



**United Nations
Conference
on Trade and
Development**

Distr.
GENERAL

TD/B/COM.2/CLP/45
13 October 2004

Original: ENGLISH

TRADE AND DEVELOPMENT BOARD
Commission on Investment, Technology and
Related Financial Issues
Intergovernmental Group of Experts on Competition Law and Policy
Sixth session
Geneva, 8–10 November 2004
Item 3(i) of the provisional agenda

PRELIMINARY ASSESSMENT OF THE SET*

Executive summary

This note reviews some of the salient developments that have taken place at the national, regional and multilateral levels in the field of competition law and policy, particularly since September 2000, when the Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was held. At the multilateral level, mention is made of the Doha mandate before and after the World Trade Organization's Ministerial Conference in Cancún and of the results of UNCTAD XI in São Paulo in the field of competition law and policy. Part II of the note contains a preliminary review of the operation of the Set, looking at its main provisions from the angle of the development dimension and the main anti-competitive practices as contained in Section D of the Set. Part III offers a conclusion in the form of a preliminary outlook for the Review Conference, covering matters to be decided by the conference.

* This document was submitted on the above date owing to technical delays.

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I. A BRIEF REVIEW OF RELATED EVENTS BETWEEN THE FOURTH REVIEW CONFERENCE AND UNCTAD XI

1. The UN Set of Principles and Rules for the Control of Restrictive Business Practices (the Set) was adopted by the General Assembly on 5 December 1980 in resolution 35/63. Next year will be the twenty-fifth anniversary of this event. This is an important event because today, a quarter century after its unanimous adoption by the General Assembly, the Set remains the single fully multilaterally agreed instrument on competition law and policy in existence. Its validity has been unanimously reconfirmed by four UN Review Conferences, most recently the Fourth UN Conference to Review All Aspects of the Set, which took place in September 2000. Since then, as called for in the Set, UNCTAD has held its annual meetings of the Intergovernmental Group of Experts on Competition Law and Policy (in 2001, 2002 and 2003). The 2004 meeting will also act as a preparatory meeting for the Fifth Review Conference.

2. The five years since the Fourth Review Conference have seen a number of important competition-policy-related events worth mentioning. First is the continuation of the increasing interest on the part of developing countries, including least developed countries (LDCs), in developing their national competition policy and working towards the adoption of national competition laws. UNCTAD, with the support of donor countries and programmes, has played an important role in preparing developing countries from all regions of the world, including numerous LDCs; in drafting competition legislation; in training officials responsible for the operation of national competition authorities; and in contributing to the creation of a “competition culture”.

3. Cooperation with other organizations such as OECD, WTO and the World Bank as well as with regional organizations and commissions such as APEC, ASEAN and SARC (in Asia); ESCWA, Islamic Development Bank and the League of Arab States (in the Middle East); UEMOA, CEMAC, COMESA and SADC (in Africa); MERCOSUR, the Andean Group, FTAA and NAFTA (in the Americas); and CARICOM (in the Caribbean), to cite just a few, was essential to develop competition policy and law initiatives throughout the world. UNCTAD also participated in the International Competition Network (ICN). Moreover, it cooperated with non-governmental organizations (NGOs) such as Consumers International and its regional members in Asia, Africa and Latin America as well as CUTS to create awareness of competition policy on the part of consumer organizations, realizing the benefits for consumer protection that should arise from competition law and policy. Such advocacy is essential for creating a competition culture in the developing world, which should eventually lead to a competition policy movement reinforcing consumer movements and enhancing the competitiveness of developing countries in a gradually globalizing world.

4. A pro-competition-policy culture is also linked to the way markets can function in favour of the poor. As the media and general public increasingly understand the value of competition policy, it will be more difficult for governments to protect vested interests – for example, by privatizing state monopolies into private monopolies without taking into account competition policy concerns. The time when vested interests could be unduly shielded either by governments awarding monopoly privileges and protection through exclusivity contracts to a few, or by enterprises using anti-competitive practices to the detriment of the public is gradually coming under increased scrutiny worldwide. More and more people around the world understand that competition policy in a transparent and rules-based system should enhance better income distribution by opening domestic markets to new entrants, including small and medium-sized enterprises (SMEs) and micro-enterprises, and thereby helping poverty alleviation and gender

mainstreaming. Competition policy tailored to the economic and social situation and specific context of each country should also help in protecting the public, including SMEs and consumers, from anti-competitive practices that may occur through the opening of domestic markets to international competition. At the same time, competition policy can also be used as a tool for gender equity and welfare, as it helps to open markets to all segments of the population. Continued privatization and liberalization of different sectors of the economy and trade in developing countries has created an even greater need to protect domestic producers, especially SMEs and consumers, from the adverse effect of anti-competitive practices in their own markets as well as in international markets.

5. Market-oriented economic reforms, including deregulation, privatization, trade and foreign direct investment (FDI) liberalization, have continued to prevail, bringing to the fore the need to adopt effective competition policies and laws. Without competition policy, privatization might result in the creation of private monopolies; trade liberalization might be used by enterprises using anti-competitive practices to maintain their vested interests; and FDI liberalization risks crowding out the domestic private sector if there is no competition authority capable of controlling abuses of dominance or other anti-competitive practices that might occur.

6. Cartels, abuses of dominance and vertical restraints in distribution networks, in particular concentration of market power through mergers and takeovers, have clearly shown their capacity to distort trade flows and to reduce the benefits that should result from trade liberalization. Ensuring that “restrictive business practices do not impede or negate the benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries” was the basic objective of the Set in 1980. Attempts already in the Havana Charter in 1947 to include control of restrictive business practices in the new trade rules were a recognition by the international community that liberalization of trade from governmental barriers was no guarantee that trade would henceforth be free from anti-competitive distortions by enterprises.

7. Hence, in launching the Doha Round in 2001, the Doha Declaration “recognized the case for a multilateral framework to enhance the contribution of competition policy to international trade and development” (para. 23). Paragraph 24 of the Declaration recognized the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area “so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development”. Special mention was made in of work “in cooperation with other relevant intergovernmental organizations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately reinforced assistance to respond to these needs”. Paragraph 25 of the Declaration stipulates that “Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them”.

8. Accordingly UNCTAD, in cooperation with WTO and OECD, organized a series of regional seminars and conferences in 2002–2003 to (a) discuss the main issues proposed at the WTO Working Group on the Interaction of Trade and Competition Policy, and (b) provide an exchange of views with the developing and least developed countries, as well as with transition economies, to specify their needs and concerns with a view to making a positive contribution to the post-Doha process. UNCTAD held eight regional seminars and conferences during that period, two each in Asia, Africa, Latin America and Eastern Europe/CIS member countries. The OECD opened its meetings to a number of developing non-member countries, first as part of its “outreach” programmes, then with the launching of the OECD Global Forums. The WTO

organized numerous Working Group meetings in Geneva, as well as workshops and seminars around the world, in which UNCTAD was invited to participate. In return, the WTO participated in the UNCTAD post-Doha meetings. Moreover, a few joint WTO/UNCTAD symposia were held in Geneva.

9. As a follow-up to the findings contained in the ICPAC Report¹ released by the US Department of Justice in June 2000, which had called for a “global competition initiative”, the International Competition Network (ICN) was launched in 2002 with the idea that countries might be prepared to cooperate in meaningful ways but were not necessarily prepared to be legally bound under international law. The ICN is basically a network of competition authorities that exchange experience and knowledge on practical competition concerns, focusing on improving worldwide cooperation and enhancing convergence through dialogue. So far, the ICN has held three annual conferences (in 2001, 2003 and 2004), and its next conference will take place in Bonn in 2005.

10. All these initiatives helped to place competition policy on the agenda of policy makers in developed as well as developing countries. In July 2003, as final preparations were being made for the WTO Ministerial Conference in Cancún, the UNCTAD secretariat submitted to the IGE on Competition Law and Policy, at its fifth session, its “Final Consolidated Report of Regional Capacity-Building Meetings Organized by UNCTAD on Competition Issues within the Framework of the Doha Mandate”. The report, which consolidated the views expressed during meetings organized by UNCTAD in 2002 and 2003 – in Panama City for Latin America and the Caribbean; Tunis for African and Arab countries; Hong Kong (China) for Asia; and Odessa for Eastern European and CIS countries, all in 2002, then Kuala Lumpur (Malaysia) for Asia; Nairobi (Kenya) for Africa; São Paulo for Latin America and the Caribbean; and Tashkent (Uzbekistan) for Eastern European and CIS countries, all in 2003 – consisted of two main parts. Part I contained general views on the “Singapore issues” (trade and investment, trade and competition, transparency in government procurement and trade facilitation), and Part II, “A Positive Agenda for Developing Countries”, contained a detailed analysis of the pros and cons of various proposals and ideas related to a “possible multilateral competition framework” under the WTO. Part I summarized developing-country concerns as follows:

“A. *Issues to deal with as a priority*: There has not been sufficient progress in the core issues of the Doha Round (agriculture, medicines and TRIPS, special and differential treatment (SDT) for developing countries and market access) for still other difficult issues being brought to the negotiating table.”

“B. *New complex issues*: The Singapore issues are new to many developing and least-developed countries, and they are complex issues for which most are unprepared; many issues still need to be further discussed and clarified; more work needs to be done at the WTO Working Group.”

“C. *Need for explicit consensus on modalities*: For negotiations to be launched at or after Cancún, there is a need for explicit consensus on the modalities. Many developing countries argue that they are not clear about modalities, hence they cannot start negotiating now.” (“Final Consolidated Report”, pp. 2 and 4)

¹ See US Department of Justice Antitrust Division, International Competition Policy Advisory Committee for the Attorney General and Assistant Attorney General for Antitrust, *Final Report, 2000*, US Department of Justice.

11. Hence, based on Part I of the report, the outcome of the Cancún conference in September 2003 was predictable. What was not was the extent to which trade and competition issues would be rejected from the Doha mandate. While it was recognized that there was a need to deal effectively with market distortions caused by anti-competitive practices, a key concern of developing countries was that a multilateral framework at the WTO might be used as a means of securing increased access to developing-country markets. The proposals to include core WTO principles of non-discrimination (most-favoured-nation treatment, national treatment), transparency and procedural fairness in a possible multilateral agreement on competition was felt as a possible limitation of the policy space available to developing countries for industrialization and sustainable development. On 1 August 2004 the WTO General Council adopted a decision on frameworks for further negotiations, the “Framework Agreement”, expected to enable WTO members to put negotiations back on track. While the decision sets out a framework, structure and direction for a future package in four core areas of agriculture, non-agricultural market access (NAMA), services and development issues, only trade facilitation was kept on the Doha agenda from the “Singapore issues”. The other issues (trade and investment, trade and competition and transparency in government procurement) would not form part of the single undertaking, as “no new work towards negotiations” would be undertaken during the Doha Work Programme negotiations. Concern has been expressed regarding the practical implications of these provisions, for example, for the possible resumption of work within relevant working groups, such as the WTO Working Group on the Interaction between Trade and Competition Policy, as well as the work towards negotiations after the Doha Work Programme.

12. Meanwhile, since Cancún, countries have continued to negotiate bilateral deals, some pure competition cooperation agreements (such as the Costa Rica–Canada bilateral cooperation agreement on competition policy), others ones where competition issues form part of a wider free trade agreement negotiation. A proliferation of regional and subregional agreements can be expected as long as no sizable progress occurs at the multilateral level. So far the FTAA talks, which include a chapter dealing with cooperation in competition matters, have not been conclusive. Again, some countries have shown concern at the prospect of limiting their policy space to the nexus between competition and industrial policy.

13. In June 2004, UNCTAD XI took place in São Paulo (Brazil). As is set out in the “São Paulo Consensus” (TD/L.380) of 16 June 2004, the conference was articulated around four main themes:

- Development strategies in a globalizing world economy
- Building productive capacity and international competitiveness
- Assuring development gains from the international trading system and trade negotiations
- Partnership for development

14. The São Paulo conference reaffirmed that the Bangkok Plan of Action² should continue to guide UNCTAD’s work in the years to come. The overarching goal of UNCTAD XI was “to identify new developments and issues in the area of trade and development since Bangkok, and to generate greater understanding of the interface and coherence between international processes and negotiations on the one hand and the development strategies and policies that developing countries need to pursue on the other”.³ This was especially important in assuring development gains from the international trading system and trade legislation.

² Report of UNCTAD X, 12–19 February 2000 (TD/390).

³ São Paulo Consensus (TD/L380).

15. Under main theme I (*Development strategies in a globalizing world economy*), paragraph 29 of the São Paulo Consensus states: “At the national level, areas to which UNCTAD should give special attention include...the creation of an enabling environment for the private sector; policies to enhance the productive capacity of developing countries and improve their ability to compete in the global economy; income distribution and poverty alleviation; strengthening development – relevant domestic institutions; ...”

16. Under theme II (*Building productive capacities and international competitiveness*), paragraph 43 states: “Improving competitiveness requires deliberate specific and transparent national policies to foster a systematic upgrading of domestic productive capacities. Such policies cover a range of areas, including...competition policy...”⁴

17. Under theme III (*Assuring development gains from the international trading system and trade negotiations*), paragraph 64 states: “Over 50 developing countries depend on the export of three or fewer commodities for more than half of their export earnings... Moreover, the added value retained by many developing countries’ producers of commodities is decreasing in some sectors, and their participation in domestic and international value chains is a major challenge. This situation may be further complicated by concentrated market structures at the international and national levels...”

18. Paragraph 72 also states: “Competition policies best suited to their development needs are important for developing countries in safeguarding against anti-competitive behaviour in their domestic market, as well as in responding effectively to a range of anti-competitive practices in international markets, which often considerably reduce the positive effects of trade liberalization for consumers and enterprises, especially SMEs.”

19. Hence, referring to “Policy response and UNCTAD’s contribution”, paragraph 84 states: “Efforts should be made to prevent and dismantle anti-competitive structures and practices and promote responsibility and accountability of corporate actors at both the national and international level, thereby enabling developing countries’ producers, enterprises and consumers to take advantage of trade liberalization. This should be supplemented by the promotion of a culture of competition and improved cooperation between competition authorities. Developing countries are encouraged to consider, as a matter of importance, establishing competition laws and frameworks best suited to their development needs, complemented by technical and financial assistance for capacity-building, taking fully into account national policy objectives and capacity constraints.”

20. Moreover, in specifying its priorities for UNCTAD’s contribution, paragraph 95 states:

“UNCTAD should build on and strengthen the implementation of the Bangkok Plan of Action within the three pillars of its work. To achieve this aim it should...

- ...Help ensure that anti-competitive practices do not impede or negate the realization of the benefits that should rise from liberalization of globalised markets, in particular for developing countries and LDCs...”

⁴ Refers to chapter III, paras. 89 and 104 under theme III.

21. Second, in paragraph 104, the São Paulo Consensus states:

“UNCTAD should further strengthen analytical work and capacity-building activities to assist developing countries on issues related to competitive law and policies, including at a regional level...”

22. Finally, under theme IV (*Partnership for development*), UNCTAD’s contribution as mentioned in paragraph 115 includes “participation of the civil society, in particular NGOs and academic circles, the private sector and other organizations of the UN system ... Interaction with academic and research institutions and the promotion of networking of researchers from developing countries could be of benefit both to these institutions and to UNCTAD through sharing of the outcomes of their analysis and research, relevant studies and knowledge, and by integrating UNCTAD courses into the curricula of such institutions.” Such partnerships are also being developed in the fields of competition policy and consumer protection.

23. It should also be noted that the Spirit of São Paulo document (TD/L.382) also, in its paragraph 12, states, *inter alia*, that “Development policies should recognize the importance of market forces, in the context of an enabling entrepreneurial environment that could include appropriate competition and consumer policies, in the promotion of growth, through trade, investment and innovation.”

24. As can be seen from all these references to competition policy and consumer protection throughout the text of the São Paulo Consensus, as well as in the Spirit of São Paulo, UNCTAD XI recognized the importance of competition policy as a cross-cutting issue that is fundamental for all the four main themes of the conference.

25. From the discussions that took place at most of the UNCTAD XI parallel events, in areas such as commodities, services, tourism, investment and LDCs, it was confirmed that competition policy is an essential underlying theme that is strongly relevant to competitiveness, growth and sustainable development.

II. OPERATION OF THE SET SINCE 2000

26. Objective 1 of the Set, “to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries”, is of such relevance today, as the effects of globalization on world markets unravel, that participants in UNCTAD XI chose among their priorities in UNCTAD’s contribution to theme III (Assuring development gains) that UNCTAD should “help ensure that anti-competitive practices do not impede or negate the realization of the benefits that should arise from liberalization in globalized markets, in particular for developing countries and LDCs”.

27. Objective 2, “to attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through:

- (a) The creation, encouragement and protection of competition;
- (b) Control of the concentration of capital and/or economic power;
- (c) Encouragement of innovation;”

has received considerable attention during the period under review. While intensive discussions took place in all related forums, such as WTO, UNCTAD, OECD and the World Bank on the need to create, encourage and protect competition at the national, regional and international levels, consensus has gradually been building regarding the need for all countries – developed as well as developing countries, LDCs and economies in transition – to adopt and effectively implement competition law and policy. A general consensus also now exists that there is “no one size fits all” solution in competition law and policy – that national competition laws must be tailored to the actual needs of developing countries, taking into account their level of development, social and economic conditions, political priorities and so on.

28. Moreover, a consensus seems to be evolving in many countries regarding the need, whenever possible, to consider adopting common competition rules for regional groupings involving free trade agreements or the constitution of common markets. This, of course, was the case with the European Community itself when the Treaty of Rome was made to include competition rules.

29. Finally, it is gradually becoming more evident to most countries that anti-competitive practices have major negative effects on their growth and development, and that while efforts are needed at the domestic level in terms of adopting national competition policy and law, close cooperation will be needed at the international level if such practices are to be effectively addressed when they originate from or affect world markets. Even for developing countries having domestic competition legislation, its implementation is rendered difficult when such practices originate from abroad, and if the body of proof is to be found abroad. Moreover, international mergers that take œcur outside the scope of domestic legislation but result in gradual concentration of market power in world markets are a matters which only large trading partners like the United States or the European Union have managed to tackle effectively so far. As is shown by many international cartel cases and mega-mergers in the period under review (for specific details, see “Ways in which possible international agreements on competition might apply to developing countries, including through preferential and differential treatment”, TD/B/COM.2/CLP/46), few developing countries, except perhaps Brazil and the Republic of Korea in some specific cases, have so far been able to take effective action in this respect. The Set provides for international cooperation in case enforcement, in particular in its Section E, as is discussed in paragraph 41 below.

30. On Objective 3, “to protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;”, a growing number of countries have adopted consumer protection legislation along with or even before adopting competition rules. It is now a common view in most countries that well-implemented competition law should have beneficial effects on consumers in terms of lower prices, better quality and wider choice, and that individual consumers also need a specific consumer protection law in line with the 1985 UN Guidelines as revised in 1999.⁵

31. Moreover, pursuant to the request contained in the Resolution adopted by the Fourth UN Conference to Review All Aspects of the Set,⁶ an Expert Meeting on Consumer Interests, Competitiveness, Competition and Development was held in UNCTAD from 17 to 19 October 2001. The Expert Meeting recognized that globalization and deregulation of goods and services markets might have the potential to improve the circumstances of consumers in many countries, but also that “these processes pose major challenges when markets fail to protect consumers and access to redress mechanisms”.

⁵ See UN Guidelines for Consumer Protection (UNCTAD/DITC/CLP/Misc. 21).

⁶ See Resolution adopted by the Review Conference, Chapter I of TD/RBP/CONF.5/16, para. 4.

32. It was pointed out, for example, that in some cases privatization and deregulation had been effected with scant regard for consumer interests and often in the absence of an institutional and legal framework for consumer protection. It was further recognized that national regimes for consumer protection would need to protect consumers and promote sustainable consumption patterns without imposing undue constraints on business, in order to achieve the development and growth of effective markets. Moreover, the experts noted that “properly implemented competition and consumer policies can make a key contribution to competitiveness and development”.⁷ In the light of these findings, the Expert Meeting made a number of recommendations for consideration by the Commission on Trade in Goods and Services, and Commodities, which in turn endorsed them at its meeting of 4–8 February 2002. These recommendations were twofold:

(a) At the national and regional levels, they invited Governments to take the necessary steps to implement the UN Guidelines on Consumer Protection (1999) and to incorporate the consumer protection dimension into their macroeconomic policies and legal frameworks. In applying consumer protection laws and other regulations, Governments were invited to ensure that measures benefited all sectors of the population, particularly the informal sector and the poor. Bearing in mind the need to reach rural areas and illiterate consumers in developing countries and LDCs, Governments were invited to develop and encourage the development of consumer information and development programmes. Such programmes could be included in the curricula of formal and non-formal education. Consumer associations were also invited to develop joint regional training and information programmes in cooperation with government, business, international organizations, academia and other civil society organizations in order to create synergies to promote consumer welfare.

(b) At the international level, UNCTAD was invited to provide adequate technical assistance and capacity building for the formulation and enforcement of consumer policies. UNCTAD was also invited to develop a model law on consumer protection and to convene further Expert Meetings on the protection of consumers, including in relation to cross-border transactions, cross-border fraud, e-commerce and the like.

A. The development dimension in the Set

33. Section C of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices contains two important paragraphs in this respect. Paragraph 6 “(ii) Relevant factors in the application of the Set” states:

“In order to ensure the fair and equitable application of the Set of Principles and Rules, States, while bearing in mind the need to ensure the comprehensive application of the Set of Principles and Rules, should take due account of the extent to which the conduct of enterprises, whether or not created or controlled by States, is accepted under applicable legislation or regulations, bearing in mind that such laws and regulations should be clearly defined and publicly and readily available, or is required by States.”

34. Paragraph 7 “(iii) Preferential or differential treatment for developing countries” states:

“In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:

⁷ See Report of the Expert Meeting on Consumer Interests, Competitiveness, Competition and Development, TD/B/COM.1/43, TD/B/COM.1/EM.17/4, Chapter I.

- (a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy, and
- (b) Encouraging their economic development through regional or global arrangements among developing countries.”

35. The relationship between industrial policy and competition policy is one of the major difficulties and subjects of concern with respect to the adoption of international frameworks on competition. This issue, along with the concern of many developing countries that negotiating a multilateral competition framework at the WTO, at a time when many did not feel sufficiently prepared to enter into negotiations with highly expert counterparts, and the wish to maintain sufficient “policy space” in order to exempt certain industries from powerful and large external competitors, were undoubtedly the major sources of reluctance to launch negotiations on this and other Singapore issues at Cancún.⁸

36. The difficulties encountered, in particular with respect to the principles of “non-discrimination” and “national treatment” in the context of a possible multilateral competition framework at the WTO, are documented in a paper presented by Ajit Singh at the meeting of the Intergovernmental Group of Experts in July 2003. Moreover, a detailed analysis of the concerns expressed by developing countries in respect of such a possible multilateral framework before the WTO Cancún meeting was contained in UNCTAD’s Final Consolidated Report on regional capacity-building meetings organized by UNCTAD on competition issues within the framework of the Doha Mandate.⁹

37. Furthermore, the meeting of the IGE on Competition Law and Policy on 8-10 November 2004 will have before it for discussion a report by the UNCTAD secretariat, as requested by the IGE, on “Ways in Which Possible International Agreements on Competition Might Apply to Developing Countries, Including through Preferential or Differential Treatment, with a View to Enabling These Countries to Introduce and Enforce Competition Law and Policy Consistent with Their Level of Economic Development”.

38. In the absence so far of any negotiations for a new multilateral framework on competition at the WTO, the UNCTAD Set remains the only fully multilaterally agreed instrument on competition policy in existence today. It should be recalled that the Fourth UN Review Conference in its Resolution reaffirmed the validity of the Set and once again called on all member States to implement the provisions of the Set.¹⁰

B. The main anti-competitive practices

39. Section D of the Set on “Principles and Rules for Enterprises, including transnational corporations” lists the core anti-competitive practices that should be banned and which enterprises should refrain from (especially in paras. D3 and D4, which deal respectively with horizontal and vertical restraints in a dominant position of market power) in an open-ended, non-exclusive manner, which means that, if needed, other anti-competitive practices may be added to the list. As listed in the Set, horizontal practices include:

⁸ See UNCTAD’s “Multilateral Competition Policy and Economic Development” by Ajit Singh, UNCTAD/DITC/CLP/2003/10.

⁹ UNCTAD/DITC/CLP/2003/1.

¹⁰ See Report of the Fourth UN Conference to Review All Aspects of the Set, TD/RBP/CONF.5/16, Chapter I, operative, para. 1.

- (a) Agreements fixing prices, including for exports and imports
- (b) Collusive tendering
- (c) Market or customer allocation arrangements
- (d) Allocation by quota as to sales and production
- (e) Collective action to enforce arrangements (e.g. by concerted refusals to deal)
- (f) Concerted refusal of supplies to potential importers
- (g) Collective denial of access to an arrangement or association that is crucial to competition.

Vertical restraints include practices such as predatory or discriminatory pricing, resale price maintenance in international trade transactions, restriction on the importation of goods that have been legitimately marked abroad with a protected trademark, unjustified refusals to deal, tied sales, and the like.

40. So far, the coverage of anti-competitive practices in the Set has been considered adequate by the participants in the four previous Review Conferences.

41. During the period under review (2000–2005), much attention has been devoted to the adverse effects of international cartels. Much less attention has been given to cases of abuse of dominance, with the notable exception of the Microsoft case in the United States and in the European Union. Available documentation is often based on cartels that have been challenged, in particular by the developed countries since 1993, when leniency programmes began to be adopted in an increasing number of jurisdictions. The fact that countries increasingly offer leniency to the first member of a cartel to inform the competition authority (“the whistle blower”) has considerably facilitated the work of competition authorities in these jurisdictions to uncover and obtain necessary evidence to process a case. Attempts to quantify the impact of private international cartels have grown in sophistication in recent years. For example, a recent study for UNCTAD¹¹ estimates that, for 12 products known to have been subject of cartels, imports by developing countries routinely exceed \$8 billion a year, so that they have amounted to more than \$80 billion since 1990. Assuming a 20 to 40 per cent price overcharge resulting from the cartels, these developing countries would have paid between \$12.5 billion and \$25 billion dollars in excess for these 12 products alone. The study goes on to say that this range of overcharges is likely to be a substantial underestimate of the true overcharges paid by developing countries since 1990, as it omits overcharges on products supplied by the other 28 private international cartels challenged in the 1990s and the overcharges of those cartels that have gone undetected so far. In the case of the vitamin cartel in force between 1989 and 1999, it appears that jurisdictions with weak or no competition enforcement suffered price overcharges of over 53 per cent for their imports of vitamins. In addition to the fact that purchasers of cartelized products paid more, there was also evidence that some cartel members took steps to shut out non-members from markets through the use of anti-dumping investigations, co-opt new entrants in their industry and limit access to the latest technological developments to cartel members.

42. While attention has been devoted to the likely effects or damages for developing countries resulting from cartels that are known to exist, or to have existed, because of action taken in developed countries against those cartels when the adverse effects were felt in those countries, very little action has in effect been taken in the developing countries, even when competition authorities existed there, for lack of cooperation agreements with their counterparts in developed countries. This situation may now improve in developing countries that have recently signed

¹¹ Can Developing Economies Benefit from WTO Negotiations on Binding Disciplines for Hard Core Cartels? Prepared at the request of UNCTAD by Simon J. Evenett, World Trade Institute, Bern, UNCTAD/DITC/CLP/2003/3.

bilateral or regional competition cooperation agreements with other countries. One objective of the supporters of a WTO multilateral framework was to facilitate enforcement cooperation in specific cases. It is not clear, however, to what extent a voluntary multilateral cooperation agreement under such a multilateral competition framework would have been able to resolve the problem of lack of exchange of crucial information on anti-cartel enforcement.

43. It should be recalled that existing multilateral cooperation provisions in the Set (e.g. under paras. 7 and 9 of Section E, on principles and rules for States at the national and subregional levels) already provide for such mutual assistance, and their application needs to be strengthened. Section E of the Set provides that

“7. States should establish appropriate mechanisms at the regional and subregional levels to promote exchange of information on restrictive business practices and on the application of national laws and policies in this area, and to assist each other to their mutual advantage regarding control of restrictive business practices at the regional and subregional levels....

9. States should, on request, or at their own initiative when the need comes to their attention, supply to other States, particularly developing countries, publicly available information, and, to the extent consistent with their laws and established public policy, other information necessary to the receiving interested State for its effective control of restrictive business practices.”

44. Nevertheless, a new working group on cartel enforcement has been established in the ICN, and cartel enforcement is one of the subjects to be discussed during the consultations scheduled to take place during the November 2004 meeting of the IGE on Competition Law and Policy.

45. More efforts to detect and quantify the adverse impact of monopolization and abuse of dominance and other vertical restraints, especially as they affect developing countries and hinder development, will be necessary.

III. PRELIMINARY OUTLOOK FOR THE FIFTH REVIEW CONFERENCE

46. Meeting one year after UNCTAD XI, the Fifth Review Conference will have a full opportunity to review the global situation in the field of competition law and policy, and to make appropriate contributions with respect to the further application and implementation of the Set.

47. By the time of the Fifth Review Conference, 25 years will have lapsed since the Set was negotiated in 1980. The question of the need to review and update certain parts of the Set may be discussed. The Fourth Review Conference already recommended to the General Assembly to subtitle the Set “UN Set of Principles and Rules on Competition” (in para. 1 of its Resolution).¹² Some experts are also of the view that the Set itself should be amended to reflect important changes in this field in the past 25 years. For example, while the stated objectives of the Set still appear perfectly valid, some have suggested that Section D, provision 4 should be revised to create a separate provision dealing with merger control, instead of being part of creation and abuse of dominance, as it presently stands in paragraph D4 (c) of the Set. Others have suggested that the wording be revised – for example, to use the modern term anti-competition practices whenever reference is made in the Set to restrictive business practices. This would also bring more clarity to translations of the term.

¹² Report of the Fourth Review Conference, op. cit. Chapter I, para. 1 on p. 4.

48. Under Section E, “Principles and Rules for States at National, Regional and Sub-Regional Levels”, provisions dealing with cooperation could introduce the more modern notions of “positive” and “negative” comity proceedings. A chapter on peer reviews could be added under Section F “International Measures” to strengthen paragraph 4 on consultations. As a result, the functions of the Intergovernmental Group under Section G, “International Institutional Machinery”, could be revised accordingly.

49. Other experts, however, suggest that, given the difficulties of negotiating as delicate a subject as competition policy at the multilateral level, it would be safer to continue to develop the Model Law while avoiding reopening the UN Set on the occasion of the Review Conference.

50. The November session of the IGE on Competition Law and Policy, which will also serve as a preparatory session for the Fifth Review Conference, could consider these and other proposals.