

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

**REPORT ON THE MEETING OF 22-23 MARCH 2001**

Note by the Secretariat

1. The fourteenth meeting of the Working Group on the Interaction between Trade and Competition Policy took place on 22-23 March 2001, under the Chairmanship of Professor Frédéric Jenny.

2. At the outset of the meeting, the Chairman noted that, as had been agreed at the informal meeting of the Working Group on 29 January 2001, the purpose of the meeting was to carry forward the work of the Working Group as provided for by the General Council in its decision in December 1998 (WT/GC/M/32, page 52). That decision read as follows:

"The General Council decides that the Working Group on the Interaction between Trade and Competition Policy shall continue the educative work that it has been undertaking pursuant to paragraph 20 of the Singapore Ministerial Declaration. In the light of the limited number of meetings that the Group will be able to hold in 1999, the Working Group, while continuing at each meeting to base its work on the study of issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, would benefit from a focused discussion on: (i) the relevance of fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice versa; (ii) approaches to promoting cooperation and communication among Members, including in the field of technical cooperation; and (iii) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade. The Working Group will continue to ensure that the development dimension and the relationship with investment are fully taken into account. It is understood that this decision is without prejudice to any future decision that might be taken by the General Council, including in the context of its existing work programme."

3. Following the approach used by the Working Group in its meetings in 2000 and as had been agreed at the informal meeting of the Group that took place on 29 January 2001, the Chairman suggested that the Group organize its work at the current meeting as follows:

- first, to take up the relevance of the fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice versa;
- then, to examine approaches to promoting cooperation and communication among Members, including in the field of technical cooperation;
- next, to consider the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade;

- and finally, to look at other issues that Members wish to raise that are relevant to the Group's mandate to study the interaction between trade and competition policy.

In addition, he referred to the Guideline provided in the above-noted decision of the General Council that the Working Group should ensure that the development dimension and the relationship with investment should be fully taken into account. Following the Group's past practice, it seemed that this was something which should be done in relation to each of the above four work elements.

4. He noted, as well, that, as was reflected in the Airgram, in framing their interventions, delegations might wish to bear in mind the points noted in the Updated Checklist of Questions Posed by Members in 2000 (Job 520) that had been circulated to Members by the Chairman on 24 January 2001 and the additional points that had been brought to his attention by Members in the consultations that he had held with individual delegations prior to the Informal meeting on 29 January 2001, and which he had brought to the attention of the Working Group at the Informal. At the Informal it had been agreed that these points, in addition to any others that Members considered to fall within the terms of the December 1998 decision of the General Council, including those raised in the Updated Checklist of Questions Posed by Members in 2000, could be addressed by delegations, to the extent they desired, in their written and oral contributions to the Group during the year, within the terms of General Council's decision. The points were as follows:

- first, it had been suggested that it would be useful for the Group to continue to place emphasis on addressing the concerns that had been expressed by some developing country Members regarding both the general impact of implementing competition policy on their national economies and the particular implications that a multilateral framework on competition policy might have for development-related policies and programs. In this regard, it had also been suggested that it would be helpful if countries having these concerns could be as specific as possible about the possible conflicts or constraints as well as the synergies that they perceived to exist, in order that they could be addressed as fully as possible in the Group. For example, any problems that Members continued to see arising from the application of the principle of national treatment within the field of competition law and/or policy should be raised and discussed.
- second, interest had been expressed in continuing exploration of the implications, modalities and potential benefits of enhanced international cooperation, including in the WTO, in regard to the subject-matter of trade and competition policy. In fact, two dimensions to this interest had been noted. The first concerned the modalities, benefits and limitations of cooperation between national competition agencies. The second concerned the issue of possible cooperation/interaction between trade and competition agencies/authorities in dealing with issues that sat astride the two disciplines.
- a third suggestion had been that it would be useful for the Group to have a continuing focus on the issue of capacity building in the area of competition law and policy. Two specific suggestions as to issues that could be addressed under this rubric were: (i) the process of competition law enforcement, including alternative investigatory/decision-making models and the role of judicial review; and (ii) the design of remedies in individual cases. In addition, there should be a continuing focus on stocktaking of national experience and legislation.

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

5. The representatives of the Czech Republic and the European Community and its member States introduced written contributions relevant to this item (documents WT/WGTCP/W/165 and 160, respectively). In addition, the representatives of Brazil; Canada; Hong Kong, China; the Philippines; the Russian Federation; Switzerland; and the United States; made oral statements or posed questions on this item. The representatives of UNCTAD and the OECD provided updates on relevant activities of their organizations.

6. The representative of the Czech Republic, introducing document WT/WGTCP/W/165, noted that competition policy in the Czech Republic was built around the fundamental principles of the WTO, namely, the principles of non-discrimination and transparency. These principles should constitute key elements of a WTO framework on competition policy. A binding principle regarding non-discrimination on the basis of nationality in the application of competition law framework was important since a fair approach towards foreign investors would help to attract foreign investment. The Czech Republic had applied such an approach since 1991. With regard to transparency, this was the best guarantee of the non-discriminatory application of competition law and should, in any case, be a primary concern of competition authorities. For example, publication of the basic legal framework that applied in a jurisdiction was essential to provide legal certainty for undertakings. His delegation believed that the proposed WTO framework agreement should also ensure effective deterrence of the most serious breaches of competition law. Particular priority should be given to hard-core cartels, especially to agreements on price-fixing, bid-rigging and market allocation or division. On the other hand, in relation to certain other types of anti-competitive practices, such as abuse of a dominant position, it was necessary to engage in a case-by-case assessment of the situation in the domestic market. Therefore, the adoption of a common principle prohibiting these types of practices would be too rigid.

7. The contribution by the European Community and its member States (WT/WGTCP/W/160) and the oral statement by Canada addressed specific questions that had been included in the Updated Checklist of Questions raised by Members.<sup>1</sup> In response to question 2 in Section III of the Checklist, which raised the matter of whether it was necessary to incorporate principles such as non-discrimination and transparency into a possible WTO competition agreement or whether it was sufficient to rely on existing general provisions such as GATT Articles III and X or on domestic competition laws in which such principles were, to varying extents, already reflected, the representative of the European Community and its member States said, firstly, that although experience in the WTO had shown that the principles of non-discrimination and transparency had general application, when it was considered particularly important to emphasise such principles in a particular context, they had been incorporated into individual WTO Agreements. Moreover, the principles had been adapted to ensure that they were well-suited to address the specific issues that arose in a particular policy area. A good example was the Agreement on Technical Barriers to Trade, which dealt with technical regulations and standards. Most would agree that such measures were already covered, implicitly, by Articles III and X of the GATT. However, insofar as the Members of the WTO had considered that the issues raised by this particular policy area were of sufficient concern for them to be addressed at the multilateral level, it had been considered important to emphasise the principle of non-discrimination and to have detailed, specific provisions relating to transparency vis-à-vis the particular concerns that were raised in relation to technical barriers to trade. His delegation believed that similar reasoning applied in the area of competition policy, insofar as WTO Members considered that it was an area that was important for realizing the benefits that were intended to be provided by the multilateral trading system. More particularly, given that more and more Members were adopting domestic competition law regimes, and were applying their laws to domestic and

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<sup>1</sup> Updated Checklist of Questions Raised by Members (Job 520) dated 24 January 2001.

international firms, it had become important to agree on some basic rules to which all participants could adhere. This did not imply that it was necessary to harmonise domestic competition frameworks – in his view, this should *not* be the objective of possible negotiations in the WTO. However, it was necessary to agree on some core principles to which all Members adhered and which could also be the basis for facilitating cooperation among WTO Members. In the view of his delegation, to a large extent, the necessary principles were those relating to non-discrimination and transparency.

8. Continuing, in response to question 3 in Section III of the Checklist, namely whether the non-discriminatory application of competition policy gave rise to conflicts with economic development and/or policies favouring the advancement of particular social groups, he said that a commitment to ensure that a domestic competition law regime did not allow discrimination on the basis of nationality of firms did not imply anything whatsoever in regard to other instruments of government policy that were not part of a competition law regime. Normally, the instruments that were used by governments in order to promote specific developmental and social objectives (as opposed to the efficient functioning of markets, which could also bring developmental benefits) had nothing at all to do with competition law as such. Therefore, they would not be affected by provisions regarding non-discrimination in relation to domestic competition law regimes. He noted, as well, that, in the view of his delegation, the application of a general principle of non-discrimination in the field of competition law and policy was separate and distinct from the question of sectoral exclusions from national competition regimes. The latter was known to be a sensitive issue in respect of which there were many different approaches among WTO Members. His delegation's view was that the right approach in relation to the issue of sectoral exclusions would be to permit them, subject to appropriate transparency requirements. For these reasons, a commitment to non-discrimination in the application of domestic competition law would not conflict with the pursuit of other domestic policy objectives, such as, for instance, the promotion of small and medium sized enterprises. The representative of Canada also emphasized that a commitment to the implementation of competition law, in compliance with the principle of non-discrimination, left open the possibility for a government to provide specific exceptions or exemptions to the law. For example, it was not uncommon for a competition law to contain provisions exempting the activities of state-owned enterprises from the coverage of the law. Similarly, certain competition regimes included aspects that gave preference to small and medium sized enterprises. As such, it was clear that commitments regarding non-discrimination in the field of competition law and policy in a multilateral agreement on competition policy would not conflict with domestic policies relating to economic development or the promotion of particular constituencies, to the extent that these were embodied in policies other than a national competition regime.

9. In response, the representative of the United States suggested that it was possible to imagine a situation where, in the course of enforcing a non-discriminatory competition law, a company might raise a defence that it was acting pursuant to and in reliance upon another national policy that happened to be in some way discriminatory, for example, a policy favouring certain depressed regions. A question could then arise as to what the national competition agency should do -- should it reject the company's defence on the ground that it would violate the non-discrimination obligation under the competition agreement or accept it on the basis of equity, fairness and legislative intent, even if it led to a discriminatory result? A decision might have to be made as to which policy would be given priority. In addition, he suggested that the EC had, in its paper (WT/WGTCP/W/160, page 3) stated that a WTO agreement on competition policy would have no impact on existing WTO Agreements. However, while in a narrow legal sense that might be true, it might not be true in a broader sense in which the language could be interpreted. To the extent that there were provisions in one WTO Agreement that were in conflict with other WTO Agreements, the conflict might, eventually, have to be resolved by the WTO dispute settlement mechanism.

10. In response to the argument put forward by the United States, the representative of the European Community and its member States reiterated that, according to the suggestion of his delegation, the principle of non-discrimination in an Agreement on Competition Policy would be

defined solely in relation to the context of domestic competition law. It was not a question of the extent to which the law was being applied or enforced in a manner that could be considered discriminatory or non-discriminatory. The hypothetical example raised by the United States raised could only be answered in a hypothetical manner. He assumed that if a domestic firm in a court proceeding raised a defence that was based on a policy objective other than competition law, it would have to be because that policy objective was recognised under the law as an available defence. The issue was whether the competition law allowed for such a defence. The question would then be whether that defence was available to all firms, regardless of nationality. If that was so, the case did not raise a question of discrimination. If that was not the case, then it would be necessary to discuss how the principle of non-discrimination should be defined, when Members entered into negotiations.

11. The representative of Hong Kong, China sought clarification from the representative of the European Community and its member States as to the level at which the principle of transparency would apply. Specifically, would it apply only to laws or would it apply to laws, regulations, administrative procedures and guidelines? How would it apply in individual cases? Should the transparency principle only apply to competition law *per se* or should it also apply to other domestic laws which might be relevant to competition such as in the areas of telecommunications, banking and broadcasting, etc.? How would it apply to sectoral regulators? Responding to Hong Kong, China and to question 2 in Section III of the Checklist as to whether a transparency obligation in the area of competition would apply to states, institutions or to private sector entities, the European Community and its member States commented that transparency was a key principle both for competition policy and for the multilateral trading system and that it should apply to a domestic competition law framework. The obligation would cover laws but also regulations, guidelines and due process guarantees relevant to the enforcement of domestic competition policy. It would not apply to the activities of private enterprises as such. Adherence to the principle of transparency would serve to enhance predictability and allow business and industry as well as consumers to know exactly what their rights were under the domestic competition law.

12. The representative of the Philippines referred to the notion of flexibility that had been referred to in the paper that had been submitted by the European Communities and its member States (WT/WGTCP/W/160). He understood that the EC was proposing a principles-based approach. Those principles were the same principles that were contained in existing WTO Agreements and were well known. On the other hand, the Working Group was talking, in many cases, about anti-competitive practices that were related to government policies. Government policies, measures and regulations were already covered in most WTO Agreements. Furthermore, confirmation had been provided by the representative of the OECD that in the survey that the OECD had conducted,<sup>2</sup> most of the existing Agreements, with very minor exceptions, did not display any discrimination. In this context, what was the need for incorporating these principles in the proposed framework?

13. In response, the representative of the European Community and its member States said that each WTO Agreement had to be interpreted within the context of the particular agreement. It was only when a case of clear conflict had been identified that the question of coherence or the relationship between different agreements could arise. It was possible that such situations could arise, in which case, they would need to be discussed. However, domestic competition laws were the subject of discussion. Therefore, his delegation did not see *a priori* any reason why there would be any implications in relation to areas that were covered by other WTO Agreements, such as the Subsidies Agreement. While it might also be worthwhile to improve existing WTO Agreements, that was not the subject of the debate. Subsequently, he noted that it had been questioned as to why a multilateral agreement was needed to nail down the principles of non-discrimination and transparency if they were already part and parcel of the vast majority of existing competition laws. In this regard, a second argument in favour of the inclusion of those principles in a framework agreement on competition policy was explained on pages 2 and 3 of the paper that had been submitted by his

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<sup>2</sup> See below at paragraph 18.

delegation (WT/WGTCP/W/160), namely that the inclusion of the principles would serve to enhance trust between competition authorities and would in turn help boost further cooperation between these authorities. Another reason for their inclusion in domestic competition laws and an argument for their inclusion in a framework agreement was the fact that there were, in fact, still some WTO Members who did not have domestic competition laws in place as yet. Their inclusion would provide a roadmap for such Members, since those basic principles were found in most other competition laws. Lastly, the inclusion of those principles would also serve to prevent, in the future, the introduction of discriminatory treatment in competition laws.

14. The representative of the United States noted that there was broad agreement on the importance of the fundamental WTO principles, including in the context of competition law and policy. However, when those principles were applied to particular contexts, it was necessary to be careful about how they were articulated in relation to the underlying foundations of the area or discipline that was the subject of discussion. To some extent, he had been reassured by the comments made by the representative of the European Community, insofar as it had been stated that in respect of principles such as non-discrimination, the starting-point should be to make reference to domestic competition law. Such reference needed to be made to determine how to give life to those obligations. It was also clear from the discussion regarding the notions of transparency and non-discrimination that practical judgements would need to be made along the way, if Members decided to negotiate an agreement. In referring to the principle of non-discrimination, the EC paper stated that that principle "would mean an obligation not to *formally* discriminate against firms on the basis of their corporate nationality".<sup>3</sup> Based upon his understanding of the EC position, the representative of the United States assumed that the use of the word "formally" did not mean that informally it would be appropriate to discriminate on the basis of nationality. Perhaps, a more precise articulation of the notion would be on the exclusive basis of nationality. In other words, by reason exclusively of the nationality of a firm, there should not be any discrimination. This would better recognize the wide range of circumstances that arose when one properly applied a competition law. These were the kind of questions that had to be resolved in coming to a common understanding of what the nature of obligations might be in the area. In that light, the representative of the United States was troubled by the EC suggestion that such matters could be resolved once negotiations were underway. Obviously, every negotiation sorted such matters out. However, there was a need to pursue the area with more specificity in order to understand and to advance the negotiating process, should one eventually develop. The direction that the WTO in general and individual Members would want to take in making sure that the principles of the system were respected at the same time as supporting the basic objective of promoting the sound application of competition law and policy was to ensure that the underlying foundations of competition law were being respected and that the ability to apply laws in a responsible way was unfettered. The representative of the European Community and its member States agreed that the word "formally" had been inappropriately used in his delegation's proposal. To be clear, if there was a provision in a domestic competition law which implied differential treatment either between domestic producers and foreign producers or between different nationalities, that would be a breach of the principle of non-discrimination. The more difficult issues that needed to be considered were cases where conditions existed in the domestic law which, as such, did not refer to nationality, but which, by definition, could only be met by domestic firms.

15. The representative of Brazil, affirming that a previous contribution by his delegation (WT/WGTCP/W/100) remained a valid statement of Brazil's views on the subject, said that his delegation continued to view in a positive light the discussions on the interaction between trade and competition policy in the WTO. With the reduction of trade barriers and the increase of globalisation, the safe-keeping of world trade was correlated with the repression of acts that were aimed at limiting competition such as the practices of dividing markets and price-fixing through international cartels that had the effect of greatly restricting the benefits derived from trade liberalisation. In that light, Brazil advocated the application of the three WTO principles in the area of competition policy -

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<sup>3</sup> WT/WGTCP/W/160, page 2.

namely, transparency, national treatment and most-favoured-nation treatment. For Brazil, the notion of transparency should entail access to all relevant laws, regulations and documents of each Member. Such access was crucial in order for private actors to determine how they should behave. The principle of transparency was a key underpinning of competition law and policy in Brazil; it covered laws, regulations and administrative procedures. Everyone had access to the Internet, which contained information regarding Brazil's procedures and details of law suits that had been instituted. Nonetheless, it was understood that there should be some provisions on confidentiality. By national treatment, it was understood that Members should assure foreign firms the same rights and obligations in respect of its domestic legislation, authorities, and proceedings as applied to domestic firms. For Brazil, cooperation between competition authorities was also of the utmost importance. That cooperation could vary depending upon the degree of development of each country and could range from technical assistance to technical cooperation. Another representative of Brazil stated that Brazil had, in the last few years, significantly enhanced its commitment to prosecute hard-core cartels and had associated itself with the OECD Recommendation on Hard-Core Cartels. This reflected the perception that cartels were more common than had previously been realized and imposed substantial costs on developing as well as developed economies. As part of this effort, Brazil had enacted a law that would take effect in October 2000 and would establish a leniency programme, to facilitate prosecution of cartels and other anti-competitive practices. The US Department of Justice had helped Brazil prosecute the vitamins cartel for activities within the Brazilian national jurisdiction.

16. The representative of the Russian Federation said that the principle of non-discrimination should play the same role in the area of competition as it currently played in trade policy. The principles of national treatment and MFN should also be included as key principles of a multilateral agreement on competition. Globalisation and increasing international competition meant that national competition policies were subjected to pressure by national industrial lobbies and national industrial policy to provide more favourable conditions for national companies. Analysis of cases involving foreign firms in Russia indicated that, currently, foreign companies were not discriminated against in gaining access to and in the enforcement of competition policy in Russia. Nonetheless, a commitment to non-discrimination in a WTO framework on competition policy could play an important role in ensuring the sound application of competition law and policy in the future, in Russia and elsewhere.

17. The representative of Switzerland said that due to constraints in human capacity, it would not be possible for all requests for cooperation on specific cases to be met. Therefore, it was important that, as the EC and Canada had mentioned previously, cooperation would be voluntary. That is, countries would not be required to provide enforcement assistance in all circumstances. This entailed a potential for discrimination with regard to the MFN principle. Guidelines would need to be established to ensure that the principle of MFN would be complied with. For instance, reasons would need to be given in cases when cooperation was declined. In whatever way that would be formulated in eventual negotiations, in Switzerland's view, the possibility of consulting and the commitment to sympathetically consider such requests for cooperation would be remarkable progress as compared to the situation that currently existed. The possibility of building up informal contacts was important to competition authorities in smaller countries like Switzerland and probably also to many developing countries. According to Switzerland's experience, it would be tremendously beneficial for competition authorities to meet regularly within a solid institutional framework such as an eventual multilateral agreement on competition policy.

18. The representative of the OECD informed participants that the Joint Group on Trade and Competition had taken up the subject of "rights of firms under competition laws". It was considered possible that a firm could be harmed by anti-competitive conduct in an export market yet lacked the same ability as domestic firms to pursue remedies under domestic law. However, a survey of procedures applicable to the pursuit of private interests under competition laws of Member countries established that foreign firms were generally not subject to differentiated treatment under the competition laws of responding countries. With minor exceptions, foreign firms enjoyed the same rights and privileges as domestic firms to pursue private remedies before national competition

agencies or courts. However, the means by which firms, domestic or foreign, could act in their private interests under competition laws varied substantially across countries. Those differences reflected a variety of policy choices and fundamental differences in national legal systems. As a result of the survey, the Joint Group had elaborated, in co-operation with WP3 of the OECD Committee on Competition Law and Policy, principles regarding private remedies under competition laws. Among others, the principles of non-discrimination and national treatment applied to all aspects of private participation in competition enforcement.<sup>4</sup>

19. The representative of UNCTAD stated that UNCTAD was also concerned with the fundamental principles of international trade and believed that non-discrimination was an important principle in the implementation of competition law. Transparency and the implementation or application of legislation according to the due process of law were also vital. Developing countries should have the possibility of adopting legislation or laws that corresponded with their level of development. In other words, there was not a single model for all countries. Convergence should occur after a certain period of time and legislation should be amended and improved. However, legislation should be introduced in a gradual way in developing countries. This meant that those countries that had not yet looked into the matter were given the opportunity to adopt legislation at a later stage. From a development perspective, exemptions were important for developing countries and needed to be considered in depth. The principle of special and differential treatment had not yet been dealt with sufficiently in the Working Group discussions. It was a principle to which developing countries attached significant importance. This could seem contradictory with the principle of non-discrimination. However, in a nutshell, what was being discussed was flexibility. Greater flexibility should be granted for least developed countries in the area of exemptions and exceptions. Such countries should be allowed to adopt a general competition law progressively over time. National legislation could be amended to become stricter, slowly removing exemptions and exceptions, as countries moved forward. In relation to cooperation, it was difficult to require countries to cooperate and, consequently, cooperation should, at least at the outset, be voluntary. However, it was possible to imagine cases where countries such as least developed countries or poorer countries made justified requests but in respect of which no replies were received. It was necessary to consider further the extent to which treatment granted to the more developed countries in international cooperation should be the same as the treatment granted to least developed countries or poorer countries and the application of the principle of non-discrimination in that respect. Further cooperation between international organisations such as OECD, UNCTAD and WTO and Members that were in a position to offer their experience and know-how was extremely important and welcome. The next UNCTAD Intergovernmental Group of Experts on Competition Law and Policy would take place alongside the next WTO meeting, from 2-4 July 2001. An important item that would be dealt with at that meeting was international cooperation.

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

20. The representatives of Colombia; Czech Republic; the European Community and its member States; Japan (two contributions); Korea; Romania; the United States; and Uruguay introduced written contributions on this agenda item (documents WT/WGTCP/W/162; WT/WGTCP/W/165; WT/WGTCP/W/160; WT/WGTCP/W/167 and WT/WGTCP/W/168; WT/WGTCP/W/166; WT/WGTCP/W/161; WT/WGTCP/W/164 and WT/WGTCP/W/169, respectively). In addition, the representatives of Canada; Ecuador; Egypt; Hong Kong, China; Guatemala; India; Korea; the Philippines; the United States made oral statements or posed questions on this item. The representative of the OECD provided an update on relevant OECD activities.

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<sup>4</sup> See "Remedies available to private parties under competition laws", in *Trade and Competition Policies – Options for a Greater Coherence*, OECD, 2001.



21. The representative of Japan, introducing document WT/WGTCP/W/167, said that competition policies were increasingly recognized as a vital engine for economic growth. While in recent years, developed countries had established mutually cooperative relations primarily through the OECD and bilateral channels, developing countries were making a growing number of requests for cooperation, that were mainly requests for technical cooperation. In the case of technical cooperation activities engaged in by Japan, most programmes had involved countries in the Asia-Pacific region. The Japanese competition agency, the Fair Trade Commission of Japan, had hosted trainees from foreign competition authorities and had despatched competition experts on short and long-term assignments to assist foreign competition authorities. However, over the past few years, a number of requests for technical cooperation had been declined due to resource limitations. It appeared that other developed countries and international organizations were confronted with the same situation. Bilateral and regional technical cooperation activities provided developing countries with valuable opportunities to obtain skills and specialized knowledge in the area of competition policy. Therefore, the continuation of such activities was entirely justified. However, it was necessary to recognize that there was a risk of duplication since technical cooperation was provided through many sources. Lack of coordination would lead to wasting limited human and financial resources. Duplication could be minimized by improving coordination among existing cooperation programmes. In certain regions, such efforts were already proving successful - for example, technical cooperation activities among members of APEC. In the opinion of his delegation, this approach should ultimately be extended to cover all geographical areas through action in the WTO. The involvement of an international organization in this area would also be desirable in view of the significant diversity among developing countries. Certain advantages were associated with a multilateral cooperative framework that did not exist in relation to either bilateral or regional frameworks. Although UNCTAD, the World Bank and the OECD automatically came to mind with respect to the provision of technical cooperation in the field of competition law and policy and notwithstanding their achievements on this front, in the opinion of his delegation, the time had come to give serious consideration to setting up a multilateral framework that would provide technical assistance to a broader range of developing countries and that would identify more clearly the objectives and direction for the provision of technical cooperation. Such a framework was necessary for at least two reasons. First, globalization meant that trans-border anti-competitive business practices were increasing. Second, while anti-competitive practices affected both developed and developing countries, developing countries tended to have weak competition regimes and this made them more prone to anti-competitive practices.

22. Continuing, he recalled that there was an increasing number of bilateral cooperation agreements in the field of competition policy. Since bilateral agreements were based on the principle of reciprocity, they tended to be concluded between developed countries that had similar levels of sophistication in terms of their competition regimes. It was notable, however, that some bilateral agreements had recently been concluded between developed and developing countries. In the light of this development, one option was to create an international network of bilateral cooperation agreements in the hope that the number of such agreements would eventually multiply. Technical cooperation could be provided for in those agreements. However, in the view of his delegation, such an approach would take too much time. Further, such an approach might exclude countries that had an important role to play in fighting specific anti-competitive activities with international dimensions. In contrast, a multilateral framework for cooperation on competition matters would offer countries the opportunity to share in the benefits of the system, if they so desired. Another justification for adopting a multilateral approach was that, following the introduction of competition law, there was a need to gain practical knowledge regarding the application of such law through, for example, sharing experiences with other countries. A multilateral framework could create opportunities for these kinds of exchanges. In addition, the promotion of multilateral cooperation could have a positive impact upon domestic decision-making processes regarding the implementation of competition policy. By increasing awareness regarding other Members' experiences and by being exposed to best practices, Members would gain important insights that would strengthen domestic reforms efforts.

23. Continuing further, he said that, since its inaugural meeting in July 1997, the Working Group had engaged in more than three-and-a-half years of discussions that had contributed to materially improved understanding of competition laws by developing countries. Further, the WTO system already contained a series of provisions that addressed anti-competitive practices, albeit in an unsystematic way. In the opinion of his delegation, many Members had arrived at a common understanding regarding the main elements of competition policy and the basic outline of a multilateral framework of cooperation on competition matters. As stated by his delegation previously, such a framework could comprise the following elements: (i) provision of technical cooperation; (ii) sharing of information and experiences; (iii) cooperation regarding notification and coordination; (iv) the adoption of core principles; and (v) a clause to ensure an appropriate level of flexibility. The GATT had been the driving force for free trade. Its mandate had focused, first, on tariff reductions. However, over the years, the scope of the activities of the GATT and its successor, the WTO, had come to cover a much broader area including areas such as trade in services, intellectual property and standards in certification. The question of whether the issue of competition should be included in the next round of multilateral negotiations lay beyond the mandate of the Working Group and awaited a political decision. However, his delegation was of the view that a sound foundation for negotiations had been established and that there was an urgent need to proceed with a multilateral competition initiative if the WTO was to maintain its relevance to the world economy.

24. The representative of the European Community and its member States requested the Secretariat to make available informally to the Working Group two background papers prepared by the European Commission. The two papers summarized the main points that had emerged at two seminars on "new" WTO issues, including competition, recently held in cooperation with the Chilean and the South African Governments respectively. He also requested that the Secretariat make available to the Group a report from the WTO Regional Workshop on Competition Policy, Economic Development and the Multilateral Trading System that had taken place in Cape Town, South Africa on 22-24 February 2001. The Secretariat responded that an informal Report on the Workshop was being prepared and that, when completed, it would be made available to the Group, as requested (done in Job 3935, dated 31 May 2001).

25. Continuing, and introducing document WT/WGTCP/W/160, the representative of the European Community and its member States said that, in the view of his delegation, the WTO could and should take on an active role regarding international cooperation on competition issues. International cooperation in the context of a WTO agreement would benefit all WTO members. As an example, the contribution submitted by his delegation made reference to the French/West African Shipowners Conference to illustrate not only the harmful effect that hard-core cartels could have on developing countries' trade, but also the need for cooperation between the competition authorities of developed and developing countries. Evidence documenting that particular hard-core cartel, which had fixed rates in freight routes between 12 West-African countries and a number of European ports and thereby adversely affected exporters and inhibited trade, was predominantly located within the jurisdictions of a number of West African countries. As the European Commission's competition authorities did not have any formal cooperation agreements with the competition authorities of the countries concerned, it had been difficult for the former to gain access to the relevant evidence, and this had led to a lengthy and cumbersome investigation. The process would have been less arduous, benefiting both developed and developing countries, had a multilateral cooperation mechanism been in place. By proposing the inclusion of international cooperation in a WTO agreement on competition, his delegation was not in any way suggesting that existing bilateral or regional cooperation agreements should be abandoned. The European Community already had cooperation agreements with the United States, Canada and several other WTO Members, and it fully intended to continue to engage in such cooperation. Rather, his delegation was of the view that there was a clear need for multilateral cooperation to bring the benefits of cooperation to other Members of the WTO and that this kind of cooperation could be complementary and should supplement existing bilateral and regional cooperation.

26. Continuing, he said that, in the opinion of his delegation, international cooperation in the context of a WTO agreement on competition should focus on three aspects. The first would be the exchange of experiences; the second would consist of discussions on areas of common interest; and the last would involve case-specific cooperation. Pursuant to this approach, every competition authority, whatever the level of sophistication and detail in its competition law, would have the possibility to liaise and interact with the competition authorities of other Members. Although, up to now, his delegation had identified hard-core cartels as the only substantive area to be covered in a WTO framework agreement on competition, cooperation under such an agreement could also take place with respect to other substantive issues. Further, in the view of his delegation, the exchange of information under a WTO agreement on competition would encompass factual as well as legal information. While the exchange of information would be limited to non-confidential information, the usefulness of non-confidential information should not be underestimated. As the contribution of the Czech Republic had made clear, there was an abundance of information in documentation relating to actual competition cases that was not available elsewhere. These types of information were very valuable for newly-established competition authorities.

27. Another representative of the European Community and its member States recalled that the contribution submitted by his delegation at the previous meeting of the Group (WT/WGTCP/W/140) had listed a number of concrete cases indicating the potential effects of international cartels on developing countries. The paper presented by the delegation of Japan at the current meeting (WT/WGTCP/W/168) made reference to a number of historical examples of international cartel cases that had had an adverse impact on developing countries. Further, a recent paper prepared by two academic economists as a background study for the World Bank had provided an important new assessment of the impact of private international cartels on developing countries. The paper was available on the Internet at the following address <http://www-unix.oit.umass.edu/~maggie/WDR2001.pdf>. It was built around case studies of cartels that had been uncovered in five industries: bromine, citric acid, graphite electrodes, and seamless steel tubes. It assessed the direct effects of these cartels on consumers in developing countries, in terms of price increases, as well as the indirect effects on producers in developing countries. One of the paper's findings was that, according to data for 1997, developing countries had imported US\$81 billion of goods from industries that had been involved in price-fixing conspiracies during the 1990s. This figure was equivalent to 6.5 per cent of the total imports of developing countries and 1.2 per cent of their GDP. These different sources showed that international hard-core cartel activity posed a demonstrable and significant threat to the welfare of developing countries, more so than had previously been understood. As more facts became available regarding the impact of cartels on developing countries through studies such as this, the need for effective competition policies and for international cooperation to facilitate the implementation of such policies would become ever more clear.

28. The representative of Romania, introducing document WT/WGTCP/W/161, said that, in the view of his delegation, competition laws, policies and institutions played an essential role in strengthening the private sector as an engine of growth and development and in preventing restrictive practices that would otherwise impose heavy costs on consumers. They were particularly important for developing and transition economies since they could help to establish the foundation for a healthy market economy. Taking account of the globalization process and the fact that undertakings were more and more involved in international operations, competition authorities needed to have the power to require such undertakings to observe national competition laws. Existing cooperation arrangements between developed countries such as the United States and the European Community could serve as an example when trying to set the basis for cooperation between developing countries. When considering the design of a possible multilateral framework for cooperation in the competition area, the following main types of anti-competitive practices would be relevant: (i) anti-competitive practices with a similar impact on several markets and on world markets, such as international cartels; (ii) anti-competitive practices affecting market access, such as import cartels, abuses of dominant positions and certain forms of vertical agreements -- cases in which, under general jurisdiction

principles, only the importing country would normally be in a position to apply its competition law; and (iii) anti-competitive practices, the effect of which was felt primarily in a different market from that in which it was conceived, such as export cartels. In order to address such anti-competitive practices in an effective manner, there was a need for both effective national competition policies and enhanced international cooperation at the bilateral, regional and multilateral levels. An important element to be included in a multilateral framework on competition policy would be support for the process of institution-building. In particular, a multilateral framework in the WTO would provide the opportunity for countries with less experience in this area to be in contact with more experienced countries and to benefit from their experience. A multilateral framework on competition policy would have to be characterized by: (i) progressivity in any commitment relating to the introduction of a domestic competition law regime; and (ii) flexibility with regard to the diversity of national approaches to competition law and policy, taking into account the differences in both the competition laws of WTO Members and in the institutional procedures for the enforcement of such laws. The WTO fundamental principles of transparency and non-discrimination should also be reflected in such a framework, as these were important underpinnings of an effective competition policy. Such a framework would offer important benefits in facilitating cooperation in the fight against restrictive business practices, for example through: (i) enhanced availability of information on cases involving anti-competitive practices; (ii) consultations among competition agencies in order to better address anti-competitive practices of common concern and to manage jurisdictional conflicts through the application of positive comity principles; and (iii) new procedures for the exchange of national experience and perspectives on competition policy such as peer review. A multilateral competition framework could also play an active role in strengthening the effectiveness of technical assistance in the area of competition policy (that is, assistance for drafting competition laws, strengthening the institutional capacities to deal with complex cases, etc). Within such a framework, technical assistance programmes could be better focused on the needs of recipient countries. Reference was also made to the Romanian Competition Council's experience in the field of international cooperation, details of which were noted in the paper.

29. The representative of Colombia, introducing document WT/WGTCP/W/162, said that, while her country had a sound competition regime in place, it lacked the tools to effectively control anti-competitive practices that arose outside its own jurisdiction. A multilateral framework on competition policy that could help to provide such tools would be of great interest. Such a framework would also make it possible to design instruments that would allow international anti-competitive practices, especially those affecting the competitiveness of developing countries' exports, to be tackled at a global level. In the view of her delegation, coordination between national authorities could also play a fundamental role in dealing with the new challenges created by globalization. A regular and permanent exchange of information, together with enhanced technical assistance for capacity building, should be important features of cooperation under a multilateral framework.

30. The representative of the United States, introducing document WT/WGTCP/W/164, said that the paper focused on the mechanics of setting policy goals and priorities with respect to the administration of competition law, and that it had been written on the premise that every Member had at its disposal finite rather than unlimited resources. Taking the example of Argentina, it was noted that, two years ago, the Argentine Congress gave the Argentine antitrust agency the authority to conduct pre-merger notification reviews and some standard merger reviews. Through this legislative reform, the Argentine antitrust agency gained an important power that it did not previously have. However, since merger reviews (particularly reviews of pre-merger notifications) were highly resource-intensive and additional resources were not allocated to the Argentine antitrust authority when the new powers were bestowed, it found itself having to devote a large proportion of its resources to that task and, consequently, less were devoted to other functions. In the case of the Netherlands, up until 1997, the year in which the new Dutch antitrust law was enacted, the Netherlands had a regime according to which cartels were legal provided that they were registered. The shift from a system of legalized cartels to a system of illegal cartels proved difficult. The Parliament of the Netherlands had provided the national antitrust agency with the power to grant

individual exemptions, which generated a flood of applications for exemption. In contrast to the situation in Argentina where much of the antitrust agency's resources were absorbed by a new task, in the case of the Netherlands, resources were freed up by the creation of the new task and it was unclear how those resources would be utilised.

31. Continuing, he said that the EC Commission had also faced the necessity to re-direct its resources as a result of a shift in priorities. For many years, the Commission had spent a large proportion of its resources on authorizations and that had prevented it from spending more resources on investigating cartels. Subsequently, the Commission had decided that this system had outlived its usefulness and generated heavy administrative costs. For these reasons, the system had been changed. In the United States, the large number of mergers that both the Federal Trade Commission and the Justice Department had to review necessarily required a heavy investment of resources. However, the revelation in the last seven or eight years that international cartels were far more common than one would have expected had called for greater emphasis to be placed on prosecuting such cartels. Under United States' law and established custom, the antitrust agencies had absolute prosecutorial discretion in the sense that they had the power to decide which cases would be prosecuted and which would not. In so deciding, those agencies considered a number of factors, including the quality and quantity of available evidence, the nature and amount of professional resources that would be consumed by a particular case, and whether the competitive climate in the United States was to be significantly improved by actually prosecuting and winning the case.

32. The representative of the Czech Republic, introducing document WT/WGTCP/W/165, said that, in the view of his delegation, strengthening international cooperation in the fight against cartels and other anti-competitive practices would be a key benefit of a WTO framework on competition policy. Such a framework should also contain provisions concerning the exchange of information. On the one hand, the extraterritorial application of competition law was becoming increasingly widespread. A multilateral framework gave force to national regulations, regardless of whether anti-competitive practices were carried out within or beyond the relevant countries' borders, as long as those practices had an effect upon the domestic market. The extraterritorial application of the competition law gave rise to considerable problems, including the problem of state sovereignty. In the view of his delegation, the exchange of information, even if restricted to non-confidential information, would make the application of competition law smoother when anticompetitive practices originated abroad given that any factual and legal information collected by a foreign competition authority would be helpful to a domestic competition authority dealing with such cases.

33. The representative of Korea, introducing document WT/WGTCP/W/166, said that advanced countries had adopted competition policies in the late nineteenth century when consolidation was the norm and attempts were being made to form trusts in several industries. During that period, the key objective of competition law had been to lessen the concentration of power in the hands of a few companies. Decades later, many developing countries introduced competition policies with the explicit aim of making the domestic economy more market-friendly by dismantling business concentrations that had been created as a result of industrial policies. Korea's economic development had surged ahead in the early 1960s and, at that time, it had been mainly based on an export-oriented growth strategy that sought to nurture specific industries by giving them preferential treatment in terms of financing and taxation. This strategy, coupled with a number of other factors, including the favourable international trend towards freer trade, allowed Korea to achieve a stunning 7 per cent annual growth rate during three decades. However, this strategy also had heavy costs, particularly in relation to Korea's long-term economic potential. In particular, effective and competitive financing mechanisms did not develop in an appropriate fashion, industry grew in an unbalanced way, and excessive economic power was concentrated in a few conglomerates. The Korean Government made several attempts to introduce a competition regime. The Monopoly Regulation and the Fair Trade Act of 1981 represented an important conceptual overhaul of the economic growth strategy that had been followed until then given that it envisioned market mechanisms as the key instruments that would lead to economic development. Nevertheless, the introduction of a fully-fledged competition policy did

not take place until the 1990s when the public became much more aware of the importance of maintaining an effective competition regime. Following this mandate, the Korean Fair Trade Commission began to take measures intended to reduce the concentration of economic power and to remove obstacles to market entry and exit. It also took measures to regulate natural monopoly sectors, such as telecommunications and gas.

34. Continuing, he said that various developing countries had already embarked on the enforcement of competition policy and that many benefits had been observed. For instance, the introduction of competition policy could prevent government monopolies from being converted into private monopolies. Another benefit from the enforcement of competition policy was the possibility of preventing the abuse of monopoly power by multinational corporations that were operating in developing countries. For instance, developing countries could use competition policy to prevent the abuse of intellectual property rights. It was difficult to precisely determine the stage of economic development at which it was most appropriate to introduce competition policy given the differences in the social and economic backgrounds of each country. However, in the view of his delegation, it was certain that the later the adoption of competition policy, the more difficult it would be to remedy market distortions brought about by the absence of competition policy. Evidently, it was easier to introduce competition regulation before monopolies became entrenched through the acquisition of political and economic power. Korea had significantly suffered for its failure to reconcile industrial policies with an active competition regime. Having learnt from its lessons, the Korean Government was currently making a concerted effort to establish pro-competitive market structures in the Korean economy.

35. The representative of Japan, introducing document WT/WGTCP/W/168, said that this paper presented some concrete examples of international cartels and illustrated how cross-border anti-competitive practices could erode the welfare effects of trade liberalization. International cartels were a prime example of cross-border anti-competitive practices with an adverse impact upon international trade, as well as the welfare of consumers. However, since the parties to such anti-competitive practices were typically located in multiple countries, it was difficult for any one country to respond adequately to such behaviour. Some international cartels had a serious impact on developing countries and they, therefore, undermined the development policies and economic health of those countries. A developing country affected by international cartels could only mount an appropriate response if it had strong competition laws that could be adequately enforced. If, however, the country concerned did not have adequate competition laws, or if such laws were not supported by adequate enforcement, that country would be victimised.

36. Continuing, he said that the paper submitted by his delegation provided an analysis of international cartels involving six different products, namely: synthetic fibers, photographic equipment (that is, prisms, lenses and lightening equipment), television equipment, chemical textile products, micro-crystalline cellulose, and food preservatives. These cartels had been prosecuted and dismantled by the competition authorities of several developed countries. The cartel involving synthetic fibers had operated in the 1970s. It had come into being as Japanese and German companies formed a cartel to divide the international markets for synthetic fibers such as acetate, rayon, staple fibre and nylon on a geographical basis. Under the terms of the cartel, Asian markets were allocated to the Japanese companies and African markets to the German companies, with parties to the cartel agreeing not to export to the others' markets. The cartel concerning photographic equipment involved three companies, one each in the United States, the United Kingdom and France, which divided up the global market among the cartel participants also on a geographical basis. The cartel concerning television equipment involved a company from the United Kingdom, the US subsidiary of that company, and other American corporations. This cartel had also functioned on the basis of geographical allocation of markets. The cartel for chemical textile products divided up the international market by using a number of cross-licencing agreements. This cartel was not based upon geographical allocation but, rather, it designated regions and then stipulated which of the parties' patents would have exclusive application in that region. The cartel for micro-crystalline cellulose (an

adhesive for medical tablets) involved a US company, which sought to eliminate two Taiwanese competitors by proposing exclusive contracts to those companies. It also offered a market share in the North American and European markets to another US competitor. The cartel involving food preservatives, which lasted around 17 years among a US company, a German company and a Japanese company, involved price-fixing as well as market sharing. While these cartels had, in some measure, been dealt with through enforcement actions by major developed countries, it was important to note that such actions, by themselves, would not necessarily alleviate or prevent the re-emergence of cartel activity in developing countries.

37. Continuing further, he said that a number of disturbing effects arose from the existence of international cartels. First, such cartels significantly undermined the benefits arising from trade liberalization by impeding the efficient flow of goods and services on a global scale. Second, these cartels were, by definition, international in scope and there was a high probability that such practices had a detrimental impact on developing countries. However, as it was impossible for any one country to deal adequately with such problems alone, a global approach was much more likely to prove effective. Given that international cartels and other cross-border anti-competitive practices eroded the benefits from free trade, it seemed logical for the WTO to take action to deal with these practices. One particular advantage of the WTO in this regard was that the WTO had the ability to provide technical assistance and other capacity-building support for developing countries, making it possible for such countries to learn from the experience of developed countries and to gradually enhance their own competition regimes.

38. With respect to the nature of cooperation that was envisioned by the proponents of a multilateral framework, the representative of Canada, commenting on question 7 in Section III of the Checklist, said that, in the view of his delegation, cooperation, by definition, it could only be voluntary in nature. It was clear that countries could not be required to cooperate. The question was then why a multilateral framework was necessary to pave the way for cooperation. The resolution to this apparent paradox lay in the realization that, while cooperation had to be voluntary, it was founded upon a degree of mutual trust. Trust was something that could not be mandated by an international agreement nor could it be subject to specific rules. Nevertheless, an international agreement could play an important role in facilitating trust. The key element in this process was to encourage convergence with respect to some basic competition principles and to ensure that such a process was linked to aspects such as having a competition law with appropriate scope, administrative and enforcement provisions, due process, etc. To the extent that relationships of trust were established between competition authorities from different countries, the question of disparity between Members in terms of bargaining power or resources would become irrelevant given the mutuality of benefits arising from cooperation in specific cases. A case in point was Canada, which had already cooperated on competition matters with both the likes of the United States and a number of countries in Latin America and the Caribbean, even if this cooperation took place in the face of considerable disparities in size and differing competition regimes. It was possible to envisage that cooperation under a multilateral agreement could operate in two phases. The initial phase could be educational and would concentrate on the development of institutional support and enforcement capacity in the Member countries, backed up by technical assistance and the exchange of background information. The second phase would have as its primary feature the development and implementation of notification procedures, its objective being to ensure a minimum level of awareness about the activities of other competition authorities.

39. Continuing, he said that, as the work of the Working Group had revealed, there were a number of cross-border anti-competitive practices which had had a direct impact on trade and development. Notably, hard-core cartels could significantly distort the price of key products and preclude trade beyond the geographic boundaries that had been set by a cartel. There was evidence that these cartels were having a substantial detrimental impact on developing as well as developed countries. However, many such countries lacked adequate tools to deal with the impact of such arrangements on their economies. While cross-border anti-competitive practices had a clear impact

upon international trade, the question still remained as to why they should be addressed at the multilateral level, and why within the WTO rather than some other multilateral organization? As certain commentators had pointed out, WTO rules were, for the most part, targeted at governmental behaviour rather than private behaviour. However, it was also true that no other international organization provided a more appropriate institutional setting for a multilateral agreement on competition policy. What other organizations were critically lacking, and what the WTO brought to the table, was the ability to require Members to implement a competition law. In addition, in certain cases, governmental measures were to be found at the root of specific anti-competitive behaviour. Of course, there were already some limited competition-promoting provisions in existing WTO agreements – the GATS addressed competition questions in Articles 8 and 9 and the related Telecommunications Reference Paper featured provisions prohibiting anti-competitive cross-subsidization. However, a problem associated with the existing provisions was that they only addressed a portion of the normal coverage of competition policy. In sum, it was clear that the WTO had a unique role to play in dealing with some of the international issues facing competition policy, but that new provisions would need to be negotiated in order to allow the WTO to fulfil this role.

40. The representative of Uruguay, introducing relevant portions of document WT/WGTCP/W/169, stated that the paper dealt with Uruguay's understanding of the development dimension in the area of competition policy. Reference was made to the Secretariat Synthesis paper on this subject (WT/WGTCP/W/80). It was recalled that the Working Group had agreed on the need to engage in a more concrete debate on the development dimension and that it was necessary to analyse the advantages and difficulties associated with the enforcement of competition policy in developing countries, as well as the problems related to the setting-up of bodies or agencies that were in charge of competition. It was well-known that trade liberalisation inside and outside the WTO had sped up globalisation. This, together with technological progress meant that transnational corporations were able to act globally and to achieve dominant positions in the global marketplace through mergers, acquisitions, strategic alliances, investment or commercial operations. In this context, developing countries had encountered difficulty in drawing up and enforcing competition policies and laws so as to safeguard the interests of consumers and the efficient functioning of their markets. During an experts' meeting at UNCTAD in June 2000, it had been said that the value of mergers and acquisitions in the world had grown in spectacular fashion during the period 1980 to 1999. The rate of increase was around 42% per year. The statistics also indicated that, in relation to the mergers and acquisitions, developed countries were primarily the sellers and purchasers. Nonetheless, a large proportion of these mergers had a significant, sometimes anti-competitive, impact in the developing world. The sectors most affected included the automobile, pharmaceutical, chemical and telecommunications sectors. In many of those sectors, a quasi-monopolistic situation existed where only a limited number of companies operated and their strategies were aimed at the international market. With regard to the issue of special and differential treatment in the area of competition policy, it was well-known that the principle of special and differential treatment was one of the fundamental principles of the multilateral trading system. It could be instrumental in protecting the interests of developing countries and in ensuring the flexibility of commitments in the form of different transition periods, etc. As to the form that the principle of special and differential treatment should take in relation to competition rules or policies, he recalled that during the 1970s, UNCTAD had adopted a set of principles and rules that had been agreed multilaterally for the control of restrictive business practices. While there were other relevant instruments, the UNCTAD "Set" was the only multilateral tool in the area of competition. It was a voluntary set of rules that were not binding. However, the Set offered specific provisions on special and differential treatment for developing countries regarding the development, financial and trading needs of developing countries that developed countries needed to bear in mind when controlling restrictive business practices. According to the 1999 UNCTAD report on trade and development, all multilateral agreements on competition should fully take into account the need for special and differential treatment of developing countries. Further, such treatment could cover the ability to exempt certain sectors from the application of national competition legislation for development reasons and the establishment of exceptions and exemptions that currently existed in nearly all developed countries. The scope of



exceptions or exemptions from the application of competition law varied considerably from one country to another. Uruguay had conducted a comparative study of national competition legislation in both developed countries and developing countries. It had been seen that economic activities including telecommunications, electricity, hydro-carbons, transport, water, fishing had been exempted from the application of national competition legislation. Different reasons had been put forward for the various exemptions from national competition legislation including, for instance, the stability of sectors for the production of goods and services that were of importance for the general economy at large, and the need to invest in research and development of new technologies. Exemptions that existed in developed countries applied in those sectors that were subject to special state regulation, as had been mentioned in the 1997 WTO Secretariat Special Study on Trade and Competition Policy. The conclusion that had been drawn by Uruguay on the basis of this study was that it was important for the Working Group to continue to examine in depth the development dimension in relation to competition policy, with specific reference to the question of exceptions and exemptions from competition law. He suggested that the Secretariat be asked to update document WT/WGTCP/W/80, the Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth, which it had prepared two years previously (see related discussion in Section IV, below). More generally, he encouraged the Secretariat to work with other international organisations including UNCTAD and the OECD, to complement the work that had already been undertaken on the development dimension. The representative of Guatemala expressed support for the comments made by the representative of Uruguay. Indeed, it would be desirable for the Group to discuss further the problems associated with the setting up of competition agencies, especially in relation to the management of scarce resources.

41. With regard to the potential value-added of a multilateral framework on competition policy, the representative of the Philippines noted that the discussion had clarified that cooperation would occur among competition authorities in the various jurisdictions, including the exchange of best practices and effective ways of dealing with the broad spectrum of problems that arose in the area of competition policy. He stated that it was a logical objective but he did not see the validity of including such an objective in international commitments or negotiating the issue in a multilateral process, thereby subjecting it to dispute settlement. Since three delegations had alluded specifically to a commitment to negotiate a competition policy framework, he wanted to share the difficulties that his delegation had with this objective. First, it had been said that competition policy covered a broad spectrum of economic activity. Trade liberalization, market opening, deregulation undertaken by Members on an autonomous basis, bilateral agreements, OECD and other trade agreements, and most of the new generation trade agreements, especially from a particularly big group, had imposed competition policy through trade agreements. For developing countries, most especially, it could be said that such commitments which had been inscribed in work schedules in trade in goods, trade in services, intellectual property, TRIMs and the mandated negotiations that were currently underway, had potentially exhausted the optimum levels of trade and trade-related commitments through trade liberalization and market-opening. This was particularly so in view of developing countries' fundamental financial trade and development needs and the fact that the imbalances and asymmetries in the mentioned existing agreements had not yet been rectified. The proponents of a competition multilateral framework obviously intended to shift from focussed, sectoral issues to a precise principles-based framework, with the fundamental WTO principles of MFN and national treatment and non-discrimination as the basis for such a regime. However, the existing structure of principles in the WTO was such that they had been based or applied in relation to specific issues, measures, elements or things. This would be lost by a broad-brush application of principles which would then encompass various trade and trade-related areas, and perhaps even environment, labour standards, and other issues if they were part of the competition policy legislation of each country, based on their own specific domestic problems. The parameters associated with such proposals needed to be openly discussed. In his view, competition policy fell outside the scope of the WTO. There was deep divergence in the OECD regarding the desired approach, as had been the case with respect to the MAI. A principles-based approach would also seem to cover developing countries' industrial policies; that appeared to be the principal objective of such a broad-based approach now that all trade and

trade-related measures had been exhausted and that developing countries and other countries were already conscious of the difficulties associated with moving forward. For these reasons, he was not convinced that the issue was ripe for negotiations in the WTO. Although it had been stated that commitments could take different forms, that is, that there would be flexibility, experiences in implementing existing agreements including TRIPS and TRIMs, illustrated that developing countries had been trapped in the short history of WTO. There were other issues that needed to be discussed such as scope, depth, timing and sequencing, coherence, government standards, relationship to dispute settlement etc. While he did not doubt the importance and validity of competition policy rules and competition policy in the domestic context, it was necessary to take into account individual country needs and priorities and allow countries to judiciously use and reconcile their scarce resources in ways that they considered fit. The representative of Hong Kong, China stated that, given that many developing countries had had bitter experiences in dealing with the various obligations that emerged from the Uruguay Round, there was a need to examine thoroughly and objectively the pros and cons of any multilateral rule-making proposal. The paper that had been submitted by Romania (WT/WGTCP/W/161) focussed on the advantages of a multilateral framework but made no mention of the possible burdens or obligations of such a framework.

42. The representative of the European Community and its member States said that the objectives of the proposed multilateral framework on competition policy were being misconstrued. In fact, they were not really so sweeping as had been suggested by some of the more reticent delegations. The application of the core principles that had been discussed would be based on the premise that there would be clear parameters about the scope of application of those principles. It was important to have at the start a very clear recognition about what non-discrimination meant, how it related to particular types of policy measures and what were the particular modalities of transparency that were of particular relevance in the context of a particular policy measure. In particular, his delegation was *not* trying to define in a multilateral framework on competition policy general principles that would apply in an undefined manner to all kinds of government policies including industrial policies or other policy objectives that were being pursued by national governments. Rather, the intent was that these principles would apply in respect of competition law and policy as such, and not to wider economic development policies. The underlying intent was to assist all WTO Members to gain access to the tools that would enable them to deal effectively with anti-competitive practices that posed a threat to their trade and development prospects.

43. The representative of the United States noted that the proponents of a cooperation framework in a multilateral agreement had stated that cooperation could not be mandatory; that it was to be voluntary. However, if MFN rules applied to cooperation systems, how voluntary would the system really be? While the application of MFN to something like tariffs was clear, it was unclear how it could apply to requests for cooperative assistance in antitrust cases. What would happen if a country received more than one request in relation to the same investigation but one request required a greater use of resources than the other? Were those like circumstances? Was it necessary to favourably reply to both requests? What if the same amount of resources were required but one request was received when the agency was less busy and one when it was more busy and did not have the resources to respond? What if a country was one from which more mutual cooperation was expected as compared to another? The answers to these questions were unknown and for that reason, concern was expressed about the idea of applying WTO rules to something that was being characterized as voluntary. One could answer that there was no obligation to cooperate but only to give sympathetic consideration to requests to cooperate. Again, how could that be judged? In fact, the possibility of being subjected to those kind of WTO disciplines in relation to a supposedly voluntary exercise could chill the exercise of cooperation and perhaps lead to less cooperation for fear that cooperating with one country would imply a burden to cooperate with many more. Arguably, this demonstrated the inappropriateness of trying to set up a voluntary framework under the auspices of the WTO multilateral rules-based system.

44. The representative of Hong Kong, China asked why domestic competition law and domestic competition authorities were seen as the backbone for successful implementation of a WTO framework agreement on competition. In response, the representative of the European Community and its member States said that it was the view of his delegation that cooperation with respect to competition matters was only possible when a competition regime was already in operation; that is, when there was a domestic competition law of some sort and a domestic competition authority existed with sufficient powers to effectively enforce that law. This, however, did not suggest that fully-fledged harmonization of domestic competition laws was desirable. His delegation was aware that significant differences existed between different competition regimes and that there were many historical, economic and political reasons accounting for these differences which could not be treated in a dismissive fashion. His delegation had not suggested setting up a supranational competition authority since the approach suggested by his delegation anticipated that domestic competition authorities would meet on a regular basis under the auspices of a WTO competition policy committee that would administer the agreement.

45. The representative of India stated that the need for and benefits of cooperation among countries in the area of competition policy was well recognised. However, significant differences of opinion arose regarding the necessity for a multilateral arrangement to achieve those objectives. Any multilateral arrangement in the area ideally needed to evolve out of the experience gained at the bilateral and the regional levels. There were very few bilateral agreements in the area of competition policy. Agreements that already existed were largely between developed countries at similar stages of development and were limited in scope. Information-sharing arrangements among competition authorities in the form of "positive comity" in the existing arrangements excluded confidential information, which rendered them ineffective. Competition policy agreements as part of regional trading arrangements (RTAs), though limited, were increasing. However, in India's view, they had not progressed to a stage from which lessons could be drawn for multilateral cooperation. Competition policy was one area where convergence of economic and even political interests appeared to be essential to persuade countries to share information with foreign competition authorities to enable them to investigate the practices of domestic enterprises that generated adverse anti-competitive effects in foreign markets while the gains of such practices accrued in the domestic market. He noted that the papers that had been submitted by the EC and Japan (WT/WGTCP/W/160 and WT/WGTCP/W/168, respectively) stated that the need for multilateral cooperation in the area of competition policy was much greater in the case of small or developing countries. India shared the views that had been expressed regarding the adverse impact of hard core cartels on developing countries. However, the remedy would only be effective to the extent that multilateral rules could be meaningfully enforced. The proposals made in the Working Group by some Members envisaged "positive comity". The extent to which positive comity could be enforced, especially in view of the exclusion of confidential business information from its purview, was subject to conjecture. India agreed with some of the views expressed within the Working Group that, in the light of the independent and discretionary role of competition authorities, it would be difficult if not impossible to make co-operation among competition authorities mandatory.

46. In response, the representative of the European Community and its member States said that, while India had expressed the view that cooperation arrangements would be ineffective if they did not provide for exchanges of confidential information, this was not the experience of his delegation. His delegation had been involved in cooperation agreements with several countries, including the United States, Canada and other countries, none of which provided for the exchange of confidential information. Despite this, it would certainly be misleading to suggest that this cooperation had not been useful. On the contrary, these countries were all of the view that such arrangements had been highly useful, notwithstanding their limitations. Moreover, it was important to bear in mind that it would be difficult to embark on a situation in which all competition authorities in the world would be party to bilateral cooperation agreements. This was another reason why his delegation considered that it was necessary to define, at the multilateral level, basic principles and modalities for cooperation. These principles and modalities could be adapted to the need of countries at different levels of

development and at different levels in their own process of institutional consolidation of domestic competition authorities. Another representative of the European Community and its member States noted that distinctions needed to be drawn between different categories of information: non-public information such as business secrets which could not be shared under most existing cooperation instruments; non-public information which *could* be shared under such instruments and was helpful to law enforcement processes, such as legal or economic analysis undertaken by an agency relating to the agency's assessment of particular practices or the fact that the investigation was proceeding; and public information such as that available on the Internet which was available to everybody. These distinctions were well known to countries with experience in international cooperation in the field of competition law and policy. Regarding whether cooperation was "compulsory" or "voluntary", there was a series of graduations that could be seen in existing cooperation instruments. For instance, there could be a requirement to give sympathetic consideration of a request or make best efforts to respond in a positive way. These could be coupled, or not, with an obligation to provide a justification in the event that a request was refused. There could also be a stipulation written into the relevant agreement that a request be compatible with the important interests of the participating countries – otherwise, they would not be required to cooperate. Another approach would be to make cooperation contingent on the existence of a mutual enforcement interest between the requesting and requested agency. Other possible qualifications could include the availability of sufficient resources to respond. In due course, it would be important to discuss more specifically the parameters of cooperation provisions that would be included in a multilateral framework on competition policy. However, the point was that appropriate qualifications could be built into such a framework to ensure that developing or other countries were not obligated to cooperate where this was inconsistent with their important interests. Nonetheless, such a framework could still provide valuable assistance to developing and other countries in addressing anti-competitive practices that were genuinely harmful to them, in that it could make routinely available information which, while not confidential in a legal sense, would, otherwise, not be easily available.

47. The representative of the United States noted that the paper that had been submitted by the European Community and its member States (WT/WGTCP/W/160) had identified the benefits of case-specific cooperation and international cooperation in general terms. For the most part, the US was in agreement regarding the value of international cooperation. However, the usefulness of cooperation should not be overstated. For example, he questioned the relevance of international cooperation provisions in the WTO in relation to cases of cartels such as the first French West African Shipowners Conference case that had been discussed in the paper. The EC paper had noted the difficulty in gathering evidence in international cartel cases such as this, but it was questioned how the type of cooperation provisions that could be envisioned in the WTO agreement would be of assistance. There were indeed types of cooperation agreements such as mutual legal assistance treaties and that between the US and Australia that contained provisions for sharing of confidential information. However, it was not obvious how, in a cartel investigation, the type of provisions that would encourage revealing non-confidential information would be of assistance. They would not authorize one country to gather evidence only for the purpose of assisting another country's investigation, nor to share confidential information once gathered. In relation to the intervention by the representative of India, the US agreed with India's scepticism regarding the benefits of an international agreement. However, support was expressed for what had been said by the representative of the European Community about the value of cooperation in information sharing, short of sharing confidential information. Another representative of the United States stated that from the point of view of an antitrust enforcement agency, the assurance of confidentiality of information was at the core of the integrity of its processes. If that could not be guaranteed to the businesses from whom information was obtained, then it would be much more difficult to obtain that information in the first place. Either the information would not be obtained at all or it would not be obtained without a court case. In the US, requests for confidential business information were almost never litigated since companies knew that the agency had a good track record in dealing with that information in enforcing the law. The information would not be leaked to newspapers, nor would it be provided to competitors. As long as that record was maintained, the agency would continue to do its job. That

was why the EC and some of the other proponents had emphasized that the sharing of confidential information was not being discussed. The US shared that concern. However, if cooperation was limited to non-confidential information, why was an agreement needed? Proponents had argued that efficiency would be enhanced through a multilateral obligation to cooperate. However, it was unclear where that efficiency would come from. Some had argued that the negotiation of a single multilateral agreement was less costly than a number of bilateral agreements. However, the cost of formal cooperation was not relevant if the various bilateral agreements were very much alike.

48. In response, the representative of Japan stated that the advantages of multilateral as compared to bilateral approaches to cooperation were discussed in the first paper that had been submitted by Japan (WT/WGTCP/W/167). First, it would take some time to conclude new bilateral agreements since each took at least half a year. The United States had the largest number of bilateral agreements but it would still be a burden for it to conclude a number of bilateral agreements with many more countries. Secondly, unless a global or multilateral network existed, a key country involved in international anti-competitive practices may not be party to the framework of bilateral arrangements. Therefore, a WTO multilateral framework was a type of safety net. Developed countries had bilateral cooperation arrangements and an arrangement for notification, coordination, cooperation and possible negative comity under the auspices of the OECD also existed. However, not all countries were parties to such mechanisms. Regarding the issue of confidential business information, most countries had restrictions on disclosure of confidential business information not only to foreign agents but to domestic agents as well. However, it was also thought that in the future, there would be improvements in the domestic legal regimes of WTO Member countries. One day, it might be possible to share confidential business information. The representative of the European Community and its member States said that his delegation had benefitted greatly from existing bilateral cooperation agreements. However, huge costs were associated with those agreements, which tended to be concluded almost exclusively between countries that were, if not at the very same technical level and level of sophistication, then at least at roughly comparable levels. A multilateral agreement was needed to share the benefits of existing bilateral arrangements with a broader group of countries.

49. Delving further into the potential benefits and costs of enhanced cooperation in the area of competition policy and responding to question 1 in Section III of the Checklist as to what extent international cooperation would require a common basis in terms of shared principles, enforcement structure and machinery and legislative provisions, the European Community and its member States commented that the harmonisation of substantive competition law was certainly not the objective of the exercise. Competition law varied from one country to another and it evolved over time. However, there was one area of substantive competition law for which there was a strong case to develop a common principle in the WTO. This was the area of hard-core cartels - that is, agreements to fix prices, to share markets, bid-rigging, output restrictions etc. That type of agreement had a clear and unambiguously harmful impact on international trade. During subsequent discussions regarding cooperation, there would also be an opportunity for developing countries to discuss the negative impact of such agreements on trade. The paper submitted by Japan (WT/WGTCP/W/168) contained a number of interesting examples in this respect. There was also strong, consistent and long-standing consensus among competition authorities that hard-core cartels were the most pernicious competition law offence and that they should be considered a serious offence under domestic competition law regimes. Therefore, the area of hard-core cartels was an appropriate one to be the subject of a common commitment in the WTO. Beyond this, his delegation did not believe that it was feasible or possible to envisage a common principle in relation to abuses of dominant positions or mergers with transboundary effects since there were too many differences among national competition laws in terms of how those areas were dealt with. However, other anti-competitive practices with an international dimension could still be the subject of the cooperation provisions in the proposed multilateral competition framework. His delegation believed that in relation to those issues, it was necessary to progress in terms of gaining a better understanding and to focus efforts in ensuring better cooperation among competition authorities to deal with those anti-competitive practices.

50. Responding to the same question, the representative of Canada stated that it had become increasingly clear from recent deliberations of the Working Group that the establishment of certain common approaches would be required in a multilateral agreement on competition policy. Most obvious amongst those would be a commitment to transparency and non-discrimination, which as had been noted, were in fact intrinsic to the effective pursuit of competition. Which forms of anti-competitive behaviour would be addressed by a multilateral agreement was a matter for negotiation. Canada had in the past suggested that general obligations on hard-core cartels or on mergers that had an impact upon multiple jurisdictions might be relevant. However, other options clearly existed. A multilateral agreement would also have to include general provisions requiring a competition law and an independent authority to administer it in order to provide the practical means for Members to respond to their undertakings. The aims of those various common approaches would be to encourage a degree of compatibility between Members in the application of their respective competition laws. Beyond those common approaches, it was Canada's view that an agreement would have to provide for considerable flexibility as had been referred to by the representative of the EC. For example, while a multilateral agreement with some common standards would require a Member to have a competition law, the particulars of that law would have to be defined by each Member as it saw fit. Such an agreement would not, however, require a Member to have a particularly sophisticated competition bureaucracy in place in order to be able to enjoy some of its benefits. As an illustration of this, Canada had already cooperated in a variety of different ways with a wide range of countries, some of which had extremely sophisticated competition regimes and others of which were just beginning.

51. The representative of the United States commented that although the representative of Canada had stated that a WTO agreement would need to include common approaches, that was not the same as the EC's position. Further, it was unclear what was meant by a "common approach". In addition, Canada's proposal seemed to go beyond the EC's proposal in relation to hard-core cartels. In response, the representative of Canada stated that although the positions encouraged by Canada and the EC in the Working Group had been similar, there was no necessary identity between one and the other. There could easily be some differences of view in certain areas and one should not be assumed to be the same as the other. As to what Canada meant by "common approaches", it was a term that had been used before. In practice, Canada had in mind an agreement that would establish certain common substantive minima, that is, a list of the main areas of competition law that would be relevant to the agreement. "Common" in this respect did not mean harmonised, nor did it mean detailed requirements. It merely meant having a common basic list of elements in national law. As for the appropriate form of dispute settlement for common substantive minima, Canada had in mind peer review as opposed to application of the Dispute Settlement Understanding.

52. The representative of the United States sought clarification as to whether common approaches might impinge upon the independence of competition agencies. In response, and commenting on question 5 in Section III of the Checklist as to how the independence of national competition authorities could be reconciled with a multilateral agreement, the representative of Canada stated that the fact that a multilateral agreement would require a Member to have a competition law which would address certain agreed upon norms, did not impinge upon the operational independence of the relevant national competition authority. As had been noted previously, the proper functioning of such an agreement was founded on the ongoing independence of national authorities. While it might be suggested that there was an apparent paradox in countries being obliged to meet certain competition norms while also being required to maintain the independence of their competition authority, this was readily resolved when one realised that the obligations that would flow from a multilateral agreement would be general in nature and would not and should not speak to the details of competition enforcement in specific cases.

53. The representative of India noted that, in general, the competition policies that had been enacted by more than 80 countries already embodied the principle of non-discrimination. If that was the case, it was questioned what a multilateral competition policy agreement was needed for. Harmonisation of competition principles assumed advanced levels of integration of the cooperating

economies. WTO Members, on the other hand, were heterogeneous, at different levels of development and with diversity of interests. Accordingly, approaches to competition policy by countries at different stages of development would be different. He referred in this regard to a learned author who had recently argued that until countries could work out what was feasible and successful on a bilateral basis, they would not have a sound basis to adopt competition rules at the WTO or other multilateral organization. According to this author, even proposals which limited multilateral rules to requirements concerning adoption and enforcement of domestic competition laws had to, at some point, address the substantive content of the laws to be accepted.

54. In response, the representative of the European Community and its member States stated that the assertion that the framework that had been proposed by his delegation would require harmonisation of national competition laws was not factual. It was not intended to achieve this result. Rather, what was sought were some basic common principles which would help different domestic competition law regimes to co-exist and to cooperate in an effective manner. The principles of transparency, non-discrimination and a common commitment to take actions against hard-core cartels provided the basis for a common language and for common cooperation among different competition policy regimes but in no way constituted a harmonization of competition law.

55. Continuing, he stated that the paper that had been submitted by Colombia (WT/WGTCP/W/162) introduced some interesting perspectives on the experience of recently-established authorities in the area of competition. One point of particular note was the limitations of national legislation to deal with anti-competitive practices that had a global dimension. This was one of the reasons why his delegation considered that a multilateral framework on competition policy was essential. His delegation also considered that a multilateral framework could respond to the needs of developing countries or transitional economies that had recently established competition legislation. Even in cases of competition authorities that had a long experience in the area, cooperation was essential in implementing competition law. His delegation had previously mentioned in a paper presented for discussion in the Working Group that the interests of developing countries affected by anti-competitive practices could be resolved more effectively and to their mutual benefit through cooperation mechanisms. It was from this perspective that his delegation was proposing the development of multilateral modalities for cooperation. Another point of importance contained in the Colombian paper was that cooperation had a dual function. On the one hand, it was necessary to build capacity in all countries in order to face up to anti-competitive practices globally. On the other hand, it was also necessary to foster progressive strengthening of national competition institutions. These two functions of a multilateral framework on competition policy should be its underlying objectives. The representative of Ecuador stated that for developing countries such as Ecuador, the establishment of a general framework on competition would enable it to draft legislation in accordance with its own principles on competition.

56. The representative of Hong Kong, China stated that, given the extent of diversity among Members, account should be taken of the fact that Members might not be equally interested in subscribing to the cooperation modalities suggested in the paper. Information was sought on whether and how the EC proposal would account for those Members wanting to opt-out of the cooperation modalities from the outset. The EC proposal clearly envisaged national competition authorities along with domestic competition laws, which would be the backbone for the effective operation and implementation of a WTO framework agreement. Given that one third of WTO Members had not yet adopted a domestic competition law, what would be the optimal timing as envisaged by the EC? Would all Members be required to have competition law when negotiations started or at the end of negotiations? Further information was requested on how flexible the notion of flexibility was. Subsequently, referring to the paper that had been submitted by Romania (WT/WGTCP/W/161), she asked what sort of flexibility and progressivity arrangements could be built in to cater for the specific circumstances of those WTO Members yet to adopt a domestic competition law?

57. In response, the representative of the European Community and its member States stated that it was not the view of his delegation that in order to initiate the process of negotiations, all Members needed to have a law in place. In the context of discussions, it would be necessary to respect the problems and needs of countries that did not have a domestic legal framework. Specific responses would have to be developed for those individual countries. A "one-size-fits-all" approach should not be adopted since one third of WTO Members did not have a competition law. Regarding the possibility of an "opt-out", his delegation was ready to look into that possibility.

58. Delving further into the implications of diversity in the institutional endowments and socio-economic situations of Members, the representatives of Ecuador, the European Community and its member States, Japan and Korea said that this did not pose an obstacle to the adoption of a multilateral framework on competition policy, since: (i) much beneficial technical cooperation could take place between countries notwithstanding differences in national endowments, stages of development and other characteristics; and (ii) the proposed framework would not require a harmonised approach and would explicitly provide for flexibility and progressivity.

59. Continuing, and commenting on question 4 in Section III of the Checklist as to how an agreement on international cooperation would apply to and generate benefits for countries at different stages of development and with differing degrees of experience and resources in competition and policy, the representative of the European Community and its member States noted that in the case of those countries that, at the current point in time, did not have a domestic competition law framework, it was necessary to look into the question of what were adequate transitional periods before an appropriate framework was introduced. Secondly, capacity-building programmes were important so that countries that needed to reinforce their domestic institutional capacity, either to make sure that they were in a position to comply with international commitments or to make sure that they could fully benefit from international cooperation, were able to do so. Thirdly, Members should not try to harmonise domestic competition laws. The importance of flexibility had already been stressed as regards sectoral exclusions. Referring to the statement that had been made by the representative of Uruguay, he agreed that a flexible approach was essential in the sphere of sectoral exclusions. For that reason, his delegation had suggested that the proposed approach could essentially be based on transparency in respect of the application of exemptions. The importance of recognising differences in domestic institutional frameworks and capacities had also been recognised. Those aspects were often linked to different levels of development. For example, some countries, particularly those that were in the process of regional integration, had indicated that in their particular circumstances it might make more sense for competition policy to be developed at the regional level rather than at the national level. In this respect, his delegation fully subscribed to comments contained in the paper that had been submitted by Australia (WT/WGTCP/W/159; introduced in Part III below) to the effect that any possible agreement on competition should be adapted to differences in institutional capacities and in levels of development. A multilateral framework should have sufficient flexibility to be responsive to those type of concerns.

60. The representative of Hong Kong, China stated that Members who had put forward proposals should define flexibility in concrete terms rather than just preaching it. She noted further that the existence of a WTO Antidumping Agreement did not mean that all countries had to have a law on antidumping per se. Actually, many did not have such a law and did not have an antidumping authority. Perhaps, parallels could be drawn between that area and the competition area. The representative Japan stated that if other Members were ready, Japan wanted to start a discussion of what kind of progressivity or flexibility could be in order in the context of a possible multilateral framework of cooperation in the WTO.

61. The representative of Egypt stated that developing countries were not yet fully informed about the pros and cons of the proposed multilateral framework. More technical work was needed that would help provide countries with means to assess their needs, based on their economic and development conditions. That implied that it was necessary to devote more time to the educational



process. Further, in advance of deciding on the issue of concluding a multilateral framework on competition, all Members needed to have domestic policies and laws. Before moving into a debate about a possible multilateral framework, it was necessary to note that competition policy might be of importance to developing countries, taking into consideration the fact that some practices such as mergers and hard-core cartels needed to be defeated.

62. The representative of the Philippines said that at the World Bank, a serious internal dispute had occurred as to whether it was necessary for certain developing countries to adopt competition policy and law. It was impossible to say at what stage or under what conditions competition law and policy should be adopted. When the Philippines had been subject to a controlled regime, the World Bank had recommended competition policy to mitigate the effects of corporate control that had resulted from such a regime. The problem was internally rather than externally generated. The plan did not succeed since the absence of domestic political will to suppress a regime that controlled anti-competitive activity meant that external pressure or commitments under the WTO, for example, could not compel countries to act. Nevertheless, for the past decade, developing countries on their own, according to a regional arrangement or pursuant to WTO commitments had increased the level of liberalisation, deregulation and openness. Such countries had probably already attained a high degree of competition but not full market contestability. It was possible that developed countries did not really desire full market contestability but sought to achieve it given the existence of private sector anti-competitive activities such as hard-core cartels. Such practices were probably not the principal focus of the multilateral framework that had been proposed by the EC. What was the need for, the timing of and the precise focus of the proposed framework?

63. In response, the representative of the European Community and its member States said that many developing countries themselves had indicated that they felt that competition policy should be implemented at an early stage since developing countries were being negatively affected by anti-competitive practices and, therefore, it was important for those countries to be able to benefit from international cooperation. Under the proposed framework, it would be for each WTO Member to determine for itself how far it wanted to request cooperation in relation to different competition policy issues. No one would be forced to seek cooperation in the WTO, or to engage in cooperation against their own important interests. However, WTO Members should be ready, if they received a request for cooperation from another WTO Member, to give sympathetic consideration and to be ready to enter into consultations with regard to the request.

64. Regarding the relationship between industrial development policies and competition policy, the representative of India noted that papers that had been previously submitted by Japan and Korea (WT/WGTCP/W/145 and 157; and WT/WGTCP/W/156 respectively) had emphasized that it was important to introduce competition policy at an early stage of economic development, although appropriate industrial policy measures could simultaneously be employed to promote economic growth. He referred to two learned authors who had noted that, in the days following the Second World War, the national antitrust laws of Japan and Germany had permitted a number of restrictive practices that would now be illegal. These laws were considered to be powerless against nationalized enterprises, private national champions protected by regulation and continuing broad industry self-regulation which was felt to be justified by the imperatives of re-construction. He suggested that the needs and requirements of developing countries today might not be any different. Even today, developed countries resorted to strategic trade policies in cases where competition policy principles had been compromised. For example, referring to the German experience, another learned author had argued that the Airbus consortium showed that the German government supported a degree of strategic trade policy. Introduction of domestic competition policy at the early stages of development, as had been suggested by Japan, certainly helped. However, efforts to have minimum standards in such policies based on international "best practice", that is practices followed by some developed countries, were something that many developing countries would find difficult to accept. The representative of the United States commented that it was important to bear in mind the risks of

delaying the implementation of sound competition laws and policies and that there was no need to wait for a WTO agreement to accomplish this.

65. Responding to these comments, the representative of Japan stated that in the late '80s and early '90s, a group called the revisionists had presented very different views regarding the Japanese economy and Japanese government economic policies from those that had been referred to by the delegation of India. For example, Professor Michael Porter had made the case that the interventionist Japanese industrial policies referred to by the delegate had been a failure. The paper that had been submitted by Japan (WT/WGTCP/W/167) was the product of a joint exercise between the Japanese government and academics in an effort to present a balanced and modest view of the impact of Japanese economic policies. That study had encompassed various factors in almost all industrial sectors and had concluded that it would have been better to introduce a more effective competition policy at an early stage of Japan's development. This would not have made it impossible for the government to intervene in other ways but it would have helped to balance such intervention. Japan recognised that, even today, industrial policies could be utilised in order to respond to some of the challenges faced by developing countries, but considered that competition laws and policies were still important to allow countries to create competitive conditions, ensuring the sound development of domestic industry and restricting the abuses of dominant positions of large companies including multinationals. The outcome of such efforts would be greater international competitiveness for domestic industries. The evidence that had been provided by the delegation of Korea regarding that country's experience suggested that Japan was not unique in this respect.

66. The representative of India referred to two additional authors who had argued that the competition policy agenda of major OECD countries was dominated by market access and merger control issues which were largely irrelevant for developing countries. To the extent that market access impediments resulting from anti-competitive behaviour by incumbent firms arose from time to time, this could and should be dealt with by domestic competition authorities. In many countries, this was impeded by institutional weakness but this was a matter for technical and financial assistance that would not be solved by the adoption of international disciplines. Those authors had concluded that the WTO process was driven by export interests or market access goals, not national welfare considerations, and there was no assurance that the rules that would be proposed or agreed would be welfare enhancing. From this perspective, the authors had expressed doubts regarding the ability of WTO-based negotiations to play as constructive a role in the area of competition law as they had in the area of trade policy. India also felt that it would be useful to share experiences in relation to bilateral agreements in the area of competition policy. Such sharing of experiences would provide additional useful perspectives on the issue and enrich the discussions within the Working Group.

67. In response, the representative of the European Community and its member States said that his delegation disagreed emphatically with the premise that the objective of the WTO was merely to guarantee market access. The objective of the WTO system was not to guarantee market access as such, but to promote the equality of competitive opportunities. This was the basic principle of the WTO as reflected in GATT Article III. This principle was fully consistent and compatible with the objectives of competition policy. Furthermore, it was manifestly not accurate to say that the current proposals focused excessively on market access to development-related goals. His delegation had been clear, when discussing a multilateral agreement on competition policy, about the need to follow a balanced approach which placed emphasis on practices that adversely affected economic development as compared with those which predominantly affected market access. This was why, in discussing international cooperation, it had been suggested that the type of issues that should be addressed through cooperative frameworks would include export cartels, abuses of dominant positions including those undertaken by multinational enterprises, and other practices having a detrimental effect on trade and/or development. These were not practices whose primary impact would be on market access as such. In addition, he suggested that the one practice that his delegation suggested should be the subject of a common principle – namely, hard-core cartels – was one which, again, was

not particularly related to market access but undoubtedly had serious adverse consequences for development.

68. On the matter of technical cooperation, the representative of the OECD said that, for the sake of clarity, technical assistance and technical co-operation should not be used interchangeably. Technical assistance related to assistance provided, directly or indirectly, by countries that had substantial experience and expertise for the drafting of law or creation of enforcement institutions. Technical co-operation, on the other hand, related to law enforcement co-operation among countries such as under bilateral antitrust agreements or under the OECD 1995 Recommendation. She presented an extensive survey of technical activities in 1999-2000 done by CLP/WP3<sup>5</sup>. The survey examined issues relating to the need for assistance, the most effective means of providing assistance, the extent of co-ordination in delivering assistance, and the costs and benefits of increasing co-ordination on planned or contemplated events. Among others, responses to the survey suggested the following. First, more competition policy technical assistance was needed and more resources altogether were necessary. Second, even if there was no sign of duplication, an increased co-ordination between providers of assistance would further enhance the efficiency of the programmes. Third, heavy co-ordination to stretch resources had limits both in terms of costs and country sensitivities. Fourth, the use by donors of current resources could be further improved with more public provision versus private assistance, notably to give competition authorities a greater role in the provision of technical assistance. Competition authorities' enforcement officials were more qualified to provide assistance than private contractors, especially if experienced former enforcement officials were not heavily involved in private contractors' work.

69. Continuing, she also announced the creation by the OECD Council of a number of global fora to achieve closer co-operation with non-Member countries than was possible through the current observership system. The Global Forum on Competition had been created in recognition of the vital role of competition policy for growth and development. It would constitute a new way to interact with non-Members, especially the economies with which OECD Member countries had a strong mutual interest in a common agenda. By inviting 15 to 20 non-Members to this series of events, the OECD's objective was to create an expanded network of high level officials who regularly met at CLP meetings to share experiences on "front burner" issues. Thus, the OECD Forum would not seek to replicate the universality of UNCTAD or the WTO, but rather would be an extension of the OECD's methods of promoting mutual understanding and analytical convergence through informal, off-the-record dialogue. Representatives of international organisations such as the UNCTAD, the WTO and the World Bank would also be invited to participate. The first meeting of the Global Forum would be held in October 2001, back-to-back with the meeting of the CLP Committee.

70. Referring to the paper that had been submitted by Japan (WT/WGTCP/W/167), the representative of the United States noted that his delegation was not convinced that there was evidence that the current ad hoc system of providing technical assistance was problematic. The US was a significant provider of technical assistance and had not heard from recipients that they were encountering problems with duplicative or uncoordinated assistance. Japan, the EC and others had proposed a role for the WTO in the provision of technical assistance in a multilateral agreement. The representative of the OECD had stated that the OECD had been carefully studying and gathering data on the issue of multiple technical assistance providers. Further, the so-called Global Competition Initiative had as one of its major priorities taking stock of and perhaps thinking about some kind of coordination for technical assistance. It seemed that more was being spent on studying the streamlining of technical assistance than actually providing it. It was not clear that a multilateral agreement on technical assistance would be a panacea or even an improvement on the current system.

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<sup>5</sup> Note by the OECD Secretariat circulated at the WTO March 2001 meeting: "Experiences of OECD outreach and Members' technical activities in 1999-2000", OECD, March 2001. The survey covers 17 Member countries, OECD outreach activities as well as information from or about UNCTAD, the World Bank and the WTO.

It was always easy to point out inefficiencies in an ad hoc system but Members should not ignore the possible inefficiencies of a centrally-planned system, the administrative cost of setting up such a system or the possibility of incorrect decisions being taken by central planners.

71. In response, the representatives of Japan and the European Community and its member States said that what the proponents had in mind was not at all equivalent to a bureaucratic central planning authority. Continuing, the representative of Japan said that he was content with the national character of bilateral technical cooperation programmes and it would be unrealistic to give a central planning role to an international organization of such programmes. What the proponents had in mind would more appropriately be termed as soft coordination: sharing information about the cooperation programmes engaged in by donor countries and sharing information on needs of particular developing countries. As had been made clear in Japan's paper (WT/WGTCP/W/167), there was a theoretical advantage associated with a multilateral organization having a soft coordinating position in relation to technical cooperation programmes. Why the WTO in this regard? There were a number of specialized agencies in Geneva and, in most of them, technical cooperation was a major component of their activities. Currently, the WTO was somewhat of an exception in this respect but there was no reason why it could not take on an enhanced role in this area, if there was a need for it. The representative of the European Community and its member States noted that his delegation did not intend the WTO to become a developmental agency or a provider of technical assistance. However, his delegation was suggesting that given the fact that there was a real need for enhanced technical assistance and capacity-building, that such assistance was already being provided but, in some cases, in a duplicative and possibly even counterproductive manner, there was a need to better coordinate and target it. Given its near global membership and the clear linkages between trade and certain anti-competitive practices, the WTO would be the right and the proper forum to undertake that role.

72. With regard to the specific elements of a multilateral competition framework, the representative of Hong Kong, China stated that the papers that had been submitted by Japan (WT/WGTCP/W/167 and 168) had not gone far enough in proposing a concrete way to move forward in the WTO context. In particular, they were unclear with respect to whether Members would be obligated by WTO rules to establish a competition law or to establish a competition authority. With regard to the paper that had been submitted by Romania (WT/WGTCP/W/161), it had identified 3 types of anti-competitive practices which, it was argued, needed to be addressed by way of a multilateral framework on competition. However, it was not clear to what extent those kinds of anti-competitive practices had been significant and had a demonstrable impact on world trade and investment. It was also unclear whether such anti-competitive practices affected a broad cross-section of the WTO membership. Answers to such questions would help to assess whether such anti-competitive practices were worthy of collective action by the WTO at all. The paper that had been submitted by Romania (WT/WGTCP/W/161) together with a number of other papers addressed only one aspect of international cooperation - that is, cooperation modalities between competition authorities. However, they had not addressed other important aspects of cooperation modalities concerning first, cooperation modalities between trade authorities and cooperation modalities between trade and competition authorities domestically. Views were sought on how to promote international cooperation not only in relation to cooperation between competition authorities but also between trade authorities and as between trade and competition authorities.

73. In response, the representative of Japan stated that Japan was open-minded with respect to the specific components of the proposed multilateral competition framework. Before defining these, it would like to have more input from developing countries regarding their needs. The representative of Romania stated that, as noted in the paper submitted by Romania, the competition authority considered that the types of anti-competitive practices that had been identified in the paper - namely, hard-core cartels, import cartels, abuse of dominant position by an internal firm against exporters - clearly had an adverse impact on international trade and development and that those practices could be usefully addressed in a multilateral agreement.

74. The representative of Hong Kong, China questioned the existence of a broad-based consensus regarding the key elements relating to a multilateral framework on competition policy, as was allegedly posited in the paper that had been submitted by Japan (WT/WGTCP/W/167). As had been stated by the representative of India, many countries considered that different approaches would be required for economies at different stages of economic development. This had also been underlined in the Australian paper (WT/WGTCP/W/159) and echoed by the EC during earlier interventions. Clarification was sought from Japan on what was meant by broad-based consensus and on how broad-based the so-called consensus actually was. In response, the representative of Japan stated that while he recognised that there were dissenting views on the subject of what should be done in the WTO, his delegation nonetheless considered that there was consensus on many of the underlying elements of competition policy and of the aspects of cooperation that were necessary to respond effectively to the threat posed by international anti-competitive practices. Some of the reasons had been explained in Japan's first paper (WT/WGTCP/W/167). Through its technical cooperation programmes with the competition officials of developing countries, Japan considered that there was a strong and broad-based consensus on the possible need for a multilateral cooperation framework. In addition, Japan had had bilateral contact with the EC competition authorities and had been involved in regional fora in the Asia/Pacific area and in other areas. Through such involvement, Japan's sense was that perhaps critical mass had already been acquired to promote a concrete framework of multilateral cooperation in the competition field. Identification of the needs of developing countries could be the starting-point for devising a concrete mechanism for multilateral cooperation in the WTO.

75. The representative of Hong Kong, China stated that his delegation had tremendous difficulties with the approach suggested in the paper that had been submitted by the Czech Republic (WT/WGTCP/W/165). First, while the paper had put forward some reasons for pursuing a multilateral approach to international cooperation, it was totally silent on the possible onerous obligations such an approach could impose upon many WTO Members. The feasibility and desirability of other alternatives to a multilateral route had not been adequately addressed. The proposed multilateral framework would impose an obligation on all Members to adopt a domestic competition law. Hong Kong, China did not consider that such an approach had adequately taken account of the divergence and the diversity in terms of competition policy objectives and implementation instruments across economies. The experience of Members in complying with certain Uruguay Round obligations should have taught Members a lesson, that is, the cost of compelling WTO Members to take on obligations that they could not readily take on could be very high. Another element of the proposed multilateral agreement which caused Hong Kong, China concern was the imposition of an obligation on all Members to set up an administrative authority. Hong Kong, China rejected outright such a prescriptive approach, which did not provide any room for flexibility. For example, obvious problems arose given the differing institutional and constitutional endowments as between Members. The objective of proposed negotiations on competition was to impose the above-mentioned unreasonable obligations on all Members, Hong Kong, China would strongly object to the launch of such negotiations. In response, the representative of the Czech Republic stated that the elements that had been proposed in his delegation's paper were needed to deal with anti-competitive practices that posed a threat to trade and development. Moreover, the elements would be complemented by the principle of flexibility which would accommodate differences in institutional and constitutional endowments as between Members. For example, in relation to any obligation to set up a competition authority, a flexible approach should be adopted so that different Members could establish their institutions in a manner that is suitable given their own particular circumstances.

#### **IV. THE CONTRIBUTION OF COMPETITION POLICY TO ACHIEVING THE OBJECTIVES OF THE WTO, INCLUDING THE PROMOTION OF INTERNATIONAL TRADE**

76. The representatives of Australia, Hong Kong, China and the Slovak Republic introduced written contributions on this agenda item (documents WT/WGTCP/W/159, WT/WGTCP/W/163 and WTT/WGTCP/W/171 respectively). In addition, the representative of the OECD provided an update

on the relevant activities of her organization. The representatives of Chile; Colombia; the European Community and its member States; Hong Kong, China; Korea; the Philippines; Switzerland; and the United States made oral statements, presented comments, or posed/responded to questions. The representative of the OECD provided an update on relevant OECD activities

77. The representative of Australia, introducing document WT/WGTCP/W/159, noted that it provided background on Australia's National Competition Policy (NCP), and highlighted the complementarity between the NCP and trade liberalization. In 1993, Australia had received a report by the Independent Committee of Inquiry on National Competition Policy which was called the "Hilmer Report". It had recommended the creation of a genuine National Competition Policy covering all of Australia and covering all trading entities regardless of their ownership. Subsequently, in 1995, all Australian governments had entered into three intergovernmental agreements which established the National Competition Policy and included a number of reforms that were described in the paper. The concept of "competitive neutrality" was fundamental to the NCP. It involved removing any unfair competitive advantage resulting from government ownership. In practice, not only did this force government-owned businesses to implement private-sector disclosure and accounting practices, but it also led to improved transparency, accountability, efficiency and competitiveness. Commercial activities – for example, exports of electoral consultancy services, had to become self-supporting. In some cases, universal service obligations were separated from core business, where possible, to ensure a level playing field. One of the practical challenges faced by many government business activities as a result of NCP was the development of an entrepreneurial approach, in other words changing the mentality of public sector officers to a more private sector oriented approach. When agreement on NCP was reached in 1995, all Australian governments had undertaken to review and, where necessary, reform legislation restricting competition. The guiding principle was that legislation should not restrict competition unless it could be demonstrated that the benefits of the restriction to the community as a whole outweighed the costs and that the objectives of the legislation could only be achieved by restricting competition. Legislation reviews generally involved calling for submissions from the public, releasing "issues papers" for comment, and producing a final inquiry report. The relevant government was then required to respond to the report with action. The process was due to finish in June 2002. The review had, in many cases, gone beyond strict competition-related matters, and had addressed the whole issue of regulation, seeking to streamline, where possible, the regulatory framework. The legislative review process was delivering a range of ongoing benefits, including lower prices, greater choice for consumers, a clearer operating environment, and reduced compliance costs for businesses, details of which were provided in the paper. More information on how that system of implementation worked could be found at the following website: [www.nec.gov.au](http://www.nec.gov.au). The National Competition Policy, while benefiting Australia overall, could significantly impact on those directly affected by change: for example, people working in industries that were previously sheltered from competition or living in communities dependent on such industries. As a consequence, in certain circumstances, governments needed to consider assistance to facilitate adjustment to reforms. In most cases, generally available assistance measures were the most appropriate form of aid. General assistance measures had a number of advantages – they were generally widely understood and already in place; they treated equally all people adversely affected by changed circumstances; they addressed the net effects of reforms, concentrating on those in genuine need; and they supported individuals and families, rather than a particular industry. An ever-present issue was whether the introduction of pro-competitive policies might have immediate negative effects on certain parts of the economy, while the broader benefits to the rest of the community would take longer to filter through. This made a national competition policy politically sensitive to implement, especially at times when external shocks were buffeting the economy, as was currently occurring in Australia. Therefore, it was imperative that governments consulted widely throughout the community and throughout the whole process to ensure that people understood the short-term costs as well as the long-term benefits of a national competition policy. Through the process, Australia had learned the hard lesson over the years that protectionist and overly burdensome domestic regulation stunted growth by restricting competition. In the early 1960s, Australia had been the third richest OECD economy. However, throughout the 1960s and 1970s, large sectors of

Australia's economy had been protected from competition, with little incentive to reduce costs and prices and/or to produce new, innovative products and services. As a result, by 1992, Australia was only the 15th wealthiest OECD economy. The turnaround in Australia's productivity growth began in the mid 1980s with the introduction of wide-ranging microeconomic and structural reforms. The introduction of the NCP in the mid 1990s further stimulated productivity growth, which had been particularly strong in the electricity, gas, water and communication services sectors. From the end of the 1990-91 recession, GDP grew over 4 per cent per annum for nine straight years, unemployment fell steadily, and inflation fell to rates not seen since the early 1970s. Moreover, the Australian average income grew 2.5 per cent per annum in the 1990s, compared to 1.4 per cent per annum in the 1970s and 1980s. This income growth was evenly distributed between labour (wages and salaries) and capital (profits). Microeconomic reform (including structural reform) and the NCP were key factors contributing to this growth. Overall, Australia's experience strongly supported the benefits of competition policy in promoting greater productivity, efficiency and economic growth.

78. The representative of Hong Kong, China, introducing document WT/WGTCP/W/159, stated that the main purpose of the submission was to stimulate more deliberation and discussion on how, from a practical perspective, to promote coherence between trade and competition policies and also to underline the need for a more balanced work programme. Regarding the case for addressing the interaction between trade and competition policies, paragraph 20 of the Singapore Ministerial Declaration provided for the setting up of the Working Group to study issues that related to the interaction between trade and competition policies. In Hong Kong, China's view, the Working Group could best contribute to fulfilling WTO objectives by devoting its energy to issues lying at the interface between trade and competition. Over the past few decades, globalisation had resulted in a paradigm shift in international commerce. That phenomenon posed many challenges to governments all over the world. First, it called for increased intergovernmental efforts to address issues with major transborder consequences in pursuit of the common goal of global welfare maximisation. Secondly, the impact of globalisation also called into question the adequacy of traditional analytical tools and policy instruments that were directed only at market conditions within national borders and not across national borders. Thirdly, the trend displayed the limitations of formulating or executing trade and competition policies in a compartmentalised manner. Fourthly, there was also a need to ensure that the multilateral trading system would continue to be effective in promoting market contestability world-wide. Her delegation considered that a balanced work programme was the best approach to fulfil the Singapore mandate. In its view, a balanced work programme should encompass the following four elements. The first element related to the trade and competition interface. Further exploratory work by the Working Group should look at two aspects: (i) how trade policies or measures could impede the free play of market forces; and (ii) how the lack of a sound competition policy could obstruct the flow of international trade. The second element concerned two aspects: (i) anti-competitive governmental action; and (ii) private restrictive business practices. Given that those two aspects could work against the competition process, it was believed that both types of action should continue to be covered by future WTO work on trade and competition. The third element concerned policy coherence within and across borders. As markets enlarged beyond their traditional national boundaries, there was a need to ensure policy coherence across national borders through, perhaps, international intergovernmental cooperative efforts to address competition issues with an international dimension. Equally important was the government's commitment to achieve policy coherence within national borders through, perhaps, implanting a competition dimension in all domestic economic policies. The fourth element concerned the interests of both consumers and producers. With an increasingly integrated world economy, it was essential that both trade and competition policies were grounded in welfare maximisation in the interests of both consumers and producers alike rather than producers alone. Hong Kong, China believed that past deliberations by the Working Group reflected a broad recognition among Members of the importance of enhancing coherence and consistency between trade and competition policies. The conceptual significance of policy coherence had to be backed up by coherence at the practical level. The paper that had been submitted by Hong Kong, China set out a number of real examples under three broad categories of cooperation modalities. The first concerned cooperation between competition authorities across

national borders. Further discussions on how to achieve the optimum results from cooperation with due regard to diversity in socio-economic circumstances and competition regimes across economies would be helpful. The second type of cooperation modality was between trade authorities across national borders. In comparison to the first type, this type of cooperation was marked by a much longer history and a much wider scope of application. As Hong Kong, China saw it, the challenge ahead for the Working Group was to explore what competition-friendly cooperation modalities between trade authorities could be brought within the WTO framework, similar to those pro-competitive modalities established in free trade agreements. For example, contracting parties to a number of free trade agreements had already undertaken not to apply to one another certain trade defence instruments that were anti-competitive in nature. The third type of cooperation modality involved trade and competition authorities within national borders. According to Members' previous submissions to the Working Group, it was found that a number of economies including Hong Kong, China, Canada, Colombia and Mexico had put in place certain domestic institutional arrangements, which were conducive to enhancing the consistency between trade and competition policies. Hong Kong, China believed that given the welfare enhancing effects of instituting cooperation modalities between trade and competition authorities, that category of cooperation modality should be given more prominence in the Working Group's future discussions. Hong Kong, China believed that the interaction between trade and competition policies was something that must be addressed in a globalising economy. Practical options to ensure consistency in the formulation and also application of trade and competition policies including the three categories of cooperation modalities that had been outlined merited further exploratory dialogue.

79. The representative of Slovak Republic, introducing document WT/WGTCP/W/171, said that competition and trade policy should be mutually reinforcing. Competition policy facilitated trade by removing restraints to commercial flows. In turn, trade policy encouraged competition by lowering tariffs and eliminating non-tariff barriers. Slovakia's competition policy regime was multi-faceted. The Anti-Monopoly Office (AMO) not only dealt with actual competition cases, but also reviewed public policies generally with a view to preventing government actions from adversely affecting competition. For instance, pursuant to inter-ministerial comment procedures, the AMO issued opinions on the likely effects on competition of draft legislation. In addition, the AMO provided comments on the implications of privatization projects from the perspective of competition, and issued opinions on the competition effects of anti-dumping and safeguard measures taken by the Ministry of Finance and the Ministry of the Economy respectively.

80. The representative of the European Community and its member States observed that a concern with the contestability of markets was common to the approaches espoused by a number of delegations, including Hong Kong, China. This could be achieved through trade liberalization and through the application of competition law to deal with private anti-competitive practices. Discussions that had occurred on this issue in the Working Group had indicated that everyone agreed that both issues were important and that the contestability of markets had to be promoted through both instruments. Indeed, discussions in the Working Group had certainly made a contribution to the growing recognition by governments in the WTO that the next phase of multilateralization should effectively tackle those issues relating to further liberalization of government restrictions and the development of the multilateral framework on competition policy. His delegation shared the sentiments of Hong Kong, China regarding the importance of cooperation at the domestic level between trade and competition officials. He could go further and support cooperation between trade, regulatory and competition officials. This was a challenging process, although the years of discussions that had taken place in the Working Group had helped all Members domestically to establish better cooperation between trade and competition officials.

81. The representative from Hong Kong, China stated that the paper that had been submitted by Australia (WT/WGTCP/W/159) had underlined the importance of mutually-reinforcing trade and competition policies and echoed views that had been expressed in the paper that had been submitted by his delegation. Australia had made a strong case for promoting the complementarity of both sets



of policies. Particularly telling in this regard were the two economic studies that had been referred to by Australia. This meant that despite the many achievements of the GATT and the WTO in dismantling trade barriers over the past decades, there was no room for complacency. His delegation also concurred with Australia's view that, wherever possible, any future multilateral rules on competition should be adaptable to Members' different levels of development. In the opinion of his delegation, any proposals to take forward WTO work on trade and competition should be evaluated in terms of the extent to which such proposals could accommodate diversity, be it with regard to economic circumstances, resources, endowments, or degree of institutional development.

82. Referring to the paper that had been submitted by Hong Kong, China (WT/W/WGTCP/W/168), the representative of the United States stated that his delegation agreed that increased participation of competition as well as trade officials in the Working Group meetings and in the preparation of submissions for the Group should be encouraged. Competition policies and agencies had significantly developed over the last 20 years, so that now there were in excess of 90 laws without any requirements or coercion from the WTO or any other body. This situation had evolved in response to domestic needs as countries had seen fit. The overwhelming majority of existing laws, if not all, were already characterized by transparency and non-discrimination. Most, if not all, contained some kind of ban against hard core cartels. Extensive systems of technical assistance provided by individual countries and international organizations already existed. Extensive cooperation occurred when agencies arrived at the stage when they felt ready to engage in those kinds of arrangements. Much had already been accomplished in an organic fashion without a formula from an international organization and the end of that process had not yet been reached. There were countries at every stage of development, ranging from those having no competition law because they were not ready or did not want one, to those in the early stages of development, to those at a very sophisticated stage of development. It was not clear that a rules-based approach in an international trade body would be superior to this constructive, evolutionary process in promoting competition law and policy.

83. The representative of Korea said that his delegation agreed with the comments made by the representative of Hong Kong, China that trade policy as well as competition policy should be grounded on the maximization of welfare for the economy as a whole, considering both consumers and producers, not producers alone. Further, national trade and competition authorities should engage in international cooperation, and that cooperation in the trade area should include a competition dimension. His delegation also agreed with Hong Kong, China's suggestion that Members should continue to share their experiences with respect to the interactions between trade and competition authorities. The kind of empirical analysis that was provided in the Australian paper was useful to developing countries in that it provided solid evidence of the catalytic role that competition policy could play in enhancing economic growth and development. The Korean Fair Trade Competition had made efforts to calculate the effects of competition policies on economic growth for instance, the degree to which domestic prices had dropped as a result of the application of competition policies but this work was very complex given the many variables at play. It would be interesting to learn more about the principle in Australia's competition regime regarding the elimination of any net competitive advantage enjoyed by government businesses resulting from their public sector ownership. The representative of Colombia suggested that the principle of neutrality embedded in the Australian competition regime could make an important contribution to create competitive conditions for all suppliers in the provision of goods and services. The representative of Hong Kong, China stated that his delegation found instructive Colombia's remark about the role played by competition authorities in that country's trade-remedy cases and wondered whether further details about this valuable national experience could be provided to the Group.

84. The representative of the Philippines said that anti-dumping was an area that would merit more emphasis when discussing how a competition policy regime in the WTO could relate to existing trade rules. Hong Kong, China apparently did not consider anti-dumping consistent with markets that were fully contestable. He wondered whether the competition policy environment in Australia had

advanced to the point where the domestic market had become fully contestable. Was progress regarding contestability related to the integration process with New Zealand? Regarding the features of a possible multilateral framework in the competition area, he said that such a framework had to be flexible enough to accommodate economic development objectives that may call for the use of investment and industrial policy measures. The representative of Australia said that the Australian delegation would answer the questions posed by Korea and the Philippines bilaterally.

85. The representative of Switzerland said that his delegation could subscribe to most elements of the paper that had been submitted by Hong Kong, China (WT/W/WGTCP/W/168), especially the general analysis, although when it came to the conclusions arising from that analysis, Switzerland drew quite opposite conclusions. For instance, the paper suggested that, due to globalization, economies had become more intertwined, and argued on this basis that the adequacy of tools and policy instruments directed at market conditions within national borders were called into question. The considerations suggested that it would be important to develop tools enabling countries to address competition issues at the multilateral level. Further, he stated that currently cooperation between national competition authorities was generally governed by bilateral agreements or regional free trade agreements. Was this the optimal form of cooperation in the competition area or would it be preferable to develop some commitments and guidelines in this regard at the multilateral level?

86. The representative of Hong Kong, China said that his delegation was of the opinion that the Group should focus on anti-competitive governmental measures and that such measures could be best addressed in a multilateral forum. Regarding the optimal form of cooperation in the area of competition, his delegation was of the view that, as one third of WTO Members did not have a competition regime in place, there was no point in discussing the prospects for cooperation involving a multilateral forum. The representative of Chile said that his delegation agreed with Hong Kong, China's view that the principles and objectives of trade and competition were exactly the same. More welfare was needed through better allocation of productive resources. Therefore, it was essential that trade and competition authorities made efforts at making the two sets of policies consistent. For this reason, in Chile, as in countries such as Colombia and Mexico, the competition agency reviewed the application of anti-dumping measures. More generally, Chile also favoured setting up a multilateral framework for competition policy at the WTO. Indeed, Chile expected greater liberalization in the WTO context to be accompanied by a framework of competition policy.

87. The representative of Colombia said that the paper that had been submitted by Hong Kong, China (WT/W/WGTCP/W/168) had offered the Working Group a wide overview of what can be understood by cooperation. In the opinion of his delegation, Hong Kong, China's ideas deserved careful consideration. In Colombia's own experience, the competition authorities had played an important reviewing role in anti-dumping and countervailing-duty investigations. It was important to strike a balance between the interests of domestic industry and those of consumers in trade-remedy cases, and Colombia had developed the proper arrangements for implementing this goal.

88. The representative of the United States said that his delegation recognized that there was a broad degree of complementarity between various aspects of trade policy and competition policy. Hence, it was useful to look at how both sets of policies could be made more complementary. Nevertheless, trade and competition policies had arisen in different historical and national contexts; these differences should receive proper attention when looking at the issue of complementarity. In addition, it was important to consider the notion of sequencing when exploring further complementarity between trade and competition policies. Therefore, in the view of his delegation, the complementarity of trade and competition policy with regards to competition-related issues adversely affecting market access should be discussed well before exploring how trade policy and competition policies could be made more mutually-supportive with respect to trade-remedy measures. The notion of sequencing made sense because, to the extent that uncompetitive market conditions could be addressed through enhanced complementarity between trade and competition policies, there would be less scope and latitude for the practices offset by trade-remedy measures to emerge in the first place.

His delegation intended to submit a paper for the next meeting delving into the area of possible cooperation modalities between trade and competition authorities with respect to competition-related problems impinging upon market access. The representative of Hong Kong, China said that the idea of having the Group discuss competition-related market access issues was a positive and constructive step in the deliberations of the Group. However, his delegation hoped that sooner or later the United States would be in a position to engage in discussions regarding the latter part of the sequence.

89. On the question of whether the WTO is the right forum for multilateral rule-making in the area of competition policy, the representatives of Hong Kong, China and the United States sought clarification as to why the WTO, which was a rule-making body in the area of international trade, would be equally competent as a rule-making body in the area of competition? Did the EC envisage any limitations resulting from the WTO taking on the role of building a binding agreement on competition policy rather than international trade? Clarification would place Members in a better position to assess the costs and benefits of the EC's rule-making proposal, having regard to their own unique domestic considerations. In response, the representative of the European Community and its member States stated that his delegation believed that competition policy was an essential guarantee for the openness of markets to ensure the benefits of trade liberalization. The WTO offered the advantage of a solid institutional framework in which developing countries and industrialised countries participated on an equal basis and could develop an agreement on the basis of equal participation. It offered a plateau of stability with the capacity to combine principles and modalities for cooperation. In any case, competition policy was already in the WTO – in the TRIPS Agreement and the GATS Agreement, for example - and it would inevitably be included in some of the issues that would be discussed in pending negotiations. The time had come for a more comprehensive and horizontal approach to the issue of anti-competitive practices. Finally, it was necessary to be aware of the backlash against globalization. Given the criticism often made about the WTO that it supported producers, it would be difficult to explain that wealthy Members had come collectively to the conclusion that anti-competitive business practices that distorted international trade was not a proper issue for the WTO to address. He noted further that the type of anti-competitive practices that were being discussed had an international dimension such as international cartels, export cartels, import cartels, abuses of a dominant position that had transboundary effects. All of those practices had a clear impact upon international trade and development and were trade distortive. It would be problematic if the WTO was not in a position to develop a common framework containing basic principles about how governments could better cooperate in order to deal with those practices. As far as his delegation was concerned, the question was why not the WTO? In relation to what had been discussed, what matters were considered inappropriate for handling by the WTO?

90. With regard to the question of whether the application of the Dispute Settlement Understanding was a necessary component of action in the WTO framework, the representative of Hong Kong, China stated that the application of the DSU in the area of competition would cause a compliance problem for those WTO Members that were not yet ready to take on obligations in the area. Given that more than one third of WTO Members had yet to adopt domestic competition law, it was premature to develop multilateral rules requiring each and every Member to introduce such a law. With more than one third of WTO Members yet to adopt a domestic competition law, what was envisaged as being the optimal timing of establishing a WTO framework agreement with national competition authorities and domestic competition laws as the backbone of the domestic competition law regime? What flexibility arrangements were being proposed by the EC to accommodate the specific circumstances of Members, particularly those without a general competition law so as to forestall a possible glut of dispute cases pertaining to the adoption of competition statutes? Was the plurilateral approach that had been proposed by the EC considered to be a possible means to overcome the compliance problem that had just been mentioned? The representative of the Philippines also asked how the dispute settlement mechanism would apply in respect an approach that was based on cooperation? In response, the representative of the European Community and its member States stated that when embarking upon negotiations on competition, Members needed to know that they were committing to something that was predictable. That was why it was felt that, as

far as possible, the dispute settlement mechanism should only apply in the area of competition to commitments regarding legislation. If the dispute settlement mechanism applied to the way in which the law was being enforced in individual cases, countries would not be in a position to say that they had assumed clear commitments. During negotiations, it was necessary to have an open mind and be flexible with regard to individual country situations. He stated that he would not comment on the possibility of an opt-out. This was an idea that had been discussed informally and it was, therefore, not something that had been put on the table for discussion in the Working Group. Certainly, that was an idea that his delegation was ready to explore and to consider in relation to the situation of individual developing countries. However, the agreement should be flexible with a strong development component and it was hoped that countries, in the process of negotiations, would come to the conclusion that it was in their own interest to subscribe to those commitments, including those that related to the adoption of a domestic competition law. In part, the process of negotiations involved a process of discussing different views and trying to come, at the end of the day, to a common conclusion.

91. The representative of the OECD mentioned two reports by the Joint Group on Trade and Competition that were relevant to the issues under consideration, namely "Complementarities between trade and competition policies" and "Consistencies and Inconsistencies between Trade and Competition Policies".<sup>6</sup> She also briefly presented the Joint Group's work on "Options for a greater coherence between trade and competition policies", which had just been published.<sup>7</sup> Five complementary options were identified in this report: (i) enhanced voluntary convergence of competition policies; (ii) enhanced bilateral co-operation between competition authorities; (iii) regional agreements containing competition policy provisions; (iv) plurilateral competition policy agreements; and (v) multilateral competition policy agreements. Without prejudging the desirability of reaching a multilateral agreement, the report focused in greater detail on the fifth option, identifying three possible categories of rules: "core principles", "common approaches" and "common standards" and elaborated on the possible content of a multilateral framework in that context. Although the view of Member countries' remained that dispute settlement should not be available to review individual cases, the paper also explored whether and how multilateral dispute settlement provisions could eventually apply. The paper concluded with an analysis of the relationship between bilateral and multilateral options. Two further papers also published elaborated on the possible treatment of "core principles", "common approaches" and "common standard".<sup>8</sup>

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

92. The representative of Uruguay, introducing relevant portions of document WT/WGTCP/W/169, noted that his country had a small market, relative to other countries in the region. Nonetheless, it considered that it was important to implement measures to deal with the implications of corporate concentration and anti-competitive practices. Rather than implementing a single, comprehensive law, it had adopted two relevant statutes which were described in detail in the written submission. These were: (i) a law dealing with large retail outlets; and (ii) a law dealing with the regulation of competition. Under the first law, outlets that exceeded certain thresholds were subject to review by the authorities responsible for the protection of small and medium-sized

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<sup>6</sup> In *Trade and Competition Policies for Tomorrow*, OECD, 1999.

<sup>7</sup> "Options for trade and competition policy coherence" and "International options to improve the coherence between trade and competition policies" are published in *Trade and Competition Policies – Options for a Greater Coherence*, OECD, 2001.

<sup>8</sup> "Outline of (A) Core principles, common approaches and common standards and (B) Bilateral and multilateral approaches" and "Note on Terminology: follow-up to work on international options to improve coherence between trade and competition principles". The two papers are published in *Trade and Competition Policies – Options for a Greater Coherence*, OECD, 2001.

enterprises. The second law provided rules that were applicable to all firms. It prohibited agreements that restricted competition between firms and a number of other anti-competitive practices. In addition, recent financial legislation had incorporated provisions relating to fines and judgements relating to instances of anti-competitive practices. Uruguay was a party to the Mercosur protocol on the protection of competition which had been adopted in December 1996, and which was also described in the submission. Uruguay was also participating actively in the negotiating group on competition policy that had been established in the context of the ongoing negotiations on the Free-Trade Area of the Americas (FTAA). The existence of the group recognized the need for measures to ensure that the benefits of trade liberalization were not undermined by anti-competitive practices, and the importance of competition policy for developing as well as developed countries.

93. The representative of Morocco, introducing document WT/WGTCP/W/170, said that the transition in Morocco from an administered and protected economy to one that was liberalized and open to the world necessarily implied increased competition. Recent external liberalization efforts, including at the multilateral and bilateral levels, as well as the progressive deregulation of prices had created a need for rules to ensure that the benefits of these efforts were not undermined by anti-competitive practices. The Law on the Freedom of Prices and Competition of Morocco had been adopted to meet this need. It was both an important tool of state economic policy and a necessary corollary of external liberalization and privatization. The purposes of the law were to ensure freedom of pricing; free access to markets; transparency and fairness in trade relations, and the strengthening of consumer information rules. Under the law, it was intended that prices would normally be set by the free play of supply and demand. This was subject to two limitations: (i) the right of the state to intervene for structural reasons, for example the existence of a natural monopoly; and (ii) for cyclical reasons, such as a supply crisis in regard to energy supply. Anti-competitive practices such as cartels and abuse of a dominant position were prohibited. The law also contained provisions for the surveillance and control of mergers as well as provisions relating to transparency and fairness in trade relations and other matters which were described in the paper. It established a Competition Council with appropriate powers. The law represented an important step toward creating a culture of competition in Morocco.

94. Pursuant to a suggestion by Uruguay, and following discussion by Members, the Working Group decided that the Secretariat would be asked to prepare a table or tables on the subject of exceptions and exemptions from competition law, on the basis of: (i) information that had been provided by members in their written and oral contributions; and (ii) the study that had been prepared by the OECD on this subject, in 1996. The tables would be similar to those that were contained in the Overview of National Competition Legislation prepared by the Secretariat (document WT/WGTCP/W/128/Rev.1) and would be factual and descriptive in nature.

95. In addition, the Chairman informed the Group that the Secretariat was in the process of updating the Overview of Members' National Competition Legislation (WT/WGTCP/W/128/Rev.1), which had last been updated in October 1999, to reflect information that had been provided or was to be provided by various countries since then. In preparing the update, the Secretariat would be pleased to take into account any additional inputs on national legislation that would be received from delegations by 30 April 2001.

96. The Chairman provided a number of personal reflections on the discussion that had taken place on Agenda items I and II. He drew attention, *inter alia*, to the following points, emphasizing that they were not in any way implied to be comprehensive and were simply some select personal impressions which had no official standing:

- There had been a wide-ranging discussion of the ways in which the fundamental principles of non-discriminations and transparency could relate to a multilateral agreement on competition policy. Two key questions which had been addressed from

various points of view had been the potential value added of an explicit WTO discipline on this subject and the question of whether it could in any way spill over to related areas of economic policy, such as industrial policy.

- A second set of questions which had been examined under agenda item I concerned the scope of the principles relating to substantive competition law that would be embodied in a multilateral agreement. In answer to this question, a number of delegates representing all sides of the debate had made the point that it would not be desirable to attempt to harmonise competition law, that it was important to recognise that there were important differences between countries and that all countries should not be expected to necessarily have sophisticated competition laws. Recognizing this, in the view of most of the proponents of a multilateral framework on competition policy, only one aspect of such policy, namely the treatment of hard-core cartels, would be amenable to a common substantive commitment. The treatment of other practices, such as abuse of a dominant position or mergers, would be left to Members to deal with in their substantive competition laws as they saw fit, so long as the treatment was consistent with the fundamental principles of national treatment and transparency. Moreover, even with regard to the prohibition of cartels, it seemed that considerable discretion would be left to Members as to how the prohibition would be reflected in their national laws.
- With regard to the subject of approaches to promoting cooperation and competition among Members, including in the field of technical cooperation, the point was made that, unlike the area of substantive competition law, the scope of the proposed provisions on cooperation in a multilateral framework on competition policy would *not* be limited to cartels. Hence, Members would be free to employ those provisions in investigating cases of abuse of a dominant position or mergers, although they would not be required to adopt a particular standard in the substantive treatment of these categories of anti-competitive conduct. Another point that was stressed was that, under the proposed framework, cooperation would ultimately remain voluntary in nature, since countries would not be subject to penalties for non-cooperation and they would not be required to cooperate against their own important interests.
- With regard to the contribution of competition policy to achieving the objectives of the WTO, a delegate had stressed the need to have a balanced agenda and a balanced work programme in the Working Group, when addressing the interaction between trade and competition policy. In this view, equal attention should be paid to the adverse impact of a deficient competition policy on trade liberalisation and to the welfare-reducing effect on protectionist trade policy or trade measures on marketing stability. Both anti-competitive governmental and business actions would be examined. Additionally, it was recognized that there was a need to promote policy coherence both across and within national borders. The point was also stressed that trade and competition policy should be grounded on the welfare maximisation in the interest of both consumers and producers.
- Another delegate had provided an interesting, empirically-based analysis of the benefits that had been produced from the recent strengthening of competition policy in her country.
- It was worth noting that, in the course of the meeting, answers had been provided to a good number of the questions that had been included in the Updated Checklist of Questions Posed by Members in 2000 (Job 520) that had been circulated to Members by the Chairman on 24 January 2001. In several cases, the answers provided had generated further discussion.

## **VI. REQUESTS FOR OBSERVER STATUS FROM INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS**

97. The Working Group agreed to revert to requests made by SELA, the Organization of the Islamic Conference, the South Centre and the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) at its next meeting, having regard to the ongoing consultations on related matters in the framework of the General Council.

## **VII. OTHER BUSINESS**

98. The Chairman noted that the next meeting of the Working Group would take place on 5-6 July, back-to-back with the annual meeting of the UNCTAD Expert Group on Competition Law and Policy which would take place on 2-4 July. The substantive agenda of the Working Group's meeting would be the same as the agenda for the current meeting. Members agreed to provide written contributions to the Secretariat not later than Friday 16 June, to permit their translation and circulation to other delegations in advance of the meeting.

99. The Chairman suggested that, in the course of its next meeting, in addition to carrying forward the work undertaken at the current meeting, it would be useful for the Working Group to consider: (i) whether it wished to hold a third substantive meeting following the summer break; and (ii) the process for preparation of its Report to the General Council for the year 2001. In reflecting on these matters, it should be borne in mind that the deadline for submission of annual reports to the General Council by subordinate bodies had been set as 14 October 2001, to ensure that the reports were completed and reviewed in advance of the Ministerial meeting which would take place in Doha on 9-13 November. The nature of the Working Group's Report should be discussed by the Group at its meeting in July but, if desired, it could be similar in style and approach to the Group's Reports for 1998, 1999 and 2000.

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