

United Nations Conference on Trade and Development

**Capacity-building on competition law and
policy for development**

A consolidated report



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Notes

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Introduction

For the more than two decades, the UNCTAD secretariat has conducted a capacity-building programme and technical assistance activities. These are funded principally by donor countries and agencies for the benefit of developing and least developed countries (LDCs) and their competition agencies, when they exist. Only during the last four years (2004–2007) have the capacity-building and technical assistance activities concerned the 54 developing countries in Africa, Asia, Latin America and the Caribbean, as well as economies in transition. There have been six main features of the programmes: (a) competition advocacy activities; (b) preparation of competition legislation; (c) training of case handlers; (d) institution-building; (e) consumer protection; and (f) peer reviews and follow-up. In addition, many countries benefited from activities provided within the framework of regional cooperation.

Depending on the level of development of the requesting country, UNCTAD has (a) assisted in explaining the role of competition policy in maximizing the benefits of liberalization and integration into the world economy; (b) advised, on the basis of the Model Law on Competition, in preparing competition laws and setting up regulatory and institutional frameworks for enforcement of competition law; (c) promoted the creation of “competition culture” among the supporting institutions (government agencies, academia, business groups, consumer associations and the press); and (d) provided activities for the training of trainers and promoted South–South cooperation.

For more than two decades, and with the accumulation of experience, UNCTAD has learned a great deal about the evolution of developing countries’ needs in this area,

as well as how to formulate and deliver an effective capacity-building and technical assistance programme at relatively low cost. Several lessons flow from this experience:

- (a) Although most developing countries have liberalized their economies and have adopted a market-based strategy for their growth and development, their level of development and the extent of poverty levels constrain their ability to introduce and apply the most modern standards in competition policy. UNCTAD provides tailor-made studies and policy advice based on a thorough analysis of the economic situation of interested countries in a way that supports the development and functioning of markets, while addressing development and poverty issues.
- (b) The most effective form of capacity-building and technical assistance activities are those which are integrated in the recipient country’s development strategy and that can be sustainable in the long run. There must be a commitment from the beneficiary agency or institutions to provide human and technical resources for using effectively the acquired skills and knowledge, and to replicate their use as widely as possible, including sharing expertise with other developing countries and competition agencies.
- (c) Capacity-building and technical assistance can be provided in a variety of ways, and there is no general rule that one method of delivery is superior or more useful than another. The method of delivery should be based on a needs assessment of the beneficiary country, as well as the cost-effectiveness of the plan. Resident advisors can be extremely effective if

the assignment is long enough; the advisor has the appropriate skills and knowledge, including an understanding of local conditions as well as how the beneficiary agency uses the advisor. Seminars and workshops provide less in-depth training but are most likely to benefit policymakers, business executives and consumer representatives about the role and benefits of adopting competition policy. Technical workshops on topics such as investigation methods, definitions of relevant markets and mergers review analysis may have a limited target population, but can be very effective for case handlers and the success of competition law enforcement. The use of training of distance learning may have limited application for day-to-day matters in the short run, but it ensures sustainability, transfer of skills and knowledge, and overcomes some of the problems created by “brain drain” of limited available human resources.

(d) Limited resources and expanding demand from developing countries have

led UNCTAD to make use of information technology that makes it relatively cheap to deliver some of its technical assistance, and develop manuals and case study material which can be adopted to suit individual country needs, and network and cooperate with other institutions that provide technical assistance activities in the area of competition policy.

(e) Developing countries believe that competition policy is needed for the success of market-oriented reforms and for generating growth and development, but their conviction varies. Some still doubt whether reliance on market forces alone can generate income and employment for the poor or whether globalization and liberalization can benefit the least developed among them. UNCTAD’s programme can provide policy advice and technical assistance as well as give additional credibility to interested countries’ policy recommendations in the two areas – formulation and enforcement of competition law advocacy for market-oriented reforms.

I. UNCTAD's capacity-building objectives in the area of competition law and policy

A. UNCTAD's mandate

UNCTAD is the focal point on all work related to competition policy and consumer protection within the United Nations system which, in turn, is part of its work on trade and development. The art of its work on trade and development – the mandate for which dates to the adoption of the United Nations Set of Multilaterally-Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in 1980 – represents an acceptance of the view that the basic norms of competition law, which have long been in use in developed countries, should extend to the operations of enterprises, including transnational corporations (TNCs), in developing countries. Thus, the Objectives section of the United Nations Set emphasizes that the interests of developing countries in particular should be taken into account in the elimination of anticompetitive practices that may cause prejudice to international trade and development. Furthermore, the Objectives section sees the United Nations Set as an international contribution to a wider process of encouraging the adoption and strengthening of laws and policies in this area at the national and regional levels.

This objective should be seen alongside UNCTAD's work on the formulation of a model law on competition. The draft model law and commentaries embody the principles laid down in the United Nations Set and couple these with a scheme for national competition authorities. The draft model law is aimed at developing countries that do not have a domestic competition regulation. Section C (iii) (7) of the United Nations Set further lays down a principle of preferential treatment for developing countries as an aspect of the equitable application of the

principles contained in the United Nations Set. Thus, States – in particular developed countries – are to take into account in the application of their competition law the “development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in: (a) promoting the establishment or development of domestic industries and the economic development of other sectors of the economy; and (b) encouraging their economic development through regional or global arrangements among developing countries.” Therefore, the United Nations Set envisages “infant industry” and regional economic integration exceptions to the application of competition controls to enterprises and other organizations from developing countries. This provision was balanced by the agreement to the principle that, “States, while bearing in mind the need to ensure the comprehensive application of the Set of Principles and Rules, should take due account of the extent to which the conduct of enterprises, whether or not created or controlled by States, is accepted under applicable legislation or regulations”.

The São Paulo Consensus at UNCTAD IX further reiterated that “Globalization offers new perspectives for the integration of developing countries into the world economy, and it can improve the overall performance of developing countries' economies by opening up market opportunities for their exports, by promoting the transfer of information, skills and technology, and by increasing the financial resources available for investment in physical and intangible assets. But globalization has also brought new challenges for growth and sustainable

development, and developing countries have been facing special difficulties in responding to them”.

In this respect, globalization has in many cases highlighted differences in regulatory regimes in various policy areas of which competition policy is an important one.

B. UNCTAD mission

The objective of the UNCTAD capacity-building programme is to implement the mandate of UNCTAD in the area of competition law and policy, as stipulated in the United Nations Set, the São Paulo Consensus adopted in June 2004, and the Fifth United Nations Review Conference held in November 2005 in Antalya (Turkey). In particular, paragraph 89 of the São Paulo Consensus stipulates that: “Efforts should be made to prevent and dismantle anticompetitive structures and practices and promote responsibility and accountability of corporate actors at both the national and the international level, thereby enabling developing countries’ producers, enterprises and consumers to take advantage of trade liberalization. This should be supplemented by the promotion of a culture of competition and improved cooperation between competition authorities. Developing countries are encouraged to consider, as a matter of importance, establishing competition laws and frameworks best suited to their development needs, complemented by technical and financial

participation of competition law and policy authorities of member States”.

UNCTAD’s capacity-building programme has been developed in line the decisions of the Fifth United Nations Review Conference (2005) as well as of the seventh and eighth sessions of the International Group of Experts (IGE) on Competition Law and Policy, held in Geneva in 2006 and 2007. It has been conceptualized on the basis of the complementarity of functions and capacities between UNCTAD and other organizations. Over the last four years, UNCTAD has implemented the relevant parts of the São Paulo mandate, and will carry out over the next four years the relevant mandate that emerges from UNCTAD XII in Accra in April 2008, including cooperation with international and regional organizations in matters related to competition law and policy and development. The components of the capacity-building programme are designed as a coherent strategy intended to generate maximum synergies between its elements, building on earlier work of UNCTAD in the areas of Restrictive Business Practices, and investment, trade and development issues.

During the annual consultations held by the UNCTAD intergovernmental Group of Experts on Competition Law and Policy, many developing countries have expressed the views that, at the national and regional levels, there is further need for the

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