provisions on hard cartels, and other possible elements of a multilateral framework.
- Specific approaches to flexibility and progressivity had been discussed. As one example, it had been made clear that flexibility could involve regional approaches for countries that chose not to have competition policy, perhaps helping to addressing resource-burdens. A more far-reaching concept of flexibility equated it with a completely non-prescriptive approach. It had been acknowledged that flexibility was more urgent in developing countries and required specific tools.

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

121. The representative of Australia introduced the relevant portion of a written submission relevant to this item (WT/WGTCP/W/232). In addition, the Group had before it a Note prepared by the Secretariat on its Technical Assistance Activities Pursuant to Paragraph 24 of the Doha Ministerial Declaration (document WT/WGTCP/W/230). The representatives of the European Community and its member States, Japan, Egypt and Brazil made oral statements or posed questions on this item.

122. The Working Group took note of the Note by the Secretariat on its Technical Assistance Activities Pursuant to Paragraph 24 of the Doha Ministerial Declaration (document WT/WGTCP/W/230). The Note covered the following aspects: (i) the scope of activities undertaken and cooperation with other intergovernmental organizations; and (ii) the design and content of workshops and symposia organized by the Secretariat in this subject area. It indicated that, in the period subsequent to the Doha Ministerial Conference, the Secretariat had organized regional workshops on the relationship between competition policy, development and trade and relevant proposals before the WTO and/or had participated in similar workshops organized by UNCTAD in most regions of the developing world.

123. The representative of Australia, introducing relevant portions of document WT/WGTCP/W/232, said that a summary of recent/pending technical assistance activities of the Australian Competition and Consumer Commission was provided in paragraphs 33 through 36 of that document. It highlighted current activities of the Commission with respect to work on the implementation of competition policy in Barbados, Fiji and Thailand.

124. The representative of the European Community and its member States said that since the publication of the European Commission Communication on trade-related technical assistance (TRTA) in September 2002, TRTA (under which heading competition-related assistance was classified) was being mainstreamed in the Commission's development policy. This meant that

competition was among the priority areas for the majority of countries and regions that benefitted from the Community's development assistance. This allowed, but did not oblige, the beneficiary countries and regions to request technical assistance relating to competition policy. He drew the Working Group's attention to the 9th European Development Fund for African Caribbean and Pacific countries was coming on stream, with a pluriannual budget of EUR 13.5 billion, which presented a particular opportunity for competition-related technical assistance to be requested.

125. The representative of Japan noted that his country had contributed a speaker to almost all of the workshops carried out in Asia that were mentioned in Annex 1 of the Note by the Secretariat (WT/WGTCP/W/230). He referred to various technical assistance activities organized recently by his country, including annual training courses and workshops on competition law and policy in Osaka and Tokyo together with plans to co-organize two APEC training seminars on competition policy with Viet Nam and Malaysia, in 2003, modelled on a seminar conducted in Thailand in 2002. The Japan Fair Trade Commission had opened a website on the subject of "East Asia competition policy forum".¹⁰ The website contained a number of papers outlining developments regarding the implementation of competition policy at the national level in the region, and other issues of interest to the Working Group.

126. The representative of Egypt expressed his appreciation to the Secretariat for having organized, in cooperation with the Government of Egypt, a regional workshop on trade and competition policy that had been held in Cairo earlier in May, for the benefit of countries from the Arab and Middle-Eastern region. Experts from 14 Arab countries had participated. The level of his country's participation in the workshop reflected the importance that it attached to the issue of competition policy. Competition policy was a necessity for development and complemented other social, economic, industrial and cultural policy instruments. Technical assistance was essential for the Arab countries to develop their capacity in this area and to enhance the culture of competition across the state, especially in the business community. The workshop organized by the Secretariat had contributed to raising awareness regarding the importance of competition policy as a tool for realizing economic progress. Egypt was now in the process of finalising its domestic competition law, and was taking substantial part in the development of the COMESA regional competition framework. The importance of competition law had also been recognised in the agreement establishing the Arab Free-Trade Area.

127. Continuing, he said that Egypt had established a national inter-agency co-ordination group on WTO issues with a sub-committee whose mandate was to examine the various issues that had been raised in the context of the Working Group's deliberations. Egypt's general assessment was that a uniform set of competition rules would not serve the needs of developing countries. In the light of this, discussions should focus on how competition could contribute to the developing countries' economic development, especially in the case of those that did not yet have a domestic competition law. Continuing technical assistance and capacity building would contribute to effective participation in related discussions by Egypt and other developing countries. The Doha Development Agenda had stressed that technical assistance and capacity building activities should focus on helping developing Members to acquire the necessary level of expertise to better analyse the relationship between competition policy and market economic development and evaluate the implications of a prospective multilateral framework on competition policy for their own development, before taking a decision by explicit consensus on modalities to launch negotiations after the Fifth Ministerial. In this regard, Egypt welcomed more targeted technical assistance activities from WTO, UNCTAD and other organizations as well as those provided by members on a bilateral basis.

128. The observer from UNCTAD recalled the Doha mandate in which "international organizations, including UNCTAD" were invited to provide technical assistance and capacity-building, to enable developing and least-developed countries to "better evaluate the implications of

¹⁰ See http://www2.jftc.go.jp/eacpf/01_01.html

closer cooperation in this field". Subsequently, UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy had requested that the UNCTAD Secretariat undertake close cooperation with the WTO Secretariat in this area. In this regard, UNCTAD had already undertaken a first round of four regional seminars in close cooperation with WTO last year, the results of which had been summarised in a Consolidated Report that had been made available to the Working Group in May 2002 (WT/WGTCP/W/197). UNCTAD had also participated in several workshops organized by the WTO Secretariat. In 2002, both Secretariats had continued to participate actively in each-other's meetings and workshops. For its part, UNCTAD was organizing four more post-Doha regional meetings on competition law and policy, three of which had already taken place (in Kuala Lumpur, Nairobi and Sao Paulo, for the benefit of countries in Asia, Africa and Latin America, respectively). The fourth such meeting would take place shortly in Tashkent (Uzbekistan), for East-European and CIS member countries. A consolidated report on these meetings would be submitted to the July meeting of UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy (2-4 July 2003).

129. The observer from the OECD said that most of the assistance provided by that Organization was of a long term nature of the type which was contemplated in paragraph 25 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1) as opposed to that which was called for in paragraph 24 of the Declaration. The assistance provided by the OECD in the drafting and implementation of competition laws favoured economic efficiency in the beneficiary countries, better preparing them to become significant protagonists in international trade. Three global fora had been held on competition (the last in February of the current year), addressing issues relating to economic development and various other matters that were relevant to the work of the Group. Particularly relevant to paragraph 24 had been the recent Global Forum on Trade and Competition Policy, which had taken place on 15-16 May and had been attended by 33 non-OECD member countries (in addition to OECD delegations). The WTO Secretariat, UNCTAD and the World Bank had also participated. The agenda had been focused on the Doha mandate on trade and competition policy, and had included specific sessions relating to core principles, provisions on hardcore cartels, modalities for voluntary cooperation, capacity building and compliance mechanisms. Two other themes had permeated the discussions – special and differential treatment and the scope of application of competition law. Extensive documentation on the Global Forum was being prepared for posting on the OECD website (www.oecd.org), and would be of interest to Members of the Group in relation to preparations for Cancun. At the recent Global Forum, developing countries had repeatedly appealed for enhanced and more in-depth technical assistance in this subject area. Such assistance needed to be provided on a long term basis and, to be effective, had to go beyond training for competition authorities and to seek to educate public authorities in general – tribunals, the media, business and consumer organizations. Finally, reference was made to the recent publication of a major report to the OECD Council entitled *Hardcore Cartels: Progress Achieved and Challenges Ahead*.¹¹

130. Subsequently, in response to a question posed by the representative of Australia, the observer from UNCTAD said that two studies relevant to the Working Group's work would be published shortly by UNCTAD – one on core principles by Professor Mathis and another on developing countries' interests with respect to negotiations on hardcore cartels which would be authored by Dr. Simon Evenett.

131. The representative of Brazil expressed his delegation's thanks to UNCTAD for the workshop that had been held in April 2002 in Sao Paulo, in which the WTO Secretariat had participated.

¹¹ OECD, *Hardcore Cartels: Recent Progress and Challenges Ahead* (Paris: 2003).

V. OTHER BUSINESS, INCLUDING STOCKTAKING OF NATIONAL EXPERIENCE AND LEGISLATION

A. STOCKTAKING OF NATIONAL EXPERIENCE

132. The Chairman recalled that, at the Working Group's meeting of 20-21 February, the Secretariat had been asked (WT/WGTCP/M/21, paragraph 136) to prepare an updated version of the document entitled "Overview of Members National Competition Legislation" (WT/WGTCP/W/128/Rev.2, dated 4 July 2001). The Secretariat had commenced work on the update and would be getting in touch with some Members to confirm specific details of their national legislation where this was unclear. The document would be issued subsequent to the meeting. To facilitate this work, delegations that had not already done so were invited to submit their national legislation to the Secretariat.

133. The representative of Australia said that his country had recently conducted a review of the competition provisions of Australia's Trade Practices Act 1974, the overarching competition law in Australia. The review, which had been commissioned by the Prime Minister 18 months previously, had addressed a number of broad questions about the applicability and appropriateness of the Act, including its implications for the ability of Australian companies to compete globally, in the light of developments such as the impact of globalisation. Attention had been given to the various interests that were affected by the competition provisions including the large business sector, the small business sector and consumers. The review had been conducted independently by a former Justice of the High Court of Australia and had benefited from a large number of submissions and representations from interested groups. The final report based on the review had emphasized that competition provisions exist to protect the competitive process rather than protecting individual competitors. The benefits of a comprehensive approach to competition law had also been stressed. Competition law was and should be treated as separate and distinct from industrial policy or industrial targeted legislation. Overall, the report had concluded that the competition law of Australia had served Australians well. In particular, it had sustained a competitive environment which had benefited consumers in terms of services available and prices, and had achieved an appropriate balance between the prohibition of anti-competitive conduct and the encouragement of competition. The majority of the specific recommendations in the report had been concerned with the fine tuning of aspects of the legislation rather than with any fundamental changes of orientation.¹²

134. The representative of Morocco said that the competition law of his county (law n° 06/99) illustrated specific kinds of flexibility that were relevant to the implementation of competition policy in developing countries and had achieved three fundamental objectives: (i) setting up an environment favourable for investment by facilitating access to all sectors and markets. This was achieved by doing away with public and private obstacles to market entry and by promoting the development of small and medium-sized enterprises; (ii) improving the performance and competitiveness of enterprises operating in Morocco with a view to encouraging them to compete on equal terms with foreign competitors on foreign markets. This permitted enterprises to develop "critical mass" with a view to realizing economies of scale. Nonetheless, it remained important to monitor concentrations of operations and tendencies to monopolisation which could result in abuse of dominance and therefore affect free and fair competition; (iii) protecting consumers against excessive prices, resulting from cartels and market sharing. These objectives might appear to be contradictory but, in fact, were not. By definition, prices were determined by the interplay of the forces of demand and supply. What was essential was that these forces worked in a legal, transparent and fair way. In fact, in view of the diversity of economic agents and the complexity of behaviours, the operation of market mechanisms was often affected by doubtful practices. The model of pure and perfect competition remained a vision of the mind and an ideal to be achieved. In order to take account of all the objectives that had

¹² Details are available on the Internet at <http://www.treasurer.gov.au/tsr/content/pressreleases/2003/021.asp>.

been mentioned (efficiency, performance, competitiveness, promotion of SMEs, consumer welfare), it was necessary to have a competition law aiming at perfect competition and to have a competition policy that would be in line with each economy. This approach led the domestic authorities to draw up a list of priorities: (i) to address price fixing and market sharing by applying competition law; (ii) to open monopolies to competition by doing away with market access barriers and abuse of dominance; (iii) to address economic concentrations. Promoting competitive market forces while carrying out an industrial policy resulting in sectorial privileges and protection presented a true dilemma. The debate was closed by the adoption of a merger law with high thresholds of market control (40 %). The legislation also contained a series of exemptions to the prohibition of cartels and abuse of dominance where these were necessary based on the concept of economic progress and efficiency gains. In these ways, an appropriate balance had been struck between preventing anti-competitive practices and providing appropriate scope for necessary industrial restructuring. Morocco looked forward to sharing its experience with other countries that were in the process of preparing or introducing national competition laws.

B. REQUESTS FOR OBSERVER STATUS FROM INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

135. The Working Group agreed to revert to requests made by SELA, the Organisation of the Islamic Conference, the South Centre and the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) at its next meeting, having regard to any developments on related matters in the framework of the General Council.

C. PREPARATION OF THE WORKING GROUP'S REPORT TO THE GENERAL COUNCIL FOR 2003

136. With regard to the preparation of the Working Group's Report to the General Council for 2003, the Group decided that the Report would be in the style of the Reports prepared in 1998 through 2002 – i.e., it would provide a substantive overview of the work done by the Group during the year, but without reaching conclusions or recommendations. Approval of the Report would be by written procedure, with the possibility of the Chairman convening a short meeting if the need arose.
