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

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COMMUNICATION FROM MALAYSIA

The following is the final text of a statement received from the Permanent Mission of Malaysia, which was circulated as an advance copy for the Working Group's meeting of 26-27 May 2003.

Let me first take this opportunity to congratulate the Secretariat for commissioning the very useful study by Dr. Simon Evenett. I would also like to thank my colleagues who have before me shared some of their thoughts on the current subject matter, some of which we concur with.

Malaysia acknowledges that a competition policy seeks to ensure efficiency in the market place. There is growing awareness on the need to develop some kind of regulatory control on anti-competitive conduct of firms and multinational companies as the existence of such practices have unnecessarily burdened consumers with not only inflated prices for goods and services but have also adversely affected the trading environment. Concerted efforts need to be undertaken to counter their effects on developing countries. The primary objective of a domestic competition policy or law is to improve market efficiency and to enhance consumer welfare.

We would like to once again emphasise our concern on the application of the WTO core principles on competition policy. Para 25 of the Doha Ministerial Declaration mandated this 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 meeting thus only sought clarification of the above mentioned and not to discuss negotiations.

If one were to agree that the proposed core principles are applicable that the Working Group has been discussing, these principles such as transparency requirements should not impose additional burden on developing countries. With respect to the principle of non-discrimination, the Working Group must debate on how it can be applicable to competition rules: specifically, the implication of non-discrimination - i.e., most-favoured-nation (MFN) and national treatment - principles in the context of a cooperation agreement.

On procedural fairness, Malaysia believes that each and every 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.

On the issue of Special and Differential treatment (S&D), Malaysia considers that this should be given more emphasis and due consideration. Exemptions including possible carve-outs, are absolutely necessary for developing countries as they strive towards a higher level of economic development. The much needed policy space for attaining developmental objectives including affirmative action programmes has to be an integral element of the structure of any agreement. Transparency considerations should be implemented in stages in pace with developmental needs as the S&D requirements vary and often are peculiar.

The case for a multilateral discussion and consensus on hardcore cartels is stronger. There should be no place for hardcore cartels in any country, irrespective of its level of economic development. Thus, it would be more appropriate for the Working Group to concentrate its efforts on discussing anti-competitive practices particularly those related to hardcore cartels. Malaysia recognises that hardcore cartels are a developed country phenomenon that have burdened developing countries with excessive costs. We also note that there is as yet no generally accepted definition of what embodies a hardcore cartel. Although the OECD does have one, we need a clear and precise definition of hardcore cartels.

Considering the enormous burden that these hardcore cartels have created, Malaysia is of the view that concerted action should be undertaken to tackle such malpractices. However, many if not most developing countries, and even countries which have introduced competition law over the last few years, lack both the experience and capacity to tackle anti-competitive practices. A Working Group such as this should debate and discuss this issue in depth. In this context, modalities on voluntary cooperation and its impact on developing countries must be explored. The discussions on hardcore cartels shall be without prejudice to the outcome as regards the ultimate form of agreement – be it a multilateral framework or regional or bilateral framework. In our view, cooperation through a multilateral framework is not necessarily the only appropriate and effective way to address hardcore cartel practices.

It is also necessary at this juncture to build capacity in terms of effective legislation and other means to deal with hardcore cartels through the cooperation mechanism. Bilateral and regional cooperation among competition authorities undertaken to address problems associated with hardcore cartels have proven to be beneficial. Bilateral cooperation, as we see it, would be a starting point to voluntary cooperation 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 have had the benefit of decades and even a century of experience in competition policy and law enforcement. On the other hand, there are many developing countries like Malaysia who do not have a comprehensive competition policy and law regime. The start up process is beset with problems and is extremely difficult to manoeuvre. Capacity constraints abound as both the government and private sectors are confronted with the prospect of a new business environment. The international community must continue to focus and prioritise on providing technical assistance to developing countries.

At this point of time, we feel that negotiations on competition law-related matters are not part of the Doha work programme. Domestic competition policy/law may not be a major consideration for developing countries. National priorities and limited capacity may require that scarce resources are allocated for the implementation of more important socio-economic development policies in the country. Alternative domestic approaches to enhance competition in the form of regulatory reform are some of the measures being undertaken.

Developing countries should be given time and flexibility to implement competition policies. As pointed out by some members, it is 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 are issues which require further in-depth discussion and research before any conclusion can be drawn.

We also need to clarify core principles and modalities for voluntary cooperation. It is important to ensure that deliberations in this Working Group, keep the perspective of the special needs of developing countries. Although ideas and suggestions have been floated, the Working Group has yet to achieve any concrete decisions that can be said to be a consensus. Malaysia does not want to find itself locked into an agreement which we are not quite clear and in which the application of specific rules and disciplines can undermine efforts to build domestic industries to face globalization.

Malaysia at the moment is preparing a competition policy and fair trade law. We need international assistance to help us draft the policy and law.
