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Working Group on the Interaction between Trade and Competition Policy

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COMMUNICATION FROM SWITZERLAND

The following communication, dated 24 September 2002, has been received from the Permanent Mission of Switzerland with the request that it be circulated to Members.

Core Principles in a Multilateral Framework on Competition Policy

Doha Ministerial Declaration Paragraph 25

1. Building on earlier written contributions of Switzerland addressing core principles[1], we would like to communicate the current state of our views on how to integrate core principles into a multilateral framework to enhance the contribution of competition policy to international trade and development. As the Working Group is in a phase of clarification and mutual exchange of opinions, we consider the views presented below as preliminary and are open to other ideas and suggestions.

I. RELEVANCE OF CORE PRINCIPLES

2. Considering that the principles of transparency, non-discrimination (most-favoured-nation treatment, national treatment), and due process are important principles throughout the WTO rules-based system it would appear appropriate to embody these principles in a multilateral framework on competition policy as well. In doing so, adaptation to the circumstances will be necessary; and the principles should be applied in a flexible, different manner, comparable to the way the principles are applied across the WTO agreements being tailored to the respective agreement and adapted to the context to which the agreement applies.

3. Transparency would seem essential for the understanding and acceptance of competition policy in the public at large; it seems of predominant importance given the fact that, often, a rule-of-reason approach is used in applying a usually rather general competition framework to a concrete case; therefore, it may be advisable to put emphasis on an extensive interpretation of the transparency obligation. Given the fair amount of discretion inherent in any competition regime, due process, or procedural fairness, would seem as another element for a well-working competition regime which is to meet broad acceptance by the economic actors. Due process largely depends on transparency and guarantees for non-discrimination. Finally, non-discrimination is an overarching issue, which is absolutely indispensable for the functioning and the application of any competition law, but which also leaves room for competition policy in a broader sense to open up possibilities to deal with other goals of, e.g., economic and social policy.

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[1] WT/WGTCP/W/89 (Relevance to Competition Policy of the Basic Principles), WT/WGTCP/W/117 (Impact of Basic Principles) and WT/WGTCP/W/151 (Possible Elements).

4. This short description, to be elaborated in more detail below, may serve as an indicator to show that the three mentioned principles are closely interlinked and reinforce each other; discarding any of them would weaken the remaining principles and the functioning of competition policy as a whole.

II. TRANSPARENCY

5. It can be reasoned that above-average standards for transparency are very important in areas where the scope for seemingly discretionary measures is relatively large, as is the case in competition policy due to the rule-of-reason approach. In a background note[2], the Secretariat identified as two components parts to the concept of transparency: (i) publication of the relevant regulations, and (ii) notification to the WTO.

6. We would find it appropriate for WTO Members to make publicly available, in a timely manner and subject to protection of confidential information, the following: relevant laws including exceptions and exemptions, and including procedural rights and obligations, as well as procedures for investigations, and important case decisions including reasoning and facts. Such interpretation of the general WTO practice of requiring publication of "laws, regulations, judicial decisions and administrative rulings of general application" would seem justified in view of the objective of increasing the predictability of all competition-related activities of the authorities for all economic actors. Thus, transparency could assist substantially in creating a "culture of competition" which necessitates well-informed economic actors.

7. Transparency would include notification of the above-mentioned information to the respective WTO body supervising competition-related matters, such as a WTO Competition Policy Committee. Furthermore, it could also be worth considering whether to include in a notification obligation information on international agreements addressing competition-related issues and certain non-public (non-confidential) information which might be of interest to particular WTO Members. In analogy to antidumping, this could mean notifying authorities of other WTO Members potentially concerned of the opening of an investigation, or when new evidence so suggests, during the course of an investigation. Such notification would facilitate contacts between Members where appropriate and would tend to increase coordination and cooperation between authorities concerned.

III. NON-DISCRIMINATION

8. We deem important to point out that it is difficult to imagine any competition framework which is not, in its fundament, based on the principle of non-discrimination: since any such framework should basically aim at promoting competition by opposing the harmful effects of restraints of competition and to achieve a market economy in which enterprises may use their resources efficiently and react to changes quickly (including innovation-related adaptations), it would not be credible if the authorities were basing their views, in a first instance, on a differentiation according to the origin of competitors. In concrete terms, in applying a competition law, the principle of non-discrimination implies that economic actors approaching the competition authority are treated the same way, no matter if they are domestic or foreign. A competition law, and authorities mandated to apply it, ought to focus on the well-functioning of markets abstracting from the origin of the subjects. [3]

9. Agreeing on most-favoured-nation treatment (MFN) will probably not pose a great problem for Members in the context of applying the competition law; it is hardly conceivable that an authority

[2] See WT/WGTCP/W/114.

[3] Canada, in a recent contribution (WT/WGTCP/W/183), set out a very succinct principle saying that the focus is on "protection of competition and the competitive process, not competitors".

would accept certain anti-competitive behavior of firms originating in one country while prohibiting for those originating in other countries. In the broader frame of competition policy, with regard to voluntary cooperation, a general commitment to cooperate would ensure that MFN is respected as a guiding principle in this context. The voluntary character of cooperation, and the fact that gradual building-up of confidence and converging views on competition policy are preconditions for cooperation, limit the applicability of MFN in this context. Certain procedural steps could be considered which might work in favor of MFN, such as a commitment to respond to foreign authorities requesting case-specific cooperation and giving reasons if the request cannot be taken into consideration. Further, the WTO Secretariat could keep track of the requests and responses and occasionally report on the developments in cooperation.

10. Deliberations so far have shown that the principle of national treatment (NT) is more contentious. For instance, concerns have been expressed by some developing countries fearing that a multilateral agreement on competition policy, and the principle of NT, might undermine their capability to have some form of industrial policy, as such policy is directed at privileging domestic over foreign enterprises. Switzerland has pointed out on earlier occasions, for instance during the July 2002 meeting of the WGTCP, that ways ought to be found to design the minimum standard of a multilateral framework on competition in such manner that it does not put in doubt countries' sovereignty to regulate and to fully apply their own competition laws. Embedding NT in its pure and literal meaning is likely not to serve the purpose. Instead, it might be advisable to include in a competition framework a modified interpretation of the NT principle. A multilateral framework would therefore not contravene exemptions and exclusions in the national framework, if presented in a transparent way. A compilation by the Secretariat (WT/WGTCP/W/172) demonstrates the wide array of sectoral and non-sectoral exceptions and exemptions addressed in existing national competition laws. Notwithstanding, where a government decides to engage in industrial policy activities, competition policy may have a role to play in advising on how to best introduce efficiency issues. Impediments to competition are often also due to government interventions, and interventionist policies may lead to sub-optimal results by advancing the interests of specific groups within society only. Therefore, it may be useful to allow authorities dealing with competition policy to bring in their opinion when industrial policy or other legislation that may affect competition is being designed, in order to make transparent those cases where government action impairs economic efficiency.

11. In short, we view NT as appropriate as a basic principle of a competition framework, which basically makes sure that the national competition regulation as well as its interpretation allow for equal treatment and do not discriminate on grounds of nationality, but in specific instances allows for industrial policy based on public benefit tests if a country wishes to take action to affect the mix of its industrial activities, and allows for other policy choices like, for instance, in the area of public services, if the process is transparent and in accordance with the rule of law.

IV. DUE PROCESS

12. Similar to a number of WTO agreements, it would seem appropriate in the competition context to agree on certain procedures which would provide for fair access to the investigation authorities at all stages of an investigation procedure and for rights of appeal.[4] These procedures would also contain elements of transparency (e.g. information of parties concerned of the initiation of an investigation) and of national treatment. According to the Swiss law, for instance, domestic and foreign-based firms have equal rights for application of a competition case and for appeals.

[4] In the case of Switzerland, appeals against decisions by the Competition Commission may be addressed to the Competition Appeals Commission. Appeals under administrative law against the decisions of the Competition Appeals Commission can be addressed to the Federal Supreme Court.

V. CONCLUSION

13. For an effective competition policy, the combined exertion of the principles of transparency, non-discrimination and due process are imperative. As argued above, not all principles can be of equal and absolute importance in all cases. A multilateral framework should, however, assure that the national competition regime complies with high standards on transparency and that in its application domestic and foreign firms have similar access to the competition authorities. Non-discrimination would, however, not prevent definition of exemptions and exclusions, including the design of industrial policy, if dealt with in a clear and transparent way. Accordingly, the principle of NT would need to be devised in a more restricted manner. At a later stage, Members having gained experience in implementing competition policy and with increasing convergence of views, further refinement of the principle could be foreseen.

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