

COMMUNICATION FROM NEW ZEALAND

The following communication, dated 20 September 2002, has been received from the Permanent Mission of New Zealand with the request that it be circulated to Members.

The Role of Core Principles in a Multilateral
Framework on Competition

Introduction

1. At Doha Ministers recognised the case for a multilateral framework to enhance the contribution of competition policy to international trade and development and the need for enhanced technical assistance and capacity building in this area. They called for further work on clarification of core principles "including transparency, non-discrimination and procedural fairness".

2. This note raises some questions about how core principles on competition might be developed and applied in a multilateral framework under the WTO.

Extension of trade disciplines behind the border

3. As discussion within the Working Group has highlighted, trade disciplines increasingly involve issues that lie behind the border. This is evident not only in newer areas such as services and intellectual property but also in relation to goods trade. As well as addressing barriers at the border, rules in these areas have also addressed domestic laws, regulations and standards as well as pointing to the need for institutional development in specific areas. To the extent that WTO disciplines in such fields as investment, trade facilitation and government procurement are further developed the need to address these policy areas will increase.

Applying competition principles in the WTO

4. For discussion of competition in a WTO context a basic question is whether we are focusing on competition laws or whether we are talking more broadly about competition policies. Much of the work done outside the WTO on external aspects of competition involves the broader policy issues.

5. In the WTO, an institution whose foundation is a system of multilateral rules and commitments, the implications of introducing new principles of a horizontal nature could be far-reaching. Application of competition principles in a WTO context would not in itself represent a novelty: such principles can be inferred from a number of existing WTO provisions. But applying a

set of principles on competition in a horizontal manner would bring a new and important dimension to the further development of multilateral rules affecting the functioning of markets¹.

What form might core competition principles take?

6. An earlier Secretariat paper ("The Fundamental Principles of Competition Policy" - WT/WGTCP/W/127 of 7 June 1999) offered a synthesis of material on the broader application of competition principles. The paper observed:

"A word may be in order as to what is meant by a "fundamental principle" of competition policy. The term is not regarded as being synonymous with the elements of competition or antitrust law. Rather, what has been identified in preparing this paper are principles of policy design and application, including but not limited to objectives set out in national competition laws, whose impact transcends specific statutory provisions and sectors, and is common to a broad range of jurisdictions having competition policies."

7. The paper went on to offer a list of commonly stated "goals" of competition policy together with a list of the more operational principles of policy design and application. The latter set appears particularly relevant to the work specified in the Doha mandate. The principles listed comprise the following:

- Presumption in favour of competitive markets;
- Promotion of internal and external market opening measures;
- Promotion of competition through pro-competitive regulation and regulatory reform;
- Evaluation of possibilities for market power to be exercised;
- Distinguishing between horizontal and vertical relationships;
- Protection of competition as a process rather than individual competitors.

8. Only one or two issues are the subject of competition law alone. Most must be examined in a broader competition policy framework.

Preserving flexibility at the national level

9. As well as introducing an additional dimension into the development of WTO rules, core principles could provide a broad template for WTO Members to take into account in developing their approaches to competition policy on a national basis without specifying what the actual elements of that policy will be. Again, this approach goes well beyond the development of competition law alone. Such an approach would recognise the diversity of circumstances of WTO Member countries.

10. A key reason for preserving a flexibility of approach under core principles relates to the appropriate sequencing of reform, particularly in developing countries. For example, in some developing countries it may be counterproductive to attempt to put in place a fully-fledged competition law with accompanying institutions until such countries have sufficient capacity and resources both for appropriate policy and institutional development. In the interim, these countries may be better served by pursuing alternative approaches to enhancing competition (e.g. through modifying import protection and through pro-competitive regulatory reform). It is important that the

¹ It is worth noting that the "APEC Principles to Enhance Competition and Regulatory Reform" take this approach. The APEC Principles open with the premise that "*open and competitive markets are the key drivers of economic efficiency and consumer welfare.*" The first preambular paragraph states that these principles "...provide a framework that links all aspects of the functioning of markets."

development of core principles within the WTO preserves such flexibility and does not put pressure on developing countries to drive towards particular competition policy outcomes, which may be inappropriate and/or premature.

11. At the same time, many developing countries have stressed that developing improved competition policies and/or the introduction of some form of competition law are key elements of their domestic development strategies. Agreement on core competition principles in the WTO, therefore, also needs to be underpinned by the provision of relevant technical assistance to developing countries. Such assistance will be important to ensuring that consistent approaches are maintained to the adoption of national policies and institutions and international rules on competition policy.

What should core WTO competition principles encompass?

12. Several core principles were specified by Ministers at Doha: transparency, non-discrimination and procedural fairness. Much useful work has already been done under these headings, both within the WTO and in other institutions such as the OECD and APEC.

13. Current WTO rules provide an indication of how core competition principles could ultimately be applied in a WTO context. For example Article III(4) of the General Agreement on Tariffs and Trade (GATT) and Article VI of the General Agreement on Trade in Services (GATS) provide for the application of two core WTO principles, national treatment and transparency, to domestic laws and regulation. It is possible to imagine the same principles being applied to domestic competition frameworks.

14. There is a case for extending the list to include a principle of "comprehensiveness". This principle forms part of most national competition policy and law frameworks as well as sets of competition principles adopted by other agencies². All countries permit exemptions and exceptions to their competition policies and laws, generally for perfectly valid reasons. However, a principle of comprehensiveness would require that exemptions and exceptions be implemented in a way that minimises economic distortions. It would also require that exemptions and exceptions be re-examined from time to time in terms of the general frameworks that apply for competition policy and law.

15. "Comprehensiveness" was not among the core principles that were mandated for further work in the WTO by Ministers in Doha. This raises the question of how exemptions and exceptions should be dealt with in the development of international competition rules under the WTO without seriously undermining those rules. Ministers left their instructions somewhat open-ended (they instructed that work should "focus on the clarification of: core principles *including*³ transparency, non discrimination and procedural fairness..."). Alternatively, other means could be explored to ensure that the concept of comprehensiveness is inherent in any framework of core competition principles agreed under the WTO.

Priorities for future work on competition

16. The evolution of GATT and WTO rules over time has been broadly consistent with the direction of efforts elsewhere in a competition context. In terms of the goals set for the Doha Development Agenda a good case can be made for injecting a stronger competition dimension into the

² The APEC Principles to Enhance Competition and Regulatory Reform include non-discrimination, comprehensiveness, transparency and accountability. "Accountability" and "procedural fairness" would appear to largely overlap as principles, leaving "comprehensiveness" as the one APEC principle not largely replicated in the Doha mandate.

³ Emphasis added.

work of the WTO. One question is what form this should take. Many will feel that any work affecting WTO rules should be approached in a measured fashion. This might suggest that priority should be given to the development of core WTO competition principles. As noted earlier, applying a set of principles on competition in a horizontal manner could ultimately bring a new and important dimension to the further development of multilateral rules affecting the functioning of markets.

17. Two further reasons can be advanced for proceeding in a measured way in the development of WTO rules on competition policy and law:

- The diversity of circumstances faced by WTO Member countries in enacting competition policies and laws. Many countries have yet to put in place a competition law, and it would be presumptuous to suggest that all will see a need to do so;
- The fact that competition policy and law are relatively new disciplines in most Member countries. Most countries are still assessing what market behaviours are welfare reducing and what behaviours are welfare enhancing and are developing their policies and laws accordingly. It is important that any WTO rules on competition not cut across this process of improvement in policies and laws.

18. Questions arise as to what form rules on competition might take in these circumstances. The services (GATS) model could be relevant if we were to view competition as a form of "regulation" in the way in which this is dealt with under the GATS.
