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Working Group on the Interaction between Trade and Competition Policy

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COMMUNICATION FROM JAPAN

The following communication, dated 25 September 2002, has been received from the Permanent Mission of Japan with the request that it be circulated to Members.

Core Principles

I. INTRODUCTION

In Paragraph 25 of the Doha Development Agenda, the Core Principles are mentioned as the items to be clarified by the 5th Ministerial Conference, together with such other focal points as hardcore cartels and voluntary cooperation, as well as the progressive reinforcement of competition institutions in developing countries. The concrete elements of the core principles, for example transparency, non-discrimination and procedural fairness, have been exemplified, all of which are fundamental principles of the WTO. Transparency, as far as the WTO is concerned, refers to the publication of relevant ordinances, rulings and decisions, not forgetting the reporting of government executive activities to the WTO. The rules and regulations for securing transparency are numerous in the WTO Agreement, including Article 10 of the GATT. Another example is non-discrimination, which imposes the national treatment and most-favoured-nation treatment, both of which are among the most basic principles of the WTO. When referring to national treatment, this implies using no less disadvantageous treatment for other countries than for one's own nationals, while the most-favoured-nation status provides no less favorable treatment than that of a certain country's most favoured nation. National treatment and most-favoured-nation treatment are set out in concrete terms in Articles III and I of the GATT, respectively. Procedural fairness in the WTO is, as provided for in Article X:3 of the GATT, to execute ordinances, judicial judgements and executive decisions in a uniform and impartial manner, and to promptly examine administrative measures.

Each element of the core principles should also be secured as a rule in the multilateral framework on competition policy. However, when it comes to actually applying these principles, it is necessary to examine certain exceptions and the application range, as it would not be right to correct them mechanically across the board.

The following issues are those to be examined at a time when the core principles are being applied to competition policy, especially with regard to the ideal way to apply the core principles within the multilateral framework on competition policy. Japan would also like to indicate the exceptions and the application range, as well as other points that should be noted for each issue. The paper has been compiled for the purpose of clarifying the points to be discussed. It should, therefore, to be noted that the Government of Japan is in no way bound by the contents of this paper.

II. THE MAIN POINTS UNDER DISCUSSION CONCERNING THE CORE PRINCIPLES REGARDING COMPETITION POLICY

- Issue 1: How should the core principles be positioned within the multilateral framework on competition policy?

Competition regulations provide for general requisites only, and whether or not they meet such requisites, they will be judged case-by-case. By making public the guidelines, the application standard can be clarified. Therefore, in order to secure their appropriate execution, it is necessary to carry out competition regulations with clarity and transparency, by making just procedures for business entities and consumers in general through not only ordinances, but also through regulations, administrative decisions and procedures available to the general public. Furthermore when applying competition law, it is evident that the law be applied equally and impartially to all enterprises, irrespective of their nationalities. As there is no objection to non-discrimination being secured, such core principles as transparency, non-discrimination and procedural fairness should be designated in the multilateral framework on competition policy, as the foundation stone.

If one is to consider the diversity of the competition laws and policies in each country, the application of the principles should be neither mechanical nor uniform. We will state this point in concrete terms at the following part.

- Issue 2: In the WTO Agreement, transparency, non-discrimination and procedural fairness are provided for only in general terms. In this respect, should not a more detailed minimum standard be provided for within the multilateral framework on competition policy in addition to the general provisions?

For example, in view of securing transparency for business entities and general consumers, the more detailed the standards of the core principles are, the more desirable it is. We already note that, in the OECD countries, the general practice is for competition agencies to announce to the general public the relevant regulations, administrative decisions, execution policies, inquiries and procedures, etc. Thus, in the multilateral framework on competition policy, there can also exist choices for setting a minimum standard for the core principles, which aim at securing transparency at a certain level, fixed in common with each country.

On the other hand, a limit should be imposed when setting out the detailed standards because competition laws and policies differ and execution procedures vary from country to country. For example, in the multilateral framework on competition policy, a general rule is worked out, leaving the possibility to give a more detailed explanation or examples, as necessary, in the form of non-binding guidelines or a menu of options.

It is thus necessary to discuss which choices to adopt in the future, considering the various elements, such as the interests of business entities and consumers, as well as the differences in the competition policies of each country.

- Issue 3: In the multilateral framework on competition policy, to what extent do we aim at securing the core principles? In doing so, to what extent should we impose an obligation on each country? Should we allow special and differential (hereinafter referred to as "S&D") treatment for developing countries?

If the core principles are characterized as the foundation stone of the multilateral framework on competition policy, the obligation for participating countries to equip themselves with a system for freedom of information may arise in order to secure transparency, or in order to

revise domestic laws for the purpose of securing non-discrimination and procedural fairness. In addition, after completion of such domestic measures, the obligation for participating countries to inform the WTO of ordinances, and court judgements and decisions may also arise. The extent of this latter obligation will depend upon how far the core principles should be secured. For instance, if participating countries are obliged to establish more detailed procedures in order to secure a high-level of procedural fairness, they will, in turn, have a greater burden the participating countries will have to bear. The burden will be even greater for countries having no competition laws.

It is expected that the countries already equipped with competition laws and systems may secure more than a certain level of the core principles. However, the secured level and the working procedures may differ from country to country. In view of the divergences in each participating country, it may not be practical to uniformly impose the obligation to secure a high-level of the core principles, nor to immediately revise competition laws or change the existing modus operandi of the competition ordinances. A certain flexibility must, therefore, be allowed. It would then be possible to show the contents of the high-level standards as the menu of options mentioned in Issue 2.

There may also be room for argument as to whether a certain flexibility should be allowed in developing countries in the form of "S&D" treatment. However, there are certain developing countries which have had competition laws for some time and thus have a great deal of experience with the competition policy system. Such countries have already secured a certain amount of transparency, non-discrimination and procedural fairness. Thus, the flexibility of the obligations of various kinds to secure the core principles should be characterized as "S&D" treatment for those countries without competition laws, irrespective of whether the country is developing or not.

Having said that, it goes without saying that proper technical assistance and capacity building must be carried out in order to allow each country participating in the multilateral framework on competition policy to secure more than a certain level of the core principles.

- Issue 4: When applying the core principles to competition policy, should the restrictions on hardcore cartels be the only subject of discussion, or should anti-competitive practices, such as the abuse of a dominant position and the concentration of businesses besides hardcore cartels, be included in discussions?

It was generally agreed at the previous Working Group session that hardcore cartels are the most harmful anti-competitive practices, and, bearing in mind the harm caused, all hardcore cartels should be globally banned. To be more specific, restrictive measures should be provided for in a multilateral framework on competition policy, obligating each country to fulfill its duty to restrict hardcore cartels. Restrictions on hardcore cartels should be prescribed in the framework of voluntary cooperation, whereby the core principles should be secured as a means of controlling hardcore cartels.

On the other hand, there is room for argument as to whether anti-competitive practices, such as the abuse of a dominant position and the concentration of businesses besides hardcore cartels, should be discussed in the multilateral framework on competition policy and whether restrictions be imposed on for each country. However, in order to tackle efficiently and effectively the various anti-competitive practices that influence trade, it would be desirable to include both the abuse of a dominant position and the concentration of businesses in the framework of voluntary cooperation. Core principles do not impose the obligation to control these anti-competitive practices on each country. However, if each country has some regulations to control the anti-competitive practice, each country is required to ensure the principle, such as transparency and non-discrimination. It would be desirable, in such a framework, that the core principles should be secured to deal with restrictions on anti-competitive practices other than hardcore cartels.

- Issue 5: What do we think about the relationship between the cooperation under a bilateral agreement on the execution of laws between competition agencies and the principle of non-discrimination?

The bilateral agreement on cooperation regarding the enforcement of competition policy between competition agencies provides a mechanism for obtaining further cooperation with a country having a close economic relationship with either one agency. If a multilateral framework on competition policy is to be established in the future, neither country seeking a closer cooperation with each other should interfere with the concluding of the agreement on such competition policy. The bilateral agreement on the execution of competition policy promotes cooperation between competition agencies: it contributes to a deepening of cooperation in the multilateral framework. Thus, if the same definition of non-discrimination as that stipulated in the existing WTO Agreement is also used in the multilateral framework on competition policy, there could arise some misunderstanding whereby such bilateral agreement is contrary to the principle of non-discrimination. To avoid any misinterpretation, the bilateral agreement should thus be indicated as an exception to the non-discrimination. When concluding a bilateral agreement, if such an agreement is to be treated as an exception, it should be notified to the WTO in order to ensure transparency under the multilateral framework on competition policy.

III. CONCLUSION

With respect to the status of the core principles of competition policy, especially regarding the application of the core principles within the multilateral framework on competition policy, Japan has already presented some specific points to be considered and discussed in the Working Group. We have voiced our opinions on the respective points at issue, as well as on points that we should pay special attention to in the future. We hope that the clarification of these points will lead to a negotiation on a multilateral framework on competition policy, which should be initiated by the WTO in the due course.