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ALL ASPECTS OF THE SET OF MULTILATERALLY  
AGREED EQUITABLE PRINCIPLES AND RULES FOR  
THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES  
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TRADE AND DEVELOPMENT BOARD  
Commission on Investment, Technology and  
Related Financial Issues  
Intergovernmental Group of Experts on Competition Law and Policy

**ROLES OF POSSIBLE DISPUTE MEDIATION MECHANISMS AND ALTERNATIVE  
ARRANGEMENTS, INCLUDING VOLUNTARY PEER REVIEWS, IN COMPETITION  
LAW AND POLICY\***

Revised study by the UNCTAD secretariat

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\* This document is being issued on the above date for technical reasons.

### Executive summary

The present study examines methods of preventing or resolving disputes **other than binding dispute settlement**, including the possible roles, in the context of international cooperation on competition policy, of voluntary peer review; consultations on issues, cases, or relating to the implementation of agreements; and diplomatic methods of dispute settlement such as conciliation, mediation and good offices. It finds that (i) peer review is not merely a compliance mechanism but may also be aimed at policy advice, encouraging policy coordination and cooperation, gathering and dissemination of information and best practice models, and providing technical assistance and aid; (ii) there **are** a variety of types of consultation provisions, but they are currently little used in the multilateral context to tackle specific issues; and (iii) good offices, mediation **and** conciliation are currently not used in this area.

The **Review Conference may therefore wish to request that future sessions of the Intergovernmental Group of Experts** (a) undertake, **in the light of experiences with peer review during the Conference and in other international organizations, further voluntary peer reviews according to an agreed format**; (b) examine the reasons why some types of consultations have not been fully used within existing multilateral frameworks, using as a basis **the review undertaken in this report**; and (c) discuss why diplomatic methods of dispute settlement have not been used for competition policy disputes, and how they could be appropriately adapted for this purpose. Possible implications for **international** cooperation on competition policy and for development objectives could be identified in this connection.

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## INTRODUCTION

1. The Intergovernmental Group of Experts on Competition Law and Policy (**IGE on CLP**), at its fourth session (3 to 5 July 2002), requested the UNCTAD secretariat to prepare for the Group's fifth session "studies on the implications of closer multilateral cooperation in competition policy for developing and least developed countries' development objectives, in particular...a study of the roles of possible dispute mediation mechanisms and alternative arrangements, including voluntary peer reviews, in competition law and policy".<sup>1</sup> Accordingly, a first report entitled "Roles of possible dispute mediation mechanisms and alternative arrangements, including voluntary peer reviews, in competition law and policy" (TD/B/COM.2/CLP/37) was presented at the Group's fifth session, held from 2 to 4 July 2003.<sup>2</sup> At the request of that session, a revised version of the report was submitted to the sixth session of the **IGE**, which requested its further revision/**updating**. This latest version of the report is prepared for the Fifth Review Conference at the request of the sixth session of the **IGE**, which, in its Agreed Conclusions, requested the secretariat to revise/update document TD/B/COM.2/CLP/21/Rev.2 **in the light of comments made by member States at the sixth session or to be sent in writing by 31 January 2005, for submission to the Fifth Review Conference.**<sup>3</sup> Additions to the text from the previous version appear in bold type. This report is expected to **facilitate the voluntary peer reviews to be held during the Conference of Jamaica's and Kenya's competition laws and policies. The present revised report should be read in conjunction with three other reports that have been prepared for the Conference, also at the request of the sixth session of the IGE: a revised version of "Experiences gained so far on international cooperation on competition policy issues and the mechanisms used" (TD/B/COM.2/CLP/21/Rev.3); a revised version of "Ways in which possible international agreements on competition might apply to developing countries, including through preferential or differential treatment, with a view to enabling these countries to introduce and enforce competition law and policy consistent with their level of economic development" (TD/B/COM.2/CLP/46/Rev.1); and "A presentation of types of common provisions to be found in international, particularly bilateral and regional, cooperation agreements on competition policy and their application".**

2. The present study therefore examines the possible roles, in the context of international cooperation on competition policy, of (a) voluntary peer review; (b) consultations on issues, cases, or relating to the implementation of agreements; and (c) conciliation, mediation and good offices.<sup>4</sup> Those

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<sup>1</sup> See UNCTAD, "Report of the Intergovernmental Group of Experts on Competition Law and Policy on its fourth session" (TD/B/COM.2/42, TD/B/COM.2/CLP/32), Agreed Conclusions, para. 4.

<sup>2</sup> See UNCTAD, "Report of the Intergovernmental Group of Experts on Competition Law and Policy on its fifth session" (TD/B/COM.2/52, TD/B/COM.2/CLP/39), Agreed Conclusions, para. 3.

<sup>3</sup> See para. 2 of its agreed conclusions in UNCTAD, "Report of the Intergovernmental Group of Experts on Competition Law and Policy on its sixth session" (TD/B/COM.2/48). Written comments on the report were received from the Governments of Indonesia and Japan, as well as from the OECD secretariat.

<sup>4</sup> Such mechanisms are often collectively referred to as methods of diplomatic dispute settlement, as opposed to obligatory dispute settlement. The terms "mediation" or "conciliation" refer to methods used by parties to a dispute to reach an amicable settlement with the assistance of a third person or institution. Both terms are used interchangeably, although conciliation normally takes place in a formal institutional context, which is not necessarily the case with mediation. Any recommendation made by the third party may be based not only upon the law, but also upon equity or other considerations. The distinction between these two methods and "good offices" (third party efforts to bring disputing parties to negotiate, without the third party itself participating in the negotiations or making proposals) is relatively more clear-cut, even though there is still sometimes some confusion in the use of these terms. The initiation of these procedures may either be a result of pre-existing treaty commitments made by the parties, or be accepted by them at the time a dispute occurs, but their

subjects are dealt with in that order here because peer review is the most general in character and the furthest away from obligatory dispute settlement, consultations would be more focused and might highlight matters of dispute, and conciliation, mediation and good offices are diplomatic methods for settling specific disputes. Chapters 1, 2 and 3 respectively deal with each of these mechanisms, review relevant provisions and experiences in the context of selected bilateral, plurilateral and multilateral instruments, highlight possible implications and make recommendations relevant to multilateral cooperation on competition policy and to development objectives.

3. The study does not deal with the following: consultations directly aimed at resolving specific disputes; the use of diplomatic methods of settling disputes in the context of regional agreements; diplomatic dispute settlement through negotiations or inquiry (involving fact-finding by a commission of inquiry);<sup>5</sup> or obligatory dispute settlement procedures such as arbitration or adjudication.

## I. VOLUNTARY PEER REVIEW

### A. Regional peer review procedures relevant to competition policy

4. Peer review has been introduced at the regional level in broad areas which could include competition policy. The African Union, in connection with the New Partnership for Africa's Development (NEPAD), has established an African Peer Review Mechanism (APRM) entailing periodic reviews of the policies and practices of participating States to ascertain progress being made towards achieving mutually agreed goals and compliance with political, economic and corporate governance values, codes and standards which have been agreed upon.<sup>6</sup> The peer review process aims at spurring countries to consider seriously the impact of domestic policies not only internally but also on neighbouring countries, and to promote mutual accountability, as well as compliance with best practice. A timetable for **making** progress towards achieving the agreed standards and goals must be drawn up by the State in question, taking into account its particular circumstances. This mechanism has not been used so far. However, **it** is striking that this review mechanism was not imposed on African countries as **a** conditionality but **was** voluntarily introduced by NEPAD members themselves. Asia-Pacific Economic Cooperation (APEC) has also set up a system of peer reviews in connection with Individual Action Plans (IAPs) for the achievement of APEC's trade and investment liberalization and facilitation goals, including in the area of competition policy; such reviews aim at assessing the completeness, comprehensiveness and clarity of the IAPs, and their efficacy with respect to APEC's Osaka Action Agenda. It has been suggested that the strengths of APEC's peer reviews are **that** they are entirely voluntary, involve the business sector, record liberalization and reforms since

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acceptance of the outcome (including any recommendation made by the mediator or conciliator) is always on a wholly voluntary basis.

<sup>5</sup> However, negotiations may be to some extent similar to consultations, which are dealt with in this study. Inquiry may not be appropriate in the competition policy field since it would involve "second-guessing" of fact-finding undertaken by national competition authorities. But inquiry as a distinct method of dispute settlement should be distinguished from the process of inquiry which a body conducting adjudication, arbitration or conciliation necessarily has to perform in order to resolve disputed issues; **for** example, Article 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU), attached as annex 2 to the Agreement Establishing the World Trade Organization, Marrakesh, 1994 (the Marrakesh Agreement), provides that WTO panels may seek information and draw negative inferences from non-cooperation.

<sup>6</sup> See African Union, 38<sup>th</sup> Ordinary Session of the Assembly of Heads of State and Government of the OAU, African Peer Review Mechanism, 8 July 2002, Durban, South Africa.

the 1980s and prevent backsliding, while their weaknesses are **that** they could be more comprehensive, transparent and user-friendly.<sup>7</sup>

## B. OECD peer review procedures relevant to competition policy

5. **Under the regulatory reform programme of the Organisation for Economic Co-operation and Development (OECD), a number of Country Reviews are carried out, in which the countries reviewed participate on a voluntary basis. These reviews are performed on the basis of detailed OECD country reports, which benefit from the reviewed countries' input. They fill out an OECD questionnaire and further fact-check the draft report before the peer review takes place.** One of the core background reports for such country reviews **considers** the role of competition policy in regulatory reform, including (a) the national competition policy's historical foundations; (b) substantive issues, including the content of the competition law; (c) institutional issues such as enforcement structures and practice; (d) limits of competition policy, including exemptions and special regulatory regimes; (e) competition advocacy for regulatory reform; and (f) conclusions and policy options. This report is presented to the Competition Committee for review; representatives of the competition authority concerned are then "examined" in a Committee session by two country examiners, after which questions are posed by other member countries. **If appropriate, the report is revised in the light of the peer review and then published under the responsibility of the Secretary-General of the OECD.** The policy recommendations flowing from such reviews, while not mandatory, are often followed by the countries reviewed, **and the Competition Committee has recently reviewed the follow-up developments related to the recommendations in the original full reports.** It has been suggested that their strengths include the use of policy options and recommendations, strong participation in meetings and the specialist knowledge of the Competition Committee.<sup>8</sup>

6. A similar (albeit less intensive) exercise involving Economic Surveys of member countries has been launched more recently in the context of reviews by the OECD Economic and Development Review Committee (EDRC), which examine macroeconomic and structural issues (with a special chapter on competition policy); participation is compulsory. This exercise is well regarded by OECD member countries for the depth and rigour of analysis and regular review of past recommendations; however, it has been found difficult to ensure that all EDRC members have appropriate expertise and sufficient time to prepare for reviews, and there have been problems **involving insufficient** interest or participation in the reviews, particularly by small countries.<sup>9</sup> However, the more focused and in-depth Competition Committee reviews will continue in parallel with the EDRC reviews.

7. A similar procedure for non-OECD member countries has been introduced, on a voluntary basis. A review of South African competition policy took place at the Third Global Competition Forum (10–11 February 2003) on the basis of a survey by the OECD secretariat, which generally expressed a favourable opinion about the manner in which South African competition policy was being implemented.<sup>10</sup> South Africa's Trade and Industry Minister has expressed satisfaction at the survey's findings; its recommendations for improvements have mostly been accepted and are in the process of being adopted.<sup>11</sup> In an account given during the 2003 OECD Joint Global Forum on Trade and

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<sup>7</sup> See OECD, Joint Group on Trade and Competition, "Practical modalities of peer review in a multilateral framework on competition", \* CCNM/GF/COMP/TR(2003)10.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> See OECD, *Competition Law and Policy in South Africa*.

<sup>11</sup> See the South African Competition Commission's website [www.compcom.co.za/resources/Media](http://www.compcom.co.za/resources/Media). These recommendations relate *inter alia* to the completion of agreements with other regulatory bodies to ensure

Competition Policy of South Africa's experiences with this review, it was stated that the review had provided the benefits of constructive and well-intentioned observations of the reviewers and other participants; **that** peer review could be a valid instrument for encouraging dialogue about and adopting better practices; **that** to maximize the benefits of such a review, participation should be voluntary; and **that** an agency that decided not to participate in such a review would be sending a clear signal to the competition community at home and abroad.<sup>12</sup> During ensuing discussions within the Forum, it was stated that peer review was not seen as impinging on national sovereignty; **that** it could contribute to capacity-building and the strengthening of competition institutions; **and that** its transparency was a desirable trait, as was the role that the private sector and civil society could play. A peer review of the Russian Federation's competition law and policy took place at the Fourth Global Competition Forum (12–13 February 2004). Turkey's peer review was held in February 2005. More such reviews are planned for the future. Reviews of the competition policies of Chile, Peru and Brazil respectively have been undertaken at successive meetings of the Latin American Competition Forum organized by the OECD and the Inter-American Development Bank since 2003.

### C. WTO Trade Policy Review Mechanism

8. The objectives of the WTO Trade Policy Review Mechanism (TPRM) include contributing to improved adherence to multilateral trade rules, and hence the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, Members' trade policies and practices; however, it is not intended to serve as a basis for enforcement of specific obligations under the WTO Agreements.<sup>13</sup> All WTO Members are subject to review, with the four Members with the largest share of world trade being reviewed every two years, the next 16 every four years, and the others every six years. A longer period may be fixed for least developed country (LDC) Members. First reviews are mostly done by volunteering countries, while second reviews follow the fixed cycle. Reviews are conducted by the Trade Policy Review Body (TPRB) on the basis of a policy statement by the Member under review and of a report prepared by the WTO secretariat from data gleaned from country missions, responses to questionnaires, publications and reactions by the Member concerned to the draft report; two discussants take a leading role in the review by the TPRB. Although the relevant documents and proceedings are published, there are no formal recommendations relating to actions to be taken by the Member concerned. Although competition issues are not formally part of the TPRM mandate, the WTO secretariat and reviewed countries have chosen to report on them in some cases, while other countries have asked questions on such issues; this has taken place on an optional basis and with varying degrees of intensity. A comment by a United States delegate regarding questions on **that country's** antitrust regime in the 2001 TPRM examination of the United States was that "it had been a useful learning experience for his agency since it highlighted differences in approaches and perspectives with other jurisdictions".<sup>14</sup>

9. It has been suggested that the TPRM's strengths include promotion of technical assistance and capacity building, particularly for LDCs, and the production of structured, detailed and analytical reports, while its weaknesses include insufficient WTO secretariat resources, limited participation in meetings, lack of recommendations or prescriptive elements and a "resistance factor" in relation to the

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consistent application of competition policy in regulated sectors; more attention to non-merger matters and competition advocacy; and enhanced resources and training.

<sup>12</sup> See OECD, *Trade and Competition – From Doha to Cancún*, Paris, 2003.

<sup>13</sup> See annex 3 of the Marrakesh Agreement.

<sup>14</sup> See WTO Working Group on the Interaction between Trade and Competition Policy, Report on the meeting of 5 to 6 July 2001, WT/WGTCP/M/15, para. 80.

review processes.<sup>15</sup> It has also been suggested that one advantage of the TPRM is the encouragement of a self-evaluation process, but that the reviews are not conducted frequently enough to be fully effective. Among several recommendations for its improvement, it has been suggested that the TPRM process could better assist individual developing countries (particularly LDCs) in adhering to the rules, evaluate the impact of implementing such rules (including by verifying whether anticipated positive effects have occurred), analyse tariff and non-tariff barriers faced by the countries concerned in their most important export markets, and assess needs for technical assistance more intensively.<sup>16</sup>

#### D. Implications and recommendations

10. In the light of an examination of some peer review processes currently used (including the above-mentioned APEC, OECD and WTO peer review processes), an OECD report concludes that: (a) all forms of peer review share the four characteristics of involvement of a committee of experts, proposals, a collegial form of monitoring compliance and interactive investigation; (b) differences can exist, for example, in relation to review frequency, cost and comprehensiveness, levels of economic development and substantive policy between reviewed countries, and the peer selection process; and (c) the review objectives can include policy advice, encouraging policy coordination and cooperation, gathering and dissemination of information and best practice models, providing technical assistance and aid, and compliance monitoring of possible breaches of international agreements and obligations.<sup>17</sup> This report suggests that any competition policy review mechanism would have to resolve certain key issues, including in relation to frequency of reviews; equal treatment or focus on particular members; the review criteria (e.g. consistency of competition laws with the reviewed country's stated policy objectives, exclusions, cooperation arrangements, restrictive business practices (RBPs) reducing both consumer welfare and market access, technical assistance needs); respective roles of the secretariat and members; review of previous recommendations; composition of the review group; voluntary or compulsory nature of participation; duties of members under review in terms of cooperation; costs and resource implications; and other issues such as the approval process for reports, publicity, increase in the level of peer pressure, or relationship with the TPRM.

11. A communication by Canada to the **former** WTO Working Group suggested that peer review would provide a non-adversarial forum to query and better understand other countries' policies and practices with the goal of sharing best practices and improving domestic policies or institutions, as well as a substitute for dispute settlement.<sup>18</sup> It noted that questions remained as to the appropriate scope or coverage of a peer review mechanism; whether it should explore trends in the application of enforcement of a country's law, or be limited to ensuring conformity by the country with its obligations under a framework agreement; be voluntary or mandatory, and involve follow-up on recommendations made by the peer group. It suggested that, with no binding obligations, peer review would clearly ensure that individual enforcement decisions were not reviewed or challenged, yet might allow WTO Members to explore the systematic application of competition law and policy over time. A synthesis of work undertaken by the OECD Joint Group on Trade and Competition suggested that the following criteria or subject matter could be relevant for such reviews in the trade and competition context: substantive issues – the content of the competition law; institutional issues –

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<sup>15</sup> See CCNM/GF/COMP/TR(2003)10.

<sup>16</sup> See A. Boormann & G. Koopmann, "Adapting the WTO Trade Policy Reviews to the Needs of Developing Countries – Starting Points and Options", Hamburg Institute of International Economics, 2002, study on behalf of the German Federal Ministry for Economic Cooperation and Development.

<sup>17</sup> See CCNM/GF/COMP/TR(2003)10.

<sup>18</sup> See WTO Working Group on the Interaction between Trade and Competition Policy, Communication from Canada, WT/WCTCP/W/226.

enforcement structures and practices; exclusions from competition law (which would increase their transparency, facilitate discussion of their impact on international trade and encourage appropriate narrowing in their focus and reduction in their incidence); cooperation arrangements; anti-competitive business practices; advocacy for pro-competitive reform; and consistency and coherence of competition measures with a **WTO** Member's stated policy objectives.<sup>19</sup>

12. During the discussions of, and in written submissions to, the Working Group, a number of favourable views and specific suggestions relating to a voluntary peer review system were highlighted by different parties.<sup>20</sup> Regarding its *objectives or advantages*, it was suggested *inter alia* that **such a system** could build up capacity and contribute to strengthened international cooperation, transparency and convergence in this area, with corresponding benefits to the international trading system; provide a forum for countries with concerns about the reviewed country's laws to raise those concerns and encourage constructive problem-solving; identify good practices which could be disseminated and aspects where further improvement would be welcome, including any need for legislative amendments and updating; and link up with technical assistance and capacity building to facilitate engagement of developing countries. Regarding **the system's coverage**, it was suggested that, **for a developed country, the system** include the question of how well it cooperated with competition authorities in other countries, particularly developing ones, and its provision of competition-related technical assistance and capacity building to those countries. For a developing country, **the system might include** how well a culture of competition was being established and whether knowledge of the competition law and regime was being successfully disseminated in the public and private sectors; **it should** also focus upon adherence to core principles and prohibition of hardcore cartels and avoid looking at decisions in individual competition cases **and** questions relating to the strategy or prioritization of a competition authority. Regarding **the system's approach to developing countries and/or countries with less experience** in this area, it was suggested that **the system** recognize the needs of developing countries and differentiate among countries on the basis of their levels of development or their experience of competition law and policy, **as well as** provide a grace period to countries **lacking** well-developed institutions. Regarding **the system's design**, it was suggested that it implement a review of countries and issues in accordance with needs and requests, such as where a country sought advice on its domestic competition law and policy, or intended to trigger international cooperation; apply a voluntary selection process in the early days of a possible multilateral framework on competition policy but progressively attain comprehensive participation; hold group peer reviews so as to ensure effective participation and take into account budget and political constraints; provide for the inclusion of developing countries in the review panel when a developing country was reviewed; provide for the preparation by an independent assessor of an initial draft review or for a report by the country examined and an initial report by the secretariat mainly based on that country's report, followed by a final secretariat report taking into account opinions and recommendations expressed during the examination; increase the level of peer pressure by publicizing reports and information; provide for periodical review of implementation of recommendations (a follow-up review two or three years later was suggested); and draw upon relevant work from other forums. **However**, concerns were expressed that economically weak countries would be forced to comply with a multilateral framework through peer and other pressure, while there would not be any mechanism in place to make the more powerful players comply; **that** pressure would be put upon the limited

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<sup>19</sup> See OECD, Trade and Competition, *op. cit.*

<sup>20</sup> See WT/WGTCP/M/22, statements by Australia, Brazil, Canada, the European Community and its member States, Japan, the Republic of Korea, Switzerland, Taiwan Province of China and the United States in paras. 62, 72, 74-83, 80-82, 91-93 and 95-96; and Communications by the European Community and its Member States, the United States, the Republic of Korea, Japan and the OECD in WT/WGTCP/W/229, 233, 235, 236 and 243/244 respectively.



resources of countries, **along with** pressure upon developing countries to align their policies with those of developed countries; **that** countries risked being criticized and having their competition regimes disapproved, with consequent multilateral or bilateral pressures to abolish exemptions which they were legally entitled to maintain; **and that** there would be a focus upon national approaches even though problems in this area were of an international dimension.<sup>21</sup> In regional seminars organized by the UNCTAD secretariat in the context of the post-Doha process, in response to suggestions that a system could be introduced whereby countries could volunteer under an OECD-type peer review, or be reviewed through periodic competition policy review mechanisms similar to the TPRM, some participants had also expressed similar concerns or doubts about the periods between country reviews being too long; the process being too costly; pressure being exerted on developing countries, with scepticism expressed as to the extent to which the authorities of developed **countries** and developing countries or LDCs could be considered peers; and how useful such a voluntary mechanism would be.<sup>22</sup>

**13. In the context of the consultations held during the sixth session of the IGE, there was an interactive discussion aimed at obtaining a better understanding of the strengths and weaknesses of peer review related to competition policy through comparisons of the operation of reviews taking place in various forums. Salient subjects covered during the discussions included, *inter alia*, its potential for promoting best practices and convergence in this area and raising the profile of competition authorities; the advantages of its being voluntary in nature; the scope of a review, including in respect of regulated sectors, and whether reviews should cover countries without competition laws, or with competition laws but no experience of implementation; criteria applied and to what extent account would be taken of development conditions and policies, capacity constraints or weakness of competition culture; governmental institutions involved within countries reviewed; financial and human resource burdens; review procedures used and experiences of countries reviewed within the OECD and under the TPRM; flexibility of review procedures in line with objectives and resources; workability of peer review within a large group; appropriateness of review in a South-South or regional context; linkages, donor conditionality or long-term follow-up in connection with technical assistance/capacity-building action plans; and the appropriateness of having peer review within UNCTAD.<sup>23</sup>**

14. Taking into account all the points raised above from different quarters, experiences with competition policy peer reviews conducted within **other international** organizations, **and UNCTAD's initial experiences with peer review during the Fifth Review Conference, the Conference may wish to request the IGE to undertake further voluntary peer reviews according to an agreed format.** For the purposes of **working out such a format**, a key set of related questions that might be discussed could be the following: the scope of the review **in the light of its objectives and available financial and human resources**; the extent to which the effects of the reviewed country's competition policy on other countries, the effects of other countries' competition policies on the reviewed country, and experiences with international cooperation in this connection would be looked at; the criteria on the basis of which the review would be undertaken, who would determine such criteria and how, **what account would be taken of development conditions and policies, capacity constraints or weakness of competition culture**, and how consistent such criteria would be over time and over reviews of different countries; whether there would be monitoring and follow-up

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<sup>21</sup> See WT/WGTCP/M/22, statements by Egypt, India, Hong Kong (China) and Nigeria, in paras. 84, 88–89, 94 and 100.

<sup>22</sup> See UNCTAD, Closer Multilateral Cooperation on Competition policy – Consolidated Report of the Four Regional Seminars on the Post-Doha Mandate held between 21 March and 26 April 2002.

<sup>23</sup> See TD/B/COM.2/48, para. 16, which sets out the Chairman's Summary of the consultations held on this subject.

in respect of any recommendations; whether there would also be any monitoring of the economic impact of following such recommendations; linkages that would be made with technical assistance; frequency of reviews of the same country; how costs of reviewed countries in particular would be met; ; what would be the membership of the review panel; and **how** peer review **within UNCTAD** might link up with existing work of **other** forums, what would be the division of labour and how consistency and coordination would be maintained.

## II. CONSULTATIONS NOT NECESSARILY LINKED TO DISPUTE SETTLEMENT

### A. Bilateral and regional mechanisms

15. Some bilateral cooperation agreements covering the competition policy area make no explicit provision for consultations; but even without such provisions, of course, consultations may still take place in the course of implementing other provisions in such cooperation agreements. Other agreements provide for consultations regarding any matter relating to the agreement, which may be as a result of a specific request or as part of a regular schedule of meetings. The United States–Japan agreement, for instance, is unique in providing for the possibility of consultations through diplomatic channels on any matter arising in connection with the implementation of the agreement, as well as direct consultations between the competition authorities concerned on matters arising in connection with the agreement; the parties' competition authorities are also to meet every year to exchange different types of information on each other's activities in this area.<sup>24</sup> The United States–Brazil agreement provides that either party may request consultations regarding any matter relating to the agreement, indicating the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited; each party shall consult promptly when so requested with a view to reaching a conclusion consistent with the purposes of the agreement.<sup>25</sup> Consultations provisions sometimes refer to the principles of the agreement; the United States–European Union Agreement, for instance, provides that in every consultation, each party shall take into account the principles of cooperation set forth in the agreement and shall be prepared to explain to the other party the specific results of its application of those principles to the issue that is the subject of the consultations.<sup>26</sup> With some variations, similar language is contained in most of the cooperation agreements entered into by the United States or by Canada.

16. The consultations provisions in the Canada–Costa Rica Free Trade Agreement go further by providing for what appears to resemble a peer review process.<sup>27</sup> The parties are to consider matters relating to the operation, implementation, application or interpretation of the competition policy chapter, and to review both their measures to proscribe anti-competitive activities and the effectiveness of enforcement actions. The parties have to consult at least once every two years, or at the written request of a party, and have to designate officials responsible for ensuring that

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<sup>24</sup> Agreement between the Government of the United States of America and the Government of Japan Regarding Cooperation on Anti-competitive Activities (Washington, DC, 7 October 1999).

<sup>25</sup> Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation between Their Competition Authorities in the Enforcement of Their Competition Laws (Washington DC, 26 October 1999).

<sup>26</sup> Agreement between the Government of the United States of America and the Commission of the European Communities on the Application of Their Competition Laws (Washington, DC, 23 September 1991, entry into force 10 April 1995).

<sup>27</sup> Free Trade Agreement between the Government of Canada and the Government of the Republic of Costa Rica (Ottawa, 23 April 2001).

consultations, when required, take place in a timely manner. If the parties do not arrive at a mutually satisfactory solution of a matter arising from a written request for consultations, they shall refer it to the Free Trade Commission set up to monitor the overall implementation of the agreement. Such detailed provisions may be contrasted with the equivalent provisions in the Canada–Chile Free Trade Agreement or in the North American Free Trade Agreement (NAFTA), which simply provide that each party shall cooperate on issues of competition law enforcement policy, consultations being listed as one of the methods of cooperation.<sup>28</sup> Indeed, although most agreements of a regional or subregional nature provide for consultations, there are wide differences in the scope of such provisions. In a few instances, consultations provisions may even go as far as providing for the communication of opinions by a competition authority in proceedings brought before the other competition authority, or the communication of opinions on draft decisions for comments.<sup>29</sup> Under some agreements, there is an obligation to seek consultations before undertaking certain action while, under most agreements, there is also an obligation to enter into consultations whenever so requested. Thus, the EU–South Africa Free Trade Agreement, for instance, provides that the parties must consult, at the request of either party, whenever the EU Commission or the Competition Authority of South Africa decides to conduct an investigation or intends to take any action that may have important implications for the interests of the other party, and both shall then endeavour to find a mutually acceptable solution in the light of their respective important interests, giving due regard to each other's laws, sovereignty, the independence of the respective competition authorities and considerations of comity.<sup>30</sup> However, "appropriate measures" can be taken by either party, after consultation within the Cooperation Council, if it considers that a particular practice has not been adequately dealt with and is harmful to its interests; similar provisions for consultations within a Cooperation Council or Association Council before action can be taken are provided for under a range of agreements concluded by the European Union.

## B. OECD mechanisms

17. At the plurilateral level, the 1995 OECD Recommendations in this area provide for consultations at the request of a Member country which considers that (a) an investigation or proceeding being conducted by another Member country may affect its important interests; or (b) one or more enterprises situated in one or more Member countries are engaging or have been engaged in RBPs of whatever origin that are substantially and adversely affecting its interests.<sup>31</sup> Requests for consultations should be made as soon as possible after notification is received of enforcement activities affecting the requesting party's important interests, and they should be accompanied by an explanation of the national interests affected that is sufficiently detailed to enable full consideration to be given to the request. Member countries receiving such requests for consultations should give full and sympathetic consideration to the views expressed or factual material provided by the requesting country, in particular with respect to (a) suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation proceeding and (b) the nature of the RBP in question, the enterprises

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<sup>28</sup> North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United States of Mexico (Washington, DC, 8 & 17 December 1992; Ottawa, 11 & 17 December 1992; and Mexico City, 14 & 17 December 1992). Canada/Chile Free Trade Agreement (Ottawa, 14 November 1996; entry into force, 1 June 1997).

<sup>29</sup> See UNCTAD, "Experiences gained so far on international cooperation on competition policy issues and the mechanisms used" (TD/B/COM.2/CLP/21/Rev.1).

<sup>30</sup> See Agreement on Trade, Development and Co-operation between the European Community and its Member States, of the one part, and the Republic of South Africa, 1999.

<sup>31</sup> Revised Recommendations of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, 27 & 28 July 1995, C(95)130/FINAL.

involved and the alleged harmful effects on the interests of the requesting country. All countries involved in consultations should give full consideration to the interests raised and to the views expressed during consultations so as to avoid or minimize possible conflict. However, entering into consultations is without prejudice to the continuation of the case, and the requested country retains full freedom of ultimate decision. However, where a Member country agrees that enterprises situated in its territory are engaged in RBPs harmful to the interests of the requesting country, it should attempt to ensure that these enterprises take remedial action, or it should itself take whatever remedial action it deems appropriate, including action under its competition legislation or administrative measures, on a voluntary basis and considering its legitimate interests. And without prejudice to any of their rights, the Member countries involved in consultations should endeavour to find a mutually acceptable solution in the light of the respective interests involved. In the event of a satisfactory conclusion, the two countries by mutual agreement should inform the OECD Competition Committee about its main points.

### **C. Mechanisms under the Set of Principles and Rules**

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

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

### **D. Mechanisms under WTO Agreements**

20. Separate consultations mechanisms (other than mandatory consultations linked to the dispute settlement process) are also established under the aegis of the WTO. A 1960 GATT Decision makes provision for consultations on harmful restrictive practices in international trade on a bilateral or multilateral basis as appropriate; it is provided that a contracting party to which a request for consultations is addressed shall accord sympathetic consideration to such a request and afford

adequate opportunity for consultations, with a view to reaching mutually satisfactory conclusions.<sup>32</sup> If it agrees that harmful effects are present, it shall take such measures as it deems appropriate to eliminate these effects. The outcome of the consultations is to be conveyed to WTO Members.<sup>33</sup>

21. Under the General Agreement on Trade in Services (GATS), Members shall enter into consultations at the request of any other Member with a view to eliminating certain business practices of service suppliers restraining competition and thereby restricting trade in services. The Member requested shall accord full and sympathetic consideration to such a request, and shall supply relevant publicly available information, as well as other information, subject to its domestic laws and the conclusion of a satisfactory agreement regarding confidentiality. This procedure has not been used so far. This article is applicable whether or not any specific commitment has been made by the requested Member with respect to the service sector in question; however, it does not cover behaviour by monopolies and exclusive service suppliers in sectors for which specific commitments have been made (separate procedures going beyond consultations are provided in such cases).

22. Under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), a WTO Member considering enforcement against an intellectual property owner which is a national or domiciliary of another Member, aimed at securing compliance with its legislation controlling anti-competitive practices in licensing arrangements, can seek consultations with that Member, and the other Member shall enter into such consultations; this is without prejudice to any action under the law and to the full freedom of ultimate decision of either Member. The Member so requested shall accord full and sympathetic consideration to the request, and shall supply relevant information under conditions similar to those set out in the GATS. Conversely, a Member whose nationals or domiciliaries are subject to such enforcement action by another Member may also ask for consultations with that other Member country, which request shall be granted. Neither of these TRIPS procedures has been used so far.

### **E. Implications and recommendations**

**23. In the light of the description undertaken above, the Review Conference may wish to request future sessions of the IGE to examine the reasons why some types of consultations have not been fully used within existing multilateral frameworks, taking into account the different forms and objectives of consultations (such as consultations on issues, cases, general sharing of experiences, or the implementation of the provisions, objectives or principles of agreements); institutional aspects; how mandatory are obligations to consult; the possible outcomes envisaged as a result of such consultations; and possible links with peer review, notification, conflict avoidance, or comity.**

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<sup>32</sup> GATT Decision on Arrangements for Consultations on Restrictive Business Practices of 18 November 1960, now incorporated into GATT 1994.

<sup>33</sup> **This procedure was invoked for the first time by the United States and Japan in respect of alleged RBPs affecting imports of that product into each other's markets (the European Union also asked to join in these consultations). However, the consultations were not pursued and had no bearing on the outcome of the case. See "Japan – Measures Affecting Consumer Photographic Film and Paper" (WT/DS44/R, 31 March 1998).**

### III. CONCILIATION, MEDIATION AND GOOD OFFICES

#### A. Non-multilateral mechanisms

24. No bilateral cooperation agreement on competition law enforcement provides for dispute settlement mechanisms.<sup>34</sup> Free trade, customs union or common market/single market agreements may have general dispute settlement mechanisms applicable to all areas, but no such agreement has mechanisms specially dedicated to competition policy. However, some free trade agreements in the Americas (including NAFTA and the free trade agreements concluded by Canada with Chile and Costa Rica) specifically exclude disputes over competition policy from the purview of the dispute settlement procedures provided for under the agreement (only obligatory procedures are provided), or from arbitration. **Similarly, all free trade agreements concluded by EFTA countries providing for arbitration specifically exclude articles dealing with competition policy from the purview of arbitration, so as to avoid the questioning by arbitrators of enforcement decisions of national competition authorities; instead, any such disputes (there have been none so far) are to be handled through technical cooperation, consultations, or Joint Committees/Councils proceedings, with the last-resort possibility of trade rebalancing measures.**<sup>35</sup> At the plurilateral level, the 1995 OECD Recommendations provide for a conciliation mechanism to resolve disputes in the event that no satisfactory solution can be reached pursuant to the consultations procedures described in the previous chapter; the Member countries concerned, if they so agree, should consider having recourse to the good offices of the OECD Competition Law and Policy Committee with a view to conciliation. The OECD secretariat should compile a list of persons willing to act as conciliators. The procedures to be followed are determined in agreement with the countries concerned, any conclusions drawn from the conciliation are not binding on them, and the proceedings are to be kept confidential unless they otherwise agree. There has so far been no recourse to this conciliation mechanism; a 1987 review of a previous version of the 1995 OECD recommendations took the view that this had mainly been because the notification, exchange of information and consultations procedures provided for in that recommendation had been effective in avoiding or resolving conflicts.<sup>36</sup>

#### B. Multilateral mechanisms

25. At the multilateral level, the Set of Principles and Rules specifies (in para. G.4) that, in the performance of its functions, neither the **IGE** nor its subsidiary organs shall act like a tribunal or otherwise pass judgement on the activities or conduct of individual Governments or enterprises in connection with a specific business transaction, and should avoid becoming involved when enterprises to a specific business transaction are in dispute.

26. The WTO's Dispute Settlement Understanding (DSU) provides for the possibility for the parties to a dispute, if they so agree, to use good offices, conciliation or mediation to settle a dispute; the Director-General of the WTO may, acting *ex officio*, offer his **or her** services for this purpose.<sup>37</sup>

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<sup>34</sup> The cooperation agreement between China and the Russian Federation provides that their Governments should make reasonable efforts to settle, through friendly means, all discrepancies and disputes, if any, arising from the agreement. See Agreement between the Government of the People's Republic of China and the Government of the Russian Federation on Co-operation in the Field of Countering Unfair Competition and Antimonopoly, 25 April 1996, article. 6.

<sup>35</sup> **Communication submitted by Switzerland, Intergovernmental Group of Experts on Competition Law and Policy, Sixth Session.**

<sup>36</sup> See OECD, *Competition Policy and International Trade: Instruments of Cooperation*, Paris, 1987.

<sup>37</sup> See Article 5 of the DSU.

However, so far, no use has been made of such procedures. A report by an independent think tank based in the United Kingdom has recommended that there should be greater effort to use alternative methods of dispute resolution, or activities that can better clarify issues for the dispute settlement process itself, so long as they accelerate and do not delay settlement of disputes.<sup>38</sup> A number of the persons interviewed for the preparation of this report stated that mediation (as well as arbitration) was theoretically an ideal mechanism for developing countries to use because they had limited capacity to participate fully in proceedings; however, many claimed that the political reality of the trading system meant that, during any process, developing countries could suffer unwelcome pressure and threats from developed countries to drop cases brought against them.

### **C. Implications and recommendations**

27. It is difficult, given the limited data and discussions on this subject, to determine the reasons for the limited existence or use of dispute resolution mechanisms in the implementation of international agreements on, or relevant to, competition policy. It is possible that this may be due to: (a) the voluntariness of undertakings to cooperate in this area, or wide discretion reserved by the parties regarding whether and how to cooperate in individual cases, which may make it difficult to prove breach of such agreements; (b) a preference for resolving disputes through informal and private bilateral consultations and negotiations, rather than through more formal plurilateral mechanisms involving third parties; (c) the effectiveness of any such bilateral consultations, which would remove the cause of dispute; (d) reluctance by Governments to allow international oversight of national enforcement decisions – in other words, sovereignty concerns; and/or (e) as regards conciliation, mediation or good offices, scepticism about how effective third party involvement resulting in non-binding recommendations may be in resolving disputes which the parties have been unable to resolve by themselves.

28. However, the effectiveness of conciliation, mediation or good offices should not be compared with that of obligatory dispute settlement, but with the situation which would prevail if there were no dispute resolution procedures available at all in this area.

29. To the extent that Governments are unwilling to have their sovereignty limited by international control over their competition enforcement decisions, they may be more prepared to agree to voluntary procedures resulting in non-binding recommendations, and which would involve less publicity than would adjudicative processes; should "losing" Governments accept such non-binding recommendations, it would give them the opportunity to show good-faith willingness to cooperate without any possibility of creating a precedent. Moreover, for many countries, particularly developing countries, third party involvement and the power that mediators or conciliators have to make recommendations based upon equity or other considerations may help to palliate relatively weaker bargaining power, expertise or resources, as well as the largely voluntary or discretionary nature of undertakings to cooperate. It has also been suggested that mediation presents particular benefits in the trade and competition context because its voluntary and informal nature is more conducive to managing the interests of the parties (as opposed to enforcing rights) and preserving a cooperative relationship after mediation, taking into account the importance of cooperation between national authorities in competition law enforcement; but that, like consultations, it has the disadvantages that a participant might at any time abandon the process or misuse it as a "fishing expedition" for

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<sup>38</sup> See Federal Trust for Education and Research, "Enhancing the WTO's Dispute Settlement Understanding – A Working Group Report, 2002", available at [www.fedtrust.co.uk/Media/](http://www.fedtrust.co.uk/Media/).

information or as a delaying tactic, while the results of the process would generally be non-binding.<sup>39</sup> In any event, diplomatic and obligatory dispute settlement methods should not be seen as conflicting solutions, but as two out of a range of alternatives (along with peer review or consultations) that might be made available to facilitate any strengthening of multilateral cooperation on competition law and policy that may be agreed.

30. However, given the limited experience in the use of these methods in this area, extensive discussions would be essential in order to work out why they are not currently used, how they could be adapted to the specificities of competition policy (such as in respect of the protection of confidential information), and how to take into account the needs and concerns of developing countries in this connection. This would be without prejudice to decisions still pending relating to the possible adoption or content of a multilateral framework on competition policy, or as to which of its provisions, if any, might be subject to binding dispute settlement. The consultations machinery of the **IGE** would provide an appropriate forum for such discussions.

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<sup>39</sup> See WTO Working Group on the Interaction between Trade and Competition Policy, "Communication from the OECD – An overview of possible compliance mechanisms in a multilateral framework on competition" (WT/WGTCP/W/240).