

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

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CLOSER MULTILATERAL COOPERATION ON COMPETITION POLICY: THE DEVELOPMENT DIMENSION

Consolidated Report on issues discussed during the Panama, Tunis, Hong Kong and Odessa
Regional Post-Doha Seminars on Competition Policy
held between 21 March and 26 April 2002

Introduction

1. As part of its capacity-building programme on competition law and policy, UNCTAD organized a series of regional meetings in cooperation with the WTO and other relevant international organizations, in line with the request made by WTO Ministers in paragraph 24 of the Doha Declaration of 20 November 2001, which concerns the interaction between trade and competition policy. These meetings focused on the decisions made by the WTO Ministerial Conference in paragraphs 23–25 of the Doha Declaration, as reproduced below:

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

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

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on 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."

2. Accordingly, the objectives of the regional meetings were to assist developing and least-developed countries to "better evaluate the implications" of closer multilateral cooperation in this field for their development, and to safeguard their interests in possible negotiations concerning a multilateral competition framework (MCF). The four regional meetings include the Panama Conference on Competition Law and Policies: The Post-Doha Agenda (for Latin American and Caribbean countries; Panama City, 21–23 March 2002), the Tunis Regional Seminar on Competition Policy and Multilateral Negotiations: The Post-Doha Mandate (for African and Arab countries; Tunis, 28–29 March 2002), the Hong Kong Regional Seminar on Competition and Policy and Multilateral Negotiations (for Asia and the Pacific; Hong Kong, China, 16–18 April 2002) and the Odessa Regional Seminar for Central and East European and Commonwealth of Independent States and Black Sea Economic Cooperation (BSEC) member countries (Odessa, 24–26 April 2002).

3. Following this first cycle of regional meetings, UNCTAD, in cooperation with the WTO, intends to hold a second and third cycle of meetings at roughly six-month intervals, during the second half of 2002 and the first half of 2003, respectively. It is hoped that, by the time the Fifth WTO Ministerial Meeting takes place in the second half of 2003, developing and least-developed countries as well as countries in transition will have had opportunities to "better evaluate the implications of closer multilateral cooperation" in this field for their development, as requested in the Doha Declaration. In this connection, it should be clearly understood that UNCTAD's participation in the post-Doha process should in no way be interpreted as a prejudgement about the outcome of the decisions that WTO Ministers will take at the Fifth Ministerial Meeting in 2003.

4. Following are a number of issues raised and views expressed by participants and experts during the four meetings. The material has been consolidated under the following headings:

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I. BASIC QUESTIONS ABOUT APPROACHES TO AND MODALITIES FOR THE ENFORCEMENT OF COMPETITION LAW AND POLICY

A. COMPETITION POLICY AND UNFAIR COMPETITION

5. A distinction was made between two bodies of law: competition law (also called antitrust law, antimonopoly law, fair trade law, restrictive trade law or restrictive business practices law in certain countries) and unfair competition law (*concurrency déloyale* in French, *competencia desleal* in Spanish, sometimes also unfair trade law in English).

6. *Competition law*, which is the subject of paragraphs 23–25 of the Doha Declaration, includes laws governing:

- (i) The prohibition of cartels, or agreements among rival firms to stop competing by fixing prices, allocating (or sharing) markets and fighting outsiders (non-members of the cartel);
- (ii) the control of vertical anti-competitive practices or restraints and the prohibition of abuses of dominant market power by large firms or monopolies, which are able to impose such anti-competitive restraints on their suppliers or distributors; and
- (iii) the control and review of mergers and acquisitions (M&As) which might lead to the creation of a dominant firm or ultimately to the establishment of a monopoly.

7. As for *unfair competition*, the term generally concerns the use of unfair means to compete, such as the counterfeiting of an intellectual property right (illicit copy of a patent, copyright or trade mark), cheating in weights and measures, misrepresentations and misleading advertising, or infringement of trade laws against dumping and export subsidies (antidumping and countervailing, respectively).

B. COMPETITION POLICY AND ANTIDUMPING

8. The original objective of antidumping was to combat the practice of "dumping", or below-cost selling, which can result in the anti-competitive practice of "predatory pricing". The aim of predatory pricing by dominant firms is to offer goods at a very low price (sometimes for free) in order to eliminate weaker competitors from the market. Once the competitor or competitors are bankrupt (or weakened so much that they could easily be acquired by the predator), the latter is able to monopolize the market and recover the losses it made in the first place by increasing prices to monopoly levels. This type of anti-competitive practice is very difficult to prove in practice and has rarely been prosecuted successfully.

9. Dumping is a similar practice whereby a foreign firm sells goods at a very low price in order to damage local competitors and to penetrate the local market and eventually monopolize it. Current WTO rules allow antidumping action whenever a producer prices goods lower for the export market than for domestic sales. Dumping is defined as sales below average total cost, while the traditional definition of predatory pricing usually relates to sales below marginal cost.

10. According to most national antidumping rules, once a complaint is lodged by domestic firms, the importing country imposes a provisional antidumping duty until an inquiry is made into the existence and extent of antidumping. In theory, if after an inquiry no dumping is found, the provisional duty should be reimbursed. If dumping is found, the permanent duty imposed should in no way exceed the proven amount of dumping. Often, however, inquiries have taken as long as six

months to more than a year, forcing the foreign exporter to go bankrupt unless it was able to divert its exports elsewhere. In order to avoid such a damaging situation, foreign exporters have often been willing to undertake voluntary export restraints (VERs) as a condition of not being subject to antidumping proceedings in the importing country. Under such VERs, exporters would typically agree to limit export quantities and increase prices, a situation very similar to that of a price-fixing and market-allocation cartel. As a result, domestic firms were often able to control the import market; hence antidumping rules, which originally were meant to avoid an anti-competitive practice such as dumping, finally resulted in encouraging the use of anti-competitive practices. Papers presented to the meetings argued that in some cases, cartels in importing countries have made use of antidumping recourse in order to block entry by non-members of the cartel.

11. It was noted that since the Uruguay Round Agreements, the use of VERs has been prohibited by WTO rules. Moreover, the objectives of competition rules are not the same as those of antidumping rules. The first aim at protecting competition itself and consumers, but not competitors, while the second aim at protecting competitors (domestic producers). It was also noted that only certain regional integration agreements, whereby free-trade areas are created, have replaced antidumping procedures with competition rules. This was the case, for example, in the internal market of the European Union and in ANZCERTA, the free-trade agreement between Australia and New Zealand.

C. COMPETITION AND MARKET-ORIENTED ECONOMIC REFORMS

12. Competition policy is directly relevant to the main elements of market-oriented economic reforms undertaken in most countries of the world during the last 10–20 years.

13. These include in particular the following:

- (i) Price liberalization and scrapping or gradual elimination of administered pricing;
- (ii) deregulation of previously regulated sectors, including state-controlled monopolies such as utilities and "network industries", considered for the most part to be "natural monopolies";
- (iii) privatization of a large part of previously state-owned enterprises;
- (iv) trade liberalization, including significant reductions in import barriers, which resulted in a considerable opening of domestic markets both in developed and in developing and transition countries; and
- (v) last but not least, important reforms in the foreign direct investment (FDI) legislation of many developing countries, which led to considerable liberalization of inward FDI.

14. The point was made that all these economic reforms have one important feature in common: the need for competition policy if market-oriented policies are to be given the best possible chance of success. For example, price liberalization, if not accompanied by competition laws and policy aimed at controlling economic behaviour and structures, can result in substantial price increases and reduced benefits for the overall economy. If monopolistic structures are allowed to continue unchecked, price liberalization will not proceed satisfactorily. The same can be said of privatization of state monopolies into private monopolies. Finally, opening of markets through import competition and FDI liberalization might bring enhanced competition, but if no safeguards exist, foreign firms might also engage in anti-competitive practices and abuse dominant market positions.

D. COMPETITION, NATURAL MONOPOLIES AND SECTORAL REGULATORS

15. After privatization, network monopolies (e.g. electricity grids, railway operations, or basic telecommunications operators) need to be guided by competition principles to ensure they do not abuse their dominant power with respect to end users. This is why sometimes they are placed within the purview of the competition authority. In many countries, special sectoral regulators are created to supervise the operations of the network operators and are given competition responsibilities which they share with the competition authority (when such an authority is in place). In the multilateral trade system, rules exist for services (e.g. GATS) as well as for some specific sectors usually regulated at the national level (e.g. telecommunications). This issue is further discussed below under section III D.

II. ISSUES RELATED TO THE PRECISE MEANING OF THE DOHA DECLARATION

A. PARAGRAPH 23: "A DECISION TO BE TAKEN BY EXPLICIT CONSENSUS"

16. While it was understood that only negotiators at the Fifth Ministerial Conference would be in a position to decide on the exact meaning of text adopted at the Fourth Ministerial Conference, some participants were of the view that the consensus to be reached at the Fifth Ministerial Conference would need to relate to a specific or *explicit* list of issues for or modalities of the negotiation. Participants also recalled the reservations of a number of developing countries during the Doha Ministerial Conference as reflected in the Chairman's statement at the closing session. They pointed to the legal uncertainty surrounding the status of the Chairman's remarks¹.

B. PARAGRAPH 23: WHAT ARE THE "MODALITIES OF NEGOTIATIONS"?

17. Some experts considered that the "modalities" could relate both to procedural and to substantial issues, such as the precise elements to be covered by a possible MCF.

18. The procedural conditions could relate to whether there would be fully multilateral or only plurilateral negotiations; whether countries would be free to "opt in" or "opt out" of the negotiations as had been proposed by the European Union; whether a further pre-negotiating period would be necessary before actual negotiations could take place; whether, before being able to negotiate, all countries would first need to adopt a domestic competition law; and so on. Substantive issues or elements to be covered by the negotiations could include a list of core trade principles such as non-discrimination and transparency; should they also include the principle of special and differential treatment for developing and least-developed countries? Furthermore, what was meant by "appropriate flexibility" as mentioned in paragraph 25 of the Doha Declaration? Some participants suggested that certain provisions of the UNCTAD Set of Principles and Rules on Competition² could be useful in clarifying this issue.

C. PARAGRAPH 25: "FULL ACCOUNT SHALL BE TAKEN OF THE NEEDS OF DEVELOPING AND LEAST-DEVELOPED COUNTRY PARTICIPANTS AND APPROPRIATE FLEXIBILITY PROVIDED TO ADDRESS THEM."

19. Some participants were of the opinion that "flexibility" referred to "enhanced technical assistance and capacity-building in this area, including policy analysis and development" as called for

¹ In a statement made prior to the adoption of the Doha Declaration, the Chairman of the Conference, Mr. Youssef Hussain Kamel (Qatar), expressed his understanding that the requirement in paragraph 23 for a decision to be taken, by explicit consensus, on the modalities for negotiations before negotiations on competition policy and other "Singapore issues" could proceed, gave "each Member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that Member is prepared to join a explicit consensus." See WTO Summary Record of the Ninth Meeting, doc. WT/MIN(01)/SR/9.

² See UNCTAD document TD/RBP/CONF/10/Rev.2, available at www.unctad.org/competition.

in paragraph 24 of the Doha Declaration. In this connection, two types of assistance and capacity-building could be envisaged:

- (i) Long-term measures aimed at enhancing national capabilities to adopt and effectively enforce competition law and policy, upon request; and
- (ii) more short-term help aimed at enabling developing and least-developed countries to "better evaluate the implications" of a possible MCF for their development policies and objectives.

20. In order to be a development-friendly instrument, a possible MCF would also need to be flexible, enabling developing and least-developed countries to take full part in the negotiations and possibly reach agreement. In particular, it was felt that developing countries would need to have the necessary policy space to be able to blend competition policy with industrial policy, if that was needed for developmental reasons, to ensure optimal chances of development in cases where market failures hampered competition. Such concerns could be taken into account under the principle of special and differential treatment for developing and least-developed countries, as is further discussed below in Section V.

III. GENERAL QUESTIONS CONCERNING A POSSIBLE MULTILATERAL COMPETITION FRAMEWORK (MCF)

A. IS COMPETITION A PROBLEM AT THE MULTILATERAL LEVEL? WHAT CAN A MCF ACHIEVE THAT CANNOT BE ACHIEVED WITH A DOMESTIC COMPETITION LAW?

21. Analysis shows that as globalization spreads to all regions of the world and to a growing number of sectors from manufactures to services, as well as some commodities, it is becoming urgent for domestic competition rules to be supplemented by international avenues of cooperation.

22. While governmental trade barriers such as tariffs and non-tariff barriers (NTBs) are being eroded by multilateral trade liberalization in many countries, including many developing countries, and as a result of regional free-trade agreements (FTAs) and multilateral agreements in the GATT and then the WTO, there is increasing need to ensure that restrictive business practices (RBPs), also called anti-competitive practices, do not replace the governmental barriers.

23. Studies show that international RBPs, such as international cartels, abuses of dominance by multinational firms (including exclusive distribution channels of such firms) and mega-mergers are able to distort trade to the advantage of dominant firms or cartel members, which then can reap monopolistic rents on individual markets while excluding and eliminating the firms of weaker trading partners. Domestic competition laws, where they exist, often lack the necessary extra-territorial reach to counter such anti-competitive practices at the global level.

24. National laws are limited by domestic borders, while some highly damaging anti-competitive practices are transborder by nature. Their adverse effects are felt in developing countries, but they can be operated from headquarters overseas. Action at the national level in countries that have competition legislation is often ineffective in such cases when the proof of infringement is outside the national territory. Hence the imperative need for cooperation agreements at the international level, in order for the affected country to be able to take the necessary remedial action.

25. Some developed countries promote bilateral cooperation agreements. Such bilateral competition cooperation agreements exist, for example, between the United States and the European Union, Germany, Japan, Canada and Australia. Very few exist between developed and developing countries. (An exception is the newly signed agreement between Canada and Costa Rica, and of course, NAFTA, which has provisions for exchange of information and consultations on competition

matters.) Nevertheless, the view was expressed that large economies would likely be less interested in cooperating with small economies than with equal partners – hence the interest in regional groupings (e.g. the European Union, but also developing-country groupings such as ASEAN, CARICOM, COMESA, MERCOSUR, SADC, SARC or UEMOA). It was also indicated that while many countries may become members of regional agreements, such agreements are usually slow to develop effective competition rules (except in the case of the EU, E.E.A and NAFTA). The urgency of the matter is shown by a study presented in Tunis by Professor Simon Evenett which estimates the annual loss for developing countries from a few known international cartels to be about 1.7 per cent of these countries' GDP, and, as the author indicates, this estimate is probably conservative, given that it covers data from only 14 of 39 known international cartels. It might therefore be useful for smaller trading partners to reach agreement in a MCF, provided it had sufficient binding force – through a dispute settlement mechanism (DSM) or otherwise – to redress damages suffered.

B. IS THERE A NEED FOR A MCF BEFORE DOMESTIC COMPETITION LAWS ARE ENACTED AND EFFECTIVELY IMPLEMENTED IN DEVELOPING COUNTRIES?

26. It was noted that the process of law enactment and effective enforcement is a slow one. Many developing countries now have such laws. Others are in the process of drafting competition bills, but many countries have not even begun to prepare such laws. Obviously, if there is a chance to act effectively, one would need to proceed as soon as possible in order to be able to take effective action. Moreover, it was felt by some experts that adopting a MCF would induce many countries to give the competition issue higher domestic priority, which might accelerate the adoption of domestic legislation and effectively control anti-competitive practices.

C. WOULD IT NOT BE MORE LOGICAL TO PROCEED FIRST WITH NATIONAL LEGISLATION, THEN WITH REGIONAL ARRANGEMENTS AND FINALLY WITH A MULTILATERAL FRAMEWORK?

27. Yes, but while countries strive to draft and adopt domestic legislation or to negotiate proper competition rules in regional integration arrangements, anti-competitive practices at the global level will continue to take their toll on developing countries, hampering their competitiveness, impoverishing them and retarding their development.

D. COMPETITION-RELATED PROVISIONS IN EXISTING WTO AGREEMENTS: IS IT NECESSARY TO HAVE A MCF IN ADDITION TO EXISTING SECTORAL AGREEMENTS IN THE WTO? IF THERE WERE A MCF, HOW WOULD IT RELATE TO EXISTING SECTORAL AGREEMENTS?

28. A number of Uruguay Round and post-Uruguay agreements contain important provisions related to competition policy. Perhaps the most important are the GATS, the TRIPS Agreement and the Telecommunications Reference Paper.

29. GATS Article VII provides that each member country will ensure that any monopoly supplier of a service in its territory does not, in supplying the monopoly service in the relevant market, act in a manner inconsistent with that member's obligations relating to most favoured nation treatment under Article II and specific commitments. The GATS also specifies that when a monopoly supplier competes, either directly or through an affiliated company, a member will ensure that the supplier in question does not abuse its monopoly position in one market to dominate another market in a manner inconsistent with its commitments. These provisions also apply in cases of exclusive service suppliers, where a member, formally or in effect, authorizes or establishes a small number of service suppliers and substantially prevents competition among these suppliers on its territory.

30. Article VIII:3 of GATS provides for the Council of Trade in Services to act in connection with a complaint by a member against a monopoly supplier of a service of any other member, by requesting information from that member relating to the supplier's product. Article VIII.4 further

provides for notification by members to the Council of the grant of monopoly rights regarding services covered by their commitments.

31. The TRIPS Agreement recognizes (Article 8) that appropriate measures may be needed to prevent (i) "the abuse of intellectual property rights by right holders" and (ii) "recourse (by right holders) to practices that unreasonably restrain trade or adversely affect the international transfer of technology".

32. Article 40 of the TRIPS Agreement (section 8 on Control of Anti-Competitive Practices in Contractual Licenses), provides that "some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and impede the transfer and dissemination of technology". It provides that "nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market" or from adopting appropriate measures to prevent or control such practices. Moreover, the Telecommunications Schedules of Specific Commitments Reference papers contain specific references to anti-competitive practices in telecommunications.

33. Appropriate measures are provided for the purpose of preventing suppliers, alone or together with others, from engaging in or continuing to engage in anti-competitive practices. These may involve (i) anti-competitive cross-subsidization; (ii) using information obtained from competitors with anti-competitive results; and (iii) not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

34. **Is it necessary to have a MCF in addition to sectoral agreements?** Some participants noted that the present piecemeal approach is not satisfactory, as the risk exists that various provisions relating to competition in different trade agreements may be inconsistent with each other. Moreover, there is a danger that developing countries – especially those that are not acquainted with competition law and policy – might be unable to take advantage of those provisions. Hence the need for more systematic, across-the-board coverage of competition law and policy principles.

35. **If there were a MCF, how would it relate to sectoral agreements?** A parallel was made with the situation in individual countries having competition legislation and a competition authority, and its relationships with competition provisions in rules governing sectoral regulators. In case of inconsistencies, there would need to be a decision as to which rules would prevail: those in the MCF or those in the sectoral agreement.

E. WHY A MCF IN THE WTO INSTEAD OF IN UNCTAD?

36. The United Nations General Assembly adopted the "Set of Principles and Rules on Competition" in 1980. The Set has been in operation since, and the Fourth United Nations Conference to Review all Aspects of the Set (September 2000) has reaffirmed the validity of the Set.

37. However, the Set is in the form of a recommendation to States; it is not a binding document. In 1985, at the First Review Conference, the G-77 had requested that the Set be transformed into a binding instrument, but this was never achieved.

38. An agreement within the framework of the WTO would have the potential to be (or to become, after an evolutionary period) a binding instrument covered by some sort of dispute-settlement mechanism, in the same way as most other WTO agreements.

39. Another rationale for a MCF in the WTO is that the WTO represents today's international trading system, and such a system would be incomplete if it covered only government barriers to

trade, not enterprise-level barriers or distortions such as anti-competitive practices (RBPs), as was the original objective of Chapter V of the Havana Charter.

F. WHAT WOULD DEVELOPING COUNTRIES AND LDCs GAIN FROM A MCF IN THE WTO?

40. In principle, multilateral agreements are favourable for weaker or small trading partners because they give them the possibility to seek redress for infringements by other members. Doubts were expressed about this argument, as it was feared that dispute settlement in other areas (e.g. bananas) might not redress imbalance, even after a country – or groups of developing countries – gained favourable panel or appellate body decisions. Others felt that the position of developing countries would still be strengthened, especially if the resulting MCF contained some sort of DSM, and if such a mechanism took due account of the flexibility afforded to developing countries under an appropriate special and differential (S&D) treatment still to be defined (see V below).

41. In any event, a MCF could be useful in helping developing countries resolve cases of anti-competitive practices operated from abroad (such as international cartels) having adverse effects on their territory.

G. WOULD IT BE MANDATORY FOR DEVELOPING COUNTRIES TO ADOPT A DOMESTIC COMPETITION LAW IN CASE A MCF WERE ADOPTED?

42. Initial proposals by the European Commission were to require members to the agreement to undertake the adoption of domestic competition legislation. Some countries have expressed reluctance to do so. Others have felt that similar obligations were forced upon them by the International Monetary Fund or the World Bank as a sort of necessary evil. One could imagine a possible MCF without such an obligation. However, what would be the case, for example, of cooperation agreements? Without a domestic competition authority, a developing country would be unable to provide any information, and in case it needed to challenge a RBP, it would be unable to do so anyway. So the capacity for cooperation would not exist. Hence, if they felt hampered by specific anti-competitive practices, countries would adopt such legislation as they saw the necessity for it and found it was in their interest to have such a law and enforce the MCF. In other words, they could negotiate and adopt an MCF without having a domestic competition law, but the MCF would remain inoperative for them as long as they did not have the national legislation. It was felt that it should be left to members to decide when it was appropriate for them to adopt a competition law, and hence to be able to take advantage of the cooperation provisions of a possible MCF.

H. THE NEED TO FULLY TAKE INTO ACCOUNT THE SOCIAL, CULTURAL, HISTORICAL AND DEVELOPMENT CONTEXT OF DIFFERENT COUNTRIES

43. Concerns were expressed that developing countries could not be expected to adopt competition laws copied from those of developed countries. Attention was drawn to the fact that while the basic principles of controlling cartels, vertical restraints and abuse of dominance, as well as mergers, were followed, all countries had legislation tailored to their specific situation (level of development, customs, socioeconomic system, cultural context, etc.). It was generally agreed that a MCF would not impose a "one size fits all" type of domestic legislation.

44. Concern was also expressed regarding the need for countries to preserve their cultural heritage, while some others also needed to implement affirmative action policies to preserve social and political stability in their economy.

IV. THE ARCHITECTURE OF A POSSIBLE MCF: DIFFERENT SCENARIOS

- A. WHAT ELEMENTS SHOULD A MCF CONTAIN? OF THESE, WHICH ONES COULD BE ADOPTED INITIALLY WITHOUT MUCH DIFFICULTY? WHICH ONES COULD BE ADOPTED LATER, CONSIDERING THE POSSIBILITY OF AN "EVOLUTIONARY SYSTEM", INCLUDING ONGOING MEETINGS AND FURTHER POSSIBLE NEGOTIATIONS?

45. Different scenarios were envisaged. It was suggested that a comprehensive MCF could ideally contain (i) **the core trade principles**: non-discrimination, transparency and due process, with inclusion of special differential treatment; and (ii) **the main competition principles**: prohibition of hard-core cartels, control of vertical restraints and abuse of dominance as well as control of M&As. Such an agreement could be covered by (iii) **voluntary cooperation rules**, including "positive" and "negative" comity principles, exchange of information, including confidentiality safeguards, consultations, peer reviews, and possibly a dispute settlement or mediation mechanism limited to specific cases. It was made clear at the outset that such a dispute-settlement mechanism would not aim at second-guessing decisions made by national jurisdictions in the application of domestic competition rules. Rather, such a system could be used to resolve or mediate disputes arising from conflicts of jurisdiction or infringements of core trade principles. (This question is discussed in more detail in VII-D).

46. If one accepts the idea of a possible evolutionary system, one that would evolve from simpler to more complete, one could imagine starting with a simpler scenario, trying to achieve an agreement on voluntary cooperation principles; another scenario could cover agreement on the core principles of international trade in (i), then parts of (ii) on hard-core cartels, and (iii) a provision on cooperation and conciliation procedures, perhaps including a peer-review mechanism, which might be acceptable. A more comprehensive scenario could include some DSM as discussed below in VII-D.

- B. AN "EVOLUTIONARY" OR "BUILDING-BLOCK" SYSTEM?

47. Some delegations expressed concern that if negotiations were launched at some point in time to reach agreement on minimalist, voluntary rules, those who were reluctant to develop a more complex mandatory agreement would still risk being dragged into it because once a "building block" was set in place, others would follow sooner or later in future rounds. Other participants considered the same argument as a favourable one, proposing that a minimalist agreement could be concluded immediately, leaving the negotiation of a more complex MCF for later, when parties would be ready to tackle it.

- C. A PLURILATERAL AGREEMENT?

48. Strong reservations were expressed about initiating negotiations at a plurilateral level, as was proposed by the European Commission. This has also been suggested as an "opt-in/opt-out" scenario, where countries could opt out if they were unhappy with the evolution of the negotiation, or opt in when they felt they were ready to enter into such an agreement. The danger of plurilateral negotiations was that later, developing countries having opted out would face an agreement which did not take into account their needs, and which was even less development-friendly. There was also concern that plurilateral agreements might eventually become part of a "single undertaking" or package, as was the case for a number of agreements at the end of the Uruguay Round.

- D. THE CORE TRADE PRINCIPLES

49. Some participants expressed the wish for more in-depth study of the interlinkages of the core principles such as MFN, non-discrimination, national treatment, and transparency with S&D in the field of competition.

V. WHAT ARE THE TYPES OF SPECIAL AND DIFFERENTIAL TREATMENT?

50. While existing WTO Agreements had many types of S&D-related provisions, basically, four types of S&D treatment could be considered:

- (i) **Technical cooperation**, capacity-building and exchange of experience.
- (ii) **Transition periods** allowing for temporary flexibility and graduality – flexibility with respect to the law's adoption and implementation, and graduality in the full coverage by the law of all the main elements contained in a competition law. The transition period could be decided across the board, with longer terms for LDCs.
- (iii) **Exceptions and exemptions**. These could be sectoral exceptions or exemptions covering certain anti-competitive practices under certain specified conditions. In the same way that most developed countries at present exempt certain sectors (e.g. agriculture for the European Commission or baseball for the United States), the MCF could give developing countries the right to declare certain sectoral exceptions for developmental reasons. It was suggested that such exemptions would not be subject to a time limit, but that it might be useful to review the applicability of sectoral exemptions periodically.
- (iv) **Specific undertakings for developed countries** to eliminate their own exceptions and exemptions on a non-reciprocal basis. These could involve still existing sectoral exceptions or exemptions of specific practices, including export cartels.

51. Some experts were of the view that in the early stages of development, a certain degree of industrial policy might be necessary to make up for market failures in developing countries. At higher levels of development and as industrialization progressed, such policies would gradually become less effective than competition policy. Nevertheless, as part of S&D treatment, developing countries, especially LDCs, would be able if they so wish, to exempt certain sectors, possibly on condition that the principle of transparency was respected.

52. Many participants felt that transition periods were inappropriate. Others expressed concern at the relative weakness of S&D treatment when faced with the principles of non-discrimination and national treatment. They felt that developing countries might face considerable pressures, irrespective of the inclusion of S&D principles in a possible MCF, to apply equal treatment to foreign firms and to open their markets to FDI.

53. It was proposed that as an additional element of S&D, developed countries should envisage renouncing existing exemptions or exceptions in their competition laws in cases where it is known that such provisions affect important interests of developing countries. This could apply to export cartels, as well as sectoral exemptions in service sectors essential for the commercial competitiveness of developing countries, such as transport services and tourism.

VI. WHAT ARE THE CORE PRINCIPLES OF COMPETITION?

54. These are found in all competition laws (see UNCTAD Model Law³), which broadly cover (i) a prohibition of cartels; (ii) case-by-case control (based on rule of reason) of vertical restraints, especially by dominant firms; and (iii) control of concentrations through mergers and acquisitions or

³ The Model Law is available on UNCTAD website at www.unctad.org/competition.

other forms of concentrations such as joint ventures, whenever such concentrations may lead to the creation of a dominant firm and ultimately a monopoly.

A. HARD-CORE CARTELS

55. Such cartels include agreements to fix prices, allocate markets, and strive to eliminate outside competition. They are also particularly damaging in cases of collusive tendering (bid-rigging) in government procurement tendering procedures. Export cartels are often exempted by law in many countries; a repeal of such exemptions could and should be envisaged.

56. In principle, so far, the prohibition against cartels has been on agreements among firms to fix prices and eliminate competition. This prohibition does not exist with respect to price undertakings made by sovereign states (Sovereign Acts of State) with respect to a basic commodity such as oil, for example. Hence, as indicated in the United Nations Set of Principle and Rules on Competition (Article 9, Section B), "intergovernmental agreements, (or) restrictive business practices directly caused by such agreements", such as OPEC would be exempted. This question should still be clarified and a specific exemption for developing countries reaffirmed in case of negotiation of a MCF.

B. VERTICAL RESTRAINTS AND ABUSE OF DOMINANCE

57. While all competition laws contain provisions to control such practices, definitions and the degree of prohibition vary widely from country to country. It might be more difficult to reach agreement on these elements in a MCF. Perhaps there could be an agreement to establish a standing committee to further study these issues with a view to incorporating an agreement on vertical restraints into the MCF at a later stage, once a reasonable degree of convergence of views has been reached among all states.

58. It was noted, however, that vertical restraints can be especially important in developing countries, whose markets are often small and where subsidiaries of foreign multinationals easily attain a dominant position. Some also manage to convince privatization officials to grant them a long-term monopoly on the occasion of the sale of a state monopoly to the private sector.

C. MERGERS AND ACQUISITIONS

59. Some developing countries stated that they did not need M&A control in their domestic legislation for the moment and that in case of abuse of dominant power they could still take effective action under provisions against abuse. Others recalled that once a merger had taken place, it was much more difficult to "unscramble the eggs". (A study has shown, for instance, that some prohibited cartels later try to reconstitute their market controlling power through mergers).

60. It was noted that multinational firms were starting to call for a multilateral discussion of mergers in order to facilitate notification procedures in case of mega-mergers where multinationals present in many countries have to satisfy multi-jurisdictional requirements.

VII. WHAT KIND OF COOPERATION, EVALUATION AND MEDIATION COULD BE ENVISAGED?

61. As was discussed in previous sections of this report, a possible MCF in the WTO might be beneficial to developing countries seeking to obtain information located outside their national territory in a case affecting their market. Under this heading, a number of cooperation and dispute mediation procedures were considered, from voluntary cooperation and exchange of publicly available information to consultations, peer reviews and specific types of limited dispute settlement mechanisms.

A. VOLUNTARY COOPERATION

62. One option or scenario envisaged for a possible MCF was that it could simply contain a voluntary cooperation agreement. Such a provision, akin to those that exist in the United Nations Set, would provide for **"negative" comity** (i.e. voluntary supplying of information on a law or case initiated in one country which had effects or concerned an anti-competitive practice having effects in another country). It could also provide for **"positive" comity** (positive action in response to a request for cooperation). In both cases, the exchange of information would be voluntary and subject to **confidentiality rules**. Concern was expressed that the voluntary nature of the process, supplemented with a confidentiality safeguard, made this kind of cooperation very hypothetical, especially for smaller partners, which were unlikely to have as many cases of information to provide as of requests they would likely address to big trading partners. Another concern, however, was that small developing country authorities with limited resources might be submerged by requests for information under cooperation agreements.

63. The case of more formal bilateral cooperation agreements (as opposed to voluntary) was invoked, in which the degree of mutual trust is such that even certain confidential information can be shared. It was felt, however, that this could more easily apply to bilateral cooperation among similar partners.

B. CONSULTATIONS

64. A MCF could envisage different types of mechanisms, beginning with periodic consultations between States on specific issues relating to competition. Such a mechanism exists under the Set, and consultations do take place during the annual meetings of UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy.

C. PEER REVIEWS

65. Another proposal would be to organize periodic "peer reviews" such as are presently taking place in the OECD. Such reviews begin with a study by independent consultants of the economic conditions of the country being reviewed, as well as a review of the competition law and accompanying rules and guidelines or decrees of application, the competition authority and its functioning, the implementation of the law, the authority's budget, actual cases decided, and so forth. The in-depth evaluation, which can be quite critical, is presented to the competition authority for a first review; then the heads of the competition authority are "examined" in a public session at the OECD by representatives of two other competition authorities (the peers), after which they respond to any questions posed by all the peers present. Finally, a list of recommendations for improvements and "best practices" is submitted to the Government of the country being reviewed.

66. This system, which is quite time consuming and expensive (since it involves engaging consultants, etc.) has been found useful by OECD countries being examined, because the recommendations for improvement then serve to convince the Government to increase the budget, amend the law to make it more effective, and so on.

67. Some non-OECD members such as South Africa have volunteered to be reviewed as well. One could imagine a system where countries could volunteer to be reviewed under an OECD-type peer review, or could simply be reviewed through periodic competition policy review mechanisms similar to the trade policy review mechanism (TPRM) which presently exists at the WTO. Some participants worried that the periods between such reviews might be too long and the process too costly. Others opined that the system would result in pressure being exerted on developing countries and asked to what extent the authorities of developed and developing or LDC countries could be considered peers. Still others questioned the usefulness of such a voluntary mechanism.

D. A WTO-TYPE DSM?

68. As for controversies or differences concerning the application or non-application of national competition law in breach of core principles of international trade (non-discrimination, transparency, S&D, etc.), some participants expressed the view that a proper dispute settlement mechanism of the WTO-panel type could be envisaged in a possible MCF. Such a mechanism would cover, for example, procedural breaches such as non-application of national competition law to an anti-competitive practice aimed at eliminating a foreign competitor, or an RBP aimed at unduly protecting a local firm or firms against a foreign firm or firms. (An example could perhaps have been the Kodak/Fuji case). In any event, all agreed that this mechanism should in no way create a multilateral body second-guessing the application of laws by national jurisdictions.

VIII. TYPES OF TECHNICAL ASSISTANCE AND CAPACITY-BUILDING AND MEANS OF DELIVERY

A. TYPES OF ASSISTANCE

69. It was noted that two distinct but mutually reinforcing types of assistance were needed by developing countries: (i) long-term help with creating a "competition culture" and developing a "tailor-made" competition law, as well as building the necessary implementing capacity for the national competition authority (through training of officials, exchanges of personnel, study tours, and advice regarding possible improvements and amendments to existing competition legislation); and (ii) in the shorter term, help with the capacity-building needed by developing and least-developed, as well as transition countries to better evaluate the possible contours and implications of an eventual MCF in the WTO.

B. NORTH/SOUTH COOPERATION

70. It was felt that while North/South cooperation and assistance were very much welcome, South/South cooperation was also a key element needed in order for developing and least-developed countries to take advantage of recent experiences of other developing countries, which faced similar difficulties in trying to implement competition rules under the realities of development.

IX. ISSUES FOR FURTHER CONSIDERATION AND STUDY

71. Looking forward to the next stages of the process of capacity-building for developing countries under the post-Doha mandate, the following issues were highlighted:

A. THE NEED FOR A PROACTIVE APPROACH BY DEVELOPING COUNTRIES IN THE WTO PROCESS

72. The point was made that developing countries, in order to safeguard their interests in a possible multilateral framework, need to be proactive by presenting proposals on the clarifications and assessment of the various concepts, principles and approaches to the mandate on competition policy issues agreed on at the Doha WTO Ministerial Conference. Proposals could include measures to promote the role of developing countries' private sectors in international trade and development and further proposals to enhance S&D treatment, such as requiring developed countries to agree on some development-friendly undertakings (e.g. eliminating sectoral exemptions and export cartels affecting the interests of developing countries).

B. THE NEED TO REINFORCE THE POST-DOHA PROCESS OF CONSULTATIONS IN ORDER TO IDENTIFY MEASURES THAT COULD SAFEGUARD THE INTERESTS OF DEVELOPING COUNTRIES IN FUTURE AGREEMENTS, INCLUDING MEASURES TO PROMOTE CONTRIBUTIONS BY THE PRIVATE SECTOR TO EXPORTS AND DEVELOPMENT

73. The majority of participants expressed the need for capacity-building to deal with the post-Doha mandate in this area and to evaluate the implications of this mandate for their development. Increasing human and institutional capacity would assist developing countries in clarifying and evaluating the substantive aspect of the mandate, identifying areas of concern to them and proposing measures that would safeguard their interests in a possible multilateral framework on competition. Measures to promote a bigger role for the private sector of developing countries, in particular, small and medium-size enterprises in international trade and investment should be identified and given adequate attention in future agreements on competition.

C. THE NEED FOR STUDY OF THE ROLE OF COMPETITION LAW AND POLICY

74. More study is needed of the interface between competition, competitiveness and development. In particular, more research needs to be devoted to the interface between competition and industrial policy in developing economies. What is the appropriate mix of such policies? To what extent would exemptions for developmental reasons be useful in this respect, and to what extent would they be applicable in the overall context of the WTO Agreements?

D. THE NEED FOR STUDY OF THE CORE WTO PRINCIPLES AND THEIR INTERFACE WITH COMPETITION

75. Future workshops and research should focus more on the core principles of the WTO. Further studies should clarify the interface of the core principles of the WTO with market access.

E. THE NEED FOR FURTHER STUDY OF THE TRIPS AGREEMENT

76. Another question touched on the need to clarify how developing countries can make use of the competition provisions in the TRIPS Agreement. These provisions and the scope for their utilization would probably need to be clarified in the course of the TRIPS Agreement negotiations.
