WORLD TRADE ORGANIZATION

WT/WGTCP/W/215
26 September 2002

(02-5153)

Working Group on the Interaction between Trade and Competition Policy

Original: English

COMMUNICATION FROM INDIA

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

Transparency and Procedural Fairness

Both transparency and procedural fairness are no doubt desirable qualities that any administrative or judicial process must ensure. However, in the context of competition policy, if they are interpreted to mean that the rules should be precisely formulated so as to admit only one interpretation, then international experience shows that this is not possible. There is very little agreement amongst theorists on many competition issues, and legally the same competition principle has been interpreted in different ways in different jurisdictions, and also differently at different times within the same jurisdiction. For example, predatory pricing behaviour is regarded by one school to be irrational and therefore not worthy of consideration by competition authorities, while another school holds that "rational predation" is a distinct possibility under various circumstances. For practical purposes, a comparison of price with average costs is widely used as a test of predatory pricing, but economists believe that a price below marginal costs is neither necessary nor sufficient to establish predation. There is a similar lack of consensus about the efficiency properties of vertical restrictions and mergers, and in developed countries rules and interpretations have changed significantly even without any change in the relevant statutes. Since developing countries have much less experience with competition policy, there will be a "learning-by-doing" process in which some amount of inconsistency and evolution is inevitable. This is where assistance for capacity-building can play a vital role in developing administrative guidelines that are appropriate to the policy objectives, data availability, and institutional framework of developing countries. Since these will differ from country to country, there cannot be a simple transfer of a blueprint that is used in countries at a very different stage of economic and institutional development. Such guidelines, made available to competition agencies and firms, can go a long way to reduce uncertainty and the costs of vexatious litigation.

In the context of international trade, the issues of transparency and procedural fairness confront us with another problem. If regulators are to be bound by transparent procedures, what about the firms they are supposed to regulate? Vital evidence may not be forthcoming if the firms have foreign bases, and are protected by their governments in the name of commercial confidentiality. Further, the process of transfer pricing of transactions between branches of multinational corporations remains opaque and impenetrable. Cooperation between competition agencies of different countries can play a role here, but developing countries are yet to see this kind of cooperation forthcoming from those who propose to introduce competition policy into the WTO framework. As in the case of National Treatment, if the same rules cannot be enforced equally on domestic and foreign defendants, it will be to the detriment of the former. Even though National Treatment formally requires "no less

. /.

favourable" treatment of foreign suppliers, a system that has an in-built bias in their favour cannot be said to be fair, and such a system will not find widespread acceptance.

_____