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Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

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Review of application and implementation of the Set

Assessment of the application and implementation of the set

Note by the UNCTAD secretariat

Executive summary

This note, prepared by the UNCTAD secretariat, reviews major developments which have taken place at the national, regional and multilateral levels in the field of competition law and policy, particularly since November 2005, when 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 was held. At the multilateral level, mention is made of UNCTAD's cooperation with international organizations and the International Competition Network (ICN), as well as the outcome of UNCTAD XII (April 2008). The note then reviews in chapter I the operation of the Set in the field of competition, looking at its main provisions, drawing attention to their actuality and evaluating the extent to which they have been implemented to date. In chapter II, an evaluation is made of progress in implementation by States members of UNCTAD and by the Intergovernmental Group of Experts (IGE) on Competition Law and Policy of the resolution adopted by the Fifth Review Conference, drawing attention to technical cooperation, informal consultations and specific studies undertaken by the IGE. Finally, in chapter III, the note looks at possible activities in the field of competition law and policy which the Sixth Review Conference might wish to launch in the light of the decisions taken by UNCTAD XII.

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Introduction

1. The General Assembly, in its omnibus trade resolution 61/186, paragraph 19, adopted on 25 January 2007, reaffirmed the role of competition law and policy in sound economic development and decided to convene a Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, under the auspices of UNCTAD in 2010.

2. The Conference, to be held 8–12 November 2010, marks the 30th anniversary of the adoption of the only fully multilateral framework on competition in existence. The issue of competition law and policy has undoubtedly achieved a higher profile at the national, regional and multilateral levels. At the national level, some 110 countries, including developing countries and economies in transition, have adopted competition laws.

3. Since 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, which was held in November 2005, more than 21 developing countries and economies in transition have introduced competition laws. In addition, most other countries are now aware of the importance of competition policy, and many, including least developed countries (LDCs), are in the process of drafting competition legislation with the assistance of UNCTAD. At the regional level, numerous groupings of States – such as the West African Monetary Union (UEMOA), the Common Market for Eastern and Southern Africa (COMESA), the Central African Common Market (CEMAC), the Andean Community, the Caribbean Community (CARICOM) and the East African Community (EAC) – have adopted competition rules; and others – including the Southern African Development Community (SADC), the South African Custom Union (SACU), the General Treaty on Central American Economic Integration (SIECA) and the Southern Common Market (MERCOSUR) in the Americas and the Association of South-East Asian Nations (ASEAN) – are in the process of establishing working groups on competition policy or are preparing regional competition rules.

4. UNCTAD, the Organization for Economic Cooperation and Development (OECD) and the ICN have been very active in spreading competition law and policy principles throughout the world, while competition authorities of member States have also been very active in this field, both bilaterally and through active cooperation with international organizations and the ICN. Another indication of the higher profile given to competition policy is the increasing number of publication issues in this respect.

5. In the period between the Fifth United Nations Conference to Review the Set and July 2009, two Ad Hoc Experts Meetings on Competition Law and Policy and three sessions of the Intergovernmental Group of Experts on Competition Law and Policy have taken place at UNCTAD. The eleventh session of the IGE, held in July 2009, acted as the preparatory meeting for the Sixth Review Conference.

6. In April 2008, UNCTAD XII took place in Accra, Ghana. The Conference, which examined “the opportunities and challenges of globalization for development”, considered the role of competition law and policy in this context and agreed that:

“74. Efforts should be made to prevent and dismantle anti-competitive structures and practices and to promote responsibility and accountability of corporate actors at both the national and the international level, thereby enabling developing countries’ producers, enterprises and consumers to take advantage of trade liberalization. This should be supplemented by the promotion of a culture of competition and improved cooperation between competition authorities. Developing countries are encouraged to consider, as a matter of importance, establishing

competition laws and frameworks best suited to their development needs, complemented by technical and financial assistance for capacity-building, taking fully into account national policy objectives and capacity constraints.”

7. It is important to note that competition policy was included among UNCTAD’s top priorities in contributing to making globalization both more efficient and more equitable. In fact, it is agreed in the Set that competition increases efficiency. Moreover, the Set also recognizes that competition policy is aimed at creating a more equitable environment. Objective No. 3 of the Set seeks to “protect and promote social welfare... and the interest of consumers” and the Set itself is entitled “Set of Equitable Principles and Rules”, in particular because it endorses the principle of “Preferential or Differential Treatment for developing countries” as embodied in Section C of the Set.

8. In addition to the Accra Declaration, UNCTAD XII adopted a Plan of Action (contained in the Accra Accord (UNCTAD/IAOS/2008/2)), which contains the following decisions with respect to competition issues:

“104. UNCTAD is the focal point on the work on competition policy and related consumer welfare within the United Nations system. It provides to its member States a forum for intergovernmental policy dialogue and consensus-building in the area of competition laws and policies. It should continue to carry out research and analysis in this area for, and/or in collaboration with, its member States and international networks on competition policy. UNCTAD should continue to be a forum to discuss competition issues on the multilateral level, with close linkages to existing networks of competition authorities, and to promote the use of competition law and policy as tools for achieving domestic and international competitiveness. UNCTAD’s work in this area should promote competition law regimes that take into account the prevailing conditions in the developing countries. Accordingly, future action by UNCTAD in this area needs to focus on:

(a) The preparation and implementation of national and regional competition law and policies and measures appropriate to developing countries’ development needs and their consumers’ welfare;

(b) Research and deliberations regarding anti-competitive practices in different sectors, their effects on consumer welfare and global markets and developing countries’ markets in particular, and mechanisms to address such effects;

(c) Examining all issues relating to the interface between competition, privatization and innovation and their impacts on trade and development, including at the regional level;

(d) Providing support to regional and South–South cooperation on competition policies;

(e) Supporting developing countries in the formulation and implementation of competition laws;

(f) Voluntary peer reviews of competition policy in UNCTAD should be extended to a wider group of developing countries and their regional economic organizations; and

(g) Facilitating the exchange of experiences and best practices in capacity-building in different regions, including programmes like the technical assistance programme on competition and consumer protection policies for Latin America (COMPAL), which should be strengthened.”

I. Implementation of the Set

A. Objectives of the Set

9. Objective No. 1 of the Set – “to ensure that restrictive business practices do not impede or negate the realization of the benefits that should arise from the liberalization of world trade, particularly those affecting the trade and development of developing countries” – is of particular relevance today, as globalization is rapidly expanding and more and more questions are being raised concerning the effects the financial and economic crises, especially with respect to the relative roles of governments and markets.

10. One important issue is the challenge arising from the global economic crisis and the approaches taken by competition authorities in order to achieve effective enforcement of merger control. While important actions are taking place, governments should endeavour to minimize any negative impact on competition arising from their interventions and account for the risk of creating adverse consequences in other States, given the global dimensions of many markets. Most competition authorities are still unable to come to grips with the challenges arising from the global economic crisis affecting their national interests, both in domestic markets and, especially, in world markets. It should be noted that, in line with the request made by the IGE on Competition Law and Policy in its agreed conclusions (TD/B/C.1/CLP/L.1) the UNCTAD secretariat is making available to the Sixth Review Conference a study on “The role of competition advocacy, merger control and the effective enforcement of law in times of economic trouble” (TD/RBP/CONF.7/6), which contains a review of the approaches taken by Competition Authorities to achieve effective enforcement of merger control and proposes issues for consideration by the Review Conference.

11. With respect to objective No. 2 – “to attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through: (a) The creation, encouragement and protection of competition; (b) Control of the concentration of capital and/or economic power; (c) Encouragement of innovation;” – the results have been encouraging. Since 2005, many developing countries and economies have shown interest in competition policy and many have requested technical assistance and advisory services to draft legislation. To date, 22 countries have actually adopted new competition laws: Botswana, Bulgaria, China, Dominican Republic, El Salvador, Gambia, Honduras, Iraq, Kurdistan, Madagascar, Mauritius, Nicaragua, Malaysia, Namibia, Pakistan, Qatar, Seychelles, Saudi Arabia, Sudan, Swaziland, the Syrian Arab Republic and Uruguay. Moreover, as the consultations during UNCTAD peer reviews show, it is not sufficient for a country to have a competition law on its statute books; it is necessary for its competition policy to have an effective impact on the economy. Setting up a competition authority can take time, and political will is necessary to sustain the momentum in the years to follow its establishment. Some countries undergoing economic crisis or changes of government have changed priorities, and some competition authorities which enjoyed political support when they were established may now face decay and loss of support from the executive power.

12. It should be noted that, in line with the request made by the eleventh session of the IGE on Competition Law and Policy in its agreed conclusions, the UNCTAD secretariat is making available to the Sixth Review Conference a report on “The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy” (TD/RBP/CONF.7/3). The report addresses the following issues: (a) appropriate design and effectiveness of competition law and policy; (b) how effective can competition law and policy be in promoting development? (c) what are the

factors that can augment or impede such effectiveness? (d) given that countries are at different stages of this economic development process, should the design and enforcement of their competition policy vary and if so in what way?

13. Objective No. 3 – “to protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries” – is receiving increased attention in many countries worldwide. As result of the UNCTAD XII decision to request the UNCTAD secretariat to undertake research and deliberations regarding anti-competitive practices and their effects on consumer welfare (Accra Accord, para. 104(b)), UNCTAD has implemented technical assistance programmes which include a strong consumer protection component. While the immediate objective of modern competition law is to increase efficiency by promoting competition, one of its important side effects is no doubt to benefit consumers. Moreover, it is increasingly felt that this is one way to overcome difficulties in implementing competition policy in many developing countries. Where this is a new concept which needs to be widely understood, it is important to create and strengthen consumer organizations, which can usefully contribute to consumer information, improve transparency and often draw the attention of competition authorities to anti-competitive practices. As can be seen from UNCTAD’s report on technical assistance (TD/RBP/CONF.7/7), UNCTAD has, in cooperation with relevant organizations, provided capacity-building and sound technical assistance to public institutions for competition and consumer protection in developing countries and work to help educate the public and representative of the private sector in this field.

B. The development dimension

14. Section C, on multilaterally agreed equitable principles for the control of anticompetitive practices, recognizes in its paragraph 6 the possibility for national legislation to exclude certain sectors from the scope of national competition law, and in paragraph 7 provides for “preferential or differential treatment for developing countries” in order to take into account “the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:

(a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy, and

(b) Encouraging their economic development through regional or global arrangements among developing countries.”

15. In line with the provisions in C.7. of the Set, developing countries should be in a position, if need be, to adopt new competition legislation in a progressive or more flexible manner, i.e. by being able to design appropriate competition policy that takes into account their development objectives, exemptions of certain sectors and coherence with other economic policies (see TD/RBP/CONF.7/3).

16. A degree of flexibility for countries newly opening their markets is therefore fully in line with this provision of the Set. Developing countries concerned with the risk of eliminating local industry as a result of the sudden opening of specific markets to strong competition should therefore be in a position to take a more flexible, gradualist approach in order to ensure that liberalization takes place when their industries are more efficient and are able to compete. Of course, it is not in the interest of countries to keep afloat industries that are never going to be viable without protection and subsidies, thus distorting the allocation of scarce resources.

17. The interface between competition and development policies has been a perennial topic for the Intergovernmental Group of Experts on Competition Law and Policy. The

Group has considered the topic in 1998, 2003, and 2009, and certain aspects of the interface in 2006 (competition and public subsidies) and 2007 (competition and the exercise of intellectual property rights). In addition, the competition branch published a book in 2004 and one in 2008 that touched on the interface.

18. The competition experts and the UNCTAD secretariat have, through informal consultations during annual meetings of the IGE, contributed to identifying “common ground” that exists and the approaches followed by States on different competition law and policy questions. In so doing, they have also shed light and exchanged views on those areas where differences exist. In particular, the study on “The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy” (TD/RBP/CONF.7/3) submitted to the Sixth Review Conference responds to the issue of appropriate design and enforcement of competition law and policy in countries at different levels of development.

C. The main anti-competitive practices

19. Section D of the Set, on Principles and Rules for enterprises, including transnational corporations, contains the core anti-competitive practices that should be refrained from by enterprises “engaged on the market in rival or potentially rival activities” or when “through an abuse or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition” (Section D, paras. 3 and 4). The treatment of horizontal and vertical restraints, as well as dominance and abuse of dominant market power, is further elaborated in UNCTAD’s model law, of which the latest version is submitted to the Sixth Review Conference in document TD/RBP/CONF.7/8. In line with the decision taken at the eleventh session of the IGE in July 2009, the full text and the design of the Model Law has been made more “reader-friendly” in that recent development in national legislations, case laws and commentaries are contained in comparative tables indicating the types of laws or solutions adopted by countries for different aspects of the law, as well as new inputs from competition agencies, OECD and ICN.

20. Section E of the set, on Principles and Rules for States at National, Regional and Subregional levels, and Section F, on international measures, complement each other, as the call in paragraph 1 of Section E for States “at the national level or through regional groupings” to “adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures”. The provisions calling for exchanges of information and cooperation in Section E are somewhat complemented in Section F, which calls for “work aimed at achieving common approaches” (para.1); consultations among States (para.4); continued work within UNCTAD on the elaboration of a Model Law or Laws (para.5); and technical assistance, advisory and training services (para.6)

D. Efforts made by member States and regional groupings

21. As indicated in the introduction, in the period since the Fifth Review Conference, there has been considerable interest on the part of developing countries and economies in transition in drafting national and regional competition rules. Twenty-two countries adopted new competition laws or modernized existing legislation in the period under review. Many more are preparing domestic legislation.

22. At the regional level, numerous groups have established or are in the process of adopting regional competition rules and or negotiating the inclusion of competition clauses in bilateral, regional and group-to-group cooperation agreements. It can be said that common approaches and trends are on the increase, largely as a result of the important

exchanges of views and consultations that take place within the framework of bilateral, regional and multilateral consultations, for example under bilateral cooperation agreements where they exist, and consultations with UNCTAD IGE on Competition Law and Policy, OECD and ICN.

The Central American Group on Competition Policy

The Central American Group of Competition (the Group) was born during the CDVII Meeting of Central American Vice-ministries of Economic Integration on 4 May 2006, to clarify and seek coherence in the existing regional regulations dealing with competition issues. The Central American region does not have specific regional instruments regarding competition policy. In this sense, under Article 21 of the Framework Agreement for the Establishment of Central American Customs Union, the Group was created with the purpose of strengthening competition policies of its members through the introduction of a common regional policy.

Among other objectives, the Group aims to achieve convergence of national laws, to set up a framework for information exchange among those member countries which have competition laws, to promote of regional competition rules in those countries that do not have national laws, and to help build institutional capacities for enforcement member States. The Group organizes annual Central American Forums of competition, with the participation of the United States of America (FTC), Spain (CNC), Mexico, Panama and the European Union, the Ministers of the region in charge of commerce, and international organizations as ECLAC and UNCTAD. Topics such as the regionalization and internationalization of the financial sector in Central America have been discussed under these forums. The Group has also been issuing a quarterly bulletin containing relevant information regarding cases, studies and advocacy activities carried out in each of its member countries.

One of the main challenges for the future, as stated in the Managua Declaration, signed at the occasion of the recently organized by UNCTAD's Seminar on "Exchange of Experiences among Central American Competition Agencies, the Central American Court of Justice and Legislators with Responsibilities on Economic Affairs", that took place on 25 June 2010, is the coordination and synergies of its regional efforts with those from FOPREL Parliaments and the Central American Court of Justice (see Managua Declaration).

E. Substantive discussions at the Intergovernmental Group of Experts on Competition Law and Policy

23. The round table consultations which take place annually during sessions of the IGE on Competition Law and Policy have become an appreciated feature of UNCTAD's intergovernmental machinery. This function of the Intergovernmental Group was decided by the Third Review Conference held in 1990 (para. 9 of the resolution adopted by the Review Conference). During the period under review, the IGE on Competition Law and Policy held roundtables on the following issues:

- (a) Criteria for evaluating the effectiveness of competition authorities;
- (b) Competition in energy markets;
- (c) Abuse of dominance;
- (d) Independence and accountability of competition authorities;
- (e) Competition policy and the exercise of intellectual property rights;
- (f) The attribution of competence to community and national competition authorities in the application of competition rule;

- (g) The use of economic analysis in competition cases;
- (h) The relationship between competition and industrial policies in promoting economic development;
- (i) Public monopolies, concessions and competition law and policies;
- (j) Roles of possible dispute mediation mechanisms and alternative arrangements, including voluntary peer reviews, in competition law and policy;
- (k) Best practices for defining respective competences and settling of cases, which involve joint action by competition authorities and regulatory bodies;
- (l) Experiences gained so far on international cooperation on competition policy issues and the mechanisms used;
- (m) Ways in which possible international agreements on competition might apply to developing countries, including through preferential or differential treatment, with a view to enabling these countries to introduce and enforce competition law and policy consistent with their level of economic development.

24. The conclusions of the consultations among experts during the IGE are recorded in the successive reports of the IGEs, and are disseminated by UNCTAD through its capacity-building in the field and reflected in the reports of voluntary peer reviews of competition policy held in UNCTAD.

F. Technical assistance

25. Despite a general widespread trend towards the adoption, reformulation and better implementation of competition laws and policies in developing and transition countries, many of these countries still do not have up-to-date competition legislation or adequate institutions for their effective enforcement, and rely to a large extent on UNCTAD capacity-building. In this regard, UNCTAD provides assistance on competition laws and policies by providing technical assistance and capacity-building activities at national, regional and sub-regional levels.

26. At national level, UNCTAD, with the support of donor countries and programmes, has played an important role in preparing developing countries from all regions of the world, including numerous LDCs, in (a) drafting competition legislation; (b) providing assistance to regional groups on competition and consumer protection issues; (c) organizing training for officials responsible for the operation of national competition authorities; and (d) contributing to the creation of a “competition culture” worldwide.

27. In addition, UNCTAD provides technical assistance related to preparation, adoption, revision or implementation of national competition and legislation and also by building national institutional capacity to enforce effective competition legislation. At the national level, UNCTAD therefore organizes:

- (a) Assistance in the preparation of competition and consumer protection laws and related legislation;
- (b) Consultative meeting to review of draft competition laws with representatives of governments. These activities represent an essential step in the way of competition legislation adoption;
- (c) Intensive courses on competition laws and policies including training courses on evidence-gathering in competition cases;

(d) Training courses for judges on issues related to competition laws and policies;

(e) Training courses on the implementation of competition law for newly appointed commissioners.

28. At regional level, UNCTAD assists in drafting and the implementation of regional legislation on competition. It also organizes a number of conferences, seminars and workshops aimed at contributing to capacity-building and multilateral cooperation in the competition area. At the regional and subregional level, UNCTAD therefore organizes:

(a) Studies and reports on strengthening institutions in the area of competition;

(b) Regional workshops/conferences on competition law and policy,

(c) International conferences on competition policies for African, Arab Latin American and Asian countries;

(d) Studies and reports on a possible framework for cooperation on competition policy, trade and related issues for regional integration groupings;

(e) Regional training of judges and public prosecutors on the enforcement of competition law.

29. As can be seen from the technical assistance report, TD/RBP/CONF.7/7 UNCTAD's capacity-building and training activities have increased considerably during the five-year period reviewed. This is due in part to the considerable interest demonstrated by member States, at both the domestic and regional levels, and in part to the solidarity demonstrated by donors from many countries who made generous financial contributions and contributions in kind.

30. The Accra Conference also invited the Secretary-General of UNCTAD to explore the feasibility of mobilizing financial and human resources on a more predictable and regular basis and to address the cooperation needs of developing countries and economies in transition in the relevant official languages of the United Nations. Efforts were made to translate documents into relevant languages and to prepare training materials, originally in different languages, in accordance with the legal traditions of different regions of the world. However, it has proved impossible to mobilize financial resources on a predictable and regular basis, owing to the ad hoc basis on which most voluntary contributions are made and the often-changing general directives of major donors.

31. At its fifty-fourth session, in 2007, the Trade and Development Board adopted decision 492(LIV) on the "Review of technical cooperation activities of UNCTAD". In this regard, paragraph 18 of this decision, took note of recommendation 19 of the Report of the Panel of Eminent Persons concerning the "need of consolidation of technical cooperation projects and request[ed] the secretariat to initiate... in consultation with member States" the process of the establishment of "thematic trust funds within and among divisions". In response to this decision, and in order to streamline UNCTAD's technical assistance activities and increase impact, two initiatives were taken by the secretariat: (a) an extension of the COMPAL programme, with increased country coverage from 5 to 10; and (b) launch of a regional programme for Africa AFRICOMP.

32. COMPAL is a programme on competition and consumer protection policies for Latin America, supported by the Swiss State Secretariat for Economic Affairs (SECO). Five Latin American beneficiary countries (the Plurinational State of Bolivia, Costa Rica, El Salvador, Nicaragua and Peru) benefited from this project during its first phase (2005–

2008). Under its second phase (COMPAL II: 2009–2013), it has been enlarged to 10 Latin American countries, including Colombia, Ecuador, Paraguay, Uruguay and the Dominican Republic.¹ An external evaluation of the programme found it a “model for technical assistance”. COMPAL interacts with various forums and informal networks within the region in and promote a culture of competition in the continent.

33. In response to the Accra Accord, the “African Competition Programme” (AFRICOMP) was modeled on COMPAL and draws on the best practices learned from the experience gained during Phase I of COMPAL. With financial and human resources from Norway and Sweden, UNCTAD launched AFRICOMP for, initially, five core African countries²: Ghana, Lesotho, Malawi, Swaziland and Zambia. In addition, AFRICOMP provides assistance to two regional groupings: UEMOA with eight member States and CEMAC covering six member States.

34. As a result of an increasing number of requests from African countries, UNCTAD expanded the project coverage to include Angola, Benin, Botswana, Burkina Faso, Cameroon, Chad, Congo, Côte d’Ivoire, Kenya, Madagascar, Mozambique, Niger, Rwanda and Uganda. A high-level meeting attended by ministers, heads of competition agencies and donor countries and the African Development Bank was organized in Lusaka, Zambia in May 2010 to discuss modalities for cooperation and mobilizing additional resources for AFRICOMP. A pipeline project is under consideration by donors and UNCTAD and it is hoped that the outcome of this decision will be announced during the Sixth United Nations Review Conference.

G. UNCTAD voluntary peer reviews

35. UNCTAD launched its Voluntary Peer Review on Competition Policy (VPR) in 2005. The VPR is dedicated to enhancing the quality and effectiveness of the competition policy enforcement framework in member States. It involves the scrutiny of competition policy as embodied in the competition law and reflects on the effectiveness of institutions and institutional arrangements in enforcing competition law.

36. The peer review process is conducted in a series of steps. The VPR begins with the consultations phase, which culminates in a detailed draft Peer Review Report, which the reviewed party has the opportunity to evaluate for factual errors before it is finalized. The second step is the assessment phase, which is a formal interactive exchange between a panel of reviewers and the reviewed party, based on the findings of the Review Report. The role of the reviewers is advisory and focused on assisting the party being reviewed to address weaknesses and identify solutions for problems. During the interactive discussion, officials from the institution under review have the opportunity to clarify the findings and recommendations of the Review Report. In addition, other member countries may pose questions and provide insight on issues arising from the Review Report, drawing from their own experience in competition enforcement.

¹ For more information about the COMPAL Programme, see “Review of capacity-building and technical assistance in the area of competition law and policy.” Study by the UNCTAD secretariat TD/B/C.I/CLP/5 27 April 2009. Available at http://www.unctad.org/en/docs/ciclpd5_en.pdf. In addition, see the website of COMPAL at <http://compal.unctad.org>.

² In addition, other cooperating partners, including France, UNDP and the United Nations Development Account, are funding technical assistance projects for African countries benefiting from UNCTAD technical assistance. These countries will be brought together under the African Project. UNCTAD has further sought financial support from Switzerland, Turkey, Spain and Japan, in order to meet the increasing demand for technical assistance from African countries.

37. The post-assessment phase and third step of the VPR is the identification of strengths and areas for possible improvement. Based on the latter, UNCTAD prepares a capacity building project proposal for consideration by the country and potential funding partners. The strengths of a country's competition framework contribute to the general identification and exchange of good practice among member States. The post-assessment phase is in many ways a by-product of the first two steps because the strengths and weaknesses of each regime are identified during the consultations and also during the assessment phase. In addition, the assessment phase concludes with a discussion on the way forward and at this time the capacity building project proposal is presented.

38. By agreeing to show its work to others, a country/institution that volunteers for the UNCTAD VPR facilitates a truthful and proactive self-assessment that helps pinpoint strengths and weaknesses in an environment that allows external participation without creating an interrogative and hostile atmosphere. The inclusive nature of the consultations phase boosts the confidence of other stakeholders in the reviewed institution and signals an outward rather than inward orientation. The emphasis on an exchange of experience in the assessment phase means that the reviewed party (and other participants) stands to gain a lot of soft benefits from direct dialogue. With advice and encouragement, weaknesses can be addressed in a cost-effective manner with the added advantage of collaborative learning.

39. During the discussions of – and in written submissions to – the IGE, a number of favourable views and specific suggestions relating to UNCTAD voluntary peer review were highlighted by different delegates. Regarding its objectives or advantages, it was suggested, *inter alia*, that it (a) build up capacity and contribute to strengthened international cooperation, transparency and convergence in this area, with corresponding benefits to the international trading system; (b) provide a forum for countries with concerns about the reviewed country's laws to raise those concerns and encourage constructive problem-solving; (c) promote compliance with international standards on competition policy; (d) identify good practices which could be disseminated and aspects where further improvement would be welcome, including any need for legislative amendments and updating; and (e) benefit from UNCTAD technical assistance and capacity-building to facilitate implementation of recommendations and engagement of developing countries. Regarding its coverage, UNCTAD peer reviews (a) focus on those areas linked to the United Nations Set on competition and therefore avoid overlap with Trade Policy Review in WTO; (b) cover a narrow range of issues with respect to formulation and effectiveness of enforcement and successes and difficulties experienced; (c) include how well a culture of competition was being established and whether knowledge of the competition law and regime was being successfully disseminated in the public and private sectors; (d) focus upon adherence to core principles and prohibition of hardcore cartels; and (e) avoid looking at decisions in individual competition cases, or questions relating to the strategy or prioritization of a competition authority. Regarding its approach to countries with less experience in this area, it was suggested that it should recognize the needs of developing countries and differentiate among countries on the basis of their levels of development or their experience of competition law and policy.

40. Regarding follow-up on recommendations, UNCTAD (a) implements technical assistance on countries and issues in accordance with needs and requests, such as where a country sought advice on its domestic competition law and policy; (b) disseminates the results of peer reviews so as to ensure wider group of stakeholders at the national and regional levels; (c) provides for periodical review of implementation of recommendations during the discussions at the IGE on technical assistance and capacity-building.

41. Since the Fifth United Nations Review Conference, UNCTAD Voluntary Competition Peer Reviews have been undertaken for Jamaica (2005), Kenya (2005), Tunisia (2006), West African Economic and Monetary Union (2007), Costa Rica (2008),

Indonesia (2009) and currently Armenia. UNCTAD peer reviews are an important tool for countries to compare their performance against international best practices. The interactive peer review promotes knowledge and experience-sharing between the authorities at regional and international levels and also enhances informal cooperation networks.

II. International cooperation

42. The Fifth Review Conference called upon States to increase cooperation between their competition authorities and Governments for the mutual benefit of all countries in order to strengthen effective international action against anticompetitive practices as covered by the Set, especially when these occur at the international level, adding that “such cooperation is particularly important for developing countries and economies in transition”. It highlighted a number of subjects relevant to international cooperation in this area for UNCTAD to work on within the framework of the resolution. In the context of this exercise, governments may wish to discuss (a) how the Set of Principles and Rules might be better implemented; (b) the competition implications at the national, regional and international levels of globalization and liberalization; and (c) the strengthening of information exchange, consultations and cooperation in enforcement at the bilateral, regional and multilateral levels having effects overseas.

43. Enforcement cooperation has, in cases with international implications, helped to improve the quality and effectiveness of enforcement and decrease its cost, helping to resolve difficulties in obtaining access to information held in other countries, in serving process or in undertaking enforcement against entities whose headquarters or assets are located abroad. It has also reduced friction that might arise between countries because of recourse to extraterritorial enforcement of competition laws or of jurisdictional conflicts. However, difficulties are sometimes experienced in implementing such cooperation. Case-specific enforcement cooperation pursuant to the existing instruments takes place primarily between developed countries in the application of bilateral enforcement agreements, mutual legal assistance treaties (limited to criminal action against cartels), free trade, customs union or common market agreements and the relevant OECD instruments. The maintenance of informal links with other competition authorities has been an important way of keeping informed of developments in competition law and policy in other jurisdictions through the exchanging of views, although the usefulness of such informal cooperation has sometimes been found to be limited in cases where an authority requires enforcement assistance in a particular matter, or confidential information.

44. Cooperation is facilitated by a degree of commonality of approach; conversely, differences in substantive competition laws or economic doctrines, enforcement practices or procedures, effects on each market or the evidence available in each jurisdiction, or interpretations of the underlying facts, may all constitute impediments to cooperation. Differences in legal doctrines relating to the scope of extraterritoriality may also adversely affect cooperation. Cooperation may also be limited by concerns about having enforcement priorities and resource allocation determined by positive comity requests from other countries, or about exposing national firms to sanctions by a foreign authority or court. Reciprocity would also be a concern.

45. In recent years, a key obstacle to enhanced cooperation on enforcement against international cartels area has arisen from the confidentiality that is accorded under national leniency programmes to information from leniency applications. While the trend toward greater convergence in this area may help to reduce such considerations and concerns, they are unlikely to disappear, since what may maximize welfare in one country may reduce it in another. Nevertheless, increased reliance on economic theory in both the enforcement of trade and competition rules is likely to help to alleviate but not eliminate these concerns.

46. For the purpose of strengthening enforcement cooperation, it has been suggested that developing common standards is important and that a balance between transparency and the protection of confidential information should be found, and that an international consensus on the latter could help to facilitate the conclusion of agreements featuring close cooperation between enforcement authorities. It has also been stated that three key ingredients for the success of cooperation are that (a) the competition area has to be perceived as legal rather than political or policy-infused, with mergers being an area of particular concern (see TD/RBP/CONF.7/6); (b) there needs to be greater substantive convergence in respect of the goals pursued by competition laws; and (c) there also needs to be greater understanding regarding procedural systems, particularly as regards the severity of penalties and the possibility of recovering treble damages through private actions. Nevertheless, it has also been suggested that a broader natural limitation to bilateral cooperation exists, in that it tends to take place among countries which are economically interdependent and share a similar level of experience in competition law enforcement or the same ideas on competition policy. An UNCTAD report notes that cooperation tends to occur most frequently between jurisdictions that have such things in common as geographic proximity (although not always the case), a strong trading relationship, a history of having been affected by the same mergers, and an existing cooperation agreement; meaningful cooperation in merger investigations is often also dependent upon the willingness of the merging parties to grant waivers of confidentiality protection, so that jurisdictions new to merger control that have not acquired a reputation for sound and fair merger control and protection of confidential information are less likely to benefit from cooperation from other competition authorities.

47. To realize the potential of regional groupings in this respect, therefore, some reflection would be appropriate as to which substantive competition regimes, institutional structures and mechanisms would promote cooperation. For this purpose, consultations might be undertaken within UNCTAD, which has provided, upon request, technical assistance to regional groups on how to maximize utilization of regional frameworks for enforcement cooperation. This is in line with the Set of Principles and Rules, which provides for the establishment of appropriate mechanisms at the regional and subregional levels to promote the exchange of information on anti-competitive practices and on the application of national laws and policies in this area, as well as to provide mutual assistance in anti-competitive practices control (article E.7). It is also in line with paragraph 104 of the Accra Accord, which provides that UNCTAD should further strengthen analytical work and capacity-building activities to assist developing countries on issues related to competition law and policies, including at a regional level.

III. Outlook for the Sixth Review Conference

48. The framework established under the Set can be used more directly to further enforcement cooperation. Furthermore, in its plan of action, UNCTAD XII in paragraph 75 of the Accra Accord decided:

“75. States are encouraged to implement the voluntary consultation mechanism provided for in section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, with a view to finding mutually acceptable solutions.”

49. So far, the consultation mechanisms provided for in the Set have mostly been used, with success, for presentations, the exchange of experiences and discussions on different competition issues. In one case in the mid-1980s, a developing country, using the UNCTAD secretariat as an intermediary, requested consultations with a developed country regarding the prohibition by one of its pharmaceutical firms of exports from a neighbouring

developing country of pharmaceuticals manufactured under a license granted by the firm. The matter was referred by the authorities of the developed country to the firm in question and its reply explaining the circumstances of the prohibition was transmitted to the developing country. (The matter was brought to the attention of the Intergovernmental Group of Experts on Restrictive Business Practices during informal consultations.) More recently, several countries from Latin America and Southern Africa, as well as regional groupings, requested information from the secretariat about the modalities for availing themselves for the use of the consultations provided for under Section F. It might be worth exploring the potential for further case-specific consultations of this type, which might be stimulated by the supply of information necessary for the effective control of anti-competitive practices to other States, particularly developing countries, in line with paragraph E.9 of the Set to the States concerned. The aim would be to reinforce or promote cooperation under bilateral or regional agreements, rather than to replace such cooperation, since enforcement cooperation under non-binding OECD instruments tends to be less intensive and case-oriented if not backed up by a binding bilateral agreement.

50. Such case-specific enforcement cooperation would not come at the expense of other forms of cooperation, but would rather aim to link with and build on them in a synergistic manner. There are extensive contacts among competition authorities for the purpose of exchanging general information, experiences or ideas; such contacts take place either on an informal basis or in pursuance of bilateral or regional agreements, as well as under the Set of Principles and Rules and under OECD instruments. Substantial technical assistance also takes place in the form of (a) seminars and training courses; (b) visits to, or training attachments with, competition authorities in developed countries; (c) short-term missions to countries needing cooperation, including analyses of their situation and needs, workshops, group training, assistance on particular issues or in the drafting of legislation; and (d) long-term secondments of personnel from authorities with experience in this area for the purposes of training and giving advice to the authorities of countries with limited experience. To the extent that the communication of experiences or provision of technical assistance by one or more countries induces other countries to adopt or amend competition legislation or modify enforcement policies or procedures along similar lines, this promotes “soft” convergence (in contrast to the varying degrees of convergence or harmonization provided for in this area by free trade, customs union or common market agreements).

51. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices provides (in para. F.4) that where a State, particularly a developing country, believes that a consultation with another State or States is appropriate with regard to an issue concerning RBP control, it may request a consultation with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request UNCTAD to provide mutually agreed conference facilities for it. States should give full consideration to requests for consultations and, upon agreement as to the subject and procedures, the consultations should take place at an appropriate time. If agreed, a joint report on the consultations and their results should be prepared by the States involved, with the assistance of the UNCTAD secretariat if they so wish, and be made available to UNCTAD for publication. As indicated above, so far, this consultations mechanism has been used only once: in the mid-1980s a developing country, using the UNCTAD secretariat as an intermediary, requested consultations with a developed country regarding the prohibition by one of its pharmaceutical firms of exports from a neighbouring developing country of pharmaceuticals manufactured under a license granted by the firm. The matter was referred by the authorities of the developed country to the firm in question and its reply explaining the circumstances of the prohibition was transmitted to the developing country. The matter was brought to the attention of the Group of Experts during informal consultations.

52. Separately, the Set of Principles and Rules, (in para. G.3) states that one of the functions of the Group of Experts shall be “to provide a forum and modalities for multilateral consultations, discussion and exchange of views between States on matters related to the Set of Principles and Rules, in particular its operation and the experience arising there from”. This consultations mechanism provides the framework for the presentations, exchange of experiences and discussions on different competition issues of a general nature which take place during the annual sessions of the Group of Experts.

53. Thirty years will have lapsed since the Set was negotiated in 1980. The need to review and update certain parts of the Set may then be discussed. During the regional meetings organized by UNCTAD as preparatory meetings for the Sixth United Nations Review Conference, participants were of the view that the language of the Set should be modernized to reflect important changes in this field in the past 30 years. Delegates may wish to reflect on the merits of providing commentaries on the various chapters of the Set, which the secretariat could attach to the set and regularly update on the basis of commentaries from member States and relevant international organizations and the ICN.

54. It might also be worth exploring the potential for further case-specific consultations of this type, which might be stimulated by the supply of information necessary for the effective control of anti-competitive practices to other States, particularly developing countries, in line with paragraph E.9 of the Set to the States concerned. The aim would be to reinforce or promote cooperation under bilateral or regional agreements, rather than to replace such cooperation, since enforcement cooperation under non-binding OECD instruments tends to be less intensive and case-oriented if not backed up by a binding bilateral agreement.

55. The Conference might wish to reflect upon and take a decision on the proposal to make more use of the principle of *amicus curiae* in case specific consultations of this type, which might be promote at the regional and subregional levels, particularly among developing countries in line with section E.9 of the Set.

56. The Conference might wish also to reflect upon and take a decision on the proposal made by some delegations during UNCTAD XI and UNCTAD XII, but which was not decided during either Conference, of establishing within UNCTAD ad hoc expert meetings on competition and related consumer welfare issues.