UNCTAD/DITC/CLP/2003/1

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

FINAL CONSOLIDATED REPORT OF REGIONAL CAPACITY-BUILDING MEETINGS ORGANIZED BY UNCTAD ON COMPETITION ISSUES WITHIN THE FRAMEWORK OF THE DOHA MANDATE

Report by the UNCTAD secretariat

UNITED NATIONS
New York and Geneva, 2003

NOTE

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INTRODUCTION

As part of the post-Doha capacity-building programmes on competition law and policy, UNCTAD provided enhanced support to developing and least-developed countries in line with the request specifically addressed to UNCTAD in paragraph 24 of the Doha Declaration on Competition and Trade Policy, which is reproduced below:

> "23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in the area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.
>
> 24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity-building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.
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> 25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarifications of core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels, modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity-building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them."

In line with the request addressed to UNCTAD in paragraph 24 of the Doha Declaration, UNCTAD contributed, in cooperation with WTO and other relevant intergovernmental organizations such as OECD and the World Bank, to responding to the needs of developing and least developed countries "for enhanced support for technical assistance and capacity-building in this area, including policy analysis and development, so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human institutional development".

In 2002, UNCTAD organized a first series of four regional seminars on the Post-Doha mandate,[1] in Panama City (Panama) for Latin America and the Caribbean; Tunis (Tunisia) for Africa and Arab countries; Hong Kong (China) for Asia; and in Odessa (Ukraine) for East European and Community of Independent States (CIS) countries.

In addition, UNCTAD actively participated in the WTO Working Groups and regional workshops and seminars, including in Libreville (Gabon), Mauritius, Guatemala City, Kingston (Jamaica), Cairo (Egypt), Nairobi (Kenya) and Buenos Aires (Argentina). In return

[1] The main findings of these four meetings are contained in a consolidated report (Closer Multilateral Co-operation on Competition Policies, doc. UNCTAD/DITC/CLP/Misc.23), published in May 2002 and made available to the WTO Working Group on the Interaction of Trade and Competition Policy, and submitted to the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy (Geneva, 3–5 July 2002).

the WTO secretariat was represented in all UNCTAD's post-Doha-related meetings and seminars. In 2003, these included a second round of regional meetings, namely the Regional Asian Conference in Kuala Lumpur (Malaysia) on 26 and 27 February 2003; the Conference on Post-Doha Competition Issues for Africa, in Nairobi (Kenya) on 9 and 10 April 2003; the Regional Post-Doha Seminar for Latin America and the Caribbean in Sao Paulo (Brazil) from 23 to 25 April 2003 and the Regional conference for East Europe and CIS member countries in Tashkent (Uzbekistan) on 5 and 6 June 2003. At these meetings, an attempt was made to bring together not only competition experts from capitals but also representatives from Ministries of Trade and in some cases Geneva ambassadors to the WTO in order to enable a full exchange of views to take place between "technical" competition officials from capitals and trade counterparts, along with negotiators in Geneva.

The present Final Consolidated Report contains a compendium of all views collected during these meetings and seminars, and is presented in a simplified-easy-to-read outlay, divided as "pros" and "cons" of each issue, so that the reader can easily browse through the main issues discussed and compare the arguments put forward by the proponents of different proposals with the concerns expressed by the developing countries, including the Group of Like-Minded Countries (LMG).

It should be noted, however, that while the UNCTAD secretariat has listed as faithfully as possible the various views expressed, under "pros" and "cons" of various proposals and elements that could be part of a possible Multilateral Competition Framework (MCF), it is not the intention of the UNCTAD secretariat to convince developing country ministers in making their decision in favour or against negotiating a MCF. It is expected that, having evaluated the various views expressed on different issues and options before them, ministers in their own wisdom will make their own decision.

Once again, it should be recalled that the Doha Declaration does not ask UNCTAD to take a position, but rather to help developing and least developed countries to "better evaluate the implications of closer multilateral co-operation" in this field. Hence the following pages cover the various, often contradictory views expressed throughout the meetings attended and organized by UNCTAD.

I. GENERAL VIEWS ON THE SINGAPORE ISSUES[2]

At the UNCTAD meetings it became apparent that many developing and least developed countries considered that:

A. Issues to deal with as a priority

There has not been sufficient progress in the core issues of the Doha Round (agriculture, medicines and TRIPS, special and differential treatment (SDT) for developing countries and market access) for still other difficult issues being brought to the negotiating table (the Singapore Issues).

Pros:

It was argued that to date (early June), all deadlines set for the negotiations on the "core issues" and the "built-in agenda" had lapsed without any agreement. Many developing countries are more interested in concrete benefits that would result from a breakthrough in agriculture or medicines than they are in the Singapore issues, which are more theoretical, and in their view more complex and not of priority concern to them.

Cons:

In the countdown to Cancún (September) some breakthroughs might still occur, for example, in agriculture, in medicines and or other issues. Moreover, the European Commission has made it clear that it sees the Doha Round as a "single undertaking" (see Doha Declaration, paragraph. 47 in particular) – hence during the Cancún conference some trade-off with some /or all of the Singapore issues might occur. Hence the need for a detailed fall-back position for the developing countries and LDCs.

B. New complex issues

The Singapore issues are new to many developing and least-developed countries, and they are complex issues for which most are unprepared; many issues still need to be further discussed and clarified, more work needs to be done at the WTO Working Group.

Pros:

Many participants argued that it is true many developing and least-developed countries still do not have, or are not aware of, competition law or policy. For most of those that have adopted such laws, they are new and their experience with implementation is short. Hence, the feeling that developing countries would be heavily disadvantaged if a negotiation on this topic was launched at Cancún.

Cons:

The view was made that the Working Group has examined all issues related to a possible MCF and its work is becoming repetitive. It is only when negotiations will start that developing countries will take the issue seriously. On the other hand, serious concern was expressed that if developing countries decide to accept the “package” because their demands are satisfied in agriculture or elsewhere, they might pay insufficient attention to competition

[2] Reference is often made to the "Singapore Issues" to mean competition, investment, government procurement and trade facilitation, as they were covered at the WTO Singapore Ministerial Meeting in December 1996.

issues for which they would be unprepared and would risk to accept whatever deal is proposed without having prepared their own positive agenda and struggled to obtain a satisfactory deal

C. Need for explicit consensus on modalities

For negotiations to be launched at/or after Cancún, there is a need for explicit consensus on the modalities. Many developing countries argue that they are not clear about the modalities, hence they cannot start negotiating now.

Pros:

Some participants noted that the issue of modalities has only been indirectly discussed in the WTO Working Group; nobody is very clear about the significance of the term. Some consider that the modalities are both procedural and substantive. Basically, developing countries would like to know more about the substance of an agreement before jumping into a negotiating stage**.** For example, no assurance has been forthcoming that SDT will be really afforded to the developing countries, other than pledges of technical assistance and capacity-building and offers of "flexibility and progressivity". For exemptions in competition law, for example, the EU is willing to accept them as quid pro quo for their own exemptions. No SDT in the sense of more strict obligations for developed countries than for developing countries seems forthcoming.

Cons:

A paper on modalities has been submitted by the EC to the General Council, and not to the Working Group. It would seem that this issue will be further clarified in consultations with the Chairman of the General Council.

II. A POSITIVE AGENDA FOR DEVELOPING COUNTRIES

The view was expressed that irrespective of the objections to initiating negotiations listed in part I above, developing countries should have a "fall-back position" or their own "positive agenda" in case negotiations are effectively launched either at Cancún or at some later stage. Hence, we first examine below what an ideal on complete multilateral framework on competition could look like, before examining the actual proposals made by of the demandeurs at the WTO Working Group.

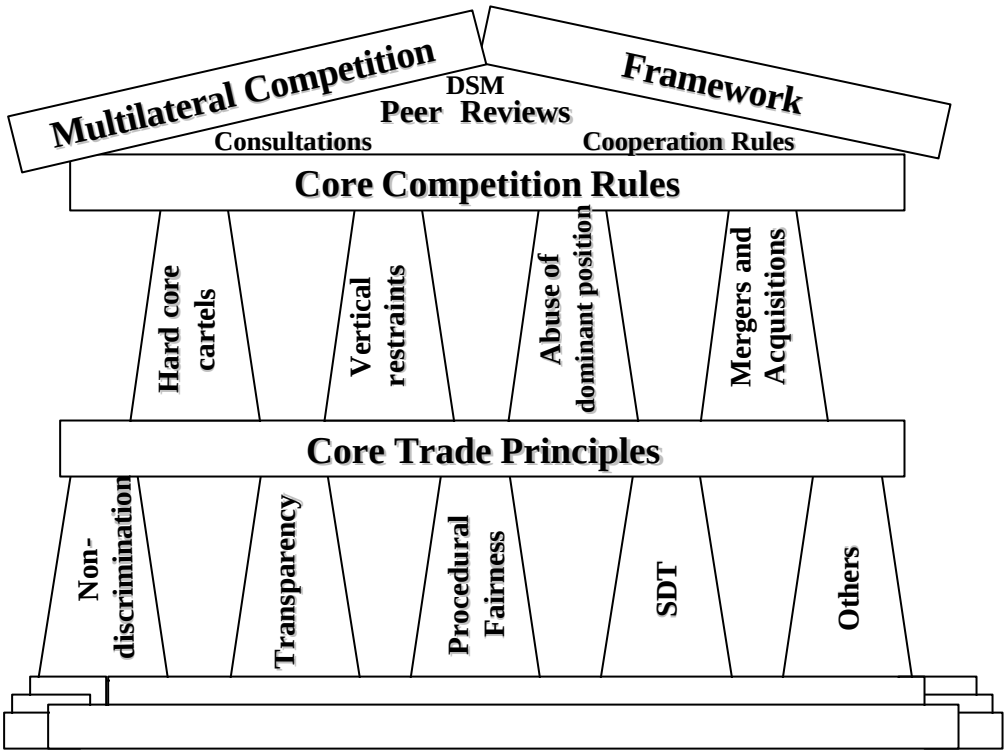
A. A possible Multilateral Competition Framework

First, a general view on the overall "architecture" of a possible MCF

As discussed at all the UNCTAD meetings, a possible MCF would have to bridge the gap between trade and competition policy principles, hence it would logically be based on core trade policy principles. These are: non-discrimination, which covers most-favoured-nation (MFN) status and national treatment; transparency; and procedural fairness. Many have argued that SDT for developing countries should be included as a core principle of a MCF, as it is a basic principle of the GATT/WTO. Another principle discussed at the WTO Working Group was the principle of "comprehensiveness," whereby exceptions should be limited to the strict minimum and subject to periodic review.

Logically, the second important layer of rules would need to cover the basic issues that form part of a competition law: prohibition of hard-core cartels; control of vertical restraints; abuses of dominant positions of market power and monopolies; and merger control (control of concentrations likely to lead to a monopoly or dominant position). These principles and rules would logically need to be bound by cooperation rules, both for technical assistance and for cooperation in specific case enforcement. Finally, a MCF could include a mediation mechanism to solve conflicts of interest which might arise among States in this field.

To simplify in a visualized manner, a possible MCF would cover the following issues, and have the following "architecture":



B. Detailed proposals at the WTO Working-Group

(a) Core-trade principles

Non-discrimination, transparency and procedural fairness are the three principles proposed by the EU.

> **(a1)** *Non-discrimination* is a core WTO principle that includes the more specific principles of MFN and national treatment. The first principle means that in trade relations, all trading partners should have the same treatment as the most-favoured partner (i.e. the best treatment should be offered to all partners). The second means that on the national territory, all goods and services (or partners) should be treated no less favourably than domestic ones. Applied to competition rules, this means that in the application of the law, no foreign competitor should be treated less favourably than a domestic one.

Pros:

This might be regarded a positive signal for attracting FDI, as investors are guaranteed that they will not be treated less favourably than domestic firms. However, this does not mean that there could not be exemptions or exceptions (either sectoral or by anti-competitive practice).

Cons:

Developing countries expressed concern at the fact that they needed sufficient "policy space" for developmental reasons to develop certain essential industries, or to protect others, especially small and medium-sized enterprises (SMEs), on grounds that foreign competition might wipe out entire sectors of the local economy. The EC proposal to accord sufficient flexibility and progressivity, and to recognize exemptions as they themselves exempt important sectors such as agriculture, is meant to accord such "policy spaces" but as

developed countries gradually reduce their own exceptions and exemptions, it is not clear to what extent they might increase pressure on the developing countries to do the same. That is why developing countries deem important the recognition of SDT in their favour as another core WTO principle to be added to the core trade principles in a possible MCF. Moreover, the proposed binding character of non-discrimination would need to be clearly meshed with proposed "flexibility" and "progressivity". For example, does progressivity imply timetables? Long-term periods? Deadlines? Would exceptions be granted once and for all at the signing of the agreement, or would a country have the possibility to add up new exemptions when it decides to do so, at a later date? How to reconcile industrial and competition policy objectives, including achieving critical mass for firms to compete on international markets and reduce risks?

Should such exemptions concern entire sectors, without discrimination among firms within a particular sector? (See in this respect the principle of "comprehensiveness" proposed by New Zealand, cited below in "other principles", which would limit exemptions and consider periodic reviews of the validity of such waivers).

(a2) *Transparency* is the second core WTO principle set out in the Doha Declaration (paragraph. 25). In the competition area, it would require all partners to publish and make easily available (on the web for instance) their competition law, rules, decrees of application, guidelines and other related publications, such as decisions, explanations about priorities and, reasoning of the competition authority. A second requirement would be to notify this information to the WTO, which would maintain a central register (possibly a website open to all members).

Pros:

Such a system, it is argued, would facilitate trade and investment, and allow foreign investors to be clear about the rules they are required to comply with.

Cons:

First, there is concern about what information is required and the heavy burden this would pose for developing countries. Concern was also expressed about the costs involved, especially if the information needs to be translated. This is another area where some "flexibility" and "progressivity" might apply for developing countries, giving them for example more time and resources to comply.

Secondly, concern was expressed as to the apparent contradiction of transparency required with confidentiality rules. To what extent transparency would be hampered if confidential information was restricted (this concern, however, applies more specifically to cooperation in case proceedings (investigations) which is discussed later, in another part of this report).

(a3) *Procedural Fairness requires* that any defendant be afforded basic rights, as follows:

- Right of access to the competition authority;
- Right of defence to make its position heard;
- Right of decisions by an independent judicial body;
- Right of protection of confidential information (business secrets, etc).

Pros:

The principle provides assurances to firms that they will be treated fairly. It should facilitate international trade and FDI.

Cons:

Not all countries have similar judicial systems; conforming to this principle might involve difficult legislative amendment processes and imply heavy costs for developing countries, especially LDCs.

(b) Other principles, including Special and Differential Treatment (SDT)

Paragraph 25 of the Doha Declaration makes clear that the core principles "include" non-discrimination, transparency and procedural fairness Hence, proposals were made to add other principles.

> **(b1)** *SDT in the GATT/WTO system in general*: As discussed under non-discrimination, the principle or practice of conceding special or differential treatment (SDT) to developing countries exists in various forms throughout the GATT/WTO agreements, including the Uruguay Round Agreement and those cancelled after that Round. WTO rules cover over 160 provisions addressing SDT through 6 modes including market access for developing countries, exports, taking into account special needs of developing countries, transitional periods, technical assistance and capacity building and special concerns of least developing countries. However, these provisions all aim at facilitating compliance with WTO rules and do not seek to facilitate the economic reforms and restructuring required for developing countries to generate growth and reduce poverty.

Pros:

Whether a MCF is desirable from the development point of view will depend to a large extent on the scope of the flexibility and progressivity embodied in it, and on the policy space accorded to developing countries. SDT, if incorporated as part of the architecture of a MCF, would allow developing countries the necessary space to pursue their development strategies and socioeconomic policies.

Cons:

Some participants expressed the view that developing countries should not be lured into agreement by SDT promises, which might not materialize the way it was expected after the agreement was signed. To put it another way, developing countries were advised not to accept a proposal only on the basis of vague SDT promises contained therein. They should first consider that the agreement is useful in itself without SDT, and then ensure that SDT provisions are integrated into the architecture, as a safeguard for development.

In the competition context, one could think of at least four main types of SDT:

> **(b1.1)** First, the offer found in many existing agreements, namely to provide technical assistance and capacity building programmes to enable the developing and least developed countries to better implement the agreements.

Pros:

The Doha Declaration (paragraph 23-25) already calls for such assistance for developing countries in the context of trade-related competition policy. As discussed above, the relatively recent introduction of such laws in many developing countries and the fact that many are in the process of drafting legislation, and still many others have not initiated such a process, mean that the needs of these countries are immense and resource-intensive. As discussed in the UNCTAD meetings, it is not only expertise from developed countries which is needed, but also exchange of experiences with other developing countries which are more advanced in this field.

Cons:

Some developing countries have expressed concern that blank promises for assistance give no assurances that once the agreement is in force, technical assistance will be forthcoming for all those in need. Some participants have expressed the will to obtain concrete pledges for assistance to ensure that these do not remain promises in vain. In particular, two aspects of capacity building and technical assistance were emphasized; (a) the non-reciprocity and flexibility in cooperation and exchange of information relating to specific cases; and (b) special consideration for the enforcement of anti-competitive practices originating abroad and affecting developing countries.

(b1.2) A second type of SDT concerns transition periods afforded to developing and least developed countries.

Pros:

The EU proposals for flexibility and progressivity are an expression of such transition. This should allow countries which are not familiar with competition law and policy to have time to better understand the issues at stake, and to prepare appropriate "tailor-made" legislation and effectively train the officials who will be in charge of enforcement.

Cons:

Some participants were of the view that across-the-board transition periods such as those found in Uruguay Agreements (5 years for developing, 10 years for least developed countries) were not appropriate. Some countries were able to implement the agreement earlier than indicated, while others were unable to do so even after further extension of deadlines. What was needed, rather, was a soft compliance system, whereby countries would gradually eliminate exemptions and exceptions when they saw fit.

(b1.3) Provision of exemptions and exceptions for developmental reasons

Since developing countries have specific socioeconomic problems which often require urgent action, it was felt that certain industries or sectors should be exempted from strict application of competition law. In order to enable all countries, including developing and least developed countries to be party to a MCF, it was felt that such flexibility with regard to developmental needs should be accorded, provided that such conditions would be notified in advance to the WTO, in accordance with the transparency requirement discussed above.

Pros:

The EU proposed that exemptions and exceptions be allowed under the principle of "flexibility", which in fact served many developed countries as well, since many, including the EU, had exemptions and exceptions in their competition laws. New Zealand, in its

proposal for adding the "comprehensiveness principle," implied that such exemptions should be limited both in scope and in time (see below).

Cons:

Concerns were expressed by developing countries that it was still not clear which of the two principles – non-discrimination or flexibility – would prevail in the event of dispute, and to what extent a country which exempted some sectors or practices would be under pressure from trading partners to abandon them, irrespective of its authorization under the agreement's "flexibility" understanding. Moreover, such pressures were expected to grow as developed countries would reduce and eliminate their own exemptions and exceptions in time.

> **(b1.4)** Finally, the view was expressed that since flexibility and progressivity were applied to both developed and developing countries, this was not really a matter of SDT, since SDT involves *non-reciprocal undertakings by developed countries*, which do not have to be matched - at least not at the same time – by the developing and least developed countries.

Such SDT could involve, for example, non-reciprocal commitments by the developed countries, to eliminate their own exemptions, without a quid pro quo from the developing countries. Similarly, a proposal was made that as a measure of SDT, developed countries could commit to eliminating their export cartels when they were aware that such cartels adversely affected developing countries. Such measures, which could involve cooperation in case proceedings of developing countries against such cartels having adverse effects on their own territory, would be part of *positive or negative comity* policies of developed countries.

Another approach to making SDT operational and effective would be for more advanced developed countries to accept a binding commitment for peer review and to cooperate closely with developing countries in the investigation and exchange of information on specific competition cases. (More details are provided under the section devoted to cooperation agreements, below).

(b2) The principle of comprehensiveness

Proposed by New Zealand, this approach sets out a framework for the universal application of competition law and policy and clear criterion for the application of exemptions which would be made subject to periodic examination under a WTO peer review procedure.

Pros:

It was urged that too many exemptions to the general principles without any restraint would be counterproductive, as only certain sectors or even a few enterprises would be covered by competition rules. The question would be to determine whether the agreement should strictly limit the conditions for authorizing exemptions or should opt for maximum flexibility; and in this case, whether flexibility should be limited to developing or least developed countries, or open to all countries, as is the case in the EU proposal. It would also be important to clarify whether exemptions could be introduced any time after the agreement is accepted or once and for all at the time of adoption. A mechanism of review would be useful to ensure that once introduced, exemptions do not become permanent, even after their raison d'être has disappeared. Again, it would be necessary to decide if the revision mechanism would be left to the responsibility of the country having adopted the exemption, or if it would be part of the WTO's tasks.

Cons:

Developing countries expressed concern was that the principle of comprehensiveness, which is not a core principle of the GATT/WTO, should not be added to undermine the little policy space that SDT would provide them.

(c) Competition rules

Competition rules usually prohibit hard-core cartels, control vertical restraints, abuses of dominance and monopolistic power and control mergers and acquisitions likely to increase concentration above acceptable levels. The proposed MCF would be limited to a ban on hard-core cartels, and would not cover the other anti-competitive practices. Such other measures of control would be left to the discretion of national authorities, in accordance with their national competition legislation.

Pros:

Hard-core cartels are harmful to all countries and should be eliminated. In many cases such as international cartels and international collusive tendering (bid-rigging), law enforcement is made difficult, if not impossible without international cooperation in case investigations and proceedings. A MCF would force all WTO trading partners to effectively control hard-core cartels and take necessary action to eliminate them.

Cons:

It was felt that limiting the MCF to a ban on hard-core cartels without any provisions against other anti-competitive restraints, such as international exclusionary practices by dominant firms misses the point, because the latter practice adversely affects developing countries as much if not more than hard-core cartels. Some participants also considered it inappropriate to make WTO core principles (non-discrimination, transparency, procedural fairness) and a prohibition on hard-core cartels binding, but cooperation on the enforcement of competition law in competition cases voluntary. Furthermore, leaving out the control of anti-competitive practices such as abuse of dominance and vertical restraint from the MCF, except to the extent to which they would be covered by national competition legislation, would bring into question the usefulness of an agreement on competition within the WTO.

(d) Prohibition of hard-core cartels

Numerous presentations, based on studies, demonstrated that international cartels can adversely affect all countries, including developing countries and LDCs. On the basis of recent cartel enforcement actions in the United States, the EU, Brazil, the Republic of Korea and other countries, such as the vitamins and the lysine cartels, experts[3] have evaluated that taking into account only the sectors where cartels are known to have existed, some 80 billion dollars worth of imports of developing countries were affected, these countries having to overpay as much as 20 billion US dollars per annum when such cartels were operating.

Pros:

The EU, supported by most if not all developed countries, and many developing countries, as well as economies in transition, propose that the so-called "hard-core cartels" be banned, i.e. those cartels that have no defense, and should be prohibited outright or "per se" using US terminology. The EU proposed that the MCF should impose a binding commitment on all

[3] See Simon Evenett, *Can Developing Economies Benefit from WTO Negotiations on Binding Disciplines for Hard–Core Cartels?(UNCTAD/DITC/CLP/2003/3).*

countries to challenge such cartels and to voluntarily cooperate in the investigations and enforcement process.

Cons:

Some participants questioned the definition of hard-core cartels, as not including export cartels and also some import cartels. It was noted that authorizations or exemptions were always possible, for example when countries authorized export cartels under their competition laws .It was also noted that on the basis of the "effects doctrine", other countries simply do not take any action against cartels affecting foreign markets, when such cartels do not have any effects on their national territory.

(e) The case of commodity-and oil-exporting developing countries

Some commodity exporting developing countries, including oil-exporting countries expressed concern about the effects of such a ban on cartels for their own export policies, such as in the case of OPEC. A proposal was made to use the same terminology as in the UN Set, Section B, paragraph. 9, which excludes intergovernmental agreements from the scope of the Set as follows:

> "The Set of Principles and Rules shall not apply to intergovernmental agreements, nor to restrictive business practices directly caused by such agreements."

It was also recalled that so far, "sovereign Acts of State" had been considered immune from any antitrust action.

(f) Other anti-competitive restraints

(f1) Control of vertical restraints having exclusionary effects

Numerous anti-competitive practices, especially when applied by firms having a dominant position of market power, including monopolies, have exclusionary effects affecting trade and development. So far, however, there has been no proposal to control such practices within the WTO process.

Pros:

One of the reasons advanced was that while positions on hard-core cartels were quite close, and multilateral agreement seemed feasible, it was felt that this was not the case at present for vertical restraints and exclusionary practices in abuse of dominant positions by large multinational firms.

Cons:

Some participants considered that more work was needed on such exclusionary practices by dominant firms, because it was felt that these were the most damaging practices for developing countries, and that having a MCF that could simply ignore them would be inconsistent. It was suggested that more work should be undertaken on this issue to bring about convergence of views and include vertical restraints and exclusionary practices by dominant firms in a possible MCF.

(f2) Concentration of market power through mergers and acquisitions and other forms of control

This issue is also absent from the proposals for a MCF at the WTO.

Pros:

Some participants noted that enough convergence of views were not available at present to make concrete proposals on concentrations. Moreover, some developing countries indicated their preference not to include merger control in their regional and national competition rules.

Cons:

Many developing countries expressed serious concern at the ongoing waves of "mega-mergers" around the world, where developing country competition authorities were often unable to take any action when mergers took place abroad while the effects were felt on the national territory when local subsidiaries subsequently merged as well. It was suggested that voluntary cooperation proposed under a possible MCF should not be limited to enforcement against hard-core cartels, but should include other competition issues such as merger control and abuse of dominance.

(g) Voluntary cooperation

The Doha Declaration (para. 25) already mentioned voluntary cooperation, hence excluding any form of more binding commitment on this issue. Two types of voluntary cooperation can be included in this section: (a) technical assistance and capacity-building of a general nature, aimed at helping developing and least developed countries adopt and effectively implement appropriate competition law and policy; and (b) case-related voluntary cooperation aimed at providing the necessary information for countries to be able to take effective action, for example in a case where essential information is held abroad, and the case could not be proceeded with if information was not made available.

Pros:

With the rise of globalization and international trade and FDI, more and more anti-competitive cases have taken an international dimension, hence the ever-increasing importance and imperative necessity of international cooperation in the enforcement of domestic competition law. Often cases found in one country give rise to similar cases being uncovered in another. Exchange of experience on best practices and procedures is very effective. Second, in case proceedings, as more cases have an international dimension, information exchange, as far as non-confidential information is concerned, can be extremely useful or even essential in resolving a case. For example, when developed countries take action against an international cartel in which they discover effects on other countries, including developing countries, it would be very useful for the affected developing country competition authority, if this information were shared with them, in order to help them take effective action as well.

Cons:

Concerns were expressed about the fact that big trading partners would be more likely to be interested in cooperating with their large counterparts than with small, less developed economies, which accounted for very small share of their trade. The small, less developed partner, however, would have a large share of its own trade with the large trading partner, and hence be heavily dependent on this cooperation. This asymmetry in the interest of cooperation between large and small partners was a cause for concern. Some developing countries were

worried that the purely "voluntary" nature of the cooperation proposed might lead to unbalanced or discriminatory cooperation. One participant even noted that the possible MCF, as proposed so far, was unbalanced, in the sense that core principles and a ban on hard-core cartels were to be made binding, while the cooperation provisions proposed were made voluntary. The point was made that it was mainly through cooperation that developing countries had most to gain in a possible MCF, while in other parts of the proposed MCF they were the ones who would have to make the greatest efforts.

The point was also made that on the one hand requests for information could easily be ignored or rejected on the basis of confidentiality rules, while on the other hand, small competition authorities in developing countries that often use part-time officials might be overwhelmed by a few demands for information they felt obliged to respond to, neglecting their day to day enforcement work in order to give priority to the foreign requests.

Concern was also expressed as to the further limitations on already voluntary cooperation procedures imposed by confidentiality rules. For example, in case of leniency programmes, it was mentioned that a country having accorded leniency to the whistle-blower in an international cartel case would not release the information about the members of the cartel in order to preserve the leniency promised to the whistle blower, unless the country receiving the information formally undertook to apply equivalent leniency. Hence, the need for further convergence of laws before such cooperation could be made effective.

Another question brought up by a developing country was that it was not clear what advantage a voluntary cooperation agreement in a MCF would yield as opposed to existing possibilities at bilateral or regional levels.

(h) Dispute mediation mechanisms

The EU in particular made detailed proposals in this context. This included periodic "peer reviews" procedures, consultations and limited dispute settlement relating only to de jure questions (i.e. the actual laws, rules, guidelines and established procedures), leaving aside all de facto enforcement issues.

It was made very clear from the outset at the WTO Working Group that the proposed MCF would not aim at acting as a tribunal "second-guessing" decisions made by courts or by competition authorities in the enforcement of competition law.

(h1) Peer reviews

The practice of "peer reviews" among competition authorities can be found in the OECD. Under such a system, member countries periodically undertake a voluntary review process, whereby one country's competition authority, its legislation, its legal procedures and effective enforcement action are studied and discussed by two competition authorities of other member countries on the basis of an in-depth report prepared by a consultant. The peer reviews are voluntary, and take place in public hearings, among the other members of the OECD. In the trade area, the WTO itself has the Trade Practices Review Mechanism (TPRM), a more constraining system of review, in the sense that its periodicity is fixed, and countries do not volunteer for review.

A similar process was proposed by a number of countries, to create a WTO Competition Committee which *inter alia* would have the task of organizing periodic "peer reviews" in the field of competition.

Pros:

There seemed to be a general consensus about the advantage of soft convergence and better understanding about competition policy issues that a voluntary peer review mechanism could bring about. Some developing countries had already volunteered to be reviewed by peers at the OECD. Other countries seemed to prefer to use UNCTAD facilities to this effect as provided for by the UN Set of Principles on Competition under the provisions dealing with the consultation mechanisms.

Cons:

Some developing countries expressed concern that a peer review mechanism, especially if it was mandatory and contained compliance review after some time, might turn out to be a mechanism to exert pressure on them and would ultimately lead to more binding and enforceable processes of dispute settlement, as proposed by the EU.

(h2) Consultations and dispute settlement mechanism

The EU proposals, which go further than peer reviews, call for the establishment of a dispute settlement mechanism (DSM) to examine complaints and non-compliance by member States. As proposed, a DSM would be available for any party which had a complaint concerning de jure issues (lack of competition law, lack of transparency, lack of procedural fairness, existence of a law which infringed the non-discrimination principle, was not transparent or was applied in an unfair procedural manner) to bring to the WTO. This procedure would involve an attempt to solve the question through (a) consultations among the parties involved in the event of lack of understanding (b) the possibility of setting up a dispute settlement panel, composed of trade and competition experts, who would take a decision and (c) an appeals board to hear eventual appeals and take a final decision.

Pros:

The EU, argued that WTO agreements normally have a DSM, its binding character being subject to dispute settlement and final decision. Otherwise the credibility of the system would be at stake. The EU proposal also makes the adoption of a domestic competition law by members a binding obligation subject to the DSM.

Cons:

Many issues remain unclear with respect to the latest EU proposal (details were submitted at the WTO Working Group in late May 2003). For example, with regard to the EU dispute settlement mechanism proposal, it is not clear exactly how disputes and consultations would be able to be strictly limited to de jure issues, without eventually spilling over into de facto issues. As for the question of a commitment by all members to adopt domestic competition law and an enforcement mechanism, some participants were of the view that countries should adopt competition law and policy because they are convinced of its benefits, not because they are compelled to do so.

III. OPTIONS FOR DEVELOPING COUNTRIES AT CANCÚN: POSSIBLE ELEMENTS OF A MULTILATERAL COMPETITION FRAMEWORK

Two basic scenarios can be envisaged at Cancún: either negotiations are launched at which developing countries are ready to make their own proposals in what UNCTAD has called a "positive agenda" for the developing countries; or negotiations are postponed to a later date or even postponed indefinitely. We will therefore envisage two basic options: (a) a possible agenda for negotiations and (b) the status quo without a MCF: a WTO system where competition is touched upon in various agreements, and the Telecoms Reference Paper serving as a basis for further service agreements.

A. A positive agenda on competition law and policy

In the discussion in the four regional meetings, it was agreed that in the event that a decision was finally taken to launch negotiations at Cancún (possibly citing the single undertaking commitment in paragraph. 47 of the Doha Declaration), it was essential for developing countries not to neglect the negotiations on the interaction of trade and competition policy. All four meetings were broadly of the opinion that developing and least developed countries, as well as countries in transition, should have a clear view of what they wished to obtain from the negotiations.

Pros:

A positive agenda, taking into account major issues and concerns noted in the previous section of this report, should enable developing countries to come better prepared to eventual negotiations so as to be able to put forward key elements reflecting their interests rather than negotiating on the proposals made by developed countries.

Cons:

Doubts were expressed about the prospects of completing the negotiations by the deadline set for December 2004. However, some delegates noted that if there was political will, an agreement on a MFC could be reached in six months.

B. Status quo; no multilateral competition framework; extension of sectoral approaches to new areas

What would be the prospects of the competition issue being dealt with within the existing structure of the WTO? Some participants were of the view that the existing structure of the WTO, especially sectoral agreements under GATS, would provide an interesting avenue for pursuing the competition policy issues without getting into the extent of a comprehensive MCF.

Pros:

Some developing countries were in favour of the "positive list" of commitments found in the GATS sectoral agreements. Under this system, developing countries can make offers to liberalize specific sectors in exchange for other commitments of market access by trading partners. Under a competition regime put forward by the proponents of a possible MCF, the "negative list" would be the rule: general liberalization, with the possibility of notifying exceptions or exemptions.

It was noted that at the end of the Uruguay Round there were great expectations regarding the possibility of extending the sectoral agreements on the model of the Annex to the Telecoms Reference Paper, which deals mainly with competition issues. Other sectors were expected to follow suit, such as postal services, energy, transportation of people and merchandise, financial services and, distribution services. So far, however, further negotiations on the Reference Paper model have not gone through.

Cons:

Some participants were of the view that sectoral agreements on the model of the Reference Paper would be dominated by sector regulators, and that therefore very little attention would be given to the views of competition experts. Moreover, the competition-related issues might be dominated by developed country competition experts because developing and least developed country competition experts, where they exist, would more likely be absent from the discussions altogether.

Furthermore, they considered that a sketchy approach to competition issues in sectoral agreements would inevitably lead to inconsistencies between one agreement and another, competition issues ending up by being treated by trade experts, whose criteria were often very different from those of competition experts. As was explained in detail, trade experts would make their decisions on the basis of market-access criteria, rather than on the basis of competition principles.

Following the discussions held during the two rounds of regional meetings in developing countries and economies in transition since the Doha WTO conference, two main options appear to be emerging among the various scenarios considered and discussed in this report:

(a) A positive agenda which would review the modalities and parameters of a possible multilateral framework, including the WTO Core Principles, SDT, a positive and negative list approach, peer reviews and a dispute settlement mechanism. Such an agenda would require further clarification and studies within the WTO Working Group before a decision by explicit consensus can be taken on starting negotiations.

(b) A continuation of the status quo which would require a detailed evaluation of the implication for a MCF for other WTO Agreements dealing with competition and a progressive reinforcement of competition institutions in developing countries through capacity-building, while taking full account of the needs of the developing and least developed countries for appropriate flexibility.

Annex 1

FREQUENTLY ASKED QUESTIONS[4]

Below are a number of frequently asked questions and views expressed by participants and experts during the Post-Doha meetings. The material has been consolidated under the following headings:

I. BASIC QUESTIONS ABOUT APPROACHES TO AND MODALITIES FOR THE ENFORCEMENT OF COMPETITION LAW AND POLICY

A. Competition policy and unfair competition

1. A distinction was made between two bodies of law: *competition law* (also called *antitrust law*, *antimonopoly law*, *fair trade law*, *restrictive trade law* or *restrictive business practices law* in certain countries) and *unfair competition law* (*concurrence déloyale* in French, *competencia desleal* in Spanish, sometimes also called *unfair trade law* in English).

2. *Competition law*, which is the subject of paragraphs 23–25 of the Doha Declaration, includes laws governing:

(a) The prohibition of cartels, or agreements among rival firms to stop competing by fixing prices, allocating (or sharing) markets and fighting outsiders (non-members of the cartel);

(b) The control of vertical anticompetitive practices or restraints and the prohibition of abuses of dominant market power by large firms or monopolies, which are able to impose such anticompetitive restraints on their suppliers or distributors; and

[5] These questions were in part those listed in the first Consolidated Report of four Post-Doha seminars in March-April 2002 (UNCTAD/DITC/CLP/Misc./23), which was published by UNCTAD in June-July 2002 and is available on the UNCTAD competition website, *www.unctad.org/competition*

(c) The control and review of mergers and acquisitions (M&As) which might lead to the creation of a dominant firm or ultimately to the establishment of a monopoly.

3. As for *unfair competition*, the term generally concerns the use of unfair means to compete, such as the counterfeiting of an intellectual property right (illicit copy of a patent, copyright or trade mark), cheating in weights and measures, misrepresentations and misleading advertising, or infringement of trade laws against dumping and export subsidies (antidumping and countervailing, respectively).

B. Competition policy and antidumping

4. The original objective of antidumping was to combat the practice of "dumping", or below-cost selling, which can result in the anticompetitive practice of "predatory pricing". The aim of predatory pricing by dominant firms is to offer goods at a very low price (sometimes for free) in order to eliminate weaker competitors from the market. Once the competitor or competitors are bankrupt (or weakened so much that they could easily be acquired by the predator), the latter is able to monopolize the market and recover the losses it made in the first place by increasing prices to monopoly levels. This type of anticompetitive practice is very difficult to prove in practice and has rarely been prosecuted successfully.

5. Dumping is a similar practice whereby a foreign firm sells goods at a very low price in order to damage local competitors and to penetrate the local market and eventually monopolize it. Current WTO rules allow antidumping action whenever a producer prices goods lower for the export market than for domestic sales. Dumping is defined as sales below average total cost, while the traditional definition of predatory pricing usually relates to sales below marginal cost.

6. According to most national antidumping rules, once a complaint is lodged by domestic firms, the importing country imposes a provisional antidumping duty until an inquiry is made into the existence and extent of antidumping. In theory, if after an inquiry no dumping is found, the provisional duty should be reimbursed. If dumping is found, the permanent duty imposed should in no way exceed the proven amount of dumping. Often, however, inquiries have taken as long as six months to more than a year, forcing the foreign exporter to go bankrupt unless it was able to divert its exports elsewhere. In order to avoid such a damaging situation, foreign exporters have often been willing to undertake voluntary export restraints (VERs) as a condition for not being subject to antidumping proceedings in the importing country. Under such VERs, exporters would typically agree to limit export quantities and increase prices, a situation very similar to that of a price-fixing and market-allocation cartel. As a result, domestic firms were often able to control the import market; hence antidumping rules, which originally were intended to prevent an anticompetitive practice such as dumping, finally resulted in encouraging the use of anticompetitive practices. Papers presented to the meetings argued that in some cases, cartels in importing countries have made use of antidumping recourse in order to block entry by non-members of the cartel.

7. It was noted that since the Uruguay Round Agreements, the use of VERs has been prohibited by WTO rules. Moreover, the objectives of competition rules are not the same as those of antidumping rules. The first aim at protecting competition itself and consumers, but not competitors, while the second aim at protecting competitors (domestic producers). It was also noted that only certain regional integration agreements, whereby free-trade areas are created, have replaced antidumping procedures with competition rules. This was the case, for example, in the internal market of the European Union and in ANZERTA, the free-trade agreement between Australia and New Zealand.

C. Competition and market-oriented economic reforms

8. Competition policy is directly relevant to the main elements of market-oriented economic reforms undertaken in most countries of the world during the last 10–20 years.

9. These include in particular the following:

(a) Price liberalization and scrapping or gradual elimination of administered pricing;

(b) Deregulation of previously regulated sectors, including State-controlled monopolies such as utilities and "network industries", considered for the most part to be "natural monopolies";

(c) Privatization of a large part of previously State-owned enterprises;

(d) Trade liberalization, including significant reductions in import barriers, which resulted in a considerable opening of domestic markets both in developed and in developing and transition countries; and

(e) Last but not least, important reforms in the foreign direct investment (FDI) legislation of many developing countries, which led to considerable liberalization of inward FDI.

10. The point was made that all these economic reforms have one important feature in common: the need for competition policy if market-oriented policies are to be given the best possible chance of success. For example, price liberalization, if not accompanied by competition laws and policy aimed at controlling economic behaviour and structures, can result in substantial price increases and reduced benefits for the overall economy. If monopolistic structures are allowed to continue unchecked, price liberalization will not proceed satisfactorily. The same can be said of privatization of State monopolies into private monopolies. Finally, opening of markets through import competition and FDI liberalization might bring enhanced competition, but if no safeguards exist, foreign firms might also engage in anticompetitive practices and abuse dominant market positions.

D. Competition, natural monopolies and sectoral regulators

11. After privatization, network monopolies (e.g. electricity grids, railway operations or basic telecommunications operators) need to be guided by competition principles to ensure that they do not abuse their dominant power with respect to end users. This is why sometimes they are placed within the purview of the competition authority. In many countries, special sectoral regulators are created to supervise the operations of the network operators and are given competition responsibilities which they share with the competition authority (when such an authority is in place). In the multilateral trade system, rules exist for services (e.g. GATS) as well as for some specific sectors usually regulated at the national level (e.g. telecommunications). This issue is further discussed in section III D.

II. ISSUES RELATED TO THE PRECISE MEANING OF THE DOHA DECLARATION

A. Paragraph 23: "a decision to be taken by explicit consensus"

12. While it was understood that only negotiators at the Fifth Ministerial Conference would be in a position to decide on the exact meaning of text adopted at the Fourth Ministerial Conference, some participants were of the view that the consensus to be reached at the Fifth Ministerial Conference would need to relate to a specific or *explicit* list of issues for or modalities of the negotiations. Participants also recalled the reservations of a number of developing countries during the Doha

Ministerial Conference as reflected in the Chairman's statement at the closing session. They pointed to the legal uncertainty surrounding the status of the Chairman's remarks.[5]

B. Paragraph 23: What are the "modalities of negotiations"?

13. Some experts considered that the "modalities" could relate both to procedural and to substantive issues, such as the precise elements to be covered by a possible MCF.

14. The procedural conditions could relate to whether there would be fully multilateral or only plurilateral negotiations; whether countries would be free to "opt in" or "opt out" of the negotiations as had been proposed by the European Union; whether a further pre-negotiating period would be necessary before actual negotiations could take place; whether, before being able to negotiate, all countries would first need to adopt a domestic competition law; and so on. Substantive issues or elements to be covered by the negotiations could include a list of core trade principles such as non-discrimination and transparency; should they also include the principle of special and differential treatment for developing and least developed countries? Furthermore, what was meant by "appropriate flexibility" as mentioned in paragraph 25 of the Doha Declaration? Some participants suggested that certain provisions of the UNCTAD Set of Principles and Rules on Competition6 could be useful in clarifying this issue.

C. Paragraph 25: "Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them."

15. Some participants were of the opinion that "flexibility" referred to "enhanced technical assistance and capacity-building in this area, including policy analysis and development" as called for in paragraph 24 of the Doha Declaration. In this connection, two types of assistance and capacity-building could be envisaged:

(a) Long-term measures aimed at enhancing national capabilities to adopt and effectively enforce competition law and policy, upon request; and

(b) More short-term help aimed at enabling developing and least developed countries to "better evaluate the implications" of a possible MCF for their development policies and objectives.

16. In order to be a development-friendly instrument, a possible MCF would also need to be flexible, enabling developing and least developed countries to take full part in the negotiations and possibly reach agreement. In particular, it was felt that developing countries would need to have the necessary policy space to be able to blend competition policy with industrial policy, if that was needed for developmental reasons, to ensure optimal chances of development in cases where market failures hampered competition. Such concerns could be taken into account under the principle of special and differential treatment for developing and least developed counties, as is further discussed in Section V.

[5] In a statement made prior to the adoption of the Doha Declaration, the Chairman of the Conference, Mr. Youssef Hussain Kamel (Qatar), expressed his understanding that the requirement in paragraph 23 for a decision to be taken, by explicit consensus, on the modalities for negotiations before negotiations on competition policy and other "Singapore issues" could proceed, gave "each Member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that Member is prepared to join a explicit consensus." See WTO Summary Record of the Ninth Meeting, document. WT/MIN(01)/SR/9.

[6] See UNCTAD document TD/RBP/CONF/10/Rev.2, available at www.unctad.org/competition.

III. GENERAL QUESTIONS CONCERNING A POSSIBLE MULTILATERAL COMPETITION FRAMEWORK (MCF)

A. Is competition a problem at the multilateral level? What can a MCF achieve that cannot be achieved with a domestic competition law?

17. Analysis presented at the various meetings and working groups has shown that as globalization spreads to all regions of the world and to a growing number of sectors from manufactures to services, as well as some commodities, it is becoming urgent for domestic competition rules to be supplemented by international avenues of cooperation.

18. While governmental trade barriers such as tariffs and non-tariff barriers (NTBs) are being eroded by multilateral trade liberalization in many countries, including many developing countries, and as a result of regional free-trade agreements (FTAs) and multilateral agreements in the GATT and then the WTO, there is an increasing need to ensure that restrictive business practices (RBPs), also called anticompetitive practices, do not replace the governmental barriers to distort trade flows.

19. Studies presented have shown that international RBPs, such as international cartels, abuses of dominance by multinational firms (including exclusionary practices by such firms) and mega-mergers are able to distort trade to the advantage of dominant firms or cartel members, which can then reap monopolistic rents on individual markets while excluding and eliminating the firms of weaker trading partners. Domestic competition laws, where they exist, often lack the necessary extraterritorial reach to counter such anticompetitive practices which occur at the global level.

20. National laws are limited by domestic borders, while some highly damaging anticompetitive practices are transborder by nature. Their adverse effects are felt in developing countries, but they can be operated from headquarters overseas. Action at the national level in countries that have competition legislation is often ineffective in such cases when the proof of infringement is outside the national territory. Hence the imperative need for cooperation agreements at the international level, in order for the affected country to be able to take the necessary remedial action.

21. Some developed countries promote bilateral cooperation agreements. Such bilateral competition cooperation agreements exist, for example, between the United States and the European Union, Germany, Japan, Canada and Australia. Very few exist between developed and developing countries. (An exception is the newly signed agreement between Canada and Costa Rica, and of course, NAFTA, which has provisions for exchange of information and consultations among members on competition matters.) Nevertheless, the view was expressed that large economies would likely be less interested in cooperating with small economies than with equal partners – hence the interest in regional groupings (e.g. the European Union, but also developing country groupings such as ASEAN, CARICOM, COMESA, MERCOSUR, SADC, SARC or UEMOA). It was also indicated that while many countries may become members of regional agreements, such agreements are usually slow to develop effective competition rules (except in the case of the EU, EEA and NAFTA). The urgency of the matter is shown by a study presented in Tunis by Professor Simon Evenett which estimates the annual loss for developing countries from a few known international cartels to be about 1.7 per cent of these countries' GDP, and, as the author indicates, this estimate is probably conservative, given that it covers data from only 14 of 39 known international cartels. It might therefore be useful for smaller trading partners to reach agreement on a MCF, provided that it had sufficient binding force – through voluntary cooperation, consultations or a dispute settlement mechanism – to enable them to take effective action in this respect.

B. Is there a need for a MCF before domestic competition laws are enacted and effectively implemented in developing countries?

22. It was noted that the process of law enactment and effective enforcement is a slow one. Many developing countries now have such laws. Others are in the process of drafting competition bills, but many countries have not even begun to prepare such laws. Obviously, if there is a chance to act effectively, one would need to proceed as soon as possible in order to be able to take effective action. Moreover, it was felt by some experts that adopting a MCF would induce many countries to give the competition issue higher domestic priority, which might accelerate the adoption of domestic legislation and effectively control anticompetitive practices.

C. Would it not be more logical to proceed first with national legislation, then with regional arrangements and finally with a multilateral framework?

23. Yes, but while countries strive to draft and adopt domestic legislation or to negotiate proper competition rules in regional integration arrangements, anticompetitive practices at the global level will continue to take their toll on developing countries, hampering their competitiveness, impoverishing them and retarding their development.

D. Competition-related provisions in existing WTO agreements: Is it necessary to have a MCF in addition to existing sectoral agreements in the WTO? If there were a MCF, how would it relate to existing sectoral agreements?

24. A number of Uruguay Round and post-Uruguay agreements contain important provisions related to competition policy. Perhaps the most important are the GATS, the TRIPS Agreement and the Telecommunications Reference Paper.

25. GATS Article VII provides that each member country will ensure that any monopoly supplier of a service in its territory does not, in supplying the monopoly service in the relevant market, act in a manner inconsistent with that member's obligations relating to most-favoured-nation treatment under Article II and specific commitments. The GATS also specifies that when a monopoly supplier competes, either directly or through an affiliated company, a member will ensure that the supplier in question does not abuse its monopoly position in one market to dominate another market in a manner inconsistent with its commitments. These provisions also apply in cases of exclusive service suppliers, where a member, formally or in effect, authorizes or establishes a small number of service suppliers and substantially prevents competition among these suppliers on its territory.

26. Article VIII: 3 of GATS provides for the Council on Trade in Services to act in connection with a complaint by a member against a monopoly supplier of a service of any other member, by requesting information from that member relating to the supplier's product. Article VIII: 4 further provides for notification by members to the Council of the grant of monopoly rights regarding services covered by their commitments.

27. The TRIPS Agreement recognizes (Art. 8) that appropriate measures may be needed to prevent (a) "the abuse of intellectual property rights by right holders" and (b) "recourse (by right holders) to practices that unreasonably restrain trade or adversely affect the international transfer of technology".

28. Article 40 of TRIPS (section 8 on Control of Anti-Competitive Practices in Contractual Licences) provides that "some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and impede the transfer and dissemination of technology". It provides that "nothing in this Agreement shall prevent Members from

specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market" or from adopting appropriate measures to prevent or control such practices. Moreover, the Telecommunications Schedules of Specific Commitments Reference Papers contain specific references to anticompetitive practices in telecommunications.

29. Appropriate measures are provided for the purpose of preventing suppliers, alone or together with others, from engaging in or continuing to engage in anticompetitive practices. These may involve (a) anticompetitive cross-subsidization; (b) using information obtained from competitors with anticompetitive results; and (c) not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

30. **Is it necessary to have a MCF in addition to sectoral agreements?** Some participants noted that the present piecemeal approach is not satisfactory as the risk exists that various provisions relating to competition in different trade agreements may be inconsistent with each other. Moreover, there is a danger that developing countries – especially those that are not acquainted with competition law and policy – might be unable to take advantage of those provisions. Hence the need for more systematic, across-the-board coverage of competition law and policy principles.

31. **If there were a MCF, how would it relate to sectoral agreements?** A parallel was made with the situation in individual countries having competition legislation and a competition authority, and its relationships with competition provisions in rules governing sectoral regulators. In the event of inconsistencies, there would need to be a decision as to which rules would prevail: those in the MCF or those in the sectoral agreement.

E. Is there a need for a new MCF in the WTO instead of that which exists in UNCTAD?

32. The United Nations General Assembly adopted the Set of Principles and Rules on Competition" in 1980. The Set has been in operation since, and the Fourth United Nations Conference to Review all Aspects of the Set (September 2000) reaffirmed its validity. However, the Set is in the form of a recommendation to States; it is not a binding document. In 1985, at the First Review Conference, the G-77 had requested that the Set be transformed into a binding instrument, but this was never done. Some participants expressed the wish to maintain competition policy in UNCTAD, and not to bring it into the WTO which they consider a purely trade-rules organization and not a development-oriented body, like UNCTAD.

33. An agreement within the framework of the WTO might have the potential to be (or to become, after an evolutionary period) a binding or partly binding instrument covered by some sort of dispute-settlement mechanism, in the same way as most other WTO agreements.

34. According to proponents, another rationale for a MCF in the WTO is that the WTO represents today's international trading system, and such a system would be incomplete if it covered only government barriers to trade, not enterprise-level barriers or distortions such as anticompetitive practices (RBPs), as was the original objective of Chapter V of the Havana Charter.

F. What would developing countries and LDCs gain from a MCF in the WTO?

35. In principle, multilateral agreements are favourable for weaker or small trading partners because they give them the possibility of seeking redress for infringements by other members. Doubts were expressed about this argument, as it was feared that dispute settlement in other areas (e.g. bananas) might not redress imbalance, even after a country – or groups of developing countries – gained favourable panel or appellate body decisions. Others felt that the position of developing

countries would still be strengthened, especially if the resulting MCF contained some sort of dispute settlement or mediation mechanism, and if such a mechanism took due account of the flexibility afforded to developing countries under an appropriate special and differential treatment still to be defined (see section V below). In any event, they considered that a MCF could be useful in helping developing countries resolve cases of anticompetitive practices operated from abroad (such as international cartels) having adverse effects on their territory, provided that cooperation from the countries where the anti-competitive practice originated was forthcoming.

G. Would it be mandatory for developing countries to adopt a domestic competition law if a MCF were adopted?

36. Initial proposals by the European Commission were to require members to the agreement to undertake the adoption of domestic competition legislation. Some countries have expressed reluctance to do so. Others have felt that similar obligations were forced upon them by the International Monetary Fund or the World Bank as a sort of necessary evil. More recent EC proposals have reiterated such obligation under a possible MCF.

37. Theoretically, one could imagine a possible MCF without such an obligation, but what would then be the case, for example, regarding cooperation agreements? Without a domestic competition authority, a developing country would be unable to discover and to provide any information, and in case it needed to challenge a RBP adversely affecting its own market it would be unable to do so with or without information provided from abroad. Hence, if they felt hampered by specific anticompetitive practices, countries would adopt such legislation as they saw the need for and found it was in their interest to have such a law and enforce the MCF. In other words, they could negotiate and adopt an MCF without having a domestic competition law, but the MCF would remain inoperative for them as long as they did not have the national legislation. Some participants considered that it should be left to members to decide when it was appropriate for them to adopt a competition law, and hence to be able to take advantage of the cooperation provisions of a possible MCF. Others felt that without a commitment to adopt a national competition law (subject to flexibility and progressivity provisions), such an agreement would be useless.

H. The need to fully take into account the social, cultural, historical and development context of different countries

38. Concerns were expressed that developing countries could not be expected to adopt competition laws copied from those of developed countries. Attention was drawn to the fact that while the basic principles of controlling cartels, vertical restraints and abuse of dominance, as well as mergers, were followed, all countries had legislation tailored to their specific situation (level of development, customs, socioeconomic system, cultural context, etc.). Concern was also expressed regarding the need for countries to preserve their cultural heritage, while some others also needed to implement affirmative action policies to preserve social and political stability in their economy. It was generally agreed that a MCF would not impose a "one size fits all" type of domestic legislation and that sufficient flexibility and prosperity would be provided.

IV. THE ARCHITECTURE OF A POSSIBLE MCF: DIFFERENT SCENARIOS

A. What elements should a MCF contain? Of these, which ones could be adopted initially without much difficulty? Which ones could be adopted later, considering the possibility of an "evolutionary system", including ongoing meetings and further possible negotiations?

39. Different scenarios were envisaged. It was suggested that a comprehensive MCF could ideally contain (a) **the core trade principles**: non-discrimination, transparency and procedural fairness, with inclusion of special differential treatment; and (b) **the main competition principles**: prohibition of hard-core cartels, control of vertical restraints and abuse of dominance as well as control of M&As. Such an agreement could be covered by (c) **voluntary cooperation rules**, including "positive" and "negative" comity principles, exchange of information, including confidentiality safeguards, peer reviews, consultations, and possibly a dispute settlement or mediation mechanism limited to texts of legislation guidelines and so forth, and not actual implementation of the laws. It was made clear at the outset that such a dispute-settlement mechanism would not aim at second-guessing decisions made by national jurisdictions in the application of domestic competition rules.

40. If one accepts the idea of a possible evolutionary system, one that would evolve from simpler to more complete, one could imagine starting with a simpler scenario, trying to achieve an agreement on voluntary cooperation principles. Another scenario could cover agreement on the core principles of international trade in (a), then parts of (b) on hard-core cartels, and (c) a provision on cooperation and conciliation procedures, perhaps including a peer-review mechanism, which might be acceptable. A more comprehensive scenario could include some DSM as discussed below in VII-D.

B. An "evolutionary" or "building-block" system?

41. Some delegations expressed concern that if negotiations were launched at some point in time to reach agreement on minimalist, voluntary rules, those who were reluctant to develop a more complex mandatory agreement would still risk being dragged into it because once a "building block" was set in place, others would follow sooner or later in future rounds. Other participants considered the same argument a favourable one, proposing that a minimalist agreement could be concluded immediately, leaving the negotiation of a more complex or more complete MCF, covering vertical restraints and abuses of dominance as well as mergers, for a later stage when parties would be ready to tackle such issues.

C. A plurilateral agreement?

42. Strong reservations were expressed about initiating negotiations at a plurilateral level, as was proposed by the European Commission. This has also been suggested as an "opt-in/opt-out" scenario, where by countries could opt out if they were unhappy with the evolution of the negotiation, or opt in when they felt they were ready to enter into such an agreement. The danger of plurilateral negotiations was that later, developing countries having opted out would face an agreement which did not take into account their needs, and which was even less development-friendly. There was also concern that plurilateral agreements might eventually become part of a "single undertaking" or package, as was the case of a number of agreements at the end of the Uruguay Round.

V. WHAT ARE THE TYPES OF SPECIAL AND DIFFERENTIAL TREATMENT?

43. While existing WTO Agreements had many types of S&D-related provisions, basically, four types of S&D treatment could be considered:

(a) **Technical cooperation**, capacity-building and exchange of experience.

(b) **Transition periods** allowing for temporary flexibility and graduality – flexibility with respect to the law's adoption and implementation, and graduality in the full coverage by the law of all the main elements contained in a competition law. The transition period could be decided across the board, with longer terms for LDCs.

(c) **Exceptions and exemptions**. These could be sectoral exceptions or exemptions covering certain anticompetitive practices under certain specified conditions. In the same way that most developed countries at present exempt certain sectors (e.g. agriculture for the European Commission or baseball for the United States), the MCF could give developing countries the right to declare certain sectoral exceptions for developmental reasons. It was suggested that such exemptions would not be subject to a time limit, but that it might be useful to review the applicability of sectoral exemptions periodically.

(d) **Specific undertakings for developed countries** to eliminate their own exceptions and exemptions on a non-reciprocal basis. These could involve still existing sectoral exceptions or exemptions of specific practices, including export cartels.

44. Some experts were of the view that in the early stages of development, a certain degree of industrial policy might be necessary in order to make up for market failures in developing countries. At higher levels of development and as industrialization progressed, such policies would gradually become less effective than competition policy. Nevertheless, as part of S&D treatment, developing countries, especially LDCs, would be able if they so wished, to exempt certain sectors, possibly on condition that the principle of transparency was respected.

45. Many participants felt that transition periods were inappropriate. Others expressed concern at the relative weakness of S&D treatment when faced with the principles of non-discrimination and national treatment. They felt that developing countries might face considerable pressures, irrespective of the inclusion of S&D principles in a possible MCF, to apply equal treatment to foreign firms and to open their markets to FDI.

46. It was proposed that as an additional element of S&D developed countries should envisage renouncing existing exemptions or exceptions in their competition laws in cases where it is known that such provisions affect important interests of developing countries. This could apply to export cartels, as well as sectoral exemptions in service sectors essential for the commercial competitiveness of developing countries, such as transport services and tourism.

VI. WHAT ARE THE CORE PRINCIPLES OF COMPETITION?

47. These are found in all competition laws (see UNCTAD Model Law[7]), which broadly cover (a) a prohibition of cartels; (b) case-by-case control (based on the rule of reason) of vertical restraints, especially by dominant firms; and (c) control of concentrations through mergers and acquisitions or other forms of concentrations such as joint ventures, whenever such concentrations may lead to the creation of a dominant firm and ultimately a monopoly.

[7] The Model Law is available on the UNCTAD website at www.unctad.org/competition.

A. Hard-core cartels

48. Such cartels include agreements to fix prices, allocate markets and strive to eliminate outside competition. They are also particularly damaging in cases of collusive tendering (bid-rigging) in government procurement tendering procedures. Export cartels are often exempted by law in many countries; a repeal of such exemptions could and should be envisaged.

49. In principle, so far, the prohibition against cartels has concerned on agreements among firms to fix prices and eliminate competition. This prohibition does not exist with respect to price undertakings made by sovereign states (Sovereign Acts of State) in relation to a basic commodity such as oil, for example. Hence, as indicated in the United Nations Set of Principles and Rules on Competition (Art. 9, Section B), "intergovernmental agreements, [or] restrictive business practices directly caused by such agreements", such as OPEC would be exempted. This question should still be clarified and a specific exemption for developing countries reaffirmed in the case of negotiation of a MCF.

B. Vertical restraints and abuse of dominance

50. While all competition laws contain provisions to control such practices, definitions and the degree of prohibition vary widely from country to country. It might be more difficult to reach agreement on these elements in a MCF. Perhaps there could be an agreement to establish a standing committee to further study these issues with a view to incorporating an agreement on vertical restraints into the MCF at a later stage, once a reasonable degree of convergence of views has been achieved among all States.

51. It was noted, however, that vertical restraints can be especially important in developing countries, whose markets are often small and where subsidiaries of foreign multinationals easily attain a dominant position. Some also manage to convince privatization officials to grant them a long-term monopoly on the occasion of the sale of a State monopoly to the private sector.

C. Mergers and acquisitions

52. Some developing countries stated that they did not need M&A control in their domestic legislation for the moment and that in the event of abuse of dominant power they could still take effective action under provisions against abuse. Others recalled that once a merger had taken place, it was much more difficult to “unscramble the eggs”. (A study has shown, for instance, that some prohibited cartels later try to reconstitute their market-controlling power through mergers.)

53. It was noted that multinational firms were calling for a multilateral discussion of mergers in order to facilitate notification procedures in the case of mega-mergers where multinationals present in many countries have to satisfy multi-jurisdictional requirements.

VII. WHAT KIND OF COOPERATION, EVALUATION AND MEDIATION COULD BE ENVISAGED?

54. As was discussed in previous sections of this report, a possible MCF in the WTO might be beneficial to developing countries seeking to obtain information located outside their national territory in a case affecting their market. Under this heading, a number of cooperation and dispute mediation procedures were considered, from voluntary cooperation and exchange of publicly available information to consultations, peer reviews and specific types of limited dispute settlement mechanisms.

A. Voluntary cooperation

55. One option or scenario envisaged for a possible MCF was that it could simply contain a voluntary cooperation agreement. Such a provision, akin to those that exist in the United Nations Set, would provide for **"negative" comity** (i.e. voluntary supplying of information on a law or case initiated in one country which had effects or concerned an anticompetitive practice having effects in another country). It could also provide for **"positive" comity** (positive action in response to a request for cooperation). In both cases, the exchange of information would be voluntary and subject to **confidentiality rules**. Concern was expressed that the voluntary nature of the process, supplemented with a confidentiality safeguard, made this kind of cooperation very hypothetical, especially for smaller partners, which were unlikely to have as many cases of information to provide as of requests they would likely address to big trading partners. Another concern, however, was that small developing country authorities with limited resources might be submerged by requests for information under cooperation agreements.

56. The case of more formal bilateral cooperation agreements (as opposed to voluntary ones) was invoked, in which the degree of mutual trust is such that even certain confidential information can be shared. It was felt, however, that this could more easily apply to bilateral cooperation among partners having comparable market size, level of development, expertise in competition and so forth.

B. Consultations

57. A MCF could envisage different types of mechanisms, beginning with periodic consultations between States on specific issues relating to competition. Such a mechanism exists under the Set, and consultations take place during the annual meetings of UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy. The EC has recently proposed a limited dispute-settlement mechanism which would involve consultations as a first step to try to resolve the issue before it is brought to a dispute settlement panel.

C. Peer reviews

58. Another proposal would be to organize periodic "peer reviews" such as are currently taking place in the OECD. Such reviews begin with a study by independent consultants of the economic conditions of the country being reviewed, as well as a review of the competition law and accompanying rules and guidelines or decrees of application, the competition authority and its functioning, the implementation of the law, the authority's budget, actual cases decided, and so forth. The in-depth evaluation, which can be quite critical, is presented to the competition authority for a first review; then the heads of the competition authority are "examined" in a public session at the OECD by representatives of two other competition authorities (the peers), after which they respond to any questions posed by all the peers present. Finally, a list of recommendations for improvements and "best practices" is submitted to the Government of the country being reviewed.

59. This system, which is quite time-consuming and expensive (since it involves engaging consultants, etc.), has been found useful by OECD countries being examined, because the recommendations for improvement then serve to convince the Government to increase the budget of the competition authority to amend the law to make it more effective, and so on.

60. Some non-OECD members such as South Africa and Chile whose competition policy is being reviewed have already volunteered to be reviewed by OECD "peers". One could imagine a system where countries could volunteer to be reviewed under an OECD-type peer review, or could simply be reviewed through periodic competition policy review mechanisms similar to the trade policy review mechanism (TPRM) which currently exists at the WTO. Some participants worried that the periods between such reviews might be too long and the process too costly. Others opined that the system would result in pressure being exerted on developing countries, and asked to what extent the authorities of developed and developing countries or LDC could be considered peers. A proposal was

made to give developing countries the option for peer reviews in UNCTAD, as part of the consultation procedures contained in the UN Set, Section F, paragraph 4.

D. A WTO-type DSM?

61. As for controversies or differences concerning the conformity or non-conformity of national competition law in breach of core principles of international trade (non-discrimination, transparency, S&D, etc.), the EU proposed that a dispute settlement mechanism of the WTO-panel type could be included in a possible MCF. As discussed earlier, such a mechanism would be limited to de jure issues (i.e. text of the law, guidelines, principles etc.) and not de facto interpretation of the law by the domestic courts. In any event, this mechanism would in no way create a multilateral body second-guessing the application of laws by national jurisdictions.

VIII. TYPES OF TECHNICAL ASSISTANCE AND CAPACITY-BUILDING, AND MEANS OF DELIVERY

A. Types of assistance

62. It was noted that two distinct but mutually reinforcing types of assistance were needed by developing countries: (a) long-term help with creating a "competition culture" and developing a "tailor-made" competition law, as well as building the necessary implementing capacity for the national competition authority (through training of officials, exchanges of personnel, study tours, and advice regarding possible improvements and amendments to existing competition legislation); and (b) in the shorter term, help with the capacity-building needed by developing and least developed countries, as well as transition countries, to better evaluate the possible contours and implications of an eventual MCF in the WTO.

B. South/South cooperation

63. It was felt that while North/South cooperation and assistance were very much welcome, South/South cooperation was also a key element needed in order for developing and least developed countries to take advantage of recent experiences of other developing countries, which faced similar difficulties in trying to implement competition rules under the realities of development.

ANNEX 2

United Nations Conference on Trade and Development (UNCTAD)

Asian Regional Conference on the Post-Doha WTO Competition Issues
Kuala Lumpur, Malaysia, 26–27 February 2003

Hotel Equatorial Jalan Sultan Ismail, 50250
Kuala Lumpur, Malaysia
Tel: 60 321 61 777, Fax: 603-21619020.

Agenda

Wednesday 26 February

08h30	Registration of participants
09h00	**Opening speeches:**
	Opening statement by the Minister of Domestic Trade and Consumer Affairs, Yang Amat Berhormat Tan Sri Dato Hj. Muhyiddin b. Hj. Yassin
	Mr. Philippe Brusick, Head, Competition and Consumer Policies Branch UNCTAD
09h30-10h00	Coffee Break
Section I:	**COMPETITION IN PROMOTING TRADE, COMPETITIVENESS AND DEVELOPMENT**
10h00-10h30	The Interface between competition, trade and development *Presentation by Mr. P. Brusick*
10h30-11h00	Adverse effects of international cartels on developing countries: Limits of domestic competition legislation *Presentation by Mr. Julian Clarke*
11h00-11h30	Discussion
11h30-12h00	Vertical restraints, abuse of dominance and mega-mergers in sectors of particular interest to developing countries: *Presentation by Mr. F. Souty*
12h00-12h30	Competition policy and promotion of SMEs in developing countries *Presentation by Mr. N. Ridgeway*

12h30-13h00 Discussion

13h00-14h30 Lunch Break

Section II: **POSSIBLE MULTILATERAL FRAMEWORK ON COMPETITION**

14h30-15h00 Elements for the development dimension in a multilateral framework: the UN Set as a model: *Mr. P. Brusick*

15h00-15h30 Relevance of core principles to countries having no competition law and authority: *Prof. J. Mathis*

15h30-15h45 Coffee Break

15h45-16h15 WTO core trade principles and S&D
Presentation by Dr. Deunden Nikomborirak Ph.D

16h15-17h00 Discussion

Thursday 27 February

09h30-10h00 Elements for a development-friendly multilateral framework: S&D
Presentation by Prof. J. Mathis

10h00-10h30 Competition policy in sectoral agreements at WTO and Working Group on Interaction between Trade and WTO Competition Policy
Presentation by Mr. Pierre Arhel Ph.D

10h30-11h00 Coffee Break

Section III: **CONSIDERATION OF OPTIONS AND THEIR IMPLICATIONS FOR DEVELOPING COUNTRIES**

11h00-11h30 Alternative modalities for international cooperation on competition
Chair - Mr. P. Brusick

Panel

11h30-13h00 Pros and cons of a comprehensive multilateral agreement:
- Core trade principles
- Core competition principles
- DSM

13h00-14h30 Lunch Break

(Panel discussion cont'd)

14h30-15h00 Pros and cons of a minimalistic approach: A voluntary competition cooperation agreement
Presentation by Mr. Joseph Seon Hur

15h00-15h30 Coffee Break

15h30-16h00	Pros and cons of a sectoral approach without a comprehensive multilateral competition framework
Section IV:	**The way ahead**
16h00-17h00	Roundtable and conclusions

ANNEX 3

REPUBLIC OF KENYA **UNCTAD**

African Regional Conference on the Post-Doha WTO Competition Issues:
Nairobi Safari Club, Nairobi, Kenya, 8-9 April 2003

Provisional Agenda

Tuesday 8 April

08h30	Registration of participants
09h00	**Opening speeches:**
	Opening statement by the Minister of Finance, Hon. Daudi Mwiraria
	Mr. Philippe Brusick, Head, Competition and Consumer Policies Branch UNCTAD
09h30-10h00	Coffee Break
Session I:	**THE ROLE OF COMPETITION IN PROMOTING TRADE, COMPETITIVENESS AND DEVELOPMENT**
	Chair: Commissioner Peter Njoroge (Kenya)
10h00-10h30	The Interface between competition, trade and development *Presentation by Mr. Philippe Brusick, Head, Competition and Consumer Policies Branch, UNCTAD*
10h30-11h00	Adverse effects of international cartels on developing countries: Limitations of domestic competition legislation *Presentation by Prof. Frederick Jenny, Chairman, WTO Working Group*
11h00-11h30	Discussions
11h30-12h00	Exceptions and Exemptions in Competition Policy and Law *Presentation by Mr. Hassan Qaqaya, UNCTAD*

12h00-12h30	Competition policy, trade and development in Tunisia *Presentation by Mr. Khalifa Tounakti (Tunisia)*
12h30 – 13h00	Discussions
13h00-14h30	Lunch Break
Session II:	**AFRICAN PERSPECTIVE ON A POSSIBLE MULTILATERAL FRAMEWORK ON COMPETITION**
	Chair: Mr. Hassan Qaqaya (UNCTAD)
14h30-15h30	Lessons from Regional integration groupings COMESA – Mr. James Musonda UEMOA – Mr. Jean-Luc Senou
15h30-16h30	Developing countries' international cooperation needs in the area of competition [List of speakers to be announced]
16h30-16h45	Coffee Break
16h45-17h45	General debate

Wednesday 9 April

Session III:	**CONSIDERATION OF OPTIONS FOR DEVELOPING COUNTRIES REGARDING POSSIBLE NEGOTIATIONS OF A MCF AT WTO**
	Chair: Ambassador Amina Mohamed (Kenya)
09h00-09h20	A general developing countries' perspective on a possible MCF, *Presentation by Ambassador Charles K. Mutalemwa, Mission of the United Republic of Tanzania to the UN in Geneva.*
09h20-09h40	Elements for a development-friendly multilateral framework: S&D and relevance of the WTO core principles to developing countries and countries having no competition law or authority: *Presentation by Prof. James Mathis, University of Amsterdam*
09h40-10h00	Competition policy in existing sectoral agreements at WTO, *Mr. Philippe Brusick, Head, Competition and Consumer Policies Branch, UNCTAD*
10h00-10h30	Discussions
10h30-11h00	Coffee Break
11h00-11h30	A possible comprehensive multilateral framework on competition *Presentation by Prof. Frederick Jenny, Chairman, WTO Working Group*
11h30-12h00	Alternative modalities for international cooperation on competition and the development dimension in a multilateral framework. *Presentation by Ms. Deunden Nikomborirak, Thailand*
12h00 - 12h30	WTO core trade principles and recent developments at the WTO Working Group on the Interface between Trade and Competition: *Presentation by Mr. Pierre Arhel, Counsellor, WTO*

12h30 - 13h00 Discussions

13h00-14h30 Lunch Break

Session IV: **THE WAY AHEAD**

Chair: Mr. Philippe Brusick (UNCTAD)

14h30-16h30 **Panel Discussion: Possible outcomes for the Cancún Ministerial Conference**

(a) Postponing MCF negotiations to a later stage;
(b) Launching negotiations: taking a proactive approach;
(c) Status quo: continuing a sectoral approach without MCF;

Panellists

Ambassador Nathan Irumba (Uganda)
Ambassador Charles Mutalemwa (United Republic of Tanzania)
Ambassador Amina Mohamed (Kenya)
Prof. Frederic Jenny
Mr. James Musonda
Mr. Jean Luc Senou
Ms. Deunden Nikomborirak
Mr. Pierre Arhel
Prof. James Mathis
Mr. Hassan Qaqaya

16h30-17h00 Coffee Break

16h30-17h00 Closing Ceremony
Minister of Tourism, Trade and Industry, Hon. Mukhisa Kituyi

ANNEX 4

UNCTAD

Conselho Administrativo de Defesa Econômica

Latin American and Caribbean Regional Conference on the Post-Doha WTO Competition Issues: São Paulo, Brazil, 23-25 April, 2003

Agenda

Wednesday, April 23

08h30 - 09h00 — Registration of participants at EDESP (Av. 9 de Julho, nº 2.029, 4th floor)

09h00 - 09h30 — Opening speeches

João Grandino Rodas, President, Administrative Council for Economic Defense (CADE)
Ary Oswaldo Mattos Filho, Director, São Paulo School of Law of Getúlio Vargas Foundation (EDESP / FGV)
Ambassador ***Rubens Ricupero***, Secretary-General, United Nations Conference on Trade and Development (UNCTAD), by video presentation
Philippe Brusick, Head, Competition and Consumer Policies Branch (UNCTAD)

09h30 - 09h50 — *Coffee break*

Section I
Competition and promoting trade, competitiveness and development

Moderator: ***Gustavo Paredes***, Commission for Free Competition and Consumer Affairs (CICLAC), Panama

09h50 - 10h20 — **The Interface between competition, trade and development**
Kurt Stockmann, Vice President, Federal Cartel Office (Bundeskartellamt), Germany
Leyda Reyes, Programme of Modernization of Foreign Trade and Trade Negotiations, Dominican Republic

10h20 - 10h50 — **Adverse effects of international cartels on developing countries: limits of domestic competition legislation**
Paulo de Tarso Ramos Ribeiro, former Minister of Justice, Brazil
François Souty, Competition Council, France

10h50 - 11h20 — Open forum for discussions

11h20 - 11h50 **Vertical restraints, abuse of dominance and mega-mergers in sectors of relevance to developing countries**
Patrick Krauskopf, Swiss Competition Authority
Teresita Dutrenit, Trade General Directorate, Uruguay

11h50 - 12h20 **Competition policy and promotion of SMEs: General challenges of competition law for small developing countries**
Michelle Goddard, Chief Executive Officer, Fair Trading Commission Barbados
Guido Rodas, Vice Minister, Ministry of Economy, Guatemala

12h20 - 12h50 Open forum for discussions
12h50 - 14h50 *Lunch break*

Section II
Bilateral and plurilateral agreements on competition

Moderator: ***Calixto Salomão Filho***, São Paulo University (USP), Brazil

14h50 - 15h20 **Bilateral / Plurilateral Agreements**
Antonio Gonzalez Quirasco, Federal Competition Commission (CFC), Mexico
Russell Damtoft, Federal Trade Commission (FTC), United States

15h20 - 15h50 **Competition policies and trade liberalization in Caribbean countries: bilateral and plurilateral agreements**
Ivor Carryl, Caribbean Community (CARICOM) Secretariat
Barbara Lee, Fair Trading Commission (FTC), Jamaica

15h50 - 16h20 **Andean Community**
Graciela Ortiz, Andean Community
Gonzalo Ruiz, National Institute of Defense for Competition and Protection of Intellectual Property (INDECOPI), Peru

16h20 - 16h50 Open forum for discussions
16h50 - 17h10 *Coffee break*

17h10 - 17h40 **MERCOSUR**
Carlos Márcio Cozendey, Head, Division for Common Market Affairs (MERCOSUR), Ministry of Foreign Affairs, Brazil
Eduardo Montamat, Commissioner, National Competition Commission (CNDC) and National Coordinator for Mercosul Protocol, Argentina

17h40 - 18h10 **FTAA (chapter on competition)**
Ivanise de Melo Maciel, Deputy Chief, Comercial Defense and Safeguards Division, Ministry of Foreign Affairs, Brazil
Santiago Cembrano, Director, Economic Integration, Ministry of Trade, Industry and Tourism, Colombia

18h10 - 18h40 Open forum for discussions
20h30 *Dinner*

Thursday, 24 April

Section III
Continuing discussions on a possible multilateral framework on competition

Moderador: ***Eduardo Montamat***, Commissioner, National Competition Commission (CNDC) and National Coordinator for Mercosul Protocol, Argentina

09h00 - 09h30 **A Development-friendly multilateral framework and S&D: the UN Se t as a model**
Philippe Brusick, Head, Competition and Consumer Policy Branch, United Nations Conference on Trade and Development (UNCTAD)

09h30 - 10h00 **Relevance of WTO core trade principles and S&D for developing countries**
James Mathis, University of Amsterdam, Netherlands

10h00 - 10h30 Open forum for discussions
10h30 - 10h50 *Coffee break*

10h50 - 11h20 **Competition policy in WTO sectoral agreements**
Pierre Arhel, Counsellor for Competition Policy, Intellectual Property Division, World Trade Organization (WTO)

11h20 - 11h50 **Interaction between competition authorities and sectoral regulators**
Mario Bravo, Fiscalía Nacional Económica (FNE), Chile
Cleveland Prates Teixeira, Commissioner, Administrative Council for Economic Defense (CADE), Brazil

11h50 - 12h20 **Latest developments in the Working Group on the Interaction between Trade and Competition**
Antonio Gonzales Quirasco, Federal Competition Commission (CFC), Mexico
François Souty, Competition Council, France

12h20 - 12h50 Open forum for discussions
12h50 - 14h30 *Lunch break*

Section IV

Reflections on the options and implications of a possible multilateral framework on Competition

Moderator: ***Philippe Brusick***, Head, Competition and Consumer Policy Branch, United Nations Conference on Trade and Development (UNCTAD)

14h30 - 14h50 **Flexibility and progressivity in competition rules for developing countries: lessons from MERCOSUR countries**
José Tavares de Araujo Junior, Secretary for Economic Monitoring (SEAE), Brazil

14h50 - 16h20 **Pros and cons of a possible comprehensive multilateral agreement on competition**

Round table discussion chaired by Ambassador ***Eduardo Pérez Motta***, Permanent Mission of Mexico to the World Trade Organization (WTO)

Panellists:
Ambassador ***Romel Adames***, Permanent Mission of the Republic of Panama to the World Trade Organization (WTO)
Core trade principles
James Mathis, University of Amsterdam, Netherlands
Core competition principles
Daniel Krepel Goldberg, Secretary of Economic Law (SDE), Ministry of Justice, Brazil
Dispute Settlement Mechanism
Russell Damtoft, Federal Trade Commission (FTC), United States
Peer reviews
Andrea Bruce, Department of Foreign Affairs and International Trade, Canada
Special and Differential Treatment
Verónica Silva, Economic Commission for Latin America and the Caribbean (ECLAC), Chile

Concluding remarks

16h20 - 16h50 Open forum for discussions
16h50 - 17h10 *Coffee break*

17h10 - 18h40 **Pros and cons of a sectoral approach without a comprehensive multilateral competition framework**

Round table discussion chaired by ***Philippe Brusick***, Head, Competition and Consumer Policy Branch, United Nations Conference on Trade and Development (UNCTAD)

Panelists:
Gesner de Oliveira, former President, Administrative Council for Economic Defense (CADE), Brazil
Philip Marsden, Legal expert on trade and competition, United Kingdom
J***ames Mathis***, University of Amsterdam, Netherlands
María Inés Rodrígues, Foreign Affairs and Foreign Trade Ministry, Argentina
Homero Larrea, General Directorate of World Trade, Ministry of Foreign Affairs, Ecuador

Friday, 25 April

Section V
"Possible way ahead"
Moderator: ***Roberto Augusto Castellanos Pfeiffer,*** Commissioner, Administrative Council for Economic Defense (CADE), Brazil

09h00 - 10h30 **Technical cooperation and capacity building**
Ana María Alvarez, Coordinator of activities for the Latin American and Caribbean region. Competition and Consumer Policy Branch, United Nations Conference on Trade and Development (UNCTAD)
The Central American experiences on competition matters

Claudia Schatan, Economic Commission for Latin America and the Caribbean (ECLAC), Mexico

Experiences of the Canada-Costa Rica agreement (chapter on competition)

Hazel Orozco, Commission to Promote Competition (COPROCOM), Costa Rica

Recent experiences in Peer Review: the case of Chile

Carmem Gloria Vega, Fiscalía Nacional Económica (FNA), Chile

Competition advocacy

Diego Petrecolla, Enterprise University of Argentina (UADE)

Developing a competition culture

Ignacio de León, Catholic University Andrés Bello, Venezuela

The development of competition in Cuba and impact on enterprise efficiency

Ivonne Rodríguez, Ministry of Economy, Cuba

A possible multilateral framework for competition: the perspective of the Latin American consumers

Claudio Lara, Consumers International, Latin American and Caribbean Office

10h30 - 11h00	*Coffee break*
11h00 - 13h00	Roundtable and conclusions
13h00	*Lunch*

Annex 5

United Nations Conference on Trade and Development (UNCTAD)

State Committee of the Republic of Uzbekistan on Demonopolization and Competition Development

Regional Conference on the Post Doha WTO Competition Issues for Countries in Transition
Tashkent, 5-6 June, 2003

Day 1, Thursday (June 5, 2003)

09:00 ~ 09:30: Registration

09:30 ~ 10:00: OPENING SESSION

Moderator – Mr. A. Bakhramov

09:30 ~ 09:45: *Welcoming address*
Dr. Rustam Azimov, Deputy Prime Minister of the Republic of Uzbekistan,

Minister of Economy of the Republic of Uzbekistan

09:45 ~ 10:00: *Opening remarks*
Mr. Philippe Brusick, Head, Competition and Consumer Policies Branch, UNCTAD

10:00 ~ 10:15: Coffee Break

10:15 ~ 15:15: I. COMPETITION LAW, LEGISLATION ON NATURAL MONOPOLIES AND ENFOR CEMENT EXPERIENCES

10:15 ~ 12:20: General trends in the development and application of competition policies in countries in transition

In this session participants will share their experience and methods on competition policy implementation and achieved results.

Moderator – Mr. A. Golomolzin

10:15 ~ 10:40: Implementation of competition policy and consumer protection and perspectives of their development
Mr. A'zamkhon Bakhramov, Chairman, State Committee of the Republic of Uzbekistan on Demonopolization and Competition Development, Republic of Uzbekistan

10:40 ~ 11:05: Antimonopoly legislation in the Republic of Kazakhstan and enforcement experience
Ms. Saule Abdurkhmanova, Head of Department, Agency of the Republic of Kazakhstan on Regulation of Natural Monopolies and Competition Protection, Republic of Kazakhstan

11:05 ~ 11:30: Issues of legislative framework of antimonopoly regulation in Kyrgyzstan
Mr. Emil'bek Uzakbaev, Chairman, State Commission on Antimonopoly Policy, Kyrgyz Republic

11:30 ~ 11:55: Competition law, legislation on natural monopolies and enforcement experience in the Republic of Belarus
Mr. Alexander Kurilchik, Deputy Director, Department on Antimonopoly and Price policy, Republic of Belarus

11:55 ~ 12:20: Competition law, legislation on natural monopolies and enforcement experience in the Republic of Latvia
Ms. Renate Benediktova, Director of Bureau, Competition Council, Republic of Latvia

12:30 ~ 14:00: Lunch

14:00 ~ 15:15: ***Competition policy and regulation of natural monopolies***

In this session participants will share their experience and methods on competition policy implementation and achieved results.

Moderator – Mr. A. Kostusev

14:00 ~ 14:25: Privatization of Natural Monopoly and Competition Issues: Korea's Experience
Mr. Hak-Kuk Joh, Vice Chairman, Korea Fair Trade Commission, Republic of Korea

14:25 ~ 14:50: Competition law, legislation on natural monopolies and enforcement experience in the Republic of Tajikistan
Mr. Rakhmonali Amirov, Director, State Agency for antimonopoly policy and support of entrepreneurship under the Government of Republic of Tajikistan

14:50 ~ 15:15: Presentation of a representative from Poland
Mr. Adam Zolnowski, Director of Market Analysis Department, Office for Competition and Consumer Protection, Poland

15:15 ~ 15:35: Coffee break

15:35 ~ 16:25: **II. ROLE OF COMPETITION IN PROMOTING TRADE, COMPETITIVENESS AND DEVELOPMENT**

Participants will present and discuss the relation between competition policy and economic progress based on the theory and experience of their countries

Moderator – Mr. E. Dosaev

15:35 ~ 16:00: Role of competition in promoting trade and development
Mr. Mehmet Akif Ersin, Head of Technical Departments, Turkish Competition Authority, Turkey

16:00 ~ 16:25: Development, globalization, competition: the "A,B,C" of the future economy
Mr. Arpad Dobai, Assistant Director, Competition Council of Romania, Romania

17:00 ~ 20:00: Cultural events

20:00 ~ : ***Official reception dinner of the State Committee of the Republic of Uzbekistan on Demonopolization and Competition Development***

DAY 2, Friday (June 6, 2003)

09:30 ~ 09:40: Opening address
Mr. A'zamkhon Bakhramov, Chairman, The State Committee of the Republic of Uzbekistan on Demonopolization and Competition Development

09:40 ~ 12:25: **III. INTERNATIONAL COOPERATION AND POSSIBLE MULTILATERAL FRAMEWORK ON COMPETITION**

Participants will try to identify directions of strengthening, perspectives, and development of multilateral framework on competition.

Moderator – Mr. ? . Ersin

09:40 ~ 10:05: Elements for the development dimension in a multilateral framework: the UN Set as a model
Mr. Philippe Brusick, Head, Competition and Consumer Policies Branch, UNCTAD

10:05 ~ 10:30: WTO core trade principles, recent developments at the WTO Working Group on the Interface between Trade and Competition and a possible comprehensive multilateral framework on competition
Mr. Pierre Arhel, Counsellor, Division on Intellectual Property, World Trade Organization

10:30~ 10:50 : *Discussion of presentations*

10:50 ~ 11:10: Coffee break

11:10 ~ 12:25: *Participants will try to identify directions of strengthening, perspectives, and development of multilateral framework on competition.*

Moderator - Mr. J. Nemenyi

11:10 ~ 11:35: Pros and cons of a sectoral approach without a MCF
Mr. Philip Marsden, Independent Counsel, Director, Competition Law Forum, British Institute of International and Comparative Law, United Kingdom

11:35 ~ 12:00: *Presentation of a representative of Turkish International Cooperation Agency (TICA)*

12:00 ~ 12:25: International cooperation of antimonopoly agencies of CIS countries in the framework of multilevel integration
Mr. Anatoliy Golomolzin, Deputy Minister, Ministry of Antimonopoly Policy and Support of Entrepreneurship, Russian Federation

12:25 ~ 13:50: Lunch

13:50 ~ 15:30: **IV. COUNTRIES IN TRANSITION: PROSPECTS, OPTIONS AND IMPLICATIONS OF DEVELOPMENTS IN INTERNATIONAL COOPERATION**

Participants will try to identify directions of strengthening, perspectives, and development of multilateral framework on competition.

13:50 ~ 14:15: Countries in Transition: prospects, options and implications of developments in international cooperation
Mr. Balazs Csepai, Counsellor, Office of Economic Competition, Hungary

14:15 ~ 14:40: Countries in transition: perspectives, options and implications of developments in international cooperation
Mr. Aleksiy Kostusev, Chairman, Antimonopoly Committee, Ukraine

14:40 ~ 15:05: Elements for a development-friendly multilateral framework: S&D

Prof. James Mathis, Academic Coordinator, Amsterdam Law School, Netherlands

15:05 ~ 15:30: Pros and cons of postponing negotiations on MCF

- *Mr. Philippe Brusick, Head, Competition and Consumer Policies Branch, UNCTAD*
- *Prof. James Mathis, Academic Coordinator, Amsterdam Law School, Netherlands*
- *Mr. Pierre Arhel, Counsellor, Division on Intellectual Property, World Trade Organization*

15:30 ~ 15:50: Coffee Break

15:50 ~ 16:50: **CONCLUDING SESSION**

The way ahead

Round table discussions and conclusions on possible outcomes of the Cancun Multilateral Conference

Mr. Philippe Brusick, Head, Competition and Consumer Policies Branch, UNCTAD

Mr. A'zamkhon Bakhramov, Chairman, State Committee of the Republic of Uzbekistan on Demonopolization and Competition Development, Republic of Uzbekistan

Mr. Anatoliy Golomolzin, Deputy Minister, Ministry of Antimonopoly Policy and Support of Entrepreneurship, Russian Federation

Mr. Hak-Kuk Joh, Vice Chairman, Fair Trade Commission, Republic of Korea

16:50 ~ 17:20 Press Conference
17:20 ~ 19:00 Cultural events
19:00 ~ Dinner