UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

WTO CORE PRINCIPLES AND PROHIBITION: OBLIGATIONS RELATING TO PRIVATE PRACTICES, NATIONAL COMPETITION LAWS AND IMPLICATIONS FOR A COMPETITION POLICY FRAMEWORK

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EXECUTIVE SUMMARY

1. This paper reviews the relevance and possible application of the WTO core principles to closer multilateral cooperation on competition. The WTO Ministerial Declaration adopted in Doha stated in paragraph 25: "further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full action shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them".

2. The discussion in this paper is limited to the issues of non-discrimination, transparency and due process as well as hard-core cartels. However, as the Doha mandate quoted above clearly states, the discussion and clarifications within the WTO Working Group on the Interaction between Trade and Competition Policy are not limited to the core principles but could include special and differential treatment as a fourth core principle. This is evident from paragraph 25, which states that the clarification should cover issues *"**including"*** the core principles. A full discussion of the issue of special and differential treatment is treated in a separate report.[1]

3. The discussions on the WTO core principles in the Working Group on the Interaction between Trade and Competition Policy have focused, since the Doha Declaration, on non-discrimination, transparency and due process.

4. These discussions have taken place in large measure within the context of the EC submissions and proposals for a multilateral competition policy framework, which also includes as a central provision the prohibition certain "hard-core" international cartels.

5. The EC approach to the national treatment obligation, as well as the manner in which this approach gives legal effect to the prohibition of cartels, is the focus of the discussions within the WTO Working Group on the Interaction between Trade and Competition.

6. WTO law as expressed in the Generally Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Service (GATS) does not establish general obligations for Members to affirmatively create internally competitive markets, nor require them to take affirmative action or provide remedies against private operators engaging in restrictive practices that affect the trade of other Members. Only a few exceptions are noted, for example government-sponsored monopolies and cartels; GATS Article IX, which provides providing for consultations regarding certain anti-competitive practices; and provisions within the GATS telecommunications reference paper.

7. GATT and GATS national treatment are limited by their scope to consider only the treatment that is accorded to *imported* goods, services or service providers. However, within this limited scope, national treatment law has developed significantly as to both *de jure* and *de facto* discrimination analysis. As WTO law stands, one can not presume that a sectoral exclusion as stated within a national law will be free from a challenge under national treatment. Such a challenge could arise where an exclusion does not apply to a directly competitive or substitutable product (or service), or where the effect of the exclusion is to eliminate any possibility that "like imported goods" or services could participate in the same or similar domestic restrictive arrangements.

[1] The Development Dimension of Competition Law and Policy (Prof. W. Lachmann) UNCTAD/ITCD/CLP/Misc.9.

8. On the one hand, the EC proposal narrows the national treatment obligation to *de jure* discrimination within the scope of national laws, including their administrative and secondary legislation. On the other hand, the EC proposal broadens the scope of GATT and GATS national treatment by directing the obligation not to imported goods or service providers, but to firms and other economic operators more generally on the basis of nationality. National competition laws do not tend to discriminate on the basis of nationality of firms in any case. However, in the WTO legal context, the proposed EC obligation of national treatment would apply whether or not goods have been imported. Under GATS the national treatment obligation would apply irrespective of whether a market access/national treatment commitment had been undertaken by a Member.

9. This broad notion of national treatment will provide a legal support for the proposed framework prohibition on domestic hard-core cartels affecting imports. This is because it would provide for a non-discriminatory right of private action to challenge local restrictive agreements that would fall under the prohibition.

10. As the EC proposal stands, it seems that national treatment obligation is not the appropriate legal basis for a prohibition on cartels. This is because, in the absence of other affirmative obligatory provisions, not evident in the EC proposals, Member States have no obligations to take actions to redress domestic restrictive practices, including cartels and dominant position affecting cross boarder trade. It is conceivable that a prohibition on certain hard-core cartels in the WTO may provide a legal basis for Members to address the external effects of domestic practices. However, no obligation to undertake such affirmative action is being explicitly made in the current EC proposals. Furthermore, since national competition laws are based upon a "territoriality" principle (domestic effects), they are also not given a domestic legal basis for "nationality" jurisdiction that would permit authorities to take action against domestic operators as their practices may affect other territories.

11. International cooperation is proposed as a means of resolving the "external effects" of anti-competitive practices as a complement to existing bilateral agreements which provide for positive comity obligations to address external effects. Whether voluntary (non-binding) cooperation is considered a sufficient quid pro quo in exchange for a more rigorous obligation to apply domestic competition laws is not clear from the proposals. However, existing WTO law, for example GATT mos favoured-nation (MFN), does not impose an obligation to extend existing bilateral cooperation arrangements for the benefit of other Members. MFN in this context applies only to those matters covered by paragraph 4 of Article III GATT, and this is limited to matters affecting the *internal* sale of goods.

12. The above suggests that a more trade-related orientation for a framework should be considered. A multilateral framework limited only to trade-related aspects would be more consistent with established practice in federal systems, regional trade agreements and existing multilateral agreements. This is the case in US federal law jurisdiction, EC Treaty law, EC Association Agreements, the UN Set, and earlier, the Havana Charter for the International Trade Organization (ITO). In all of these examples, a basis for taking action is provided for those matters that actually or potentially affect trade between States. These examples suggest a more trade-law-oriented set of remedies at the outset. While a national competition authority may not have nationality jurisdiction to address the external effects of domestic practices, trade law authorities can and do address unlawful import and export restrictions. For example, the "extraterritoriality" principle has been used to extend the competence of national judicial authorities to deal with external effects, as is the case in the OECD Anti-bribery Convention.

13. A "trade-related" framework would not focus on the elimination of anti-competitive practices as a general objective, nor limit its scope to international cartels. Rather, emphasis should be placed on the need to address restrictive practices that are limiting exports or imports of goods or services. Both the import and export dimensions would be treated in equal measure by establishing a Member's obligation to address a request made by other Members. A suggested modality would be to tailor the operative provisions, as in the separate annexed agreement for the GATT and the GATS. This would ensure that the scope of the framework provisions remains within the context of the annexed agreements themselves for the purpose of giving effect to their existing provisions.

14. In the GATT context, Article XI provides for a prohibition against government measures relating to exports and imports This article should be the primary point of reference to give greater legal effect to a higher degree of State responsibility for the Members to affirmatively address private restrictive practices that affect the trade of other Members. This could be accommodated by an understanding regarding the application of GATT Article XI to restrictive business practices. Similarly, Article 11 of the WTO Safeguards Agreement also prohibits Members from cooperating in the establishment of output restrictions in the form of voluntary export restraints and similar arrangements.

15. Note, however, that GATS does not have a hierarchy that establishes an existing prohibition against certain measures affecting imports or exports. However, Article IX of the GATS already provides a basis for consultations on private anti-competitive practices that undermine the obligations undertaken in the GATS. This article may therefore provide the primary point of reference for giving effect to a more extensive prohibition in respect to imports and exports of goods and services and in respect to service providers.

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