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Report of the Intergovernmental Group of Experts on Competition Law and Policy on its ninth session

Held at the Palais des Nations, Geneva from 15 to 18 July 2008

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I. Agreed conclusions adopted by the Intergovernmental Group of Experts at its ninth 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 XII in the Accra Accord, including the provisions in paragraphs 10, 54, 74, 75, 103, 104 and 211,

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,

Noting that UNCTAD XII has focused on addressing the opportunities and challenges of globalization for development,

Underlining that competition law and policy is a key instrument for addressing globalization, including by enhancing trade and investment, resource mobilization and the harnessing of knowledge,

Recognizing that an effective enabling environment for competition and development may include both national competition policies and international cooperation,

Recognizing further the need to continue UNCTAD's work on competition law and policy so as to enhance its development role and impact,

Noting with satisfaction the important written and oral contributions from competition authorities of members participating in its ninth session,

Taking note with appreciation of the documentation prepared by the UNCTAD secretariat for its ninth session,

1. *Expresses appreciation* to the Government of Costa Rica for volunteering for a peer review during the ninth session of the Intergovernmental Group of Experts and to all Governments and regional groupings participating in the review; *recognizes* the progress achieved so far in the elaboration and enforcement of Costa Rica's competition law; and *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;

2. *Decides* that UNCTAD should, in the light of the experiences with the voluntary peer reviews undertaken so far by UNCTAD and others and in accordance with available resources, undertake a further voluntary peer review on the competition law and policy of a member State or regional grouping of States, during the tenth session of the Group of Experts;

3. *Emphasizes* the importance of independence and accountability of competition authorities; and *takes notes* of the discussions and written contributions of member States to this issue; and *requests* the UNCTAD secretariat to disseminate the summary of the Intergovernmental Group of Experts discussions on this topic to all interested States, including through its technical cooperation activities;

4. *Underlines further* the importance of using economic analysis in competition cases; and *requests* the UNCTAD secretariat and other available sources to prepare a report on this topic based on contributions from member States, which are to be sent in writing by 31 January 2009 for submission to the tenth session of the Intergovernmental Group of Experts;

5. *Calls upon* UNCTAD to promote and support cooperation between competition authorities and Governments in accordance with the Accra Accord, paragraphs 103 and 211;

6. *Recommends* that the tenth session of the Intergovernmental Group of Experts consider the following issues for better implementation of the Set:

- (a) Public monopolies, concessions, and competition law and policy;
- (b) The relationship between competition and industrial policies in promoting economic development; and
- (c) Voluntary peer review on the competition law and policy of Indonesia;

7. *Further requests* the UNCTAD secretariat, with a view to facilitating the round table discussions, to prepare reports on items 6 (a), (b) and (c) above; with a view to facilitating the consultations at the peer review, the secretariat should prepare an executive summary of the peer review report in all working languages, as well as a full report of the peer review in its original language to be submitted to the tenth session of the Intergovernmental Group of Experts;

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

(a) An updated review of capacity-building and technical assistance, taking into account information to be received from member States and observers no later than 31 January 2009;

(b) Further issues of the *Handbook on Competition Legislation* containing commentaries on national competition legislation providing the base for further revision and updating of the Model Law to be received from member States no later than the end of April 2009; and

(c) An updated version of the *Directory of Competition Authorities*;

9. *Further 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, focus its capacity-building and technical cooperation activities (including training) on maximizing their impact in all regions, within the financial and human resources available.

II. Proceedings

A. Secretary-General's statement

1. The full text of the opening statement of the Secretary-General of UNCTAD is available on the Internet at www.unctad.org/competition.

B. General statements

2. Many delegations from developing countries, including the least developed countries (LDCs), informed the meeting that their countries were experiencing difficult challenges in the formulation and implementation of competition and consumer policies, due to lack of adequate financial, material and skilled human resources. Many spoke about the challenges or obstacles they faced when they promoted competition, whether that promotion was through enforcing a competition law or trying to persuade society and Government of the advantages of competition. The delegations expressed appreciation to UNCTAD for organizing the meeting as it afforded them an opportunity to exchange ideas and experiences with their peers, and gave them an opportunity to have a dialogue with the other cooperating partners.

3. The delegations further expressed concern at the effects of the food and oil crisis on their economies. They asked UNCTAD to provide guidance on how the competition authorities could play a meaningful role in addressing those problems. Further concerns were raised in relation to the development of the small and medium-sized enterprise (SME) sector, which they said was under threat from the competition of larger firms. There was consensus for countries to create and maintain an appropriate domestic environment which accommodated and allowed SMEs to contribute to economic growth and compete effectively.

4. All the delegations stressed the importance of technical cooperation as one of the pillars of UNCTAD's work, and the need for increased linkages and coherence among the research, policy analysis and capacity-building pillars. In that regard, the secretariat was requested to make significant efforts to mobilize and increase funding for technical and capacity-building programmes. Delegates also expressed their appreciation for the efforts UNCTAD was giving to the developing countries in order to promote competition, economic growth and development.

5. Regarding UNCTAD's role in technical development, many delegations appreciated the organization's activities, including the voluntary peer review of competition law and policy, the training and capacity-building programmes, support to regional cooperation and integration, and assistance in the drafting, formulation and enactment of competition and consumer rules and regulations. The delegates called upon UNCTAD to assist in carrying out competition advocacy programmes involving national and regional stakeholders, both as a prerequisite to the enactment of the law and as an educational activity after the laws were in force. The delegations expressed the need for UNCTAD to prepare studies and reports that would assist them in understanding international economic issues and to improve the skills of their trade negotiators, especially in the ongoing negotiations of the economic partnership agreements.

6. Participants praised the UNCTAD voluntary peer review of competition law and policy, and acknowledged that it offered the developing competition authorities an opportunity to adopt the best practices in the administration, application and enforcement of competition law and policy. The peer review identified the constraints and weaknesses in the law itself and how those could be addressed. In so doing, the system identified the technical assistance needs and related matters to be addressed in order to strengthen the institutions of competition in the country. It was accepted that the peer review was frank and constructive, and in appreciation

requests were made to UNCTAD by South Africa, Indonesia, and El Salvador, to be considered for the next peer review. At the regional level, the Common Market for Eastern and Southern Africa (COMESA) also volunteered for the next peer review.

C. Voluntary peer review of competition policy in Costa Rica

Chair's summary

7. The peer review of Costa Rica was moderated by Mr. Eduardo Pérez-Motta, Director of the Mexican Competition Commission. The peer reviewers were (a) Mr. Paulo Furquim de Azevedo, Commissioner of the Administrative Council for Economic Defence (Brazil); (b) Mr. Duane Schippers, a lawyer at the Competition Bureau (Canada); (c) Mr. Eduardo Jara, President of the Tribunal de Defensa de la Libre Competencia (Chile); (d) Ms. Maria Tineo Coppola, Federal Trade Commission (United States); and (e) Mr. Richard Larm, a lawyer at the Department of Justice (United States). The Commission for the Promotion of Competition of Costa Rica (COPROCOM) was represented by Commissioner-President Mr. Pablo Carnevale and other commissioners and staff.

8. The first session consisted of the main findings of the report, followed by a statement by the Commissioner-President of COPROCOM) and a question-and-answer session. The consultant presented the main findings and recommendations of the report "Voluntary peer review on competition policy: Costa Rica" (UNCTAD/DITC/CLP/2008/1). The consultant also explained substantive aspects of the law and the institutional framework, and reviewed the most important cases handled by the competition agency. He discussed the objectives of the law, remarking that the competition law of Costa Rica was in line with the United Nations Set of Principles on Competition. He said that the policy approach taken by COPROCOM was that of using competition as a tool for alleviating poverty and development.

9. He went on to assess COPROCOM's institutional aspects, autonomy, and investigative and decision-making powers. He mentioned the agency's enforcement record and international cooperation. He concluded with his findings and recommendations aimed at enhancing COPROCOM's functions, including (a) the need to call upon the legislative branch for the law reform to expand the scope of the law to include all economic actors, and to reinforce the law along its institutional framework; (b) the need for international cooperation to address possible monopolistic practices at the regional level; (c) the elimination of exceptions from the law; and (d) increasing and strengthening the deterrent power of sanctions.

10. COPROCOM's Commissioner-President remarked that competition policy was indeed one of the tools needed to address poverty alleviation. In that regard, the issues of consumer welfare and efficiency were part of the major objectives of competition law. He stated that Costa Rica competition law implicitly incorporated the rule of reason.

11. The Commissioner-President of the competition authority concurred with the report findings and recommendations. In particular, he referred to the need to regulate *ex ante* merger control, to reform the law and to make COPROCOM recommendations binding on other governmental bodies. In reference to the issue of institutional autonomy, he said that it was an issue of semantics which in practice had not presented problems at the operational level. However, he acknowledged that there was scarcity of staff due to budgetary constraints, and gaining more independence from the general budget would be a very important step forward. In regard to the limits of the scope of competition law, he said that exceptions from the competition law were obstacles that COPROCOM had encountered. He concluded

by confirming his organization's commitment to working with UNCTAD and other international organizations in implementing the peer review recommendations.

12. Questions were raised from the competition authorities of Brazil, Canada, Chile and the United States. The questions touched upon a number of issues such as the level of independence and accountability of the agency, the difficulties in detecting cartel behaviour and the establishment of an immunity or leniency programme. The delegates also enquired on (a) whether it was possible to file an action for civil damages in court after the competition authority had ruled on a particular case; (b) whether or not it was possible to include in the law reform a pre-merger notification system and whether such notification would be mandatory or voluntary; and (c) whether a change in the treatment of special regulatory regimes was envisaged in the law reform project.

13. In its replies, COPROCOM stated that – although the law provided the designation of commissioners by the executive branch and the budget was provided by the Ministry of the Economy – in practice the independence of COPROCOM had been fully respected. Furthermore, commissioners had been ratified and could not be removed from office without just cause. It was acknowledged, however, that reforms would be a useful device to prevent future political influence. COPROCOM further stated that it had prosecuted cartels, but that was not an easy task, as the investigative powers of the agency were restrained by law. Leniency programmes were only possible through legal reform, given that, under the current law, if COPROCOM found cartel members guilty, it was under statutory obligation to sanction them. The delegates were informed that procedurally it was possible to file actions for civil damages after the competition agency had ruled on a case. However, there had only been one precedent where the constitutional chamber decided there was no need to exhaust the administrative procedure. The delegates were also informed that the law did not provide for a pre-merger control, but *ex post* merger review was mandatory. A mandatory pre-merger notification system would be the most efficient mechanism. In regards to the list of exceptions from the law (public services by concession, State monopolies and municipal authorities), those had been in existence since 1994. COPROCOM interpreted exceptions to the law restrictively. Costa Rica, however, made clear that the project of law reform was an ongoing process and was not yet on the legislative agenda. Summarizing the discussions, the Chair of the peer review said that, in order to prevent unforeseen future attempts to affect the autonomy of the institution, it was convenient to give a structural legislative solution to the issue.

14. In the second session, an interactive discussion was held on the peer review report. The discussion was initiated by a question of COPROCOM on the strategy needed to mobilize support for legislative reforms in its country. Brazil replied that it was an intensive negotiation process with all stakeholders, where trade-offs to balance the changes were often required to pass the reforms. Another delegation asked how COPROCOM analysed markets, given the difficulties intrinsic to small economies. Costa Rica replied that it did so on a base-by-case basis, based on the importance to the consumers. A delegate referred to the concept of “merger thresholds” as a tool to address the issue of concentrations, adding that that those should reflect sensibly the possible impact on the relevant market. Another delegate queried if “downraids” were to be included in the proposed bill and whether the three-day limit on appeals was to speed up or to block appeals. COPROCOM responded that “downraids” were to be included in the amendment of the law, and that the time-frames stemmed from the general procedural principles of the country's legal system. A delegate referred to the issue of institutional independence and asked about the possibility of penalizing agents refusing to cooperate with an investigation and on the possibility to grant exceptions by virtue of “economic efficiency”. COPROCOM responded that the law established penalties for non-

cooperative agents, but there was no possibility to grant particular or block exceptions.

15. In session III, UNCTAD presented a technical assistance project to address the report's findings and recommendations. It was stated that, within the framework of the Competition and Consumer Protection Policies (COMPAL) II programme, it would provide COPROCOM with technical assistance to (a) consolidate the first phase of the programme; (b) enhance its institutional framework; (c) elaborate guidelines for investigation; (d) prepare sectoral studies; and (e) promote regional and subregional cooperation.

D. Round table on independence and accountability of competition authorities

16. The round table was moderated by Mr. Manuel Sebastião, President of the Portuguese Competition Authority. The panellists for the session were Ms. Deborah Healey of the University of South Wales (Australia); Mr. Alper Karakurt, Competition Expert, Turkish Competition Authority; Mr. Thula Kaira, Acting Executive Director of the Zambia Competition Commission; and Ms. Celina Escolan, Superintendent of the El Salvador Competition Authority. Ms. Mona Yassina from the Egyptian Competition Authority and Mr. Patrick Krauskopf of the Swiss Competition Authority were discussants.

17. The view was expressed that the absence of reasonable enforcement mechanisms rendered even sound competition law worthless. It was mentioned that it could not be presumed that competition laws were always effective or enforced in an appropriate manner. Enforcement reviews by the Australian Productivity Commission confirmed competition law as a major source of productivity and economic well-being in Australia, and led to significant improvements in economic performance, including through extending the ambit of competition law to previously excluded areas such as public enterprises. Those and other reviews had also been useful in that they served as a vehicle by which competition law and enforcement had been refined in response to perceived problems.

18. Another panellist addressed the accountability problem as prevalent in situations where there was insufficient clarity on the jurisdictional boundaries of the competition authority and the sector regulator regarding competition matters in regulated sectors. A recommended solution to that problem was the establishment of cooperation mechanisms between the competition authority and the regulator. It was stated that legal transparency in the form of clear rules and divisions of competencies – i.e. *ex ante* transparency – as well as *ex post* transparency, whereby the judiciary decides on the nature and extent of competencies assigned to either body, was a critical factor in assuring accountability of competition enforcement in regulated markets. The experience of collaboration between Turkey's competition authority (TCA) and the telecommunications regulator (TPA) was presented as an example of beneficial coexistence and fruitful functional cooperation in the area of competition enforcement in regulated sectors. The interaction between the TPA and the TCA was governed by a communiqué which delineated their respective roles and established a strict timeline for the handling of competition matters. That cooperation mechanism proved particularly useful for achieving harmonious collaboration in the privatization of the fixed-line telephone company Turk Telekom.

19. Another panellist emphasized credibility as a key element that defined the essence of independence. He emphasized that the legal framework was a core factor influencing a competition authority's structural and behavioural independence, while also noting that structural independence did not guarantee full independence. There was also a need for the competition authority to be seen as independent in the behaviour of its officials, processes and procedures. He pointed out that a politically

conscious chief executive may tend to be partisan, and thus compromise the independence of the competition authority, even in the face of legal and structural independence. Similarly, a chief executive who accepted gifts from the private sector was open to tacit influence that could be likened to tacit collusion. He suggested that the chief executive's "voluntary" loss of "freedom" might be the single most destructive route to compromised independence, and stressed that chief executives should be proactive in their efforts to uphold the integrity and credibility of the competition authority. He described some of the pitfalls in sustaining independence, such as entrenched paternalistic governance arrangements, low levels of democracy, weak competition culture, weak professional leadership within the competition authority, and the lack of support from international partners in developing countries. For developing countries in particular, decisions that had social dimension and were perceived as going against the public interest could have negative consequences for the independence of the competition authority and even render competition law enforcement unsustainable. He remarked that, depending on the political sensibilities in a country, it could be useful to make reference to the autonomy of a competition authority rather than its independence.

20. One panellist described the process of setting up the competition authority in her country, stating that budgetary independence was necessary to avoid delays in the implementation of the law, and to secure and retain skilled staff.

21. A commentator identified three kinds of independence: institutional, political and media. He noted that when Government could reverse decisions taken by the competition authorities, legal independence was not guaranteed. He said that national competition authorities were faced with the threat of political influence on a daily basis. He suggested that the Anglo-Saxon system could constitute a better way of avoiding that kind of pressure. He noted that the failure by a Government to address staff shortages at the competition authority could be interpreted as a lack of conviction on the part of the Government concerning the need for competition law. He stressed the need to take into account different parameters when assessing the independence of a competition authority, noting that the independence of an institution also depended on the courage and personality of those heading the competition authority.

22. With respect to independence from the media, he drew attention to the fact that, following the rise in the prices of raw materials, many competition authorities in Europe were pressed to undertake enquiries and that showed that competition authorities were not immune to media pressure.

23. One commentator was of the view that structural separation was an indispensable element of the independence of competition authorities. She noted that the media was an additional factor that had a determinant influence on the independence of a competition authority. In that context, the publicizing of its findings and decisions played a crucial role in pressuring the authorities to act on the competition authority's findings and decisions. She commented that fears on the part of the legislature about the risks of overregulation by the competition authority could result in curtailment of the powers granted to the authority, as had happened in her country.

24. In the light of the influence of the media, she underlined the need for competition authorities to sensitize politicians and the public on the role and objectives of competition law enforcement. She stressed that, in handling sensitive decisions that could go against popular sentiment, the competition authority should always be prepared to argue and present all sides of the issues at hand in its dealings with the media.

25. Many participants endorsed the sentiments expressed by the panellists on the need for the independence of competition authorities. In countries where there was a large informal sector, the lack of a competition culture and skilled human resources

was a particular challenge. A large informal sector also complicated the undertaking of market analyses. Structural independence also had its disadvantages, particularly for a young competition authority that was starting out without the cushion of an existing and strong national competition culture. In that context, it was suggested that the experience of Brazil was instructive, in that its competition bodies were established as ministerial departments; their proximity to the Government machinery facilitated their advocacy activities towards Government as a whole, and was crucial in securing the necessary political support for competition enforcement. Taking into account the Brazilian experience, structural independence could be viewed as a possible outcome of an incremental process, suggesting that it should be seen as a standard prescription for competition authorities.

26. It was stated that an additional measure of the extent of the independence of competition authorities was their ability to sanction anticompetitive behaviour by Governments acting directly and not through public enterprises.

27. The point was made that *de jure* hooks were often necessary to assure *de facto* independence, and that a useful way of ensuring legal safeguards for independence was for the competition law to oblige the Government to ensure administrative and functional independence, with an overriding provision to guard against political influence.

28. It was said that inadequate funding represented the greatest threat to the independence of a competition authority and was a source of power and political influence that was wielded by the executive over the competition authority.

29. Concerns were raised about the negative impact of the sharing of competition competences between the competition authority and sector regulators, and about the exclusion of State enterprises from the ambit of competition law on the independence of competition authorities. It was noted that, in developing countries especially, the establishment of sector regulators tended to predate the existence of competition authorities, and was often the reason for the exclusion from competition law of regulated sectors or the sharing of competition competences. In that context, it was suggested that the experience of the United Kingdom relating to concurrent jurisdiction, the Turkish example already mentioned, and other international experiences with formal and informal cooperation arrangements were instructive for countries grappling with those questions. It was noted that the chances of achieving legislative resolution to the jurisdictional issues with fewer restrictions on the scope of competition law was greater when competition culture was entrenched.

30. It was thought difficult for competition authorities – whose mandates were limited to the control of specific anticompetitive practices and the enforcement of narrow provisions that often did not extend to social issues – to directly address matters such as poverty alleviation and other public policy objectives. The need for extensive competition advocacy prior to the enactment of competition legislation, as well as continuous advocacy throughout its enforcement, was underlined.

31. A participant commented that a competition authority's strategic planning process offered the opportunity to align its objectives to those of the broader national development agenda and public policy, while also setting accountability criteria. Moreover, engaging in dialogue with other stakeholders besides big business and encouraging broad-based public participation in decision-making processes were desirable and served to deepen the debate on competition policy within civil society. They also strengthened competition culture. It was stressed, however, that in engaging with civil society, it was important that the competition authority be prepared for populist debate and win public arguments.

32. It was noted that the personality and professional profile of the chief executive of a competition authority was a crucial factor in resisting political interference, in addition to the adoption of a collegial approach to decision-making. It was further

noted that consensus-based decision-making was one way to combat the risk of bribery to competition officials. In that context, it was necessary for the competition authority to evaluate the relative importance it gave to the opinions of interest groups in its competition analysis, such as in the case of mergers. It was also important to have in place adequate regulations governing the declaration by competition officials of their interests, particularly in small countries where everybody knew each other, in order to avoid conflicts of interest. In some countries, competition authorities/officials were liable for wrongful decisions on competition cases, with the possibility of dismissal, criminal prosecution and liability for damages.

33. With regard to confidentiality claims by business, it was noted that, if properly defined, confidentiality should not normally impinge on the freedom of decision-making. The competition authority should have strict guidelines on what might be deemed confidential business information.

34. It was recognized that the mass media could have an impact on the independence and credibility of competition authorities. Participants acknowledged that the mass media could greatly facilitate the work of a competition authority but that it could also undermine the work of a competition authority by spreading untruths and tarnishing its image.

35. It was also noted that market studies comparing the situation before and after competition enforcement in specific sectors were a good way of identifying and demonstrating the benefits from competition enforcement. Periodic enforcement reviews could be used to demonstrate that competition enforcement resulted in improved economic performance. The limited capacity and financial resources to monitor the impact of competition enforcement activities by competition authorities in developing countries was recognized.

E. Round table on the attribution of competence between community and national competition authorities, and the application of competition rules

36. The round table was moderated by Sir Christopher Bellamy, a former judge of the Court of First Instance and recently of the Competition Appeal Tribunal of the United Kingdom. The panellists for the session were Ms. Erika Fink, Directorate-General for Competition, the European Commission; Mr. Amadou Dieng, Director of Competition, West African Economic and Monetary Union (WAEMU) Commission; Mr. Thomas Cheng of the University of Hong Kong (China); and Mr. Peter Muchoki Njoroge, Chair, COMESA Board of Competition Commissioners. Written contributions were provided by the Governments of Burkina Faso, El Salvador and Peru, as well as by COMESA, the European Commission and the UNCTAD secretariat (based on a survey).

37. The moderator opened the session by describing the expanse of the topic, ranging from the case of the European Union (EU) – with parallel jurisdiction between community and national competition authorities (NCAs) – to Asia, where there were few regional arrangements on competition. The importance of efficient allocation of available resources was emphasized, due to the shortage of financial and skilled human resources faced by many competition authorities, especially the small agencies. The main issues raised were (a) how parallel competence works in the EU competition system; and (b) where judges fit in the competition law enforcement system. The judiciary, although part of the competition law enforcement system, was not integrated into the rest of that system. National competition laws of EU member States were the same in substance as the competition provisions in the European Commission Treaty. There had been soft harmonization in the EU despite the lack of any directives on the subject matter. Therefore, parallel competence worked well in the EU. The question of how the

decision on attribution of competence was taken and whether such a decision was open to challenge was noteworthy. Whether a case was dealt with by the national or the regional authority affected the procedures and outcome of the case. The lack of an overarching court of appeal for cases dealt with by national courts was mentioned as a difficulty faced by competition systems with parallel competence. As for how the judges fit in the competition law enforcement system, it was explained that insufficient resources and lack of familiarity by the judiciary with competition cases were some of the challenges faced in the effective enforcement of competition law. A recommended solution to that problem was that appeals should be allocated to a small number of judges, who would also be provided with necessary training, in order for them to gain expertise. The experience with the Court of First Instance proved that argument to be true.

38. A panellist introduced the two-tier competition law enforcement system in the EU. Prior to the reforms, the European Commission (EC) had quasi-exclusive jurisdiction to enforce articles 81 and 82 of the EC Treaty, whereas afterwards the principle of parallel competence was adopted. Under that principle, the commission, NCAs and national courts were given full powers to enforce articles 81 and 82. However, if the EC formally initiated a proceeding against an anticompetitive practice, the competence of the NCAs to deal with the same case ended. On merger control, the EC had exclusive jurisdiction over mergers with a community dimension. The focus of that presentation was on the cooperation between the NCAs of member States and the EC within the framework of the European Competition Network. It was explained that cooperation in competition cases took place at both the case allocation and investigation stages. In addition, the authorities at the national and community levels cooperated to ensure consistency of decisions taken by different agencies.

39. Another panellist presented WAEMU's regional competition regime. The WAEMU Commission had exclusive competence on competition matters at both the national and regional level, but the WAEMU Treaty stipulated cooperation between the NCAs and the WAEMU Commission. The advantages of having a centralized competition law enforcement system were listed as the homogeneity of law, respect for the rule of law, better regional integration, economizing on the funds needed for legislative formulation and capacity-building projects, and procedural costs. It was pointed out that there was a lack of a competition culture at the national level in the region. Therefore, the rationale for giving responsibility to the regional competition agencies was questioned. The limits of such a centralized system were also recognized. Those included insufficient resources to intervene in all cases (including national ones), the work overload and the dissatisfaction with EC performance. During the discussions, commentators made proposals to improve the WAEMU competition regime, such as the adoption of a *de minimis* threshold that would distribute competition cases between regions and NCAs. It was mentioned that it would be necessary to give the EU maximum policy space to determine the competition policies of member States.

40. A panellist elaborated on the extent to which competence on competition law enforcement should be attributed to a regional body. The focus was on the advantages and disadvantages of both centralized and decentralized regimes in terms of institutional design and effectiveness in enforcement. The most evident advantage of a centralized system mentioned was the achievement of economies of scale in enforcement, especially in the case of small economies involved in a regional grouping. Another advantage was the prevention of conflicting decisions, especially in merger control, by giving exclusive jurisdiction to the regional competition authority, as is the case in the EU. The third advantage was distancing competition law enforcement from national politics. On the other hand, the disadvantages of centralization were also mentioned. Competition law enforcement at both the national and regional levels required more financial and human

resources. With respect to the advantages of a decentralized competition law enforcement system, it was argued that a national competition authority would be better placed to examine domestic competition cases than a regional authority. It was stressed, however, that cooperation between the members of a regional grouping on competition cases with cross-border effects was necessary. The greater the degree of economic integration in a regional grouping, the greater would be the need for a formal cooperation mechanism.

41. A panellist introduced the main features of COMESA, which was based on the EU Competition Policy model. The COMESA Competition Commission was established in 2004 and at the time of the round table was at the stage of setting up its enforcement instruments. The panellist emphasized the importance of having simple but clear rules on the attribution of competence in order to prevent forum shopping. He commented on regional authorities with exclusive competence on national and regional competition cases, and stated that there might be a need to give more competence to NCAs. He joined other panellists in stressing the importance of cooperation between the NCAs and regional competition authorities on the exchange of information and expertise, investigations, extraterritorial arrangements, enforcement, staff training and participation in international conferences. In order to facilitate such cooperation and information-sharing between the NCAs and the regional competition authorities, he emphasized the need to have common information-sharing software as well as teleconferencing, videoconferencing or voice over internet protocol, and a shared website.

42. A commentator said that, under Caribbean Community (CARICOM) competition rules, member States were required to establish their own NCAs. In addition, there was also a subregional competition authority, which would act on behalf of the Organization of Eastern Caribbean States (OECS). A shortage of resources was a challenge, especially in two-tier competition systems, where financial resources had to be devoted to both national and regional authorities and, in the case of CARICOM, to a subregional entity, OECS.

43. Several delegates explained their regional competition law enforcement systems in the Central and Latin American region, Central Africa and East Africa. Delegates pointed out their need for technical assistance and praised the way the COMPAL programme supported certain Latin American countries. One delegate explained the role of the Interstate Council for Antimonopoly Policy (ICAP) in strengthening competition law and policy implementation among the members of the Commonwealth of Independent States. He also pointed out the potential difficulty in the implementation of decisions taken by ICAP due to the lack of a supranational authority.

44. Other delegates introduced the regional competition enforcement regimes in Africa, such as the Economic and Monetary Community of Central Africa (CEMAC), WAEMU and the East African Community. In CEMAC, there was a need to adopt a directive at the regional level specifying the implementation of procedural rules to be followed by both national and community authorities. On WAEMU, one delegate asked a question on the competence of NCAs and sector regulators in member States. The response was that national authorities had the competence to deal with competition cases, but the decisions were to be taken by the WAEMU Commission. Another delegate mentioned his concern about the exclusive competence attributed to the WAEMU Commission in the area of competition. It was pointed out that the WAEMU Treaty did not explicitly attribute exclusive competence to the Commission, contrary to the interpretation provided by the Court of Justice.

45. Many delegates from developed and developing countries as well as from regional groupings emphasized the importance of cooperation between national and regional competition authorities on the investigation of competition cases and law

enforcement. Several delegates also drew attention to the need for clarity on the attribution of competence between national and regional competition authorities.

F. Round table discussion on capacity-building and technical assistance activities on competition law and policy: criteria for evaluation the impact of technical assistance in the field

46. The round table was moderated by Mr. George Lipimile, Senior Advisor, Competition Policy and Consumer Protection Branch of UNCTAD. The key speaker for the round table was Mr. Hans-Peter Egler of the State Secretariat for Economic Affairs, Switzerland. The panel was composed of Mr. Roger Nellist, Acting Head of the Growth and Investment Group at the United Kingdom Department of International Development; Mr. Manuel Sebastião, President of the Portuguese Competition Authority; and Ms. Susan Matthews of the International Affairs Division of the Canadian Competition Bureau. The commentators were Mr. Amadou Dieng, Director of Competition, WAEMU; and Mr. Peter Njoroge, Chair of the COMESA Competition Commission.

47. Another panellist referred to three main elements of setting up competition law and policy, as well as an institution: (a) the essential role of competition in every stage of economic development; (b) strong competition as a real necessity for creating a democratic market economy; and (c) an active competition body as an essential element in the architecture of a modern market economy. He highlighted some lessons learned from his agency's technical assistance activities, i.e. the need for a long-term commitment, joint activities with other donors, focus on sustainability, using a trilateral development cooperation model, ensuring the evaluation was built from the beginning, and going beyond formal laws to build capacity to analyse the state of competition.

48. A panellist referred to the achievements in cooperation within the Portuguese-speaking competition network, including bilateral cooperation initiatives and collaboration with UNCTAD since 2004. He pointed out that the cooperation between Portuguese-speaking countries had brought about concrete achievements through the Portuguese-speaking phone competition network aimed at (a) nurturing and disseminating competition culture among the community; (b) bilateral cooperation provided by the Brazilian competition system; and (c) the role played by UNCTAD on the basis of the memorandum of understanding in assisting Portuguese-speaking countries in enforcing competition laws, capacity-building, and fostering cooperation to strengthen the Portuguese-speaking competition network, particularly in promoting competition as a pillar for sustainable development.

49. A speaker highlighted the main elements in measuring the success of technical assistance initiatives by her country, and pointed out the need to establish effective communication between all involved parties, long-term commitment, considering the needs of the requesting Governments, and the stated objectives of the programme. She emphasized the need to tailor-make technical assistance, establish concise objectives and identify partners and organizations, avoiding additional institutions that created more bureaucracy.

50. The representative of UNCTAD presented an example of cooperation between two UNCTAD divisions in the delivery of technical assistance, such as investment policy reviews and competition peer reviews. She highlighted the phases included in ensuring the effectiveness of the programme and involvement of all stakeholders, particularly the beneficiary Governments. She added that the programme was an example of coordination between the different UNCTAD divisions and had included contributions from the Competition and Consumer Protection Branch.

51. A delegate referred to three important aspects in the process of reinforcement of capacities: formulation, implementation and evaluation. He stressed the need for tailor-made programmes that took into consideration the needs of the requesting country and cooperation between all the involved parties. He called for evaluations of programmes to be done in an effective manner throughout the life of the programme.

52. A speaker referred to the criteria for evaluating the impact of capacity-building and technical assistance in developing countries. He referred to the importance of a sensitive analysis of needs of the receiving State in order to ensure results. He added that there should be coherence in the aims, approaches and activities of both the giver and the receiver of technical assistance. He also stressed the importance of ensuring a commonality of interests between all stakeholders and the need to settle all issues at the beginning of the process. He added that there should be transparency, accountability and objectivity in the implementation of capacity-building and technical assistance. Finally, he stressed the need for an accurate evaluation of capacity-building and technical assistance.

53. In the discussion, the delegates expressed their appreciation of the technical assistance and capacity-building programmes provided by UNCTAD. It was mentioned that UNCTAD had played a major role in shaping the competition and consumer protection policies of many developing countries, LDCs and economies in transition, both at the national and regional levels. Technical assistance had generally been useful, particularly in areas such as training of staff of competition agencies, judges, academicians and other relevant stakeholders. In some cases, the training courses for judges had resulted in better enforcement of competition law and in the introduction of competition-related courses in the university curricula of developing countries. Work on economic mapping and sectoral studies was also commended, as it had ensured the identification of the needs assessment of the country in question before the development of the competition law or policy. Sensitization workshops for advocacy purposes were also held at both the national and regional levels for most developing countries. The need for continued study tours and placements in advanced competition agencies was stressed.

54. The regional workshops also served as means for senior officials from established competition agencies to share their experiences. That kind of tailor-made technical assistance and capacity-building activity had been effective and should therefore be maintained. Delegates also praised the UNCTAD secretariat for the organization of the Intergovernmental Group of Experts and recognized its role in enhancing the know-how of participants, as they shared experiences and brainstormed on the implementation and enforcement of competition law and policy. The usefulness of the peer review was recognized and a number of countries expressed interest in the process. The COMPAL programme was highlighted as a good example of the design and implementation of a technical assistance and capacity-building programme on competition law and policy, and several delegates called for its replication in other regions. The need to develop the competition law and policy of the Asian Expert Group on Competition was mentioned and UNCTAD's assistance requested.

55. Delegates highlighted the need to establish a library in competition agencies to enhance knowledge. The issue of software development to assist competition agencies, particularly at their inception stage, was raised. That software would assist in the creation of a database to be used in the tracking and follow-up of cases dealing with competition.

56. The need for timely technical assistance was stressed so as to ensure the credibility of competition agencies in developing countries. The role played by other international agencies and other donors was mentioned, and complementarity with the work of UNCTAD was highlighted. The importance of a competition

culture, particularly in developing countries, was brought to the forefront. Information was provided on the UNCTAD–Tunisia Regional Training Centre on Competition for the Middle East and North Africa, with the aim of ensuring the development of a competition culture. In addition, other examples of technical assistance provided at the bilateral level were given. The issue of South–South cooperation in the area of competition law and policy implementation, compliance and enforcement was stressed. UNCTAD was requested to follow up on that issue to facilitate dialogue between developing countries.

57. Delegations called for the continuation of UNCTAD’s technical assistance and capacity-building programmes, particularly to assist young competition agencies in developing countries in undertaking economic mapping and drafting of competition law and policy. It was agreed that, for technical assistance and capacity-building to be effective, all involved parties – beneficiaries and donors – would have to be fully committed to the implementation of the programmes. Donor countries expressed their willingness to support the work on technical assistance and capacity-building in the areas of competition law and policy and consumer protection, and called for tailor-made programmes to be developed that took into account the absorption capacity of beneficiary countries. The limitation on technical assistance funds was highlighted and delegates called for donor countries to contribute to the UNCTAD Trust Fund on Capacity-Building for Competition Policy.

III. Organizational matters

A. Election of officers

(Agenda item 1)

21. At its opening plenary meeting, on Tuesday, 15 July 2008, the Intergovernmental Group of Experts elected its officers, as follows:

Chair: Ms. Taisiya Tkacheva (Russian Federation)
Vice-Chair-cum-Rapporteur: Mr. Léopold Noel Boumsong (Cameroon)

B. Adoption of the agenda and organization of work

(Agenda item 2)

22. Also at its opening plenary meeting, the Intergovernmental Group of Experts adopted the provisional agenda for the session (TD/B/COM.2/CLP/65). The agenda was thus as follows:

1. Election of officers
2. Adoption of the agenda and organization of work
3. (a) 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
(b) Work programme, including capacity-building and technical assistance on competition law and policy
4. Provisional agenda for the tenth session of the Intergovernmental Group of Experts on Competition Law and Policy
5. Adoption of the report of the Intergovernmental Group of Experts on Competition Law and Policy

C. Provisional agenda for the tenth session of the Intergovernmental Group of Experts on Competition Law and Policy

(Agenda item 4)

23. At its closing plenary meeting, on 18 July 2008, the Intergovernmental Group of Experts approved the provisional agenda for its tenth session (for the text of the provisional agenda, see annex I).

D. Adoption of the report of the Intergovernmental Group of Experts on Competition Law and Policy

(Agenda item 5)

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

Annex I

Provisional agenda for the tenth session of the Intergovernmental Group of Experts on Competition Law and Policy

1. Election of officers
2. Adoption of the agenda and organization of work
3. (a) 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
(b) Work programme, including capacity-building and technical assistance on competition law and policy
4. Provisional agenda for the eleventh session of the Intergovernmental Group of Experts on Competition Law and Policy
5. Adoption of the report of the Intergovernmental Group of Experts on Competition Law and Policy

Annex II

Attendance*

1. Experts from the following States members of UNCTAD attended the meeting:

Albania	Mali
Algeria	Mauritius
Angola	Mexico
Benin	Moldova
Bhutan	Morocco
Bolivia	Mozambique
Bosnia and Herzegovina	Nepal
Botswana	Nicaragua
Brazil	Pakistan
Burkina Faso	Peru
Cambodia	Poland
Cameroon	Qatar
Canada	Republic of Korea
Chile	Romania
China	Russian Federation
Costa Rica	Saint Lucia
Côte d'Ivoire	Saudi Arabia
Czech Republic	Senegal
Dominican Republic	South Africa
Egypt	Spain
El Salvador	Sri Lanka
France	Swaziland
Gabon	Sweden
Germany	Switzerland
Ghana	Syrian Arab Republic
Guatemala	Togo
Guinea-Bissau	Tunisia
Honduras	Turkey
Hungary	Ukraine
India	United Kingdom of Great Britain and Northern Ireland
Indonesia	United Republic of Tanzania
Iran (Islamic Republic of)	United States of America
Italy	Uzbekistan
Japan	Venezuela (Bolivarian Republic of)
Kenya	Viet Nam
Lao People's Democratic Republic	Zambia
Malaysia	Zimbabwe
Malawi	

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

Central African Economic and Monetary Community
 Common Market for Eastern and Southern Africa
 Economic Community of West African States
 European Community

* For the list of participants, see TD/B/COM.2/CLP/Misc.9.

European Commission
 Organization for Economic Cooperation and Development (OECD)
 Organisation internationale de la Francophonie
 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 session:

World Trade Organization

Panellists

Mr. Vincent Martenet, Vice-Chair, Swiss Competition Commission
 Mr. Eleanor Fox, New York University School of Law
 Mr. Khalifa Tounakti, Tunisia
 Ms. Hongying Cao, Fair Trade Bureau, China
 Mr. Paulo Azevedo, Brazil
 Mr. Frederic Jenny, Chair, OECD, CLP
 Mr. Syamsul Maarif, KPPU, Indonesia
 Mr. Deuksoo Chang, Fair Trade Commission, Republic of Korea
 Mr. Markus Lange, German Cartel Office
 Mr. Shiyong Xu, East China University
 Mr. Drexler, Max Planck Institute, Munich
 Mr. Alberto Heimler, Italian Competition Authority
 Mr. Rachid Baina, Direction de la concurrence et des prix, Morocco
 Mr. Carel Maske, Microsoft
 Mr. Manuel Sebastião, Portugal
 Mr. Hans-Peter Egler
 Mr. Duane Schippers
 Mr. Eduardo Jara
 Mr. Dick Larm
 Ms. Maria Coppola
 Ms. Celina Escolan
 Ms. Deborah Healey
 Mr. Thula Kaira
 Mr. Patrick Krauskopf
 Mr. Alper Karakurt
 Mr. Christopher Bellamy, Ex-President, Competition Appeal Tribunal
 Ms. Erica Fink
 Mr. Amadou Dieng
 Mr. Thomas Cheng
 Mr. Peter Njoroge
 Mr. Roger Nellist
 Mr. Hisham Elkoustaf