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Agenda item 5

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

Held at the Palais des Nations, Geneva
from 31 October to 2 November 2006

CONTENTS

I. AGREED CONCLUSIONS ADOPTED BY THE INTERGOVERNMENTAL GROUP OF EXPERTS AT ITS SEVENTH SESSION

The Intergovernmental Group of Experts on Competition Law and Policy,

Recalling the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,

Recalling the provisions relating to competition issues adopted by UNCTAD XI in the São Paulo Consensus (TD/410), including the provisions in paragraphs 89, 95 and 104 of the São Paulo Consensus,

Further recalling the resolution adopted by 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 (Antalya, Turkey, November 2005),

Reaffirming the fundamental role of competition law and policy for sound economic development and the need to further promote the implementation of the Set of Principles and Rules,

1. *Encourages* developing countries 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 the objectives of other national policies and capacity constraints;

2. *Recognizes* that liberalization and privatization without competition safeguards could adversely affect sound economic development;

3. *Calls upon* States to increase cooperation between competition authorities and Governments for the mutual benefit of all countries in order to strengthen effective international action against anti-competitive practices as covered by the Set, especially when these occur at the international level; such cooperation should take particular note of the needs of developing countries and economies in transition;

4. *Recognizes* the link between competition and regulation and suggests that States promote coordination between competition authorities and regulatory bodies to ensure complementarity between these authorities and the effectiveness of their work;

5. *Expresses appreciation* to the Government of Tunisia for volunteering for a peer review during the seventh session of the Intergovernmental Group of Experts and to all Governments participating in the review; *recognizes* the progress achieved so far in the enforcement of Tunisia's competition law; *invites* all member States to assist UNCTAD on a voluntary basis by providing experts or other resources for future activities in connection with voluntary peer reviews; and *decides* that UNCTAD should, in the light of the experiences with the voluntary peer reviews undertaken during the Fifth Review Conference and the seventh session of the Group of Experts and in accordance with available resources, undertake further voluntary peer reviews on the competition law and policy of member States or regional groupings of States, back-to-back with the eighth session of the Group of Experts;

6. *Notes with satisfaction* the important written and oral contributions from competition authorities of members participating in its session;

7. *Takes note* of the continued implementation of national economic reforms aimed at the establishment of competition rules and strengthening of bilateral and multilateral cooperation in the area of competition;

8. *Takes note* with appreciation of the documentation prepared by the UNCTAD secretariat for its seventh session, and *requests* the secretariat to revise/update documents in the light of the comments made by member States at the seventh session or to be sent in writing by 31 January 2007 for submission to the eighth session of the Group of Experts;

9. *Requests* the UNCTAD secretariat to prepare for the eighth session of the Group of Experts a study on competition issues at national and international levels in the energy sector;

10. *Further requests* the UNCTAD secretariat to continue publishing as non-sessional documents and to include in its website the following documents:

(a) Further issues of the Handbook on Competition Legislation;

(b) An updated version of the Directory of Competition Authorities;

(c) A further information note on recent important competition 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 2007;

(d) An updated review of capacity building and technical assistance, taking into account information to be received from member States no later than 31 January 2007; and

(e) 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 2007;

11. *Recommends* that the eighth session of the Group of Experts consider the following issues for better implementation of the Set:

(a) Competition at national and international levels: energy;

(b) Competition policy and the exercise of intellectual property rights; and

(c) Criteria for evaluating the effectiveness of competition authorities;

12. *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 available resources;

13. *Proposes*, in order to enhance the effect of presentations by speakers and delegations, that they should be complemented where possible by a more detailed account of cases, in particular those with a regional and international dimension.

II. PROCEEDINGS

A. General statements

1. The **Deputy Secretary-General of UNCTAD** underlined the fundamental role of competition law and policy for sound economic development. New legislation and regional agreements relevant to this area continued to be adopted and applied. UNCTAD played its role in promoting such trends through its research, intergovernmental and technical assistance activities. In line with the resolution adopted by the Fifth Review Conference on the Set of Principles and Rules and in the light of discussions within the ad hoc expert group and the Intergovernmental Group of Experts itself, the Group of Experts might take concrete action to help ensure that anti-competitive practices did not impede the benefits of trade liberalization, particularly for developing and least developed countries. The Group might also discuss the conduct of UNCTAD voluntary peer reviews on competition law and policy, taking into account experiences with such reviews during the Conference and with the review of Tunisia.

2. The representative of the **World Trade Organization** recalled that work on competition policy within the WTO had been suspended in 2004. However, the subject of competition policy continued to be of interest to his organization and constituted a very important element within its Trade Policy Reviews.

3. The representative of **Trinidad and Tobago** stated that his country had recently adopted a competition law and had sought the assistance of the UNCTAD secretariat for the establishment of a competition authority and the implementation of the law.

4. The representative of **Mozambique** expressed his appreciation for the technical assistance his Government had received from the UNCTAD secretariat on competition policy and stated that more assistance was now required towards the implementation of the law.

5. The representative of **Malawi** stated that his country was successfully implementing its process of economic reform, which took competition issues into account. Its competition authority had been operating for a year but needed technical assistance, such as study tours or sectoral studies, in connection with the implementation of the competition law.

B. Voluntary Peer Review of Tunisia – Chairperson's summary

6. After an introductory statement by the UNCTAD secretariat, the two consultants responsible for preparing the report "Examen collégial volontaire de la politique de concurrence: Tunisie" (UNCTAD/DITC/CLP/2006/2), highlighted its main findings, conclusions and recommendations. The report placed the adoption of Tunisia's competition law in 1991within the context of the economic development and structural change that had taken place in Tunisia since independence. The law dealt with liberalization, as well as the prohibition of anti-competitive and discriminatory practices, provided for enforcement of the law by both a government ministry and an independent competition council, and laid down appeal procedures. The law had been amended several times to reflect the Government's determination to establish a market economy and strengthen economic reforms and competitiveness. The report made seven broad recommendations, namely: strengthening the culture of competition among consumers and businesses; strengthening the application of competition policy in the public sector and by ministries; reinforcing penalties and sanctions, and establishing a documentation centre; training staff responsible for applying competition

policy; coordinating sector regulation and competition law enforcement; improving investigation techniques and procedures; and identifying enforcement priorities for the competition council.

7. The Tunisian delegation then made its comments and provided clarifications regarding some of the issues raised in the report. The delegation expressed appreciation for the technical assistance received from UNCTAD and from foreign competition authorities (particularly those of the EU and France). UNCTAD's voluntary peer review procedure was commended for its role in: enabling the Government of Tunisia to explain the challenges it faced in implementing its competition law and learn from countries which were more advanced in this field; providing independent views on how Tunisian competition law and policy might be developed and its enforcement enhanced; and perhaps assisting other developing countries aspiring to strengthen their competition policies. For over 10 years, the application of sound competition law and policy had provided a foundation for the reinforcement of the market economy in Tunisia and contributed to good economic growth.

8. Questions were asked by the reviewers and from the floor and replies given by the Tunisian delegation in respect of several issues arising from the report. Regarding the functioning and effectiveness of the leniency programme adopted by Tunisia in 2003, the delegation stressed that communication programmes were needed to increase enterprises' awareness of the programme. On the types of advocacy activities conducted by the authorities to enhance civil society awareness in this area, the delegation stated that this was a long-term task but a training programme was being implemented to strengthen the skills of competition experts and representatives of civil society, in parallel with enhancement of competition policy in the public sector and within ministries responsible for specific sectors. Regarding the increase in the relative numbers of cases in which sanctions had been imposed, the delegation stated that the Tunisian competition authorities were following the case law of the Tunisian courts and international standards; in particular, sanctions were applied in conformity with EU competition law. On the increase in the numbers of merger notifications to the competition authorities, the delegation stated that the authorities' assessment was made in the context of the restructuring of the national economy. Regarding remedies for tackling collusion in the banking sector, the delegation indicated that, in line with the recommendations made by the competition authorities, the Governor of the Central Bank had issued a note requesting banks to cease their anticompetitive conduct. Other subjects covered included exemptions for the sizeable public sector from competition policy; justifications for the exclusion of some services and goods from the liberalized trade regime of Tunisia; investigative powers of the competition authority; whether cartel investigations were aimed at ascertaining the intentions of the participants or the cartels' anticompetitive impact; and the roles of the courts and other bodies in the enforcement of the competition law. The delegation stressed that international cooperation was needed to help Tunisia strengthen its competition policy and requested further technical assistance from UNCTAD.

9. Concluding the peer review process, the Chairperson invited Tunisia to implement the recommendations of the report and congratulated UNCTAD for its work. The UNCTAD secretariat described efforts already being made to develop a technical assistance programme in cooperation with UNDP and other donors to implement the recommendations arising from the peer review over a period of two years. The secretariat invited other development partners to cooperate in this project.

C. 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

10. In the context of the consultations held under agenda item 3 (a), panels and related discussions were held on the following two subjects: the relationship between competition authorities and sector regulators, particularly with respect to abuse of dominant positions, and international cooperation in investigating and prosecuting hard-core cartels affecting developing countries. The summary below was prepared under the personal responsibility of the Chairperson. It presents some of the main points arising from keynote speeches, interventions from the floor and written contributions on one or both of the subjects from the Governments of the following countries: Algeria, Brazil, Cameroon, Chad, Croatia, Gabon, Japan, Kenya, Madagascar, Morocco, Republic of Korea, Romania, Togo, Turkey and Zambia. A written contribution was also received from personnel from the Institute for Consumer Protection, Mauritius. Separately, the Chairperson decided to annex to the report of the proceedings of the Intergovernmental Group of Experts the summary prepared by the Chairperson of the meeting of the Ad Hoc Expert Group on Competition Law and Policy which met on 30 October 2006.

Panel I on the relationship between competition authorities and sector regulators, particularly with respect to abuse of dominant position

11. The keynote speaker on this subject was from the Office of the Protection of Competition, Czech Republic. The other panellists were from Bolivia, Chile, France, Mali, Romania and Zambia. Presentations were also made by experts from Cameroon, Croatia, Japan, Mauritius and Turkey. Some of the points made in connection with the proceedings under this panel are highlighted below.

12. During the previous two decades, many countries had privatized their utility sectors as part of their programmes of structural economic reform. Independent sector regulators had been established during or after such privatization, as the specific characteristics of utility sectors necessitated regulation and monitoring of the activities of the actors in these markets. This was particularly appropriate as a key objective of the privatization of these sectors was to introduce competition and thereby ensure that these markets operated efficiently. A view expressed from a consumer perspective emphasized that the regulatory authorities should have a solid legal framework to ensure that consumers could access services at reasonable prices However, in addition to these regulators, there was also a need to involve competition authorities, especially in dealing with abuses of dominance.

13. The relationship between competition and regulatory authorities had thus become a significant issue. There was a consensus among the experts that cooperation and coordination between the two types of authorities at both the policy and the individual case levels was essential and should help to create a competition culture, avoid overlapping jurisdictions and enable competition authorities to be more effective. However, it was underlined that there would be differences in the respective roles attributed to these authorities in the light of the differences in countries' administrative and bureaucratic systems. Many countries provided for a clear distinction in the respective competence of these two types of authorities, whereby: the competition authority had overall responsibility for the protection of competition in all markets, acting ex-post to ensure that markets functioned in a competitive environment, to control anti-competitive practices and to sanction violations of the competition law; sector regulators were responsible for ex ante technical and economic

regulation in specific markets, including by ensuring access by other firms to the relevant networks.

14. Some experts also warned against conflicts relating to cases and suggested that the laws should set out clear provisions on who should rule in such situations. It was recommended that cooperation between these two types of authorities could be organized through cooperation agreements or bilateral protocols, which would provide for ongoing communication and exchange of information and/or consultations. This would ensure that the authorities benefited from each other's experiences and the sector-specific regulators would systematically provide information to the competition authority and take its opinion into account in performing their regulatory functions. Such consultation mechanisms might avoid conflicting rulings and blockages of the system. The experiences described by the experts showed that such formal cooperation had proved useful in many countries. Some countries had further provided that the competition authority could issue binding opinions on proposed legislation, sometimes through mechanisms whereby an official from the competition authority would participate in governmental meetings where prospective laws were discussed; while this prevented the enactment of legislation with anti-competitive provisions, it made it all the more necessary to have clear provisions laying down the forms of coordination between the competition authorities and sector regulators in cases of anti-competitive practices. Under some systems, the competition authority had the status of a court and could therefore approve or revoke the decisions of sector regulators. In some countries, the competition authorities took a more proactive role and defined priority regulated sectors where there appeared to be a need for intervention because of high market concentration. It was highlighted by an expert that, in two cases in the airline and telecommunications industries respectively, pro-competitive measures taken by the sector regulator in consultation with the competition authority had proved to be useful in dealing with anti-competitive practices.

15. It was suggested that, in most developing countries, Governments were unwilling to leave regulation to the competent regulatory bodies. It was also mentioned that, in many developing countries, Governments still had a large share in utility sectors and state enterprises were sometimes exempted from the competition law. In such cases, there was a high likelihood of abuse of dominant position by state enterprises. It was therefore suggested that Governments be held accountable for their activities in utility markets. One expert also warned against the capture of utility sectors by politicians and the capture of sector regulators by industries. In such cases, the essential role played by the competition authorities was emphasized.

16. It was also suggested that international agreements could play a role in highlighting models for cooperation between competition and regulatory authorities. In this connection, the importance of expert meetings for constructive exchange of experiences was emphasized. It was also suggested that convergence and reflection at the global level might be essential for improving the relationship between competition and regulatory authorities.

Panel II on international cooperation in investigating and prosecuting hardcore cartels affecting developing countries

17. The keynote speaker on this subject was from the Commerce Tribunal of Brussels, Belgium. The other panellists were from Algeria, Brazil, Chile, the European Commission, France, Madagascar, Switzerland, Turkey and the United States. The main points made in connection with the proceedings under this panel are highlighted below.

18. It was stated that hardcore cartels severely harmed those economies in which they operated. There were ample data regarding the billions of dollars developing countries had lost in many sectors as a result of international cartels. There was consensus, however, that it was extremely difficult for competition authorities to prove the existence of hardcore cartels by relying exclusively on their own investigative powers. Moreover, specific investigatory measures often had to be authorized by the courts. Economic evidence (which was costly to generate) was not sufficient by itself in most jurisdictions to establish a violation of cartel laws; the existence of an agreement actually had to be proven. It was particularly difficult for the competition authority to show evidence of a hardcore cartel in criminal proceedings (as compared with purely administrative proceedings). In most cases, investigations only started after competition authorities were given a hint by "whistleblowers". In this connection, the experts praised leniency programmes, which in many instances had helped gather information on hardcore cartels in return for leniency relating to fines or personal sanctions for the provider of information.

19. In an era of globalization, there was a constant trend towards the internationalization of anticompetitive practices which was especially harmful where hardcore cartels affected the smaller and more vulnerable developing economies. Competition authorities trying to control such international anticompetitive behaviour were often hampered by territorial and jurisdictional barriers and, in the case of developing countries, inadequate resources. Foreign competition authorities would not enforce measures against cartels affecting other countries. It was suggested that the Empagran case showed that attempts by foreign parties to bring cases before the courts of other countries in respect of harm suffered from international cartels would not succeed. While many countries had undertaken efforts to endow their competition authorities with the resources and mechanisms necessary for the control of hardcore cartels, several issues could not be tackled unilaterally and required international cooperation. International cooperation in the investigation and prosecution of hardcore cartels affecting developing countries could play a key role in solving their enforcement problems. It was suggested that competition authorities should be more active in the design of regional trading agreements, and UNCTAD should be asked to design rules for this purpose.

20. Different vehicles of international cooperation in hardcore cartel cases included bilateral agreements (a few of which provided for the exchange of confidential information), memoranda of understanding and informal cooperation. Reference was made to the International Competition Network's recommendation on cooperation in cartel investigations. During the discussions, it became clear that trust and comfort between competition authorities was a very important element in facilitating cooperation, particularly in cases where no bilateral agreement laid down clear-cut rules for such cooperation. Apart from "hard" cooperation in the enforcement of competition law, the experts praised "soft" cooperation by way of the technical assistance that was taking place between many of the countries represented in the meeting.

21. However, in the view of many experts, international cooperation in this area currently did not work as well as it should, especially in the resolution of individual cases. This was mainly due to legal restrictions preventing competition authorities from sharing information with each other easily. Such confidentiality restrictions tended to be more stringent in cases where cartels were treated not only as infringements of regulatory or administrative law but also as criminal offences (bringing into play the rights of defence of the accused). However, examples did exist where national legislation allowed competition authorities to share all relevant information with competition authorities of other jurisdictions. The experts discussed

the problematic issue of how confidential information could be defined and which authority should be competent to decide on its confidential character. The firms involved considered everything to be confidential, court approval for the divulgence of the relevant information was sometimes required in such cases, and the burden of proof would then be on the competition authority to show the information should be divulged – something which the courts were often reluctant to order. Moreover, if a jurisdiction provided for criminal procedures, other jurisdictions might not provide information as easily as they would if the proceedings were only of an administrative nature, particularly if there was the possibility of custodial measures or if rights of defence were not comparable. In the case of leniency programmes, a waiver by the firm concerned was also sometimes required. Some experts suggested that leniency could also be used in order to convince companies to grant waivers of confidentiality, which would enable competition authorities to exchange the relevant information freely. However, it was suggested that, for this to happen, ways would have to be found to ensure that judges accepted grants of leniency by the competition authority and did not overrule its decisions.

D. Action by the Intergovernmental Group of Experts

22. At its closing plenary meeting, on 2 November 2006, the Intergovernmental Group of Experts adopted agreed conclusions (see chapter I above).

III. ORGANIZATIONAL MATTERS

A. Election of officers
(Agenda item 1)

23. At its opening plenary meeting, on Tuesday, 31 October 2006, the Intergovernmental Group of Experts elected its officers, as follows:

Chairperson:	Ms. Cecilia Escolan (El Salvador)
Vice-Chairperson-cum-Rapporteur:	Ms. Hillary Jennings (United Kingdom)

B. Adoption of the agenda and organization of work
(Agenda item 2)

24. Also at its opening plenary meeting, the Intergovernmental Group of Experts adopted the provisional agenda for the session (TD/B/COM.2/CLP/52). 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 eighth session of the Intergovernmental Group of Experts on Competition Law and Policy
5. Adoption of the report of the Intergovernmental Group of Experts

C. Provisional agenda for the eighth session of the Intergovernmental Group of Experts
(Agenda item 4)

25. At its closing plenary meeting, on 2 November 2006, the Intergovernmental Group of Experts approved the provisional agenda for its eighth session (for the text of the provisional agenda, see annex II).

D. Adoption of the report of the Intergovernmental Group of Experts
(Agenda item 5)

26. Also at its closing plenary meeting, the Intergovernmental Group of Experts authorized the Rapporteur to complete and finalize the report.

Annex I

SUMMARY PREPARED BY THE CHAIRPERSON OF THE MEETING OF THE AD HOC EXPERT GROUP ON COMPETITION LAW AND POLICY, 30 OCTOBER 2006

1. The ad hoc expert group had two subjects on its agenda: (i) the relationship between competition law and policy and subsidies; and (ii) cooperation and dispute settlement mechanisms relating to competition policy in regional free trade agreements, taking into account issues of particular concern to small and developing countries. These issues had been highlighted for consultations within UNCTAD in the resolution adopted by 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. The summary below was prepared under the personal responsibility of the Chairperson. It presents some of the main points arising from keynote speeches, interventions from the floor and written contributions on one or both of the subjects from the following: Algeria, Bhutan, Bolivia, Burkina Faso, Chile, European Union, Malawi, Republic of Korea, Russian Federation, Senegal, Trinidad and Tobago, United Kingdom and Zimbabwe. Written contributions were also received from personnel from the Université Libre de Bruxelles, the Trade Law Centre for Southern Africa, the Instituto de Empresa Business School of Spain, and the Middle East Technical University of Ankara, Turkey.

The relationship between competition law and policy and subsidies

2. The keynote speaker on the first subject was from the University of St. Gallen and the EFTA court. The other panellists were from the Chilean competition authority, the EU and UEMOA Commissions, and the UK Office of Fair Trading. Some of the main points made in connection with the proceedings under this panel are highlighted below.

3. The distinctions between subsidies and state aids were explained. The former were characterized on the basis of how they affected the competitive position in international trade of national (or regional) enterprises taken as a bloc. The WTO Agreements on Subsidies and Countervailing Measures and on Agriculture and many regional trading agreements applied to subsidies, and there had been some key cases on these (for example on cotton or sugar). State aids were analysed by competent national and regional/supranational competition authorities (including the authorities of the EU, EEA and UEMOA) on the basis of how they unfairly distorted competition on national or regional markets in favour of individual enterprises; however, within regions, state aid rules applied only to the extent that competition on the internal market was distorted and trade between Member States was affected. There were thus differences between the trading system approach and national or regional competition approaches in terms of objectives and procedures, as well as in remedies (such as orders to pay back state aid received). The distinction between how industrial policy could operate within the antitrust context (for example through exemptions) and outside the antitrust context (for example through tariffs, antidumping or public procurement) was also highlighted. It was suggested that the post-Washington consensus now recognized the validity of many industrial policy measures and that distinctions should be made between those industrial policy measures that created new advantages and those that distorted market forces and hampering structural change. The shift in some developing countries from market-distorting subsidies to support of training and competitiveness was highlighted, as were the adverse effects of export subsidies upon developing countries, particularly in respect of agricultural products such as cotton.

4. Possible public interest objectives (or common interest objectives in the case of regions) of subsidies/state aids were mentioned, including; efficiency; pricing of basic commodities; support of state enterprises providing essential services, declining sectors or employment; correction of market failure; R and D; industrial policy, growth and environment; national security; and regional development. The rationales for control of State aid in terms of equity among enterprises, market efficiency, consumer welfare or promotion of regional integration were also listed, and it was underlined that these rationales would vary according to the objectives of a given subsidy. Criteria for distinguishing between positive and negative effects of state aids, such as the objective and nature of the aid, the selection process and market power of the aid beneficiaries, the characteristics of the aid in terms of amount, duration and repetition, and the characteristics of the market in terms of structure, capacity utilization and entry barriers. It was described how, in one region, State aids were controlled in terms of appropriateness to address a market failure or other objective, the incentive effect on enterprises, and proportionality in terms of the objective. On the other hand, it was suggested that the preoccupation of competition should not be to distinguish between or balance good and bad effects of subsidies/state aids but to apply competition criteria to control their effects upon the market. In response to a query as to how far control of state aids was concerned with consumer welfare, it was stated that consumer welfare was indirectly affected even in the short term by market distortions caused by anti-competitive state aids. Trends toward economic analysis and an effects-based approach in subsidy control were highlighted, as well as those characteristics of subsidies, relevant markets and possible beneficiaries which were most likely to give rise to significant effects upon competition. The need for a rigorous selection process for the targeting of subsidies was emphasized, and it was suggested that selection should not operate in response to political pressures, since that might lead to unfair and inefficient and conflicting outcomes.

5. The mechanics of how national and supranational/regional competition regimes operated in this area through advocacy or through enforcement were described. It was underlined that, for most national competition authorities, it was better to stick to advocacy measures to avoid conflicts and inconsistencies with decisions by the executive, leaving enforcement measures for regional institutions. Competition authorities might use their economic expertise, speak up against bad measures, or ask for transparency of costs and benefits. Such efforts could be directed towards both Governments and the public and help to build up a competition culture.

6. The need for a tailor-made approach by developing countries in this area was recognized, although it was suggested that this position should be refined in the light of emerging global approaches to competition policy. The need to strengthen international dialogue among competition authorities and to promote information exchange and technical assistance in this area was emphasized. The potential for developing an advocacy strategy by referencing steps taken by other competition authorities was also highlighted. An example might be taken from the judicial field, where dialogue undertaken as a reaction to globalization had enhanced the quality of decisions and referencing to the relevant actors had enhanced mutual support. It was suggested that UNCTAD could play a role in monitoring and addressing national and international trends and issues in this area in a broad competition, trade and development perspective, taking into account sectoral issues.

Cooperation and dispute settlement mechanisms relating to competition policy in regional free trade agreements, taking into account issues of particular concern to small and developing countries

7. The keynote speaker on the first subject was from the Swedish competition authority. The other panellists were from the Ministry of Commerce of Bhutan, the competition authorities of El Salvador, Indonesia, Kenya and Zambia, and the TRALAC Trade Law Centre of South Africa. Some of the main points made in connection with the proceedings under this panel are highlighted below.

8. The attention of experts was drawn to the work of UNCTAD and other organizations such as OECD in the area of regional cooperation and dispute settlement in the context of competition policy. It was noted that there were many objectives driving the inclusion of competition provisions in regional trade agreements (RTAs). It was evident from the available research that there was a common realization among countries entering into regional trade agreements of the risk that the benefits from trade liberalization could not be guaranteed in the absence of a region-wide competition regime. Depending on the objectives and the maturity of the competition culture of the parties involved, the construction of cooperation provisions varied from best endeavour provisions to formal cooperation requirements, with or without mechanisms for dispute resolution. It was stated that the special needs of developing countries were often accommodated through exceptions or exemptions from the application of RTA competition provisions and commitments on technical assistance and capacity building. However, it was emphasized that politicians should be sensitized to the drawbacks of such exceptions or exemptions (such as negative impacts on consumer welfare) and the need for them to be transparent and subject to periodic review.

9. The experts considered regional trade agreements to be catalysts in the adoption of competition laws in member countries. For example, Egypt had recently enacted a competition law in response to its COMESA obligations. Similarly, the EC-Turkey customs union agreement had accelerated the enactment of a domestic competition law in Turkey and it was expected that Uganda would adopt a competition law in the very near future in line with its East African Community commitments. It was interesting to note the example of Guatemala which, although it did not have domestic competition legislation, was reported to have achieved some regional cooperation on competition issues through recourse to its constitution, which included provisions on the promotion of fair competition and consumer welfare.

10. It was suggested that, in the absence of national competition legislation, countries had the option of using a regional competition framework or seeking positive comity from neighbours that had competition legislation. However, in the latter case, the option presupposed that both neighbours had functioning competition authorities in order to effectively address cross-border anti-competitive practices. It was suggested that positive comity could be a useful first step to North-South cooperation.

11. It was suggested that there were good reasons why many RTAs made extensive use of cooperation and consultation mechanisms rather than dispute settlement rules. In this context, it was noted that informal exchanges in the form of information sharing and enforcement cooperation had also proved to be effective in mitigating potential disputes and fostering common understanding. However, it was observed that informal cooperation took a long time to develop and, in this regard, the regional nexus was important. For example, the historical,

cultural, and language commonalities of Central American countries had facilitated regional cooperation and common approaches to competition enforcement. Common history, culture and experience, including common economic actors, facilitated relationships based on mutual trust and experience. This mutual trust and common experience often formed the basis for informal cooperation outside a legal framework and made possible progress on the exchange of confidential information. It was stated that Zambia, Zimbabwe and Malawi had on many occasions responded to informal referrals of competition cases in the context of positive comity. Reference was made to the fact that most North-South RTA competition provisions did not encompass the sharing of confidential information. This tended to diminish the utility of these agreements because a key concern of developing countries was their ability to prosecute large multinational companies in breach of competition law, which often implied the exchange of confidential information or enforcement cooperation. It was mentioned that the absence of a supporting legal framework in one or more of the contracting parties, such as laws safeguarding company rights, could be a key obstacle to provisions allowing the exchange of confidential information. It was stated that the lack of a state aids regime and the absence of a competition authority at the time of the negotiation of the EC-Turkey Customs Union agreement had necessarily limited the scope of the agreement's competition provisions.

12. It was stated by some experts that developing countries often lacked the capacity to fully implement competition-related RTA commitments. Other experts noted that many developing countries had yet to implement competition-related RTA provisions because they lacked sufficient resources and skills. There was general agreement that cooperation provisions encompassing technical assistance and capacity building were important and valuable to developing countries. In this regard, the question of how far such provisions could be made binding was worth consideration.

13. It was observed that it was desirable to build a degree of dynamism and flexibility into competition-related RTA provisions in order that they could respond to the evolving economic conditions and enforcement capacity of the contracting parties. For example, the recently concluded bilateral agreement between Morocco and Tunisia included a provision on the modalities for the renegotiation and updating of the agreement.

14. Some experts warned against the pitfalls of overlapping membership in free trade areas and customs unions, since that might increase the potential for conflicting commitments. However, it was also pointed out that multiple memberships could offer some leverage in terms of harmonizing competition principles across larger regions.

15. Although some experts mentioned a certain dissatisfaction with the implementation of competition-related RTA provisions, the consensus was that, as with other areas of competition enforcement, there was no one-size-fits-all approach to cooperation and dispute settlement mechanisms. More work needed to be done to document and evaluate the experiences gained so far in this area. In addition, developing countries required more time to implement such provisions and more targeted capacity-building to assist them to implement cooperation agreements, including those of a South-South character.

Annex II

PROVISIONAL AGENDA FOR THE EIGHTH SESSION

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 ninth session of the Intergovernmental Group of Experts on Competition Law and Policy
5. Adoption of the report of the Intergovernmental Group of Experts

Annex III

ATTENDANCE[1]

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

Afghanistan
Albania
Algeria
Angola
Argentina
Armenia
Bangladesh
Barbados
Belgium
Benin
Bhutan
Bolivia
Bosnia and Herzegovina
Botswana
Brazil
Burkina Faso
Cambodia
Cameroon
Chad
Chile
China
Costa Rica
Côte d'Ivoire
Croatia
Cyprus
Czech Republic
Dominican Republic
Ecuador
Egypt
El Salvador
Ethiopia
Finland
France
Gabon
Germany
Guatemala
Guinea-Bissau
Haiti
Honduras
Hungary
India
Indonesia
Iran (Islamic Republic of)
Italy
Japan
Kenya
Latvia
Lao People's Democratic Republic
Madagascar
Malaysia
Malawi
Mali
Mauritius
Morocco
Mozambique
Namibia
Nepal
Nicaragua
Niger
Pakistan
Panama
Paraguay
Philippines
Portugal
Republic of Korea
Romania
Russian Federation
Saint Lucia
Sao Tome and Principe
Senegal
Serbia
South Africa
Spain
Sri Lanka
Sudan
Sweden
Switzerland
Syrian Arab Republic
Thailand

[1] For the list of participants, see TD/B/COM.2/CLP/INF.6.

The former Yugoslav Republic of Macedonia
Togo
Trinidad and Tobago
Tunisia
Turkey
United Kingdom of Great Britain and Northern Ireland
United Republic of Tanzania
United States of America
Venezuela
Viet Nam
Yemen
Zambia
Zimbabwe

2. The following intergovernmental organizations were represented at the meeting:

African Union
Economic and Monetary Community of Central African States
Economic Community of Western African States
European Commission
Organisation for Economic Co-operation and Development
Organization of the Petroleum Exporting Countries
Permanent Secretariat of the General Treaty on Central American Economic Integration
West African Economic and Monetary Union

3. The following specialized agencies and related organizations were represented at the Meeting:

United Nations Industrial Development Organization
World Trade Organization

4. The following non-governmental organizations were represented at the Meeting:

General Category

Engineers of the World
Institute for Agriculture and Trade Policy

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