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Working Group on the Interaction between Trade and Competition Policy

MODALITIES FOR VOLUNTARY COOPERATION

Background Note by the Secretariat

This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO.

I. INTRODUCTION

1. This note has been prepared in response to the request by the Working Group during the informal meeting that was held on 26 February 2002 that the Secretariat prepare a set of background papers based on the discussions held and materials considered in the previous work of the Group. The papers were to deal, respectively, with each of the four substantive elements that are contained in paragraph 25 of the Doha Ministerial Declaration, namely: (i) core principles, including transparency, non-discrimination and procedural fairness; (ii) provisions on hardcore cartels; (iii) modalities for voluntary cooperation; and (iv) support for progressive reinforcement of competition institutions in developing countries through capacity building. The first in this series of notes, dealing with the subject of support for progressive reinforcement of competition institutions in developing countries through capacity building, was issued as document WT/WGTCP/W/182, dated 17 April 2002. The second, dealing with provisions on hardcore cartels, was issued as document WT/WGTCP/W/191, dated 20 June 2002.

2. The present note deals with the third subject mentioned above, namely modalities for voluntary cooperation, which is to be the subject of focused attention at the Working Group's meeting to be held on 1-2 July 2002. The aim of the note is to provide a synthesis of the issues raised and points made by Members on the topic. It has been prepared on the basis of the Working Group's annual reports, which in turn rely upon the minutes of the Group's meetings, and of written submissions by Members to the Group.

3. The subject of voluntary cooperation in the field of competition law and policy has been discussed in numerous meetings of the Working Group during the past five years. In 1997-98, it was dealt with principally as an aspect of the Group's work on stocktaking and analysis of existing instruments, standards and activities regarding trade and competition policy, including of experience with their application, as called for by the Checklist of Issues Suggested for Study that was issued in July 1997.[1] Beginning in 1999 and continuing through 2001, the topic of cooperation was dealt with under the rubric of "Approaches to promoting cooperation and communication among Members, including in the field of technical cooperation", as set out in the decision taken by the General Council in December 1998 regarding the work programme of the Working Group (WT/GC/M/32, page 52).

[1] See Report (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council (WT/WGTCP/2), Annex I. (Henceforth in this Note, documents issued in the series WT/WGTCP/1-5 are referred to as "Report (1997—2001)", as appropriate. Documents issued in the series WT/WGTCP/W/__ are referred to as W/__.)

4. The term "cooperation" has been used in a broad and a narrow sense in the Working Group. In its broad sense, it has been used to refer to the full range of elements on which it has been proposed by some Members that Members might undertake to work together in the framework of the WTO – including technical cooperation and capacity building and possible commitments on hardcore cartels in addition to narrower forms of cooperation such as notifications, consultations and mutual assistance in particular cases.[2] Clearly, in this sense, the term overlaps with other elements contained in paragraph 25 (i.e., support for progressive reinforcement of competition institutions in developing countries and provisions on hardcore cartels) which are the subject of other Secretariat papers synthesizing the discussion on those topics.

5. Therefore, the present note focuses on modalities for voluntary cooperation in a narrower sense. As reflected in recent contributions by Members, cooperation in this sense has two main elements: (i) provisions to facilitate case-specific cooperation on anti-competitive practices having an impact on international trade; and (ii) provisions relating to general exchanges of information and experiences and joint analysis of global trade-related competition issues, to be conducted by a WTO Competition Policy Committee.[3] These elements are discussed in detail in the remainder of this note. The note does *not* address proposals concerning technical cooperation and capacity building which are covered in the separate Secretariat note on this subject (W/181). Nonetheless, the point has been made in the Working Group that important synergies can arise between cooperation in the narrower sense used in the note and wider aspects of cooperation such as technical assistance and institution building.[4] The potential for such synergies is noted at a couple of points in the paper.

6. The remainder of this note is divided into three sections that deal, respectively, with:

- The need for and importance of international cooperation in the field of competition law and policy. The focus here is on points made by Members concerning the various factors that underlie efforts to strengthen international cooperation in the field of competition law and policy, whether at the bilateral, regional or multilateral levels.

- The discussion of existing cooperation mechanisms which has taken place in the Working Group.

- The discussion of current proposals for international cooperation on competition policy in the framework of the WTO, including a discussion of the benefits that could accrue from such cooperation and of questions and concerns that have been raised in relation to the current proposals and the responses that have been provided.

II. THE NEED FOR INTERNATIONAL COOPERATION IN THE FIELD OF COMPETITION LAW AND POLICY

7. The need for and importance of international cooperation in the field of competition law and policy has been discussed in numerous meetings of the Working Group. Reference has been made, in this regard, to the importance of international cooperation as a tool of law enforcement, to address the increasing incidence of anti-competitive activities with a cross-border dimension[5]; to the benefits of expanded communication between competition authorities, as a means of minimizing jurisdictional conflicts and promoting "soft convergence" of substantive approaches to competition law and policy among Members[6]; and to the contribution of case-specific and other specific forms of cooperation in

[2] See, e.g., Contribution of Japan (W/168) and Contribution by Australia (W/148).
[3] See, e.g., Contribution of the European Community and its member States (WT/WGTCP/W/184).
[4] Report (2001), paragraph 57.
[5] Report (1998), paragraph 68 and Report (2000), paragraphs 41-47.
[6] Report (2000), paragraph 41.

reinforcing institution-building processes particularly in developing countries.[7] Each of these points is elaborated below, with appropriate references. More broadly, the suggestion has been made that expanded cooperation and communication between WTO Members in this area is necessary in the light of falling trade barriers and the ongoing globalization of markets.[8] Without a commitment to expanded cooperation, anti-competitive practices may undermine the benefits of trade liberalization, thereby also undermining confidence in the multilateral system. The argument has also been made that international cooperation can help to address an imbalance of power that allegedly exists between transnational corporations and developing country governments, without which developing countries may have practical difficulties in enforcing their laws against harmful conduct originating abroad.[9]

8. More specifically, the following points have been made regarding the benefits that can flow from international cooperation in the enforcement of competition law and policy, depending on the nature of particular cases and the scope of cooperation undertaken: first, it has been suggested that the procurement of information regarding markets, practices and the firms and individuals involved can substantially facilitate the enforcement of relevant laws in particular cases[10]; second, the exchange of views between sister agencies on matters such as the delineation of relevant markets, the assessment of alternative theories of a case and the pros and cons of alternative remedies can be of great value to the enforcement process[11]; third, cooperation can minimize and help with the management of conflicts that can arise between jurisdictions in cases in which firms headquartered in one jurisdiction are the subject of investigation/possible prosecution in another[12]; fourth, cooperation involving the coordination of remedies can minimize inconsistencies and maximize the resulting benefits for economic efficiency and consumer welfare, in appropriate cases.[13]

9. To illustrate the potential usefulness of cooperation to address cross-border anti-competitive practices, reference has been made in the Working Group to the problem of international cartels. Information has been brought to the attention of the Working Group which suggests that such cartels are more widespread than was previously known, and that they impose heavy costs on consumers and user industries in both developed and developing countries.[14] The enforcement of anti-cartel provisions by those countries already having such provisions undoubtedly helps to mitigate this impact, in that it acts as a general deterrent to international cartel activity. However, it is unlikely to adequately address the impact of all such arrangements, particularly in the case of countries lacking adequate competition laws and/or enforcement machinery. Consequently, the argument is made that, unless countries are parties to international cooperation mechanisms that give them access to information regarding the scope and operations of cartels when they are disclosed, they will continue to be victimized by such arrangements.[15] According to relevant submissions by Members, the required cooperation may be as simple as the exchange and dissemination of basic information such as legislation and enforcement guidelines or may extend to the exchange of information related more specifically to particular cases (discussions in the Working Group have focused principally on the benefits that might be achieved through more widespread exchange of non-confidential information regarding relevant firms and cases as opposed to confidential information).[16]

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[7] Report (1999), paragraph 61; see also Report (2001), paragraph 57.
[8] Report (1999), paragraph 39.
[9] Report on the meeting of 23-24 April 2002 (WT/WGTCP/M/17), paragraph 15.
[10] Report (2001), paragraph 57.
[11] Report (1999), paragraph 39; see also Contribution of Romania (W/181/Rev.1)
[12] Report (2000), paragraph 41.
[13] Contribution of the European Community and its member States (W/184).
[14] See Secretariat Background Note on Hardcore Cartels (W/191), paragraph 9, and references cited therein.
[15] Secretariat Background Note on Hardcore Cartels (W/191), paragraph 18; see also Contribution by Japan (WT/WGTCP/W/168), paragraph 3.
[16] Report (2000), paragraph 41; Report (2001), paragraph 68.

10. The view has also been expressed that a framework for case-specific cooperation in the WTO can substantially reinforce the process of institution-building in developing countries. In particular, by increasing awareness of other Members' experiences and by being exposed to best practices through international cooperation, Members may gain valuable insights that strengthen domestic reform efforts.[17] In connection with this point, particular reference has been made to the importance of cooperation for countries with limited resources, such as small island economies.[18] Cooperation mechanisms can also provide countries with nascent competition policy regimes with valuable insights into the enforcement of competition law.[19] In particular, cooperation can facilitate the dissemination of information concerning best practices in applying competition policy and assist countries with newly established regimes to identify priority enforcement areas so as to maximize the effectiveness of their implementation efforts.[20] A cooperation framework can also help to promote a culture of competition, given that national competition agencies and competition legislation are necessary but not sufficient to accomplish this objective.[21]

III. DISCUSSION OF EXISTING COOPERATION MECHANISMS IN THE FIELD OF COMPETITION LAW AND POLICY

11. Reference has been made, in the Working Group, to various existing arrangements regarding cooperation in competition policy and law enforcement. These include: (i) bilateral agreements relating specifically to cooperation in competition law enforcement that have been adopted by a number of countries; (ii) provisions relating to cooperation in competition policy/law enforcement that are incorporated into bilateral or regional trade agreements; and (iii) existing arrangements of a non-binding nature at the multilateral level.

12. With regard to bilateral agreements dealing specifically with competition law enforcement, these arrangements are usually administered directly by the relevant competition agencies, acting on behalf of their national governments. Examples include, among others that could be cited, agreements that have been in existence for some years between the European Community and the United States, the United States and Canada, and Canada and the European Community.[22] The point has been made in the Working Group that such agreements generally embody, in varying degrees, the following two themes: (i) cooperation in the law enforcement process; and (ii) the avoidance or management of disputes. Typically, they contain provisions relating to notifications, consultations, avoidance of conflicts and limited forms of mutual assistance, in appropriate cases. In most cases, existing cooperation agreements at the bilateral level do not provide for the exchange of confidential information. However, the exchange of such information is permitted under deeper cooperation arrangements to which a small number of countries are party. A further interesting feature of some bilateral agreements is "positive comity". Under this concept, cases involving anti-competitive practices originating in one country but affecting another can be referred to the competition agency of the country where such practices have originated for appropriate action. Only a small number of cases have actually been dealt with under positive comity procedures.

13. The point has been made in the Working Group that bilateral agreements on cooperation in competition law enforcement have generated important benefits for the participating countries, including specific assistance with the law enforcement process in a number of cases and wider benefits in terms of the sharing of perspectives and know-how.[23] They have also been an important

[17] Report (2001), paragraph 57.
[18] Report (2000), paragraphs 27 and 42.
[19] Report (1999), paragraph 63.
[20] Report (1999), paragraph 61.
[21] Report (1999), paragraph 61.
[22] For background, see Contribution of the United States (W/48) and Contribution of the United States (W/116).
[23] Contribution of the United States (W/116) and Contribution of the European Community and its member States (W/184).

factor in helping with the prevention and management of disputes in particular cases. The observation has been made that cooperative relationships embodied in bilateral agreements tend to be evolutionary: whereas cooperation may begin with a relatively simple agreement, over time, the level of obligation and of mutual benefit is likely to increase.[24] The point has also been made that, currently, participation in such agreements is limited to a fairly small number of countries. In particular, most developing countries remain outside the scope of such arrangements.[25]

14. With respect to cooperation at the regional level, a distinction has been drawn between three types of cooperation arrangements. First, it has been noted that some countries have been or are in the process of establishing a competition regime at the regional level, as in the case of COMESA, CARICOM and Mercosur.[26] A second type of regional arrangement involves free trade agreements containing competition provisions, such as the European Union, NAFTA, the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) and the Canada-Costa Rica Free Trade Agreement.[27] Many of these arrangements aim, to a degree, at the harmonization of approaches to competition in the region.[28] A third type involves the sharing of experiences relating to the implementation of a domestic competition regime at the regional level.[29] Reference has been made, in this regard, to meetings convened by APEC and in the context of NAFTA and the Free Trade Area of the Americas in relation to competition issues.[30]

15. At the multilateral level, cooperation in the field of competition law and policy has often taken the form of non-binding instruments and recommendations as well as policy advice, technical assistance and the preparation of specialized studies. UNCTAD and the OECD have been especially active in this regard. UNCTAD, in particular, is responsible for administering the United Nations Set of Multilaterally Agreed Equitable Principles and Rules, a non-binding instrument of cooperation that has received much attention in the Working Group.[31]

16. Reference has also been made in the Working Group to the usefulness of the 1995 OECD Council Recommendation Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade.[32] The Recommendation provides for OECD member countries to notify other member countries when undertaking competition law enforcement activities which may affect other member countries' important interests, and for consultation, upon request, with regard to such activity. It further exhorts member countries to take into account, in their enforcement activities, the significant national interests of other member countries that may be affected. It calls upon OECD member countries to cooperate with one another in the enforcement of competition law and provides a mechanism for conciliation of disputes between member countries, if requested and agreed by all the member countries involved.[33]

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[24] Report (1998), paragraph 68 and, for additional background, Contribution of the United States (W/48).

[25] Contribution of the European Community and its member States (W/184).

[26] Report (2001), paragraph 54; Report (1998), paragraphs 69 and 70.

[27] Report (2001), paragraphs 54 and 56; Report (1998), paragraph 69.

[28] Report (1999), paragraph 46.

[29] Report (2001), paragraph 54.

[30] Report (1999), paragraph 46.

[31] See Contribution of UNCTAD (W/17) and Background Note by the Secretariat on the Fundamental Principles of Competition Policy (W/127).

[32] OECD Document No. C(95)130/Final (21 September 1995). See references in Report (2000), paragraph 41.

[33] Report (2000), paragraph 41 and Contribution of the United States (W/48).

IV. DISCUSSION OF CURRENT PROPOSALS FOR MODALITIES ON COOPERATION IN THE FRAMEWORK OF THE WTO

A. NATURE OF THE CURRENT PROPOSALS

17. The discussions to date in the Working Group on the Interaction between Trade and Competition Policy have emphasized two main elements constituting modalities on voluntary cooperation that could be incorporated in a multilateral framework on competition policy: (i) case-specific cooperation, including notifications, consultations and mutual assistance; and (ii) cooperation in the sense of the sharing of information and experiences and analysis/discussions of issues of common interest.[34] Consistent with this approach, a recent contribution by a Member on this topic highlights the following two elements under the heading of "modalities for international cooperation": (i) provisions to facilitate case-specific cooperation on anti-competitive practices having an impact on international trade; and (ii) provisions relating to general exchanges of information/experiences and joint analysis of global trade-related competition issues, possibly within a WTO Competition Policy Committee that would be established once a framework was agreed upon.[35]

18. The above-noted contribution[36] indicates further that the following elements would be included under the rubric of case-specific cooperation:

- Exchanges of case-related information and evidence.

- Consultations and exchanges of views on cases affecting the important trade interests of other WTO Members.

Expanding on these elements, the contribution suggests that WTO Members should inform other Members whose important trade interests may be affected by ongoing investigations and proceedings under its competition laws. Similarly, under the proposed modalities, a WTO Member could bring to the attention of another WTO Member evidence of an anti-competitive practice with an impact on its trade or investment and seek information about any possible competition investigation relating to such practices. In the context of consultations, Members could also seek assistance from the home country of a foreign multinational in relation to an ongoing competition investigation and/or seek information which may be of value for enforcement activities in relation to international, import or export cartels. Consultations would also provide an opportunity to exchange views about relevant market analysis and possible remedies. As a final aspect of case-specific cooperation, the submission notes that a WTO agreement could also include principles of "negative comity" – meaning that WTO Members would take into account the important and clearly stated trade interests of other Members before action is taken in particular cases.[37]

19. With regard to cooperation in the sense of general exchanges of information and experiences, the above-noted contribution indicates that the following activities are contemplated:

– exchanges of information on domestic laws, practices and developments through the establishment of "contact points" in the competition authorities of each WTO Member;

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[34] Report (2001), paragraphs 55-57; see also Contribution of Switzerland (W/151), Contribution of the European Community and its member States (W/152), Contribution of Canada (W/155), Contribution of Japan (W/156), Contribution of the Czech Republic (W/165), Contribution of Canada (W/174) and Contribution of the European Community and its member States (W/184).

[35] Contribution of the European Community and its member States (W/184), pp. 3-4.

[36] Contribution of the European Community and its member States (W/184).

[37] Contribution of the European Community and its member States (W/184), p. 4.

- exchanges of experiences and discussions on competition policy issues having an impact on international trade;

- voluntary "peer reviews" of WTO Members' competition policies;

- joint analysis and discussion on global competition issues affecting international trade and the global economy. A possible tool to facilitate such analysis would be the preparation of a periodic report on major competition policy developments with an impact on international trade and the global economy.

According to the Member's proposal, the above functions would be carried out by or under the auspices of a WTO Competition Policy Committee which would be established following the conclusion of a competition agreement.38

20. Based on the discussions held thus far in the Working Group, four further observations can be made regarding the nature and scope of the current proposals relating to "modalities for voluntary cooperation". First, application of the proposed cooperation modalities would not be limited to cases involving hardcore cartels. Rather, the modalities would be available in respect of most or all types of competition law violations, including cartels, exclusionary abuses of a dominant position and other practices.39 Second, the cooperation envisioned would indeed be voluntary in nature and, therefore, not subject to dispute settlement.[40] However, the framework would contain a commitment to consult and to seek mutually acceptable solutions in cases involving anti-competitive practices with an international dimension.[41] Third, the provisions on cooperation would not require the exchange of information that is confidential or subject to statutory protection.[42] Fourth, the provisions on cooperation that would be embodied in a multilateral framework on competition policy would be intended to exist side by side with, and not replace, existing cooperative arrangements at the bilateral and regional levels. Parties to the proposed framework would remain free to enter into more intensive cooperation arrangements with individual partners where they choose to do so.[43]

21. A related perspective on the current proposals relating to modalities for voluntary cooperation is provided by the following excerpt from the Working Group's Report (2001):

> "… cooperation in a WTO setting would be essentially incremental in nature, and would be achieved in a step-by-step manner. The first phase of the exercise would be largely educational, concentrating on the development of enforcement capacity. The second phase would have as its primary feature the development and implementation of notification procedures. A Member undertaking an investigation that might affect important interests of another Member should notify the latter at an appropriate stage in the investigation. More meaningful steps towards enhancing international cooperation would be the coordination of enforcement actions against international cartels and the development of a common approach with respect to procedural issues in merger review. The latter step would aim at minimizing the transaction costs involved in getting the requisite approvals of a merger plan in different jurisdictions …".[44]

[38] Contribution of the European Community and its member States (W/184), p. 5.
[39] Contribution of the European Community and its member States (W/184), p. 4.
[40] Report (2000), paragraph 51.
[41] Report (2000), paragraph 51.
[42] Report (2000), paragraphs 47-50
[43] Report (2000), paragraph 60; see also Contribution of the European Community and its member States (W/184), pp. 3-5.
[44] Report (2000), paragraph 44.

22. As a further illustration of possible modalities on voluntary cooperation that could be included in a multilateral framework on competition policy, reference has been made in the Working Group to the competition policy chapter of the recent Canada-Costa Rica Free Trade Agreement.[45] The Agreement contains provisions on general principles relating to competition law/policy; cooperation; confidentiality; technical assistance; and consultations between relevant authorities. The suggestion has been made that the Agreement provides a practical example of the types of cooperation that are possible to address the detrimental effects of anti-competitive practices in relation to trade and development, even between countries at different levels of development.[46]

B. POTENTIAL BENEFITS OF PROPOSED MODALITIES FOR VOLUNTARY COOPERATION

23. The view has been expressed that a multilateral framework on competition policy could make a distinct and valuable contribution to enhancing international cooperation in the competition policy area by enabling Members of the WTO to deal more effectively with anti-competitive practices that affect their trade and development. More particularly, it has been suggested that modalities on voluntary cooperation would facilitate the fight against anti-competitive practices that thwart trade and development, for example by providing for: (i) enhanced availability of information on cases involving anti-competitive practices; (ii) consultations among competition agencies in order to better address anti-competitive practices of common concern and to manage jurisdictional conflicts through the application of comity principles; and (iii) new procedures for the exchange of national experience and perspectives on competition policy such as peer review. The promotion of cooperation at the multilateral level could also have a positive impact on domestic decision-making processes in relation to the implementation of competition policy. In particular, by increasing awareness of other Members' experiences and by being exposed to best practices, Members would gain valuable insights that would strengthen domestic reform efforts. The suggestion has also been made that a multilateral framework could reinforce the effectiveness of institution-building programmes in the area of competition policy by providing hands-on exposure to best practices in dealing with cross-border cases. Within such a framework, technical assistance programmes could receive higher priority and be better focused on the needs of recipient countries.[47] A cooperation framework might also contribute to the promotion of a culture of competition.[48]

24. The point has also been made that a multilateral framework on cooperation in this area would certainly not render existing cooperation mechanisms redundant. On the contrary, the view has been expressed that, rather than being mutually exclusive, arrangements at the bilateral, regional and multilateral levels are complementary in nature. For example, bilateral and regional agreements can be useful in facilitating more intensive levels of cooperation between countries with complementary interests. In this context, it has been suggested that a WTO framework would enable the benefits of existing bilateral and regional arrangements to be shared more broadly, particularly with developing countries and would function as a "safety net" in that it would be available where alternative agreements or arrangements are not.[49]

C. QUESTIONS/CONCERNS RAISED REGARDING THE PROPOSED PROVISIONS ON COOPERATION AND RESPONSES PROVIDED

25. A number of questions and concerns have been raised in the Working Group and responses provided regarding the proposed modalities for voluntary cooperation**.** Some of these are as follows. First, the question has been posed as to whether the proposed modalities on cooperation would require the enactment of a national competition law and the establishment of a competition authority by each

[45] See Contribution of Canada and Costa Rica (W/173).
[46] Report (2001), paragraph 56.
[47] Report (2001), paragraph 57.
[48] Report (1999), paragraph 61.
[49] Report (2001), paragraph 53.

participating WTO Member. A number of objections have been posed to any such requirement, including the view that such a requirement does not take due account of the divergence and diversity of competition policy objectives and implementation instruments across WTO Members.[50] In response, the point has been made that cooperation on competition policy matters is only possible where there is a well-established competition regime, including a law and a domestic competition authority with sufficient powers to effectively enforce the law.[51] Nonetheless, the point has also been emphasized that sufficient flexibility can be provided under the terms of the proposed multilateral framework to accommodate differences in national approaches to competition policy and institutional/constitutional structures.[52] With regard to the specific situation of small island economies, the point has been made that regional as opposed to national approaches to the implementation of competition law have potential advantages that should be taken into consideration.[53]

26. In relation to the proposed voluntary nature of the cooperation provisions to be contained in the framework, a question has been posed as to whether voluntary tools of cooperation will effectively address the problems and concerns of developing countries in the area of anti-competitive practices.[54] In response, the view has been expressed that, even though cooperation would remain, ultimately, voluntary in nature, the effect of the proposed framework would be to significantly enhance the environment for and incentives to engage in cooperation among participating countries.[55] If a request for cooperation is reasonable and properly motivated, it is unlikely that participating competition authorities would refuse to consider it in a favourable manner except in exceptional circumstances.[56] The suggestion has also been made that the voluntary nature of cooperation is an important protection for competition authorities in developing countries, who might not have adequate resources to deal with all the requests they might receive.[57]

27. Doubts have been expressed about the usefulness of cooperation modalities that would be limited to the exchange of non-confidential case-related information. In addition, the question has been raised as to why an agreement is needed at all if cooperation is limited to non-confidential information that may already be publicly available, for example, on competition agencies' websites.[58] In response, the point has been made that distinctions need to be drawn between different categories of information: non-public information such as business secrets which cannot be shared under most existing cooperation instruments; non-public information which can be shared under such instruments and is helpful to law enforcement processes, such as legal or economic analysis undertaken by an agency relating to the agency's assessment of particular practices or the simple fact that an investigation is proceeding; and public information such as that available on the Internet which is available to everyone.[59] There may be much valuable information in the second category – i.e., information which is not confidential in a legal sense but is not widely available. Experience with the operation of existing cooperation agreements at the bilateral level suggests that these have been valuable and have resulted in fruitful cooperation – notwithstanding that most such agreements do not provide for the exchange of confidential information.[60] The fact that, in many cases, even where they

[50] Report (2001), paragraph 78.
[51] Report (2001), paragraph 79; see also Contribution of the European Community and its member States (W/184), p. 2.
[52] Report (2001), paragraph 79.
[53] Report (2000), paragraph 27.
[54] Report (2000), paragraph 52.
[55] Report (2000), paragraph 51.
[56] Report (2000), paragraph 53.
[57] Report (2001), paragraph 71.
[58] Report (2001), paragraph 67; Report (2000), paragraph 49.
[59] Report (2001), paragraph 68.
[60] Report (2001), paragraph 68.

are not required to do so, cooperating parties may agree to a waiver to allow the exchange of confidential information and the important benefits that this could provide have also been noted.[61]

28. Apart from questions about voluntariness and the nature of the information to be exchanged, the issue has been raised as to how an agreement on international cooperation would apply to and generate benefits for countries at different stages of development and with differing degrees of experience and institutional endowments in this field. In response, the view has been expressed that these considerations do not pose an obstacle to or detract from the desirability of the adoption of a multilateral framework since: (i) the proposed framework would not require a harmonized approach and would place considerable emphasis on the need for flexibility and progressivity; (ii) much valuable cooperation can take place in this context; and (iii) the proposed framework would also embody important commitments on the technical assistance and institution-building, to address disparities in institutional endowments over time.[62]

29. The question has been posed as to whether cooperation in a bilateral or regional context might be sufficient to address the perceived detrimental impact of anti-competitive practices on international trade and/or development. Possible advantages of these approaches that should be considered include the shorter negotiation time and higher level of cooperation standards that could be applicable in a bilateral or regional setting.[63] In response, the view has been expressed that, while recognizing the important benefits that can be attained through bilateral cooperation arrangements, there are important practical and substantive reasons for developing a multilateral agreement. To begin with, international cartels and other anti-competitive practices are unlikely to respect the neatly defined territories covered by bilateral agreements. Rather, they tend to act strategically and to seek out the cracks that exist between relevant regional and bilateral agreements. Only by having a proper network that covers all potential areas, that is, a multilateral framework, can Members prevent such behaviour. In addition, for many countries, there will be significant operational limitations on the number of bilateral or other agreements into which they can enter. In these circumstances, a multilateral agreement could be an efficient tool to facilitate meaningful cooperation. More intense cooperation could still be pursued with individual partners, as desired. The point has also been made that bilateral agreements are limited in number and based on mutual interests and reciprocity. In order to encourage cooperation between countries at different levels of development, it is necessary to go beyond a purely bilateral or regional approach.[64]

30. Concerns have been expressed that the proposed system of notification of competition law enforcement actions on a multilateral basis would be burdensome and unworkable.[65] Further, it could be inconsistent with national confidentiality requirements and could seriously impair the effectiveness of such actions.[66] In response, the suggestion has been made that a notification system can be designed that would avoid any undue administrative burden. Clearly, the system must also be consistent with national confidentiality requirements. However, much valuable information can be exchanged without violating these.[67] Nevertheless, the point has been accepted that the undue burdens associated with the notification process should be avoided.[68]

31. The question has been raised as to how the MFN principle would apply to the cooperation provisions if cooperation is to be voluntary. In particular, the question has been posed as to whether all requests for cooperation would have to be acceded to on the basis of this principle regardless of the

[61] Report (2001), paragraph 68; see also Report (2000), paragraph 50.
[62] Report (2001), paragraph 75; see also Contribution of Japan (W/176) and Contribution of the European Community and its member States (W/175).
[63] Report (2000), paragraph 57.
[64] Report (2000), paragraph 58.
[65] Report (1999), paragraph 56; see also Report (2000), paragraph 73.
[66] Report (1999), paragraph 56.
[67] Report (1999), paragraph 57; see also Report (2001), paragraph 65.
[68] Report (1999), paragraph 57.

resources possessed by the requested competition agency and the resource requirements associated with each request.[69] In response, it has been stated that guidelines may be needed on this matter.[70] In principle, appropriate qualifications could be built into the proposed multilateral framework to ensure that developing or other countries are not obliged to cooperate in cases where this is inconsistent with their important interests.[71] Members would not be forced to seek cooperation in the WTO nor would they be obliged to engage in cooperation against their own interests.[72]

32. Concerns have also been raised as to whether international cooperation would require a narrowing down of differences in substantive competition laws, procedures and interpretations and, therefore, entail an undesirable degree of harmonization of national approaches to competition policy.[73] In response, the point has been made that the experience of Members who are already party to cooperation agreements at the bilateral or regional level indicates clearly that harmonization of substantive laws and enforcement policies is not necessary for effective cooperation. For example, the point has been made that the competition authorities of the United States, the European Community and Canada have close working relationships with each other and engage in beneficial cooperation in many cases notwithstanding the clear and significant differences that exist in the three jurisdictions' substantive competition laws.[74] Nonetheless, the point has also been made that, over time, cooperation tends to foster a degree of non-compulsory or "soft" convergence in substantive approaches to competition policy based on shared experience with respect to particular issues and cases.[75]

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[69] Report (2001), paragraph 64.
[70] Report (2001), paragraph 28.
[71] Report (2001), paragraph 65.
[72] Report (2001), paragraph 66.
[73] Report (2000), paragraph 55.
[74] Report (2001), paragraph 72; Report (2000), paragraph 56.
[75] See Report (2000), paragraph 41.

ANNEX

MEMBERS' CONTRIBUTIONS ON INTERNATIONAL COOPERATION

SYMBOL: (WT/WGTCP/-)	MEMBER/ OTHER SOURCE	PARAGRAPH/ PAGE REFERENCE	MATTERS DISCUSSED
W/48	United States	Whole document	Experience with cooperation especially at the bilateral level
W/116	United States	Whole document	Objectives of cooperation; approaches at bilateral, regional and multilateral levels
W/121	Japan	Pages 1 and 2	International cooperation
W/124	Korea	Whole document	Approaches to cooperation at bilateral, regional and multilateral levels
W/125	Australia	Page 1	Approaches to cooperation and communication among WTO Members
W/126	Zimbabwe on behalf of WTO African Group	Pages 2 and 3	Competition policy and development; role of international cooperation
W/129	European Community and its member States	Pages 9 to 13	Proposal for cooperation on competition policy in context of WTO
W/132	Romania	Pages 1 and 2	Objectives of cooperation and enforcement measures at national and international level
W/140	European Community and its member States	Pages 7 to 10	Key elements of a multilateral framework agreement, and perceived benefits for LDCs
W/143	Trinidad and Tobago	Pages 2 to 6	Role of cooperation at multilateral level; concerns of smaller countries
W/148	Australia	Pages 2 to 5	Australia's experience with cooperation agreements
W/151	Switzerland	Pages 2 to 6	Possible elements of cooperation at the multilateral level
W/152	European Community and its member States	Whole document	Multilateral negotiations; elements of possible future WTO agreement; types of cooperation
W/154	Korea	Page 2, para. 1	Effects of companies' anti-competitive behaviour and governmental measures; WTO as appropriate forum
W/155	Canada	Pages 3 to 7	Cooperation in a multilateral setting
W/156	Japan	Pages 2 to 5	Role of international cooperation; need for a multilateral agreement
W/160	European Community and its member States	Whole document	Elements of a WTO framework agreement
W/161	Romania	Paras. 3 and 5	Anti-competitive practices; progressivity and flexibility in a multilateral framework

SYMBOL: (WT/WGTCP/-)	MEMBER/ OTHER SOURCE	PARAGRAPH/ PAGE REFERENCE	MATTERS DISCUSSED
W/162	Colombia	Whole document	Anti-competitive practices and cooperation in context of WTO
W/165	Czech Republic	Sections B and C	Objective of international cooperation; principles for a multilateral framework
W/167	Japan	Sections II, III and IV	International cooperation and WTO; relation to economic development
W/168	Japan	Whole paper	International cartels and WTO's role
W/169	Uruguay	Pages 3 to 5	Development dimension and S&D in a multilateral framework; importance of comparative law perspective
W/173	Canada and Costa Rica	Page 2, para. 3	Cooperation on competition policy in a bilateral trade agreement
W/174	Canada	Pages 2 to 5	Nature of cooperation at different levels
W/175	European Community and its member States	Whole paper	Elements and benefits of a WTO competition agreement
W/176	Japan	Pages 1 to 3	Impact of anti-competitive practices on developing countries
W/177	Japan	Page1, para. 1	Progressivity and flexibility in a multilateral framework
W/184	European Community and its member States	Whole paper, especially pages 2-5	Modalities for voluntary cooperation in a multilateral framework