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

Held at the Palais des Nations, Geneva, from 19 to 21 October 2016

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I. Agreed conclusions adopted by the Intergovernmental Group of Experts adopted at its fifteenth 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,

Taking into account the resolution adopted by the Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Geneva, Switzerland, July 2015),¹

Considering the provisions relating to competition issues adopted by the fourteenth session of the United Nations Conference on Trade and Development (UNCTAD XIV; Nairobi, July 2016), including the provisions in paragraphs 69 and 76 (x) of the Nairobi Maafikiano,²

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

Noting that the 2030 Agenda for Sustainable Development and the outcomes of UNCTAD XIV focus on addressing the opportunities and challenges of globalization for development and poverty reduction,

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

Recognizing that an effective enabling environment for competition and development may include both national competition policies and international cooperation to deal with cross-border anti-competitive practices,

Recognizing further the need to strengthen the work of UNCTAD on competition law and policy so as to enhance its development role and benefits for consumers and business,

Noting with satisfaction the important written and oral contributions from competition authorities and other participations which contributed to a rich debate its fifteenth session,

Taking note with appreciation of the documentation and the peer review of competition law and policy of Uruguay prepared by the UNCTAD secretariat for its fifteenth session,

1. *Expresses appreciation* to the Government of Uruguay for volunteering for a peer review of competition law and policy and for sharing its experiences, best practices and challenges with young competition agencies during the fifteenth session of the Intergovernmental Group of Experts, and to all Governments and regional groupings participating in the reviews; recognizes the progress achieved so far in the elaboration and enforcement of the peer-reviewed country's competition law;

¹ TD/RBP/CONF.8/11.

² TD/519/Add.2.

2. *Invites* all member Governments and competition agencies to assist UNCTAD on a voluntary basis by providing experts or other resources for future and follow-up activities in connection with voluntary peer reviews and their recommendations;
3. *Decides* that UNCTAD should, in light of experiences with voluntary peer reviews undertaken so far by UNCTAD and others and in accordance with available resources, undertake further voluntary peer reviews of the competition law and policy of member States or regional groupings of States during the sixteenth session of the Intergovernmental Group of Experts, to be held in July 2017;
4. *Underlines* the importance of using the communications strategies of competition agencies as a tool for the effective enforcement of competition law and of disseminating evidence on the benefits of competition and appropriate regulations for consumers and businesses, as well as the need to strengthen international cooperation, including informal collaboration among agencies; and calls upon UNCTAD to promote and support cooperation between Governments and competition authorities, as directed by the Accra Accord in paragraphs 103 and 211;
5. *Emphasizes* the importance of regional cooperation in the enforcement of competition law and policy; and invites competition agencies to strengthen their bilateral and regional cooperation;
6. *Calls upon* UNCTAD to promote and support cooperation between competition authorities and Governments in accordance with the Accra Accord (paragraphs 103 and 104), the Nairobi Maakifiano (paragraphs 69 and 76 (x)) and the resolution adopted by the Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (paragraphs 3 and 16);
7. *Underlines* the importance of priority setting and resource allocation as a tool for the effectiveness of capacity-building activities extended to young agencies; and requests the UNCTAD secretariat to disseminate the summary of the discussions of the Intergovernmental Group of Experts on this topic to all interested States, including through its technical cooperation activities and peer reviews;
8. *Requests* the UNCTAD secretariat to prepare studies for the sixteenth session of the Intergovernmental Group of Experts, to facilitate consultations on the following topics, chosen from among the clusters in the resolution adopted by the Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices:
 - (a) Challenges faced by young and small competition authorities in the design of merger control;
 - (b) Enhancing international cooperation in the investigation of cross-border competition cases: Tools and procedures;
9. *Requests* the UNCTAD secretariat to prepare, for the consideration of the sixteenth session of the Intergovernmental Group of Experts, an updated review of capacity-building and technical assistance activities, taking into account information to be received from member States no later than 28 February 2017;
10. *Requests* the UNCTAD secretariat to prepare a further revised and updated version of chapters 2 and 7 of the Model Law on Competition on the basis of submissions to be received from member States no later than 28 February 2017;
11. *Notes with appreciation* 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 interested countries.

II. Chair's summary

A. Opening statements

1. The Director of the UNCTAD Division on International Trade in Goods and Services, and Commodities opened the fifteenth session of the Intergovernmental Group of Experts on Competition Law and Policy.

2. The Deputy Secretary-General of UNCTAD recalled that, 70 years earlier, members of the United Nations came together to discuss the negative consequences of restrictive business practices, which led to putting competition policy on the agenda of the United Nations. He highlighted the role currently played by competition policy in attaining the Sustainable Development Goals, which represented an ambitious agenda that involved challenges for Governments, the private sector, civil society and international organizations. Implementation of competition law was crucial for economic efficiency but also to narrow the digital divide. More and better competition policies were needed to capture the full benefits of trade and investment, ensure better and fairer functioning markets at the service of citizens and achieve the Sustainable Development Goals.

3. The Head of the Federal Antimonopoly Service of Russia Federation underlined, via video broadcast, the contribution of the United Nations Set of Multilaterally Equitable Principles and Rules for the Control of Restrictive Business Practices and of the UNCTAD Model Law on Competition to the anti-monopoly legislation of his country. He noted that those rules and principles were being applied by regional groups that cooperated with the Russian Federation, pointing to the Treaty on the Eurasian Economic Union and countries of the Commonwealth of Independent States, and informed participants on ongoing joint work in the context of Brazil, Russian Federation, India, China and South Africa, the BRICS. He addressed the need to enhance international cooperation in order to effectively fight trans-border anticompetitive practices (cartels), suggesting that a new initiative on the issue could be explored under section F of the United Nations Set and requesting the support of other member States.

4. Some participants noted their support for the statements.

B. Consultations and discussions regarding peer review on competition law and policy; review of the Model Law; and studies related to the provisions of the Set of Principles and Rules

(Agenda item 3 (a))

5. Under the agenda item, the Intergovernmental Group of Experts on Competition Law and Policy held four round-table discussions and undertook one voluntary peer review.

Examining the interface between the objectives of competition policy and intellectual property

6. In opening the first round table, the UNCTAD secretariat presented the main points on the topic of examining the interface between the objectives of competition policy and intellectual property (TD/B/C.I/CLP/36).

7. A representative of the Graduate Institute of Geneva, Switzerland; the President of the Galician Competition Council of Spain; an international counsel of the Department of Justice of the United States of America; a competition lawyer from Jamaica; and a representative from the Intellectual Property and Competition Policy Division of the World Intellectual Property Organization were the panellists.

8. The keynote speaker, the panellist from the Graduate Institute of Geneva, underscored the complementarities between competition and intellectual property law enforcement. He indicated three areas where competition law enforcement played a role: pay for delay agreements, standard essential patents and refusal to license. Competition law enforcement was best placed to address pay for delay and refusal to license, but not standard essential patents. It played a significant role in dealing with competition cases related to standard essential patents because of institutional failures of standard-setting organizations in clearly defining fair, reasonable and non-discriminatory terms.

9. The panellist from the Galician Competition Council stated that competition law and policy aimed at promoting and protecting the competitive process and contributed to attaining greater economic efficiency. He highlighted best practices to promote innovation through an intellectual property regime granting patents, with a “the fewer, the better” approach; free and vigorous competition; and a balance between intellectual property and competition. That balance could be lost due to generalization of practices, intended to extend the initial scope of protection given by a patent, such as patents procured by fraudulent representation and abusive use of intellectual property rights. An excessive number and the scope of legitimate and valid patents might raise rivals’ research and development costs and prevent entry. The challenges faced by competition authorities when dealing with intellectual property-related cases included novelty of the matter; difficulty in identifying anticompetitive patent filings; collision between competition and intellectual property laws and the lack of explicit references in these to each other; and a false perception of the adverse effects of rigorous competition law enforcement on innovation. He strongly advocated rigorous competition law enforcement in the area of intellectual property against conduct that, though deemed legal according to patent law, aimed only at extending the period and scope of patent protection.

10. The panellist from the United States Department of Justice presented her country’s general approach, stating that intellectual property and antitrust laws shared the purpose of promoting innovation and enhancing consumer welfare. The core principles of analysis in the United States included the same general antitrust analysis for intellectual property rights as for other forms of property. There was no presumption that intellectual property rights conferred market power. Licensing of intellectual property rights was generally recognized as pro-competitive. Antitrust laws were intended to protect competition, not individual competitors. She recommended that relevant authorities calibrate enforcement work to ensure that competition and intellectual property laws played their complementary roles in encouraging innovation and enhancing consumer welfare. An effects-based analysis rooted in sound economic principles and remedies tailored to address competitive harm were the best tools to that end. Transparency and consistent procedures in decision-making processes would assist in enhancing the legitimacy of decisions and encourage investment in innovation.

11. The panellist representing Jamaica focused on the treatment of intellectual property rights in small developing countries. Know-how was intellectual property in developing countries, including unregistered or unrecognized designs, methods and practical and non-patented business processes. It was the use of undisclosed yet identifiable farming, plant-breeding, agricultural, medical knowledge and processes. Nothing in international agreements prevented developing countries from formulating and implementing policies and legislation to ensure that exercising intellectual property rights did not lead to market

foreclosure. Ways of doing so included defining know-how in legislation; registering and granting know-how the same protection as intellectual property rights; and including know-how within the scope of competition law. She recommended that developing countries formulate policies for addressing conflicts between intellectual property rights and competition law; arrange for concurrent jurisdiction and coordination between relevant authorities, including patent or registration offices, competition and consumer protection authorities, standards bureaux, customs, government bodies regulating food, drug and agriculture; and develop guidelines to explain the position of competition authorities on intellectual property rights.

12. The panellist from the World Intellectual Property Organization noted that intellectual property and competition law were complementary and fostered innovation. He provided examples where competition law enforcement protected intellectual property rights. The World Intellectual Property Organization promoted collaboration between intellectual property and competition agencies; prepared comparative studies and surveys; provided technical assistance and legal advice to member States; and encouraged pro-competitive licensing practices. As intellectual property was becoming a crucial competitive asset, the number of intellectual property rights-related competition cases was increasing, requiring stronger cooperation between intellectual property and competition authorities.

13. A Commissioner from the Malaysia Competition Commission presented the example of off-label use of medication in his country's health sector and possible collusive practices between branded drug manufacturers in the registration of drugs. Collusive practices resulted in significant price differences and therefore harm to consumers. Such cases should be addressed by both competition authorities and relevant health regulators.

14. Many participants emphasized the complementarity between intellectual property and competition laws in fostering dynamic competition, innovation and economic growth, benefiting consumers. Several delegates recognized that intellectual property rights did not automatically confer a dominant position to their owners. However, one panellist considered that intellectual property did create a dominant position that conflicted with competition law.

15. Many delegates and panellists emphasized the importance of mutual consultations, policy coordination and cooperation between intellectual property rights and competition authorities in achieving coherence and tackling conflicts and trade-offs. One delegate suggested that the judiciary review of intellectual property rights-related competition cases should adopt a balanced approach, in light of the rights of parties recognized constitutionally. He stressed the usefulness of those discussions for the judiciary in the interest of better administration of justice.

16. One participant elaborated on the convergence of competition and intellectual property laws in the Agreement on Trade-Related Aspects of Intellectual Property Rights, particularly articles 8.2, 31 and 40.

17. Another participant encouraged delegates to undertake advocacy activities in their home countries so that the general public could better understand the benefits of competition, trade and intellectual property. That could be achieved by undertaking activities on the anniversary of the adoption of the United Nations Set.

Enhancing legal certainty in the relationship between competition authorities and judiciaries

18. The interactive discussion was chaired by the Vice-President-cum-Rapporteur of the meeting, with the Director of the University of Oxford Centre for Competition Law and Policy as the keynote speaker and four discussants: one judge each from the Magistrate of

the Supreme Court of Bulgaria and the Magistrate of the Supreme Court of Peru, a Commissioner from the Commission for Supervision of Business Competition of Indonesia and a representative of the United States Federal Trade Commission.

19. A brief introduction by the secretariat highlighted the role of courts not only focusing on sound economics, but also on applying the law in a way that the system remained robust, efficient, predictable and fair. The interactive discussion was organized around the issues of capacity, structural reforms (creation of specialized courts) and procedural aspects.

20. Competition authorities and courts should make clear and transparent decisions. Courts should use economic analysis to produce educated outcomes, cooperating effectively with competition authorities yet maintaining the independence of the court.

21. On capacity, discussants stressed the fundamental need for strengthening the capacities of judges when reviewing economic evidence. They also stressed the need for judges to have an innovative approach, achievable through an understanding of the economic rationale behind competition authority decisions and by equipping judges to undertake an effective judicial review successfully. Capacity issues would become instrumental in ensuring legal certainty between competition agencies and courts as judges would effectively understand economic evidence, with the proactiveness of competition agencies crucial in assisting courts. Participants agreed, however, that it was a challenge to reach an optimal intervention due to inconsistency being inevitable as economic analysis capacity differed markedly, due to complex modelling, assumption of rationality and utility maximization, among other issues. Hence, framing the quest for optimal intervention should start by having clear guidance to communicate with stakeholders and conduct self-policing continuously.

22. Courts, through judges, should show a workable level of deference to the economic analysis of competition agencies, while improving the level of understanding of economic concepts. Judges should not ignore the economic analysis evidence submitted by experts, while maintaining an independent review of the law and facts and taking into account due process and other constitutional rights of the parties.

23. Concerning structural reforms, with the exception of Canada, Chile and the Netherlands, where the review of competition authorities' rulings was entrusted to a specialized court that addressed only competition cases, in the majority of jurisdictions, the review of competition cases was handled by general courts. Discussants stressed the best approaches to ensure that the review of competition authorities' rulings was robust and sound, with solid economic and legal concepts; judges should have full capacity to deal with competition cases. A system with a single court covering competition cases, such as in the Netherlands, was discussed.

24. Some discussants agreed that a lower court review before a specialized judge with the possibility of appeal to a specialized tribunal could be a positive solution for those countries wishing to shift the judicial review from only control of the legality to a more comprehensive review of the legality and technical assessment of a case. Other discussants suggested that including the topic of law and economics in the judiciary as a service examination to become a judge could be a realistic option for young competition regimes. Discussants agreed that there were risks associated with the policy option of specialized tribunals that dealt with economic issues, in particular in developing countries. For instance, in Indonesia, it would be impossible to separate a specified court and general courts.

25. With regard to procedural aspects, standard of review and/or standard of proof were discussed as critical for ensuring legal certainty and predictability of competition decisions and judges' rulings. In this regard, discussants argued that judicial review shaped positively

the principle of legal certainty, starting with the simple question of whether the legal and institutional framework of a jurisdiction was sufficiently and expressly clear to divide the work of the courts and authorities when it came to enforcement of competition rules. The latter, they highlighted, would be even more critical when young competition regimes were still shaping the ways and means of how competition rules should be implemented and the message given to the practitioners about the legitimacy of a system.

Enforcement of competition policy in the retail sector

26. The secretariat opened the round table, focused on competition issues in the food retail sector. Expert panel members who addressed participants were the keynote speaker, representing Spain, followed by representatives from the European Commission, Panama, South Africa, Indonesia, Portugal and Turkey.

27. The keynote speaker mentioned that the twenty-first century brought a change in paradigm in retail due to concentration in e-distribution, as technology was bringing sellers and consumers together. Intermediaries in the retail sector chose which producer reached the consumer, suppressing sellers' power. Consumers no longer chose between different brands or products, but rather different multi-product systems, with "virtual guardian angels" that ultimately decided when sellers reached consumers.

28. On competition in two-sided markets, markets involved two groups of agents who interacted via platforms in which sellers were on one side and buyers on the other. He noted that the next step in the retail sector was vertical concentration that would lead to market foreclosure and other anticompetitive practices. Supermarkets were producing their own brands and benefiting from the access they had to consumers by displaying their products in a privileged way. Supermarkets had access to key information about external brands and consumers' preferences, and they were using that information to create and sell their own brands. Competition rules and regulations should complement each other, and competition legislation should be adapted to the new market reality.

29. The representative from the European Commission emphasized European Union concerns about the increase in retail concentration, raising competition challenges in the region. Overall retail concentration was increasing due to the fact that retailers had taken small groceries stores. The findings of the Commission's modern retail study on choice and innovation in the food sector in Europe and the European Central Bank study on price differences in Europe revealed that an increase in the relative concentration of retailers vis-à-vis their suppliers had a positive effect on innovation.³ She detailed the questions raised by those studies for follow-up on the subject and the challenges faced by the European Union agricultural sector, such as increased demand from consumers for quality, choices and tradability as well as the unequal bargaining power faced by farmers and competition from non-European Union imports. She noted the importance of a long-term solution to increase sustainability and revenues for local farmers and cooperation to increase bargaining power, as well as increasing competitiveness through vertical and horizontal integration in the food supply chain.

30. The representative of the Competition Authority of Panama said that the Authority could investigate anticompetitive practices by retailers to their suppliers, and acknowledged that up to the present, no formal complaints had been dealt with. He added that they had

³ See European Union, 2014, The economic impact of modern retail on choice and innovation in the European Union food sector, available at http://ec.europa.eu/competition/sectors/agriculture/retail_study_report_en.pdf (accessed 9 November 2016), and European Central Bank, 2014, Retail market structure and consumer prices in the euro area, Working Paper Series No. 1744, available at <http://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1744.en.pdf> (accessed 9 November 2016).

found more exploitative than exclusionary anticompetitive practices in the retail sector. The Panamanian capital's seven chains competed among themselves and with smaller businesses, which together had a larger and increasing market share. On how to improve and extend benefits for consumers, he referred to verification of promotional offers, instruments to address consumer's complaints and promotion of prices by mobile applications, as in Panama where consumers could report prices and abuses.

31. The representative from South Africa described the country's retail sector as concentrated, explaining that the four largest supermarket chains operating collectively accounted for between 80 and 90 per cent of food and grocery sales. He explained that the enquiry provisions in the Competition Act allowed the South Africa commission to probe markets where there was no evidence of outright prohibited practices taking place. Solutions should be customized for the South African people and its conditions.

32. The representative of the Commission for the Supervision of Business Competition of Indonesia stressed that fair dealing in the retail sector was a priority for the Indonesian competition agency. Regarding economic barriers, she mentioned that the listing fee had seriously impeded the ability of small and medium-sized enterprises to grow their business and be exposed to more customers; the situation was mainly due to big retailers. Regarding legal barriers, she raised the problem of licences for imported food. The types of food products available to consumers were generic, white-label products and branded products, and the price difference gave a clear indication of quality.

33. The representative of the Portuguese Competition Authority stated that large retail distribution represented 90 per cent of the Portuguese market and, thus, had very high buyer power. She also noted the difference in bargaining power between retail distributors and suppliers which posed competition concerns.

34. The representative of the Turkish Competition Authority said that a more effective concentration mechanism should be established by replacing the dominance test with the test of significant lessening of competition. The Turkish retail market was not as concentrated as in other countries but major changes might arise.

35. One delegation mentioned that mergers of large retailers had not impaired competition in China but that retailers' abuses were increasing, and monitoring of the retail sector was necessary.

36. The representative of one civil society organization noted that the exploitative abuses of retailers in the wine market were threatening producers in Chile. Her organization believed in free trade and acted to prevent unfair conditions.

Strengthening private sector capacities for competition compliance

37. The Chair of the Intergovernmental Group of Experts on Competition Law and Policy moderated the round table. Panellists included representatives of Berwin Leighton Paisner LLP (Brussels), the Competition Authority of Kenya, the Japan Fair Trade Commission and the Competition Authority of Italy.

38. The UNCTAD secretariat introduced the topic, noting the importance of compliance with competition law, consequences of not complying with competition law and challenges faced by businesses in compliance. Some challenges included complexity of laws that made it difficult to understand responsibilities, lack of sufficient resources (both human and financial) and difficulty in ensuring that working across different jurisdictions was within the boundaries of the law.

39. The keynote speaker, the representative of Berwin Leighton Paisner LLP, provided insights from the perspective of the private sector. Despite the advantages of compliance, such as free and fair markets, an enabling environment for companies to compete on merit

and putting everyone on the same playing field, awareness was still low in both developed and developing countries. He emphasized the need to raise the profile of competition compliance and pointed out that it took time and investment to establish compliance procedures. He assured delegates that it was worthwhile for competition agencies to do compliance outreach to enhance private sector capacity.

40. Speakers highlighted different ways in which compliance could be promoted. For example, the keynote speaker highlighted advocacy as an effective way of promoting compliance and acknowledged the contribution of UNCTAD and the International Competition Network in promoting awareness. Use of outreach/advocacy in competition law compliance was a positive bridge between an agency and the private sector to enhance compliance and build a competition culture. Several participants agreed that use of advocacy was an effective tool currently used globally by several agencies in raising awareness and for disseminating information to the business community. They encouraged regulatory authorities to combine its use with enforcement of competition law.

41. Some panellists shared examples on ensuring the effectiveness of compliance. For instance, in Japan compliance programmes should be tailor-made and take into account deterrence, detection and damage control goals, including training, detection of infringements through audits, internal reporting and making active use of leniency programmes, providing for prompt response and appropriate decision-making of top management.

42. In Italy, having a rigorous compliance programme was taken into consideration, but not automatically considered when calculating fines for competition infringements, which could act as an incentive to increase compliance efforts. The Competition Authority faced challenges in promoting understanding of compliance as 95 per cent of companies operating in the country were small enterprises with fewer than eight employees, and most had limited understanding of the laws. There were different methods and approaches that could be used in encouraging compliance but that depended on the economic situation and maturity of an agency.

43. Most speakers considered establishing compliance programmes a viable option in building capacity. The keynote speaker called for an international consensus compliance programme supported by competition agencies.

44. Several panellists shared their experiences in building capacity in the private sector for competition compliance. For example, one participant noted that in Kenya, a country with a relatively young competition law, the Competition Authority took a realistic approach to compliance based on available resources. Its capacity-building started with building its internal capacity, followed by prioritizing the sector and then identifying the key stakeholders. Resources to carry out the task and the mode of delivery were then identified. The participant stressed the need for buy-in among stakeholders to ensure success and gave the example of a successful initiative seeking to cease companies' anticompetitive conduct rather than register new infringement cases.

45. Many speakers identified the lack of resources as a drawback in providing support to the private sector in the form of training workshops, media training and the like.

46. During the discussion, many delegates gave further insights on capacity-building activities, for example, obligations to conduct advocacy as enshrined in law to prepare advocacy reports; collaboration with other institutions on training; and training of stakeholders, e.g. legal professionals, and students in tertiary institutions to increase the level of awareness.

47. Responding to a question on multinational companies and compliance, one delegation said that multinational corporations were more cooperative with respect to

competition laws because in their home countries competition law was well established, and the effects of a bad reputation were well known.

48. One participant emphasized that transparency was central to the success of compliance with competition law. It was essential to adopt guidelines to allow companies the opportunity to better understand infringements such as abuse of a dominant position and vertical/horizontal agreements. Furthermore, he emphasized that rules did not reward those who already had compliance programmes. However, a cooperative attitude during investigations was rewarded.

Voluntary peer review of competition law and policy: Uruguay

49. The voluntary peer review of competition law and policy of Uruguay was moderated by a representative of the Competition Authority of Kenya. The peer reviewers were the Assistant Deputy Director of the International Affairs Department of the National Competition Authority of Spain; a Commissioner from the Federal Competition Commission of Mexico; the Director of the National Institute for the Defence of Competition and the Protection of Intellectual Property of Peru; and the former Chair of the National Institute for the Defence of Competition and the Protection of Intellectual Property of Peru and expert in competition law.

50. The Permanent Representative of Uruguay to the World Trade Organization and the Chair of the Commission for the Promotion and Defence of Competition of Uruguay made opening statements. The Permanent Representative said that Uruguay had very high expectations from the UNCTAD peer review process. He outlined the work UNCTAD had done in developing capacity-building in competition in the country. The Chair of the Commission for the Promotion and Defence of Competition of Uruguay gave an overview of the economic system in Uruguay, referring to various reforms undertaken, namely on investment, innovation, research and competition. She reiterated the Commission's commitment to learn from the experience and from delegates' comments and to implement the peer review recommendations in collaboration with UNCTAD.

51. An UNCTAD consultant presented the peer review report, touching upon legal framework of Uruguay for competition, aimed at enhancing consumer welfare and the promotion and safeguarding of competition. Some objectives pursued related to efficiency and competition; others related to socioeconomic benefits of public interest. The law also ensured free and equal market access to companies and products, applicable to all economic activities within Uruguay. She highlighted the importance of binding the State to comply with competition law when it engaged in commercial activities. However, the law excluded the authorized activities of statutory bodies or production of public goods within their scope, which could be an avenue for further exceptions.

52. The Commission for the Promotion and Defence of Competition was a decentralized body of the Ministry of Economic Affairs and Finance responsible for the implementation of the Competition Act. It was entrusted with decision-making powers, subject in some areas to the possibility of appealing the Commission's decisions before the Minister of Economic Affairs and Finance. The Commission investigated and remedied anticompetitive conduct, including abuse of market power and economic concentrations.

53. The Commission engaged in enquiries and raised awareness of competition legislation. Between 2009 and 2015, it handled 90 enquiries, translating to 18 annually. Some of the enquiries had evolved into investigations. Due to the lack of resources, the Commission had a more reactive rather than proactive role.

54. The report included several recommendations for legal and institutional reform, including a review of the scope of the Competition Act in order to broaden it, amendment of provisions on anticompetitive practices and mergers and a clear distinction between

horizontal and vertical agreements. On mergers, a review of notification thresholds was suggested to promote efficient use of available resources. The report also recommended that the Commission develop the necessary case handling skills and, in particular, its enforcement capabilities in the area of anticompetitive practices and mergers.

55. There was a need for greater autonomy and independence in budgetary and decision-making aspects, including a review of appeals to the Minister. The report also recommended that the Commission improve its knowledge management regarding the exchange of case information and records of staff activities, among other issues.

56. During the question-and-answer session, the Assistant Deputy Director of the National Competition Authority of Spain asked about a future distinction between the “per se” and the “rule of reason” approaches. A Commissioner from the Commission for the Promotion and Defence of Competition responded that the missing distinction was a shortcoming of competition enforcement. She added that there was a proposed amendment that distinguished cartels from other anticompetitive practices.

57. A second question concerned the proportionality in sanctions and how the Commission ensured it. The Commissioner noted that the Commission for the Promotion and Defence of Competition used business turnover to modulate sanctions, although clear criteria were not set in law. A last question from the Assistant Deputy Director concerned advocacy and how the Commission prioritized consultations. The Commissioner said that the Commission preferred to focus on high impact markets for advocacy purposes.

58. The Commissioner from the Federal Competition Commission of Mexico asked about exceptions in competition law enforcement. The Chair of the Commission for the Promotion and Defence of Competition noted that sectoral regulators for telecommunications, energy and finance had powers under competition law and that the Commission expected that no sectors were exempted from the authority’s enforcement. A second question involved the introduction of thresholds for compulsory notifications of mergers and the powers of the Commission to act. The Chair replied that merger authorization was only compulsory if a de facto monopoly was to be established. Another question concerned the formal and informal tools the authority had for advocacy initiatives. The Commissioner of the Commission for the Promotion and Defence of Competition said that the Commission had issued recommendations for the amendment of anticompetitive public policies regarding, for example, collaborative economy and games of chance.

59. The last question addressed organization and institutions issues, especially the level of autonomy wished by the Commission for the Promotion and Defence of Competition. The Commissioner from Uruguay highlighted lack of funds as a challenge to face as well as the repeal of the authority’s decisions by the Minister. It would be desirable to have a higher level of autonomy and not being integrated in the Ministry. The Commission needed a larger budget and an increased allocation of human resources, as underlined by the report.

60. The Director of the National Institute for the Defence of Competition and the Protection of Intellectual Property of Peru asked about the formal sanctions applicable if decisions to cease anticompetitive agreements were not upheld. The Chair of the Commission for the Promotion and Defence of Competition commented that the law amendment foresaw sanctions for anticompetitive practices and for breach of those decisions.

61. The former Chair of the National Institute asked about the leniency programme and how the Commission intended to strengthen it. The Chair of the Commission stated that the communication strategy should be reinforced as it was a weakness of the Commission and added that only one case had been received under that framework.

62. During the interactive discussion, one delegation focused on leniency programmes and the most effective tools. She highlighted transparency based on a clearly stated policy as an important feature to the success of those programmes.

63. Another delegation raised a question on the methods used to calculate fines and where proportionality standards were applied. The former Chair of the National Institute replied that two aspects of calculating fines were used and two guides for fining were available on the competition website.

64. The secretariat presented a proposal for a technical assistance project for Uruguay based on the findings and recommendations of the peer review report. Its overall goal was to achieve a better business environment and a well-functioning market economy in Uruguay. In particular, the project would address the legal and institutional frameworks of the Commission, as well as its capacity to enforce competition law and to carry out advocacy activities.

65. The Chair of the Commission agreed with the recommendations and thanked UNCTAD for guiding her country throughout the process, noting the need to maintain the momentum of implementing the recommendations.

C. Work programme, including capacity-building and technical assistance on competition law and policy

(Agenda item 3 (b))

Review of capacity-building activities

66. The round table was chaired by the Chair of the Competition Authority of Argentina. Speakers included representatives of the following countries and institutions: Burkina Faso, Japan, Luxembourg, Peru, Zimbabwe, the West African and Economy and Monetary Union (WAEMU), Consumer Unity and Trust Society International and the German Agency for International Cooperation.

67. The aim of the round table was to discuss how to improve the effectiveness of capacity-building in competition policy, the absorptive capacities of young competition agencies and coordination between providers and beneficiaries.

68. The secretariat informed the meeting that the new UNCTAD global strategy on capacity-building in competition law and policy, as endorsed by the Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in 2015, sought to achieve the following objectives: reinforcement of technical assistance for competition and consumer protection policies and regulations; creation of an enabling environment for the private sector; work with the public sector (ministries, sector regulators, etc.) for policy coherence between competition and related public policies through the promotion of non-discriminatory and competitive practices (competition neutrality strategies); and follow-up and impact assessment of activities and an expanded regional focus.

69. The secretariat also emphasized the regional anchorage of the UNCTAD capacity-building approach, used in developing countries and economies in transition.

70. One delegation shared the experience of Peru as a beneficiary of the Competition and Consumer Protection for Latin America programme. Thanks to the programme, a school was established in Lima with the aim of providing specialized training courses for officials of competition and consumer protection authorities in the region. Training courses, workshops and seminars were provided either physically or by using Internet technology, which helped to enhance the ability of the officials engaged in competition and consumer

protection policies. Agencies in the region could also share their own knowledge and experiences.

71. The representative of WAEMU noted the long-standing cooperation between the organization and UNCTAD, as manifested by memorandums of understanding signed in 2005 and 2011, and the peer review of WAEMU competition policy conducted by UNCTAD in 2007. Thanks to the memorandums of understanding, funding was provided to UNCTAD in 2012 to implement the recommendations of the peer review. The activities implemented had enabled the reforms necessary to improve the effectiveness of the competition regime of WAEMU and its member States to be conducted.

72. The representative of the German Agency for International Cooperation introduced the organization. The Agency's approach to capacity-building is framed by strong partners along the project cycle. He also informed participants about the cooperation between UNCTAD and the German Agency for International Cooperation on providing capacity in competition policy and consumer protection in the Association of Southeast Asian Nations (ASEAN).

73. Another delegation pointed out work done by Japan in competition policy in East Asia since 2004. The Japan Fair Trade Commission launched a two-year training programme in September 2016, to assist ASEAN competition authorities, aimed at enhancing enforcement of competition law in the region. The programme would be conducted in cooperation with the ASEAN secretariat, and UNCTAD had a significant role to play in the project by actively contributing to its workshops.

74. Another delegation stated that, since the peer review of competition policy in 2013 in Zimbabwe, his country had benefited from UNCTAD capacity-building activities targeted at judges, parliamentarians, lawyers and sectoral regulators. Since participating in different capacity-building seminars, the competition authority in Zimbabwe had a better understanding of competition policy and law.

75. Another delegation indicated that capacity-building was crucial for strengthening competition law and policy. Financial and technical support from donors, mature agencies and international organizations were important for young agencies such as that of Ethiopia. In order to make capacity-building successful, close cooperation and coordination between donors and recipients were important. Capacity-building project proposals by donors should be organized in line with the needs of recipients. He commended the work of UNCTAD and the financial support received from the Government of Luxembourg.

76. As a beneficiary of WAEMU capacity-building implemented by UNCTAD, another delegation shared the experience of Burkina Faso, underscoring the learning of legal principles, experiences of agencies outside the country and ongoing globalization in the world. Capacity-building had also given a new impetus to the enforcement activities of the competition authority in Burkina Faso.

77. The delegation of Luxembourg acknowledged the importance of capacity-building, which justified the support of her Government to Ethiopia. She commended the study visit organized by UNCTAD for competition officials of Ethiopia. She also stressed that coordination among providers and beneficiaries of capacity-building was crucial for its success, as well sustainability and ownership.

78. The representative of one non-governmental organization drew attention to the fact that one size did not fit all. Capacity-building programmes should be tailored to national circumstances.

D. Closing plenary

79. The UNCTAD secretariat recognized the support received from development partners in strengthening competition law enforcement capacities in developing countries, expressing its appreciation to Luxembourg, Sweden, Switzerland, the European Union and the German Agency for International Cooperation for their financial support to UNCTAD technical assistance work in Ethiopia, Zimbabwe, Latin America, the Middle East and North Africa and ASEAN. The secretariat highlighted WAEMU, whose members are mostly least developed countries, which financed a technical assistance project implemented by UNCTAD, and took note of the openness of the German Agency for International Cooperation to strengthen work with other developing countries.

80. One delegation requested UNCTAD support in ongoing work on the revision of its regulatory and institutional framework for competition and consumer protection implementation.

81. Another delegation expressed its appreciation for UNCTAD support in strengthening the enforcement of competition and consumer protection laws in Latin America.

III. Organizational matters

A. Election of officers

(Agenda item 1)

82. At its opening plenary meeting on Wednesday, 19 October 2016, the Intergovernmental Group of Experts elected its officers, as follows:

Chair:	Mr. Esteban Manuel Greco (Argentina)
Vice-Chair-cum-Rapporteur:	Mr. Saadaki Suwazono (Japan).

B. Adoption of the agenda and organization of work

(Agenda item 2)

83. The Intergovernmental Group of Experts adopted the provisional agenda as contained in document TD/B/C.I/CLP/35. 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 review 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 sixteenth 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 sixteenth session of the Intergovernmental Group of Experts on Competition Law and Policy

(Agenda item 4)

84. At its closing plenary meeting, on 21 October 2016, the Intergovernmental Group of Experts approved the provisional agenda for the sixteenth session of the Intergovernmental Group of Experts on Competition Law and Policy (see annex I).

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

85. Also at its closing plenary meeting, the Intergovernmental Group of Experts authorized the Vice-Chair-cum-Rapporteur to finalize the report of the session.

Annex I

Provisional agenda of the sixteenth 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 of competition law and policy; review of the Model Law on Competition; and studies related to the provisions of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices
 - (b) Work programme, including capacity-building and technical assistance on competition law and policy
4. Provisional agenda for the seventeenth 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

Attendance⁴

1. Representatives of the following States members of UNCTAD attended the meeting:

Albania	Luxembourg
Algeria	Madagascar
Argentina	Malaysia
Austria	Mauritius
Bahamas	Mexico
Bhutan	Morocco
Bosnia and Herzegovina	Namibia
Botswana	Nepal
Brazil	Nicaragua
Bulgaria	Nigeria
Burkina Faso	Oman
Cambodia	Pakistan
Cameroon	Panama
Chile	Paraguay
China	Peru
Colombia	Philippines
Congo	Portugal
Costa Rica	Qatar
Côte d'Ivoire	Republic of Moldova
Democratic Republic of the Congo	Russian Federation
Dominican Republic	Saudi Arabia
Ecuador	Senegal
Egypt	Serbia
Ethiopia	South Africa
France	Spain
Germany	Swaziland
Honduras	Switzerland
Hungary	The former Yugoslav Republic of Macedonia
India	Tunisia
Indonesia	Turkey
Italy	Ukraine
Japan	United Arab Emirates
Jordan	United States
Kenya	Uruguay
Kuwait	Viet Nam
Lao People's Democratic Republic	Zambia
Lebanon	Zimbabwe

2. Representatives of the following Member of the Conference attended the session:

Holy See

⁴ For the list of participants, see TD/B/C.I/CLP/INF.6.

3. Representatives of the following non-member observer State of the Conference attended the session:

State of Palestine

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

Caribbean Community

European Union

League of Arab States

Organization for Economic Cooperation and Development

West African Economic and Monetary Union

5. The following United Nations organ, body or programme was represented at the meeting:

United Nations Human Settlements Programme

6. The following specialized agencies or related organizations were represented at the meeting:

World Intellectual Property Organization

World Tourism Organization

World Trade Organization

7. The following non-governmental organizations were represented at the meeting:

General category:

Consumer Unity and Trust Society International

Global Traders Conference

International Federation of Pharmaceutical Manufacturers and Associations
