



**United Nations  
Conference  
on Trade and  
Development**

Distr.  
GENERAL

TD/B/COM.2/CLP/48  
22 December 2004

Original: ENGLISH

TRADE AND DEVELOPMENT BOARD  
Intergovernmental Group of Experts on  
Competition Law and Policy  
Sixth session  
Geneva, 8–10 November 2004

**REPORT OF THE INTERGOVERNMENTAL GROUP OF EXPERTS ON  
COMPETITION LAW AND POLICY ON ITS SIXTH SESSION**

Held at the Palais des Nations, Geneva,  
from 8 to 10 November 2004

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## Chapter I

### AGREED CONCLUSIONS ADOPTED BY THE INTERGOVERNMENTAL GROUP OF EXPERTS ON COMPETITION LAW AND POLICY AT ITS SIXTH SESSION

*The Intergovernmental Group of Experts on Competition Law and Policy,*

*Recalling* the United Nations Set of Principles and Rules on Competition, the decisions on competition issues adopted by UNCTAD X in paragraphs 140–143 of the Bangkok Plan of Action (TD/386), and 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,

*Taking note* of United Nations General Assembly resolution 55/182 of 20 December 2000, which “reaffirms the role of competition law and policy for sound economic development, takes note of the important and useful work of the United Nations Conference on Trade and Development in this field, and, in this regard, decides to convene in 2005 a fifth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, under the auspices of the United Nations Conference on Trade and Development”,

*Recalling* further the São Paulo Consensus (TD/410) and relevant paragraphs related to competition law and policy adopted at UNCTAD XI,

1. *Takes note* with appreciation of UNCTAD's relevant work in the field of competition law and policy and consumer protection, and *invites* the secretariat to further strengthen its analytical work and capacity-building activities to help ensure that anti-competitive practices do not impede or negate the realization of the benefits that should flow from liberalization in globalized markets, in particular for developing countries and LDCs, as well as for economies in transition;

2. *Takes note* of the *documentation* prepared by the UNCTAD secretariat for the sixth session of the Intergovernmental Group of Experts, and *requests* the secretariat to revise/update documents TD/B/COM.2/CLP/21/Rev.2, TD/B/COM.2/CLP/37/Rev.1, TD/B/COM.2/CLP/43, TD/B/COM.2/CLP/44, TD/B/COM.2/CLP/46 and TD/B/COM.2/CLP/47 in the light of the comments made by member States at the sixth session or to be sent in writing by 31 January 2005 for submission to the Fifth United Nations Conference to Review All Aspects of the Set, and to make these revised documents available through UNCTAD's website;

3. *Requests* the UNCTAD secretariat to prepare for the Fifth United Nations Conference to Review All Aspects of the Set in 2005 studies on closer international cooperation in competition policy for the development objectives of developing and least developed countries, in particular:

- (a) An assessment of the application and implementation of the Set;
- (b) A presentation of types of common provisions to be found in international, particularly bilateral and regional, cooperation agreements on competition policy and their application;
- (c) A synthesis of recent cartel investigations that are publicly available;

4. *Recommends* that the Review Conference in 2005 consider the following issues for better implementation of the Set:

- (a) An ad hoc voluntary peer review during the Conference;
- (b) Techniques for gathering evidence on cartels;
- (c) The role of economic analysis in competition law enforcement;
- (d) The role of the judiciary in competition law enforcement;
- (e) Application of competition law and policy to the informal sector; and
- (f) How to operationalize special and differential treatment for developing countries in competition law and policy;

5. *Takes note* with appreciation of the voluntary financial and other contributions received from member States; *invites* member States to continue to assist UNCTAD on a voluntary basis in its capacity-building and technical cooperation activities by providing experts, training facilities or financial resources; and *requests* the UNCTAD secretariat to pursue and, where possible, expand its capacity-building and technical cooperation activities (including training) in all regions, within the available resources, taking into account the deliberations and consultations that took place at the sixth session, and to provide updated information about its forthcoming events on its website;

6. *Requests* the UNCTAD secretariat to prepare for consideration by the Fifth Review Conference:

- (a) An updated review of capacity building and technical assistance, taking into account the information to be submitted by member States and international organizations no later than 31 January 2005;
- (b) A further revised and updated version of the Model Law on Competition on the basis of submissions to be received from member States no later than 31 January 2005; and
- (c) An information note on recent important cases, with special reference to competition cases involving more than one country, and taking into account information to be received from member States no later than 31 January 2005;

7. *Requests* the secretariat to continue to prepare the following documents on a regular basis and to make them available on the Internet:

- (a) Further issues of the *Handbook on Competition Legislation*, including regional and international instruments;
- (b) An updated version of the *Directory of Competition Authorities*.

## Chapter II

### GENERAL STATEMENTS

#### Opening plenary

1. The **Officer-in-Charge of UNCTAD** said that the sixth session of the Intergovernmental Group of Experts would have to prepare for the Fifth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in the light of the resolution adopted by the Fourth Review Conference and the framework established by UNCTAD XI, as well as of current trends in this area and relevant work done elsewhere. The São Paulo Consensus had recognized competition policy as a cross-cutting issue with an important role in the promotion of supply capacity, competitiveness for development, market access and market entry, as well as in ensuring the equity of, and development gains from, the trading system. UNCTAD's central and unique role in this field had been reconfirmed and its work programme reinforced, particularly to help ensure that anti-competitive practices did not impede or negate the realization of the benefits that should flow from liberalization in global markets, particularly for developing and least developed countries. The Consensus called for improved cooperation between competition authorities and for further work, in particular on issues relating to regional cooperation. He suggested a number of subjects that the Group might recommend for consideration by the Fifth Review Conference, including the promotion of international cooperation and UNCTAD's further work in this connection; voluntary peer reviews; competition aspects of concentrated market structures in some commodity sectors at the international and national levels; competition issues relating to large distribution networks; competition policy and the exercise of intellectual property rights; how competition policy may be suited to development needs and conditions, such as in respect of exemptions or institutional design and procedures; and technical assistance and capacity-building. Much work was needed to shed further light on how competition law and policy could be shaped and applied in a manner that was optimal for growth and development and in consonance with global economic trends and international norms.

2. The representative of the **Russian Federation** said that the competition authority of his country cooperated with many international organizations but had experience of reviewing competition policies only within the framework of the Organization for Economic Co-operation and Development (OECD). Moreover, his country was the first non-OECD member country whose regulatory reforms had been the subject – in 2004 – of an OECD review. The recommendations of that review were aimed at improving the efficiency of the competition authority and were being implemented in the course of its reorganization, as well as in the process of improving national competition legislation. Two new draft federal laws had been prepared taking into account those recommendations, while the preparation and the presentation of the review to the OECD had also allowed the Russian competition authority to benefit from the experience acquired by the OECD.

#### Closing plenary

3. The representative of Ukraine said that, during the 10-year period of the implementation of competition policy in his country, an organizational and legal system of protection of economic competition had been established. The prevention of unfair competition and the status of the national antimonopoly authority were set out in the Constitution and were a specific feature of his country's experience. After the adoption of the new law on the protection of competition, work on the drafting of a competition legal code

had begun. Moreover, in 2004 the antimonopoly authority had secured the right to formulate state antimonopoly policy and to cooperate in this area with both the Government and the Parliament.

4. The representative of **Turkey** conveyed the offer by his Government to host the Fifth UN Conference to Review All Aspects of the Set of Principles and Rules in the autumn of 2005 and to meet the logistical needs for organizing the Conference. He requested that a virtual platform be created by UNCTAD to enable participants in the Intergovernmental Group of Experts to keep in touch.

5. The representative of **Tunisia** said that there might be a need to revise the concepts of the Set in line with developments in the area. He expressed the willingness of his country to host a regional training centre on competition law and policy.

6. The representative of **Saint Lucia** expressed appreciation for the UNCTAD regional seminar on consumer protection organized in his country earlier in the year and requested further assistance in connection with the implementation of the CARICOM Single Market, which would be created the following January.

7. The representative of **El Salvador** expressed appreciation to the Swiss Government and to UNCTAD for technical co-operation received under the COMPAL project.

8. The representative of **Cameroon** requested that the list of participants in the meeting include their addresses. He expressed regret that a number of documents distributed during the meeting were available only in English and requested that further efforts be made to translate them into French.

9. The representative of **Benin** also requested that all documents be translated into French.

10. The representative of **OECD** expressed satisfaction with the attendance and the subjects discussed at the meeting, as well as the complementarity between the work of her organization and UNCTAD.

11. The representative of the **Consumer Unity and Trust Society** requested that civil society and non-governmental organizations be given the opportunity to cooperate in the organization of preparatory regional seminars prior to the Fifth Review Conference, as well as to participate in the Conference itself.

12. The representative of **Egypt** requested that an opportunity be provided for further discussions in preparation for the Fifth Review Conference, during meetings of the Commission on Investment, Technology and Related Financial Issues or during regional seminars.

13. The representative of **Burkina Faso** expressed his appreciation for UNCTAD's support and requested UNCTAD to help build up the capacity of the West African Economic and Monetary Union (WAEMU) to implement its regional competition law at the national and regional levels.

14. The representative of **Nepal** expressed appreciation for technical co-operation provided by UNCTAD for the preparation of a competition law, which would soon be finalized and adopted. He requested further assistance for its implementation.

15. The **Director of the Division on International Trade in Goods and Services and Commodities** expressed deep appreciation for the offers to host the Fifth Review Conference and a regional training centre made respectively by the Turkish and Tunisian Governments.

She pledged that the secretariat would make further efforts to translate documents from English into other languages, despite resource constraints, and that regional seminars would be held to prepare for the Conference.

### Chapter III

## CONSULTATIONS AND DISCUSSIONS REGARDING PEER REVIEWS ON COMPETITION LAW AND POLICY; REVIEW OF THE MODEL LAW; AND STUDIES RELATED TO THE PROVISIONS OF THE SET OF PRINCIPLES AND RULES

### Chairperson's summary of consultations

16. Four subjects were discussed under this agenda item. First, an interactive discussion was held to obtain a better understanding of the strengths and weaknesses of *peer review related to competition policy* through comparisons of the operation of reviews taking place in various forums. An expert from France, who had acted as moderator at the ad hoc Meeting of Experts on Peer Review on Competition Policy organized by the UNCTAD secretariat on 15–16 July 2004, presented a summary of the discussions which had taken place during that meeting. This was followed by interventions from the floor. Salient subjects covered during the discussions included:

- (a) Objectives and advantages of peer review;
- (b) Its potential for promoting best practices and convergence in this area and raising the profile of competition authorities;
- (c) The advantages of its being voluntary in nature;
- (d) Scope of a review, including in respect of regulated sectors, and whether reviews should cover countries without competition laws, or with competition laws but no experience of implementation;
- (e) Criteria applied and how far account would be taken of development conditions and policies, capacity constraints or weakness of competition culture;
- (f) Governmental institutions involved within countries reviewed;
- (g) Financial and human resource burdens;
- (h) Review procedures used and experiences of countries reviewed within the OECD and under the WTO's Trade Policy Review Mechanism (TPRM);
- (i) Flexibility of review procedures in line with objectives and resources;
- (j) Workability of peer review within a large group;
- (k) Appropriateness of review in a South-South or regional context;
- (l) Linkages, donor conditionality or long-term follow-up in connection with technical assistance/capacity-building action plans; and
- (m) Appropriateness of having peer review within UNCTAD.

17. It was noted that some countries, as well as one regional grouping of States, had volunteered for peer reviews of their competition laws and policies within UNCTAD, and it was accordingly accepted that the topic of ad hoc voluntary peer review should be considered by the Fifth Review Conference.

18. Secondly, consultations were held on the subject of *cooperation and dispute mediation mechanisms in regional integration agreements (RIAs)* related to competition law

and policy. To assist the Group of Experts in its deliberations on this subject, a presentation was made by an expert from the Amsterdam Law School. This was followed by interventions by experts from Brazil, the Common Market of East and Southern Africa (COMESA), the West African Economic and Monetary Union (WAEMU), the European Union, the Southern African Development Community (SADC), Switzerland and Zimbabwe, as well as other interventions from the floor.

19. The following were among the points covered:

- (a) The overlap among provisions of different agreements and the fact that no one size fitted all in this area;
- (b) Institutional elements of regional trading agreements (RTAs), including coverage of trade measures and of other area-wide or cross-border flows or State aids, rights directly granted to individuals as well as member States, powers provided to the executive authority, the relationship between and among regional and national laws, and degree of transfer of sovereignty;
- (c) Functional aspects, including the number, development levels, market sizes, capacities and legal and institutional characteristics of RTA members, as well as the anti-competitive practices causing problems;
- (d) The relationship of the regional competition policy with regional integration objectives, including how far it was linked to or weighed against trade policy and whether it could override domestic law;
- (e) Coverage or ease of enforcement with respect to anti-competitive cross-border or exclusionary practices affecting import or export trade or area-wide competition, as well as enforcement with respect to multinationals operating within the region;
- (f) National approaches or cooperation mechanisms such as the effects doctrine, rights of complaint of foreign firms and national treatment, traditional and positive comity, notification, "soft" or top-down convergence, extended territorial jurisdiction, delegation of jurisdiction or prohibition of export cartels;
- (g) How to deal with non-compliance by "free-riders", including through enhanced flexibility, consultation mechanisms, mediation, arbitration, or regional courts;
- (h) Capacity to implement the law.

20. The applicable provisions and experiences in respect of several RIAs were highlighted during the discussions. It was requested that these discussions be reflected in UNCTAD documentation.

21. Thirdly, consultations were held on the subject of *evidence-gathering and cooperation in hardcore cartel investigations*. The lead speaker on this was a representative of the Antitrust Division of the United States Department of Justice. Other panel speakers on this topic were from Australia, Brazil, Canada, the EU, France, Japan, Peru, the Republic of Korea, South Africa, and Zambia. Further interventions were made from the floor.

22. The following were among the main issues raised or points made during the discussions, in the light of experience in several countries or regions:

- (a) Anti-cartel enforcement, methods of detecting cartels, evidence-gathering and investigative tools and problems encountered when requesting and analysing documents in cartel cases;
- (b) The meaning and treatment of hardcore cartels;
- (c) Difficulties of gathering evidence against cartels;
- (d) Detection of cartels through leniency programmes, public agency or corporate complaints, tips from insiders, proactive outreach efforts, newspaper articles, private bar and citizens/customers' complaints, and cartel profiling;
- (e) Leads to international cartels from the use of trade association cover, involvement of senior executives, fear of detection by cartel participants, global fixing of prices, worldwide volume-allocation agreements, retaliation threats used for policing cartels, audits and the use of score sheets, compensation schemes and budget meetings;
- (f) Investigation tools for evidence gathering and document gathering;
- (g) Handling of non-compliance by treating compliance seriously, setting deadlines and keeping them, memorizing agreements and certification of compliance, as well as undertaking criminal prosecutions for contempt of court, false declarations of compliance or obstruction of justice, (under procedures used by the United States Government, when wanted persons are out of the United States, methods used are border watch, red notice and extradition);
- (h) The need for all countries to strengthen enforcement against cartels through active investigation and prosecution, creation of effective leniency programmes, imposition of deterrent penalties and raising of awareness;
- (i) The danger of bid-rigging in the course of privatization, particularly in developing countries.
- (j) The need for international cooperation in this area, particularly when cartel activity is of an international nature.
- (k) The challenges developing countries face when dealing with cartel cases, particularly because of shortage of financial and human resources, and their consequent need for cooperation from developed countries.

23. Finally, consultations were held on *advocacy in promoting awareness of competition policy in developing countries*. A presentation on this subject was made by the Chairman of the Competition Board of Tunisia. This was followed by interventions by experts based in Oxford University, Brazil and the OECD secretariat, as well as a former director of the United Kingdom Office of Fair Trading.

24. The following were among the main points made during the discussions, in the light of experiences of several countries, regions or international organizations:

- (a) Advocacy and enforcement activities are complementary. Effective enforcement of competition legislation cannot be achieved without political will, broad-based public support, and public acceptance of the competition authority's legitimacy. Accordingly, competition advocacy is particularly necessary in countries lacking a competition culture and experience of competition. It should be given a more prominent role among the functions of

competition authorities in these countries, with commensurate resources. It is now increasingly the practice to include such competition advocacy in the mandate of competition authorities;

- (b) Advocacy should be tailored according to whether countries are in the pre-competition law and policy stage, have enacted a competition law but not yet begun to enforce it, or have begun enforcement;
- (c) One form of competition advocacy requires widespread and sustained awareness campaigns on the objectives and benefits of competition law and policy, aimed at increasing awareness both in the business community and among consumers. This task is complicated by the fact that competition yields long-term, diffused and what often appears to be theoretical benefits, whereas its negative effects are stark and immediately apparent. But this form of competition advocacy leads to greater compliance with the law and a more meaningful flow of complaints about non-compliance. Businesses and consumers become more cognizant of the law, their legal rights and the fact that the law can be used both as a weapon and a shield by firms;
- (d) A second form of advocacy targets government institutions and involves the monitoring of regulatory initiatives and the regulatory impact of legislation. This form of advocacy is also more important in developing countries because of the likelihood of greater vested interests. There could also be conflicts between competition policy and other policies of a developmental nature, and competition advocacy would have to recognize and adjust to these policy tensions.
- (e) Extensive use of the mass media is desirable, as well as annual reports and other well-designed publications. It is also important to disseminate speeches made by competition officials, respond to queries received, hold seminars to educate the public sector, private firms, lawyers and judges, implement antitrust compliance programmes, play a role in the revision of other legislation, and support research by academic institutions.
- (f) Advocacy derived its impetus from strong and effective enforcement, which establish the competition authority's credentials and legitimacy in the eyes of the public and legal community. Thus, it is more effective when the competition authority has resources, is independent and is seen to be carrying out its functions vigorously, efficiently and impartially. The public needs to be convinced of the usefulness of competition law through enforcement action and concrete results. The public should also see competition policy as serving developmental goals, and there should thus be a dynamic approach in line with evolving economic conditions, as well as provision for appropriate exemptions. Cases should be resolved speedily;
- (g) Trade barriers could increase the price of domestic and foreign goods and services, while insufficient implementation of competition law and policy could lead to the benefits of market liberalization being undermined by anti-competitive practices;
- (h) Regional bodies might play an important role in advocacy activities vis-à-vis member Governments, but there might be sovereignty concerns on the part of such governments;

- (i) Technical assistance is needed by many countries or regions to enable them to build competition awareness;
- (j) Anti-competitive conduct appears to affect richer and poorer sub-Saharan African nations alike. Allegations of cartelization predominate, and anti-competitive practices recurring across the region are in lines of business likely to have a relatively more substantial impact upon the poor, the rural sector and small businesses. It was suggested that poorer and less developed countries therefore need to place even higher priority upon competition law and policy than wealthier countries.

## Chapter IV

### ORGANIZATIONAL MATTERS

#### A. Opening of the session

25. The sixth session of the Intergovernmental Group of Experts on Competition Law and Policy was opened on Monday, 8 November 2004, by Mr. Philippe Brusick, Head, Competition and Consumer Policies Branch, UNCTAD. In the course of the session, the Intergovernmental Group of Experts held two plenary meetings and four informal meetings.

#### B. Election of officers

(Agenda item 1)

26. At its opening plenary meeting, on Monday, 8 November 2004, the Intergovernmental Group of Experts elected its officers, as follows:

Chairperson:	H. E. Ms. Amina Mohamed (Kenya)
Vice-Chairperson-cum-Rapporteur:	Ms. Teresa Moreira (Portugal)

#### C. Adoption of the agenda and organization of work

(Agenda item 2)

27. Also at its opening plenary meeting, the Intergovernmental Group of Experts adopted the provisional agenda for the session (TD/B/COM.2/CLP/40). The agenda was thus as follows:

1. Election of officers
2. Adoption of the agenda and organization of work
3. (i) Consultations and discussions regarding peer reviews on competition law and policy; review of the Model Law; and studies related to the provisions of the Set of Principles and Rules
- (ii) Work programme, including capacity-building and technical assistance on competition law and policy
4. Provisional agenda for the Fifth Review Conference
5. Adoption of the report of the Intergovernmental Group of Experts

#### D. Provisional agenda for the Fifth UN Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

(Agenda item 4)

28. At its closing plenary meeting, on 10 November 2004, the Intergovernmental Group of Experts approved the provisional agenda for the Fifth Review Conference (for the text of the provisional agenda, see annex I).

**E. Adoption of the report of the Intergovernmental Group of Experts**

(Agenda item 5)

29. Also at its closing plenary meeting, the Intergovernmental Group of Experts authorized the Rapporteur to complete the formalities and to finalize the report, subject to any amendments that delegations might wish to make.

**Annex I**

**PROVISIONAL AGENDA FOR  
THE FIFTH UN CONFERENCE TO REVIEW ALL ASPECTS OF THE SET OF  
MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE  
CONTROL OF RESTRICTIVE BUSINESS PRACTICES**

1. Opening of the Conference
2. Election of the President and other officers
3. Adoption of the rules of procedure
4. Adoption of the agenda and organization of work of the Conference
5. Credentials of the representatives to the Conference:
  - (a) Appointment of a Credentials Committee
  - (b) Report of the Credentials Committee
6. Review of all aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices:
  - (a) Review of application and implementation of the Set
  - (b) Consideration of proposals for the improvement and further development of the Set, including international cooperation in the field of control of restrictive business practices
7. Other business
8. Adoption of the Report of the Conference

**Annex II****ATTENDANCE \***

1. The following States members of UNCTAD were represented at the meeting:

Algeria	Malaysia
Angola	Malawi
Argentina	Mali
Austria	Mauritania
Azerbaijan	Mexico
Bangladesh	Morocco
Barbados	Mozambique
Belarus	Nepal
Belgium	Niger
Benin	Nigeria
Botswana	Oman
Brazil	Peru
Burkina Faso	Philippines
Cambodia	Poland
Cameroon	Portugal
Canada	Republic of Korea
Chad	Romania
Chile	Russian Federation
China	Saint Lucia
Costa Rica	Senegal
Côte d'Ivoire	South Africa
Dominican Republic	Sri Lanka
Egypt	Swaziland
El Salvador	Switzerland
Finland	Thailand
France	Togo
Gabon	Trinidad and Tobago
Germany	Tunisia
Ghana	Turkey
Greece	Uganda
Indonesia	Ukraine
Iran (Islamic Republic of)	United Kingdom of Great Britain and Northern Ireland
Italy	United Republic of Tanzania
Jamaica	United States of America
Japan	Venezuela
Jordan	Viet Nam
Kenya	Yemen
Lebanon	Zambia
Lesotho	Zimbabwe
Madagascar	

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\* For the list of participants, see TD/B/COM.2/CLP/INF.6.

2. The following intergovernmental organizations were represented at the meeting:
  - African, Caribbean and Pacific Group of States
  - Caribbean Community
  - Common Market for Eastern and Southern Africa
  - European Community
  - Organization for Economic Cooperation and Development
  - West African Economic and Monetary Union
3. The following United Nations agency was represented at the meeting:
  - Economic Commission for Latin America and the Caribbean
4. The following specialized agencies and related organizations were represented at the meeting:
  - World Trade Organization
5. The following non-governmental organizations were represented at the meeting:
  - General Category*
    - International Confederation of Free Trade Unions
  - Special Category*
    - Exchange and Cooperation Centre for Latin America
  - Register*
    - Consumer Unity and Trust Society
6. The following keynote speakers addressed the meeting:
  - Round Table discussion on Peer Review on Competition Policy*
    - M. Frederick Jenny, ESSEC, Paris, France
  - Round Table on Cooperation and Dispute Mediation Mechanisms in Regional Integration Agreements related to Competition Law and Policy*
    - Mr. Jim Mathis, Professor, Law School of Amsterdam, Netherlands
  - Round Table on Evidence Gathering and Cooperation Issues in Hardcore Cartel Investigations*
    - Ms. Ann Olek, Department of Justice, Washington D.C., United States of America
  - Round Table on Advocacy in Promoting Awareness of Competition Policy in Developing Countries*
    - M. Ghazi Jeribi, President, Competition Board, Tunis, Tunisia