

**Working Group on the Interaction
between Trade and Competition Policy**

REPORT ON THE MEETING OF 10-11 JUNE 1999

Note by the Secretariat

1. The ninth meeting of the Working Group on the Interaction between Trade and Competition Policy took place on 10-11 June 1999, under the Chairmanship of Professor Frédéric Jenny.

I. THE RELEVANCE OF FUNDAMENTAL WTO PRINCIPLES OF NATIONAL TREATMENT, TRANSPARENCY AND MOST-FAVOURLED-NATION TREATMENT TO COMPETITION POLICY AND VICE VERSA

2. The United States introduced a written contribution on this topic (WT/WGTCP/W/131). In addition, Turkey introduced a non-paper, and the Group had before it a background note by the Secretariat on the Fundamental Principles of Competition Policy (WT/WGTCP/W/127). Representatives of Hong Kong, China; Korea; Switzerland; the European Community and its member States; India; Norway; Japan; Malaysia; and the Czech Republic and observers from the Russian Federation and Croatia provided oral comments or posed questions on this item.

3. The representative of the United States, introducing document WT/WGTCP/W/131, said that it examined each of the three fundamental principles of transparency, national treatment and most-favoured-nation treatment, considered how each had been given effect in the various instruments and provisions of the WTO Agreement, and addressed how such principles manifested themselves in the administration of the United States antitrust laws, noting also where adaptations had been appropriate for the effective and impartial enforcement of those laws. The treatment of the principle of transparency in the paper began by detailing the several purposes that were served by adherence to the principle in the context of the WTO system. Transparency was critical to ensuring fair application of WTO obligations in the administration of a Member's domestic legal system, in demonstrating a Member's compliance with those obligations to other Members, and in reinforcing support by the public at large for the operation and objectives of the multilateral trading system. The submission reviewed the main provisions of the WTO Agreements where the transparency principle was found, and focused on how these provisions ensured proper balancing between transparency and the adequate protection of confidential information. In pointing out the extent to which this principle was reflected in the administration of the United States antitrust laws, it described the vast amount of information which was made available to the public through internet websites, government and business publications, academic journals, laws and regulations, public advocacy efforts and the fulfilment of notification obligations in international agreements. It also explained how, within the context of transparency, appropriate and effective steps were taken to protect commercially sensitive information and to maintain the integrity of investigative proceedings. With regard to national treatment and most-favoured-nation treatment, the submission provided an overview of the relevant WTO provisions and noted that it was the long-standing policy of the United States antitrust agencies that they did not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. This commitment to non-discrimination was essential to maintaining the effectiveness, impartiality and credibility of the laws. The basic tenet of United States antitrust law was to protect competition in the market as a whole, not individual competitors, irrespective of their nationality.

Adherence to these principles did not always mean that arrangements were treated identically in the course of a proceeding, just as this was not necessarily the case when such principles were applied through measures related to WTO obligations. A transaction involving foreign firms would sometimes receive treatment that was different from the treatment of a similar transaction involving domestic firms simply because the two transactions had different effects on United States markets. However, any differentiation which came about in the application of United States antitrust laws was due not to differences in nationality, but rather to differences in the degree of culpability among parties in a particular case, to the differing evidence available with respect to such parties, or to differences in the nature and extent of their cooperation in the investigative context. The submission concluded that antitrust law enforcement and competition policy in the United States and many other countries was consistent with fundamental WTO principles. United States antitrust authorities respected public notice rules, consistent with legal and confidentiality requirements. They enforced laws that were not in themselves discriminatory, in a non-discriminatory manner. Indeed, the fundamental principles of transparency and non-discrimination were essential to the economically optimal application of the antitrust laws and to maintaining public confidence and support of competition policy, and were also features of good governance generally.

4. The representative of Turkey, introducing a non-paper by her delegation, said that the WTO principles of non-discrimination and transparency, which were cornerstones of the multilateral trading system, aimed to improve market access opportunities by eliminating discriminatory actions that caused distortions in trade and by increasing predictability in the market and in the administrative procedures in the fields of trade in goods, trade in services and trade-related intellectual property rights. While the general framework of these principles was set out in the WTO system and related commitments by Members, it was important to note that the context and implementation of these principles could differ with regard to the scope of the relevant WTO Agreements and the specific needs of the underlying subject-matter. No direct reference to competition policy or to relevant practices was made in the wording of the general principles. However, the objectives of "removing any barrier to market access" and "improving market access opportunities" could be considered as one of the common points in the implementation of the basic principles in relation to both trade and competition policies. When in-depth analysis was made, it was possible to find some differences in the non-discrimination and transparency approaches that were required by the multilateral trading system and national competition policy and legislation (e.g. the transparency approach). Thus, the non-discrimination and transparency principles might be best applied in relation to competition policy and legislation through proper adaptation in accordance with the specific needs of competition policy. When dealing with the relationship between competition policy and these fundamental principles, an important point to be considered was the necessity for the existence and application of national competition legislation and relevant administrative procedures. In cases where no such legislation existed or it was not effectively applied, or where competition rules were applied through sector-specific legislation or where there were exceptions, exclusions and derogations from the competition laws, the relevance of the fundamental WTO principles to competition rules was unclear. With regard to the application of the non-discrimination principles to competition policy, either exempting a certain country or its undertakings from generally accepted competition rules or discriminating between domestic and foreign undertakings contradicted the objective of realizing competition under equal conditions. It could, nonetheless, be said that, as discrimination between firms was not acceptable in terms of competition objectives, competition policy and law inherently reflected the non-discrimination principle. A non-transparent system or discriminatory actions against foreign firms, products or services under the provisions of competition laws would cause market distortions and undermine the competitive environment in the relevant market. Reflecting this belief, the provisions of the Turkish Competition Law were applied to all domestic and foreign firms in a non-discriminatory and transparent manner. At all levels of the legal framework (laws, regulations, communiqués), decisions and information about administrative procedures were published to meet the transparency requirement. In doing so, the principle of confidentiality was fully respected. In a globalized world economy, it was generally recognized that a multilateral approach on competition would be helpful to achieve the objectives of the WTO. Due to the nature of competition rules, it

should be kept in mind that a multilateral framework would work most efficiently if all Member countries had national competition legislation based on a common understanding reached at the multilateral level. To this end, the future work of this Group should be focused on studies to reach a common understanding of the issues and to promote the adoption of national competition laws based on the principles of non-discrimination and transparency. In doing so, the differences in the provisions of national legislations and administrative procedures should be taken into account.

5. The representative of the Secretariat, introducing a Note on the Fundamental WTO Principles of Competition Policy (WT/WGTCP/W/127), said that it responded to a request that had been made by the Working Group at its meeting on 19-20 April, to provide a note setting out factual background on the fundamental principles of competition policy. Consistent with the approach that had been taken in the previous note by the Secretariat on the Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency (WT/WGTCP/W/114), the present note did not attempt to analyse the relevance of the principles discussed in it for trade policy. Rather, it was understood that this was a task for Members in the Working Group. One important difference between the subject-matter of this Note and the previous Note was that, whereas the fundamental WTO principles addressed in the previous Note had been identified in the mandate given to the Secretariat and indeed in the work programme of the Working Group, the same had not been the case for the fundamental principles of competition policy. In fact, these were not codified in any international treaty. Principles relating to the control of restrictive business practices were addressed in one multilateral instrument, namely the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices ("the Set"). The Set was of obvious interest and relevance to the work of the Group and was referred to at several points in the Note. The Set, however, took the form of non-binding recommendations rather than treaty obligations. For that reason, and following the instructions given by the Working Group, in identifying the principles that were addressed in the Note, the Secretariat had sought guidance from a number of sources, including statements that had been made by Members in the Working Group, guidelines and analyses that had been prepared by other intergovernmental organizations, national competition laws and guidelines, and academic analyses. For the purposes of the Note, the concept of the "fundamental principles of competition policy" had not been treated as being synonymous with the elements of competition or antitrust law. Rather, what had been identified in the Note were principles of policy design and application, including but not limited to objectives that were set out in national competition laws, whose impact transcended specific statutory provisions and sectors and was common to a broad range of jurisdictions having competition policies. From this perspective, three general categories of principles were identified in the Note. The first category concerned principles in the sense of the overriding goals or objectives of competition policy - for example, the promotion of economic efficiency, the promotion of consumer welfare and economic development. These objectives were known to serve as important guide-posts for officials in applying diverse aspects of related laws and policies. The second category of principles consisted of operational principles of policy design and application. Examples of principles in this category included the promotion of market-opening measures, the identification of situations in which market power was likely to be exercised, and the distinction that was made in virtually all competition law systems between arrangements that were primarily horizontal in nature and those that were primarily vertical in nature. The third category of principles related to the institutions and processes through which competition policy was applied. Examples of principles in this category included adherence to due process in the application of competition law and policy, optimizing the scope of competition policy and ensuring coherence between competition policy and direct economic regulation, adherence to the fundamental WTO principles of non-discrimination and transparency, and international cooperation to the extent permitted by national laws.

6. The observer from the Russian Federation said that the Russian Antimonopoly Law was applicable both to domestic and foreign companies in cases where the operations of these companies affected competition on Russian domestic markets. All the provisions of the Russian law had the same force for Russian and for foreign companies, and their enforcement was conducted by the

Russian antimonopoly authorities on a non-discriminatory basis. There were no exemptions in this regard from the Russian Antimonopoly Law, including with regard to such sensitive matters as the activities of export cartels, mergers and acquisitions with foreign companies, and so on. Her country had not had any complaints from foreign companies concerning the discriminatory application of competition law, nor was there any discrimination among foreign companies. Transparency in the administration of competition law was also very important. In this regard, in Russia, all of the relevant laws were published; furthermore, methodological recommendations and guidelines were registered in the Ministry of Justice and then published officially. It had to be noted that, unlike the principles of national treatment and most-favoured-nation treatment, full implementation of the principle of transparency required substantial financial resources for activities such as official publications, competition advocacy and the provision of explanations of the provisions of law guidelines. Technical assistance had an important role to play in this regard.

7. The representative of Hong Kong, China, commenting on the Note by the Secretariat on the Fundamental Principles of Competition Policy (WT/WGTCP/W/127), said that the Secretariat's attempt to group competition principles in three categories was helpful. Hong Kong, China supported a broad treatment of the term "competition policy" as was mentioned in paragraph 2 of the Note, i.e., it considered that competition policy should be defined broadly to comprise the full range of measures that might be used to promote competitive market structures and behaviour, including but not limited to a comprehensive competition law. In view of the broad application of competition policy and in order to ensure that the principles identified were capable of wide application, he saw merits to first identifying core competition principles and then second-level principles to uphold core principles. In doing so, the Group should guard against narrow, prescriptive rules with limited applicability. Work that was under way in the context of APEC would be helpful in future work on this matter. It was important to note, as was pointed out in paragraph 3 of the Note by the Secretariat, that, while the fundamental WTO principles had been codified in multilateral law and jurisprudence, namely that of the WTO, the same could not be said for the fundamental principles of competition policy. This statement highlighted the problems that would be posed by any attempt to harmonize competition principles. He noted that, while economic efficiency, development and the promotion of consumer welfare were widely recognized as overriding goals or objectives of competition policy, there was considerable diversity in terms of the application or achievement of these goals in the respective laws and policies of individual WTO Members. In this regard, he also noted an observation made by the United States in paragraph 16 of its submission to the meeting (WT/WGTCP/W/131), which pointed out that differences in analytical approaches as well as in substantive legal standards could, in certain instances, account for the sometimes differing treatment of multinational mergers by antitrust authorities in different countries. Given the evident diversity between Members in their development history and socio-economic background, further work on competition principles must continue to respect Members' different approaches to promoting competition, so long as they were consistent with the core principles and contributed to the goals of promoting market contestability and economic efficiency. Competition law was but a means to achieve an end and never an end in itself.

8. The representative of Korea, commenting on the contribution of the United States (WT/WGTCP/W/131), said that it spoke not only about the United States antitrust laws and enforcement policies, but also defended other countries' laws and policies in terms of their consistency with the fundamental WTO principles of non-discrimination and transparency. This was encouraging, because it vindicated an important role that competition policy could play in further promoting the objectives of the WTO, both in theory and in practice. Whether or not the United States had intended to do so, it had provided a significant empirical finding supporting the arguments for establishing a framework on competition policy within the WTO, as well as for a competition-oriented reform of the current WTO rules. The same conclusion could be drawn from observations made by the European Community and its member States, Japan and Switzerland in their respective papers presented at the last meeting of the Group (documents WT/WGTCP/W/115, WT/WGTCP/W/119 and 120, and WT/WGTCP/W/117, respectively). As indicated more fully in the paper prepared by Korea for agenda item III (document WT/WGTCP/W/133), his delegation believed that, after the rich debate on

the interaction between trade and competition policy that the Group had engaged in over the past two-and-a-half years, the time was ripe to engage in more serious talks about the advantages and disadvantages of a multilateral framework on competition policy and on how to reform the existing WTO rules in a competition-oriented manner. As long as the Group agreed on the compatibility and shared objectives of competition policy and trade policy in terms of promoting international trade and market access, there was no reason why mechanisms to benefit more fully from the interaction of trade and competition policy should not be explored. However, as had been made clear at the last meeting, it was also important not to be too ambitious in efforts to this end. As had been said in the Symposium held before the Group's last meeting, a modest approach, consistent with the current structures of the WTO, would be the most realistic and deliverable one. Efforts to achieve excessive conformity in national competition laws might result in an entrenchment of a "lowest-common-denominator" body of rules that would be difficult to remedy over time. As one of the advocates for multilateral rules on competition, Korea was and would remain flexible on the scope, coverage and standards to be adopted in the proposed rules.

9. The representative of Switzerland recalled the debate on this item which had taken place at the Group's previous meeting, on 19-20 April. Several delegations, including her own, had presented contributions to show the impact of basic principles such as national treatment, transparency and MFN on competition policy. While some delegations remained to be convinced, for others the discussions which had taken place in the Working Group over two years of discussion had shown clearly that anti-competitive practices could under certain circumstances reduce market access and distort trade. In order to deal effectively with these barriers to international trade, it was necessary to develop rules. The report which the Working Group had adopted last December provided explicit documentation of these problems. In the written contributions which her delegation had submitted to the Group's meetings in July 1998 and April 1999 (WT/WGTCP/W/89 and 117, respectively), it had tried to show the limits of the principles of transparency and non-discrimination as they were currently defined in WTO Agreements *vis-à-vis* the field of competition law and policy. One of the central points that had been made was that, as currently defined, the principles applied only in respect of government practices. In the field of competition, the proportion of anti-competitive practices accounted for by private arrangements such as price-fixing cartels, export and import cartels, and market-sharing arrangements could not be ignored. If Members wished to remedy these situations and strengthen progressive liberalization of markets within the Organization, it was essential to ensure that competition conditions were, in fact, applied. Concerning the Note by the Secretariat on the Fundamental Principles of Competition Policy (WT/WGTCP/W/127), this provided a wide-ranging and useful exposition of the principles and objectives of competition policy. In a related vein, Article I of the Federal Law on Cartels that her delegation had submitted to the Group two years previously clearly stipulated that competition must be promoted in the interests of a market economy based on a liberal regime. With regard to the relevance of these principles to trade policy concerns, this had been clearly established in the Group's initial meetings, in 1997, in which the relationship between the objectives, principles and concepts of trade and competition policy had been discussed exhaustively. Additional discussion on this point was unnecessary to achieve further progress.

10. The representative of the European Community and its member States said that one element which had emerged very clearly from the Group's discussion was that transparency and non-discrimination were fundamental principles both for the multilateral trading system and for competition law. This had been very clearly indicated in the contribution by the United States (WT/WGTCP/W/131) and in the Note prepared by the Secretariat on Fundamental Principles of Competition Policy (WT/WGTCP/W/127). This showed that there was a very good basis on which to develop common principles relating to competition law and its enforcement, which would to a large extent build upon the fundamental WTO principles of transparency and non-discrimination. His delegation agreed with the statement made by Hong Kong, China that competition policy was a broader concept than competition law. What was also clear, at least, for his delegation, was that competition law was an essential component of competition policy. He had, therefore, noted with interest that Hong Kong, China had mentioned that it saw competition policy as also including

competition law. He felt that it was extremely important that the Group look together into the scope for development of common principles relating to the adoption and enforcement of competition law. He emphasized that such an exercise would not be aimed at the harmonization of competition laws, as there were many reasons why competition laws had to be different in individual countries. Rather, what would be desirable would be to define the elements relating to transparency and non-discrimination which were common to most jurisdictions and were most important for the multilateral trading system. It was also worth recalling that the purpose of the non-discrimination principle in the WTO was to promote the equality of competitive opportunities. In this context, effective implementation of the principle of non-discrimination implied a need to look into some aspects of competition law. These, he felt, should include the following elements: first, the existence of a national competition law which covered key anti-competitive practices and was backed up by an effective and transparent enforcement structure; second, the matter of sectoral exclusions from the application of competition law; and third, the competition advocacy role of competition authorities. These elements could contribute importantly to promoting the equality of competitive opportunities. Transparency was another key element in the context of competition law. It was clear that competition authorities were committed to the application of this principle which was fundamental both for competition and for the multilateral trading system. Here, three considerations were relevant. First, it was important to ensure transparency as regards the legal framework, including both the law itself and any related guidelines or administrative regulations. Second, transparency needed to be ensured in the enforcement process. With regard to this aspect, it was also essential to ensure due protection of confidential information. Third, it was important to ensure due process in the enforcement of the law. This had at least two aspects: first, the possibility for private firms to have access to domestic competition law systems whether through complaints presented to the competition authorities or through the judicial system. Second, it was important to ensure fair treatment of parties in the application of the law.

11. The representative of India noted that the contributions by the United States and the Secretariat had been received only shortly before the meeting, and said that they should receive further consideration at the next meeting of the Group. The contribution by the United States had clearly shown the broad relevance and importance of the fundamental WTO principles of non-discrimination and transparency to competition law and policy. It had also been shown that these principles were already imbibed in most jurisdictions' domestic competition regimes. In this regard, it was not just the rules and regulations and laws which needed to be transparent and non-discriminatory, but more importantly the processes through which those rules and legislations were enforced. A further important point which had been made by Switzerland was that some of the fundamental WTO principles, as presently defined, seemed to address government practices and government actions more than private practices and actions. This was despite the fact that the latter constituted a greater proportion of competition practices and policies. Reflecting on these observations, three conclusions could be drawn. First, the fundamental WTO principles were basic to any competition policy regime. Second, these principles should be incorporated in domestic policy regimes. Third, and this was linked to the broader objective that the Group seemed to be arriving at in its discussions over the past one-and-a-half years, countries which did not have domestic competition policy regimes at the moment not only needed to have such regimes – this would be helpful – but also needed to ensure that these regimes imbibed these basic principles. However, while his delegation agreed with others regarding the relevance and importance of these principles, he did not think that this created a need for a multilateral framework of rules as the way to move forward. Harmonization, as the representative of the European Community and its member States had stated, was not an objective. Similarly, he felt that, at least on the basis of the discussion that had taken place on this item, the need for multilateral rules had not been shown. With regard to the Note by the Secretariat, the section where the rules of competition policy were elaborated was important in that it could assist the Group in focusing on both the broader rules of competition policy and the more micro rules of competition laws and regimes. This could assist the Group in its consideration of other agenda items, including with respect to the subject of trade remedies.

12. The representative of the United States, responding to the comments made on his delegation's paper (WT/WGTCP/W/131) by the delegation of Korea, said that his delegation's assessment that most countries' competition laws and policies were consistent with basic WTO principles could also be taken as demonstrating that from the WTO standpoint, things were fine as they stood and that no multilateral framework was needed. As had been said by US Assistant Attorney-General for Antitrust, Mr. Joel Klein, at the recent Berlin Cartel Conference in Berlin, "if it ain't broke, don't fix it".

13. The representative of Norway said that the Note by the Secretariat on the Fundamental Principles of Competition Policy (WT/WGTCP/W/127) would be especially useful for trade officials. He noted that the first category of principles discussed in the paper was defined in the form of overriding goals of competition policy such as economic efficiency. In his view, it would have been useful to distinguish more clearly between the goals of competition policy, on the one hand, and the relevant principles, on the other. Furthermore, the paper indicated that the most basic goal of competition policy was to promote and maintain healthy inter-firm rivalry in markets. Although this could be said to be a partial goal, his delegation felt that the overriding objectives of competition policies were or should be those enumerated in paragraph 16 of the paper, namely economic efficiency, consumer welfare and economic development. The promotion of inter-firm rivalry in markets was more to be regarded as a means rather than a goal in itself. He stressed, in particular, the importance of the principle referred to in paragraph 34 of the Note, that competition policy protects competition and not competitors. In the international context, this implied that nationality was irrelevant in well-constituted competition policies. With regard to the relevance of competition principles for trade policy, it could be said, firstly, that such principles could clearly contribute to secure market access and provide predictability in markets; and secondly, that competition policies, including the application of fundamental competition principles and the multilateral trading system, should be made mutually supportive in order to realize the broader societal objectives that he had mentioned. There was, therefore, a need to ensure an orderly relationship between a defined set of fundamental competition principles and the trading system.

14. The observer from Croatia said that the interaction between trade policy and competition policy called for more efficient enforcement of competition rules, including those contained in national laws. It also highlighted the need for international cooperation in this field. Croatia, as a country in transition from the mid-European region had faced significant changes in market structures, and had found it necessary to initiate extensive reforms to its legal system as a whole. As one element of the necessary reforms, it had enacted the law on protection of market competition in 1995. The law stipulated rules of conduct and a system of measures aimed at protecting free and effective market competition, and was modelled on Articles 85 and 86 of the Treaty of Rome. The law as well as the entire competition framework of Croatia reflected the principles of transparency, national treatment and most-favoured-nation treatment. The Croatian Competition Authority made its best efforts to ensure equal access to the market to every company which appeared on the market. With regard to transparency, the law on protection of market competition and related by-laws were published in the Official Gazette, with the newest amendments to the law. In 1998, it was decided that the agency's decisions and the competition cases would be published in the Official Gazette as well. In the same way, the second degree decisions, which were issued by the Administrative Court of Croatia, were also published in the Official Gazette. Concerning the matter of international cooperation in the field of competition policy, she felt that the promotion of competition and a competition culture was necessary for countries in transition. Competition advocacy promoted national welfare and was especially important for obtaining the resources and mechanisms for preventing anti-competitive practices such as horizontal restraints and abuse of a dominant position. Perhaps, it would be worthwhile to develop a multilateral system of competition rules, especially in view of the fact that anti-competitive practices harmed the development of international and regional trade.

15. The representative of Hong Kong, China, responding to comments by the United States on the need or otherwise for a multilateral framework to codify the application of WTO principles on national treatment, MFN and transparency to competition policy, said that Article XVI:4 of the Marrakesh Agreement stipulated that each Member should ensure the conformity of its laws, regulations and administrative procedures with its obligations in the WTO Agreement. There was no doubt that the principles of national treatment, MFN and transparency had been enshrined in the WTO Agreement. Therefore, by virtue of Article XVI:4, those competition policies and competition laws that had an impact on international trade in general, and relating to individual WTO agreements in particular, would necessarily be subject to the three principles under discussion. Consequently, he remained to be educated as to why additional frameworks or elements needed to be considered.

16. The representative of the European Community and its member States, replying to the point made by the United States that "if it ain't broke, don't fix it", said that, if consideration was being given to certain commitments at the multilateral level, it was not solely a question of determining whether existing national laws or the laws of other countries created a problem in terms of those commitments. Rather, the starting-point should be a consideration of whether competition law was relevant for the trading system. On this point, the discussions that had taken place in the Group thus far had shown clearly that there was a very large degree of agreement that the effective application of competition law complemented and reinforced the process of trade liberalization. In the light of this, the question arose as to whether such law had to be implemented by countries purely at the domestic level, or whether it was something which could usefully be reinforced through common commitments and common understandings. In his delegation's view, the latter was clearly the case. As a second comment, his delegation was convinced that cooperation in the field of competition policy was a global issue and was something from which all countries should benefit, and in which all countries could participate. An option which was based purely on bilateral agreements was something which did not respond adequately to the challenges of globalization. He emphasized, however, that, in order to have effective and sustained cooperation, it was not necessary to harmonize competition law, and this was not the objective of his delegation. Rather, what was needed was a common agreement on the key principles which should be reflected in competition laws.

17. The representative of Japan said that his delegation was very much encouraged by the statements made by Korea as well as by the European Community and its member States that there were significant commonalities between the fundamental WTO principles and competition policy, and especially the competition-oriented principle as was correctly noted in the Note by the Secretariat. A number of WTO instruments, including the GATS in general, Article 40 of the TRIPS Agreement and the results of the Basic Telecoms Negotiations, all suggested that competition enhancement was an important aspect of trade liberalization. Clearly, the WTO was the right place to study the possibility of adopting a multilateral framework on competition policy.

18. The representative of Malaysia said that, as had been pointed out, even now WTO Members were required to notify, in the interests of transparency and non-discrimination, all relevant laws and provisions. Consequently, he did not see the value added in having global rules on competition policy that would inscribe and further entrench these principles. Of course, domestic competition laws should firmly entrench these principles. However, it should be left to the domestic legislators to formulate domestic laws and as far as his delegation was concerned, international cooperation could be pursued through bilateral means and there was no need for having global rules or rules at the multilateral level discussed in the WTO.

19. The representative of the Czech Republic said that it was clear to his delegation that questions concerning the application of regulations governing economic competition must play a leading role in the evolution of economic policies. For this reason, it placed great emphasis on the debate concerning adherence to the fundamental WTO principles of national treatment, most-favoured-nation treatment and transparency. These principles provided a basis for achieving the aims of competition policies and also for effective international cooperation in this field. The importance of these principles was

greater than ever in this era of globalization of world trade. This trend, which was indicated by the increased concentration of the market in a few major centres, necessitated clear legislation which in turn would shape the economic policies of each country. Only through adherence to these principles would WTO Members create a favourable environment for fair competition and likewise for the growth of international trade with all of its positive repercussions on economic development and living standards worldwide.

20. In reflecting on the discussion on this item, the Chairman recalled that, in the course of the discussion of this item at the Group's meeting in April, a number of Members had made the point that the WTO principles of non-discrimination, national treatment and transparency were relevant in the field of competition policy. The discussion today had substantiated this point, with reference to a number of Members' national experiences. For example, the contribution of the United States had made the point that the antitrust laws of that country indeed incorporated the fundamental WTO principles. A number of other delegations had made the same point regarding their respective national laws. In this context, several important questions had been raised. First, it had been pointed out that it was important to look not only at the wording of the relevant statutes, but also at the possibility of discriminatory application of competition laws. Further to this point, it was important to consider the question of what escaped the law, either because it was exempted or it was excepted. This was because the extent of exceptions and exemptions to the law might create a possibility of differential treatment. With regard to the principle of transparency, one delegate had mentioned the fact that, even if a law or an agency was required to adhere to the principle of transparency, fulfilling this commitment required resources and some countries might have more difficulty than others in this regard. Another delegation had tried to spell out the elements that would be involved in applying this principle in the context of competition law and policy. He had suggested, for example, that these might include not only transparency with respect to the basic legal framework but also transparency of the enforcement process, transparency with respect to access of foreign firms to the domestic competition law system and also due process requirements. A detailed analysis of these elements might be needed to ascertain the relevance of the fundamental WTO principle of transparency to competition policy. The paper prepared by the Secretariat for this meeting had looked at the fundamental principles of competition policy *per se*, as opposed to the matter of how fundamental WTO principles applied to competition policy, and a number of delegations had indicated that they had found it to be useful. It had been observed that principles could be delineated at different levels - the level of objectives, the level of policy design and the level of institutional design and due process. It had been suggested that these principles were fully consistent with the principles of trade policy or, at least, trade liberalization. In other words, the implementation of transparent and effective competition policies by WTO Members was something that would help to promote the goals and principles of the multilateral trading system. Further to this point, an extended and inconclusive discussion had taken place on what, if anything, needed to be done to entrench the application of fundamental WTO principles in the field of competition policy, given the fundamental complementarity of competition policy with trade liberalization. One view was that, in fact, competition policy was already fully consistent with the fundamental WTO principles - indeed, naturally so given its focus on protection of competition as a process rather than individual competitors - and, therefore, that nothing particularly needed to be done to reinforce this. This point of view had, however, been challenged in two ways. First, it had been said that, even if it seemed apparent that competition policy satisfied the requirements of the fundamental WTO principles of national treatment, most-favoured-nation treatment and transparency in some key jurisdictions, would it not be useful to reinforce this tendency and ensure its general applicability across the membership of the WTO through more specific and formal commitments? It had also been pointed out that, even if competition legislation itself was already subject to fundamental WTO principles, this might not address situations in which market access was thwarted through private arrangements. This may be particularly true in national markets where there was no competition law or effective enforcement structure. From this perspective, some delegations had felt that there was a case to be made for some kind of framework agreement that would involve a commitment to adopt a competition law, and would spell out specific elements that should be reflected in the law with respect to the fundamental

principles of national treatment, most-favoured-nation treatment and transparency. Of course, certain other Members had felt that this was premature or unnecessary and an unwelcome intrusion on national sovereignty. He emphasized that these were merely his personal reflections on the discussion.

II. APPROACHES TO PROMOTING COOPERATION AND COMMUNICATION AMONG MEMBERS, INCLUDING IN THE FIELD OF TECHNICAL COOPERATION

21. The representatives of the European Community and its member States, Zimbabwe on behalf of the WTO African Group, and Romania introduced written contributions on this agenda item (documents WT/WGTCP/W/129, WT/WGTCP/W/126 and WT/WGTCP/W/132, respectively). In addition, the representatives of the United States; Singapore, on behalf of ASEAN; Japan; Australia; Switzerland; Canada; Hong Kong, China; India; Korea; the Czech Republic; the European Community and its member States; and Morocco made oral statements or posed questions on this item.

22. The representative of the European Community and its member States, introducing document WT/WGTCP/W/129, said that, while bilateral agreements were an important means of developing international cooperation, they had some limitations as well. Bilateral agreements were drawn up mainly between countries which shared the same ideas in the field of competition policy. Further, they were set up on a case-by-case basis and this approach did not make it possible to take up all the challenges arising from globalization. A broader approach needed to be considered. In administering the bilateral competition law agreements to which the European Community was a party, the Commission did not consult every country affected by a competition investigation; rather, it only consulted those countries with whom the Community had signed a bilateral agreement. It was not feasible to set up a bilateral agreement with every country, since in many cases very few business transactions were involved. In contrast, within the framework of a multilateral agreement, countries would be informed in a quick and detailed way about the cases that were important to them. The contribution presented by his delegation was organized around two major issues: the Community's experience with respect to international cooperation on competition matters, and the role that the WTO could play in this regard, including the matter of the provisions relating to cooperation that could be inserted in a multilateral agreement. The Community had concluded a bilateral agreement with the United States. This agreement included provisions on positive comity. Positive comity entailed several advantages, for instance cutting down on the number of cases examined by competition authorities and reducing market access problems arising from anti-competitive behaviour. Positive comity was also an important alternative to the extraterritorial application of competition rules. To date, however, this tool had rarely been applied and perhaps there were lessons to be drawn from this when considering the adoption of a multilateral cooperation framework. Limited use of positive comity was not a problem for competition authorities closely attached to their own work programme and priorities and who did not wish to be overwhelmed by inquiry requests transmitted by other countries. This suggested that positive comity should not enter into a multilateral agreement as a binding tool. There were two possible options in this regard. One option was to define the general principles of positive comity in a multilateral agreement and develop implementation through bilateral agreements. Another option was to build into the multilateral agreement limitations intended to avoid the proliferation of inquiry requests. A multilateral agreement could also feature an obligation to notify investigations having an important effect upon WTO Members. With regard to the matter of technical assistance, the Community was heavily involved in providing this. While such assistance had been principally directed at countries seeking accession to the European Union, great efforts had also been made in this regard for countries in Latin America and the Mediterranean region. The provision of technical assistance could play an important role within a multilateral framework. It was important to ensure that the provision of technical assistance took into consideration that host countries were at different levels of development. Technical assistance could be provided more efficiently if there was increased cooperation among the different agencies performing this function.

23. The representative of Zimbabwe, speaking on behalf of the WTO African Group and introducing document WT/WGTCP/W/126, said that, while the Group was in agreement with the overall thrust that markets should remain competitive, developing countries should be assisted to develop their competition regimes in order to ensure efficient competition and the protection of the consumer. In the view of this Group, special attention should be accorded to the specific situation of many African countries that had not yet adopted domestic legislation on competition matters, or created institutions for the enforcement of competition policy. Two levels of technical cooperation were interesting for the WTO African Group. At the operational level, countries could be assisted in developing their institutional capabilities on a bilateral, on a regional and on a multilateral basis; relevant institutions and organizations in this regard were the World Bank, the OECD, the European Commission as well as the UNCTAD and the WTO. A second level of cooperation related to the analysis of certain anti-competitive practices with cross-country effects; mega-mergers, for example. The WTO African Group would encourage the Working Group to examine this issue in its further deliberations.

24. The representative of Romania, introducing document WT/WGTCP/W/132, said that international cooperation in the field of competition law and policy was useful even if initially limited to the exchange of non-confidential information. It paved the way for the adoption, at a later time, of rules such as positive comity and bilateral notification of investigations. At an advanced stage, cooperation should aim at coordinating actions controlling anti-competitive practices. This type of cooperation promoted the efficient enforcement of competition law as it reduced the risk that domestic agencies might take conflicting decisions with respect to competition problems cutting across national boundaries. From a broader perspective, competition policy could help to prevent restrictive practices from nullifying the welfare gains resulting from the elimination of tariff and non-tariff barriers. The application of competition policy would benefit from the adoption of international rules. For instance, there was value in setting up procedures through which a country could consult others with respect to the control of anti-competitive practices and exchange information relating to these practices. Competition policy was a main pivot integrating Romania into the multilateral trading system. In addition, in Romania, as was the case in other Central and Eastern European countries, competition policy played an important role in enforcing the European Agreements as well as in pre-accession strategies. Trade liberalization and deregulation did not obviate the need for properly regulating the behaviour of private firms and the government as an economic agent. For instance, the formation of strategic alliances by way of acquisitions and mergers could create a market environment leading to the abuse of dominant positions. In addition, privatization could convert a government monopoly into a private monopoly. As these issues were very complex, they merited multilateral discussions. Such discussions would enhance the abilities of national competition authorities to create and protect competition in the domestic market. Romania had signed bilateral cooperation agreements both with WTO Members, such as the Czech Republic and Bulgaria, and with non-WTO Members such as the Russian Federation and Belarus.

25. The representative of the United States said that the United States shared many of the views that had been expressed by the European Community and its member States. For instance, the United States agreed with the Community that cooperation in international enforcement and policy issues was extremely important, and that technical assistance to antitrust agencies in countries that had recently adopted or were in the process of drafting antitrust laws was crucial to effective antitrust enforcement in those countries. However, the United States had questions and reservations about other aspects of the presentation by the Community. First, the notification of antitrust actions as proposed by the Community was unworkable. The United States made more of these notifications every year than any other country; nearly 130 in 1998. These notifications were made either in the course of an investigation, or nearing the end of an investigation at the point in time where the agency concerned was contemplating prosecution, in a criminal context, or taking non-criminal action against a merger or similar matter. These matters called for great confidentiality and secrecy, given the due process protection that should be accorded to companies involved in antitrust investigations. Notifications were made ordinarily on a bilateral basis; that is, only the affected country was notified. This meant

that, for instance, the OECD secretariat was not notified. Disclosing upcoming antitrust actions to all OECD Member countries would make a mockery of the notion of confidentiality, apart from impairing the effectiveness of such actions. Second, the Community had expressed the view that disciplines at the multilateral level on positive comity should be non-binding. In the opinion of the delegation of the United States, this position was inconsistent with the Community's objective to arrive at a multilateral agreement on competition matters binding WTO Members to specific commitments. Third, the justification for a multilateral agreement standardizing country practices in the area of competition was not evident. There was nothing theoretically inappropriate or offensive about having 80 plus competition laws in the world. Striving for homogeneity in this field was of no particular relevance to any practical concern. Therefore, from the perspective of the United States, a major problem with the Community's proposal was it did not address why the diversity in antitrust laws around the world was a bad thing that needed to be fixed by imposing some sort of standard regime upon the laws. Lastly, centralizing the provision of technical assistance to new competition agencies did not seem warranted. The experience of the United States in this regard had been that countries seeking assistance usually had a clear idea of what they needed and who they needed it from, and thus there was no point in having some centralized organization step in to provide overall coordination. There was nothing wrong in a developing country seeking technical assistance and policy advice from several countries at once.

26. The representative of Singapore, speaking on behalf of ASEAN, noted several "markers" in respect of the arguments made in favour of developing WTO instruments addressing cooperation on competition law and policy. To begin with, past experience with international cooperation, at the bilateral, regional or multilateral level, had confirmed that it was facilitated by a degree of commonality. Differences in substantive competition law, differences in enforcement practices and procedures and differences in the economic, social and political environment underpinning the direction that Members took on competition policy and law, could constitute legitimate impediments to cooperation. Nevertheless, a number of arguments had been put forward favouring the adoption of formal instruments of cooperation at the WTO. For instance, the argument had been made that, following globalization, the effects of private anti-competitive practices could now be felt across countries and that could result in conflicts of law and jurisdiction and in excessive costs, not only to firms, which were subject to different jurisdictions, but also to competition agencies. It had been argued, further, that the solution to these problems lay in making multilateral cooperation binding. This prescription raised several questions. First, were these problems all that prevalent? A few well-publicized multi-jurisdictional cases did not make such problems global nor did they make a case for a global solution. Second, could other approaches be more realistic? Past experience bore important lessons in this regard. In ASEAN's view, it appeared that bilateral and regional approaches had been relatively more successful than multilateral ones. Besides, none of the instruments that had been negotiated or discussed at the multilateral level, such as UNCTAD's Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, or the numerous instruments developed by the OECD, were binding. They remained as recommendations or guidelines. Another marker related to the costs and benefits of cooperation at a WTO level on competition law issues. Did the benefits of cooperation outweigh the considerable costs entailed in achieving the degree of commonality of approach required to ensure the success of multilateral cooperation? Some had suggested that, even if the modalities for cooperation were flexible, there was a net benefit to be gained from cooperation. Nevertheless, the fact remained that Members would only be prepared to cooperate if there was a shared perception of common interest and mutual benefit. The representative of Australia said that these were important matters for consideration in the Group.

27. The representative of Japan offered a number of comments with respect to the presentation by the European Community and its member States. He recalled that the contribution by the Community had focused on two issues which were important from the perspective of a WTO framework on competition: the exchange of experiences relating to the application of competition law, and the promotion of enhanced and better coordinated technical assistance with respect to competition matters. A further step in the dissemination of experiences regarding the application of competition

law would be to launch regular reviews at the WTO in the area of competition policy, including of the handling of individual cases. The WTO already had the Trade Policy Review Mechanism (TPRM) in place but the TPRM dealt with broader trade issues and one could not expect to have sufficient discussion of competition law and policy in this context. In the view of his delegation, it was useful to consider the possibility of setting up regular WTO meetings focusing on competition law and policy. He said further that, as had been pointed out in earlier meetings, technical assistance could make a substantial contribution towards helping Members solve some of the difficulties involved in implementing a competition regime. An option worth considering was the creation of technical cooperation and competition advocacy support systems within the WTO. In particular, it would be valuable to discuss whether the WTO could assist Members facing problems with respect to the application of competition law and policy through technical cooperation and competition advocacy.

28. The representative of Switzerland said that in the view of her delegation it was essential to ensure that national legislation on competition matters conformed to the minimal requirements of the WTO system – i.e., national treatment, transparency and MFN treatment. The importance of greater cooperation between competition authorities was underlined by the many examples referred to by the United States and the European Community in the discussions in the Group. These had highlighted the distinctions to be made between different types of cooperation. The first form of cooperation between competition authorities was solely educational; it involved cooperation between a competition authority with substantial experience and another which had not gone past the process of putting the legislation into practice. This kind of cooperation could be seen as a form of technical assistance. At a second stage, there was a more elaborate type of cooperation featuring the exchange of non-confidential information regarding specific inquiries, the notification of decisions and inquiries to affected trading partners, and possibly the introduction of a traditional positive comity mechanism. Some Members had taken a position already on what was the level of cooperation they could accept. This seemed prejudicial, however, since there was not a direct connection between cooperation consisting of technical assistance and more developed and elaborate forms of cooperation. Besides, the context in which cooperation took place was evolving given the speed at which developing countries and transitional economies were adopting competition policy. Limiting discussions to educational cooperation could mean failing to anticipate the real needs that developing countries and transitional countries might face in the near future. Her delegation agreed with the European Community and its member States that one of the main reasons to promote multilateral cooperation was that anti-competitive practices could affect several markets at the same time. Effective enforcement of competition policy in this setting required concerted communication between competition authorities. In turn, communication between competition authorities helped achieve acceptable solutions for all parties concerned. There was also a question as to whether the lack of a multilateral framework for cooperation on competition matters did not highlight some degree of mistrust between competition authorities. Multilateral cooperation could be seen as a form of confidence building. Lastly, in the view of her delegation, bilateralism and multilateralism were not mutually exclusive and the coexistence of these two types of cooperation in the area of competition could enhance multilateral trade.

29. The representative of Canada said that, given the growing interdependence of markets, the enforcement work of competition authorities was no longer conducted in isolation but rather in a more coordinated fashion in cooperation with foreign competition authorities. Canada had gained considerable experience in both bilateral and regional competition policy initiatives. NAFTA, the Canada-Chile and the Canada-Israel Free Trade Agreements featured provisions on competition policy committing parties to adopt or maintain competition laws and encouraging further cooperation on competition law enforcement. In addition, Canada had a bilateral cooperation agreement on competition policy with the United States and expected to sign a similar agreement with the European Community in the near future. Agreements of this type included commitments on cooperation and information exchange taking into account confidentiality considerations and the interests of parties. The effectiveness of bilateral cooperation agreements could be constrained by differences in substantive laws, the degree of independence of competition agencies, whether a competition agency

was adequately resourced, and differences in national laws governing the exchange of confidential information. Notwithstanding these limitations, there was a need to find cooperation mechanisms to reduce pressures for unilateral action. A multilateral initiative through the WTO could offer a broader and more coordinated approach to developing cooperation in competition policy. Such an agreement could augment and reinforce bilateral and regional initiatives. Through commitments on transparency and national treatment, such an agreement would confirm the rules of business conduct in foreign markets and ensure that firms were treated in a non-discriminatory manner with respect to the application of competition policy. In the view of her delegation, the WTO provided the most appropriate forum for an effective and comprehensive discussion of competition issues within a multilateral framework. Canada was engaged in domestic consultations on the merits of exploring, within a multilateral framework, principles such as transparency and non-discrimination in the application of competition policy; core elements of sound competition policy including due process; and approaches to enhancing cooperation on competition policy among Members. A multilateral agreement on competition policy could serve to solidify the gains from trade liberalization by disciplining private barriers to trade, improving cooperation and communication among Members on competition policy matters, and promoting greater certainty as to the rules for conducting business in foreign markets.

30. The representative of Hong Kong, China said that the competition policy of Hong Kong, China basically consisted of measures liberalizing trade and investment flows and for this reason Hong Kong, China had neither competition law nor a competition authority. In this context, there was a question as to how Hong Kong, China could cooperate with other WTO Members on competition matters. More generally, half of the WTO Members had still not adopted a competition law or established a competition authority. Hence, the paper presented by the European Community and its member States seemed premature since it took for granted the existence of national competition regimes. The fundamental objective of competition policy was economic efficiency and consumer welfare. Thus, multilateral cooperation with respect to competition policy was not an end in itself, but rather a means to achieve these objectives. The purpose of the paper tabled by the Community was not clear. The paper addressed the question of how to construct a WTO agreement on competition policy but not why such an agreement was necessary. In addition, the paper was not sufficiently clear with respect to other issues. For instance, was the agreement envisioned by the Community to be binding? Was it limited to rules regarding cooperation? Did it feature dispute settlement provisions? In the view of his delegation, the most appropriate forum to explore multilateral cooperation on competition matters was the Working Group itself. At this juncture, a WTO agreement on competition policy was certainly premature and bound to fail.

31. The representative of India said the presentations and comments made by the delegations of Zimbabwe, the United States, Singapore, and Hong Kong, China had been very useful. The paper by Zimbabwe had brought out clearly two distinct situations wherein developing countries would require assistance and perhaps advice on how to proceed. The first of these situations concerned mergers with cross-border implications. In the opinion of his delegation, this was an extremely important issue that needed to be elaborated upon in future meetings of the Working Group. The second situation concerned anti-competitive practices affecting developing countries but originating elsewhere. These practices were not controlled by the relevant national competition authorities since the effects of anti-competitive behaviour on foreign countries tended to be overlooked. This was too narrow a perspective and cooperation could help to promote the notion that the global good should be duly taken into consideration by national competition authorities. The Indian delegation agreed with the view that it was premature to discuss multilateral rules on competition policy. The implications and ramifications of such rules required further study and analysis. As had been pointed out by Hong Kong, China, the paper presented by the European Community and its member States had explained what should constitute a WTO agreement on competition policy without really elaborating on why. The necessity of such an agreement on competition policy was not generally accepted. Furthermore, the proposal tabled by the Community was problematic in several regards. First, notification of competition actions would make the burden of WTO notifications even more onerous. This was a

serious concern for developing countries. Second, notification of competition actions could be unnecessary given that the firms concerned would be better placed to inform their governments about such actions directly and this was a quicker procedure than notification. Third, the Community itself had recognized that the exchange of information and positive comity posed difficulties. The Indian delegation recognized that the exchange of experiences relating to the application of competition law, particularly between countries at different levels of economic development, was especially fruitful. In fact, experience-sharing could perhaps expedite the adoption of a competition regime. However, the dissemination of experiences in the application of competition policy did not require a multilateral framework or a WTO agreement. Similarly, technical assistance was available regardless of whether these instruments existed. Lastly, the notion that bilateral agreements were of limited scope and had to be supplemented by a multilateral agreement was directly contradicted by India's experience with respect to the Agreement on the Application of Sanitary and Phytosanitary Measures. In this case, the existence of a multilateral agreement had not, in India's view, generated the expected benefits and it was now argued that such benefits were contingent upon the establishment of bilateral agreements.

32. The representative of Korea said that his delegation agreed with the observations made by Romania and the European Community and its member States. Such observations were very similar to those in an earlier written contribution by Korea (WT/WGTCP/W/124). In particular, his delegation agreed that flexible modalities of cooperation were required to support the process of reinforcing domestic capacities, to ensure that the interests of all countries were taken into account, and that technical assistance was well adapted to the specific needs of developing countries, within a well established and coordinated framework. In the area of positive comity, his delegation agreed with the need to take a step-by-step approach with respect to introducing rules of a binding nature given the limited experience in this area.

33. The representative of the Czech Republic said his country had put in place a competition regime starting in 1991. Bilateral cooperation with some experienced WTO Members had helped bring about a competitive environment. Seen from this perspective, international cooperation was very important for the successful implementation of competition law and policy. Further, it was essential to create as wide a basis of cooperation as possible by allowing national authorities to pool information concerning anti-competitive practices. Such cooperation could be the subject of future negotiations.

34. The representative of the European Community and its member States responded to some of the comments concerning its presentation. He said that one of the main reasons justifying cooperation on competition matters within the WTO framework was that anti-competitive practices increasingly had an international dimension and therefore affected the interests of a multiplicity of WTO Members. He disagreed with the notion that anti-competitive practices with a global dimension were unimportant. Quite the contrary, investigations against international cartels, merger reviews involving multiple jurisdictions, and anti-competitive practices with cross-country effects were already relatively common. Such problems called for a framework of cooperation involving all participants in the multilateral trading system. This framework would have to be flexible in modalities so as to take into account the needs of countries at different levels of development. Such a framework could also support the progressive development of capacities in the competition field. In this connection, it was important to bear in mind the observation made by the representative of Switzerland that one should not try to distinguish the type of cooperation that arises in an enforcement context from the type of cooperation which is related to a general exchange of experiences. Both types of cooperation were needed and both of them responded to the actual needs of countries. On the subject of notifications, he said that, in the view of his delegation, if a WTO Member conducted a competition investigation and this investigation affected the interests of other WTO Members, it seemed normal that there should be some process for signalling that such an investigation had taken place, as well as a framework of consultations where other WTO Members could raise any particular concerns relating to that investigation. Further, the Community was fully aware of the need to avoid overburdening the WTO system of notifications and thus had a flexible system in mind. On the subject of information

exchange, he said that his delegation recognized that there were obvious limits to the exchange of confidential information. However, it was important not to lose sight of the fact that in every investigation there was a significant amount of non-confidential information which could be exchanged. With respect to multilateral cooperation, he said that, while his delegation was fully convinced of the value of bilateral and regional cooperation, a framework of multilateral cooperation provided wider benefits, particularly by taking into consideration the interests of third countries. With respect to the question of whether cooperation in the framework of a multilateral agreement should be binding, he said that it was important that these commitments with respect to cooperation were seen as binding, although his delegation acknowledged that some aspects of those commitments, for instance those relating to notifications and consultations, did not easily lend themselves to dispute settlement. In the view of his delegation, positive comity was at an early stage of development and creating an obligation to investigate on request did not seem warranted at this point. With respect to whether a competition regime was a pre-condition to cooperation, he said that a flexible framework for cooperation would feature progressivity of commitments so that, whatever the stage of development of the competition regime, countries would draw benefits from the kinds of cooperation suitable to their particular circumstances. Finally, with respect to whether multilateral cooperation should await a broader dissemination or development of competition law across the world, he said that this view was not practical because if WTO Members waited to have sufficient convergence in competition law to engage in cooperation they risked in fact never cooperating.

35. The representative of Canada said that one of the essential stepping stones to the development of a competition regime was the recognition of the benefits of sound competition policy. In the context of the Free-Trade Area of the Americas (FTAA) and APEC, Canada had advanced substantive initiatives aimed at promoting awareness of the fundamental elements of sound competition policy and its benefits. One of the most notable and encouraging features of the Working Group had been the active and positive contribution of developing economies. Discussions in the Working Group had illustrated the positive interaction between competition principles and development objectives. Finally, her delegation concurred with the notion that assistance to the efforts by developing economies to develop, implement and enforce domestic competition laws and policies should be coordinated internationally. Such assistance should take into consideration the particular social, political and economic structures of those economies.

36. The representative of Morocco said that there was a complementarity and a synergy between bilateral cooperation and multilateral cooperation. His delegation agreed with the Swiss delegation that there was no exclusion or incompatibility between different forms of cooperation. Bilateralism presupposed the existence of affinities with respect to language, culture and other factors, but for this very same reason it was insufficient as a tool to integrate successfully in an ever more globalized economy. A multilateral approach posed a clear advantage in this regard, but the general feeling was that it was still too early to consider a multilateral agreement. One should remain practical, flexible and pragmatic between these two extremes. In undertaking this approach, it was important to make a distinction between competition law and competition policy. A lot of convergence had taken place already with respect to competition law, at least as far as the fundamental principles were concerned. Basically, all countries shared the same definition of monopolies, anti-competitive agreements, abuse of a dominant position, and concentrations. These concepts lay at the heart of every competition law. In contrast, countries should retain the possibility of implementing a competition policy according to its specificities and according to the stage of development they found themselves in without this being necessarily incompatible with or contrary to any regional or multilateral commitments they may have subscribed to.

37. The representative of the United States reiterated his objections to the system of notifications of competition actions suggested by the Community. He said that he did not object to a notification process as such but to what had been proposed to be notified. As had been pointed out by India, notifications involving the exchange of non-confidential information did not mean much in the way of a substantive commitment. Conversely, if notifications involved the exchange of confidential

information, then this was a serious problem because this was the most sensitive information that any law enforcement agency possessed with respect to cases under investigation and cases that it was preparing to prosecute. Notifications of confidential information would adversely affect the due process rights of the companies involved and would surely impose serious impediments to the ability to enforce antitrust laws. In response to a question by Japan, he said that under NAFTA there was no obligation to exchange confidential information. Under the OECD, however, there was an obligation to notify individual OECD governments about upcoming competition enforcement actions when such actions affected their interests significantly. These notifications were exclusively bilateral, from government to government. Bilateral notifications served the purpose of the notification obligation which was to give the government in question an opportunity to convey any possible concerns about the proposed action. The experience of the United States had been that bilateral notifications did not adversely affect the confidentiality and the integrity of investigations, nor the due process rights of the firms involved.

38. The Chairman offered a number of comments summarizing the major issues that had been outlined in the foregoing presentations. There had seemed to be general agreement that cooperation was useful. For instance, the point had been made that cooperation would assist developing countries in dealing with international mergers and anti-competitive practices affecting such countries but taking place in other markets. Most of the discussion had centered on whether there were complementarities or synergies between bilateral and multilateral cooperation. Specific issues discussed in this regard included voluntary cooperation as opposed to a commitment to cooperate, and small-scale cooperation between like-minded countries versus cooperation in a more general framework. Several contributions had raised questions as to how cooperation, in whatever format, could be made more efficient. Another question had been whether there was a tendency for voluntary cooperation to result in a binding process. A number of delegates had explained what they would include in a framework of multilateral cooperation; for example, general competition advocacy, a competition review mechanism, multilateral notifications, exchange of information, and positive comity. Other delegates had also addressed the objectives of multilateral cooperation; that is, what additional purpose would multilateral cooperation fulfil as compared to bilateral cooperation? Some had argued that multilateral cooperation would help fill in the gaps existing in bilateral cooperation given that bilateral cooperation was generalized and thus left third countries out of the process. Others had said that a multilateral framework was increasingly necessary because there were more and more anti-competitive practices with international implications. Words of caution with respect to a multilateral framework for cooperation had also been expressed. A first comment in this regard had been that cooperation was best left to parties who wanted to cooperate and should remain a flexible tool to remain useful. Another view had been that cooperation required a certain amount of commonality which did not sit well in a multilateral framework including very diverse countries. A counter-argument to this view had been that cooperation was most useful between countries which were at very different levels of development and had different experiences.

III. THE CONTRIBUTION OF COMPETITION POLICY TO ACHIEVING THE OBJECTIVES OF THE WTO, INCLUDING THE PROMOTION OF INTERNATIONAL TRADE

39. The representatives of the European Community and its member States, Korea, and Japan introduced written contributions (in Japan's case, two contributions) relating to this agenda item (documents WT/WGTCP/W/130; WT/WGTCP/W/133; and WT/WGTCP/W/134 and 135, respectively). In addition, the representatives of the United States; Zimbabwe on behalf of the WTO African Group; Switzerland; Hong Kong, China; Korea; the European Community and its member States; and Japan made oral statements or posed questions on this item.

40. The representative of the European Community and its member States, introducing document WT/WGTCP/W/130, said that a multilateral framework for competition would make a major

contribution towards the promotion of international trade. This framework should be part of a more general and balanced WTO agenda. In the view of his delegation, there were several benefits to be derived from such a multilateral framework. First, although it was generally recognized that anti-competitive practices had a significant adverse impact on international trade and investment, especially in the context of globalization, there was no mechanism at the WTO to address such practices. A multilateral framework on competition would play this role. Second, because many countries had adopted and were enforcing competition law, and because anti-competitive practices increasingly had an international dimension, there seemed to be a need for a multilateral framework for cooperation, complementing cooperative efforts at the bilateral and at the regional levels. Third, a WTO agreement on competition would contribute towards the spread of a competition culture and this would reinforce the WTO system overall. Finally, a multilateral agreement on competition would be very helpful in cases falling under a multiplicity of jurisdictions and this could help reduce unnecessary costs to business.

41. In his opinion, there were several elements that should be considered in the context of a multilateral agreement on competition matters. The first one related to common principles and rules on competition law and policy. Principles such as transparency and non-discrimination were essential building blocks for both effective competition law and the multilateral trading system. Discussing other principles of competition law and policy promoting an open trading system would be a useful exercise. The second element concerned the need to focus on anti-competitive practices with a significant impact on international trade and investment. It was generally recognized that hard-core cartels were in this category, that their harmful effects were clear and unambiguous, and that they could, therefore, be treated under a common rule. In contrast, in areas where competition law relied on a case-by-case assessment, such as abuse of dominant position or monopolization, and vertical agreements, a common rule was not the right approach because it would eliminate the flexibility which was essential for a proper assessment. The Working Group should discuss how other anti-competitive practices could be incorporated into the framework. The third element suggested for consideration concerned cooperation. As the topic had already been the subject of discussion in the meeting, he simply reiterated his delegation's view that there should be a flexible mechanism for cooperation, well adapted to the needs of countries at different stages of development. Finally, he said that dispute settlement within a multilateral agreement on competition was a very complex issue requiring much further study. One early conclusion, however, was that dispute settlement in this context did not require a review of individual decisions taken by national competition authorities. In the view of his delegation, a multilateral framework of competition rules and principles had to be characterized by flexibility. In addition, it should not envisage the harmonization of competition law, given that there was value in the diversity of national practices. Convergence should occur where convergence mattered and where it helped the process of international cooperation. His delegation did not see the WTO as an institution which should develop some kind of power to investigate or to enforce competition law. This was very much a domestic process.

42. Continuing, he emphasized that a multilateral agreement on competition matters should give due consideration to the development dimension. Progressivity was an essential concern in this regard. In particular, commitments relating to the introduction of competition law would be progressive in nature on account of different levels of development and different capacities. In addition, while one of the objectives of a competition agreement could be to gradually limit exclusions from competition law, the progressivity of this process would have to take into account differences in levels of development. Flexibility was another key aspect of a multilateral framework addressing development concerns. Merger control could provide a good illustration of this flexible approach. As a number of Members had indicated that they faced difficulties in establishing a system of merger control at the early stages of development, a multilateral framework would not necessarily envisage commitments regarding merger control. A flexible approach could also be adopted with respect to small- and medium-sized enterprises. His delegation was very willing to engage in the consideration of any issues raised by developing countries where flexibility in rules was needed. Cooperation was another key aspect from a development perspective. It would provide sustained

support for the process of progressive development of a competition enforcement structure in developing countries. Cooperation in individual cases and general exchanges of experiences should be core components of a multilateral agreement on competition and should be geared towards meeting the particular concerns that developing countries had expressed in this field. The WTO itself could become a significant provider of technical assistance in the competition area.

43. The representative of Korea, introducing document WT/WGTCP/W/133, said that the paper presented by his delegation discussed how competition law and policy could contribute to achieving the objectives of the WTO, and what were the key elements of a possible multilateral framework on competition policy. Although there was no agreement or consensus on the need for a multilateral framework on competition policy, many Members recognized the desirability of such a framework. The WTO was considered by many to be the best available forum to address this issue. Some Members had argued that divergence on the substantive provisions of competition laws and enforcement practices would make it impossible to establish a multilateral framework on competition policy. However, according to other Members, the very fact that competition law and its enforcement were so diverse suggested that setting up a multilateral framework was valuable. A multilateral framework on competition policy would provide a level playing field for world trade and investment and this would also help firms reduce costs regarding compliance with national regimes. In the view of his delegation, non-discrimination and transparency should be two key elements of a multilateral framework. The substantive provisions of this multilateral framework should include commitments with respect to issues such as the adoption of a competition law, the establishment of a competition authority, and the prohibition of hard-core cartels. A multilateral framework should also feature provisions on international cooperation for better enforcement of competition law and policy. However, there would not be any commitments regarding positive comity. Further, a number of specific provisions would address the development dimension: grace periods, exemptions from certain obligations, waivers, and reservations. Technical assistance would also be of importance in this connection. While it would be difficult to impose an obligation on competition agencies to assume a competition advocacy role, the status of competition advocacy should be pressed politically to enhance competition in markets. In addition, the Korean contribution discussed dispute settlement procedures in the context of a multilateral framework. The last section of the Korean paper covered governmental measures adversely affecting international trade. Although a competition-oriented reform of the existing WTO system was not part of a future multilateral framework on competition policy, such a framework should address the anti-competitive effects of government measures.

44. The representative of Japan, introducing document WT/WGTCP/W/134, said that the view that competition policy had a major role to play in economic development, which was a key objective of the WTO, had been broadly supported throughout the discussions of the Group. A number of issues merited consideration in this regard. In particular, some Members had argued that limiting the number of the players in a given industry could facilitate the attainment of economies of scale and the allocation of resources in accordance with policy priorities. However, Japan's experience had been that facilitating rather than curbing competition in the domestic market was more likely to improve international competitiveness. In industries such as textiles, automobiles and microchips that had been the locomotives of Japan's economic growth there had been severe competition in the domestic market. This was strong evidence that exposing domestic firms to competition promoted the development of internationally competitive industries. The second issue was the impact that exemptions and exceptions from competition law had on economic development. Under the Anti-Monopoly Act exemption system, various types of cartels could be authorized. Only one type of cartel authorization related to industrial development. In practice, however, this type of cartel had seldom been used. Some industries that had applied for such authorization had not actually formed a cartel and others had not been covered by the exemption system. Thus, the exemptions system had had a negligible impact on industrial development in Japan. In the view of his delegation, careful studies should be undertaken prior to the introduction of exemption systems, taking into consideration the balance between the negative impact of these systems on competition and other policy objectives. In addition, after their introduction such systems should be reviewed in order to determine whether

they should be revised or abolished following changes in the domestic and global economies. The third issue meriting special consideration was the social effects of competition policy. In inefficient industries, the introduction of competition policy could result in heavy unemployment. An optimal approach to tackling this problem would be to combine the implementation of competition policy with policies to minimize any adverse effects of such policy by way of creating new industries, promoting job mobility and implementing relief measures for the unemployed. Japan was now actively engaged in undertaking economic structural reform in this context. With regard to the justification for competition law and the matter of dispute settlement, it had been argued that there were ways to achieve the benefits of competition law without actually resorting to such a law. It would be useful to have further discussion on this issue. In the view of his delegation, judgements on individual disputes regarding the application of competition law should be reserved to national competition authorities. When such disputes arose, it was preferable not to go beyond the exchange of opinions in a legally non-binding forum. He also offered a number of suggestions regarding the matter of a WTO framework on competition policy. First, transitional measures would be important when putting the framework into place. A second suggestion was to prioritize anti-competitive practices to be addressed. A third suggestion was to examine the appropriateness of exemptions systems, particularly any adverse effects on economic development. A fourth suggestion was to study further whether competition law was a necessity. In particular, it should be discussed whether there were ways to render markets competitive without resorting to a competition law. Fifth, it would be desirable to conduct regular reviews on competition policy, including the handling of individual cases by each Member. The last suggestion was to create a technical cooperation and competition advocacy support system within the WTO.

45. Introducing document WT/WGTCP/W/135, the representative of Japan said that it described the impact of import cartels, export cartels and international cartels on international trade and market entry by foreign firms. The impact of import and export cartels was fairly obvious. Import cartels directly restricted competition in the domestic market between domestic and foreign suppliers by restraining imports of goods and services. Export cartels restricted competition in the foreign market to which exports were directed. International cartels, in turn, prevented competition in global markets. Of course, this had an effect upon the domestic market as it generated a rise in the price of goods and services sold domestically and a reduction in consumer welfare. A complicated question was whether domestic hard-core cartels, such as price-fixing, output allocation, and the division of markets, had adverse effects on international trade. Such cartels did not distort international trade by themselves. For example, price-fixing would result in high prices in the domestic market. As high prices in the domestic market would attract entry by foreign firms, a successful domestic cartel had to be accompanied by government measures excluding foreign companies from the domestic market, such as tariffs and non-tariff barriers. Another possibility was for domestic firms to behave anti-competitively to jointly prevent the entry of foreign firms, for example by controlling the distribution of imported goods.

46. The representative of the United States said that discussions in the Working Group had provided numerous examples of how the pursuit of a soundly structured and vigorously enforced competition policy, including the enactment and enforcement of an antitrust law, supported the general objectives of trade liberalization and the development of open and competitive markets. In addition, the Working Group had learned a great deal about how trade policy and competition policy, notwithstanding their complementary roles, were frequently aimed at different objectives and operated in different contexts. Further, it was an over-simplification to posit the convergence of trade policy and competition policy and it was not necessarily the case that one policy was superior to the other. His delegation was still reflecting on how these and other considerations could come into play for discussing future work at the WTO with respect to competition policy. At this point, his delegation was firmly convinced that, where appropriate and necessary, competition considerations would continue to influence the development of WTO rules and market access provisions. For instance, competition-related concerns had been instrumental to the achievement of a high-quality agreement on the liberalization of trade on basic telecommunications services. There was no need to

undertake some sort of comprehensive review of all WTO provisions to determine whether they needed to be infused with allegedly pro-competitive modifications. In the view of the United States, the means by which competition-related concerns became important for the purpose of ensuring market access was frequently a function of the attributes of the trade involved, in particular the products or the particular markets concerned, and it was not necessary or even desirable to consider such means on a general basis. It was also important to bear in mind that certain WTO rules, such as those on trade remedies, fulfilled a particular role in the balance of concessions offered by Members and that any attempt to philosophically refashion those rules would fundamentally disrupt the existing balance in the WTO system. His delegation also remained unconvinced that the negotiation of a legal framework for competition rules and obligations in the WTO was the appropriate course to take at present. A multilateral agreement of a binding nature would provide no assurance of doing a better job in promoting mutual education, cooperation and understanding than the efforts that were taking place in the Group and other international fora. In fact, activities such as education, cooperation, technical assistance, and further analytical exploration could occur quite naturally outside the bounds of a legal framework. Furthermore, such an agreement, even if it were relatively general in scope and content, would still pose the risk of interfering seriously with the intelligent and dynamic evolution of methodologies and practices to address anti-competitive conduct. At this stage there were many ways in which the Working Group could continue to pursue many of the sensible goals motivating the various proposals for negotiation. Whether the WTO could continue to host some or all of these activities was to be settled elsewhere in the context of creating a agenda for the future work of the WTO.

47. The representative of Zimbabwe, speaking on behalf of the WTO African Group, said that few of the nearly 80 countries with a competition regime were African. The communication submitted by Zimbabwe on behalf of the African Group drew attention to the fact that, while African countries had benefited from the assistance provided by UNCTAD, the World Bank and other intergovernmental organizations in this area, the degree of assistance provided had not been equal to the challenges faced by developing economies. In addition, the Working Group had devoted insufficient attention to technical assistance and training in the adoption and application of competition policy. Therefore, the Working Group should consider how to augment assistance and enhance coordination between the relevant agencies in order to make such assistance more effective. In addition, it was necessary to undertake further studies on the strengths and weaknesses of the adoption of multilateral rules, including discussions on the so-called commonly agreed principles and rules of competition policy.

48. The representative of Switzerland said that the negotiations on intellectual property rights during the Uruguay Round provided an interesting parallel to possible future negotiations in the competition area. At the time that such negotiations had begun, relatively few Members had a functioning regime protecting intellectual property rights. However, this had been no impediment to a WTO agreement covering this subject. Discussions in the present Working Group had evidenced that there was a significant number of anti-competitive practices directly impinging upon trade. Such practices had been amply illustrated in a number of presentations, notably Japan's. The question of why a new Round should address competition aspects could be answered by referring to many of those examples. The WTO was a privileged forum for strengthening the progressive liberalization of markets through the adoption of a multilateral framework of competition rules. Opening negotiations in this sector should serve a threefold purpose. First, competition must be integrated in a horizontal manner into the system of rules and disciplines of the WTO. A sectoral approach, as was the case in telecommunications, was nothing other than a partial reply to anti-competitive practices affecting trade. A horizontal approach also meant that integrating competition rules in the multilateral system would of necessity have an impact on the WTO rules and disciplines in order to maintain consistency. Second, it was important to ensure that national competition legislation satisfied the minimum requirements of WTO principles. Third, a common approach in respect of hard-core cartels, import/export cartels or criteria for assessing certain anti-competitive practices should be thoroughly explored. In the view of her delegation, the above three objectives should be pursued bearing in mind

diverse modalities to be defined through negotiation, amongst them flexibility and progressivity. This approach seemed to be rightly balanced, particularly in the interests of developing countries and countries in transition.

49. The representative of Hong Kong, China said that technological changes had rendered the world economy of today very different from what it had been at the founding of the GATT. Firms now took decisions on investment and production matters from a global rather than from a national perspective. Therefore, there was a need to modernize the multilateral framework in tandem with economic realities. In the view of his delegation, the WTO should work towards the promotion of market contestability taking into account this changed paradigm. For instance, the Group should examine whether the notion that investment, goods and services had a clear-cut national origin should remain as the foundation of multilateral rules on trade. In addition, this review should aim at reforming and, where appropriate, removing all unnecessary measures that impeded the contestability of the global market. There were no cogent reasons why such a review should be confined to measures in either the public or private sectors. It should cover both. For these reasons, Hong Kong, China had advocated a WTO approach; that is the adoption of a competition-oriented approach to review all existing WTO rules. He said further that, while his delegation recognized the desirability of a multilateral framework on trade and competition, the question was what the optimum framework should be. If consideration was being given to the pros and cons of developing multilateral rules and disciplines, it was equally important to bear in mind that Members were at various stages of development with very different domestic considerations and institutional set-ups. Hence, any multilateral framework promoting a harmonized approach to competition in a one-sided manner would not be the best result for all Members. What was important was whether markets would become more contestable as a result of the adoption of the framework, and not whether the statute books of Members became thicker.

50. The representative of Korea said that his delegation wished to contribute some analytical inputs regarding how to reform the WTO system by introducing competition policy perspectives therein. His delegation was in broad agreement with the views presented by Hong Kong, China in this regard (document WT/WGTCP/W118). In particular, he felt that, in the process of discussing whether and how to formulate multilateral rules on competition, one should not overlook addressing anti-competitive elements in the current WTO system. Out of the six elements identified in the paper by Hong Kong, China as illustrative examples for reform, the third element, concerning producer-biased WTO rules such as anti-dumping and safeguard measures, was particularly relevant. Korea's concerns about anti-dumping rules were well-known. In addition, Korea was of the opinion that the WTO rules on safeguard measures also needed to be reviewed from a competition perspective. For example, Article 11 of the Agreement on Safeguards did not address purely private business practices, which raised the question of whether measures such as voluntary restraints initiated by private firms were prohibited under this Article. In the opinion of his delegation, the reason why Article 11 banned grey-area measures such as voluntary export restraints and orderly market arrangements was that such measures adversely affected competition. Therefore, whether or not certain grey-area measures were prohibited under Article 11 would have to be decided on the basis of the effects these measures had on competition rather than on the basis of whether the government was involved in the establishment of such measures. This interpretation appeared to be consistent with the letter and the spirit of the Preamble to the Agreement on Safeguards, which emphasized the need to enhance rather than limit competition in international markets. To avoid problems of interpretation, Article 11 required further improvement from a competition perspective. This competition-oriented review should be extended to other WTO rules.

51. The representative of the European Community and its member States, responding to a question from Hong Kong, China, said that a multilateral agreement on competition should, in his view, incorporate a binding framework of rules and principles relating to domestic legislation and enforcement, and dispute settlement would come into play only in this context. However, dispute settlement should not provide for the review of individual decisions taken by competition authorities.

There were important substantive reasons for this. Very clear rules on the substance of competition law were needed if dispute settlement was to be put into practice meaningfully. However, many anti-competitive practices were examined by competition authorities on a case-by-case basis according to their assessment of the particular situation in the market. His delegation did not think it was sensible to allow dispute settlement to go into how a particular anti-competitive practice had been assessed. This would imply a substantive overview of the work of competition authorities by panels which, in the opinion of his delegation, was neither feasible nor desirable to envisage. Further, although there were areas of competition law with rules subject to precise application, the *per se* prohibitions regarding cartels for instance, gathering evidence to prove the existence of a cartel was extremely fact-intensive. Dispute settlement in this context would involve a panel review of whether the facts of a case justified the application of the law. Again, in the view of his delegation, this kind of panel review was neither feasible nor desirable. Dispute settlement regarding trade remedy cases should not be seen as a model for dispute settlement in the area of competition policy commitments. Each particular WTO agreement had its own justifications for the scope of the obligations contained therein. In response to a question from Australia regarding the treatment of small- and medium-sized enterprises within a multilateral agreement on competition matters, he said that his delegation was not proposing to exempt such firms from the application of competition law and the scope of a multilateral framework. Rather, his delegation was of the view that, generally speaking, these types of firms would not infringe competition law given their lack of market power and that for this very same reason normally they would not be able to affect international trade. However, as small- and medium-sized firms could gain collective market power, taken together they could raise serious concerns under competition law and foreclose access to markets with a consequent disruption of international trade.

52. The representative of Japan said that his delegation shared the concern of the Korean delegation about the anti-competitive aspects of trade remedies such as anti-dumping. His delegation fully agreed with the statement by the Korean delegation that trade-related governmental measures could have anti-competitive effects on international trade similar to those caused by private anti-competitive practices, and that a competition-oriented reform of the existing WTO rules could be necessary in areas such as anti-dumping. On the issue of the multilateral framework on competition policy, he said that he found very many similarities between the papers tabled by his delegation (WT/WGTCP/W/134 and W/135) and those presented by Korea (document WT/WGTCP/W/133) and the Community (WT/WGTCP/W/130). His delegation was of the view that the Working Group should undertake further discussions on how a multilateral framework on competition policy could be developed.

IV. OTHER ISSUES RAISED BY MEMBERS RELATING TO THE GROUP'S MANDATE TO STUDY THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY

53. Mexico introduced a written contribution on this matter (WT/WGTCP/W/136). In addition, the Group had before it an Overview of Members' National Competition Legislation (WT/WGTCP/W/128) prepared by the Secretariat. The following delegations made oral comments: Argentina; Korea; Romania; Canada; Hong Kong, China; Malaysia; Japan; Australia; and the Russian Federation. The observers from UNCTAD and the OECD provided updates on relevant activities of their organizations.

54. The representative of Mexico, introducing the contribution of his delegation (WT/WGTCP/W/136), said that the aim of the paper was to set out certain ideas on the principles of competition and how they could contribute to the objectives of the WTO. These ideas were premised on the understanding that the fundamental goal was to improve the well-being of the populations of the Member countries of the WTO, through continuing liberalization and efforts to ensure the better functioning of market forces. There was no doubt that the application of competition disciplines in this framework would contribute effectively to protecting competition in the international realm and

thereby to the objectives of the multilateral trading system. Furthermore, it would seem that a general agreement as to the application of competition legislation on a national level would make an important contribution to achieving these objectives, since most countries had set themselves the goal of drawing up this kind of legislation and of applying it as transparently as possible in terms of national treatment. This system had to be strengthened through international cooperation agreements, some of which had already been established regionally. Noteworthy amongst these were the recommendations of international bodies whereby Member countries had entered into commitments to notify each other in order to coordinate their action and to respect principles such as comity. In this way, with better coordination and an attempt to achieve integration, the effectiveness of existing national legislation had been maximized and efforts had been made to eliminate restrictions affecting competition in markets, thereby ensuring the benefits of liberalization. Transparency, national treatment and most-favoured-nation treatment were essential principles for such cooperation. His delegation believed that these principles were certainly important, but that their achievements were limited largely to procedural questions. They could be particularly useful in solving coordination problems in the application of competition laws. Implicit in the most-favoured-nation concept was the principle of reciprocity. While linked to questions of procedure, this principle was understood by Mexico to be fundamentally substantive in nature. It needed to be expressed in substantive ways in competition legislation. This by no means implied a need for full convergence of competition law among WTO Members. His delegation believed that, in general terms, the legislation of most Members covered the main types of anti-competitive conduct and arrangements, and was based on essentially the same principles. However, much remained to be done in promoting reciprocity in the application of competition law and policy. Perhaps the most problematic aspect concerned waivers and exclusions from the application of national laws. To some extent, the differences that existed among countries with reference to these matters diminished the degree of reciprocity that could be reached through agreements among states. Mexico believed that Members could achieve a sufficient degree of coordination based on the principle of reciprocity wherever possible, without being over-ambitious in terms of harmonization of competition laws. Basically, this would involve specifying the fundamental criteria to be used in competition legislation. For example, it would be possible to specify fundamental criteria used by Members in addressing vertical market restrictions and abuse of a dominant position. In addressing these practices, all countries, to some extent or another, made use of concepts such as the relevant market(s) and market power. Further exploration and analysis of these concepts in the international arena would contribute to promoting the use of common analytical tools across jurisdictions, which would promote reciprocity and the effective resolution of situations in which anti-competitive practices distorted trade or impeded access to markets.

55. Another realm in which important progress had been made and further progress was desirable was in the area of international cooperation relating to predatory pricing and price discrimination. The framework for addressing such conduct internationally was contained in the Agreement on the Implementation of Article VI of the GATT. This Agreement set up a series of disciplines which covered the fundamental concepts of transparency, national treatment and implied precepts or concepts which, in one way or another, guaranteed reciprocity in dealing with these types of matters among Member countries. In this context, it was relevant to mention the objectives of anti-dumping measures as he understood them. The first objective was to protect the national firm from undue displacement. A second objective, and this had to be consistent with the previous criterion, was to avoid undue displacement without affecting the functioning of other markets. This necessitated allowances for the necessary adjustment of markets. This required an assessment of the costs and benefits of possible interventions, as was familiar to persons involved in the administration of competition policy. To some extent, the costs and benefits were recognized in certain criteria which were used in anti-dumping legislation. From this, it might be inferred that the criteria specified permitted the assessment of the minimum costs that would be acceptable in order to achieve market adjustment which in the long term would be of benefit to the entire population. However, as was described in his delegation's written contribution to the meeting, the definition of dumping raised problems in terms of its effective application under the criteria described. First of all, the concept of dumping, as it was reflected in the law, was based on price differentiation related to market power.

However, the practice of price differentiation was difficult to fit into general concepts of protection of competition since it did not necessarily involve the undue displacement of economic agents. The practice of predatory pricing was included in the broader concept of price discrimination. Price discrimination was, to an extent, defined in the Agreement on the Implementation of Article VI itself; predatory pricing was not, although this was part and parcel of the concept of dumping. His delegation believed it was important to specify these concepts clearly in the Agreement, to provide a more rational and economically sound basis for the administration of anti-dumping measures. The concept of price discrimination should be defined in terms of competition theory, with reference to concepts of costs and market power. Similarly, an effort would be made to properly define the concept of predatory pricing, through specification of variables that would be considered and the application of relevant tests. A further element which merited consideration with reference to the anti-dumping agreement and could help to refine the application of anti-dumping measures was that of injury. Rather than the mere displacement of competitors, this should be concerned with the displacement of efficient competitors. Furthermore, it should not be concerned with injury that was manifested in other types of variables that reflected medium- rather than long-term changes. Adverse changes in market structure should be part and parcel of the assessment of injury, as should be the consideration of net consumer welfare effects and the ability to abuse a dominant position. The concepts of the relevant market and market power would also be relevant. The former, in particular, would facilitate assessment of the extent of whether a particular practice was affecting the efficient functioning of markets in various ways that were explained in his delegation's written contribution.

56. The representatives of Korea; Hong Kong, China; Malaysia; and Japan said that they shared and supported most or all of the points that had been made in the presentation by Mexico with regard to existing rules on anti-dumping. The representative of Hong Kong, China said further that, with regard to the question that had been raised concerning the venue for consideration of issues related to trade remedies, although Hong Kong, China had learned a great deal from the presentations made by competition experts in the Working Group, the Group had been established to study the interaction between trade and competition policy. In this context, he felt it was appropriate that the Group give consideration not only to private anti-competitive practices but also to government measures, including trade remedies, that affected competition. The representative of Malaysia said that the concerns that had been raised by Mexico would have to be addressed adequately in the WTO, though not necessarily in the Working Group on the Interaction between Trade and Competition Policy. Like many delegations, Malaysia had found the work of the Working Group to be interesting and educational, and felt that it should continue as the educational process was far from over. His delegation did not agree with the proposals that had been tabled earlier in the meeting for negotiations on rules in this area.

57. The representative of Argentina said that, although the discussions to date in the Group had been very useful, his delegation questioned the advisability of the Group's putting forward a proposal to the Ministerial Conference. It was clear that no common view had emerged on many subjects. Two broad perspectives could be identified on the scope and focus of the Group's work. A first perspective was that the Group should confine itself to a relatively narrow focus on competition policy *per se*. A second view was that the Group should follow a much broader concept of competition policy which would include the subject of anti-dumping and many other subjects that had an influence on the organization of markets. If one took the latter view, one would also have to consider the impact on trade and competition of matters as diverse as state assistance, subsidies, banking subsidies and subsidized interest rates. However, he did not think that it was the role of the Group to consider these matters. In light of the divergence of views on these fundamental matters, Argentina was inclined to the view that it would be premature for the Group to put forward a proposal to the Ministerial Conference, though the life of the Group should certainly be prolonged.

58. The representative of Canada said that her delegation shared some of the concerns that had been raised by various Members of the Working Group regarding the application of anti-dumping measures and related WTO provisions regarding trade remedies. Related discussions that had taken

place within the WTO Committee on Anti-dumping Practices had highlighted certain aspects of the anti-dumping provisions regarding which it might indeed be beneficial to seek some clarification. Of particular concern was the trend towards adoption of anti-dumping laws by an increasing number of countries and the increasing number of actions which were being taken. The current WTO Anti-dumping Agreement provided considerable discretion to investigating authorities. In this regard, Canada had signalled that it supported a review of trade remedies within the WTO, including consideration of the possibility of integrating competition policy and public interest elements into trade remedies law. Her delegation believed, however, that these issues would be more appropriately addressed in a trade remedies forum than in one focused on competition policy. Discussions within a competition framework should focus on issues of competition law and policy.

59. The representative of Mexico said that it was important to note that, to a large extent, the Members participating in the discussion felt that the topic that had been raised by Mexico was an important one that merited consideration in the WTO. This, rather than the choice of forum, was the substantive issue. Having said this, it was his understanding that the Working Group was intended to address the interaction between trade and competition policy, and not just competition *per se*. From a procedural viewpoint, the aim was to try to settle problems of international trade. When one focused on the ultimate objective of trade liberalization, the distinction between trade remedies and competition measures became increasingly artificial.

60. With regard to the Overview of Members' National Competition Legislation that had been prepared by the Secretariat (WT/WGTCP/W/128), the Chairman reminded Members that a draft of the overview had been circulated at the Group's meeting in April (Job 2223). The current document was the same as the draft version circulated in April, except that it incorporated comments that had been received by the Secretariat from a number of Members. The representatives of Korea and Romania requested two further corrections in the document (to be done in WT/WGTCP/W/128/Rev.1).

61. The observer from the Russian Federation said that the main contribution of competition policy to achieving the objectives of the WTO was to ensure competition in international markets. In this connection, it was important to consider what might be achieved by the participation of competition authorities in the implementation of trade policy. The Russian anti-monopoly authorities paid special attention to the impact of trade policy on competition. At the moment, an important task of the anti-monopoly body was to prevent trade policy from having a negative impact on competition in the domestic market. For a number of years, a high-level representative of the anti-monopoly body, being a member of the Government Commission on Safeguard Measures and Tariff Policy, had participated actively in decision-making processes on trade policy. This permitted the anti-monopoly body to screen and, where appropriate, advise against, the imposition of restrictive trade measures that would impact adversely on competition. Recently, the role of the anti-monopoly body in providing advice on these matters had been explicitly reflected in the Russian federal law governing the imposition of safeguards, anti-dumping and countervailing measures. She felt that the advice given by the anti-monopoly body to the Commission on Safeguard Measures and Tariff Policy had had a significant impact in minimizing the anti-competitive effects of trade measures and promoting the overall pro-competitive character of Russian trade policy.

62. The representative of Australia, referring to her previous comments on the "markers" that had been put down by Singapore (see paragraph 26 above), said that, while not wishing to indicate support for any specific conclusions that had been reached by that delegation, the questions that had been posed by Singapore and others, namely regarding the nature and scope of the problems in the WTO on competition, the suitability of other approaches, and the costs and benefits of trade and competition, were among the issues that needed to be examined in the consideration of a multilateral framework on trade and competition. While Australia's position on further work on trade and competition in the WTO was still being refined, including through public consultations, the debate in the Working Group had contributed greatly to its understanding of the issues. She mentioned, further,

that in Australia, the recent release of a draft report by The Australian Productivity Commission on the impact of competition policy reforms in rural and regional Australia had generated a debate on the appropriateness of competition policies. One of the key recommendations of the report was that governments should take steps to improve community understanding of competition policy including clarification of how social considerations were to be taken into account on implementation. In due course, when the report had been finalized, she intended to provide the Working Group with extracts from it relevant to various aspects of the Group's discussions. The report had highlighted the considerable gains to the Australian economy from implementing competition policy reforms. In this way, it reinforced the general point that the broader adoption of competition principles in other economies would contribute to achieving the objectives of the WTO as well as the economic and social objectives of individual Members.

63. The observer from the OECD drew Members' attention to a Conference on Trade and Competition to be held in Paris on 29 and 30 June.

64. The observer from UNCTAD informed the Group on a meeting of UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy which had taken place from 7 to 9 June. The session had served as the preparatory meeting for the Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which was scheduled for September 2000, and had also helped to prepare the ground for the consideration of competition law and policy issues at UNCTAD X, scheduled for February 2000. In its Agreed Conclusions, the Expert Group had reaffirmed the fundamental role of competition law and policy for sound economic development, stressed the importance of the creation of a competition culture and recognized the need for strengthened international cooperation in the area of competition law and policy. It had invited the Secretary-General of UNCTAD to continue cooperation with the WTO and other organizations working in this area. It welcomed the convening of regional meetings in preparation for the Fourth Review Conference, requested the UNCTAD secretariat to pursue its technical cooperation activities, and invited the Secretary-General of UNCTAD to explore the feasibility of supporting training and capacity-building on a regional basis. The Expert Group had recommended that the Review Conference consider the following issues related to the better implementation of the Set: (a) experience gained so far with the establishment of competition laws and competition authorities, enforcement and competition advocacy, in developing countries, countries in transition, and relevant regional organizations; (b) organization and powers of competition authorities, including how to determine enforcement priorities; (c) treatment of confidential information in competition law and policy; (d) the role of competition policy in economic development; (e) competition policy issues in telecommunications; and (f) competition policy and its implications for regulatory and legislative reforms. He also drew to the attention of Members a pre-UNCTAD X Seminar on the Role of Competition Policy for Development in Globalizing World Markets to be held on 14 and 15 June 1999.

V. REQUESTS FOR OBSERVER STATUS FROM INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

65. The Working Group agreed to revert to requests made by SELA, the Organization of the Islamic Conference and the South Centre at its next meeting, having regard to the ongoing consultations on related matters in the framework of the General Council.

VI. OTHER BUSINESS

66. Regarding the nature and process for preparation of the Group's report to the General Council on its activities in 1999, the Chairman proposed that the Secretariat be asked to prepare a draft report of the type that had been done at the end of 1998 (WT/WGTCP/2), but without any recommendation.

A short meeting of the Group would be held in September, with the main item on the agenda being the approval of the report.

67. Following discussion, and in the light of comments made by a number of Members, the Group agreed that the Secretariat be asked to draft a report on the Working Group's activities in 1999 on the above basis. The report was to be factual, descriptive, balanced and objective, and would be based on the minutes of the Group's meetings.

68. Following suggestions made by Members, the Chairman noted, further, that the minutes of the current meeting would be circulated in advance of the report. The Group's meeting in September would be held as close as conveniently possible to the meeting of the Working Group on the Relationship between Trade and Investment.
