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FLEXIBILITY AND PROGRESSIVITY FOR DEVELOPING COUNTRIES IN A POSSIBLE MULTILATERAL FRAMEWORK ON COMPETITION: RESULTS OF A SURVEY

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The study, which is also available in French, can be found on the OECD website at the following address: http://www.oecd.org/trade and http://www.oecd.org/competition

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EXECUTIVE SUMMARY

In the context of the WTO discussions on flexibility and progressivity in a possible Multilateral Framework on Competition (MFC), the Joint Group on Trade and Competition asked the Secretariat to prepare a note examining in greater depth the needs of developing countries in this area. The note begins by recalling the evolution of special and differential treatment provisions in the GATT and the WTO and then provides a summary of the discussions held in the WTO over the last two years on flexibility and progressivity. A survey was developed with a view to shedding light on what is meant when developing countries argue for S&D in the context of possible multilateral commitments on competition.

Six questions were posed covering the following subjects: (1) the possibility of implementing commitments without any form of flexibility or progressivity; (2) the need for sectoral or other exclusions; (3) whether differentiation or non-reciprocation of commitments would represent appropriate flexibility; (4) whether a transition period longer than 5 years would be needed to implement commitments; (5) effective action against hard core cartels; and (6) whether technical assistance and capacity building (TA/CB) would allow the implementation of obligations within 5 years. Each of the questions, (except question 5 which was an open-ended question), requested answers across five issues which track those in paragraph 25 of the Doha Declaration: (a) transparency; (b) non-discrimination; (c) procedural fairness; (d) effective action against hard core cartels; and (e) modalities for voluntary cooperation.

On question 1 on an overall need for flexibility: (a) the majority of respondents foresaw no problem being able to comply with the transparency obligations; (b) non-discrimination would be unachievable for about half of the developing countries; (c) responses were divided about complying with procedural fairness commitments; (d) most respondents argued that their countries lacked procedures necessary to grapple with hard core cartels; and (e) half of the respondents expressed confidence in the possibilities of co-operating with foreign competition agencies.

On question 2, on the need for exclusions: (a) most experts foresaw no difficulty in complying with transparency obligations; (b) most respondents expressed the view that some sectoral or other exclusions from non-discrimination were necessary; (c) a clear majority were optimistic that their countries would not require flexibility in the form of exclusions for procedural fairness; (d) a majority expressed confidence about taking action against hard core cartels without any need for exclusions; and (e) although a clear majority of respondents answered that they would not require exclusions, a number of reservations were expressed on modalities for voluntary cooperation.

On question 3, concerning non-reciprocation: (a) most respondents were confident about being able to conform to transparency requirements; (b) a majority felt that differentiation or non-reciprocation would be necessary for non-discrimination; (c) most respondents were optimistic about being able to comply with procedural fairness obligations, with differentiation or non-reciprocity; (d) Most respondents felt differentiated or non-reciprocal treatment was needed in their efforts against hard core cartels; and (e) a majority agreed that differentiation or non-reciprocation would not be required on modalities for voluntary cooperation.

On question 4, on transition periods: (a) a majority of survey respondents were optimistic about being able to implement the transparency requirement within 5 years; (b) half were generally upbeat about implementing non-discrimination requirements within 5 years; (c) half were confident being able to comply with procedural fairness obligations within 5 years; (d) few respondents were optimistic about their ability to take effective action against hard core cartels within a 5 year time frame; and (e) the transition period necessary for successful voluntary cooperation was generally estimated to be between 5 and 10 years.

On question 6 on the need for TA/CB: (a) a timeline of 5 years was seen to be appropriate for transparency; (b) most answers ranged from 5-7 years regarding non-discrimination; (c) periods ranged from 5-10 years, with most respondents expressing confidence that 5 years would be sufficient for procedural fairness; (d) and (e) a time period of 5 years was deemed adequate regarding, respectively, effective action against hard-core cartels and for voluntary cooperation.

I. INTRODUCTION

1. In "*The role of 'Special and Differential Treatment' at the trade, competition and development interface*" [COM/TD/DAFFFE/CLP(2001)21/FINAL], the Joint Group examined the origins and evolution of special and differential treatment provisions in the multilateral trading system and took a first look at S&D in a trade and competition context. That note also suggested five general approaches to adopting S&D in a possible future agreement on competition in the WTO. At the time, discussions in the WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP) had not directly focussed on these issues. It was the Fourth WTO Ministerial Conference at the end of 2001, which in the final sentence of paragraph 25 instructed the WGTCP that, in its clarification work, "Full account should be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them."

2. In renewing its mandate in May 2002, Members charged the Joint Group with four general areas, one of which was how flexibility can be allowed in a possible WTO agreement on competition to take into account the various situations of developing countries [COM/DAFFE/COMP/TD/M(2002)43]. In the recognition of the growing importance of this subject for developing countries in the WTO discussions, the Joint Group, at its meeting in February 2003, asked the Secretariat to prepare a new note examining in greater depth the needs of developing countries for flexibility and progressivity in a possible MFC.[1]

3. This note responds to the Joint Group's request made at its meeting in February. It is structured in four parts with two Annexes. Following this Introduction, Part II briefly recalls the evolution of S&D provisions in the GATT and the WTO, based on the earlier Secretariat note, and then provides a background summary on the discussions over the last two years in the WGTCP on flexibility and progressivity. This section explains the difference between the two concepts and the various interpretations given to them by WTO Members – at a general level. The methodology of the investigation is set out in Part III. Part IV summarises the results of the Secretariat's investigation – designed precisely to gather details on the developing countries' needs for flexibility and progressivity. Annex I reproduces the questionnaire sent out to respondents and Annex II collates the replies from the respondents to those questions which lend themselves to synthetic presentation in tabular form.

4. It should be noted that the work for this exercise was carried out over the summer leading up to the Fifth WTO Ministerial, held in Cancún from 10-14 September 2003. While the setback in Cancún means that negotiations have not been launched, the crucial importance of Special and Differential Treatment overall in the Doha negotiations and the continuing hesitations of certain developing countries about a competition agreement in the WTO, would underscore an ever greater need for a detailed understanding of the differing needs of these countries. No conclusions have been drawn at this stage from the survey results – they have been delivered here in summary form, *tels quels*. Some conclusions would be relatively obvious – e.g. arising from the repeated expression of extensive needs for focussed technical assistance and capacity building. These and others – such as implications for analysing the various

1 . In addition, it was decided to integrate this theme throughout the discussion on various items at the Joint Global Forum on Trade and Competition, held in May 2003. Documentation prepared for the JGFTC included the earlier note from 2001 and a new paper setting out illustrative examples of exclusions in the coverage of competition laws [COM/DAFFE/TD(2003)6/FINAL].

approaches to an architecture for rules on competition in the WTO suggested in the original Secretariat document – could be the subject of future work in the Joint Group.

II. BACKGROUND TO SPECIAL AND DIFFERENTIAL TREATMENT

Historical Context: S&D in the GATT and the WTO

5. Underlying the original GATT agreement (1947), was the fundamental principle of non-discrimination and the universal and reciprocal application of its commitments. Between 1948 and 1955, developing countries participated in tariff negotiations as equal partners and were subject to the same rules as their developed counterparts. While the original GATT contained no explicit provisions on development issues, soon thereafter developing countries started to raise concerns and identify the special challenges that they faced in international trade. They argued that it was not realistic to expect fragile economies to compete on a level playing field with established industrial countries and pressed for measures which would enable them to protect their domestic industries.

6. The first occasion that provisions were adopted to address the needs of developing countries as a group was in 1955 where revised provisions allowed them, under certain conditions, to derogate from their scheduled tariff commitments, use quantitative restrictions for balance-of-payments purposes and other measures to promote certain industries. Developing countries continued to push for their concerns to be addressed during the period from 1957-64, culminating in the adoption of Part IV of GATT specifically addressing "Trade and Development" at the end of the Kennedy Round. Part IV contained new articles setting out various obligations, *inter alia*, recognising the need for positive efforts to improve market access for primary, processed and manufactured products of interest to developing countries; requiring developed Contracting Parties to accord high priority to the reduction of barriers to products of export interest to less-developed countries, etc.

7. Part IV was perhaps most significant, however, in formalising the acceptance by developed countries of the principle of *non-reciprocity*. For example, reciprocal tariff concessions were exempted. The contribution which developing participants would make to the objective of trade liberalisation was to be considered in light of the development, financial and trade needs of developing countries themselves, that is that developing countries themselves were to decide what contributions they could make.

8. Non-reciprocity formed one of the core pillars of S&D prior to the Uruguay Round. The other pillar conferred enhanced and preferential market access to developed country markets. Preferential market access was formally secured via the "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" framework agreement, introduced during the Tokyo Round of Trade Negotiations in 1979. Commonly known as the "Enabling Clause", it placed S&D at the heart of the GATT legal system by creating a permanent legal basis for the preferential tariff treatment accorded under the Generalised System of Preferences (GSP)[2] as well as greater flexibility in the formation of preferential

[2] The Generalised System of Preferences was proposed under the auspices of UNCTAD in 1964 and implemented in 1971 to recognise "agreement in favour of the early establishment of a mutually acceptable system of generalised, non-reciprocal and non-discriminatory preferences which would be beneficial to developing countries" (UNCTAD Resn 21 (II)).

trade regimes between developing countries. With the Enabling Clause, the second broad justification for S&D of enhanced and preferential market access was formally introduced and made permanent.

9. Despite the introduction of these various S&D provisions, by the 1980s it was becoming apparent that they had not reversed developing countries' marginalisation from the international trading system. The overall effectiveness and value of S&D was being queried. Such questioning was linked to a critical reassessment of development policy and how trade should be aligned to support the developmental process. The protection of domestic industry via import substitution policies and infant industry protection was challenged as evidence suggested that rather than increasing their integration into the trading system, the industries that developed behind high tariffs were not internationally competitive. As a consequence, by the 1980s a significant shift in developing countries' attitudes towards S&D was taking shape. Developing countries entered the Uruguay Round negotiations advocating less emphasis on non-reciprocity with the negotiating objective of accepting a dilution of S&D in exchange for better market access and strengthened rules. Although this is not to say that they were critical of all aspects of S&D and they certainly continued to advocate preferential access to developed country markets. They did not seek exemption from the multilateral trade agreements, that is they accepted the "single undertaking" approach of the Round.

10. The Uruguay Round, which established the WTO, maintained the tradition of preferential treatment for developing countries and allowed for more than 145 S&D provisions in GATT law. The WTO has since classified the various types of special and differential treatment contained into five broad categories :

1. provisions aimed at increasing trade opportunities through market access
2. provisions requiring WTO Members to safeguard the interests of developing countries
3. provision providing greater flexibility of commitments
4. provisions allowing for greater transitional time periods
5. provisions allowing for technical assistance

with additional provisions within these five groups relating specifically to least-developed countries.[3]

11. The depth to which special and differential treatment has become rooted in the architecture of WTO negotiations became evident at the Fourth WTO Ministerial in 2001, where special and differential treatment was specifically referred to in paragraph 45 of the Doha Ministerial Declaration.

> "We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special

[3] WTO, "Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions", Note by the Secretariat, WT/COMTD/W/77, Geneva, 2000.

and differential treatment set out in the Decision on Implementation-Related Issues and Concerns."[4]

12. The Doha Decision on Implementation-Related Issues and Concerns has been at the centre of to the evolving debate on special and differential treatment in the WTO since the Fourth Ministerial. Ministers charged the WTO Committee on Trade and Development with S&D issues. Paragraph 12 of the document, entitled Cross Cutting Issues, set a mandate, inter alia to find how S&D could be made more effective and be incorporated into the architecture of WTO rules and to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions.[5] But the focus of work has been on Agreement-specific S&D issues with each one being debated separately. It is undoubtedly fair to say that S&D has been one of the most politically visible issues in the Doha Development negotiations.

Flexibility and Progressivity in the WTO Working Group

13. The debate about S&D treatment in the trade and competition context has taken a higher profile since the Fourth Ministerial in 2001. The Doha Declaration addresses a possible multilateral framework on competition (MFC) in paragraphs 23-25. As mentioned above the final sentence of the Doha Declaration on competition policy refers to appropriate flexibility provided to address the needs of developing and least-developed country participants.

a) Flexibility

14. Flexibility and progressivity appear to have various meanings for different Members. For this reason, a brief discussion of flexibility and progressivity follows, drawing upon the various submissions made to the WGTCP over the past two years. In the WGTCP, special and differential treatment is normally referred to under the terms "progressivity and flexibility". The meaning of the two terms is similar. Flexibility essentially refers to the degree of discretion allowed to Members with regard to the extent, limitations and timing of any commitments they make. One approach to flexibility asks Members subscribing to a core set of obligations to allow exclusions and exemptions, of a sectoral or non-sectoral nature. Another approach to flexibility could entail the imposition of a greater number or deeper degree of obligations upon a developed country than on a developing country.

The Annual Report of the WGTCP in 2001 had this to say about the concept of flexibility:

With regard to the concept of flexibility, the view was expressed that it referred to the ability of a country to choose from the menu of prohibitions that could be embodied in competition law those aspects that were relevant for its particular economy, in view of its market structure, level of development, the types of anti-competitive conduct that were prevalent and other characteristics. This recognized that some elements of competition law might not be relevant for a particular economy, or might have to be tempered to complement industrial or development policies, through the use of exemptions and exclusions. For example, a small, open economy might not need merger control regulation, if the exercise of market power through mergers was disciplined effectively by the competition that was provided by imports. Analysing mergers was a complex procedure and it might be a waste of resources to have a merger control regulation in these circumstances. Further, the structure of the market might be able to accommodate concentrations or might even require concentrations for efficiency-related reasons. Alternatively, a small economy might want to support its industrial policy by using exclusions and exemptions from its

4 WTO, WT/MIN(01)/DEC/W/1, 14 November 2001

5 WTO, WT/MIN(01)/W/10, 14 November 2001.

competition law. It might want to exclude from the purview of its competition law the practice of exclusionary distribution agreements because the peculiarities of smallness could necessitate that a distributor not carry competing products. It was important that any arrangements relating to competition policy at the multilateral level take due account of these considerations.[6]

15. Debate between 2001 and 2003 has proved enlightening with regard to the perception of flexible treatment by the various WTO Members. On one hand proponents of an MFC have suggested that little flexibility will be necessary, given the minimal requirements suggested for its implementation. The proposals to date for an MFC do not call for agreement on the complete substantive scope of a domestic competition regime; rather, they call only for a substantive provision banning hard core cartels. Other Members are negatively predisposed to too great a degree of flexibility, based on their own experiences with exclusions. Still others are enthusiastic supporters of the rights of developing countries to allow exemptions from certain obligations under a possible MFC.

16. It would appear that many of the possible arguments in support of flexibility do not appear to be as relevant since MFC proponents have made it clear that sectoral exemptions will be allowed. Even the more ambitious proposals would allow WTO Members to retain the policy space they require to maintain and implement important domestic policies that respond to their social, economic and developmental objectives. Given that the requirements of a proposed MFC are minimal, the proponents of an MFC also contend that flexibility is already built in.[7]

17. Members that have previously favoured competition policy over industrial policy tend to be critical of any attempts to introduce flexibility into a possible MFC. One such Member, warning of the danger of flexibility in competition policy, has declared that once cartels become established, they tend to exist for a long time making operators reluctant to rationalize their operations. Further, the arguments against allowing unlimited flexibility in an MFC, particularly in regards to industrial policy, are based on national experiences which have shown that international competitiveness can further be strengthened by increasing competition among domestic companies, rather than by regulating competition through exemptions.[8]

18. In a similar vein, another Member warned of its experiment with industrial policy carried out under lax competition laws. The member acknowledged that it experienced rapid growth in quantitative terms during this period but that it came at the expense of "socio-economic weakness." This weakness manifested itself in the lack of a competitive infrastructure and imbalances among different industries, allowing, for example, a number of debt-ridden, nonviable firms to remain in the market long after they should have succumbed to market pressures to cease operating.[9]

19. Nonetheless, several countries have voiced support for measures that ensure that flexibility is written into any future competition agreement. One Member has stated its concern that the MFC may constrain its ability to approve mergers. This member asserts that larger firm size may be necessary for its industrial development because firms require a minimum threshold size to finance their research and development activities. [10] On the question of merger review, a submission from a small open economy suggested that its unique characteristics may not warrant merger control regulation at all, given that the

6 M/15, paragraph 28 in WT/WGTCP/5, 8 October 2001

7 WTO, WT/WGTCP/W/234, 26 June 2003

8 WTO, WT/WGTCP/W/177, 13 December 2001

9 WTO, WT/WGTCP/W/166, 26 June 2001

10 WTO, WT/WGTCP/W/216, 26 September 2002

size of firms may be too small to pose a threat, given the level of competition introduced by imports. Further, the structure of the market may be able to accommodate concentrations or may require concentrations for efficiency reasons.[11]

20. Other Members have extended this argument further, proposing that special and differential treatment should be accorded to developing countries in all respects[12] or that special and differential treatment should become a fourth "core principle" of any future MFC.[13] Other Members have asserted that, at minimum, appropriate flexibility be included in any future MFC to address specific needs of developing and least developed countries.[14]

21. One Member advocates a third way of understanding the issue of flexibility in the context of a possible MFC, an approach which borrows from both of the preceding viewpoints. This Member suggests that,

> "developing countries need an industrial *strategy* which… is developed mainly through dialogue with the private sector, particularly in key industries and is aimed at increasing international competitiveness. Competition policy is a form of industrial strategy since it opens up markets and puts pressure on producers, making them more efficient. It also prevented the abuse of market power, by domestic or multinational firms, and reinforced incentives for efficiency, productivity and the speeder adoption of new technology".
>
> "In developing an industrial strategy, a balance was needed to ensure that, on the one hand, enterprises could attain the size needed to be internationally competitive and, on the other hand, that they were subjected to appropriate competitive disciplines to ensure that they were not in a position to abuse their market power and, indeed, faced appropriate incentives for continual improvement of their productivity and performance."[15]

22. Several delegations have expressed concern about the possibility that an MFC would impede their maintaining exclusions and exemptions for various sectors of their economies. These delegations regard the maintenance of such exemptions as a necessary type of flexibility. One delegation in particular was concerned that it would not be able to adopt a sectoral approach to exemptions and that a horizontal approach would preclude the safeguard of important industries.[16] Proponents of the MFC argued that this was not the case and cited the recent Study of Issues Relating to a Possible Multilateral Framework on Competition Policy, commissioned by the WGTCP Secretariat, as evidence that the two could co-exist. This Secretariat report identifies five ways in which to incorporate industrial strategy into competition law.[17] Submissions by other delegations countered the assertion that the approach to competition law had to be necessarily horizontal and argued that a vertical approach, though more burdensome, was nonetheless feasible under the proposed MFC.[18] Examples of the successful integration of competition law were

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11 WTO, WT/WGTCP/W/179, 10 September 2001

12 WTO, WT/WGTCP/W/227 14 March 2003

13 WTO, WT/WGTCP/W/213 Rev.1 26 September 2002

14 WTO, WT/WGTCP/W187, 29th May 2002

15 Keynote address at the WTO Regional Workshop on Competition Policy, Economic Development and the Multilateral Trading System, Cape Town, 22-24 February 2001.

16 WTO, WTWGTCP/W/224, 5 March 2003

17 WTO, WT/WGTCP/W/228 19 May 2003

18 WTO, WT/WGTCP/W/226, 12 March 2003

outlined by another delegation which showed the successful coordination within its own political system of social and industrial policies.[19]

23. These various submissions show that debate over flexibility has focused on the need for exceptions and exemptions from any obligations imposed by a possible MFC, versus the viewpoint that the minimal criteria required in a proposed MFC would not require exclusions. Between these two positions, various subsidiary arguments regarding the need for industrial policy as a means of enhancing a country's development may be detected.

b) Progressivity

24. Progressivity refers to the concept of allowing different categories of Members to adopt commitments over varying periods. For example, certain developing countries may wish to benefit from a transition period to implement commitments under an MFC. Commitments might be linked to a fixed period of time or to the receipt of increased technical assistance or the attainment of certain minimum capacity. Progressivity in commitments might also be linked to the review and eventual phasing-out of exclusions.

25. The Annual Report of the WGTCP in 2001 had this to say about progressivity:

> Concerning the concept of progressivity, the view was expressed that it referred to the approach or methodology employed in developing and implementing a competition regime. It allowed for the gradual and selective introduction of instruments to control anti-competitive behaviour. This was important to provide the responsible authority as well as other government departments and stakeholders the time to accommodate and to adjust to the changes that were involved. It would also permit the further evolution and deepening of relevant instruments, as economies developed and regimes matured, over time. Progressivity was particularly important for small economies because of the lack of human and financial resources required for the initial establishment of a competition regime. It allowed a country to build a firm foundation for the competition regime by fully assimilating one aspect of competition rules before progressing to the next. To give an example of how progressivity could be put into practice, in the initial stage of the development of a competition regime, a small developing economy might do better to introduce only measures against hard core cartels and blatant abuses of dominance or, possibly, not even the latter, in view of its complexity. It could focus principally on competition advocacy in relation to government policies and on consumer education in order that consumers would gain a positive understanding of competition law and how it worked in their favour. Such an approach would also give the new personnel in a competition commission an opportunity to get a feel for the job as well as relevant technical training. When appropriate experience had been gained, provisions dealing with more complex aspects of anti-competitive agreements and abuse of dominance could be introduced, and a greater focus on sanctions could be applied.[20]

26. There seems to be a general consensus among WTO Members that the concept of progressivity is a legitimate response to the exigencies of developing countries. It should be accorded to Members that, for example, have yet to adopt a competition law or agency or other relevant enforcement authority. Such countries should be allowed, in the words of one Member, to take advantage of reasonable and more individualised time-periods in which to adopt such legislation or establish a competition authority.[21]

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19 WTO, WT/WGTCP/W/232, 23 May 2003

20 M/15, paragraph 29 in WTO, WT/WGTCP/5, 8 October 2001

21 WTO, WT/WGTCP/W/228, 23 May 2003

Another Member states that competition laws and policies have evolved over the years, and it would not be realistic, for example, to expect a developing country with no competition laws to suddenly introduce competition laws and policies on a par with a developed country. A more appropriate approach would be the gradual introduction and reinforcement of competition laws and policies in line with a country's stage of development.[22]

27. In the words of a submission from a small, island economy:

> "Progressivity is particularly important in small economies due to the lack of sufficient human and financial resources to establish a competition regime for the first time. It allows a country time to build a firm foundation for the competition regime…"
>
> "In establishing its competition regime, a small developing country may find it more effective, in the first phase, to concentrate its efforts on measures to address one type of anti-competitive conduct such as hardcore cartels. The choice of conduct addressed first should be guided by the procedures necessary for each.
>
> For instance, addressing "abuse of dominance" involves such complex rule of reason procedures that it may consume too many of the economy's resources at such an early stage. Instead, the small economy could focus on consumer protection."[23]

28. An important aspect of progressivity is technical assistance required for the progressive implementation of capacity building in developing countries. The aim of technical assistance (and capacity building) is to boost and upgrade the human and institutional framework of competition law and enforcement in developing countries. There are three broad components to building an effective competition policy for developing countries: 1) creating a competition culture, 2) remedying structural and institutional distortions, and 3) putting in place an effective mechanism for dealing with private anticompetitive conduct.

29. This link between capacity building and progressivity has been used by some Members to suggest another definition of progressivity. Under this definition, progressivity would not be linked to a period of time; rather it would be associated with an increase in the capacity of the Member concerned.

30. More recently, the question of costs versus progressivity has arisen in the WGTCP. Criticism has been levelled at the idea that progressivity will somehow defray the costs linked to the creation of a competition law and policy infrastructure. Even if lengthier implementation periods are granted to developing countries, the overall costs would still remain. Only significant technical assistance will defray these costs for developing nations.[24] As a means of answering the complaint related to cost, delegations have pointed to the Study of Issues Relating to a Possible Multilateral Framework on Competition Policy commissioned by the WTO Secretariat which points out that the savings from having a competition regime are paid for in many multiples by the savings which accrue to the economies which have them in place.[25]

31. Additionally, proponents of an MFC argue that the actual costs for the implementation and enforcement of a competition regime are far lower than is commonly thought. For example, a specific

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22 WTO, WT/WGTCP/W/176, 13 December 2001

23 WTO, WT/WGTCP/W/179, 10 September 2001

24 WTO, WT/WGTCP/224, 5 March 2003

25 WTO, WT/WGTCP/W/228, 19 May 2003

administrative committee or tribunal dedicated to competition is not necessary, existing infrastructure can be used. [26]

32. Despite the range of Member submissions on this topic, there appears to have been an emerging consensus that progressive implementation of various measures is a legitimate response for developing countries to the lack of human and institutional capacity and resources in their countries. The differences between Members on this topic centre on the criteria by which progressivity is measured and the means by which the gradual adoption of competition law and policy should take place.

III. SURVEY METHODOLOGY

33. The Secretariat decided to approach this investigation on flexibility and progressivity by devising a survey which would be directed at competition experts in developing regions. The survey was designed to assess the needs of developing countries for special and differential treatment in competition policy. The analysis sets out the needs of each country or region as perceived by leading academics and researchers familiar with competition policy in their sub-region.

34. Discussion in the WTO Working Group on the Interrelationship of Trade and Competition Policy has often focussed on the possible needs for exemptions and exceptions for developing countries from certain obligations under a possible MFC. Various countries have referred to the cost of implementing measures associated with an MFC, the lack of resources to do so, the restrictions such an agreement may impose upon their domestic policy initiatives and so on. These concerns have led developing countries to argue in favour of special derogations in order to allay these concerns. In the period following the Fourth WTO Ministerial at Doha there remained nonetheless a lack of specificity as to as what — exactly — the developing countries are asking for. The actual requirements of these economies, or the needs which would be addressed by special and differential treatment, have not been spelt out, other than in general terms. It is the aim of this survey to shed light on the details of what is meant by developing countries when they argue for special and differential treatment in the context of future multilateral commitments on competition.

Methodology

35. The selection of candidates and potential respondents were extracted from a number of sources. The participants lists of major conferences held by international organisations such as UNCTAD, ICN, CARICOM and the OECD on the subject of trade and competition policy were particularly useful. Equally informal networks within the trade and competition community provided names of experts in various regions currently at work on trade and competition projects. Finally, the authors of recent academic publications in the field of trade and competition were contacted to determine their interest in this project or their suggestions for developing country experts who might participate in the survey. Through these sources it was possible to compile a list of over forty potential respondents representing knowledge and experience with competition policy in a broad spectrum of developing countries.

[26] WTO, WT/WGTCP/234, 26 June 2003

36. Survey respondents usually held a PhD and significant experience either from previous work in the competition agency of their home country or in consumer protection organisations. All participants were actively engaged in the debate about trade and competition policy at the regional or multilateral level as reflected in their participation in conferences, publication of academic works or consultancy activities in recent years.

37. To undertake this task, the OECD Trade Directorate sent out a questionnaire to forty academics or other researchers with specialities in competition law and policy. The questionnaire sent to the respondents is attached to this document as Annex I. Of these forty experts fifty per cent returned the survey. The table below shows the number of surveys received by region.

Table 1. Regional Representation of returned survey

Region	Surveys Received
Caribbean	1
Central America	2
East Asia	3
East Europe	3
North Africa/Middle East	2
Oceania	1
Southern Africa	1
South America	6
South Asia	1

38. All respondents were assured that their identities and affiliations would remain anonymous. Experts who responded to the survey are not government officials of the country or region for which they provided information, but reside in the country or region.

IV. OVERVIEW OF SURVEY RESULTS

A. General needs for flexibility and progressivity (Question 1)

Transparency

39. The majority of the respondents foresaw no problem in their countries being able to comply with transparency in the context of an MFC. There was acknowledgement that the envisaged requirements of the transparency obligation were not high. The competition agencies in two South American countries, for example, are already in compliance with the transparency principle through publication of the laws, regulations and guidelines which are available on their respective websites. One publishes regulations and precedents in an official gazette in addition to its internet postings.

40. In identifying possible capacity constraints with regard to transparency, the respondents outlined a number of different issues facing developing countries. The non-existence of a competition regime in their country or region figured as a crucial constraint for most, an obstacle that would entail at least a delay sufficient to allow the country to build capacity in this area. Another obstacle was the possibility that a transparency obligation may go beyond the mere publication of laws, regulations and precedents.

Non-discrimination

41. In the opinion of the respondents, non-discrimination would be unachievable or undesirable for about half of the developing countries for which they answered. A number of reasons were put forward for this. Most respondents cited the need to shelter at least some domestic industries from market forces, which would require a flexible application of the non-discrimination principle. Reasons for the protection of these industries were varied. One respondent, from East Asia, noted that certain sectors of his country's economy were constitutionally protected from foreign ownership and, therefore, from competition. Asking this country to open up these constitutionally protected sectors would require time and would not be certain of success, given the nature of the electoral process. Respondents from countries with a history of socialism acknowledged the obstacle posed by the continuing role of government in their economies. East Asian and East European respondents remarked that formerly state-owned and operated industries were being gradually re-privatised. The gradual market absorption of these enterprises would need to be recognised as an exclusion from any obligations imposed by a future MFC. Time was required to review and update legislation, in addition to the problems of slow privatisation, and the links between state power and business in some countries, would need to be addressed in a progressive and flexible manner.

42. The remaining submissions put forward various justifications for the promotion of domestic exports and national champions. For example, submissions from both small island respondents argue that their economies remain very vulnerable to competition from larger states and require sheltering from market forces to ensure that local firms are protected against foreign competition. Middle Eastern and North African responses cite strong domestic lobby groups, as well as the need for development of local industry as the reason why flexible application of non-discrimination should be granted to them. One South American state has a local content requirement for government procurement which, it is argued, would need to be exempted from non-discrimination.

Procedural fairness

43. The responses to this question were split. Most submissions, whether optimistic about being able to implement procedural fairness or not, refer to the lack of trained judiciary and the need for institutional reforms as obstacles to be overcome before procedural fairness could be truly established in their countries.

44. This weakness of existing institutions is most frequently referred to as the cause of developing country anxiety about their ability to meet the expectations of a possible MFC in terms of procedural fairness. At a domestic level, for example, consumers may be well served by the few existing competition commissions. However, long delays can result from submissions to the judicial court. This is due to the scarcity of lawyers specialising in competition. The re-education of lawyers and practitioners in a North African and Middle Eastern country also concerns one respondent who asserts that progressivity may be required to allow time for the competition community to digest any international changes and educate themselves about the ramifications of new obligations. Other constraints varied from the need to fight corruption and increase the commitment to rule of law, a poor culture of competition, the slow pace of government reform or the relative unfairness of the international trading system.

Effective action against hard core cartels

45. Most respondents argued that their countries lacked procedures necessary to grapple with hard core cartels. This was manifested, in the eyes of some respondents, by the fear that the strategies and techniques currently being used were not effective enough to combat hard core cartels. Others referred to a lack of institutional strength, experience or expertise as being major problems.

46. A lack of interest in prosecuting hard core cartels, motivated by resistance from strong domestic lobby groups or lack of commitment to the issue of competition policy generally, or even the fear that prosecuting hard core cartels may divert FDI away from the country were alternative reasons used to justify exemptions.

47. The small size of the economy in certain island nations means that business in those economies tends to be transacted between a very small number of people, which could make it difficult to prove that collusion had taken place. This issue of size would need to be accounted for in any future MFC.

48. In all cases, the relevant definition of hard core cartels would be important to each country's capacity to enforce such a law.

Modalities for voluntary cooperation

49. Half of the respondents expressed confidence in their country's ability to cooperate with foreign competition agencies. Respondents thought cooperation to be beneficial for the development of domestic institutions, but that effective co-operation could only take place once those institutions were developed. The more pessimistic responses expressed doubt that cooperation would be beneficial for foreign partners because the respondent's country or region had not shown an interest in competition issues, or may have had an interest in maintaining strong (and presumably anticompetitive) links with business.

B. Flexibility: exclusions and exemptions (Question 2)

Transparency

50. For the majority of the countries surveyed, the responses to this question clearly showed that no difficulty was foreseen in complying with the obligations of an MFC in relation to transparency. In fact, a startling majority of respondents were confident that no type of exclusions or exemptions would be

required for their countries. To clarify this optimism, two respondents remarked that the ability of their countries to meet the obligations of transparency in a future MFC would depend upon the scope of the obligations eventually agreed upon.

51. Of the remainder, two respondents felt that some type of exemption may be necessary for their countries Both the weakness of institutions in small island economies and lack of institutional capacity or lack of institutional will, were put forward as reasons why flexibility may be warranted.

Non-discrimination

52. Most respondents expressed the view that some sectoral or non-sectoral exclusions from non-discrimination were necessary. A frequent argument was that protection was required for some important sectors of the economy and should therefore be exempted from a possible MFC. The respondents differed on what they thought were the most important sectors of the economy. For one group it was the provision of basic services, meaning consumers were better off if those "essential" sectors of the economy were left to the government rather than market forces. In the case of small island nations, it was suggested that the most sensitive areas of the economy were those sectors that contributed to local employment or that conserved precious foreign currency, which is important to island economies because of their dependence on imports. A third group identified national champions and local industries as requiring exemption. In this latter group, the reason for protecting local industry was to gain competitive advantage over developed nations.

53. Others focused on legislative impediments to non-discrimination. For example, one East Asian nation's constitution restricts the foreign ownership of certain sectors of the economy. In an Eastern European economy, significant legislative changes would be required to bring the country into compliance with the principles of non-discrimination. Progressivity would be required in both countries.

54. There was general agreement that making such exclusions transparent, reviewable and predictable would not pose a problem.

Procedural fairness

55. The responses to this question were generally upbeat. A clear majority of respondents were optimistic that their countries would not require any type of flexibility in the form of exclusions or exemptions. In fact, excluding the undecided, these optimistic responses outnumbered the others by a ratio of more than three to one, and covered all the major regions included in this survey.

56. For those respondents who felt that their countries would require exclusions, the necessity of preserving confidentiality in some sectors of the economy, the exclusion of various domestic export cartels and a lack of capacity to fulfil the requirements of procedural fairness were all quoted as reasons why exemptions should be allowed. One response cited the need for progressivity to allow their region to catch up with more developed nations.

Effective action against hard core cartels

57. Again, a majority of respondents expressed confidence in their country's ability to take action against hard core cartels without any need for exclusions. As in the previous question, the optimistic responses outnumbered the negative results by a ratio of three to one, excluding the undecided.

58. Of the pessimists, three focussed on the need for progressivity in developing countries so as to allow them the time necessary to develop effective legal institutions that would be capable of tackling hard

core cartels. While the remainder were concerned that their countries be allowed exclusions and exemptions for certain sectors, for developmental reasons.

Modalities for voluntary cooperation

59. Although a clear majority of respondents answered that they would not require exemptions, a number of reservations were expressed. The different level of development of some countries would make it difficult for them to respond effectively to some requests for cooperation. More specifically, two respondents noted that lack of experience with competition issues in their countries could hamper their ability to cooperate with other competition agencies and their more developed peers should take this into account.

C. Flexibility: differentiation and non-reciprocation (Question 3)

Transparency

60. Most of the respondents were confident about their country's ability to conform to the transparency requirement. Differentiation, or non-reciprocation, was deemed unnecessary in the majority of cases. Of those who were not confident about their country being able to achieve transparency, their reasons all related to the lack of institutional capacity within their country to reciprocate transparency. One survey response summed up the flavour of these submissions by detailing the special support developing nations require to construct information databases and other mechanisms, which over time lead to the establishment of competition institutions and culture. The foundation of these institutions will require an indefinite duration, during which developed countries should not expect reciprocation on transparency.

Non-discrimination

61. The majority of respondents felt that differentiation or non-reciprocation would be necessary. The survey respondents identified three issues with regard to non-discrimination.

62. First, many replies restated their need for differentiated commitments, which would allow them to protect domestic industries from competition. In one case, the respondent claimed that this differentiated treatment would be time limited and could expire once the development concerns in question had been achieved.

63. A second theme in the replies was that differentiated or non reciprocal treatment would be needed to ameliorate the shock of exposing domestic constituencies to competition. This could take the form of relaxed prohibitions on legislative changes protecting certain sectors, or entail more permissive treatment of domestic mergers and rationalisations.

Procedural fairness

64. Most survey respondents were optimistic about their country being able to comply with the mandates of an MFC in terms of procedural fairness and that no differentiation or non-reciprocity would be required.

65. A small number claimed that some form of differentiation or non-reciprocation would be necessary. Their reasons included the necessity of establishing and implementing legal procedures levelling the playing field between developing and developed nations and that different judicial procedures among the different Member states could not be codified in a manner that would suit a universal definition of procedural fairness.

Effective action against hard core cartels

66. Most respondents felt that their countries would require differentiated or non-reciprocal treatment in their efforts against hard core cartels. The responses to this question generally made the point that developed countries had a significant role to play in the elimination of hard core cartels.

67. For example, the view was expressed that, though developing countries were willing to fight hard core cartels, developed countries had a natural advantage in doing so for the reason that they had more information about these cartels, because the cartels were generally based in developed countries. An asymmetrical information flow in favour of developing countries could therefore be envisaged.

68. The elimination of hard core cartels was linked to progressivity by at least one respondent, who claimed that the phasing out of non-reciprocal and differentiated practices on the part of developing countries could be linked to the compliance of developed countries with their commitment to eliminate hard core cartels.

69. Several ideas that had appeared in responses to previous questions came up again. The idea was once more floated that ideological constraints in certain developing countries would justify a differentiated treatment of hard core cartels. Non-reciprocation was also justified on the more general grounds that developing countries needed to level the playing field with their developed counterparts, even to the extent of allowing certain cartels to operate from developing countries if they were capable of promoting the development of the country concerned. These exemptions, if accepted for developing countries, should not be allowed for developed countries.

Modalities for voluntary co-operation

70. Even though a majority of respondents agreed that differentiation and non-reciprocation would not be required, the view was expressed that developed countries should differentiate between developing countries with respect to the amount of cooperation each was able to provide. Small and developing economies, for example, should receive positive comity and assistance in investigations, legal assistance and other support for the work of their competition authorities, particularly in cases dealing with multinational corporations (MNCs) or international cartels. The inability of developing and small economies to extract information from other competition agencies, even when international cartels were resident in the local economy, had the result that small and developing nations could not benefit from case-related cooperation unless they received assistance beyond that which was available publicly. The dominant characteristic of MNCs in developing countries makes this a critical issue. One respondent claimed that this type of differentiated treatment should be a permanent feature of any future MFC, that would not be subject to change, even with time and assistance.

D. Progressivity: transition periods (Question 4)

Transparency

71. A clear majority of survey respondents were optimistic about their country's ability to implement the transparency requirement within 5 years. Adding to this upbeat result was the fact that even those respondents who were hesitant about the 5 year timeline, nonetheless envisaged a finite period (of at most, 10 years) within which those obligations could be undertaken. Of this latter group, the following constraints were mentioned: the severe lack of financial and human resources in some economies, the need to develop specialised skills in this area and the low level of public awareness of competition.

Non discrimination

72. About half of the respondents were generally upbeat about their ability to implement the non-discrimination requirement within 5 years and a majority of those surveyed expressed confidence that 5 years would be sufficient. The shorter time periods seemed to be associated with simple changes in government policy, the longer time periods were associated with the need to create a culture of competition, which would include educating the relevant governmental and economic agents. Longer time periods of 10 years were envisaged by several others from South America, the Middle East and North Africa. In the former, the transition period was justified on the grounds that the government needed this period of time to educate its members about the benefits of changing its trade policy, which at present allowed many firms and some sectors to be protected from full market forces. In the latter, the intense lobbying of the government by domestic economic agents and fears within the population that foreign competition could be disadvantageous to the economy were cited as reasons for longer implementation periods.

Procedural fairness

73. About half of those surveyed were confident of their country being able to comply within 5 years. Of those who thought that five years was insufficient, Central American respondents reported that their countries lacked competition institutions and lacked the human resources required to run them and required aid from developed countries to rectify these structural weaknesses. An Eastern European submission added that the encouragement of civil society to support procedural fairness was also important and that this, in addition to the amelioration of capacity restraints mentioned in other submissions would take approximately 10 years.

Effective action against hard core cartels

74. Few respondents were optimistic about their ability to take effective action against hard core cartels within a 5 year time frame. Periods of up to 10 years were mentioned as reasonable given the necessity of implementing structural changes in developing countries sufficient to enact effective prosecution of hard core cartels. The process of legislative change required to implement an anti-cartel law in a country where none existed before could take between 2-4 years, suggested one response. A number of submissions referred to either the lack of human resources, the time necessary to acquire and train staff, lack of skills in collecting information necessary to investigate and prosecute hard core cartels or lack of experience in the administration of such a law. A common feature of all the responses was that they relied upon the presence of sustained international cooperation, which would allow them to make the necessary legislative and infrastructural changes within the period they had estimated.

Modalities for voluntary co-operation

75. The transition period necessary for successful voluntary cooperation was generally estimated to be between 5 and 10 years. About half of respondents thought 5 years was a reasonable implementation period. Of these positive responses, several pointed out that international trade and investment agreements between developing and developed countries were necessary to ensure that poorer countries could meet the voluntary cooperation requirements within 5 years. A South Asian respondent and another from the Middle East asserted that the positive bias towards domestic industries in their region would require at least five years before lapsing.

76. Of the more pessimistic responses, some cited the length of time required to muster people with the necessary skills for effective voluntary cooperation as an obstacle that he estimated would require 10

years to overcome. During the period of time it takes for the people and processes to be put in place, he added, all obligations for voluntary cooperation should be suspended.

E. Effective action against hard core cartels (Question 5)

77. Question 5 of this survey was an open question without any defined structure. The majority of responses were strongly in favour of a complete ban on all types of hard core cartels, however a large minority considered some exclusions and exceptions necessary, particularly with regard to government operated or mandated cartels.

78. Various reasons were advanced for such flexibility. The argument was made that temporary crisis cartels and some export cartels should be excluded from any multilateral prohibition, the latter because the principal exports of regional countries are primary goods which are subject to erratic international cycles in prices and output.

79. Other respondents stated that government operated and mandated cartels should be excluded from hard core cartel legislation. Various reasons were put forward, the most frequent being the need to shelter certain industries for developmental purposes. One response argued that small economies required flexibility in operating export cartels, while larger developing economies did not.

80. Legislative barriers were cited as justification for flexibility. One response focused on the constitutional protection of certain industries and the need for an MFC to respect this impediment, a second on the fact that the country's cartel legislation had resulted in few successful prosecutions despite being in place for thirty years.

81. The irrelevance of entrenched practices was the theme of several responses. One submission lamented the co-existence of competition law alongside powerful domestic cartels in the respondent's country, which the government had not taken steps to prosecute; another asserted that it would be unrealistic to expect a cartel law enacted in a small island economy to have any impact on international cartels.

F. Technical assistance and capacity building (Question 6)

82. Answers to this question focused on the type of technical assistance required, the time period for which it was required and the countries that would be best able to deliver the technical assistance. The types of technical assistance required by the respondents were listed in detail. Respondents generally concurred that technical assistance for capacity building should come from developed countries.

Transparency

83. A timeline of 5 years was seen to be appropriate. The majority of respondents expressed confidence in their ability to comply with the requirements of an MFC in this area without any further technical assistance. Two respondents referred to the work done in a Latin American country in which transparency in competition issues had been linked to a wider program of public access to information.

Non-discrimination

84. The time periods ranged from 5-7 years, with only one exception. The types of technical assistance envisaged included the training of staff and acquisition of hardware and software, as well as assistance to conquer deeply held notions in some societies about the benefits of protecting certain parts of the market from competition, particularly those sectors which were considered "unstable". One submission called for assistance to help dismantle large state-owned enterprises that still existed as a hold over from a

previous socialist regime. Three others mentioned the need to advocate a culture of competition in their countries. The appropriate donors of this assistance were identified as developed countries, or internationally respected experts, or leaders in the field of competition.

Procedural fairness

85. Time periods ranged from 5-10 years, with most respondents expressing confidence that 5 years would be sufficient. The majority of answers claimed that some type of technical assistance from developed countries would be required for them to comply with an MFC.

86. The types of assistance envisaged were awareness, education and training for government and civil society groups, fostering an increase in judicial knowledge about competition laws, procedural improvements within existing competition regimes and the design of legal issues. It was noted by some respondents that procedural fairness would need to be adapted to each country's conditions and that there should be no obligation to conform domestic processes to those of other countries with different judicial procedures.

Effective action against hard core cartels

87. A time period of 5 years was deemed adequate to bring the majority of developing countries into line with the obligations mandated by a possible MFC. Five years was generally agreed to be sufficient for the legal and relevant institutions to come on line.

88. The types of technical assistance required were enforcement assistance, procedural assistance as well as improved awareness, education and training for government and civil society groups in addition to the formation of institutional human capacity.

89. Specialised institutions in developed countries were nominated as possible sources of technical assistance as were regional competition agencies and developed country competition agencies.

90. Three respondents added that some form of enforcement program against hard core cartels were either in place, or in the process of being established in their countries. In these cases, technical assistance could help sharpen existing enforcement abilities and hasten the progressive implementation of existing plans.

Modalities for voluntary cooperation

91. A time period of 5 years was deemed adequate for voluntary cooperation. Assistance for training of personnel, and education and training of government and civil society groups were mentioned. Funding was also considered important. The source of assistance was described as either developed country specialised institutions or international experts.

ANNEX I
SURVEY ON DEVELOPING COUNTRY NEEDS FOR FLEXIBILITY AND PROGRESSIVITY IN A POSSIBLE MULTILATERAL FRAMEWORK ON COMPETITION

Overview

92. The Doha WTO Ministerial declaration addresses a possible multilateral framework on competition (MFC). In paragraphs 23-25, Ministers instructed the Working Group on the Interaction between Trade and Competition Policy (WGTCP) to focus on clarifying six issues in relation to further negotiations on competition before the Fifth Ministerial Conference to be held in Cancún in September 2003. These six issues are: the core principles of 1) transparency, 2) non-discrimination and 3) procedural fairness, plus 4) provisions on hard core cartels, 5) modalities for voluntary cooperation, and 6) support for progressive reinforcement of competition institutions in developing countries through capacity building.

93. In clarifying these issues, full account is to be taken of developing country needs and the "appropriate flexibility" needed to address them. This survey will be used to collect information in order to analyse each of these Doha issues with respect to the above. It poses questions to determine possible constituent elements of flexibility and progressivity in relation to making multilateral commitments in each of these areas. The survey's overall aim is to contribute to a better understanding of the readiness, in operational terms, of developing countries for their commitments under a possible MFC.

94. The following section explains each of the six main issues as they relate to the current debate on the interaction between trade and competition policy at the WTO.

Brief explanatory notes to the Doha competition issues discussed in the WTO WGTCP

Transparency

95. The core principle of transparency in the multilateral trading system encompasses two broad obligations: (i) to publish, or at least to make publicly available, all relevant laws, regulations, and decisions; and (ii) to notify various forms of governmental action to the WTO Secretariat and WTO Members. For the purposes of this survey, please assume that a transparency obligation will require publication and notification of laws, regulations and general guidelines relevant to competition, and that any future MFC will allow latitude as to the specific way in which WTO Members are to carry out these obligations.

96. Some developing countries have noted that they cannot be expected to adhere to the same standards as developed countries in terms of transparency. Obligations may entail certain costs, both in terms of the actual publication and notification and in terms of the personnel skills and resources required to comply with those obligations. This argument is also driven by the fact that the precise scope of the transparency requirement has yet to be agreed upon. Developing countries may not have in place the procedures for publishing or notifying the information on competition laws, regulations and guidelines that the transparency principle would require.

97. It would be useful in your reply to provide information on any additional burden that the transparency principle might place on your country/sub-region. Transparency is addressed in questions 1, 2, 3 and 4.

Non-discrimination

98. There are two components to the core principle of non-discrimination as they are embodied in the multilateral trading system: national treatment and most-favoured-nation treatment (MFN). National treatment requires that a WTO member not put the goods, services or persons of other WTO members at a competitive disadvantage vis-à-vis its own goods, services or nationals. MFN requires that any advantage conferred by one member upon the goods, services or persons of another member shall be automatically granted to all other members.

99. In the course of competition law enforcement, there are many situations in which discrimination issues could arise. Violations of the national treatment principle could be classified as either *de jure* or *de facto*. *De jure* discrimination would exist when competition laws, or ancillary laws such as those creating exemptions, draw an express distinction on the basis of national origin which places foreign firms at a competitive disadvantage. *De facto* discrimination could be said to exist in the case of laws or law enforcement policies, neutral on their face, that in application discriminate against foreign firms. Laws implementing various aspects of industrial or other public policy can have discriminatory effect. The same may be true of exclusions/exemptions from competition laws. Every country has such laws, of course, but developing countries may consider it necessary for their own national needs to have relatively more of them. Non-discrimination is addressed in questions 1, 2, 3 and 4.

Procedural fairness

100. The different competition law enforcement constituencies have varying interests with respect to procedural fairness (or "due process"). Respondents or subjects of investigations and proceedings face possible sanctions for violating the law, and thus have strong "due process" interests. Victims of anticompetitive conduct and private claimants should have the right to petition the competition agency to ask the agency to undertake an investigation of the allegedly harmful practice and to present evidence supporting the petition, and to pursue, either through the agency or independently in court, remedies for unlawful conduct. Third party witnesses and public interest and consumer groups, need access to the competition agency to submit complaints, for confidentiality protection and for access to the public record in investigations and proceedings, consistent with the protection of confidential information. Protection of confidential information from unwarranted disclosure is also a fundamental part of procedural fairness.

101. The difficulty with fashioning standards relating to procedural fairness is that administrative and judicial procedures vary substantially across countries. The issues for developing countries in this area are similar to those found in transparency. The required institutions and procedures tend not to exist in these countries, so creating and staffing them may impose special burdens. Some developing countries might require extra time to meet the requirements of this core principle. Procedural fairness is addressed in questions 1, 2, 3 and 4.

Effective action against hard core cartels

102. The existence of hard core cartels has serious consequences for consumers and governments. Bid rigging in government contracts reduces the amount of money that governments can allocate to social welfare and important infrastructure projects. Higher prices mean that consumers are forced to pay more for cartelised goods, potentially leaving them with less money to spend on food and essential services. Cartels reduce the pace of technological innovation and reduce efficiency in the industries in which they

operate by dampening competition in those sectors. International cartels affect all countries, developed and developing alike. They harm consumers in developing countries by raising the prices of products that those countries import. International cartels can also have another, equally pernicious effect on developing economies: by a variety of means, they can inhibit new entry of both foreign and domestic firms into the cartelised markets.

103. Most countries have condemned hard core cartels as the most egregious form of anti-competitive practice and agree they should be banned. Debate in the WTO Working Group has centred on the definition of a hard core cartel and coverage of a proposed ban, and the obligations incumbent upon domestic law enforcers and competition agencies.

104. Developing countries that do not have competition laws have little power to prevent or punish these international cartels. But it is difficult even for those that do have competition laws to take action against international cartels. The obligation to take action against hard core cartels implies the existence of domestic enforcement procedures and institutions sufficient to permit the investigation, adjudication, and remedy of cartel activities.

105. Some WTO Members have suggested that developing countries should be given a transition period to be in a position to carry out the investigation and prosecution of hard core cartels. If developing countries are to prosecute international cartels successfully they must co-operate with other countries. The proponents of a multilateral framework on competition point out that such an agreement would provide for strengthened co-operation to combat hard core cartels. Developing Members have also spoken about mutual legal assistance to be provided through an agreement on hard core cartels and mandatory notification, consultation, and assistance should a cartel be discovered in a Member's territory.

106. Questions 1, 2, 3 and 4 address flexibility needs in combating hard core cartels. Question 5 asks more detailed points about cartels.

Modalities for voluntary cooperation

107. There are two general types of international *"voluntary cooperation"* in competition law enforcement:

> *Institutional cooperation* includes exchanges of information and experiences on a variety of policy matters, including content and form of competition laws and regulations, institutional design of a competition agency, analysis of competition issues, case handling techniques and the like. It takes place in international organisations, including OECD, UNCTAD and the WTO. It also occurs in regional settings through organisations such as the European Union, APEC, NAFTA, COMESA and CARICOM. The benefits of institutional cooperation at the most general level, help to build working relationships among competition enforcement officials and between national competition agencies. They also help to build consensus on best practices in competition law enforcement, and over time they bring about convergence in competition policy.
>
> *Case-specific cooperation* takes place when information is exchanged and assistance rendered between competition agencies in specific competition cases or investigations. This cooperation is normally the result of two or more countries sharing an interest in closer cooperation. A growing phenomenon in international cooperation in competition law enforcement is the creation of formal cooperation agreements between countries. Most are bilateral agreements between countries that have important trade or geopolitical ties. Some are plurilateral, such as NAFTA or MERCOSUR. There are now dozens of such agreements, and more are created each year. They involve OECD and non-OECD countries alike. They provide for notification of investigations or

proceedings affecting the other party, for exchange of information, for co-ordination of investigations and proceedings, for positive comity and for consultations.

108. Cooperation in *cartel* investigations is growing. It most often takes the form of "informal" cooperation — exchanges of deliberative process information among case handlers, such as case theories, affected markets, and witness evaluations; and it occurs most frequently between countries that have developed close working relationships over time. It is widely perceived that the incidence of transnational (or "cross-border") mergers — mergers that have effects in more than one country — has increased significantly in the past decade, though it is difficult to quantify this trend. Hardcore cartels and transnational mergers are two areas which have been proposed by MFC proponents as subjects requiring coverage by provisions on voluntary cooperation at the multilateral level.

109. Discussions in the WGTCP have shown that while some countries advocate the creation of a Competition Policy Committee in the WTO to oversee cooperation between countries, others would prefer cooperation to take place between competition agencies using informal networks of information exchange. Some countries regard the voluntary cooperation requirement to be case-specific, others to be a more general framework of information exchange. Some developing countries have asserted that there is little incentive for large developed countries to cooperate with small developing ones and that, as a result, consultation and assistance should be mandatory under any proposed MFC. Voluntary cooperation is addressed in questions 1, 2, 3 and 4.

Support for progressive reinforcement of competition institutions in developing countries through capacity building

110. Capacity building implies no direct obligations *per se* for developing countries. Therefore, addressing the flexibility or progressivity of obligations with regard to capacity building for developing countries under an MFC will not be relevant to this survey.

111. The aim of capacity building is to boost and upgrade the human and institutional framework of competition law and enforcement in developing countries. There are three broad components to building an effective competition policy for developing countries: 1) creating a competition culture, 2) remedying structural and institutional distortions, and 3) putting in place an effective mechanism for dealing with private anticompetitive conduct.

112. The most detailed proposals call for an integrated approach between donors (bilateral and multilateral) that addresses developing country needs on an individual basis. Developing countries have asked for long-term commitments from donors to meet the requirements of a possible MFC.

113. Due to the special nature of capacity building in the Doha context, questions 6a) and 6b) below are framed in a way that asks for information on the extent and nature of capacity building needed in your country/sub-region and your preference for the type and source(s) of such assistance.

114. Questions 6.a) and b) address capacity building.

Flexibility

115. For the purposes of this survey, flexibility refers to the degree of discretion allowed to Members with regard to the extent, limitations and timing of any commitments they make. One approach to flexibility asks Members subscribing to a core set of obligations to allow exclusions and exemptions, of a sectoral or non-sectoral nature, for developing countries. Another approach to flexibility would entail the imposition of a greater number or deeper degree of obligations upon a developed country than on a developing country. Unlike progressivity, flexibility is not necessarily linked to a specific time period.

116. Questions 1, 2 and 3 address needs for flexibility with respect to a possible MFC.

Progressivity

117. For the purposes of this survey, progressivity refers to allowing different categories of Members to adopt commitments over varying time periods. For example, certain developing countries may wish to benefit from a transition period to implement commitments under an MFC. Commitments might be linked to a fixed period of time or to the receipt of increased technical assistance or the attainment of certain minimum standards. Progressivity in commitments may also be linked to the review and eventual phasing-out of exclusions.

118. Questions 1 and 4 address needs for progressivity with respect to a possible MFC.

INSTRUCTIONS

119. Please answer *each* question, drawing upon experience within your country/sub-region. All answers to the survey will be treated confidentially. No names of respondents or individual countries will be referred to in the compilation of the results from this survey and the full anonymity of all respondents will be assured.

1. Please enter the name of the country/sub-region on which you are providing information for this survey.

2. We recommend that you read all questions before beginning to reply to the survey as some are closely related and may affect your answers to later questions.

3. Questions 1-4 have been divided into two parts, a) and b). The first question can be answered with a simple Yes, No or Undecided. Part b) calls for a further explanation. You may not need to separately respond to every one of the Doha issues mentioned in the second half of each question.

4. Space for your answers has been provided. Your answers should be separated into each of the five Doha issues which imply some commitments or obligations. The sixth issue — capacity building — is the subject of the final question.

5. Feel free to give as much detail as possible, the boxes automatically expand to accommodate your answer.

6. Please email results to julian.clarke@oecd.org and dale.andrew@oecd.org. (Or you may fax results to +33 1 44 30 61 63.)

Name of country/sub-region in which respondent has knowledge:…….……

Flexibility and progressivity: general

1a) Given the current (fairly modest) proposals for an MFC, which of the following five Doha issues could be implemented in your country/sub-region without any form of flexibility or progressivity? For example, this could be the case if your competition regime already incorporates — or is expected to — substantive provisions corresponding to commitments for the five areas listed below.

	Yes	No	Undecided
Transparency			
Non-Discrimination			
Procedural Fairness			
Effective Action Against Hard Core Cartels			
Modalities for Voluntary Cooperation			

For those areas where flexibility or progressivity would be needed (where you answered **No** in 1a),

1b) *In general terms* what type of flexibility or progressivity would your country/sub-region need? What objective factors are relevant to determining the time period required for implementation of commitments?

Transparency	
Non-Discrimination	
Procedural Fairness	
Effective Action Against Hard Core Cartels	
Modalities for Voluntary Cooperation	

Flexibility: Exclusions/exemptions

2a) Proponents of an MFC have advocated a flexible approach by allowing considerable latitude on exclusions. The domestic legal framework of each country would be allowed to define the scope and modalities of the exclusions, exceptions and exemptions (sectoral or non-sectoral) so long as they are transparent, predictable, and reviewable.

Would sectoral and/or non-sectoral exclusions from obligations under a possible MFC be needed by your country/sub-region in any of the following areas?

	Yes	No	Undecided
Transparency			
Non-Discrimination			
Procedural Fairness			
Effective Action Against Hard Core Cartels			
Modalities for Voluntary Cooperation			

For areas you answered **Yes** in 2a),

2b) If so, please give details of the exclusions and exemptions envisaged in each area. What are the general reasons for exclusions? Would you envisage any obstacles to making such exclusions transparent, predictable and reviewable?

Transparency	
Non-Discrimination	
Procedural Fairness	
Effective Action Against Hard Core Cartels	
Modalities for Voluntary Cooperation	

Flexibility: differentiation or non-reciprocity

3a) Some countries have called for differentiated commitments and non-reciprocal undertakings to be adopted in relation to flexibility under an MFC. Differentiated obligations would involve varying commitments according to agreed criteria, e.g. development category ("least developed") or as a degree of experience and maturity of each country's competition institutions. Non-reciprocal undertakings would involve more numerous or more extensive commitments adopted by developed countries than by developing countries. Examples of some non-reciprocal undertakings might include taking measures against more anticompetitive practices (than just hard core cartels) or a commitment to apply comity in favour of developing countries or to review exclusions in the national competition regime.

Based on your country/sub-region's experience, would differentiation or non-reciprocation of commitments under a future MFC represent appropriate flexibility for which of the following areas?

	Yes	No	Undecided
Transparency			
Non-Discrimination			
Procedural Fairness			
Effective Action Against Hard Core Cartels			
Modalities for Voluntary Cooperation			

For those areas you answered **Yes** in 3a),

3b) Which specific obligations within each of the identified issue areas should be differentiated or non-reciprocal in view of your country/sub-region's needs? What substantive development concerns will be successfully addressed by differentiated commitments / non-reciprocal undertakings? Should differentiated commitments be phased out over time? If so, under what circumstances might more numerous or more extensive commitments on the part of your country/sub-region be phased in?

Transparency	
Non-Discrimination	
Procedural Fairness	
Effective Action Against Hard Core Cartels	
Modalities for Voluntary Cooperation	

Progressivity: transition periods

4a) Assuming the current proposals for an MFC were adopted and developing countries were given a specific time period (e.g. 5 years) to implement them, in which of the following areas would your country/sub-region need a longer transition period to comply with those commitments?

	Yes	No	Undecided
Transparency			
Non-Discrimination			
Procedural Fairness			
Effective Action Against Hard Core Cartels			
Modalities for Voluntary Cooperation			

For those areas you answered **Yes** in 4a),

4b) Which proposed obligations within each of the issue areas listed below would require longer transition time periods? Why? What time period could be envisaged?

Transparency	
Non-Discrimination	
Procedural Fairness	
Effective Action Against Hard Core Cartels	
Modalities for Voluntary Cooperation	

Effective action against Hard Core Cartels

5) In terms of the substance of competition policy, the recent debate in the WTO has focused on the need for a domestic regime to combat hard core cartels. Some Members have expressed concern about the definition of a cartel and the scope of a ban on cartels in the proposed MFC. Would your country/sub-region need flexibility for a hard core cartel regime? If so, what kind? Should the scope of a ban on hard core cartels exclude government and government mandated cartels? Should export cartels be included or excluded from such a ban?

Effective action against Hard Core Cartels	

Progressive reinforcement of competition institutions in developing countries through *capacity building*

6a) Suppose the current proposals for an MFC are adopted. In which of the following areas would your country/sub-region be able to implement these obligations *without* technical assistance? In which of the following areas would appropriate technical assistance and capacity building allow the implementation of the proposed obligations in 5 years or less?

	Without T.A.	In 5 years or less
Transparency		
Non-Discrimination		
Procedural Fairness		
Effective Action Against Hard Core Cartels		
Modalities for Voluntary Cooperation		

In areas needing capacity building/technical assistance for 5 years or more,

6b) For which obligations would technical assistance be needed for more than 5 years? What types of technical assistance would be needed, and for how long? What factors are you using to assess your country/sub-region's needs with respect to technical assistance? Given these needs, which sources would be best able to deliver the technical assistance required and why?

Transparency	
Non-Discrimination	
Procedural Fairness	
Effective Action Against Hard Core Cartels	
Modalities for Voluntary Cooperation	

ANNEX II
SURVEY RESULTS, COLLATED BY SUB-REGION*

Flexibility and progressivity: general

1a) Which of the following five Doha issues could be implemented in your country/sub-region without any form of flexibility or progressivity?

	Yes	No	Undecided
Transparency	Central America (1) East Asia (2) East Europe (2) Nth Africa/Middle East (2) Southern Africa (1) South America (5) South Asia (1)	Caribbean (1) East Asia (1) East Europe (1)	Oceania (1)
Non-Discrimination	East Asia (1) East Europe (1) South America (5) South Asia (1)	Caribbean (1) Central America (2) East Asia (2) East Europe (2) Nth Africa/Middle East (2) Oceania (1)	Southern Africa (1) South America (1)
Procedural Fairness	East Asia (2) East Europe (1) Nth Africa/Middle East (1) Southern Africa (1) South America (5)	Caribbean (1) Central America (2) East Asia (1) East Europe (2) Nth Africa/Middle East (1) Oceania (1) South America (1)	South Asia (1)
Effective Action Against Hard Core Cartels	East Asia (1) East Europe (1) Nth Africa/Middle East (1) South America (4)	Caribbean (1) Central America (2) East Asia (2) East Europe (1) Nth Africa/Middle East (1) Oceania (1) Southern Africa (1) South America (1) South Asia (1)	East Europe (1) South America (1)
Modalities for Voluntary Cooperation	East Asia (1) East Europe (2) Nth Africa/Middle East (1) South America (5) South Asia (1)	Caribbean (1) Central America (2) East Asia (2) Southern Africa (1) South America (1)	East Europe (1) Oceania (1)

*Not all respondents replied to all questions, hence the varying totals.

Flexibility: Exclusions/exemptions

2a) Would sectoral and/or non-sectoral exclusions from obligations under a possible MFC be needed by your country/sub-region in any of the following areas?

	Yes	No	Undecided
Transparency	Oceania (1)	Caribbean (1) Central America (2) East Asia (3) East Europe (2) Nth Africa/Middle East (2) Southern Africa (1) South America (5) South Asia (1)	East Europe (1)
Non-Discrimination	Caribbean (1) Central America (2) East Asia (1) East Europe (2) Nth Africa/Middle East (1) Oceania (1) South America (3) South Asia (1)	East Asia (2) Nth Africa/Middle East (1) Southern Africa (1) South America (2)	East Europe (1)
Procedural Fairness	Nth Africa/Middle East (1) Oceania (1) South America (1)	Caribbean (1) Central America (2) East Asia (3) East Europe (2) Nth Africa/Middle East (1) Southern Africa (1) South America (4)	East Europe (1) South Asia (1)
Effective Action Against Hard Core Cartels	Caribbean (1) East Asia (1) East Europe (1) South Asia (1)	Central America (1) East Asia (2) East Europe (2) Nth Africa/Middle East (1) Southern Africa (1) South America (5)	Central America (1) East Europe (1)
Modalities for Voluntary Cooperation	East Asia (1) East Europe (1) South Asia (1)	Central America (2) East Asia (2) East Europe (1) Nth Africa/Middle East (2) Southern Africa (1) South America (5)	Caribbean (1) East Europe (1) Oceania (1)

Flexibility: differentiation or non-reciprocity

3a) Based on your country/sub-region's experience, for which of the following areas would differentiation or non-reciprocation of commitments under a future MFC represent appropriate flexibility

	Yes	No	Undecided
Transparency	Central America (1) Nth Africa/Middle East (1)	Caribbean (1) Central America (1) East Asia (2) East Europe (2) Nth Africa/Middle East (1) Oceania (1) South America (4) South Asia (1)	East Asia (1) South America (1)
Non-Discrimination	Caribbean (1) Central America (1) East Asia (1) East Europe (2) Nth Africa/Middle East (1) South America (2) South Asia (1)	East Asia (1) Nth Africa/Middle East (1) Oceania (1) South America (2)	Central America (1) East Asia (1) South America (1)
Procedural Fairness	Central America (2) Nth Africa/Middle East (1) South Asia (1)	Caribbean (1) East Asia (2) East Europe (2) Nth Africa/Middle East (1) Oceania (1) South America (4)	East Asia (1) South America (1)
Effective Action Against Hard Core Cartels	Caribbean (1) Central America (2) East Asia (1) East Europe (1) Nth Africa/Middle East (1) Southern Africa (1) South America (1) South Asia (1)	East Asia (1) East Europe (2) Nth Africa/Middle East (1) Oceania (1) South America (2)	East Asia (1) South America (2)
Modalities for Voluntary Cooperation	Caribbean (1) East Asia (1) Nth Africa/Middle East (1) Southern Africa (1) South Asia (1)	Central America (1) East Asia (2) East Europe (2) Nth Africa/Middle East (1) Oceania (1) South America (4)	Central America (1) South America (1)

Progressivity: transition periods

4a) Assuming the current proposals for an MFC were adopted and developing countries were given a specific time period (e.g. 5 years) to implement them, in which of the following areas would your country/sub-region need a longer transition period to comply with those commitments?

	Yes	No	Undecided
Transparency	Caribbean (1) East Asia (1) Nth Africa/Middle East (1)	Central America (2) East Asia (2) East Europe (2) Nth Africa/Middle East (1) South America (5) South Asia (1)	East Europe (1) Oceania (1)
Non-Discrimination	Central America (1) East Asia (1) Nth Africa/Middle East (2) South America (1) South Asia (1)	Caribbean (1) Central America (1) East Asia (2) East Europe (2) South America (3)	East Europe (1) Oceania (1) South America (1)
Procedural Fairness	Central America (2) East Asia (1) East Europe (1) Nth Africa/Middle East (2)	Caribbean (1) East Asia (2) East Europe (1) South America (5)	East Europe (1) Oceania (1) South Asia (1)
Effective Action Against Hard Core Cartels	Caribbean (1) Central America (1) East Asia (1) East Europe (1) Nth Africa/Middle East (2) Southern Africa (1) South Asia (1)	Central America (1) East Asia (1) East Europe (1) South America (3)	East Europe (1) Oceania (1) South America (2)
Modalities for Voluntary Cooperation	Central America (1) East Asia (1) Nth Africa/Middle East (2) Southern Africa (1) South Asia (1)	Central America (1) East Asia (1) East Europe (2) South America (5)	Caribbean (1) East Europe (1) Oceania (1)

Progressive reinforcement of competition institutions in developing countries through capacity building

6a) Suppose the current proposals for an MFC are adopted. In which of the following areas would your country/sub-region be able to implement these obligations *without* technical assistance? In which of the following areas would appropriate technical assistance and capacity building allow the implementation of the proposed obligations in 5 years or less?

	Without T.A	In 5 Years or Less
Transparency	Central America (1) East Asia (1) East Europe (1) Nth Africa/Middle East (2) Southern Africa (1) South America (4) South Asia (1)	Central America (1) East Asia (2) East Europe (2) South America (1)
Non-Discrimination	Central America (1) East Asia (1) South America (4) South Asia (1)	Central America (1) East Asia (2) East Europe (1) Nth Africa/Middle East (1) Southern Africa (1) South America (1)
Procedural Fairness	East Asia (1) East Europe (1) Southern Africa (1) South America (3)	Central America (1) East Asia (2) Nth Africa/Middle East (1) South America (2) South Asia (1)
Effective Action Against Hard Core Cartels	East Asia (1) East Europe (1) South America (2)	Central America (2) East Asia (2) Nth Africa/Middle East (1) Southern Africa (1) South America (3) South Asia (1)
Modalities for Voluntary Cooperation	East Asia (1) South America (3) South Asia (1)	Central America (2) East Asia (2) East Europe (2) Nth Africa/Middle East (1) Southern Africa (1) South America (2)