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**Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed
Equitable Principles and Rules for the Control of Restrictive Business Practices**
Geneva, 8–12 November 2010

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

Held at the Palais des Nations, Geneva, from 8 to 12 November 2010

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I. President's summary

A. Opening statements

1. The following speakers made opening statements: the representative of the United States of America, the representative of the Republic of Korea, the representative of France, the representative of Armenia, the representative of China, the representative of Kenya, the representative of the European Union, the representative of Paraguay, the representative of Brazil, the representative of Morocco, the representative of Zimbabwe, the representative of the Russian Federation, the representative of India, the representative of Cameroon, the representative of Bhutan and the representative of Peru.

2. There was a strong consensus from delegates that the competition process was a significant contributor to economic development and that to maximize its impact it was necessary to design the policy and legislation to reflect national legal norms and economic development policy objectives.

3. There was also a consensus that in time of economic crisis the role of competition as a driver of more efficient markets was even more important. Several delegates explained that the recent global financial crisis was caused by a number of factors that did not include excessive competition law enforcement. One delegate made the point that competition policy and law was part of the solution and not part of the problem. Many delegates argued that in times of economic crisis governments must strongly resist the pressure to reduce competition law enforcement that may come from individual businesses or industry sectors. One delegate emphasized that it was very important that the competition authority always act with full transparency so that businesses and the public could see what was happening and why.

4. One delegate stated that competition policy had performed a significant role during the time of economic and financial crisis by providing safeguards against anticompetitive practices as governments put in place market stimulant packages. Such anticompetitive practices included cartels in public procurement and sectors used disproportionately by poor and disadvantaged groups, such as transport and health care.

5. Several delegates referred to the contribution that competition had made to poverty alleviation by reducing barriers to entry into markets which originated from government and private enterprise. Such barriers limited the development of local talents and efforts for local development. Competition policy increased the capacity of delivery and provision of services by both the private and public sectors.

6. One delegate explained that in the United States there had been instances where state governments had enacted laws that significantly affected interstate trade on the justification of meeting other policy objectives such as the reduction of underage alcohol consumption. An important role for a competition authority was to examine the validity of such justifications. Several delegates expressed the view that competition advocacy was critical to government considering competition effects of intended legislation during drafting and debate.

7. One delegate explained that the enactment of a competition law and the creation of a competition authority had been a turning point in the economic development of his country. The need for adequate resourcing of the authority and the need for public support of the competition policy and law were essential to the effectiveness of the authority.

8. One delegate explained that, although his country was experiencing a prolonged and severe period of economic challenges, the benefits of applying competition law were recognized. The elimination of anticompetitive horizontal agreements in the beverages, cigarette, phone and electricity sectors – as well as the reduction of barriers to entry in the cement, sugar and fertilizer industries – had produced tangible benefits to business and consumers.

9. One delegate explained the priority of his country's authority was equal application of the competition law as between domestic and foreign companies or between private and State-owned enterprises. Reflecting this priority was a strong programme of supporting guidelines and declarations designed to ensure that business understood the requirements of the law. One delegate noted that it was sometimes difficult to take account of the particular disadvantages being faced by local businesses and asked how that could be done in the context of a competition law.

10. Several delegates expressed concern about the ability of developing economies to protect themselves from anticompetitive practices originating in developed economies. There was a general consensus that international cooperation in competition policy and law enforcement should be given greater attention than it was currently receiving. Some delegates noted the roles of UNCTAD and other organizations such as the international Competition Network in promoting and facilitating networking between competition authorities with a view to encouraging closer cooperation and coordination on international cartels and mergers. One delegate recommended that there should be increased dialogue between developed and developing countries concerning competition issues.

11. Several delegates described current or proposed amendments to their respective competition law designed to make them more effective and to overcome shortcomings that had limited the application of the laws or made them more difficult to enforce. One delegate made the point that, because the economy evolved through time, the competition law should be reviewed to assess how relevant it remained and whether amendments should be considered.

12. Several delegates noted the importance of small and medium-sized enterprises (SMEs) and the informal sector to their economies. Several enquired what the role of SMEs in competition policies should be in protecting SMEs' growth, noting that employment might not always be in line with global competition regulations. Several delegates also raised the question of regulating the operations of multinational companies in the weakest and most vulnerable developing countries in order to protect them from unfair competition. Several delegates reported that the sanctions provided by their respective competition laws had been recently increased substantially or were about to be increased. There was a general consensus that businesses were motivated to comply only if both the risk of detection and the likely penalties were significant.

13. A number of delegates concurred that it was essential that competition authorities prioritize their objectives and prepare strategies to ensure that their limited resources be applied to the conduct that is most harming their economies. One delegate explained how the prioritization of competition policy reflected economic and social objects by focusing on anticipative conduct in agriculture, infrastructure, manufacturing of steel, cement, tyres and pharmaceuticals, use of government resources and in services consumed by "the common man", including education, health, housing and banking.

14. One delegate noted that populations without the protection of a competition law would be at a disadvantage because in the global economy they have less protection from the effects of cross border anticompetitive practices.

15. Several delegates specifically noted the value of the United Nations Set as a platform for dialogue between developed and developing countries. There was a general

consensus that the work of UNCTAD over the last 30 years had assisted many countries in developing and implementing competition laws. Several delegates noted that their countries had not yet implemented a competition law and that assistance from UNCTAD, developed countries and competition networks would be needed to achieve this goal.

B. Session I: Implementation of competition law and policy

16. The UNCTAD secretariat opened the session by presenting a short summary of its background paper on sanctions, remedies and judicial review as contained in document TD/RBP/CONF.7/5.

17. The keynote speaker highlighted that different regimes worldwide dealt with the issue of sanctions and remedies in varied ways. Most regimes imposed administrative fines on companies and some also had criminal penalties on both companies and individuals.

18. The speaker questioned whether the United States, as the oldest jurisdiction to maintain antitrust laws and incorporate civil as well as criminal sanctions, would be a transposable model for other competition regimes.

19. The speaker pointed out risks associated with the inclusion of criminal sanctions in a competition regime. One such risk was the potential to undermine the effectiveness of leniency programmes by, for example, opening a conflict of interest between the company applying for leniency and the individuals who may be subject to imprisonment. This was illustrated by the recent case of Virgin/British Airways that highlighted the risk of relying too heavily on the information provided by the leniency applicant. Judges were forced to abandon the criminal trial as it came to light that evidence derived from the leniency party did not establish the existence of the alleged agreement.

20. In that light, the speaker suggested that younger competition authorities should carefully balance the advantages and disadvantages of introducing criminal sanctions, which may prove more challenging to enforce.

21. The keynote speaker raised the need for competent judges to preside over competition cases. This was a major concern of numerous delegates and particularly for developing countries.

22. The speaker noted the potential conflict of interest in jurisdictions in which the judiciary both made initial decisions on competition cases and also reviewed its validity on appeal. This may compromise the due process of law and the separation of powers; delegates also highlighted this point further during the proceeding round table discussion.

23. Finally, the keynote speaker highlighted the importance for tribunals to exercise good time and case management, especially in relation to merger cases.

1. Appropriate sanctions and remedies

24. The first round table was devoted to the issues of sanctions and remedies.

25. The first panellist addressed two key issues: (a) the deterrent effect and the predictability of sanctions; and (b) the importance of reducing and narrowing the discretionary power of competition authorities when determining fines.

26. In assessing the deterrent effect of fines, the panellist noted that the level of fines had less impact on undertakings than the likelihood of detection. In addition, the panellist said that fines should be in line with expected profits as opposed to actual benefits incurred. The panellist suggested that the excessive discretion of competition authorities to impose fines was counterproductive and should be addressed by the development of guidelines to increase transparency and predictability.

27. The second panellist focused on a recent case in Brazil highlighting alternative sanctions, specifically the prohibition of the participation of convicted companies in public tenders. This sanction proved to be beyond the financial capacity of two companies. In order to prevent the bankruptcy of these companies, the Brazilian Competition Tribunal (CADE) reached a compromise whereby the sanction was lifted in exchange for an upfront payment of the entire fine by the companies.

2. Judicial review of competition cases

28. The second round table was devoted to judicial review of competition cases.

29. One panellist stated that judicial review over decisions by the Korea Fair Trade Commission (KFTC) went largely uncontested until the early twenty-first century, when the KFTC substantially increased its fines. In response, businesses hired expert representatives to respond to allegations of the KFTC and became increasingly successful in challenging KFTC decisions. The courts responded by increased scrutiny of KFTC decisions and established special panels for competition law cases. The panellist concluded that currently the judiciary was considered an important player of competition law enforcement.

30. Another panellist described three types of sanctions available to the competition authorities of Tunisia: (a) injunctions to compel undertakings to stop anticompetitive activities; (b) fines of up to 5 per cent of company turnover; and (c) an obligation imposed on the company to publish a summary of the decision in two national newspapers. The panellist mentioned that Tunisia, in enforcing competition law, adopted a gradual approach. At early stages of implementation, fine levels were low to account for a lack of knowledge of competition issues in the business community. Instead, emphasis was on advocacy. In light of recommendations from the Peer Review of its competition regime conducted by UNCTAD in 2006, Tunisia has drastically increased the level of fines imposed.

31. The panellist mentioned that administrative appeal had a suspensory effect on the sanctions imposed. He was, however, of the opinion that this was detrimental to the credibility of the decisions of the competition authority.

Comments from delegates

32. Delegates echoed the importance for judges reviewing competition authority decisions to have appropriate qualifications and competencies. They emphasized the need for judges to receive relevant training and participate in international conferences on competition. It was noted that young competition authorities in particular were vulnerable to this challenge.

33. Several delegates emphasized that there was no one-size-fits-all approach to determining the appropriate level of fines and sanctions. Instead, fines and sanctions should be tailored to the specific needs, context and stage of development of each country.

34. Delegates stressed the need to ensure that sanctions and fines had the effect of re-establishing competition rules and culture. In addition, the need for detailed guidelines and appropriate criteria on adopting fines and sanctions was strongly emphasized.

35. A delegate stressed the need to increase uniformity in the application of sanctions at regional and subregional levels to avoid relocation of firms to countries where enforcement of competition was lax or non-existent. It was recommended to the Conference that an international discussion should be had in relation to the harmonization of sanctions.

36. Finally, public and private undertakings under investigation for alleged anticompetitive behaviour should be scrutinized with equal vigour by competition authorities and public bodies should not benefit from favouritism.

II. Organizational matters

A. Opening of the Conference

(Agenda item 1)

37. The Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was opened on 8 November 2010 by Mr. Nurettin Kaldirimci, President of the Competition Authority (Turkey).

B. Election of the President and other officers

(Agenda item 2)

38. At its opening plenary meeting, the Conference elected Mr. Thula Kaira (Zambia) President of the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

39. The Conference elected five vice-presidents and a Rapporteur to serve on the Bureau of the Conference at its sixth session. Accordingly, the elected Bureau was as follows:

President:	Mr. Thula Kaira (Zambia)
Vice-presidents:	Mr. Dhanendra Kumar (India)
	Mr. Humberto Guzman (Nicaragua)
	Mr. Abdelali Benamour (Morocco)
	Mr. Theodor Thanner (Austria)
	Mr. Andrey Tsyganov (Russian Federation)
Rapporteur:	Mr. Russell Damtoft (United States of America)

40. Following established practice, the Conference agreed that the regional coordinators would be fully associated with the work of the Bureau of the Conference.

41. The Conference also agreed that the Bureau would assume the functions of a Credentials Committee and would report to the Conference accordingly.

C. Adoption of the rules of procedure

(Agenda item 3)

42. Also at its opening plenary meeting, the Conference adopted the rules of procedure for the session contained in TD/RBP/CONF.7/9.

D. Adoption of the agenda and organization of the work of the session

(Agenda item 4)

43. Also at its opening plenary meeting, the Conference adopted the provisional agenda for the session contained in TD/RBP/CONF.7/1.
