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**WAYS IN WHICH POSSIBLE INTERNATIONAL AGREEMENTS ON COMPETITION
MIGHT APPLY TO DEVELOPING COUNTRIES, INCLUDING THROUGH
PREFERENTIAL OR DIFFERENTIAL TREATMENT, WITH A VIEW TO ENABLING
THESE COUNTRIES TO INTRODUCE AND ENFORCE COMPETITION LAW AND
POLICY CONSISTENT WITH THEIR LEVEL OF ECONOMIC DEVELOPMENT**

Note by the UNCTAD secretariat

Executive summary

A review of some existing international instruments and cases relevant to this area highlights issues such as the following: the relative contributions of binding agreements, informal cooperation and national enforcement efforts (supported by technical assistance) in addressing different enforcement difficulties that developing countries face in cases of RBPs with international elements; types of provisions in such international agreements, such as substantive commitments relating to the content or application of national laws, or advanced types of procedural cooperation, that might enhance enforcement in such international cases, as well as technical assistance to implement such provisions; how incentives for more advanced countries to cooperate in this area might be maximized and possible disincentives arising from confidentiality restraints aimed at safeguarding national leniency programmes might be minimized through international collaboration; application of competition laws to restrictive business practices affecting foreign markets (including where there are links between effects upon foreign and domestic markets); preferential or differential treatment for developing countries; means of enhancing cooperation among developing countries; injury caused by export and international cartels; appropriateness of current competition provisions in cooperation agreements and regional trading agreements for the needs and capacities of developing countries; examples of successful cooperation in this area; interrelationships between competition policy and trade, investment, infant industries, industrial policy and regulation; possibilities for cooperation between competition and trade authorities in international merger cases; and enhanced coordination among different international bodies. Governments might examine these questions, within the framework set out by the Fifth Review Conference, in working out how possible bilateral, regional, plurilateral or

Executive summary cont'd

multilateral agreements on competition might apply to developing countries. Such an examination might take into account relevant provisions of the Set of Principles and Rules, the São Paulo Consensus and WTO agreements. This could assist in the continuing elaboration and presentation by UNCTAD of types of common provisions to be found in international, particularly bilateral and regional, cooperation agreements on competition policy and their application and would also enhance consistency and coordination among different forms or levels of international cooperation in this area. The concept of a possible multilateral framework on competition formerly discussed within the WTO is not dealt with here.

CONTENTS

INTRODUCTION	4
I. SELECTED INTERNATIONAL NORMS RELEVANT TO COMPETITION POLICY AND DEVELOPMENT	5
A. The Brazil-United States enforcement cooperation agreement	5
B. Selected regional trade agreements.....	6
C. Selected OECD, ICN and WTO instruments.....	8
II. SELECTED CASES WITH INTERNATIONAL AND DEVELOPMENTAL IMPLICATIONS	10
A. International cartel cases.....	10
B. Selected NAFTA and WTO cases	12
III. IMPLICATIONS AND ISSUES FOR POSSIBLE EXAMINATION.....	14
A. Common approaches and differences	14
B. Cooperation on cases, confidentiality and leniency.....	15
C. Issues for possible examination	18

INTRODUCTION

1. The Intergovernmental Group of Experts on Competition Law and Policy, at its fifth session (2 to 4 July 2003), requested the UNCTAD secretariat to prepare for the Group's sixth session "studies on the implications of closer multilateral cooperation in competition policy for developing and least developed countries' development objectives, in particular... (b) A report on ways in which possible international agreements on competition might apply to developing countries, including through preferential or differential treatment, with a view to enabling these countries to introduce and enforce competition law and policy consistent with their level of economic development".¹ That report (TD/B/COM.2/CLP/46) was duly submitted to the sixth session of the Group which, in its agreed conclusions, requested the secretariat to revise/update the report in the light of comments made by member States at that session or to be sent in writing by 31 January 2005, for submission to the Fifth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.² The Review Conference took note with appreciation of the documentation prepared by the UNCTAD secretariat for the Conference, and requested the secretariat to revise documents, including *inter alia* TD/RBP/CONF.6/9, in the light of comments by member States made at the Conference or to be sent in writing by 31 January 2006 for submission to the following session of the Group of Experts.³ A revised version of the report was accordingly prepared for the seventh session of the Group of Experts (31 October-2 November 2006), which requested the UNCTAD secretariat to revise/update documents in the light of the comments made by member States at the seventh session or to be sent in writing by 31 January 2007 for submission to the eighth session of the Group of Experts.⁴ In response to this mandate, the present report adopts an empirical approach and reviews some existing international instruments (in part I) and cases (in part II) in this area, with an emphasis on aspects relevant to developing countries. Part III highlights some implications and questions that Governments may wish to examine in assessing relevant issues regarding possible agreements on competition at the bilateral, regional, plurilateral or multilateral levels. Additions to the text from the previous version have been indicated in bold script. The present revised report should be read in conjunction with three other UNCTAD secretariat reports, the first of which have now been revised for the eighth session of the Group of Experts: "Experiences gained so far on international cooperation on competition policy issues and the mechanisms used" (TD/B/COM.2/CLP/21/Rev.5); "Roles of possible dispute mediation mechanisms and alternative arrangements, including voluntary peer review in competition law and policy" (TD/B/COM.2/CLP/37/Rev.3); and "A presentation of types of common provisions to be found in international, particularly bilateral and regional, cooperation agreements on competition policy and their application" (TD/RBP/CONF.6/3). Also of high relevance to the present report is the UNCTAD book entitled *Trade and Competition Issues: Experiences at Regional Level*, particularly the article it contains on special and differential treatment in this area,⁵ as well as the UNCTAD book *Implementing Competition-Related Provisions in Regional Trading Agreements: Is it possible to obtain development gains?*, UNCTAD/DITC/CLP/2006/4.

2. As most of the instruments and cases reviewed here have been mentioned in these or other previous UNCTAD reports,⁶ or in other documentation that is cited, full references are not provided in the present report, except for some new cases. No regional trade agreement (RTA) with only developing-country members is reviewed here, nor is any general review undertaken of the provisions of the Set of Multilaterally Agreed Equitable Principles and

Rules for the Control of Restrictive Business Practices.⁷ However, in dealing with questions for examination, chapter 3 refers to agreements among developing countries and to some of the Set's provisions. The report does not deal with the concept of a possible multilateral framework on competition within the WTO which had formerly been discussed by the WTO Working Group on the Interaction between Trade and Competition Policy. This is based on the WTO General Council Decision that the issue of the Interaction between Trade and Competition Policy will not form part of the Work Programme set out in the Doha Declaration and therefore no work towards negotiations on this issues will take place within the WTO during the Doha Round. However, some references are made to relevant information or views contained in the documentation of this Group. Throughout the report, the term "restrictive business practices" (RBPs) is used interchangeably with "anticompetitive practices".

I. SELECTED INTERNATIONAL NORMS RELEVANT TO COMPETITION POLICY AND DEVELOPMENT

A. The Brazil-United States enforcement cooperation agreement

3. A striking feature of many international instruments dealing with competition policy is their "softness", whether in terms of the non-binding nature of such instruments, the fact that their provisions are worded so as to allow their addressees a large margin of discretion as to what course of action to follow, and/or the exclusion of dispute settlement. Enforcement cooperation agreements are legally binding, but their provisions are often loosely worded and subject to provisos. So far, only one enforcement cooperation agreement between a developed and developing country (the United States and Brazil) has been concluded. It includes the typical provisions which are contained in most enforcement cooperation agreements, with minor variations: notification of changes in applicable legislation or of specified enforcement activities affecting the other party (which in this case is mandatory subject to confidentiality restraints); commitments to give careful consideration to each other's important interests when investigating or applying remedies against anticompetitive practices (negative comity); consultations regarding any matter relating to the agreement; sharing of non-confidential information that facilitates the effective application of competition laws and promotes better understanding of each other's competition enforcement policies and activities, to the extent compatible with respective laws and important interests and within reasonably available resources; the possibility of coordinated enforcement against related anticompetitive practices occurring in both countries; and maintenance of confidentiality of sensitive information provided by the other party. This agreement also includes a type of provision contained in some advanced agreements, "positive comity", under which each party's competition authorities shall give careful consideration to requests by the other party to undertake enforcement action against anticompetitive practices in the requested country's territory that contravene the requested country's laws and adversely affect the requesting country's important interests. However, this "positive comity" clause does not limit the prosecutorial discretion of the requested competition authorities not to take any action. Nor does it preclude the requesting competition authorities from enforcing their own laws (although the requesting country's laws need not be infringed for it to make such a request).⁸ The Brazil-United States agreement also provides for working together in technical cooperation activities.

4. However, this agreement does not provide for the possibility of the exchange of confidential information, subject to limitations on use or disclosure, a clause that is included in some advanced agreements. (It should be noted, however, that the Mutual Legal Assistance Treaty (MLAT) between the U.S. and Brazil allows for assistance and the exchange of confidential information in criminal matters. MLATs have been used as a vehicle for cooperation in cartel investigations.) The Brazil–United States agreement also does not include two other types of clauses contained, for instance, in the Australia–United States enforcement cooperation agreement: a requirement to notify (to the extent compatible with laws, enforcement policies and other important interests) information about activities appearing to be anticompetitive that may be relevant to or warrant enforcement by the other party’s competition authority, even if there is no violation of the notifying party’s competition law or no enforcement action undertaken pursuant to the law; the possibility of sharing confidential information; and the possibility of investigatory assistance, involving the use of compulsory processes by one country under its laws to acquire information at the request of another country whose important national interests are being affected by anticompetitive behaviour organized in the requested country, even if such behaviour is not illegal under the requested country’s laws.

B. Selected regional trade agreements

5. Many free trade, economic partnership, custom union or common market/single market agreements (here collectively termed “regional trade agreements” or RTAs) often provide for procedural rules on cooperation in competition cases similar to those contained in enforcement cooperation agreements, albeit often of a less far-reaching or detailed character. Accordingly, RTAs often envisage the issuance of regulations or decisions on cooperation, and they may also be supplemented by bilateral enforcement cooperation agreements between the parties. Unlike enforcement cooperation agreements, RTAs often include substantive competition rules. Such rules vary widely among different RTAs in terms of scope, strength and detail. Some RTAs contain general obligations to take action against anticompetitive conduct, others prescribe specific standards and rules, and a few require common laws and procedures. Some RTAs provide for the applicability, content and/or effective enforcement of competition rules relating only to RBPs affecting trade among the parties, while others contain such prescriptions with respect to all RBPs.

6. Both the NAFTA and the Canada–Costa Rica RTA provide that each party shall adopt or maintain measures to proscribe, respectively, “anticompetitive business conduct” or “anticompetitive activities” and take appropriate enforcement action for this purpose. However, the Canada–Costa Rica FTA goes on to define “anticompetitive activities” as meaning any conduct or transaction subject to penalties or other relief under the parties’ respective competition legislation, as well as amendments thereto and other legislation the parties may jointly agree to be applicable. Such “anticompetitive activities” include (but are not limited to) cartels, abuse of dominance and mergers with substantial anticompetitive effects, unless these are excluded, directly or indirectly, from the coverage of a party’s own laws or authorized in accordance with those laws. However, it is provided that all such exclusions and authorizations shall be transparent and shall be periodically assessed by each party to determine whether they are necessary to achieve their overriding policy objectives. Provision is also made for the establishment or maintenance by each party of an impartial competition authority authorized to take appropriate enforcement action and advocate procompetitive policies and legislation independently from political interference; transparency (publication or public availability of legislation, procedures, practices or

administrative rulings of general application, as well as notification to the other party of changes to these); non-discrimination (in respect of both measures to proscribe anticompetitive activities and enforcement action); procedural fairness (fair and equitable judicial and quasi-judicial proceedings subject to an appeal or review process); and technical assistance. In terms of procedural enforcement cooperation, there is provision for mandatory notification of enforcement actions that may affect the other party's important interests (unless this would go against confidentiality concerns or would harm important interests), with detailed criteria as to what should be notified; consultations; and negative comity. The possibility that the parties may enter into additional cooperation or mutual legal assistance agreements or arrangements is also provided for. This agreement (like the NAFTA, as well as the Canada-Chile and European Union–Chile FTAs), excludes competition policy disputes from the application of dispute settlement procedures. In the context of the Free Trade Area of the Americas Negotiating Group on Competition Policy, Trinidad and Tobago's position is that: it would want special and differential treatment (S&D) in the first tier of the agreement, so that smaller economies could adopt the competition policy provisions with flexibility and progressivity; and "transitional provisions" would be part, but not the entirety, of S&D.⁹

7. Virtually all RTAs concluded by the European Union include competition policy provisions, but their nature and scope vary. All of the Euro-Mediterranean agreements provide that certain practices (which are characterized in terms broadly similar to those used in the Treaty of Rome) are incompatible with the proper functioning of the agreement insofar as they may affect trade between the European Union and the other country concerned.¹⁰ Some of these agreements specifically state that these practices shall be assessed on the basis of criteria arising out of Articles 81 and 82 of the Treaty of Rome. However, other agreements contain only a declaration by the European Union that it will apply such criteria pending the adoption of implementing rules by the association councils set up under these agreements. The procedural enforcement cooperation provided for is limited to the exchange of non-confidential information (without any indication as to what might trigger such an exchange). However, the competition policy provisions of these RTAs (like those of most of the other RTAs reviewed below) have not so far been fleshed out through decisions of the councils set up to administer them.

8. Like the Euro-Mediterranean agreements, the European Union–South Africa agreement applies to RBPs only insofar as they may affect trade between the parties. However, it differs from these agreements in using standards that differ from those in EU competition rules (and resemble those in the South African competition law) to characterize such RBPs and in specifically making a link to the territory of the parties. Thus, Articles 35 and 36 of the agreement provide for controls on horizontal decisions and/or concerted practices, as well as of vertical agreements, that have the effect of substantially preventing or lessening competition in EU or South African territory (unless the firms can demonstrate that the anticompetitive effects are outweighed by procompetitive ones), and controls on abuse of market power in the whole or in a substantial part of either party's territory. Provision is also made for mandatory consultations on request, exchange of non-confidential information, granting of technical assistance and application of negative and positive comity; there is no specific obligation to notify enforcement activities.

9. A quite different approach is taken in the Cotonou Agreement with the ACP States. Its scope is not limited to RBPs affecting trade between the parties. Instead, the European Union and the ACP countries undertake to implement national or regional rules and policies

controlling agreements, decisions and concerted practices that have as their object or effect the prevention, restriction or distortion of competition and to prohibit abuse of a dominant position in the European Union and in the territory of ACP States, in order to ensure the elimination of distortions to sound competition and with due consideration for the different levels of development and economic needs of each ACP country. The parties also agree to reinforce cooperation in this area with a view to formulating and supporting effective competition policies with the appropriate national competition agencies that progressively ensure the efficient enforcement of the competition rules by both private and State enterprises. Cooperation is to include, in particular, assistance in the drafting of an appropriate legal framework and its administrative enforcement, with particular reference to the special situation of the least developed countries. No specific reference is made to cooperation in respect of individual cases.

10. A further contrast may be drawn between the Cotonou Agreement and the European Union–Mexico RTA (as supplemented by a Joint Council Decision). The latter agreement and Decision make no provision for substantive convergence. Instead, the parties undertake to apply their respective competition laws with the objective *inter alia* of avoiding adverse effects on trade and economic development, as well as the possible negative impact that anti-competitive activities may have on the other Party's interests. However, the Decision has quite far-reaching enforcement cooperation provisions; notification of enforcement activities is mandatory in principle, for instance, although the list of what should be notified is narrower than in the RTAs or enforcement cooperation agreements concluded by Canada and by the United States.

C. Selected OECD, ICN and WTO instruments

11. The OECD Recommendation on Hard-Core Cartels (HCC Recommendation) provides that Member countries should ensure that their competition laws effectively halt and deter hard-core cartels, in particular by providing for effective sanctions, enforcement procedures and institutions with adequate powers. This Recommendation also encourages cooperation and comity in respect of enforcement against such cartels, setting forth some principles and practices for this purpose. Hard-core cartels are defined so as to exclude “agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorised in accordance with those laws” (para. 2(b)). However, it is provided that all exclusions and authorizations of what would otherwise be hard-core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. Members should provide the OECD with annual notice of any new or extended exclusion or category of authorization. Non-members are invited to associate themselves with the Recommendation.

12. International Competition Network (ICN) members have *inter alia* approved the Guiding Principles and Recommended Practices on Merger Notification and Review Procedures. While their work in the area of cartel enforcement is not as advanced, a Working Group dealing with this area has been established. This Working Group would have two subgroups: one of them would aim to deliver guiding principles and/or recommended practices on transparency, non-discrimination, due process, effectiveness of enforcement procedures and institutions, and international cooperation on anti-cartel enforcement; the second would aim to help competition authorities improve their enforcement techniques. The ICN's work

product is non-binding but helps to improve cooperation and convergence through the development and exchange of international best practice.

13. The WTO agreements contain a number of general provisions potentially relevant to competition policy, as well as several provisions dealing specifically with competition related matters.¹¹ Among the provisions potentially relevant to competition policy may be included those dealing with special and differential (S&D) treatment. The WTO secretariat has listed 145 such S & D provisions, which it has classified under five main headings: (a) provisions aimed at increasing trade opportunities through market access; (b) provisions requiring WTO Members to safeguard the interests of developing countries; (c) provisions providing greater flexibility of commitments; (d) provisions allowing for longer transition periods; and (e) provisions providing for technical assistance. Additional provisions within these five groups relate specifically to the least-developed countries.¹² The General Council Decision of 31 July 2004 *inter alia* recalled the Ministers' decision in Doha to review all S&D treatment provisions with a view to strengthening them and making them more precise, effective and operational.¹³

14. Several provisions of the WTO agreements deal specifically with competition related matters, such as those in the TRIPS agreement or in the Agreement on Implementation of Article VI (dealing with antidumping). The following review focuses on the 1996 Reference Paper on Pro-competitive Regulatory Principles to the GATS Agreement as its provisions were interpreted in the Telmex case, described below. This agreement sets out principles governing the regulatory framework for basic telecommunications services and has been incorporated into the schedule of GATS commitments of some WTO Members. These Members undertake to maintain appropriate measures to prevent suppliers that, alone or together, constitute a "major supplier" from engaging in or continuing anticompetitive practices. They also undertake to ensure that these suppliers provide interconnection to their integrated networks and do so on broadly nondiscriminatory terms and conditions. A "major supplier" is one that "has the ability to materially affect the terms of participation, having regard to price and supply, in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market". "Essential facilities" are defined as "facilities of a public telecommunications transport network or service that are: (a) exclusively or predominantly provided by a single or limited number of suppliers; and (b) cannot feasibly be economically or technically substituted in order to provide a service." "Anticompetitive practices" include in particular "anticompetitive cross-subsidization", "using information obtained from competitors with anticompetitive results" and "not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services".

II. SELECTED CASES WITH INTERNATIONAL AND DEVELOPMENTAL IMPLICATIONS

A. International cartel cases¹

15. The cases described below all touch on international aspects of competition policy and/or the application of some of the instruments reviewed in part I, and also either directly involve developing countries or otherwise raise issues that would concern them.¹⁴ Among the major international cartel cases that have been brought by competition authorities in recent years, three in particular stand out as involving issues of international cooperation: the *Graphite Electrodes*, *Lysine*, and *Vitamins* cases. All three cartels were first discovered, prosecuted and sanctioned by the US Department of Justice (DOJ), with the *Graphite Electrodes* and *Vitamins* investigations assisted by information submitted under its leniency programme. Subsequently, several jurisdictions investigated these cartels in respect of effects on their markets. In the Republic of Korea, the Korean Fair Trade Commission (KFTC) opened an investigation into *Graphite Electrodes* after reading about these prosecutions.¹⁵ It initially attempted to require the suspected cartel participants to provide evidence for the investigation.¹⁶ However, because those companies were based abroad and most of them had no legal presence in the country, the KFTC was unable to enforce these information requests.¹⁷ It then issued requests for information to foreign competition agencies that had prosecuted the cartel.¹⁸ While some of them responded positively, the only information provided was already in the public record.¹⁹ A relatively significant amount of such information arose from the criminal trial in the United States; according to an OECD report, such information was by itself insufficient to sustain a prosecution by the KFTC.²⁰ According to this report, the KFTC was eventually able to impose penalties on six of the foreign firms involved, but only after pouring enormous effort and time into the investigation.²¹

16. In the *Lysine* case, a report presented by Brazil to the OECD Global Forum on Competition states that the Brazilian authorities became aware of the investigation because of a DOJ presentation during a seminar. However, according to this report, only after the case went to trial and the available material became public were they able to obtain transcripts of the cartel meetings showing that Latin America and Brazil were included in the world market division set by the cartel. This enabled the Brazilian authorities, according to the report, to press on with their own investigations and eventually sanction the cartel.²²

17. In the *Vitamins* case, the same report by Brazil to the OECD Global Forum on Competition states that, after reading press releases announcing the prosecution of this cartel in the United States, the Brazilian competition authorities began their investigation of the Brazilian subsidiaries of some of the firms involved. However, the report states that the Brazilian authorities made little progress as, the report suggests, the fact that the case had not gone to trial in the United States prevented the sharing of documents because of confidentiality restraints.²³ However, the report states that some general information was later received informally from North American authorities (even though the Brazil–United States

¹ The United States Government requested in respect of the previous version of this report (TD/RBP/CONF.6/9/Rev.1/ TD/B/COM.2/CLP/46/Rev.2) that the following text be deleted in section A: in para. 14, the phrase "by itself .. was insufficient to sustain a prosecution by the KFTC"; the whole of para. 15; in para. 16, the whole of the second sentence, as well as the words "However, some general .." and "...an important hint transmitted was that the Vitamins cartel operated in a very similar manner to the Lysine cartel:" in the third sentence.

cooperation agreement had not been concluded at that time); according to this report, an important hint obtained was that the *Vitamins* cartel operated very similarly to the *Lysine* cartel.²⁴ The report states that the Brazilian competition authorities still needed to undertake extensive investigations before obtaining sufficient evidence that, in line with instructions from their global headquarters, the Brazilian subsidiaries of these firms had cartelized Brazil and the rest of the Latin American market. They accordingly ordered that the firms concerned be sanctioned; however, the ruling is still being appealed.

18. An important sequel to the *Vitamins* case occurred in the United States in the recent *Empagran* case, which clarified the international reach of United States antitrust laws. *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004). Under the Sherman Act, there are two principal tests for subject matter jurisdiction in foreign commerce cases. With respect to foreign import commerce, the Sherman Act applies to “foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.” *Hartford Fire Insurance Co. v. California*, 113 S.Ct. 2891, 2909 (1981). With respect to foreign commerce other than imports, the jurisdiction of the Sherman Act is delineated by the 1982 Foreign Trade Antitrust Improvements Acts (FTAIA) of the United States. Under the FTAIA, the Sherman Act applies to foreign conduct only when: (1) such conduct has a direct, substantial, and reasonably foreseeable effect on United States commerce; and (2) such effect gives rise to a claim under the Sherman Act. The *Empagran* case dealt with the FTAIA and involved a private action for treble damages brought by foreign corporations based in Australia, Ecuador, Panama and Ukraine. Essentially, the question for the Court involved the extent to which foreign plaintiffs may bring suits under the Sherman Act for injuries suffered from a cartel that as a whole had a direct, substantial and reasonably foreseeable effect on U.S. commerce, but where the plaintiffs’ claims did not arise from those domestic effects. After a Court of Appeals ruling on jurisdiction favourable to the plaintiffs had been delivered, the case went to the Supreme Court. The DOJ and the Federal Trade Commission (FTC) filed a joint *amicus curae* brief to support the petition to overturn the decision, arguing that such an expansive interpretation of the FTAIA would greatly expand the potential liability for treble damages in United States courts and would thereby deter members of international cartels from seeking amnesty from criminal prosecution by the United States Government. This, in turn, would undermine the effectiveness of the U.S. anti-cartel enforcement programme. They also argued that the Court of Appeals decision also likely would damage the cooperative law enforcement relationships that the United States has nurtured with foreign governments. The Governments of Belgium, Canada, Germany, Ireland, Japan, the Netherlands and the United Kingdom also filed briefs urging that their citizens not be allowed to bypass their own remedial schemes for antitrust injury, thus upsetting the balance of competing considerations that their antitrust laws embodied and undermining their own antitrust enforcement and amnesty programmes.

19. The Supreme Court unanimously vacated the Court of Appeal’s decision, holding that the FTAIA does not allow antitrust claims arising solely out of a foreign injury that is independent of the domestic effects of the challenged anticompetitive conduct. The Court offered “two main reasons” for its conclusion: the importance of “constru[ing] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations” (prescriptive comity); and fidelity to Congress’ intent “not to expand in any significant way, the Sherman Act’s scope as applied to foreign commerce.” *Empagran* at 2366-2369. The Supreme Court rejected the plaintiffs’ argument that permitting foreign parties to sue in United States courts for antitrust injuries suffered abroad would have little practical impact

on foreign antitrust enforcement since many countries had adopted antitrust laws similar to those in the United States. The Supreme Court stated that, not only did there remain significant disagreements among nations regarding whether antitrust enforcement should apply to various types of commercial conduct, but also, even where they agreed about primary conduct such as price fixing, there was dramatic disagreement about appropriate remedies. It further noted that the application of treble damages remedies to anticompetitive conduct in the United States had generated considerable controversy. The Court also rejected the plaintiffs' assertion that their construction of the FTAIA would help to deter cartels, noting the "important experience-backed arguments (based upon amnesty-seeking incentives)" raised by the defendants, the United States and foreign governments. *Empagran* at 2372. The Supreme Court declined to consider the plaintiffs' alternative theory that their foreign injury was not independent and the anticompetitive conduct's domestic effects were linked to the foreign harm. The Supreme Court remanded the case back to the Court of Appeals to consider the issue. On remand, the Court of Appeals agreed with the DOJ and FTC's position that the language of the FTAIA requires a proximate cause connection between the foreign injury and the domestic effects and found that the plaintiffs had not made factual allegations that could be used to establish proximate cause. *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, No. 01-7115 (D.C. Cir. June 28, 2005). Thus, the Court rejected the plaintiffs' alternative argument and concluded that it lacked jurisdiction over the plaintiffs' claims.

B. Selected NAFTA and WTO cases

20. A recent interlocutory decision made in an investor-State arbitration under Chapter 11 of NAFTA has a bearing on the status of competition law and policy and international law. In the case of United Parcel Service (UPS) and Government of Canada,²⁵ the plaintiff alleged that Canada Post Corporation, a Canadian Crown corporation, had engaged in anticompetitive practices, including predatory conduct and cross-subsidization. In its Amended Statement of Claim, UPS set out three bases for its allegation, one of which was that Canada had breached its obligations under NAFTA Article 1105.1²⁶ by failing to accord UPS treatment in accordance with international law, including fair and equitable treatment. Canada responded by bringing a motion on jurisdiction, arguing that the Tribunal had no jurisdiction over anticompetitive behaviour because, among other things, there were no principles of international competition law and, therefore, Article 1105.1 had no application to the case.

21. In its Award on Jurisdiction of 22 November 2002, the UPS Tribunal addressed the question whether the NAFTA Article 1105.1 imposes obligations on the Parties to control anticompetitive behaviour and answered in the negative. In concluding that "there is no rule of customary international law prohibiting or regulating anticompetitive behaviour", the Tribunal relied on the following: studies of national competition laws indicated that many States did not have competition laws (only 13 out of 34 western hemisphere nations and of about 80 WTO members, with more than half of the laws having been enacted in the previous 10 years); and that the national competition legislation that did exist, including that of the three NAFTA parties (Canada, Mexico and the United States) differed markedly, reflecting their unique economic, social and political environments. The Tribunal also relied on four other points: (a) there was no indication in any material before it that national competition legislation was enacted out of a sense of general international legal obligation; (b) although references had been made by the plaintiff to fair and equitable treatment clauses in bilateral investment treaties, the plaintiff had not attempted to establish that this state practice reflected

the existence of a generally owed international legal obligation which, moreover, had to relate to the specific matter of requiring controls over anticompetitive behaviour; and (c) multilateral treaty and codification processes demonstrate the absence of rules of customary international law in the field of competition law and policy. WTO Members are only now beginning to address the possibility of negotiating multilateral rules in this area having recognized the absence in WTO treaties of any general set of provisions prohibiting or controlling anticompetitive behaviour; and (d) there was no reference to regulating anticompetitive behaviour in the draft articles of the UN International Law Commission on denial of justice to aliens or on international responsibility of States for injuries to aliens.)

22. In the WTO *Telmex* case,²⁷ Mexico's international long distance (ILD) rules provided that Telmex (Mexico's largest supplier of telecommunications services) would negotiate a settlement rate for all incoming calls with foreign suppliers, that Telmex and its competitors would all apply that rate to interconnection for incoming traffic from the United States; that Telmex had to give up traffic to, or accept traffic from, other Mexican suppliers depending on whether the proportion of incoming traffic surpassed or fell short of its proportion of outgoing traffic; and that it might then enter into "financial compensation agreements" with other operators, which required the approval of the Mexican authorities. The United States brought a successful complaint before the WTO Dispute Settlement Body (DSB) alleging that the access rate was not cost-oriented and that Mexico had effectively set up a State-authorized cartel of telecommunications operators, thus inhibiting foreign entry in contravention of the Reference Paper. Mexico and the U.S. then settled the case and Mexico repealed the offending ILD rules.

23. The panel's findings and reasoning related to a large extent to the interpretation of the Reference Paper, but there was much of more general relevance to competition policy. A key finding was that the "relevant market" within the terms of the Reference Paper was the termination in Mexico of telephone calls from the United States, in line with the notion of demand substitution, which was "central to the process of market definition as it is used by competition authorities". The panel also ruled that the term "anticompetitive practices" broadly suggested actions that lessened rivalry or competition in the market; and the examples of "anticompetitive practices" in the Reference Paper illustrated certain practices that were considered to be particularly relevant in the telecommunications sector. While it considered that all of these practices could be undertaken by a major supplier on its own, such a supplier could also be comprised of different companies, and this itself suggested that horizontal coordination of suppliers might be relevant. The panel further reasoned that the meaning of "anticompetitive practices" was informed by the use of this term in WTO members' competition legislation; the background note by the WTO Secretariat indicated that many WTO members maintained competition laws, the term "anticompetitive practices" was often used in these laws to designate categories of unlawful behaviour, and, while the range of anticompetitive practices prohibited varied among members, practices that were unlawful under competition laws included cartels such as agreements to fix prices or share markets, as well as certain vertical restraints and abuses of dominance. The panel also looked at the international picture in this connection, noting that the meaning of "anticompetitive practices" and the importance of controlling them was also informed or emphasized by related provisions of some international instruments, such references already being contained in the Havana Charter, and now included in the Set, as well as the HCC Recommendation calling for strict prohibition of cartels (this was relevant since both Mexico and the United States were OECD members); and reference had been made in the work of the WTO Working Group to the pernicious effects of hard-core cartels, and to the consensus that

existed among competition officials that these ought to be banned. It accordingly ruled that the object and purpose of the Reference Paper supported the conclusion that the term “anticompetitive practices”, in addition to the examples mentioned, included horizontal price-fixing and market-sharing agreements by suppliers, which, at the national or international level, were generally discouraged or disallowed.

24. Accordingly, the panel ruled that the ILD rules required practices by Telmex that were “anticompetitive” within the meaning of the Reference Paper. The panel rejected Mexico’s arguments that these measures were procompetitive and prevented predation by foreign entrants and that by having a competition law in place, it did maintain “appropriate measures” to prevent anticompetitive practices. The panel also considered that national doctrines whereby a firm complying with a specific legislative requirement would be immunized from being found in violation of the domestic competition law were not applicable here since, under principles of public international law and in accordance with the Vienna Convention, a requirement imposed by a WTO Member under its internal law on a “major supplier” could not unilaterally erode the international obligations incurred by the commitments made in its schedule to other WTO members to prevent major suppliers from “continuing anticompetitive practices”. However, the panel stated that, beyond its findings regarding horizontal price fixing and market allocations among competing suppliers of basic telecommunications services, the term “anticompetitive practices” might be interpreted differently by different WTO members. The panel took into account GATS provisions on differential and more-favourable treatment for developing country Members. However, it rejected Mexico’s argument that it was necessary to condition access to its networks for the purpose of strengthening its domestic telecommunication infrastructure, as allowed for developing countries under the Annex, since Mexico had not included any such limitations in its Schedule of Specific Commitments, and since it had not demonstrated that anti-competitive price-fixing and market-sharing arrangements were “reasonable” and “necessary” conditions for enhancing these development objectives. The panel emphasized that its findings in no way prevented Mexico from actively pursuing such development objectives by extending telecommunications networks and services at affordable prices in a manner consistent with its GATS commitments.

III. IMPLICATIONS AND ISSUES FOR POSSIBLE EXAMINATION

A. Common approaches and differences

25. During the discussions on a possible multilateral framework on competition within WTO, it was suggested by Canada that “While cooperation may itself be voluntary, it is founded upon certain prerequisites, notably that of mutual trust. Trust is also something that cannot be mandated by international agreement, nor can it be subject to rules – but an international agreement can play an important role in facilitating trust by promoting convergence among its signatories... The key element in this is encouraging familiarity amongst the countries in question... A multilateral agreement where countries commit themselves to certain common approaches on competition policy would provide over time the practical basis for such trust to emerge by broadening the convergence on best practices between Members.”²⁸

26. Canada also suggested that the HCC Recommendation did not take any position as to whether competition laws relating to hard-core cartels should be based on *per se* prohibitions or a rule of reason approach, or impose a civil or criminal law framework with regard to

enforcement, sanctions and fines, which are matters to be decided by national authorities; and that, during the negotiations on the Recommendation, an attempt had been made to develop more detailed definitions of hard-core cartels, but this had been abandoned because it might lead to the development of common standards, whereas the needs and circumstances of Member States were not identical, and such a harmonized approach might have provided a basis for determining whether a Member's law conformed to the Recommendation.²⁹ It has also been suggested (by the Republic of Korea) that, even though the Set's and the HCC Recommendation's definitions on cartels do not differ much in substance, the Set's definition may have a broader scope as it does not explicitly provide for exemptions or authorizations and explicitly covers anticompetitive arrangements such as collective refusals to deal or collective denial of access to associations, as well as price-fixing agreements "including as to exports and imports"; however, it is also added in this document that "it should not be construed that the Set precludes other forms of cartels that is not included in the list, nor that the Recommendation necessarily precludes certain forms or types of cartels, including export or import cartels."³⁰ A recent ICN report notes that, while the basic understanding of what constitutes a cartel, what are its harmful effects and the priority to be attached to combating them is remarkably consistent across jurisdictions, there are some different approaches to the definition and enforcement of cartel prohibitions, including as to whether or not to enumerate specific prohibited conduct, the extent of exemptions to the law, whether to include vertical conduct, and the standard of proof required to establish a violation.³¹

B. Cooperation on cases, confidentiality and leniency²

27. Commenting on Lysine and similar cases, the Brazilian authorities stated that, "Despite the signature of the international agreement between Brazilian and North American authorities, the most valuable source of international cooperation continues being informal."³² On the other hand, a former head of the DOJ's Antitrust Division indicated that, in the course of investigating the Lysine and Citric Acid international cartel cases), the DOJ's ability to share information was limited with countries that are not parties to cooperation agreements that permit the exchange of confidential information. ("Soft cooperation agreements," such as those between the U.S. and Australia, Brazil, Canada, the European Commission, Germany, Israel, Mexico, and Japan do not permit the exchange of statutorily protected confidential information).³³ Support has indeed been expressed by one developing country for its having bilateral enforcement cooperation agreements with developed countries, since many foreign or foreign-affiliated business entities originating from developed countries operated in its territory and it was sometimes necessary to summon them to respond to complaints or to give evidence;³⁴ the difficulties experienced by the Republic of Korea because cartel participants did not have local branches have also been highlighted above.³⁵ An OECD report also suggests that "Korea's experience in the graphite electrodes case is instructive as to the difficulties that can confront a country that does not obtain cooperation from one of the conspirators in an international cartel case. Korea also suffered from perceptions that it was in some sense a developing country, and one that did not have a substantial history of competition law enforcement."³⁶ Further commenting on the Graphite Electrodes and Vitamins cases, the report notes: "These conspiracies presumably affected many, if not most, countries world-wide, yet the prosecutions occurred mostly if not exclusively in OECD

² The United States Government requested in respect of the previous version of this report (TD/RBP/CONF.6/9/Rev.1/ TD/B/COM.2/CLP/46/Rev.2) that the following text be deleted in section B: the whole of para. 27 (except for the text in bold, which has been newly added); and in para. 28, the sentence "It may be noted that long-standing recommendations .. efficiency defence".

countries... International cooperation among competition agencies was limited mostly to the exchange of public information, which for countries that did not benefit from cooperation by one or more parties to the cartel was not sufficient to support a prosecution... Leniency programmes were directly responsible for the success of the prosecutions in some countries, but a salient and quite necessary feature of leniency programmes – the strict confidentiality that is accorded the information that is derived from a leniency application – prevented those few countries from sharing that information with their foreign counterparts. Moreover, only a few countries benefited from leniency applications. Coordination of leniency programmes would be difficult, but it could substantially enhance cooperation against international cartels. The network of bilateral and plurilateral cooperative relationships is expanding, but there are still many countries that are not parties to them, or to many of them, and those countries are less likely to benefit from international cooperation because of it. Perhaps the most important impediment to improved cooperation is the restrictions, again justified to some extent, against disclosure of confidential or protected information developed in the course of a competition investigation.”³⁷ Another recent OECD report also notes that, despite the substantial advances that have been made in international cooperation in this area, there is substantial room for improvement, particularly through more formal exchange of confidential information so as to make enforcement against international cartels more effective.³⁸ This report provides the example of Turkey's investigation of a suspected cartel was significantly impeded because it could not obtain confidential information from the European Commission (which was also investigating this suspected cartel), in the absence of any formal cooperation mechanism authorizing such exchange of confidential information. The report accordingly recommends that countries should consider authorizing their competition authorities to exchange confidential information with foreign competition authorities, provided appropriate safeguards against unauthorized disclosure are in place such as those developed in the OECD Competition Committee's Best Practices for formal information exchange in cartel investigations.

28. However, it has been suggested that the more international a cartel and the greater the number of jurisdictions that might punish it, the less incentive there would be for cartel participants to take advantage of national leniency programmes.³⁹ Indeed, it has been stated that, in the United States, the success of the DOJ's leniency programme is increasingly dependent upon leniency applicants receiving comparable assurances of non-enforcement or limited penalties in other jurisdictions; it has accordingly been recommended that the DOJ continue to strongly advocate international norms that can enhance the effectiveness of all leniency programmes and provide every incentive for individuals and corporations to self-report illegal conduct.⁴⁰ It may also be noted in this connection that it has been stated that many international cartels discovered in recent years by the United States federal antitrust agencies have conducted their meetings in other countries in an attempt to evade criminal anti-cartel prosecutions by these authorities; moreover, it has been suggested that similar concerns may arise with respect to some other countries as they implement stricter penalties and strengthen enforcement against cartels.⁴¹ Two suggestions made in a report by an expert in this area to cope with such difficulties relating to leniency agreements and enforcement are: (a) offering cartel members the prospect of leniency in a number of jurisdictions in return for information on the cartel's activities within those jurisdictions; and (b) offering a firm that receives an amnesty from another WTO member's competition authority no worse treatment if the firm comes forward with the same information it supplied the first competition authority and if it supplies any additional information and assistance needed to secure a prosecution in the second jurisdiction.⁴² The same report urges that a binding international accord on the enactment of cartel laws and specifying minimum standards of cartel

enforcement in each jurisdiction would have positive “spillover” effects in other jurisdictions, because: (a) public announcements in one nation about cartel enforcement actions tend to trigger investigations by trading partners, which thus benefit from active enforcement abroad, and these benefits are likely to be reinforced over time as formal and informal cooperation between competition authorities deepens; and (b) cartel investigations depend on securing relevant testimony and documentation and, to the extent that an international cartel hides such documentation in a jurisdiction that cannot or will not cooperate with foreign investigations into the cartel’s activities, this jurisdiction’s actions have adverse effects on its trading partners’ interests. The report thus proposes that an international accord can go some way towards eliminating safe havens for domestic as well as international cartels. The recent OECD report referred to above indeed recommends that ways should be examined of coordinating leniency programmes, especially by encouraging leniency applicants to simultaneously apply in as many countries as possible.⁴³ The need for such efforts to strengthen international cooperation in this area is emphasized by recent research showing that cartels with multi-continental effects raise prices higher than other types of international cartels and that, despite evident increases in cartel detection rates and the size of monetary fines and penalties in the past decade, a good case can be made that current global anticartel regimes are under-detering.⁴⁴

29. On the other hand, Trinidad has queried whether smaller economies would be able to effectively discipline large multinational corporations, given the power asymmetry; it has accordingly suggested that new and creative ways need to be developed for helping developing countries, and smaller economies in particular, to benefit from a competition regime with respect to cross-border issues.⁴⁵ Along the same lines, it has been suggested that small economies cannot always make a credible threat to prohibit a merger or an export cartel of foreign firms since, given that trade in the small economy is usually only a small part of the foreign firm’s total world operations, were the small economy to place significant restrictions on the foreign firm’s conduct, the latter would most likely choose to exit the small economy, with consequent net negative welfare effects. There might also be political resistance from the home countries of these foreign firms.⁴⁶ The same report further suggests that harmonized rules that rely for their enforcement on unilateral actions taken by the harmed jurisdiction would be disadvantageous for small economies and would not meet their concerns with regard to extra-territorial conduct with negative effects on their domestic markets, so the report states that such harmonized rules should include a rule that prevents all export cartels. During discussions within the International Competition Network (ICN), speakers from developing countries have recommended that focusing the efforts of its Cartel Working Group on matters relating to the exchange of information would be beneficial to developing countries, and that it should consider the role and legal standing of export cartels.⁴⁷ It may be noted in this connection that long-standing recommendations have been made that all countries repeal immunity for export cartels to the extent that such conduct would be unlawful if directed at the domestic market,⁴⁸ or that export cartels be prohibited unless they can demonstrate that they serve to overcome a genuine barrier to competition in the importing country, or can invoke an efficiency defence.⁴⁹ However, as has been highlighted by the Empagran case, countries affected by international cartels may have sensitivities about the application of foreign laws or sanctions to these cartels. Moreover, even in the absence of explicit exclusions, the coverage of competition laws generally does not extend to practices only affecting foreign markets.

30. A written submission made at the seventh session of the Group of Experts by Brazil reviews that country’s cooperation experiences with different jurisdictions and notes that the

exchange of information for technical assistance purposes has been very successful through both informal cooperation or bilateral cooperation agreements, while the exchange of non-confidential information on mergers and unilateral conduct is increasing and also meets expectations.⁵⁰ The submission notes further that: "From the Brazilian perspective, however, the attempts to use international cooperation tools to enforce cartels have had limited or no use at all...The legal constraints existing in all jurisdictions are undisputable and seem to be the main obstacle for effective cooperation, as no important information has been gathered so far." A report reviewing the implementation record of competition cooperation agreements and competition-related provisions (CRPs) in regional trading agreements (RTAs) and analysing the case-specific cooperation experiences of Brazil, the Republic of Korea and Turkey, finds and recommends that: (a) although case-specific cooperation between more experienced and less experienced competition agencies remains quite limited, it generally leads to results which could not otherwise have been achieved when it does take place; (b) taking into account the cost implications of international cartels for developing countries, the negative impact on their economic development, their lesser institutional capacity and the likely dispersion of necessary evidence among different jurisdictions, cooperation is very important assisting developing countries fighting in international cartels; (c) to some extent, agreements dealing with cooperation in this area may be ill-designed, as burdens to negotiate and notify may be high and the real needs of the parties, including differences in the level of institutional maturity, are not always considered; (d) enhancement of cooperation might thus start with the building of capacity and effective institutions and moving on to notification and exchange of confidential information; (e) countries should consider ways to authorize their competition authorities to exchange confidential information; (f) current lacunae in the implementation of cooperation provisions may be because the benefits of cooperation are insufficiently clear while the costs of implementation are high; (g) informal cooperation has its uses but it is sometimes important to have a formal framework; and (h) continuous identification of positive outcomes of cooperation would motivate increased and more efficient cooperation towards developing countries, creating incentives to establish an appropriate cooperation framework and providing developing countries with strong political support and the technological assistance to overcome challenges in every stage of competition policy development.

31. One competition authority has suggested that, in order to improve the knowledge base available for developing countries on competition policy and to prevent contradictions among agreements dealing with different areas, UNCTAD could promote studies on the relationships which competition policy has with trade and investment, addressing interrelated issues in these areas.⁵¹ That authority further suggests that discussions be encouraged on the following issues: cooperation between competition and trade authorities in cases of international mergers; injuries caused by export cartels; relationships among competition policy, infant industries and industrial policy; relationships between competition policy and regulation; and relationships between competition policy and foreign direct investment. injury caused by export cartels;

C. Issues for possible examination

32. While some of the above-mentioned comments or suggestions were made in relation to a possible multilateral framework on competition housed within the WTO, they may be relevant to provisions of other possible multilateral instruments, as well as of bilateral and regional agreements. Accordingly, this section suggests some issues and questions which might be examined by the Group of Experts in working out how possible international

agreements on competition might apply to developing countries, including through preferential or differential treatment.

33. On the basis of substantial enforcement efforts, sometimes assisted by informal cooperation, the competition authorities of Brazil (which are among the most experienced of developing country authorities) and the Republic of Korea have had some success in taking action against a few international cartels affecting them. However, most of the international cooperation that took place in two of these cartel cases was limited to the exchange of publicly available information which, according to an OECD report, was insufficient, to support prosecutions where competition agencies did not benefit from cooperation from one or more parties to the cartel.⁵² The Republic of Korea experienced these difficulties despite being an OECD member country having adopted all the relevant OECD recommendations relating to cooperation in this area, including the HCC Recommendation and the revised recommendation of the OECD Council concerning cooperation between member countries on anti-competitive practices affecting international trade.⁵³ In recent years, it has entered into a number of enforcement cooperation arrangements and free trade agreements which provide for varying degrees of cooperation; none of these (like most agreements) provide for exchange of confidential information, the lack of which has been identified as an obstacle to substantial enforcement cooperation.⁵⁴ Accordingly, Governments may wish to discuss the relative roles and importance of binding agreements vis-à-vis informal cooperation and national enforcement efforts in addressing different enforcement difficulties that developing countries face in cases of RBPs with international elements. Where, for example, a developing country's competition authority with limited experience, resources, legal tools or bargaining power wishes to summon foreign-based or foreign-affiliated business firms to respond to complaints or to give evidence, or wishes to detect whether such firms have engaged in anticompetitive practices, or wishes to enforce remedies or sanctions directed at such entities, what enforcement techniques could they feasibly utilize for such purposes – and what kind of technical assistance might usefully assist them in their efforts? What informal cooperation (including provision of what kind of non-confidential information) would be readily available or needed from other competition authorities in such situations, and to what extent would it suffice in addressing such enforcement problems? For what kind of problems would the conclusion of binding agreements in this area by developing countries with other countries be necessary – and what types of provisions in such agreements would actually be of use in tackling such problems? How far and on what terms and conditions would other countries be prepared to sign cooperation agreements with individual developing countries providing, for example, for notification of anticompetitive activities affecting a developing country even if there is no violation of the notifying country's law, for investigatory assistance, or for the exchange of confidential information subject to appropriate safeguards? How should questions relating to leniency agreements and confidentiality be addressed? How much injury is caused by export and international cartels? How appropriate are current provisions in competition cooperation agreements and RTAa for the needs and capacities of developing countries? What examples are there of successful cooperation in this area? What are the interrelationships which competition policy has with trade, investment, infant industries, industrial policy and regulation? What are the possibilities for cooperation between competition and trade authorities in international merger cases?

34. Substantial procedural cooperation in the competition policy area takes place, mainly between some developed countries or regions, despite significant differences in their substantive approaches; it is not clear to what extent any substantive commitments in binding agreements have been a necessary precondition for such cooperation. Conversely, several

free trade or economic partnership agreements, mainly between developed and developing countries (including those reviewed in the present report), provide for substantive commitments of varying natures and degrees in the competition policy area; it is similarly not clear to what extent such commitments have promoted procedural cooperation in competition cases so far. It might be necessary to clarify, for instance: (a) how the specification of minimum standards of cartel prohibition and/or enforcement in an international agreement (in a manner that caters for existing divergences in this area) would assist developing country competition authorities in detecting and undertaking enforcement against domestic or international cartels, taking into account the resources and expertise they could muster for this purpose, the likelihood that cartel participants would be interested in developing-country leniency offers, the likely availability of significant documents or potential witnesses within developing countries and of the means to access any such evidence, the ability of developing countries to enforce their laws outside their borders, and their bargaining power vis-à-vis large firms; and (b) whether a provision in a free trade agreement providing for non-discrimination in the competition policy area would actually be able to prevent discrimination in practice or, conversely, whether it might encourage allegations of discrimination against inexperienced competition authorities. Accordingly, Governments may wish to discuss: the extent, degree and specificity of substantive commitments in possible international agreements relating to the content or application of national laws; which specific divergences in competition policy approaches are deterring (or might deter) which types of procedural cooperation in which kinds of cases; how far substantive commitments might both succeed in promoting convergence in practice and better enable developing countries to tackle their enforcement problems; conversely, how far the absence or limited nature of such substantive commitments could adversely affect mutual trust and international cooperation (both where there are actually substantial divergences in approach and where there are not); and appropriate technical assistance to assist developing countries in meeting any substantive commitments or in engaging in procedural cooperation. Such discussions might take into account: the content of substantive provisions in existing international instruments; any linkages or balance among such substantive provisions, case-specific procedural cooperation and dispute settlement; experiences so far in the legal interpretation and application of substantive and procedural provisions of such international instruments; common approaches and divergences in competition policies currently prevailing at the national or regional levels (including in respect of exceptions and exemptions) and likely future trends in this respect; and the lack of experience, knowledge and bargaining power of many developing countries in this area. It may be recalled in this connection that paragraph 8 of the São Paulo Consensus states that: "It is for each Government to evaluate the trade-offs between the benefits of accepting international rules and the constraints posed by the loss of policy space. It is particularly important for developing countries, bearing in mind development goals and objectives, that all countries take into account the need for appropriate balance between national policy space and international disciplines and commitments."

35. Another question that Governments may wish to discuss is the extent to which countries with more experience in this area might be prepared to take enforcement action to assist developing countries, in the light of paragraph E.4 of the Set. As described above, in the *Empagran* case, several developed countries successfully argued against intervention by United States courts in respect of injury to these countries' markets from an international cartel, on the grounds that this would undermine their own antitrust enforcement and amnesty programmes. It may be appropriate to clarify whether developing countries with less effective enforcement in this area would object to or welcome intervention by more experienced countries in respect of RBPs emanating from overseas affecting developing country markets.

Some suggestions in OECD reports relating to how the export cartel issue might be addressed have been highlighted above. It may also be recalled in this connection that: paragraph E.9 of the Set provides that States should, on request, or at their own initiative when the need comes to their attention, supply to other States, particularly developing countries, publicly available information and, to the extent consistent with their laws and established public policy, other information necessary to the receiving interested State for its effective control of RBPs; paragraph C.7, dealing with preferential or differential treatment for developing countries, provides that, in order to ensure its equitable application, States, particularly developed countries, should take into account in their RBP control the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in: promoting the establishment or development of domestic industries and the economic development of other sectors of the economy; and encouraging their economic development through regional or global arrangements among developing countries; and para. F.4 provides for consultations between States with regard to an issue concerning RBP control, for which the States involved may request UNCTAD to provide mutually agreed conference facilities.

36. Governments may also wish to identify: how cooperation among developing countries in the competition policy area might be enhanced, in the light of paragraphs C.7 and E.7 of the Set (the latter provides for regional and subregional cooperation in this area through the exchange of information on RBPs or on the application of RBP control laws, and through mutual assistance regarding RBP control);⁵⁵ and how UNCTAD might best implement paragraph 104 of the São Paulo Consensus (which provides that UNCTAD should further strengthen analytical work and capacity-building activities to assist developing countries on issues related to competition law and policies, including at a regional level), taking into account ways in which coordination of work in this area by different international bodies might be enhanced.

37. To date, the Set of Principles and Rules is the only multilateral instrument with a universal character dealing with the area of competition law and policy and setting out commonly agreed standards in this area. Although it is not legally binding, it has the political authority and legitimacy of a unanimously adopted General Assembly resolution. The Fifth Review Conference reaffirmed the fundamental role of competition law and policy for sound economic development and the Set's validity and called upon all member States to make every effort to implement fully its provisions.⁵⁶ Accordingly, any examination of the above-mentioned questions should take due account of the Set's provisions; it might be used as a guide or framework regarding the manner whereby possible international agreements on competition might apply to developing countries (including through preferential or differential treatment). Any such examination would also need to be conducted within the framework laid down by the Fifth Review Conference. Should Governments so wish, account might also be taken, as appropriate, of relevant provisions of the WTO Agreements, including their provisions relating to S&D treatment and ongoing efforts to strengthen them and make them more precise, effective and operational. Such an examination might help to enhance consistency and coordination among national laws and different forms or levels of international cooperation in this area. It might also feed into the continuing presentation by UNCTAD of types of common provisions to be found in international, particularly bilateral and regional, cooperation agreements on competition policy and their application.

¹ See UNCTAD, Report of the Intergovernmental Group of Experts on Competition Law and Policy (TD/B/COM.2/52, TD/B7COM.2/CLP/39), Agreed Conclusions, para. 4. This request of the Group of Experts followed such a request by the Fourth Review Conference on the Set of Principles and Rules in 2000.

² See paragraph 2 of the Group's agreed conclusions in UNCTAD, "Report of the Intergovernmental Group of Experts on Competition Law and Policy on its sixth session" (TD/B/COM.2/48). A written communication relating to the report was received from the Government of Indonesia.

³ See resolution adopted by the Conference at its closing plenary meeting on 18 November 2005, The Fifth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Antalya, Turkey, 14–18 November 2005 (TD/RBP/CONF.6/14), para. 10. Written communications relating to this report were received from the Governments of Canada, Serbia and Montenegro, Trinidad and Tobago and the United States.

⁴ See paragraph 8 of the Group's Agreed Conclusions in UNCTAD, "Report of the Intergovernmental Group of Experts on Competition Law and Policy on its seventh session" (TD/B/COM.2/CLP/57). A written communication relevant to the report have been received from the Government of Brazil.

⁵ See P. Brusick and J. Clarke, "Operationalizing special and differential treatment in cooperation agreements on competition law and policy", in UNCTAD, *Trade and Competition Issues: Experiences at regional level (UNCTAD/DITC/CLP/2005/1)*.

⁶ The scope, coverage and enforcement of competition laws and policies and analysis of the provisions of the Uruguay Round agreements relevant to competition policy, including their implications for developing and other countries (TD/RBP/COM.2/EM/2); Recent Important Competition Cases in Developing Countries (TD/B/COM.2/CLP/26); and Experiences Gained So Far on International Cooperation on Competition Policy Issues and the Mechanisms Used (TD/B/COM.2/CLP/21/Rev.2).

⁷ General Assembly resolution 35/63 of 5 December 1980 (TD/RBP/CONF/10/Rev.2).

⁸ However, the United States is the only country whose competition law applies to RBPs in foreign markets affecting its exporters.

⁹ Communication by the Government of Trinidad and Tobago.

¹⁰ These agreements have been concluded by the European Union with Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority and Tunisia.

¹¹ See J. Mathis, WTO core principles and prohibition: Obligations relating to private practices, national competition laws and implications for a competition policy framework, UNCTAD consultant report (UNCTAD/DITC/CLP/2003/2).

¹² See WTO, Developing Countries and the Multilateral Trading System: Past and Present, Background Note by the Secretariat, 1999, and Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by the Secretariat, WT/COMTD/W77.

¹³ See WTO General Council, Doha Work Programme, Draft General Council Decision of 31 July 2004, WT/GC/W/535.

¹⁴ See S. Evenett, Can developing countries benefit from WTO negotiations on binding disciplines from hard core cartels?, UNCTAD consultant report (UNCTAD/DITC/CLP/2003/3); and OECD, Hard core cartels: Recent progress and challenges ahead (CCNM/COMP/TR(2003)7).

¹⁵ See OECD, Hard core cartels: Recent progress and challenges ahead (CCNM/COMP/TR(2003)7).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.* See also Chang, Deuk-Soo, "Suggestions For Enhancing Effectiveness Of Cooperation On Competition Law and Policy At Regional Level From Korea's Experience", in UNCTAD, *Trade and Competition Issues: experiences at regional level (UNCTAD/DITC/CLP/2005/1)*.

²⁰ See OECD, *op. cit.*

²¹ See OECD, *op. cit.*

²² See OECD, OECD Global Forum on Competition, Contribution from Brazil, 29 January 2002, CCNM/GF/COMP/WD(2002)3, Paper prepared by Cleveland Prates Teixeira (General Coordinator for Anti-Cartel Enforcement), Pedro de Abreu e Lima Florêncio (Coordinator for Anti-Cartel Enforcement) and Susana Salum Rangel (Assistant of the General Coordination for Anti-Cartel Enforcement).

²³ *Ibid.*

²⁴ *Ibid.*

- ²⁵ United Parcel Service of America Inc. (UPS) and Government of Canada, award on jurisdiction in an arbitration under Chapter 11 of the North America Free Trade Agreement (Arbitration Tribunal, 22 November 2002).
- ²⁶ NAFTA Art. 1105.1 states: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."
- ²⁷ See WTO, *Mexico – Measures affecting telecommunications service – Report of the Panel*, WT/DS204/R, 2 April 2004, critically commented on in P. Marsden, WTO decides its first competition case, with disappointing results, *Competition Law Insight*, May 2004.
- ²⁸ See WTO Working Group on the Interaction between Trade and Competition Policy, Communication from Canada, 2 July 2001, WT/WGTCP/W/174.
- ²⁹ See WTO Working Group on the Interaction between Trade and Competition Policy, Communication from Canada, 12 August 2002, WT/WGTCP/W/201.
- ³⁰ See WTO Working Group on the Interaction between Trade and Competition Policy, Communication from Korea, *Hardcore Cartels and Voluntary Cooperation: Conceptual and Practical Enforcement Issues*, WT/WGTCP/W/225.
- ³¹ See ICN Working Group on Cartels, "Defining Hard Core Cartel Conduct -Effective Institutions -Effective Penalties", in *Building Blocks for Effective Anti-Cartel Regime*, vol. 1.
- ³² See Evenett, *op. cit.*
- ³³ See J. L. Klein, A note of caution with respect to a WTO agenda on competition policy, Address to the Royal Institute of International Affairs, Chatham House, London, 18 November 1996 (mimeo).
- ³⁴ Communication from the Government of Indonesia.
- ³⁵ See also Chang, Deuk-Soo, *op. cit.*
- ³⁶ See CCNM/COMP/TR(2003)7, at p. 36.
- ³⁷ *Ibid.*, at p. 37-38.
- ³⁸ See OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation*, 2006.
- ³⁹ See M. Hviid and A. Stephan, *Leniency Undermined?* (mimeo), Centre for Competition Policy, University of East Anglia.
- ⁴⁰ See American Bar Association Section of Antitrust Law, *The State of Federal Antitrust Enforcement 2004*, at http://www.abanet.org/antitrust/comments/2004/state_of_fed_enforc.pdf
- ⁴¹ See W. Kolasky, *Criminalizing Cartel Activity: Lessons from the U.S. Experience*, address to the Global Competition Law Centre, at <http://gcllc.coleurop.be/documents/Kolasky%20-%20criminalizing%20cartel%20activity%208-04.pdf>
- ⁴² See Evenett, *op. cit.*
- ⁴³ See OECD, *Hard Core Cartels: Third Report*, *op. cit.*
- ⁴⁴ See J. M. Connor, *Price-fixing overcharges: Legal and economic evidence*, *Research in Law and Economics* (forthcoming).
- ⁴⁵ See WTO Working Group on the Interaction between Trade and Competition Policy, Communication from Trinidad and Tobago, WT/WGTCP/W/143, 2 August 2000.
- ⁴⁶ See M. Gal, *Competition policy in small economies*, OECD Global Forum on Competition Policy, CCNM/GF/COMP/WD(2003)42.
- ⁴⁷ See S. Evenett and M. Gal, *A Report on the Third Annual Conference of the International Competition Network*, 2004.
- ⁴⁸ See American Bar Association, *Special Committee Report on Antitrust* (1991).
- ⁴⁹ See OECD, *Obstacles to Trade and Competition*, Paris, 1992.
- ⁵⁰ The Brazilian recent experience with international cooperation – Contribution by Brazil (mimeo.).
- ⁵¹ Communication to the UNCTAD secretariat by Brazil.
- ⁵² See OECD, *Hard core cartels: Recent progress and challenges ahead*, *op. cit.*
- ⁵³ Adopted on 27 and 28 July 1995 (C(95)130/FINAL).
- ⁵⁴ See Chang, Deuk-Soo, *op. cit.*
- ⁵⁵ See TD/B/COM.2/CLP/21/Rev.3.
- ⁵⁶ See TD/RBP/CONF.6/14, paras. 1 and 2.