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Working Group on the Interaction between Trade and Competition Policy

CORE PRINCIPLES, INCLUDING TRANSPARENCY, NON-DISCRIMINATION AND PROCEDURAL FAIRNESS

Background Note by the Secretariat

1. This note has been prepared in response to the request by the Working Group during the informal meeting that was held on 26 February 2002 that the Secretariat prepare a set of background papers based on the discussions held and materials considered in the previous work of the Group. The papers were to deal, respectively, with each of the four substantive elements that are contained in paragraph 25 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1), namely: (i) core principles, including transparency, non-discrimination and procedural fairness; (ii) provisions on hardcore cartels; (iii) modalities for voluntary cooperation; and (iv) support for progressive reinforcement of competition institutions in developing countries through capacity building. The first in this series of notes, dealing with the subject of support for progressive reinforcement of competition institutions in developing countries through capacity-building, was issued as document WT/WGTCP/W/182, dated 17 April 2002. The second, dealing with provisions on hardcore cartels, was issued as document WT/WGTCP/W/191, dated 20 June 2002. The third, dealing with modalities for voluntary cooperation, was issued as document WT/WGTCP/W/192, dated 28 June 2002.

2. The present note deals with the subject of core principles, including transparency, non-discrimination and procedural fairness, which is to be the subject of focused attention at the Working Group's meeting to be held on 26-27 September 2002. The aim of the note is to provide a synthesis of the issues raised and points made by Members on the topic. It has been prepared on the basis of the Working Group's annual reports, which in turn rely upon the minutes of the Group's meetings, and on written submissions by Members to the Group. Reference is also made, where appropriate, to a background note by the Secretariat on the Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency (document WT/WGTCP/W/114, issued 14 April 1999). Annex I to the paper contains a list of contributions to the Working Group relevant to the topic of Provisions on Hard Core Cartels.

3. It may be noted that paragraph 25 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1) refers to "core principles, including transparency, non-discrimination and procedural fairness" (emphasis added). Given this, reference is made in the paper to one other principle which, it has been suggested, could form part of a multilateral framework on competition policy, namely that of special and differential treatment.[1]

[1] See Report of the Working Group on the Interaction between Trade and Competition Policy (2001), WT/WGTCP/5, paragraph 32. (Henceforth in this Note, documents issued in the series WT/WGTCP/1-5 are

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

- The nature and content of the referenced core principles, namely transparency, non-discrimination and procedural fairness.

- Suggestions that have been put forward regarding the application of these principles in the context of a WTO agreement on competition law and policy.

- Arguments for incorporating core principles in a multilateral framework on competition policy, as suggested in the above-noted proposals.

- Questions, concerns and reservations expressed by Members concerning the application of the above-mentioned principles in the context of a WTO agreement on competition policy; and responses that have been provided by other Members to these questions, concerns and reservations.

I. CONTENT AND ROLE IN THE WTO OF THE CORE PRINCIPLES OF TRANSPARENCY, NON-DISCRIMINATION AND PROCEDURAL FAIRNESS

5. A background note prepared by the Secretariat in April 1999 (WT/WGTCP/W/114) describes the content of the fundamental WTO principles of national treatment, most-favoured-nation treatment and transparency. With respect to each of these principles, it discusses the main provisions in which the principle is currently found; the background/purpose of the principle; its scope and application as revealed in decisions of relevant panels and the Appellate Body as of that date; and exceptions to the principle.[2]

6. Reflecting on the role and content of these principles in the framework of the WTO, the point has been made in the Working Group that the importance of these principles is greater than ever in the current era of the globalization of world trade.[3] Under GATT/WTO jurisprudence, a core objective of the principles of national treatment and most-favoured-nation treatment is to promote the equality of competitive opportunities for Members and their respective goods, services and enterprises. These principles seek the avoidance of distortions in the competitive process, not the guarantee of specific results in terms of market access. In the light of this, the suggestion has been made that there is an intrinsic relationship between competition policy and the principles of national treatment and most-favoured-nation treatment, in that competition policy provides a tool to address certain kinds of discriminatory policies and arrangements which deny equal competitive opportunities to foreign competitors. The view has also been expressed that the principles of national treatment and most-favoured-nation treatment reflect and reinforce a basic tenet of competition policy, namely that it protects competition rather than individual competitors.[4]

7. The view has been expressed that the principle of transparency is critical to ensuring the fair application of national laws and policies, including those implementing Members' WTO obligations, in demonstrating and promoting a Member's compliance with those obligations to other Members, and in reinforcing support by the public at large for relevant laws and policies and for the operation and objectives of the multilateral trading system. The view has also been expressed that transparency, as it is embodied in the framework of the WTO, has at least three dimensions: first, publication; second, uniform, impartial and reasonable administration of measures that have an impact on trade; and third, the rights of parties to legal proceedings that might lead to the adoption of measures that would have

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referred as "Report (1997—2001)", as appropriate. Documents in this series WT/WGTCP/M/_ are referred to as M/_.

[2] The Fundamental WTO Principles of National Treatment. Most-Favoured-Nation Treatment and Transparency (background note by the Secretariat, WT/WGTCP/W/114).

[3] Report (1999), paragraph 11.

[4] Report (1999), paragraph 12.

an impact on trade, for example the right to be heard. The point has also been stressed that, as under the rules of the WTO, an important qualification concerning the principle of transparency in competition law enforcement is the provision of appropriate safeguards for the protection of confidential information; this is vital to maintaining confidence in the administration of justice, and therefore to public support for the law.[5]

8. The point has been made that the principles of national treatment and most-favoured-nation treatment, on the one hand, and transparency, on the other hand, are extensively intertwined, in that if a high degree of transparency is maintained, this makes it difficult for a competition agency or other statutory body to discriminate in any consistent way over time since, if it does so, this will become publicly known, and will not be a sustainable position.[6]

9. In comparison to the principles of transparency and non-discrimination, relatively little has been said in the Working Group about the content of the principle of procedural fairness. However, in the context of the Working Group's discussion of the principle of transparency, the point has been made that Article X of the GATT contains provisions on the uniform, impartial and reasonable administration of trade measures and the right of review of action taken pursuant to them. Provisions of this nature can be found in many other WTO Agreements, including the GATS (in particular Article VI), the TRIPS Agreement (in particular Articles 41-42 and 62) and in various Annex IA Agreements, such as those on Subsidies and Countervailing Measures, Anti-Dumping Measures, Customs Valuation, Import Licensing Procedures and Pre-Shipment Inspection.[7]

II. PROPOSALS FOR INCORPORATION OF CORE PRINCIPLES, INCLUDING TRANSPARENCY, NON-DISCRIMINATION AND PROCEDURAL FAIRNESS, IN A MULTILATERAL FRAMEWORK ON COMPETITION POLICY

10. Various suggestions have been put forward by Members in the Working Group for strengthening the application of core principles, including transparency and non-discrimination, in the field of competition law and policy, including in regard to the fight against anti-competitive practices of enterprises that impact adversely on international trade. Although differing in some respects, including the degree of detail in which they are set out, these suggestions envision defining specific ways in which the referenced core principles would apply in the field of competition law and policy.[8]

11. With regard to the principle of non-discrimination, one specific suggestion has been that the Group could consider developing a principle that would call for no less favourable treatment in terms of rights for citizens or firms of foreign countries under national competition legislation than that accorded to firms or nationals of the host country. From a procedural standpoint, this could involve the granting of no less favourable treatment to a foreign product or company in the exercise of their rights in legal or administrative proceedings in the field of competition law and policy.[9]

12. With regard to the principle of transparency, two specific considerations have been noted. First, it is important to ensure transparency as regards the legal framework, including both the law itself and any related guidelines or administrative regulations. Second, transparency needs to be

[5] Report (1999), paragraph 13.
[6] Report (1999), paragraph 11.
[7] WT/WGTCP/W/114, paragraph 55.
[8] Report (1999), paragraph 25 and Report (2001), paragraph 14; see also Contributions of Switzerland (WT/WGTCP/W/89 and 117), Contribution of Japan (WT/WGTCP/W/120), Contribution of Canada (WT/WGTCP/W/174), Contribution of the Czech Republic (WT/WGTCP/W/165), and Contributions of the European Community and its member States (WT/WGTCP/W/160 and 175, respectively).
[9] Report (1999), paragraph 27.

ensured in the enforcement process, including through publication of relevant decisions. With regard to this aspect, it is also essential to ensure due protection of confidential information.[10]

13. With regard to the related matter of procedural fairness in the enforcement of the law, the following considerations have been noted: first, the need for firms to have access to domestic competition law systems, whether through complaints presented to the competition authorities or through the judicial system. Second, the importance of fair treatment of parties in the application of the law has been noted.[11]

14. A further, specific suggestion that has been made in the Working Group to strengthen the application of the principle of transparency concerns the adoption of a system of voluntary notification by countries of their national competition legislation and regulations. The suggestion has also been made that a system of voluntary country reviews could be a particularly useful tool for sharing and benchmarking different national experiences. Such a system could help to demonstrate the advantages of competition, and show how good competition laws and enforcement of such laws can help countries to achieve improvements in economic welfare. The suggestion has also been made that the publication of world reports on competition developments on a regular basis would also be a useful activity that could be undertaken by the WTO as an aspect of its educational role in this area.[12]

15. With regard to the scope of application of the principles of national treatment and most-favoured-nation treatment as they would be embodied in a possible multilateral framework, the suggestion has been made that they would apply to competition law and/or policy as such and not to wider industrial or development-related policies. Outside the domain of competition policy, they would have no implications for the much broader question of the extent to which a market is open to foreign investment. Furthermore, with respect to non-discrimination, the principles would be intended solely to ensure that such law/policy did not include provisions that discriminate on grounds of nationality.[13]

16. The point has also been stressed by proponents of a multilateral framework on competition policy that, in advocating the adoption of a framework embodying certain key principles, they are not calling for, and indeed believe it is important to avoid, a "one-size-fits-all" or harmonized approach to the development of national competition policies.[14] Therefore, under the proposed framework, there would still be a large amount of flexibility in regard to most aspects of a substantive competition law regime.[15]

17. As noted, paragraph 25 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1) refers to "core principles, <u>including</u> transparency, non-discrimination and procedural fairness" (emphasis added). With regard to other principles that might be incorporated in a multilateral framework, the view has been expressed that the principle of special and differential treatment is another of the fundamental principles associated with the multilateral trading system which should be reflected in such a framework. Such provisions should embody the concepts of progressivity, flexibility and capacity-building and be integral elements of the proposed multilateral framework.[16] Further to this point, the view has been expressed that the concept of flexibility refers to the ability of a country to choose from the menu of prohibitions that could be embodied in competition law those aspects that are 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 approach recognizes

[10] Report (1999), paragraph 28; see also Report (2001), paragraph 29.
[11] Report (1999), paragraph 28.
[12] Report (1999), paragraph 36.
[13] Report (2001), paragraph 20.
[14] M/15, paragraphs 7 and 41; M/14, paragraph 57.
[15] M/15, paragraph 7.
[16] Report (2001), paragraph 31.

that some elements of competition law may not be relevant for a particular economy, or may have to be tempered to complement industrial or development policies, through the use of exemptions and exclusions.[17] In a related vein, it has been suggested that the concept of progressivity refers to the approach or methodology employed in developing and implementing a competition regime. For example, it permits the gradual and selective introduction of instruments to control anti-competitive behaviour. The view has been expressed that this is 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. Progressivity is particularly important for small economies because of the lack of human and financial resources required for the initial establishment of a competition regime in such countries.[18]

III. ARGUMENTS FOR INCORPORATING CORE PRINCIPLES, INCLUDING TRANSPARENCY, NON-DISCRIMINATION AND PROCEDURAL FAIRNESS, IN A MULTILATERAL FRAMEWORK ON COMPETITION POLICY

A. IMPORTANCE OF CORE PRINCIPLES, INCLUDING TRANSPARENCY, NON-DISCRIMINATION AND PROCEDURAL FAIRNESS, FOR THE EFFECTIVE ADMINISTRATION OF COMPETITION LAW AND POLICY

18. The view has been expressed that adherence to the fundamental WTO principles of national treatment, most-favoured-nation treatment and transparency is central to the effective administration of competition law and policy.[19] Indeed, the suggestion has been made that it is not possible to conceive of a sound national competition policy without much attention being paid to these principles.[20] The principle of due process is also considered to be vital to the sound application of competition law and policy.[21]

19. With regard to the principle of transparency, the view has been expressed that this is the best guarantee of the non-discriminatory application of competition law and should, in any case, be a primary concern of competition authorities. For example, publication of the basic legal framework that applies in a jurisdiction is essential to provide legal certainty for undertakings. Adherence to the principle of transparency serves to enhance predictability and allow business and industry as well as consumers to know their rights and obligations under the domestic competition law, thereby promoting voluntary compliance with the law.[22]

B. IMPORTANCE OF ENSURING TRANSPARENCY, NON-DISCRIMINATION AND PROCEDURAL FAIRNESS IN THE APPLICATION OF COMPETITION LAW AND POLICY FOR THE OBJECTIVES OF THE WTO

20. The view has been expressed in the Working Group that adherence by Member Governments to the fundamental principles of national treatment and most-favoured-nation treatment and strict observance of any rules permitting limited departure from these principles are central to the role and mission of the WTO.[23] More broadly, the point has been made that in view of the globalization of markets, the continued growth of world trade is correlated with the repression of acts aimed at limiting competition, such as international cartels that fix prices or divide national markets. Such acts have the effect of restricting the benefits that are intended to be derived from trade liberalisation. In order to deal effectively with these practices, it is essential to expand cooperation in the implementation and enforcement of competition law. This, in turn, requires the upgrading of

[17] Report (2001), paragraph 32; see also related arguments in Report (1999), paragraph 29.
[18] Report (2001), paragraph 33.
[19] Report (1998), part C.II(a); Report (2001), paragraph 19.
[20] Report (1999), paragraph 11.
[21] Report (2001), paragraph 29.
[22] Report (2001), paragraph 29.
[23] Report (1998), paragraph 60.

institution-building programmes and the creation of a climate of mutual trust, which would be facilitated by agreeing on a number of core principles, including transparency and non-discrimination. Negotiations and/or an enhanced work programme on competition policy built around these principles would help to ensure political commitment for necessary reforms and implementation.[24] Furthermore, a framework built around principles such as the foregoing could, regardless of the size of an economy or country, be a basis for putting in place a competition policy that would contribute to both consumer welfare and development-related objectives.[25] In any case, the view has been expressed that, given that more and more Members are adopting domestic competition law regimes, and are applying their laws to domestic and international firms, it has become important to agree on some basic rules to which all participants can adhere.[26]

21. With specific reference to the principle of non-discrimination, the point has been made that with globalisation and increasing international competition, national competition policies are subject to national industrial policy and pressures by related lobbies to provide more favourable conditions for national companies. Application of the fundamental WTO principle of national treatment in the field of competition law and policy would assist governments in resisting such pressures. In addition, a binding principle regarding non-discrimination on the basis of nationality in the application of competition law and policy would help countries to attract foreign investment, by ensuring a predictable business environment.[27] Similarly, the suggestion has been made that application of the principle of transparency in the field of competition law and policy fosters confidence in an economy and increases its attractiveness as a location for investment.[28]

22. Supporting the general relevance of core WTO principles to the field of competition policy, the Working Group has been informed that the *APEC Principles to Enhance Competition and Regulatory Reform* which were endorsed by APEC Ministers and Leaders in September 1999 include reference to the core principles of non-discrimination, comprehensiveness, transparency and accountability. These non-binding principles are intended to assist in the process of introducing competitive markets within Member economies and to recognize the diverse circumstances of Member economies that seek to implement them.[29]

C. EXTENT TO WHICH COMPETITION POLICY IN MOST JURISDICTIONS IS ALREADY CONSISTENT WITH THE PRINCIPLES OF TRANSPARENCY, NON-DISCRIMINATION AND PROCEDURAL FAIRNESS

23. The view has been expressed that in many, if not most, jurisdictions having competition laws, the content and application of such laws are already generally consistent with the fundamental WTO principles of national treatment, most-favoured-nation treatment and transparency. A number of Members have affirmed this as regards their own competition laws and policies. In this connection, the point has also been made that consistency with the principle of non-discrimination should not be understood to mean that differential treatment of arrangements or firms, including between foreign and domestic firms, cannot arise in particular cases, but that such differentiation is attributable not to differences in nationality, but rather to factors such as differences in the degree of culpability among parties in a particular case, the differing evidence available with respect to such parties, or differences in the nature and extent of their cooperation in the investigative context. This, it has been suggested,

[24] Report (2001), paragraph 13.
[25] Report (2001), paragraph 14.
[26] Report (2001), paragraph 22.
[27] Report (2001), paragraph 19.
[28] M/8, paragraph 13.
[29] Report (1999), paragraph 22.

shows the reasonableness of a commitment regarding application of these principles in the field of competition law and policy in the framework of the WTO. [30]

D. NECESSITY OF ADAPTING THE CORE PRINCIPLES OF THE WTO TO THE FIELD OF COMPETITION LAW AND POLICY

24. Notwithstanding general recognition that the fundamental principles of the WTO are already applicable, at least to an extent, to the field of competition law and policy, in the light of general provisions of the GATT, the GATS and other agreements[31], the view has been expressed that effective application of these principles in this field requires their adaptation to the particular subject-matter. In this regard, the point has been made that adaptation of these principles was necessary in the case of services and trade-related intellectual property rights, in the GATS and the TRIPS Agreement, respectively. Similarly, the suggestion has been made that it is important to identify the elements of transparency and non-discrimination that have been found to be important for the administration of competition law and policy and which are also important from the perspective of the international trading system.[32]

25. In a related vein, the view has been expressed that the fundamental WTO principles apply only in respect of government measures and not in regard to private practices, or even hybrid practices, as was demonstrated in the Fuji/Kodak matter. A number of examples have been cited of anti-competitive practices which could have restrictive or discriminatory effects, and which would not be reached by existing WTO instruments. These include, inter alia, collective boycotts, exclusionary actions by professional associations, abuses of a dominant position which were intended to prevent the entry of new competitors, price-fixing cartels, export and import cartels, and market-sharing arrangements. The view has also been expressed that effective application of the principles of national treatment, most-favoured-nation treatment and transparency in the sphere of competition policy depends on the existence and active enforcement of a well-constituted national competition law. In cases where no such law exists or the law is not effectively applied, or where competition rules are applied through sector-specific legislation, the relevance of the fundamental WTO principles to competition rules is unclear.[33]

IV. QUESTIONS, CONCERNS AND RESERVATIONS THAT HAVE BEEN EXPRESSED REGARDING INCORPORATION OF CORE PRINCIPLES IN A MULTILATERAL FRAMEWORK ON COMPETITION POLICY; AND RESPONSES PROVIDED TO THESE POINTS

A. DOUBTS REGARDING THE NEED FOR INCORPORATION OF CORE PRINCIPLES GIVEN THAT, IN MOST CASES, COMPETITION LAW IN MOST JURISDICTIONS HAVING SUCH LAW IS ALREADY BROADLY CONSISTENT WITH THE RELEVANT PRINCIPLES

26. The view has been expressed that, in many, if not most, jurisdictions having competition laws, the content and administration of such laws is already broadly consistent with fundamental WTO principles; consequently, the suggestion has been made that no action is called for by the WTO.[34] In other words, the argument has been made that, given the assessment that most countries' competition laws and policies are already broadly consistent with basic WTO principles, matters are fine as they stand and no action is needed at the multilateral level in this regard.[35]

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[30] Report (2001), paragraph 16.
[31] Report (1999), paragraph 14.
[32] Report (1999), paragraph 15.
[33] Report (1999), paragraph 14; see also similar argument in Report (1998), paragraph 64 and Contributions from Switzerland (WT/WGTCP/W/89 and 117).
[34] Report (1999), paragraph 30.
[35] Report (1999), paragraph 16.

27. In response, the point has been made that, if consideration is being given to certain commitments at the multilateral level, it is not solely a question of determining whether existing national laws or the laws of other countries create a problem in terms of those commitments. Rather, the starting-point should be a consideration of whether competition law is relevant for the trading system. On this point, the discussions that have taken place in the Group thus far have shown clearly that the effective application of competition law complements and reinforces the process of trade liberalization in important ways.[36] Given this, it is logical to consider ways of strengthening the relationship between the two policy fields. An obvious starting-point, in this regard, concerns the application of fundamental WTO principles to competition law and policy, since adherence by Member Governments to these principles and strict observance of any rules permitting departure from them are central to the role and mission of the WTO.[37]

B. DOUBTS REGARDING THE NEED FOR INCORPORATION OF CORE PRINCIPLES GIVEN THAT, AT LEAST TO AN EXTENT, THE PRINCIPLES ARE ALREADY APPLICABLE

28. The view has been expressed that the fundamental WTO principles are already applicable to competition law and policy, to the extent that they affect trade, by virtue of Article XVI:4 of the Marrakesh Agreement.[38] In the light of this, the question has been posed as to whether it is indeed necessary to incorporate these principles in a multilateral framework on competition policy.[39]

29. The view has also been expressed that Articles VIII and IX of the GATS, which address monopolies and restrictive business practices in the services sector, might be able to address private barriers to the market that could not be handled, at least not with sufficient efficiency, within the GATT itself, at least in some cases. This reflects the fact that trade in goods is extensively intertwined with distribution services. Distribution services which, according to this view, are within the regime of the GATS include agency agreements, distribution agreements and franchising agreements.[40]

30. In response, the point has been reiterated that, although experience in the WTO has indeed shown that the general provisions of the WTO Agreements relating to non-discrimination and transparency have broad application, where the principles are deemed to be particularly important in a specific context it has nonetheless been considered appropriate to incorporate the principles into individual agreements dealing with specific subject-matter. This approach permits the principles to be adapted to ensure that they are well-suited to address issues that arise in a particular policy area. A good example is the Agreement on Technical Barriers to Trade, which deals with technical regulations and standards. Most would agree that such measures were already covered, implicitly, by Articles III and X of the GATT. However, insofar as the Members of the WTO considered that the issues raised by this particular policy area were of sufficient concern for them to be addressed in an individual agreement at the multilateral level, it was deemed useful to incorporate the principles in specific provisions adapted to this subject-matter.

C. CONCERNS ABOUT THE IMPLICATIONS OF INCORPORATING THE PROPOSED CORE PRINCIPLES (ESPECIALLY THE PRINCIPLE OF NON-DISCRIMINATION) FOR THE ABILITY OF DEVELOPING COUNTRIES TO IMPLEMENT PRO-DEVELOPMENT INDUSTRIAL AND OTHER POLICIES

31. The concern has been expressed that incorporation of core principles, particularly non-discrimination, in a multilateral framework on competition policy could encroach upon or

[36] Report (2001), paragraph 17.
[37] Report (1998), paragraph 60.
[38] Report (1999), paragraph 14.
[39] Report (2001), paragraph 22; see also Updated Checklist of Questions Posed by Members in 2000 (Job 520, circulated 24 January 2001), section III, question 2.
[40] Report (1999), paragraph 14.

constrain the ability of developing countries to implement pro-development industrial and/or social policies.[41] In this regard, the view has been expressed that competition policy covers a larger canvass than trade policy and has implications for industrial policy and investment, among other areas. National treatment in the context of competition policy is, accordingly, more complex. The objective of competition policy is to obtain efficiency enhancement, presumably including the concept of "allocative efficiency". However, gains in allocative efficiency may be less important for developing countries than dynamic efficiency gains or gains in productivity over and above those that are attributable to increases in the factors of production, involving the concept of total factor productivity (TFP) growth. This is possible only through increased knowledge, technology upgrading, better organizational and management techniques in production and through general enhancement of education and skill levels. The suggestion has been made, in this regard, that many of the benefits of international trade over the last century have been made possible through "beggar-thy-neighbour" policies pursued by countries in the absence of binding rules restraining such practices. To some extent, these practices have been promoted by making competition policy subservient to industrial policies.[42]

32. The related point has been made that discussions on competition policy and its relationship to economic development should take into account the concerns of developing countries relating to provisions of the Agreement on Trade-Related Investment Measures (TRIMs). The suggestion has been made that some TRIMs constitute useful tools to control horizontal as well as vertical restrictive business practices (RBPs) of multinational corporations (MNCs). Similarly, it has been argued that TRIMs could be used by host countries in bargaining with multinational companies. More generally, the argument has been made that the pursuit of a market access agenda in work on competition policy in the WTO might result in outcomes that are detrimental from a welfare point of view.[43]

33. The view has been expressed that many complexities are involved in the process of developing a competition law; application of the proposed principle on national treatment has to be assessed in this light. For example, it may be legitimate for a developing country competition authority to allow large domestic firms to merge so that they could go some way towards competing on more equal terms with multinationals. The same authority may wish to prohibit mergers involving multinationals within their territory on the basis that they are already large enough to achieve relevant economies of scale in either a static or dynamic sense. The application of national treatment has to be considered carefully in this context.[44]

34. In a related vein, the view has been expressed that, notwithstanding the assurances given by the proponents, conflicts could still arise between the principle of national treatment and the pursuit of certain economic or other policies if those policies are applied in a way that is not facially non-discriminatory but tends, de facto, to benefit only national firms. Taking the example of special legislative regimes that allow for special consideration of small and medium-sized businesses, it may be plausible that those kinds of rules could be based on sales thresholds that de facto eliminate their application to foreign entities. Similarly, while it might make sense in a domestic context to promote the ability of domestic firms to compete more effectively internationally, provisions relating to this could, as a practical matter, be unavailable to non-domestic firms since, by definition, they are already doing business cross-border and are, therefore, already competitive internationally, or at least presumptively so.[45]

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[41] Report (2001), paragraph 20; see also Updated Checklist of Questions Posed by Members in 2000, op cit., section III, question 3.

[42] Report (2000), paragraph 12.

[43] M/11, paragraph 4.

[44] Report (2001), paragraph 24.

[45] Report (2001), paragraph 26.

35. In response to the foregoing concerns, it has been stated by the proponents of a multilateral framework on competition policy that the intent of the proposed WTO framework is to support the application of competition law and policy as such, and *not* to encroach upon the domain of industrial, development or social policy. Reflecting this, the principles of national treatment and most-favoured-nation treatment, as they would be embodied in the proposed multilateral framework, would apply to competition law and/or policy as such and not to wider industrial or development-related policies. Outside the domain of competition policy, they would have no implications for the much broader question of the extent to which a market is open to foreign investment. Furthermore, with respect to non-discrimination, it is not proposed that the principle would be binding in regard to how a competition law is applied, as opposed to the content of relevant statutes.[46]

36. The related point has also been made that application of the principle of non-discrimination in the field of competition law and policy would not preclude the enactment of sectoral exceptions, exemptions and exclusions from national competition regimes. The latter is accepted to be a sensitive issue in respect of which there are many different approaches among WTO Members. Accordingly, the approach proposed by the proponents of a multilateral framework in relation to the issue of sectoral exclusions from competition law is simply to permit them, subject to appropriate transparency requirements. Provision for exceptions would further ensure that a commitment to non-discrimination in the application of domestic competition law would not conflict with the pursuit of other domestic policy objectives such as, for instance, the promotion of small and medium-sized enterprises.[47]

37. In support of this argument that a tailored approach to national competition law can co-exist with adherence to core principles such as non-discrimination, reference has been made to the national experience of a Member whose legislation adheres to the principles of non-discrimination, transparency, due process and flexibility, and yet is tailored to meet its specific needs and circumstances. For example, in relation to merger control, this Member's legislation provides for active participation of labour representatives in the assessment of mergers. This approach has been put in place to deal with a specific national concern. In addition, the objective of promoting small businesses is built into the legislation. This is achieved through certain exemptions or exclusions that are applicable providing that specific criteria are met. Special provision is also made for joint activities relating to export promotion. This degree of tailoring has been possible notwithstanding the commitment to the core principles of transparency and non-discrimination.[48]

D. BROADER CONCERNS ABOUT THE IMPLICATIONS OF THE SO-CALLED PRINCIPLES-BASED APPROACH BEING ADVOCATED FOR A MULTILATERAL FRAMEWORK ON COMPETITION POLICY

38. The view has been expressed that government policies, measures and regulations that give rise to anti-competitive practices are already covered, in most case, by existing WTO Agreements, which require compliance with the relevant principles. Furthermore, in most cases, existing competition laws do not contain discriminatory provisions. In this context, the suggestion has been made that the need for a framework setting out the application of these principles in the field of competition law and policy is unclear.[49] In a related vein, the concern has been expressed that even though the proponents have stated that they are not seeking harmonization of national competition legislation, the proposal to set out the core principles in substantive provisions would, in fact, entail a degree of harmonization.[50]

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[46] Report (2001), paragraph 20; see also related arguments in paragraph 27.
[47] Report (2001), paragraph 21.
[48] Report (2001), paragraph 14.
[49] Report (2001), paragraph 18.
[50] Report (2001), paragraph 17.

39. In response, the point has been made that none of the existing WTO Agreements deals in a systematic way with issues that arise in the field of competition law and policy. The need for action in the WTO is clear, given the mounting evidence that anti-competitive practices are undermining both the gains from trade and the development prospects of Members, for example through the operation of international cartels. At the same time, it is not the intention of the proponents that an agreement on competition law and policy would have implications that go beyond the domain of competition law/policy. Therefore, there is no reason to expect, a priori, any conflict with other WTO Agreements or with other national economic policies of Members.[51] Certainly, the proposed principles would not enforce a one-size-fits-all approach to national competition law and policy.[52]

E. VIEW THAT A COMPREHENSIVE COMPETITION LAW IS NOT STRICTLY NECESSARY TO GIVE EFFECT TO THE PROPOSED CORE PRINCIPLES IN THE FIELD OF COMPETITION POLICY

40. The view has been expressed that a competition law is not strictly necessary to ensure effective application of fundamental WTO principles in the area of competition policy. In this regard, reference has been made to the examples of Hong Kong, China and Singapore which, it has been suggested, have been regarded, for years, as being among the most competitive markets in the world, despite the fact that neither of these countries currently has a comprehensive competition law. Furthermore, it has been said that the proposal for a requirement for a comprehensive competition law does not take into account the diversity of legal systems and the state of development of individual WTO Members. For example, it is not clear why a sectoral approach could not work equally as well as a comprehensive competition law approach, at least for some economies.[53]

41. In response, the point has been made that no Member has questioned the fact that there are many other policies that contribute to promoting competition and economic welfare. However, there is plenty of evidence that a competition law still has an important role to play from the perspectives of development and international trade. While it could well be that, in some cases, competition policy considerations might also be reflected in sectoral legislation or regulations, the question of the interaction between trade and competition policy in general is something that has to be considered with reference to all sectors of the economy – hence, the advantage of comprehensive approaches.[54] The perceived advantages of a comprehensive competition law as opposed to reliance exclusively on sectoral approaches have also been discussed on various occasions.[55]

F. CONCERNS ABOUT THE IMPLICATIONS OF INCORPORATING CORE PRINCIPLES FOR CURRENT PRACTICES REGARDING COOPERATION BETWEEN COMPETITION AGENCIES

42. The concern has been expressed that application of the principle of non-discrimination in a multilateral framework on competition policy could raise issues if a country cooperates to a greater extent with certain countries than with others. Would this raise MFN issues or would each bilateral relationship be treated as separate and distinct?[56] It has been suggested that guidelines might be needed on this matter.[57]

43. The related point has been made that, in any case, situations can arise where it may be necessary to treat different actors differently under competition law by virtue of the facts of a particular situation, or to treat certain information in a confidential manner. It is important to think carefully about the distinctions that may have to be drawn, in this regard, between the facial contents

[51] M/14, paragraph 13.
[52] M/15, paragraphs 7 and 41.
[53] Report (1999), paragraph 30; see related arguments in Report (2001), paragraph 17.
[54] Report (1999), paragraph 31.
[55] See, e.g., Report (2001), paragraph 80.
[56] WT/WGTCP/M/18, forthcoming.
[57] Report (2001), paragraph 28.

of a law and related enforcement approaches, in order to ensure that integrity is preserved with respect to the application of the law in these situations.[58]

[58] Report (2001), paragraph 25.

ANNEX I

Working Group on the Interaction between Trade and Competition Policy

CONTRIBUTIONS RELEVANT TO CORE PRINCIPLES, INCLUDING TRANSPARENCY, NON-DISCRIMINATION AND PROCEDURAL FAIRNESS

SYMBOL: (WT/WGTCP/-)	MEMBER/ OTHER SOURCE	PARAGRAPH/ PAGE REFERENCE	MATTERS DISCUSSED
W/26	Hong Kong, China	page 1	non-discriminatory trade liberalization tends to enhance microeconomic "technical efficiency"
W/42	Canada	page 2	importance of non-discrimination; transparency; and procedural fairness
W/45	European Community	pages 4-6	the principles of transparency and non-discriminatory treatment of foreign and domestic firms are common to both competition law and the multilateral trading system
W/57	Canada	*passim*	application of the principle of national treatment to competition law
W/89	Switzerland	pages 2 *et seq.*	preliminary elements concerning the relevance of the principles of national treatment and transparency
W/100	Brazil	pages 3 *et seq.*	extension of WTO principles of transparency and national treatment to the antitrust sphere
W/115	European Community	pages 3 *et seq.* pages 8 *et seq.* pages 11 *et seq.*	key elements of competition law and policy and their relationship to transparency and non-discrimination the contribution of competition law towards ensuring non-discrimination and transparency in international trade Scope for developing within WTO core principles of Competition law and its enforcement
W/117	Switzerland	pages 2 *et seq.*	reference to the experience acquired in the area of TRIPS
W/119	Japan	page 3	importance of basic principles of "most-favoured-nation treatment", "national treatment", "transparency" and "competition-oriented principle"

SYMBOL: (WT/WGTCP/-)	MEMBER/ OTHER SOURCE	PARAGRAPH/ PAGE REFERENCE	MATTERS DISCUSSED
W/120	Japan	pages 1 *et seq.* pages 4-5	applicability of WTO Principles to Competition Policy in light of Japan's experience implications that the basic philosophy of competition policy has for the WTO principles
W/131	United States	page 1 *et seq.*	relationships of WTO principles to antitrust law enforcement and competition policy
W/149	India	page 1	importance of the principles of non-discrimination and transparency to the multilateral trading system
W/160	European Community	page 2	there is a need for the inclusion of the principle of non-discrimination in a WTO framework agreement on competition by way of a separate specific provision
W/165	Czech Republic	page 3	a WTO framework agreement should be based on the principles of non-discrimination and transparency
W/173	Canada and Costa Rica	page 1	the Canada-Costa Rica Free Trade Agreement contains commitment to the principles of transparency; non-discrimination; and procedural fairness
W/174	Canada	page 3	importance of a commitment to transparency and non-discrimination in a multilateral agreement on competition
W/175	European Community	page 3-4	how a number of developing country interests and concerns could be addressed in relation to certain core principles such as transparency and non-discrimination