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**ANALYSIS OF MARKET ACCESS ISSUES FACING DEVELOPING COUNTRIES:
CONSUMER INTERESTS, COMPETITIVENESS, COMPETITION AND
DEVELOPMENT**

The comments of the United States on the outcome of the Expert Meeting on Consumer Interests, Competitiveness, Competition and Development are attached, at the request of the Government of the United States.

U.S. Government Comments on the Outcome of the Expert Meeting on Consumer Interests, Competitiveness, Competition and Development

I. Overview

1. The United States appreciates the opportunity to provide these comments to the UNCTAD Trade and Development Board with respect to the Outcome of the Expert Meeting on Consumer Interests, Competitiveness, Competition and Development ([TD/B/COM.1/43](#); [TD/B/COM.1/EM.17/4](#)) held in Geneva from October 17 to 19, 2001.

2. In general, the United States applauds UNCTAD for opening a discussion on consumer protection, and we hope to have fruitful discussions on this issue. Consumer protection is an important complement to UNCTAD's ongoing work in the area of competition policy. While the tone of the Expert Meeting was generally positive, the United States is concerned that the "outcome" document partially reflects a view that open competitive markets are antithetical to consumer interests and that consumer protection should serve as an antidote to the effects of open and competitive markets. It has been the United States' experience that, in a well-functioning market economy, consumer protection goes hand in hand with competition policy. Competition policy creates conditions that lead to competitive markets, which in turn increase the availability of goods that consumers want to buy at lower cost. Markets work if they have rules, enforcement mechanisms, and organizations promoting market transactions. *See Building Institutions for Markets: World Development Report 2002*, World Bank, Washington D.C. at 1 (Oxford University Press 2002), available at <http://www.worldbank.org/wdr/2001/fulltext/fulltext2002.htm>. These include public and private institutions that provide consumers with information, enforce contractual and property rights and protect against fraud and deception. These institutions should be the focus of continuing Expert Meetings.

3. As will be discussed in more detail, the United States could support two more UNCTAD expert meetings. These meetings would serve as a forum to discuss consumer protection issues that are not adequately addressed in other fora. Our support for the continuation of such expert meetings is based on three considerations. First, the United States will support limited continuation of expert meetings on consumer protection only if its mandate is limited to consumer protection policy and excludes the discussion of competition policy matters. The Intergovernmental Group of Experts on Competition Law and Policy of the Commission on Investment, Technology and Related Financial Issues has substantial expertise in, and is already discussing competition issues, and this Expert Meeting should not duplicate the efforts of that Committee. Second, the United States opposes a more extended mandate for a consumer protection group at this time; instead, it would be beneficial to assess how useful the discussions are, and then re-evaluate whether to continue the Expert Meetings. Finally, the United States is opposed to the Expert Meeting's seeking to develop a model law on consumer protection, at least during this initial trial period. Rather, we should all work together to try to understand better the problems in this area before trying to draft solutions.

4. The United States now makes its specific and more detailed comments in the context of the Outcome of the Expert Meeting, [TD/B/COM.1/EM.17/L.1](#), which is included within the Report of the Expert Meeting, TD/B/COM.1/43 (the “Outcome Report”).

II. Globalization, Privatization and Deregulation (Paragraphs 2, 3, 13)

5. The Outcome Report was overly critical of globalization, privatization and deregulation. In particular, the United States questions the assertion of paragraphs 2 and 3 that globalization and deregulation themselves necessarily create problems for consumers. The United States believes the opposite is true: globalization and deregulation, at least when accompanied by sound competition policy, lead to an increased variety of goods and services on the market. This gives consumers greater choice in the marketplace, and the resulting competition among sellers and providers will lead to greater availability of products with the qualities desired by consumers at the lowest prices. At a fundamental level, the opportunity for consumers to choose among sellers and providers is one of the most important protections consumers have in a market economy: sellers and providers that offer what consumers want at competitive prices will be rewarded by increased sales and profits; those that do not will be punished by loss of profits.

6. The United States also questions the reference to “unwarranted imports” in paragraph 2 of the Outcome Report. While imports of noxious products such as spoiled food, unsafe drugs and products that violate intellectual property rights are clearly unwarranted, the same cannot be said of products that increase consumer choice and competitiveness.

7. Similarly, paragraph 13 of the Outcome Report invites governments to combat unsafe and poor quality products. While the invitation for governments to combat unsafe products is appropriate, the invitation for governments to combat poor quality products in all circumstances can improperly intrude on the role of the marketplace. It is the exercise of informed choice by consumers that ensures that poor quality goods and services eventually will disappear from the market. In other words, if products are unsatisfactory, consumers will stop using them, and they will no longer be sold. In some cases, consumers may prefer inexpensive products that some might consider poor quality, because high quality goods may be too expensive and they may view poor quality as better than none at all. In that case the government’s intervention will reduce consumer choice and impair consumer interests.

III. Institution-Building for Consumer Protection (Paragraphs 7, 10, 12, 14, 17, 28)

8. As noted at the outset, the United States believes that the Expert Meetings should consider and discuss appropriate institutions for consumer protection. Effective consumer protection requires a mix of public and private laws and institutions. Such laws and institutions could include the following:

- **Laws and institutions protecting contract and property rights:** Private law can supply an important vehicle for consumer protection by clearly defining property

rights (property law), establishing mechanisms for voluntarily exchanging those property rights (contract law), and providing redress for individuals harmed by negligent or willful injurious acts of others (tort law). Because these private law regimes provide valuable means for protecting consumer interests and ensuring that producers have incentives to serve consumers faithfully, a system of economic reform for emerging markets should emphasize the creation of legal conventions that define property rights, promote their exchange by contract and redress injuries. Institutions for protecting these rights could include formal, public institutions such as courts and consumer protection enforcement bodies, as well as more informal institutions such as consumer associations, self-regulatory organizations, such as trade associations that resolve consumer dispute with their members, and local community dispute resolution programs. At the same time, in order to ensure that parties' reasonable expectations are met, it is important to enforce rules prohibiting fraud or deception.

- **Laws providing information to consumers:** Such laws could be useful where, for example, consumers traditionally received little information, and where the cost of providing the additional information is offset by the additional benefits flowing from the increased information. For example, the United States has laws requiring disclosures to investors that assist them in making investment decisions, laws requiring disclosures in mortgages that allow consumers to shop for loans containing the best terms, and laws requiring disclosure of information about dissemination of consumers' credit histories.
- **Institutions allowing open access to information:** Exchanging information through open debate holds government accountable to the people. This can in turn enhance the functioning of public institutions.
- **Institutions to educate the public:** Consumer and civil society organizations can play an active role in disseminating information to the public, both about government activities and about merchants. Trade associations can disseminate information about their members.¹

9. The Expert Meetings should keep in mind that a "one-size-fits-all" institutional approach across all sectors and countries will not work. The Expert Meetings should not necessarily prescribe one specific approach; rather, they should be devoted to sharing information and learn about what works and what does not work, which will enable us to innovate and adapt to changing circumstances. With this in mind, the United States has a few comments about the Outcome Report.

10. Paragraph 7 of the Outcome Report suggests that Governments should negotiate on behalf of consumer interests when entering into international agreements. Governments should not purport to represent consumers but should in fact consult with all stakeholders when entering into binding international agreements.

11. The apparent intent of paragraph 10, to ensure that consumer protection be available to the poor and the marginalized, is commendable. However, the language chosen would

preclude governments from enacting consumer protection measures that would benefit only targeted sectors of the population, such as buyers of particular products (*e.g.*, automobiles, credit) or children. As noted above, a one-size-fits-all approach will not work for all sectors.

12. Similarly, paragraph 12 asks governments to create a system of consumer courts. There are numerous ways for governments to ensure the availability of redress mechanisms to its consumers. A system of consumer courts is only one of these. While the United States has had a favorable experience with such courts, this may not be the best solution in countries with limited budgets or different cultural traditions.

13. Again, while the intent of paragraph 14 is commendable, its language is too prescriptive. Not all governments have the resources to undertake consumer education in the schools. Equally effective consumer education could be accomplished through consumer associations and self-regulatory organizations.

14. Finally, there should not be a requirement on each private sector organization to adopt a code of conduct, as recommended by paragraph 17. Many countries have found that appropriate codes of conduct established by business associations can be beneficial to consumers. This is the case in the United States, which has a well established culture of competition. In some situations, however, such codes of conduct have led to attempts by competitors to injure consumers, such as by agreeing to be less responsive to consumer interests, to exclude competitors, to raise costs, or to reduce output. The United States therefore believes this paragraph is too prescriptive.

15. The United States notes that the Internet is one avenue for greater education and transparency in consumer protection. We commend the idea in paragraph 28 of building a website with consumer protection information. The United States notes that there exist several websites on consumer protection issues, and encourages UNCTAD to organize any website it develops so that it complements, rather than duplicates, efforts under way in other fora. For example, econsumer.gov contains consumer information from several countries.

IV. Continuation of Expert Meetings on Consumer Protection (Paragraph 24, 29)

16. Currently, there is no comprehensive international forum to discuss consumer protection in the developing world.ⁱⁱ The Expert Meetings suggested by paragraph 24 could serve as such a forum. In our experience, effective consumer protection is a crucial component of a free market economy, which in turn can lead to sound and stable long-term economic growth.

17. The United States believes that the Expert Meetings should initially focus their work primarily on institutions to combat fraud and deception in advertising and marketing. Fraud and deception, though not the only important consumer protection issues, cause major problems for consumers. According to statistics compiled by the United States, in the year 2000, over 100,000 consumers have complained to the U.S. Federal Trade Commission (FTC) and its law enforcement partners to report almost \$140 million in losses. An increasing number of these complaints involve complaints by consumers in one country against

companies in another country. So far, for the year 2001, approximately 13% of the complaints received by the FTC have involved a cross-border element (either foreign consumers complaining about U.S. businesses or domestic consumers complaining about foreign businesses), compared to approximately 1% in 1995. Fraudulent companies take advantage of the added problems faced by law enforcers in acting against foreign companies, including problems with service of process, discovery, and enforcement of judgments. Thus, there is a greater need than ever for cross-border law enforcement cooperation.

18. The need for cross-border cooperation is heightened by the advent of electronic commerce. The growth of electronic commerce depends in large part on a high level of consumer confidence in doing business on the Internet. Consumers should experience a comparable level of protection online to that which they enjoy offline. Not only should consumers know that the goods and services offered online are fairly represented, but they also need to know that meaningful redress is available if they are not satisfied with some aspect of a transaction. Moreover, if strong consumer protections are not implemented and enforced worldwide, countries could serve as havens for Internet fraud that could affect consumers and competition around the world. Finally, given that the Internet makes it easy for fraudulent companies to operate in one country and target consumers in another, it is important for law enforcement and consumer protection bodies to be engaged, share information, cooperate and coordinate their activities with law enforcement and consumer protection bodies around the world.

19. The United States believes it would be valuable for consumer protection authorities such as the FTC to continue to develop strong cooperative relationships with consumer protection authorities in other countries so, together, they can stop consumer fraud, return money to defrauded consumers, and ensure that no country is a haven for fraud. The Expert Meetings can identify ways that developed and developing countries can work together to fight consumer fraud and deception through techniques such as sharing information about current enforcement efforts, identifying obstacles to fighting consumer fraud and deception, and sharing best practices on fighting consumer fraud and deception.

20. If the work of the Expert Meeting is to be continued, it should be borne in mind that regulatory “cures” that extend beyond simply correcting the problem risk upsetting the balance of forces in the rest of the market and, ultimately, may harm consumers. Government intervention should not stifle innovation or restrict new companies from offering new products at lower prices to consumers. Business has developed and is continuing to develop initiatives that empower consumers. For example, in the United States and many developed countries, when consumers have problems with defective goods, their first thought is not generally to complain to the government. Rather, they will first try to work out the dispute with the company. In fact, companies compete on the basis of customer satisfaction programs. If the merchant does not resolve the problem, the consumer will often complain to a trade association or other self-regulatory body such as the Better Business Bureau in an effort to get a neutral private-sector third party to resolve the complaint. The United States experience with self-regulation showcases its benefits: efficiency, increased flexibility, increased incentives for compliance, and reduced cost. At the same time, we note that self-regulation in the United States has been effective because consumers have confidence that

there are law enforcement agencies that can bring actions against fraudulent companies that misrepresent compliance with self-regulatory programs.

21. These issues could be addressed through the continuation of the Expert Meetings on consumer protection. In addition to the general possibilities for institution-building outlined above, some specific areas in which future work might be helpful, for example, include the following:

- A key area where international cooperation would be helpful is in the area of **enforcement**. To that end, the United States would support a discussion on consumer protection law enforcement, and potentially a training session through which law enforcement agencies could better combat fraud and deception in advertising and marketing. Such a session could have the added benefit of establishing relationships among law enforcers in fighting cross-border consumer fraud and deception.
- **Self-regulation** is an important component of consumer protection. The Expert Meetings could focus on self-regulatory programs specifically, and public/private sector cooperation generally. This could include a dialogue on how self-regulation could be made more effective in order to provide more efficient protection for consumers and how governments could promote and assist in the development of self-regulatory efforts.
- Another potential topic for discussion is **consumer credit**. Having in place a system of credit is crucial to the growth of a developing economy. The United States would be pleased to share its experience in this area.

22. All future work should be conducted keeping in mind that effective consumer protection includes a mix of public and private law regimes and that a prerequisite for effective consumer protection in a market economy is the creation of legal conventions that define property rights, promote their exchange by contract and redress injuries.

23. As noted at the outset, United States support for the continuation of the Expert Meetings on consumer protection is subject to three considerations.

24. First, while recognizing that free competition provides a fundamental foundation for consumer choice, the Expert Meetings should not address ways to achieve and maintain competition. Competition policy is the focus of the Intergovernmental Group of Experts on Competition Law and Policy, and all issues relating to competition policy should be within the exclusive purview of that Group. This Group -- which has been in existence for over 20 years -- has substantial expertise in competition policy issues. Unfortunately, there has already been some redundancy between the two groups. At least two issues that were discussed at the October Expert Meeting of the Consumer Interests, Competitiveness, Competition and Development Committee have been addressed by the Intergovernmental Group of Experts on Competition Law (i.e., interface between competition and deregulation and cross-border mergers). In addition, the Outcome Report inappropriately touches upon

several competition policy issues. *See, e.g.* Paragraphs 5, 7, 16, 25 and 27. Given the limited resources of competition experts, there should not be a duplication of efforts.

25. Moreover, although competition shares a common theoretical framework with consumer protection, the day-to-day work of the two disciplines is quite different. While the two disciplines are joined in the same agency in the United States and some other countries, such as Canada and Australia, in others they are handled by separate institutions. Thus, many countries would find it difficult to address both issues through this forum, as there are relatively few who are expert in both. It would neither be advisable to discuss competition policy without competition experts nor to discuss consumer protection policy without consumer protection experts.

26. Therefore, the United States opposes efforts to discuss competition policy in the Expert Meetings and would oppose their continuation if their mandate were not limited to exclude matters within the competence of the Intergovernmental Group of Experts on Competition Law and Policy.

27. Second, the United States believes that discussions of consumer protection at future Expert Meetings should not be given a permanent mandate at this point. Instead, it would be beneficial to continue discussions for a trial period, to assess how useful the discussions are, and then re-evaluate whether to continue the Expert Meetings. If the Expert Meetings prove useful as a forum for developing international consumer protection policy, then perhaps their mandate could be renewed; if not, it should terminate. The United States believes that two additional Expert Meetings would serve as an appropriate trial period.

28. Third, the mandate of the Expert Meetings should not include development of model laws on consumer protection. The United States does not believe that it would be a valuable use of the Expert Meeting's resources to develop model laws on consumer protection at this time, as suggested by paragraph 29. It is important that all countries first seek to understand better the problems in this area before trying to draft solutions.

V. Technical Assistance (Paragraph 25)

29. The United States agrees that technical assistance in adopting or reforming and better enforcing consumer protection laws is a commendable goal. However, it is unclear whether there are sufficient resources for UNCTAD to provide technical assistance upon request. Paragraph 25 of the Outcome Report recommends that UNCTAD provide member countries with technical assistance for enforcing consumer protection and competition laws. This paragraph should not commit UNCTAD to provide technical assistance beyond its existing resources.

30. The United States further agrees that technical assistance in the area of competition laws is also a commendable goal, and has expended significant resources of its own to provide such assistance. However, as discussed above, technical assistance in the area of competition policy is beyond the competence of this Expert Meeting, as it is within the competence of the Intergovernmental Group of Experts on Competition Law and Policy.

VI. The Interface Between Competition and Consumer Protection (Paragraph 27)

31. The United States is not among the countries that believes that UNCTAD should further study the issues relating to the interface between competition and consumer protection, as described in paragraph 27 of the Outcome Report. Indeed, the United States objected to this paragraph at the October meeting. Such studies would be a poor use of UNCTAD's resources, and would be unlikely to produce a valuable outcome. Indeed, the very premise of the paragraph appears flawed. The interface between competition and consumer protection is well understood. One of the fundamentals of a market economy is the free flow of information about goods and services offered for sale. The more fully consumers are informed, the better equipped they will be to make purchase decisions appropriate to their own needs. A competitive or free market will thrive in direct proportion to consumers' ability to inform themselves about the relative merits of various purchasing alternatives and consumers' ability to choose freely among those alternatives to buy the products and services best suited to their needs.

ⁱFor more information about these general themes, *see generally Building Institutions for Markets: World Development Report 2002*, World Bank, Washington D.C. at 1 (Oxford University Press 2002), available at <http://www.worldbank.org/wdr/2001/fulltext/fulltext2002.htm>.

ⁱⁱThe OECD and the International Marketing Supervision Network offer fora for certain countries, but neither has representation from developing countries.



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TRADE AND DEVELOPMENT BOARD
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**THE ROLE OF CONSUMER AND COMPETITION POLICIES IN
ENHANCING COMPETITIVENESS AND DEVELOPMENT**

Outcome of the Expert Meeting

The Expert Meeting made the following proposals on issues which should be taken into account in UNCTAD's work on consumer interests, competitiveness, competition and development.

1. The Expert Meeting offered the opportunity for an enriching exchange of expertise and experiences on the relevance of competition law and policy and consumer protection policies for enhancing competitiveness in developing countries and economies in transition. The discussions covered member countries' relevant experiences in matters of consumer protection and competition policy, including privatization and deregulation of public sector utilities; the implications of globalization for cross-border anti-competitive practices; and public policy and capacity-building for rule-making and enforcement. The importance of national and regional traditions and cultures was stressed as the background against which the content and the implementation of consumer protection and competition laws should be defined.

FINDINGS

2. Whilst recognizing that globalization and deregulation of goods and services markets may have the potential to improve the circumstances of consumers in many countries, the meeting also recognized that these processes pose major challenges when markets fail to protect consumers and access to redress mechanisms. The challenges posed by competition among developing countries to attract foreign investment, as well as the permeability of frontiers to unwarranted imports in some countries, were noted as deserving particular attention in this regard.

3. It was recognized that privatization and deregulation in developing countries (particularly the least developed countries among them) and the drive to limit the role of Governments in the market place may go hand in hand with regard for consumer interests and the need for an institutional and legal framework for consumer protection. It was pointed out that in some cases privatization and deregulation have been effected with scant regard for consumer interests and often in the absence of an institutional and legal framework for consumer protection. The processes of deregulation and liberalization have thus exposed consumers in developing countries and economies in transition to unsafe products and services and fraudulent business practices.

4. It was further recognized that national regimes for consumer protection would need to protect consumers and promote sustainable consumption patterns without imposing undue constraints on business, in order to achieve the development and growth of effective markets.

5. It was noted that properly implemented competition and consumer policies can make a key contribution to competitiveness and sustainable development.

6. In the light of these findings the Expert Meeting made the following recommendations for consideration by the Commission on Trade in Goods and Services, and Commodities at its sixth session, to be held in Geneva from 4 to 8 February 2002.

A. At the national and regional levels

7. Governments are invited to take the necessary steps to implement the UN Guidelines on Consumer Protection (1999) as a matter of urgency and in this regard incorporate the consumer protection dimension into their macroeconomic policies and legal frameworks. In this respect, Governments should also take account of the interests of consumers and actively negotiate on their behalf when entering into binding international agreements.

8. Governments should develop and maintain competition and consumer protection policies which are mutually reinforcing, with a view to promoting consumer welfare, competitive markets, competitiveness and development.
9. Governments should take into account consumer views and interests at all levels of policy- and decision-making processes and in this respect they should create specific channels and mechanisms for dialogue with consumers and their representative organizations. It was suggested that Governments should adopt mechanisms to delegate to civil society certain reconciliation and consumer arbitration powers.
10. In applying consumer protection laws and other regulations Governments should take due care to ensure that measures benefit all sectors of the population, particularly the informal sector and the poor.
11. Bearing in mind the need to reach rural areas and illiterate consumers, Governments should, as appropriate, develop and/or encourage the development of consumer information and education programmes.
12. Governments should take the necessary steps to establish consumer courts.
13. Governments are invited to take measures with a view to combating the production and marketing of poor-quality and unsafe products, including the development of black markets for the sale of such products.
14. Governments should take the necessary steps to include consumer education programmes in the curriculum of formal and non-formal education.
15. Enterprises should obey relevant laws and regulations of the countries in which they do business and conform to the appropriate provisions of international standards.
16. Enterprises should conform to the provisions of the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, particularly section D, "Principles and rules for enterprises, including transnational corporations".
17. Each private sector organization should adopt a code of conduct for its members in order to promote ethics, subject to competition laws.

18. Consumer associations and representatives should, for their part, familiarize themselves fully with the UN Guidelines on Consumer Protection in order to be able to play their role of educating consumers, particularly those in the informal sector, thereby contributing to the implementation of those guidelines.

19. Consumer associations are encouraged to be proactive in their interaction with government and intergovernmental agencies and with businesses in order to advance and safeguard consumer views and interests.

20. Consumer associations should develop joint regional training and information programmes in cooperation with government, business, international organizations, and academic and other civil society organizations in order to create synergies for promoting consumer welfare.

B. At the international level

21. UNCTAD should call upon the international development partners to provide technical and financial assistance in the field of capacity-building at the human resource and institutional levels for the formulation and enforcement of consumer policies. In this respect, financing organizations and external donors are invited to make voluntary contributions in support of those objectives.

22. The Expert Meeting noted with appreciation the important and useful work done by UNCTAD in the field of competition law and policy and consumer protection.

23. UNCTAD should strengthen its institutional machinery and promote consumer interests with a view to monitoring implementation of the UN Guidelines on Consumer Protection.

24. UNCTAD should convene Expert Meetings on the protection of consumers and regulation of public services and on international mechanisms for consumer protection, including in relation to cross-border transactions, cross-border fraud, e-commerce, etc.

25. UNCTAD should, upon request, provide member countries with technical assistance in adopting or reforming and better enforcing consumer protection and competition laws and in implementing the UN Guidelines on Consumer Protection as expanded in 1999. Resources permitting, UNCTAD should also assist consumer organizations in this respect.

26. UNCTAD should cooperate with other relevant international organizations and consumer associations with a view to taking stock of ongoing work, disseminating information and creating synergies towards an integrated approach for more effective implementation of the UN Guidelines on Consumer Protection.

27. Some experts recommended that UNCTAD should further study the interface between competition, consumer interests, competitiveness and development by focusing on how markets can integrate the informal sector, work better for the poor and generate growth, employment and export opportunities.

28. UNCTAD should develop and maintain a website network on consumer protection containing information on existing consumer protection activities, policies, organizations and legislation, including regional and international agreements containing consumer-related provisions.

29. UNCTAD should develop a model law or laws on consumer protection.