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**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***

Executive summary

A review of some existing international instruments and cases relevant to this area highlights issues such as the following: commitments in international instruments to common approaches and the relationship between such commitments and other provisions of these instruments, cooperation on cases, the content or application of national laws, and effective national enforcement; the precise nature of cooperation provisions; incentives to cooperate; confidentiality restraints; application of competition laws to restrictive business practices only affecting foreign markets; preferential or differential treatment for developing countries; means of enhancing cooperation among developing countries; and enhanced coordination among different international bodies. Governments might examine these questions in working out how possible bilateral, regional, plurilateral or multilateral agreements on competition might apply to developing countries. Such an examination might take into account relevant provisions of the Set of Principles and Rules, the São Paulo Consensus and WTO agreements. This could assist in the elaboration by UNCTAD of Model Cooperation Provisions with an explanatory commentary and would also enhance consistency and coordination among different forms or levels of international cooperation in this area. The concept of a possible multilateral framework on competition formerly discussed within the WTO is not dealt with here.

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

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INTRODUCTION

1. The Intergovernmental Group of Experts on Competition Law and Policy, at its fifth session (2 to 4 July 2003), requested the UNCTAD secretariat to prepare for the Group's sixth session "studies on the implications of closer multilateral cooperation in competition policy for developing and least developed countries' development objectives, in particular... (b) A report 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".¹ In response to this mandate, the present report adopts an empirical approach and reviews some existing international instruments (in part I) and cases (in part II) in this area, with an emphasis on aspects relevant to developing countries. Part III highlights some implications and questions that Governments may wish to examine in assessing relevant issues regarding possible agreements on competition at the bilateral, regional, plurilateral or multilateral levels.

2. As most of the instruments and cases reviewed here have been mentioned in previous UNCTAD reports² or in other documentation that is cited, full references are not provided in the present report, except for some new cases. No regional trade agreement (RTA) with only developing-country members is reviewed here, nor is any general review undertaken of the provisions of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. However, in dealing with questions for examination, chapter 3 refers to agreements among developing countries and to some of the Set's provisions. The report does not deal with the concept of a possible multilateral framework on competition within the WTO which had formerly been discussed by the WTO Working Group on the Interaction between Trade and Competition Policy. This is based on the WTO General Council Decision that the issue of the Interaction between Trade and Competition Policy will not form part of the Work Programme set out in the Doha Declaration and therefore no work towards negotiations on this issues will take place within the WTO during the Doha Round. However, some references are made to relevant information or views contained in the documentation of this Group. Throughout the report, the term "restrictive business practices" (RBPs) is used interchangeably with "anticompetitive practices".

I. SELECTED INTERNATIONAL NORMS RELEVANT TO COMPETITION POLICY AND DEVELOPMENT

A. The Brazil–United States enforcement cooperation agreement

3. A striking feature of many international instruments dealing with competition policy is their "softness", whether in terms of the non-binding nature of such instruments, the fact that their provisions are worded so as to allow their addressees a large margin of discretion as to what course of action to follow, and/or the exclusion of dispute settlement. Enforcement cooperation agreements are legally binding, but their provisions are often loosely worded and subject to provisos. So far, only one enforcement cooperation agreement between a developed and developing country (the United States and Brazil) has been concluded. It includes the typical provisions which are contained in most enforcement cooperation agreements, with minor variations: notification of changes in applicable legislation or of specified enforcement activities affecting the other party (which in this case is mandatory subject to confidentiality restraints); commitments to give careful consideration to each

other's important interests when investigating or applying remedies against anticompetitive practices (negative comity); consultations regarding any matter relating to the agreement; sharing of non-confidential information that facilitates the effective application of competition laws and promotes better understanding of each other's competition enforcement policies and activities, to the extent compatible with respective laws and important interests and within reasonably available resources; the possibility of coordinated enforcement against related anticompetitive practices occurring in both countries; and maintenance of confidentiality of sensitive information provided by the other party. This agreement also includes a type of provision contained in some advanced agreements, "positive comity", under which each party's competition authorities shall give careful consideration to requests by the other party to undertake enforcement action against anticompetitive practices in the requested country's territory that contravene the requested country's laws and adversely affect the requesting country's important interests. However, this "positive comity" clause does not limit the prosecutorial discretion of the requested competition authorities not to take any action. Nor does it preclude the requesting competition authorities from enforcing their own laws (although the requesting country's laws need not be infringed for it to make such a request).³ The Brazil–United States agreement also provides for the furnishing of technical assistance.

4. However, this agreement does not provide for the possibility of the exchange of confidential information, subject to limitations on use or disclosure, a clause that is included in some advanced agreements. The Brazil–United States agreement also does not include two other types of clauses so far contained only in the Australia–United States enforcement cooperation agreement: a requirement to notify (to the extent compatible with laws, enforcement policies and other important interests) information about activities appearing to be anticompetitive that may be relevant to or warrant enforcement by the other party's competition authority, even if no enforcement action is undertaken by the notifying party itself; and the possibility of investigatory assistance, involving the use of compulsory processes by one country under its laws to acquire information at the request of another country whose important national interests are being affected by anticompetitive behaviour organized in the requested country, even if such behaviour is not illegal under the requested country's laws.

B. Selected regional trade agreements

5. Many free trade, economic partnership, custom union or common market/single market agreements (here collectively termed "regional trade agreements" or RTAs) often provide for procedural rules on cooperation in competition cases similar to those contained in enforcement cooperation agreements, albeit often of a less far-reaching or detailed character. Accordingly, RTAs often envisage the issuance of regulations or decisions on cooperation, and they may also be supplemented by bilateral enforcement cooperation agreements between the parties. Unlike enforcement cooperation agreements, RTAs often include substantive competition rules. Such rules vary widely among different RTAs in terms of scope, strength and detail. Some RTAs contain general obligations to take action against anticompetitive conduct, others prescribe specific standards and rules, and a few require common laws and procedures. Some RTAs provide for the applicability, content and/or effective enforcement of competition rules relating only to RBPs affecting trade among the parties, while others contain such prescriptions with respect to all RBPs.

6. Both the NAFTA and the Canada–Costa Rica RTA provide that each party shall adopt or maintain measures to proscribe "anticompetitive activities" and take appropriate enforcement action for this purpose. However, the Canada–Costa Rica FTA goes on to define "anticompetitive activities" as meaning any conduct or transaction subject to penalties or other relief under the parties' respective competition legislation, as well as amendments thereto and other legislation the parties may jointly

agree to be applicable. Such “anticompetitive activities” include (but are not limited to) cartels, abuse of dominance and mergers with substantial anticompetitive effects, unless these are excluded, directly or indirectly, from the coverage of a party’s own laws or authorized in accordance with those laws. However, it is provided that all such exclusions and authorizations shall be transparent and shall be periodically assessed by each party to determine whether they are necessary to achieve their overriding policy objectives. Provision is also made for the establishment or maintenance by each party of an impartial competition authority authorized to take appropriate enforcement action and advocate procompetitive policies and legislation independently from political interference; transparency (publication or public availability of legislation, procedures, practices or administrative rulings of general application, as well as notification to the other party of changes to these); non-discrimination (in respect of both measures to proscribe anticompetitive activities and enforcement action); procedural fairness (fair and equitable judicial and quasi-judicial proceedings subject to an appeal or review process); and technical assistance. In terms of procedural enforcement cooperation, there is provision for mandatory notification of enforcement actions that may affect the other party’s important interests (unless this would go against confidentiality concerns or would harm important interests), with detailed criteria as to what should be notified; consultations; and negative comity. The possibility that the parties may enter into additional cooperation or mutual legal assistance agreements or arrangements is also provided for. This agreement (like the NAFTA, as well as the Canada-Chile and European Union–Chile FTAs), excludes competition policy disputes from the application of dispute settlement procedures.

7. Virtually all RTAs concluded by the European Union include competition policy provisions, but their nature and scope vary. All of the Euro-Mediterranean agreements provide that certain practices (which are characterized in terms broadly similar to those used in the Treaty of Rome) are incompatible with the proper functioning of the agreement insofar as they may affect trade between the European Union and the other country concerned.⁴ Some of these agreements specifically state that these practices shall be assessed on the basis of criteria arising out of Articles 81 and 82 of the Treaty of Rome. However, other agreements contain only a declaration by the European Union that it will apply such criteria pending the adoption of implementing rules by the association councils set up under these agreements. The procedural enforcement cooperation provided for is limited to the exchange of non-confidential information (without any indication as to what might trigger such an exchange). However, the competition policy provisions of these RTAs (like those of most of the other RTAs reviewed below) have not so far been fleshed out through decisions of the councils set up to administer them.

8. Like the Euro-Mediterranean agreements, the European Union–South Africa agreement applies to RBPs only insofar as they may affect trade between the parties. However, it differs from these agreements in using standards that differ from those in EU competition rules (and resemble those in the South African competition law) to characterize such RBPs, and in specifically making a link to the territory of the parties. Thus, Article 35 of the agreement provides for controls on horizontal and vertical agreements, decisions and/or concerted practices that have the effect of substantially preventing or lessening competition in EU or South African territory (unless the firms can demonstrate that the anticompetitive effects are outweighed by procompetitive ones), and controls on abuse of market power. Provision is also made for mandatory consultations on request, exchange of non-confidential information, granting of technical assistance and application of negative and positive comity; there is no specific obligation to notify enforcement activities.

9. A quite different approach is taken in the Cotonou Agreement with the ACP States. Its scope is not limited to RBPs affecting trade between the parties. Instead, the European Union and the ACP countries undertake to implement national or regional rules and policies controlling agreements, decisions and concerted practices that have as their object or effect the prevention, restriction or distortion of competition and to prohibit abuse of a dominant position in the European Union and in the territory of ACP States, in order to ensure the elimination of distortions to sound competition and with due consideration for the different levels of development and economic needs of each ACP country. The parties also agree to reinforce cooperation in this area with a view to formulating and supporting effective competition policies with the appropriate national competition agencies that progressively ensure the efficient enforcement of the competition rules by both private and State enterprises. Cooperation is to include, in particular, assistance in the drafting of an appropriate legal framework and its administrative enforcement, with particular reference to the special situation of the least developed countries. No specific reference is made to cooperation in respect of individual cases.

10. A further contrast may be drawn between the Cotonou Agreement and the European Union–Mexico RTA (as supplemented by a Joint Council Decision). The latter agreement makes no provision for substantive convergence. Instead, the parties undertake to apply their respective competition laws to prevent distortions or restrictions on competition that may affect trade between the parties. However, the Decision has quite far-reaching enforcement cooperation provisions; notification of enforcement activities is mandatory in principle, for instance, although the list of what should be notified is narrower than in the RTAs or enforcement cooperation agreements concluded by Canada and by the United States.

C. Selected OECD, ICN and WTO instruments

11. The OECD Recommendation on Hard-Core Cartels (HCC Recommendation) provides that Member countries should ensure that their competition laws effectively halt and deter hard-core cartels, in particular by providing for effective sanctions, enforcement procedures and institutions with adequate powers. This Recommendation also encourages cooperation and comity in respect of enforcement against such cartels, setting forth some principles and practices for this purpose. Hard-core cartels are defined so as to exclude “agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country’s own laws, or (iii) are authorised in accordance with those laws” (para. 2(b)). However, it is provided that all exclusions and authorizations of what would otherwise be hard-core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. Members should provide the OECD with annual notice of any new or extended exclusion or category of authorization.

12. International Competition Network (ICN) members have *inter alia* approved guiding principles and recommended practices on merger notification and review. While their work in the area of cartel enforcement is not as advanced, a Working Group dealing with this area has been established. This Working Group would have two subgroups: one of them would aim to deliver guiding principles and/or recommended practices on transparency, non-discrimination, due process, effectiveness of enforcement procedures and institutions, and international cooperation on anti-cartel enforcement; the second would aim to help competition authorities improve their enforcement techniques.

13. The WTO agreements contain a number of general provisions potentially relevant to competition policy, as well as several provisions dealing specifically with competition policy issues.⁵ Among the provisions potentially relevant to competition policy may be included those dealing with special and differential (S&D) treatment. The WTO secretariat has listed 145 such S & D provisions, which it has classified under five main headings: (a) provisions aimed at increasing trade opportunities through market access; (b) provisions requiring WTO Members to safeguard the interests of developing countries; (c) provisions providing greater flexibility of commitments; (d) provisions allowing for longer transition periods; and (e) provisions providing for technical assistance. Additional provisions within these five groups relate specifically to the least-developed countries.⁶ The General Council Decision of 31 July 2004 *inter alia* recalled the Ministers' decision in Doha to review all S&D treatment provisions with a view to strengthening them and making them more precise, effective and operational⁷

14. Several provisions of the WTO agreements deal specifically with competition policy, such as those in the TRIPS agreement or in the Agreement on Implementation of Article VI (dealing with antidumping). The following review focuses on the 1996 Reference Paper on Pro-competitive Regulatory Principles to the GATS Agreement as its provisions were interpreted in the *Telmex* case, described below. This agreement sets out principles governing the regulatory framework for basic telecommunications services and has been incorporated into the schedule of GATS commitments of some WTO Members. These Members undertake to maintain appropriate measures to prevent suppliers that, alone or together, constitute a "major supplier" from engaging in or continuing anticompetitive practices. They also undertake to ensure that these suppliers provide interconnection to their integrated networks and do so on broadly nondiscriminatory terms and conditions. A "major supplier" is one that "has the ability to materially affect the terms of participation, having regard to price and supply, in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market". "Essential facilities" are defined as "facilities of a public telecommunications transport network or service that are (a) exclusively or predominantly provided by a single or limited number of suppliers; and (b) cannot feasibly be economically or technically substituted in order to provide a service." "Anticompetitive practices" include in particular "anticompetitive cross-subsidization", "using information obtained from competitors with anticompetitive results" and "not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services".

II. SELECTED CASES WITH INTERNATIONAL AND DEVELOPMENTAL IMPLICATIONS

A. International cartel cases

15. The cases described below all touch on international aspects of competition policy and/or the application of some of the instruments reviewed in part I, and also either directly involve developing countries or otherwise raise issues that would concern them.⁸ Among the major international cartel cases that have been brought by competition authorities in recent years, three in particular stand out as involving issues of international cooperation: the *Graphite Electrodes*, *Lysine*, and *Vitamins* cases. All three cartels were first discovered, prosecuted and sanctioned by the US Department of Justice (DOJ), prompted by information submitted under its leniency programme. Subsequently, several jurisdictions investigated these cartels in respect of effects on their markets. In the Republic of Korea, the Korean Fair Trade Commission (KFTC) opened an investigation into *Graphite Electrodes* after reading these

prosecutions. It initially attempted to require the suspected cartel participants to provide evidence for the investigation. However, because those companies were based abroad and most of them had no legal presence in the country, the KFTC was unable to enforce these information requests. It then issued requests for information to foreign competition agencies that had prosecuted the cartel. While some of them responded positively, the only information provided was already in the public record. (The Republic of Korea has no enforcement cooperation agreement with any other country.) Although a relatively significant amount of such information arose from the criminal trial in the United States, by itself it was insufficient to sustain a prosecution by the KFTC. The KFTC was eventually able to impose penalties on six of the foreign firms involved, but only after pouring enormous effort and time into the investigation.

16. In the *Lysine* case, the Brazilian authorities became aware of the investigation because of a DOJ presentation during a seminar. However, only after the case went to trial and the available material became public were they able to obtain transcripts of the cartel meetings from the DOJ showing that Latin America and Brazil were included in the world market division set by the cartel. This enabled the Brazilian authorities to press on with their own investigations and eventually sanction the cartel.

17. In the *Vitamins* case, after reading press releases announcing the prosecution of this cartel in the United States, the Brazilian competition authorities began their investigation of the Brazilian subsidiaries of some of the firms involved. However, they made little progress, as the fact that the case had not gone to trial in the United States prevented the DOJ from sharing documents because of confidentiality restraints (partly because of the leniency arrangement concluded with one of the firms). However, some general information was later received informally from North American sources, particularly the DOJ (even though the Brazil–United States cooperation agreement had not been concluded at that time); an important hint transmitted was that the *Vitamins* cartel operated very similarly to the *Lysine* cartel. The Brazilian competition authorities still needed to undertake extensive investigations before obtaining sufficient evidence that, in line with instructions from their global headquarters, the Brazilian subsidiaries of these firms had cartelized Brazil and the rest of the Latin American market. They accordingly ordered that the firms concerned be sanctioned; however, the ruling is still being appealed.

18. An important sequel to the *Vitamins* case occurred in the United States and clarified the international reach of United States antitrust laws. Under the “effects doctrine”, these laws apply to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. This common-law doctrine is confirmed by the 1982 Foreign Trade Antitrust Improvements Acts (FTAIA) of the United States, which creates a general rule that the Sherman Act does not apply to foreign commerce unless the conduct has a direct, substantial and reasonably foreseeable effect on imports, domestic commerce or US exporters and the effect is of a kind considered to be harmful within the terms of the Sherman Act. The recent *Empagran* case arose from private actions brought by foreign corporations based in Australia, Ecuador, Panama and Ukraine that purchased vitamins abroad from vitamin companies for delivery outside the United States and were affected by the cartel. The foreign plaintiffs (along with purchasers based in the United States) claimed treble damages against the cartel participants under the FTAIA in respect of inflated prices paid for the vitamins in foreign markets, on the grounds that the defendants’ conduct had also produced domestic effects that had given rise to antitrust claims by domestic plaintiffs, bringing the case within the FTAIA’s “domestic injury exception”. After a Court of Appeals ruling on jurisdiction favourable to the plaintiffs had been delivered, the case went to the Supreme Court. The DOJ and the Federal Trade Commission (FTC) filed a joint *amicus curae* brief to support the petition to overturn the decision, while the Governments of Canada, Germany, Japan and the United Kingdom also filed

briefs urging that their citizens not be allowed to bypass their own remedial schemes for antitrust injury, thus upsetting the balance of competing considerations that their antitrust laws embodied and undermining their own antitrust enforcement and amnesty programmes.

19. In a unanimous decision on this case, the US Supreme Court held that it was unreasonable to apply United States antitrust law to conduct that was significantly foreign insofar as that conduct caused foreign harm and that foreign harm alone gave rise to a claim; the Court of Appeals' decision was overruled as being inconsistent with the Congressional intent behind the FTAIA and the principles of international comity, which would involve avoiding unreasonable interference with the sovereign authority of other nations.⁹ The Supreme Court rejected the plaintiffs' argument that permitting foreign parties to sue in United States courts for antitrust injuries suffered abroad would have little practical impact on foreign antitrust enforcement since many countries had adopted antitrust laws similar to those in the United States. The Supreme Court stated that other countries had enacted antitrust laws but that, even where they agreed about primary conduct such as price fixing, there was dramatic disagreement about appropriate remedies. It further noted that the application of treble damages remedies to anticompetitive conduct in the United States had generated considerable controversy. However, the judgement only covered situations where adverse foreign effects are independent of any adverse domestic effects and did not address the foreign plaintiffs' alternative argument that the foreign and domestic effects were linked, that the cartel could not have existed without an adverse domestic effect, and that this domestic effect allowed the cartel to inflict injury abroad. The case was remanded to the lower court for consideration of this separate issue; no decision has yet been taken on this.

B. Selected NAFTA and WTO cases

20. The *UPS* decision by a NAFTA arbitration tribunal has a bearing on the status of international law obligations regarding competition policy.¹⁰ In that case, the United States-based plaintiff alleged that the State-owned Canada Post Corporation (CPC) had engaged in anticompetitive practices, including predatory conduct, tied selling, cross-subsidization and unfair use of CPC's monopoly infrastructure and network for ordinary postal services to provide its products in the courier market (where it did not have a monopoly) with advantages not extended to UPS's Canadian subsidiary. UPS accordingly claimed that the Canadian Government's failure to enforce its law to control CPC's anticompetitive behaviour had contravened its obligations under NAFTA Articles 1502, 1503 and 1505.¹¹ Canada successfully challenged the tribunal's jurisdiction on the basis that the Article 1505 obligation did not cover regulation of anticompetitive practices.

21. In deciding this issue relating to the scope of the Article 1505 obligation, the Tribunal had to determine whether there was a customary international law obligation to prohibit or regulate anticompetitive practices. It relied for this purpose on the submissions of Canada, Mexico and the United States, which argued that there was insufficient state practice to show that such a customary rule had been formed; studies of national competition laws indicated that many States did not have competition laws (only 13 out of 34 Western Hemisphere nations and about 80 WTO members, with more than half of the laws having been enacted in the previous 10 years), while national legislation, including that of these three countries, differed markedly, reflecting their unique economic, social and political environment. The Tribunal also relied on three other points: (a) there was no indication in any material before it that national competition legislation was enacted out of a sense of general international legal obligation; (b) although references had been made by the plaintiff to fair and equitable treatment clauses in bilateral investment treaties, the plaintiff had not attempted to establish that this state practice reflected the existence of a generally owed international legal obligation which,

moreover, had to relate to the specific matter of requiring controls over anticompetitive behaviour; and (c) multilateral treaty and codification processes demonstrated the absence of customary rules, as WTO discussions showed that Members were only now beginning to address the possibility of negotiating multilateral rules in this area (which was to be related to the absence in WTO treaties of any general set of provisions prohibiting or controlling anticompetitive behaviour), while there was also no reference to the regulating of anticompetitive behaviour in draft articles on denial of justice to aliens or the international responsibility of States for injuries to aliens submitted to the UN International Law Commission.

22. A contrast can be made between the *Empagran* and *UPS* cases on the one hand and the recent WTO *Telmex* case on the other.¹² Mexico's international long distance (ILD) rules provided that Telmex (Mexico's largest supplier of telecommunications services) had to negotiate a settlement rate for incoming calls with foreign suppliers and apply that rate to interconnection for incoming traffic from the United States; that Telmex had to give up traffic to, or accept traffic from, other suppliers depending on whether the proportion of incoming traffic surpassed or fell short of its proportion of outgoing traffic; and that it might then enter into "financial compensation agreements" with other operators, which required the approval of the Mexican authorities. The United States brought a successful complaint before the WTO Dispute Settlement Body (DSB) alleging that the access rate was not cost-oriented and that Mexico had effectively set up a State-authorized cartel of telecommunications operators, thus inhibiting foreign entry in contravention of the Reference Paper.

23. The panel's findings and reasoning related to a large extent to the interpretation of the Reference Paper, but there was much of more general relevance to competition policy. A key finding was that the "relevant market" within the terms of the Reference Paper was the termination in Mexico of telephone calls from the United States, in line with the notion of demand substitution, which was "central to the process of market definition as it is used by competition authorities". The panel also ruled that the term "anticompetitive practices" broadly suggested actions that lessened rivalry or competition in the market; and the examples of "anticompetitive practices" in the Reference Paper illustrated certain practices that were considered to be particularly relevant in the telecommunications sector. While it considered that all of these practices could be undertaken by a major supplier on its own, such a supplier could also be comprised of different companies, and this itself suggested that horizontal coordination of suppliers might be relevant. The panel further reasoned that the meaning of "anticompetitive practices" was informed by the use of this term in WTO members' competition legislation; the background note by the WTO Secretariat indicated that many WTO members maintained competition laws, the term "anticompetitive practices" was often used in these laws to designate categories of unlawful behaviour, and, while the range of anticompetitive practices prohibited varied among members, practices that were unlawful under competition laws included cartels such as agreements to fix prices or share markets, as well as vertical restraints and abuses of dominance. The panel also looked at the international picture in this connection, noting that the meaning of "anticompetitive practices" and the importance of controlling them was also informed or emphasized by related provisions of some international instruments, such references already being contained in the Havana Charter, and now included in the Set, as well as the HCC Recommendation calling for strict prohibition of cartels (this was relevant since both Mexico and the United States were OECD members); and reference had been made in the work of the WTO Working Group to the pernicious effects of hard-core cartels, and to the consensus that existed among competition officials that these ought to be banned. It accordingly ruled that the object and purpose of the Reference Paper supported the conclusion that the term "anticompetitive practices", in addition to the examples mentioned, included horizontal price-fixing and market-sharing agreements by suppliers, which, at the national or international level, were generally discouraged or disallowed.

24. Accordingly, the panel ruled that the ILD rules required practices by Telmex that were “anticompetitive” within the meaning of the Reference Paper. The panel rejected Mexico’s arguments that these measures were procompetitive and prevented predation by foreign entrants and that by having a competition law in place, it did maintain “appropriate measures” to prevent anticompetitive practices. The panel also considered that national doctrines whereby a firm complying with a specific legislative requirement would be immunized from being found in violation of the domestic competition law were not applicable here since, under principles of public international law and in accordance with the Vienna Convention, a requirement imposed by a WTO Member under its internal law on a “major supplier” could not unilaterally erode the international obligations incurred by the commitments made in its schedule to other WTO members to prevent major suppliers from “continuing anticompetitive practices”. However, the panel stated that, beyond its findings regarding horizontal price fixing and market allocations among competing suppliers of basic telecommunications services, the term “anticompetitive practices” might be interpreted differently by different WTO members.

III. IMPLICATIONS AND ISSUES FOR POSSIBLE EXAMINATION

A. Common approaches and cooperation on cases

25. During the discussions on a possible multilateral framework on competition within WTO, it was suggested by Canada that “While cooperation may itself be voluntary, it is founded upon certain prerequisites, notably that of mutual trust. Trust is also something that cannot be mandated by international agreement, nor can it be subject to rules – but an international agreement can play an important role in facilitating trust by promoting convergence among its signatories... The key element in this is encouraging familiarity amongst the countries in question... A multilateral agreement where countries commit themselves to certain common approaches on competition policy would provide over time the practical basis for such trust to emerge by broadening the convergence on best practices between Members.”¹³

26. Canada also suggested that the HCC Recommendation did not take any position as to whether competition laws relating to hard-core cartels should be based on *per se* prohibitions or a rule of reason approach, or impose a civil or criminal law framework with regard to enforcement, sanctions and fines, which are matters to be decided by national authorities; and that, during the negotiations on the Recommendation, an attempt had been made to develop more detailed definitions of hard-core cartels, but this had been abandoned because it might lead to the development of common standards, whereas the needs and circumstances of Member States were not identical, and such a harmonized approach might have provided a basis for determining whether a Member’s law conformed to the Recommendation.¹⁴ It has also been suggested (by the Republic of Korea) that, even though the Set’s and the HCC Recommendation’s definitions on cartels do not differ much in substance, the Set’s definition may have a broader scope as it does not explicitly provide for exemptions or authorizations and explicitly covers anticompetitive arrangements such as collective refusals to deal or collective denial of access to associations, as well as price-fixing agreements “including as to exports and imports”; however, it is also added in this document that “it should not be construed that the Set precludes other forms of cartels that is not included in the list, nor that the Recommendation necessarily precludes certain forms or types of cartels, including export or import cartels.”¹⁵

27. Commenting on *Lysine* and similar cases, the Brazilian authorities stated that, “Despite the signature of the international agreement between Brazilian and North American authorities, the most valuable source of international cooperation continues being informal.”¹⁶ On the other hand, the former head of the DOJ’s Antitrust Division indicated that, in the course of investigating the *Lysine* and *Citric Acid* cases (the latter also involved an international cartel), the DOJ could not share evidence relevant to other countries that it had discovered, as the countries concerned were not party to antitrust cooperation agreements with the United States.¹⁷ An OECD report also suggests that “Korea’s experience in the graphite electrodes case is instructive as to the difficulties that can confront a country that does not obtain cooperation from one of the conspirators in an international cartel case. Korea also suffered from perceptions that it was in some sense a developing country, and one that did not have a substantial history of competition law enforcement.”¹⁸ Further commenting on the *Graphite Electrodes* and *Vitamins* cases, the report notes: “These conspiracies presumably affected many, if not most, countries world-wide, yet the prosecutions occurred mostly if not exclusively in OECD countries... International cooperation among competition agencies was limited mostly to the exchange of public information, which for countries that did not benefit from cooperation by one or more parties to the cartel was not sufficient to support a prosecution... Leniency programmes were directly responsible for the success of the prosecutions in some countries, but a salient and quite necessary feature of leniency programmes – the strict confidentiality that is accorded the information that is derived from a leniency application – prevented those few countries from sharing that information with their foreign counterparts. Moreover, only a few countries benefited from leniency applications. Coordination of leniency programmes would be difficult, but it could substantially enhance cooperation against international cartels. The network of bilateral and plurilateral cooperative relationships is expanding, but there are still many countries that are not parties to them, or to many of them, and those countries are less likely to benefit from international cooperation because of it. Perhaps the most important impediment to improved cooperation is the restrictions, again justified to some extent, against disclosure of confidential or protected information developed in the course of a competition investigation.”

28. Two suggestions made to cope with such difficulties relating to leniency agreements are (a) offering cartel members the prospect of leniency in a number of jurisdictions in return for information on the cartel’s activities within those jurisdictions; and (b) offering a firm that receives an amnesty from another WTO member’s competition authority no worse treatment if the firm comes forward with the same information it supplied the first competition authority and if it supplies any additional information and assistance needed to secure a prosecution in the second jurisdiction.¹⁹ The same report urges that a binding international accord on the enactment of cartel laws and specifying minimum standards of cartel enforcement in each jurisdiction would have positive “spillover” effects in other jurisdictions, because (a) public announcements in one nation about cartel enforcement actions tend to trigger investigations by trading partners, which thus benefit from active enforcement abroad, and these benefits are likely to be reinforced over time as formal and informal cooperation between competition authorities deepens; and (b) cartel investigations depend on securing relevant testimony and documentation and, to the extent that an international cartel hides such documentation in a jurisdiction that cannot or will not cooperate with foreign investigations into the cartel’s activities, this jurisdiction’s actions have adverse effects on its trading partners’ interests. Thus, an international accord can go some way towards eliminating safe havens for domestic as well as international cartels.

29. On the other hand, Trinidad has queried whether smaller economies would be able to effectively discipline large multinational corporations, given the power asymmetry; it has accordingly suggested

that new and creative ways need to be developed for helping developing countries, and smaller economies in particular, to benefit from a competition regime with respect to cross-border issues.²⁰ Along the same lines, it has been suggested that small economies cannot always make a credible threat to prohibit a merger or an export cartel of foreign firms since, given that trade in the small economy is usually only a small part of the foreign firm's total world operations, were the small economy to place significant restrictions on the foreign firm's conduct, the latter would most likely choose to exit the small economy, with consequent net negative welfare effects. There might also be political resistance from the home countries of these foreign firms.²¹ The same report further suggests that harmonized rules that rely for their enforcement on unilateral actions taken by the harmed jurisdiction would be disadvantageous for small economies and would not meet their concerns with regard to extra-territorial conduct with negative effects on their domestic markets, so such harmonized rules should include a rule that prevents all export cartels. It may be noted in this connection that long-standing recommendations have been made that all countries repeal immunity for export cartels to the extent that such conduct would be unlawful if directed at the domestic market,²² or that export cartels be prohibited unless they can demonstrate that they serve to overcome a genuine barrier to competition in the importing country, or can invoke an efficiency defence.²³ However, as has been highlighted by the *Empagram* case, countries affected by international cartels may have sensitivities about the application of foreign laws or sanctions to these cartels. Moreover, even in the absence of explicit exclusions, the coverage of competition laws generally does not extend to practices only affecting foreign markets.

B. Issues for possible examination

30. While some of the above-mentioned comments or suggestions were made in relation to a possible multilateral framework on competition housed within the WTO, they may be relevant to provisions of other possible multilateral instruments, as well as of bilateral and regional agreements. Accordingly, the following questions might be examined by the Group of Experts in working out how possible international agreements on competition might apply to developing countries, including through preferential or differential treatment: (a) in cases of RBPs with international elements, the relative roles and importance of binding agreements vis-à-vis informal cooperation and national enforcement efforts; (b) the degree and specificity of commitments to common approaches in possible agreements, in the light of provisions on common approaches in existing international instruments, common approaches and divergences at the national or regional levels (including in respect of exceptions and exemptions from competition policy) and the lack of experience of many developing countries in this area; paragraph 8 of the São Paulo Consensus would be relevant in this connection;²⁴ (c) how far such commitments might succeed in promoting convergence in practice, given the nature of commitments to common approaches in existing agreements and their legal interpretation and application by parties to such agreements (it is generally accepted, for instance, that it is difficult to discern instances of case-by-case *de facto* discrimination); (d) how far the absence or limited nature of such commitments would adversely affect mutual trust and international cooperation (both where there are actually substantial divergences in approach and where there are not), taking into account any linkages or balance in the provisions of existing international instruments relating to common approaches, case-specific procedural cooperation and dispute settlement, and prospects that national laws will unilaterally follow (or continue to follow) common approaches; and (e) which specific divergences in approach might act as significant barriers to agreement on case-specific cooperation or informal cooperation.

31. Further questions that might be examined include (a) whether or how the specification of minimum standards of cartel enforcement in an international agreement might assist competition

authorities in developing countries in detecting and undertaking enforcement against domestic or international cartels, taking into account available resources and expertise, the likely interest of cartel participants in developing-country leniency offers, the likely availability of significant documents or potential witnesses within developing countries, the ability to enforce developing countries' laws outside their borders, and bargaining power vis-à-vis large firms; (b) possible incentives for countries with effective enforcement to cooperate with countries with less effective enforcement (mainly developing countries); (c) the precise nature of cooperation provisions (relating to, for example, notification or investigatory assistance) that would assist countries in effectively tackling RBPs with an overseas element;²⁵ (d) how obstacles to international cooperation created by confidentiality restraints could be tackled; (e) possibilities and conditions for application of competition laws to RBPs affecting only foreign markets;²⁶ (f) preferential or differential treatment for developing countries in respect of rights and obligations under possible agreements;²⁷ (g) means of enhancing cooperation among developing countries in this area, in the process of implementing paragraph 104 of the São Paulo Consensus;²⁸ and (h) enhancement of coordination of work in this area by different international bodies.

32. To date, the Set of Principles and Rules is the only multilateral instrument with a universal character dealing with the area of competition law and policy and setting out commonly agreed standards in this area. Although it is not legally binding, it has the political authority and legitimacy of a unanimously adopted General Assembly resolution.²⁹ The Fourth Review Conference on the Set, held in 2000, reaffirmed the Set's validity, called on all member States to implement its provisions and further reaffirmed the fundamental role of competition law and policy for sound economic development. Accordingly, any examination of the above-mentioned questions should take due account of the Set's provisions; it might be used as a guide or framework regarding the manner whereby possible international agreements on competition might apply to developing countries (including through preferential or differential treatment). Account might also be taken, as appropriate, of relevant provisions of the WTO Agreements, including their provisions relating to S&D treatment and ongoing efforts to strengthen them and make them more precise, effective and operational. Such an examination might help to enhance consistency and coordination among national laws and different forms or levels of international cooperation in this area. It might also feed into the elaboration by UNCTAD of Model Cooperation Provisions (MCP), with alternative options based on typical clauses contained in different international instruments (without limiting Governments' discretion to insert additional clauses or additional wording within any typical clause).³⁰ An explanatory commentary on the MCP might take into account any UNCTAD discussions or comments by member States on the above-mentioned questions. The mechanics of how cooperation under some provisions might work in practice might also be illustrated through some hypothetical cases based *inter alia* on the cases reviewed here.

¹ See UNCTAD, Report of the Intergovernmental Group of Experts on Competition Law and Policy (TD/B/COM.2/52, TD/B7COM.2/CLP/39), Agreed Conclusions, para. 4. This request of the Group of Experts follows such a request by the Fourth Review Conference on the Set of Principles and Rules in 2000.

² The scope, coverage and enforcement of competition laws and policies and analysis of the provisions of the Uruguay Round agreements relevant to competition policy, including their implications for developing and other countries (TD/RBP/COM.2/EM/2); Recent Important Competition Cases in Developing Countries

(TD/B/COM.2/CLP/26); and Experiences Gained So Far on International Cooperation on Competition Policy Issues and the Mechanisms Used (TD/B/COM.2/CLP/21/Rev.2).

³ However, the United States is the only country whose competition law applies to RBPs in foreign markets affecting its exporters.

⁴ These agreements have been concluded by the European Union with Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority and Tunisia.

⁵ See J. Mathis, WTO core principles and prohibition: Obligations relating to private practices, national competition laws and implications for a competition policy framework, UNCTAD consultant report (UNCTAD/DITC/CLP/2003/2).

⁶ See WTO, Developing Countries and the Multilateral Trading System: Past and Present, Background Note by the Secretariat, 1999, and Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by the Secretariat, WT/COMTD/W77.

⁷ See WTO General Council, Doha Work Programme, Draft General Council Decision of 31 July 2004, WT/GC/W/535.

⁸ See S. Evenett, Can developing countries benefit from WTO negotiations on binding disciplines from hard core cartels?, UNCTAD consultant report (UNCTAD/DITC/CLP/2003/3); and OECD, Hard core cartels: Recent progress and challenges ahead (CCNM/COMP/TR(2003)7).

⁹ *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, No. 03-724 (U.S. 14 June 2004), 614/04.

¹⁰ *An arbitration under chapter 11 of the North American Free Trade Agreement between United Parcel Service of America Inc. and Government of Canada, Award on Jurisdiction*, 22 November 2002.

¹¹ Art.1502 of NAFTA affirms the right of a Member to designate both privately owned and public monopolies, subject to the constraints that they must (a) act in accordance with the obligations under NAFTA law; (b) act solely in accordance with commercial considerations in their purchase or sale of the monopoly good or service; (c) provide non-discriminatory treatment to NAFTA investors and investments, and to NAFTA goods and service providers in the purchase or sale of the monopoly good or service in the relevant market; and (d) not use their monopoly position to engage in anticompetitive behaviour in a non-monopolized market. Pursuant to Art. 1503, state enterprises must act in a manner consistent with the NAFTA obligations on investment and financial services and must maintain non-discriminatory treatment in their sales to NAFTA investors or investments and not use their monopoly positions to engage in anticompetitive practices in non-monopolized markets, including through discriminatory provision of the good or service, cross-subsidization or predatory pricing. Art. 1505 provides that each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

¹² See WTO, *Mexico – Measures affecting telecommunications service – Report of the Panel*, WT/DS204/R, 2 April 2004, critically commented on in P. Marsden, WTO decides its first competition case, with disappointing results, *Competition Law Insight*, May 2004.

¹³ See WTO Working Group on the Interaction between Trade and Competition Policy, Communication from Canada, 2 July 2001, WT/WGTCP/W/174.

¹⁴ See WTO Working Group on the Interaction between Trade and Competition Policy, Communication from Canada, 12 August 2002, WT/WGTCP/W/201.

¹⁵ See WTO Working Group on the Interaction between Trade and Competition Policy, Communication from Korea, Hardcore Cartels and Voluntary Cooperation: Conceptual and Practical Enforcement Issues, WT/WGTCP/W/225.

¹⁶ See Evenett, *op. cit.*

¹⁷ See J. L. Klein, A note of caution with respect to a WTO agenda on competition policy, Address to the Royal Institute of International Affairs, Chatham House, London, 18 November 1996 (mimeo).

¹⁸ See CCNM/COMP/TR(2003)7.

¹⁹ See Evenett, *op. cit.*

²⁰ See WTO Working Group on the Interaction between Trade and Competition Policy, Communication from Trinidad and Tobago, WT/WGTCP/W/143, 2 August 2000.

²¹ See M. Gal, Competition policy in small economies, OECD Global Forum on Competition Policy, CCNM/GF/COMP/WD(2003)42.

²² See American Bar Association, *Special Committee Report on Antitrust* (1991).

²³ See OECD, *Obstacles to Trade and Competition*, Paris, 1992.

²⁴ The paragraph states: "It is for each Government to evaluate the trade-offs between the benefits of accepting international rules and the constraints posed the loss of policy space. It is particularly important for developing

countries, bearing in mind development goals and objectives, that all countries take into account the need for appropriate balance between national policy space and international disciplines and commitments.”

²⁵ Para. E.9 of the Set provides for the supply by States on request, or at their own initiative when the need comes to their attention, to other States, particularly developing countries, of 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 RBPs.

²⁶ Para. E.4 of the Set provides that States should seek appropriate remedial or preventive measures to prevent and/or control the use of RBPs within their competence when it comes to their attention that these adversely affect international trade, and particularly the trade and development of developing countries.

²⁷ Para. C.7 of the Set provides for preferential or differential treatment for developing countries in this area.

²⁸ This provides that UNCTAD should further strengthen analytical work and capacity-building activities to assist developing countries on issues related to competition law and policies, including at a regional level. Para. E.7 of the Set also provides for regional and subregional cooperation through the exchange of information on RBPs or on the application of RBP control laws, or through mutual assistance for RBP control.

²⁹ G.A. resolution 35/63 of 5 December 1980 (TD/RBP/CONF/10/Rev.2).

³⁰ This was proposed in TD/B/COM.2/CLP/21/Rev.2.