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

Study by the UNCTAD secretariat

**Executive summary**

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

The Group of Experts may therefore wish to: (a) undertake a cost-benefit analysis of peer review in the competition policy area, in the light of its possible objectives, scope, criteria, voluntariness, structure and follow-up, as well as views expressed thereon; (b) examine the reasons why some types of consultations have not been fully used within existing multilateral frameworks, using as a basis a typology that might be prepared by the UNCTAD secretariat of the different objectives of consultations, linked with the preparation of Model Cooperation Clauses; and (c) discuss why diplomatic methods of dispute settlement have not been used for competition policy disputes, and how they could be appropriately adapted for this purpose. Possible implications for multilateral cooperation on competition policy and for development objectives could be identified in this connection. This would be without prejudice to decisions still pending as to the possible adoption or content of a multilateral framework on competition policy, or as to which of its provisions, if any, might be subject to binding dispute settlement.

**Contents**

## Introduction

1. The Intergovernmental Group of Experts on Competition Law and Policy, at its fourth session held from 3 to 5 July 2002, requested the UNCTAD secretariat to prepare for the Group's fifth session "studies on the implications of closer multilateral cooperation in competition policy for developing and least developed countries' development objectives, in particular….. a study of the roles of possible dispute mediation mechanisms and alternative arrangements, including voluntary peer reviews, in competition law and policy".[1]

2. The present study therefore examines the possible roles, in the context of international cooperation on competition policy, of: (a) voluntary peer review; (b) consultations on issues, cases, or relating to the implementation of agreements; and (c) conciliation, mediation and good offices.[2] Those subjects are dealt with in that order here because peer review is the most general in character and the furthest away from obligatory dispute settlement, consultations would be more focused and might highlight matters of dispute, and conciliation, mediation and good offices are diplomatic methods for settling specific disputes. Chapters 1, 2 and 3 respectively deal with each of these mechanisms, review relevant provisions and experiences in the context of selected bilateral, plurilateral and multilateral instruments, highlight possible implications and make recommendations relevant to multilateral cooperation on competition policy and to development objectives, without prejudice to what may be the eventual outcome of ongoing discussions within the WTO Working Group on the Interaction between Trade and Competition Policy.

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

## Chapter I

## VOLUNTARY PEER REVIEW

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

4. Peer review has recently been introduced at the regional level in broad areas which could include competition policy. The African Union, in connection with the New Partnership for Africa's Development (NEPAD), has established an African Peer Review Mechanism (APRM), entailing periodic reviews of the policies and practices of participating States to ascertain progress being made towards achieving mutually agreed goals and compliance with political, economic and corporate governance values, codes and standards which have been agreed upon.[4] The peer review process aims at spurring countries to consider seriously the impact of domestic policies not only internally, but also on neighbouring countries, and to promote mutual accountability, as well as compliance with best practice. A timetable for effecting progress towards achieving the agreed standards and goals must be drawn up by the State in question, taking into account its particular circumstances. This mechanism has not been used so far. However, what is striking is the fact that this review mechanisms was not imposed on African countries as conditionality but voluntarily introduced by NEPAD members themselves. Asia-Pacific Economic Cooperation (APEC) has also set up a system of peer reviews in connection with Individual Action Plans (IAPs) for the achievement of APEC's trade and investment liberalization and facilitation goals, including in the area of competition policy; such reviews aim at assessing the completeness, comprehensiveness and clarity of the IAPs, and their efficacy with respect to APEC's Osaka Action Agenda. It has been suggested that the strengths of APEC's peer reviews are they are entirely voluntary, involve the business sector, record liberalization and reforms since the 1980s and prevent backsliding, while their weaknesses are they could be more comprehensive, transparent and user-friendly.[5]

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

5. The Country Reviews of Regulatory Reform carried out by the Organisation for Economic Co-operation and Development (OECD), in which the countries reviewed participate on a voluntary basis, involve an assessment of the policies and performance of a member country by other countries relating to different areas of regulation. Detailed country reports are prepared by the OECD secretariat, on the basis of responses by the reviewed Government to OECD questionnaires, country missions and the reactions of the reviewed country to the draft report. One of the core background reports for such country reviews examines the role of competition policy in regulatory reform, including: (a) the national competition policy's historical foundations; (b) substantive issues, including the content of the competition law; (c) institutional issues such as enforcement structures and practice; (d) limits of competition policy, including exemptions and special regulatory regimes; (e) competition advocacy for regulatory reform; and (f) conclusions and policy options. This report is presented to the Competition Committee for review; representatives of the competition authority concerned are then "examined" in a Committee session by two country examiners, after which questions are posed by other member countries. After a less in-depth review by another OECD body, the report is revised by the secretariat and published. The

policy recommendations flowing from such reviews, while not mandatory, have often been followed by the countries reviewed, but the Competition Committee itself does not monitor whether there is follow-up. These Country Reviews of Regulatory Reform will soon be discontinued. It has been suggested that their strengths include the use of policy options and recommendations, strong participation in meetings and the specialist knowledge of the Competition Committee; on the other hand, lack of review of past recommendations and their implementation has been identified as a weakness.[6]

6. A similar (albeit less intensive) exercise involving Economic Surveys of member countries has been launched more recently in the context of reviews by the OECD Economic and Development Review Committee (EDRC), which examine macroeonomic and structural issues (with a special chapter on competition policy); participation is compulsory. This exercise is well regarded by OECD member countries for the depth and rigour of analysis and regular review of past recommendations; however, it has been found difficult to ensure that all EDRC members have appropriate expertise and sufficient time to prepare for reviews, and there have been problems of interest or participation in the reviews, particularly by small countries.[7] However, the more focused and in-depth Competition Committee reviews will continue in parallel with the EDRC reviews.

7. A similar procedure for non-OECD member countries has now been introduced, on a voluntary basis. A review of South African competition policy took place at the Third Global Competition Forum (10 - 11 February 2003) on the basis of a survey by the OECD secretariat, which generally expressed a favourable opinion about the manner in which South African competition policy was being implemented.[8] The South African Trade and Industry Minister has expressed satisfaction at the survey's findings; its recommendations for improvements have mostly been accepted and are in the process of being adopted.[9] A review of Chile's competition policy has also been undertaken, at the Latin American Competition Forum organized by the OECD on 7 and 8 April 2003. More such reviews are planned for the future.

## C. WTO Trade Policy Review Mechanism

8. The objectives of the WTO Trade Policy Review Mechanism (TPRM) include contributing to improved adherence to multilateral trade rules, and hence the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, Members' trade policies and practices; however, it is not intended to serve as a basis for enforcement of specific obligations under the WTO Agreements.[10] All WTO Members are subject to review, with the four Members with the largest share of world trade being reviewed every two years, the next 16 every four years, and the others every six years. A longer period may be fixed for least developed country (LDC) Members. First reviews are mostly done by volunteering countries, while second reviews follow the fixed cycle. Reviews are conducted by the Trade Policy Review Body (TPRB) on the basis of a policy statement by the Member under review and of a report prepared by the WTO secretariat from data gleaned from country missions, responses to questionnaires, publications and reactions by the Member concerned to the draft report; two discussants take a leading role in the review by the TPRB. Although the relevant documents and proceedings are published, there are no formal recommendations relating to actions to be taken by the Member concerned. Although

competition issues are not formally part of the TPRM mandate, the WTO secretariat and reviewed countries have chosen to report on them in some cases, while other countries have asked questions on such issues; this has taken place on an optional basis and with varying degrees of intensity. A comment by a United States delegate regarding questions on its antitrust regime in the 2001 TPRM examination of the United States was that "it had been a useful learning experience for his agency since it highlighted differences in approaches and perspectives with other jurisdictions".[11]

9. It has been suggested that the TPRM's strengths include promotion of technical assistance and capacity building, particularly for LDCs, and the production of structured, detailed and analytical reports, while its weaknesses include insufficient WTO secretariat resources, limited participation in meetings, lack of recommendations or prescriptive elements and a "resistance factor" in relation to the review processes.[12] It has also been suggested that one advantage of the TPRM is the encouragement of a self-evaluation process, but that the reviews are not conducted frequently enough to be fully effective. Among several recommendations for its improvement, it has been suggested that the TPRM process could better assist individual developing countries (particularly LDCs) in adhering to the rules, evaluate the impact of implementing such rules (including by verifying whether anticipated positive effects have occurred), analyse tariff and non-tariff barriers faced by the countries concerned in their most important export markets, and assess needs for technical assistance more intensively.[13]

D. Implications and recommendations

10. In the light of an examination of some peer review processes currently used (including the above-mentioned APEC, OECD and WTO peer review processes), an OECD report concludes that: (a) all forms of peer review share the four characteristics of involvement of a committee of experts, proposals, a collegial form of monitoring compliance and interactive investigation; (b) differences can exist, for example, in relation to review frequency, cost and comprehensiveness, levels of economic development and substantive policy between reviewed countries, and the peer selection process; and (c) the review objectives can include policy advice, encouraging policy coordination and cooperation, gathering and dissemination of information and best practice models, providing technical assistance and aid, and compliance monitoring of possible breaches of international agreements and obligations.[14] This report suggests that any competition policy review mechanism would have to resolve certain key issues, including in relation to frequency of reviews; equal treatment or focus on particular members; the review criteria (e.g. consistency of competition laws with core WTO principles or with the reviewed country's stated policy objectives, exclusions, cooperation arrangements, restrictive business practices (RBPs) reducing both consumer welfare and market access, technical assistance needs); respective roles of the secretariat and members; review of previous recommendations; composition of the review group; voluntary or compulsory nature of participation; duties of members under review in terms of cooperation; costs and resource implications; and other issues such as the approval process for reports, publicity, increase in the level of peer pressure, or relationship with the TPRM.

11. A communication by Canada to the WTO Working Group suggests that peer review would provide a non-adversarial forum to query and better understand other countries' policies and practices with the goal of sharing best practices and improving domestic policies

or institutions, as well as a substitute for dispute settlement.[15] It notes that questions remain as to the appropriate scope or coverage of a peer review mechanism; whether it should explore trends in the application of enforcement of a country's law, or be limited to ensuring conformity by the country with its obligations under a framework agreement; be voluntary or mandatory, and involve follow-up on recommendations made by the peer group. It suggests that, with no binding obligations, peer review would clearly ensure that individual enforcement decisions are not reviewed or challenged, yet might allow WTO Members to explore the systematic application of competition law and policy over time.

12. During the discussions of the Working Group, it has been questioned whether the WTO would be the right forum for peer review, since it had been indicated that the latter would not be a substitute for a compliance mechanism, and was expected to help countries to evolve their competition laws over time; in this connection, it was noted that UNCTAD was already providing such a forum.[16] In regional seminars organized by the UNCTAD secretariat in the context of the post-Doha process, in response to suggestions that a system could be introduced whereby countries could volunteer under an OECD-type peer review, or be reviewed through periodic competition policy review mechanisms similar to the TPRM, some participants expressed concerns or doubts about the periods between country reviews being too long; the process being too costly; pressure being exerted on developing countries, with scepticism expressed as to the extent to which the authorities of developed and of developing countries or LDCs could be considered peers; and how useful such a voluntary mechanism would be.[17]

13. Taking into account all the points raised above from different quarters, the Group of Experts may wish to undertake a cost-benefit analysis of peer review, in the light of its possible objectives, structure and implications for international cooperation and for developing countries' competition policies. For the purposes of such an analysis, a key set of related questions that might be discussed could be the following: the voluntariness or automaticity of the choice of the country to be reviewed; the scope of the review, including the extent to which it would confine itself to verifying compliance with any agreement, look at competition laws and their enforcement trends, or go into the consistency of competition laws with core WTO principles or with the reviewed country's stated policy objectives; the extent to which the effects of the reviewed country's competition policy on other countries, the effects of other countries' competition policies on the reviewed country, and experiences with international cooperation in this connection, would be looked at; the criteria on the basis of which the review would be undertaken, who would determine such criteria and how, and how consistent such criteria would be over time and over reviews of different countries; whether any prescriptive recommendations would be made by the review machinery and, if so, how consensual any such recommendations would need to be for their adoption; what would be publicized; whether there would be monitoring and follow-up in respect of any recommendations; whether there would also be any monitoring of the economic impact of following such recommendations, or of complying with any multilateral agreement; linkages that would be made with technical assistance; frequency of reviews of the same country; and how costs of reviewed countries in particular would be met.

## Chapter II

## CONSULTATIONS NOT NECESSARILY LINKED TO DISPUTE SETTLEMENT

### A. Bilateral and regional mechanisms

14. Some bilateral cooperation agreements covering the competition policy area make no explicit provision for consultations; but even without such provisions, of course, consultations may still take place in the course of implementing other provisions in such cooperation agreements. Other agreements provide for consultations regarding any matter relating to the agreement, which may be as a result of a specific request or as part of a regular schedule of meetings. The United States - Japan agreement, for instance, is unique in providing for the possibility of consultations through diplomatic channels on any matter arising in connection with the implementation of the agreement, as well as direct consultations between the competition authorities concerned on matters arising in connection with the agreement; the parties' competition authorities are also to meet every year to exchange different types of information on each other's activities in this area.[18] The United States - Brazil agreement provides that either party may request consultations regarding any matter relating to the agreement, indicating the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited; each party shall consult promptly when so requested with a view to reaching a conclusion consistent with the purposes of the agreement.[19] Consultations provisions sometimes refer to the principles of the agreement; the United States - European Union Agreement, for instance, provides that in every consultation, each party shall take into account the principles of cooperation set forth in the agreement and shall be prepared to explain to the other party the specific results of its application of those principles to the issue that is the subject of the consultations.[20] With some variations, similar language is contained in most of the cooperation agreements entered into by the United States or by Canada.

15. The consultations provisions in the Canada - Costa Rica Free Trade Agreement go further by providing for what appears to resemble a peer review process.[21] The parties are to consider matters relating to the operation, implementation, application or interpretation of the competition policy chapter, and to review both their measures to proscribe anti-competitive activities and the effectiveness of enforcement actions. The parties have to consult at least once every two years, or at the written request of a party, and have to designate officials responsible for ensuring that consultations, when required, take place in a timely manner. If the parties do not arrive at a mutually satisfactory solution of a matter arising from a written request for consultations, they shall refer it to the Free Trade Commission set up to monitor the overall implementation of the agreement. Such detailed provisions may be contrasted with the equivalent provisions in the Canada - Chile Free Trade Agreement or in the North American Free Trade Agreement (NAFTA), which simply provide that each party shall cooperate on issues of competition law enforcement policy consultations being listed as one of the methods of cooperation.[22] Indeed, although most agreements of a regional or subregional nature provide for consultations, there are wide differences in the scope of such provisions in a few instances, consultations provisions may even go as far as providing for the communication of opinions by a competition authority in proceedings brought before the other competition authority, or the communication of opinions on draft decisions for comments.[23]

## B. OECD mechanisms

16. At the plurilateral level, the 1995 OECD Recommendations in this area provide for consultations at the request of a Member country which considers that: (a) an investigation or proceeding being conducted by another Member country may affect its important interests; or (b) one or more enterprises situated in one or more Member countries are engaging or have been engaged in RBPs of whatever origin that are substantially and adversely affecting its interests.[24] Requests for consultations should be made as soon as possible after notification is received of enforcement activities affecting the requesting party's important interests, and they should be accompanied by an explanation of the national interests affected that is sufficiently detailed to enable full consideration to be given to the request. Member countries receiving such requests for consultations should give full and sympathetic consideration to the views expressed or factual material provided by the requesting country, in particular with respect to (a) suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation proceeding and (b) the nature of the RBP in question, the enterprises involved and the alleged harmful effects on the interests of the requesting country. All countries involved in consultations should give full consideration to the interests raised and to the views expressed during consultations so as to avoid or minimize possible conflict. However, entering into consultations is without prejudice to the continuation of the case, and the requested country retains full freedom of ultimate decision. However, where a Member country agrees that enterprises situated in its territory are engaged in RBPs harmful to the interests of the requesting country, it should attempt to ensure that these enterprises take remedial action, or it should itself take whatever remedial action it deems appropriate, including action under its competition legislation or administrative measures, on a voluntary basis and considering its legitimate interests. And without prejudice to any of their rights, the Member countries involved in consultations should endeavour to find a mutually acceptable solution in the light of the respective interests involved. In the event of a satisfactory conclusion, the two countries by mutual agreement should inform the OECD Competition Committee about its main points.

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

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

pharmaceuticals manufactured under a licence granted by the firm. The matter was referred by the authorities of the developed country to the firm in question and its reply explaining the circumstances of the prohibition was transmitted to the developing country. The matter was brought to the attention of the Group of Experts during informal consultations.

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

## D. Mechanisms under WTO Agreements

20. Separate consultations mechanisms (other than mandatory consultations linked to the dispute settlement process) are also established under the aegis of the WTO. Under a 1960 GATT Decision, a contracting party to which a request for consultations is addressed shall accord sympathetic consideration to such a request and afford adequate opportunity for consultations, with a view to reaching mutually satisfactory conclusions.[25] If it agrees that harmful effects are present, it shall take such measures as it deems appropriate to eliminate these effects. The outcome of the consultations is to be conveyed to WTO Members. This procedure was invoked for the first time by the United States and Japan in the Photographic Film case, in respect of alleged RBPs affecting imports of that product into each other's markets (the European Union also asked to join in these consultations).[26] However, the consultations were not pursued, and had no bearing on the outcome of the case.

21. Under the General Agreement on Trade in Services (GATS), Members shall enter into consultations at the request of any other Member with a view to eliminating certain business practices of suppliers restraining competition and thereby restricting trade in services. The Member requested shall accord full and sympathetic consideration to such a request, and shall supply relevant publicly available information, as well as other information, subject to its domestic laws and the conclusion of a satisfactory agreement regarding confidentiality. This procedure has not been used so far.

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

### E. Implications and recommendations

23. It has been suggested that a multilateral competition framework could envisage different types of mechanisms, beginning with periodic consultations between States on specific issues relating to competition.[27] Without prejudging such questions, it may be useful for the UNCTAD secretariat to elaborate a typology of the different forms and objectives of consultations, such as consultations on issues (which might be categorized into different kinds), cases, general sharing of experiences, or the implementation of the provisions or principles of agreements, including their possible links with peer review, notification or conflict avoidance, and with explanatory commentaries and illustrative hypothetical cases. It would be appropriate to link the preparation of such a typology with the elaboration of alternative Model Cooperation Provisions on Competition Law and Policy, as suggested in a previous UNCTAD secretariat report.[28] In the course of discussions on such Model Cooperation Provisions relating to consultations, the Group of Experts might wish to identify the reasons for the limited use so far of certain types of consultations at the multilateral level.

## Chapter III

## CONCILIATION, MEDIATION AND GOOD OFFICES

### A. Non-multilateral mechanisms

24. No bilateral cooperation agreement on competition law enforcement provides for dispute settlement mechanisms.[29] Free trade, customs union or common market/single market agreements may have general dispute settlement mechanisms applicable to all areas, but no such agreement has mechanisms specially dedicated to competition policy. However, some free trade agreements in the Americas (including NAFTA and the free trade agreements concluded by Canada with Chile and Costa Rica) specifically exclude disputes over competition policy from the purview of the dispute settlement procedures provided for under the agreement (only obligatory procedures are provided), or from arbitration. At the plurilateral level, the 1995 OECD Recommendations provide for a conciliation mechanism to resolve disputes in the event that no satisfactory solution can be reached pursuant to the consultations procedures described in the previous chapter; the Member countries concerned, if they so agree, should consider having recourse to the good offices of the OECD Competition Law and Policy Committee with a view to conciliation. The OECD secretariat should compile a list of persons willing to act as conciliators. The procedures to be followed are determined in agreement with the countries concerned, any conclusions drawn from the conciliation are not binding on them, and the proceedings are to be kept confidential unless they otherwise agree. There has so far been no recourse to this conciliation mechanism; a 1987 review of a previous version of the 1995 OECD recommendations took the view that this had mainly been because the notification, exchange of information and consultations procedures provided for in that recommendation had been effective in avoiding or resolving conflicts.[30]

## B. Multilateral mechanisms

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

26. The WTO's Dispute Settlement Understanding (DSU) provides for the possibility for the parties to a dispute, if they so agree, to use good offices, conciliation or mediation to settle a dispute; the Director-General of the WTO may, acting *ex officio*, offer his services for this purpose.[31] However, so far, no use has been made of such procedures. A report by an independent think tank based in the United Kingdom has recommended that there should be greater effort to use alternative methods of dispute resolution, or activities that can better clarify issues for the dispute settlement process itself, so long as they accelerate and do not delay settlement of disputes.[32] A number of the persons interviewed for the preparation of this report stated that mediation (as well as arbitration) was theoretically an ideal mechanism for developing countries to use because they had limited capacity to participate fully in proceedings; however, many claimed that the political reality of the trading system meant that, during any process, developing countries could suffer unwelcome pressure and threats from developed countries to drop cases brought against them.

## C. Implications and recommendations

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

29. However, the effectiveness of conciliation, mediation or good offices should not be compared with that of obligatory dispute settlement, but with the situation which would prevail if there were no dispute resolution procedures available at all in this area. It should be noted in this connection that, during the discussions of the WTO Working Group on the Interaction between Trade and Competition Policy, a consensus appears to have emerged that it would not be appropriate to apply the binding dispute settlement procedures of the WTO to all provisions of a possible multilateral framework on competition policy. However, different views have been expressed as to the extent to which this would be the case. Whereas it has

been suggested by some countries that dispute settlement would be limited to the existence of a ban on hard-core cartels and the core principles (except for transparency), others questioned the need for dispute settlement at all, given the desirability of preserving competition authorities' prosecutorial discretion and avoiding the “second-guessing” of national enforcement decisions, and taking into account that the effects of remedies granted by a WTO dispute settlement panel might be anti- rather than pro-competitive.[33]

30. To the extent that Governments are unwilling to have their sovereignty limited by international control over their competition enforcement decisions, they may be more prepared to agree to voluntary procedures resulting in non-binding recommendations, and which would involve less publicity than would adjudicative processes; should "losing" Governments accept such non-binding recommendations, it would give them the opportunity to show good-faith willingness to cooperate without any possibility of creating a precedent. Moreover, for many countries, particularly developing countries, third party involvement and the power that mediators or conciliators have to make recommendations based upon equity or other considerations may help to palliate relatively weaker bargaining power, expertise or resources, as well as the largely voluntary or discretionary nature of undertakings to cooperate. In any event, diplomatic and obligatory dispute settlement methods should not be seen as conflicting solutions, but as two out of a range of alternatives (along with peer review or consultations) that might be made available to facilitate any strengthening of multilateral cooperation on competition law and policy that may be agreed.

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

Notes

[1] See UNCTAD, Report of the Intergovernmental Group of Experts on Competition Law and Policy on its fourth session (TD/B/COM.2/42, TD/B7COM.2/CLP/32), Agreed Conclusions, para. 4.

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

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

[4] See African Union, 38th Ordinary Session of the Assembly of Heads of State and Government of the OAU, African Peer Review Mechanism, 8 July 2002, Durban, South Africa.

[5] See OECD, Joint Group on Trade and Competition, Practical modalities of peer review: in a multilateral framework on competition, COM/DAFFE/TD (2002)82/FINAL.

[6] *Ibid.*

[7] *Ibid.*

[8] See OECD, Competition Law and Policy in South Africa.

[9]See the South African Competition Commission's website at http://www.compcom.co.za/resources/Media. These recommendations relate *inter alia* to the completion of agreements with other regulatory bodies to ensure consistent application of competition policy in regulated sectors; more attention to non-merger matters and competition advocacy; and enhanced resources and training.

[10] See annex 3 of the Marrakesh Agreement.

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

[12] See COM/DAFFE/TD(2002)82/FINAL.

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

[14] See COM/DAFFE/TD (2002)82/FINAL.

[15] See WTO Working Group on the Interaction between Trade and Competition Policy, Communication from Canada,WT/WCTCP/W/226.

[16] See WTO Working Group on the Interaction between Trade and Competition Policy, Report on the meeting of 20-21 February 2003 (forthcoming), statement by India at para.

[17] See UNCTAD, Closer Multilateral Cooperation on Competition policy – Consolidated Report of the Four Regional Seminars on the Post-Doha Mandate held between 21 March and 26 April 2002.

[18] Agreement between the Government of the United States of America and the Government of Japan regarding Cooperation on Anti-competitive Activities, (Washington, DC, 7 October 1999).

[19] Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil regarding Cooperation between their Competition Authorities in the Enforcement of their Competition Laws (Washington DC, 26 October 1999).

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

[21] Free Trade Agreement between the Government of Canada and the Government of the Republic of Costa Rica (Ottawa, 23 April 2001).

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

[23] See UNCTAD, Experiences gained so far on international cooperation on competition policy issues and the mechanisms used, TD/B/COM.2/CLP/21/Rev.1.

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

[25] GATT Decision on Arrangements for Consultations on Restrictive Business Practices of 18 November 1960, now incorporated into GATT 1994.

[26] Japan – Measures Affecting Consumer Photographic Film and Paper (WT/DS44/R, 31 March 1998).

[27] See Consolidated Report of the Four Regional Seminars on Post-Doha Mandate, *(note 17 above).*

[28] See TD/B/COM.2/CLP/21/Rev.1, which recommends the elaboration of alternative Model Cooperation Provisions on Competition Law and Policy, covering procedural cooperation, substantive provisions and dispute avoidance or resolution procedures, with optional wording relating to preferential or differential treatment for developing countries, as well as explanatory commentaries and illustrative hypothetical cases.

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

[30] See OECD, Competition Policy and International Trade: Instruments of Cooperation, Paris, 1987.

[31] See Article 5 of the DSU.

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

[33] See WTO Working Group on the Interaction between Trade and Competition Policy, Report on the meeting of 20 - 21 February 2003 (forthcoming).