

## **CORE PRINCIPLES IN A TRADE AND COMPETITION CONTEXT**

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### **EXECUTIVE SUMMARY**

The Doha Ministerial Declaration called for an examination of the application of the three "core principles" of transparency, non-discrimination and procedural fairness in the context of the interaction between trade and competition policy. This paper discusses these principles in turn, first as they appear in the WTO agreements and then in relation to competition law enforcement. The OECD Joint Group on Trade and Competition Policy (Joint Group) has done some prior work on this topic, and that work forms the foundation for this paper. The Joint Group's work to date has found that core principles such as these are applied quite differently across the WTO agreements, and their application in competition law enforcement is likely to be similarly flexible.

#### **Transparency**

The core principle of transparency in the multilateral trading system encompasses two broad obligations: (i) to publish, or at least make publicly available, all relevant laws, regulations, and decisions; and (ii) to notify various forms of governmental action to the WTO Secretariat and WTO Members. Transparency is important in this context for various reasons. It provides vital information to market participants about the conditions under which commercial transactions can take place, and it facilitates monitoring of compliance with WTO law. The scope of the publication obligation is wide. For example, GATT Article X:1 covers all "laws, regulations, judicial decisions and administrative rulings of general application" pertaining to the various issues covered in the GATT. However, this obligation does not extend to judicial decisions or administrative rulings that are only relevant to specific individuals or entities. A common and key exception to the transparency provisions of the WTO agreements allows members to refrain from disclosing confidential information.

Competition laws are usually written in general, framework form, and the details of their application are determined on a case-by-case basis. Genuine transparency in this context requires, therefore, that more than the applicable laws and regulations be made public. Further, the constituencies of competition policy are diverse, and include the business community, individual consumers, academics, regulatory and government officials and the public at large. The information needs of each of these groups can vary substantially. The Joint Group has previously studied the principle of transparency in the context of competition law enforcement. It concluded that it is a common practice for the competition agency of OECD member countries to publish relevant laws and regulations, case decisions, and explanations of its enforcement policies and procedures.

## **Non-discrimination**

The core principle of non-discrimination in the multilateral trading system is embodied in national treatment and most-favoured-nation treatment (MFN) provisions. National treatment requires that a WTO Member not put the goods, services or persons of other WTO Members at a competitive disadvantage vis-à-vis its own goods, services or nationals. MFN requires that any advantage conferred by one Member upon the goods, services or persons of another Member shall be automatically granted to all other Members. An interesting feature of the WTO framework, especially in relation to non-discrimination in competition law, is that national treatment and MFN have been operationalised differently across the WTO agreements. This reflects the different contexts in which the principles are applied. This sort of flexibility may also be important if any sort of multilateral disciplines relating to competition law are negotiated within the WTO.

National treatment and MFN can be violated by de jure or de facto discrimination. De jure discrimination exists when national measures draw an express distinction on the basis of origin which disadvantages foreign products or services. De facto discrimination arises from national measures that do not distinguish explicitly on the basis of origin but that, when applied, actually discriminate on that basis. Discrimination in competition law enforcement might arise from laws exempting certain firms from prohibitions on cartels or abuses of dominance in competition laws. It might also occur in laws that apply certain "public policy" considerations to the standard "rule of reason" analysis under competition laws in a discriminatory fashion. In the competition context, de facto discrimination is used in another way, to describe a situation in which a domestic firm receives more favourable treatment than a foreign firm in a particular case or in two apparently comparable cases. It is quite difficult, however, to determine whether this is the result of discrimination against the foreign firm or merely the result of the firms being situated differently, for the reason that no two competition cases are exactly alike.

## **Procedural fairness**

While the principle of "procedural fairness" might be considered to belong more to the domain of competition policy than to trade policy, various provisions in the WTO agreements can be identified which are closely related to this principle. These provisions concern: (i) requirements for fair and equitable procedures in administrative and judicial proceedings; and (ii) the capacity for review of administrative and judicial decisions. For example, GATT Article X:3 sets out that each WTO Member shall administer its laws, regulations, decisions and rulings in a "uniform, impartial and reasonable manner", and also maintain or institute judicial, arbitral or administrative tribunals or procedures allowing for "prompt review and correction of administrative action". Certain WTO agreements, such as the TRIPS and Agreement on Government Procurement, also introduce a limited form of private party standing into the multilateral trading system by requiring procedural fairness-related provisions at the national level.

The principle of procedural fairness is important in competition law enforcement, in which there are many participants with differing interests. There are respondents or subjects to agency enforcement proceedings, who are businesses or business people. They require adequate notice of charges against them, fair and impartial procedures in the competition agency and rights of appeal. There are victims or private claimants who may have been harmed by anticompetitive conduct. Both businesses and individual consumers may comprise this class. They require rights to petition the competition agency and to pursue adequate remedies either through the agency or the courts. Finally, there is a diverse group of complainants, witnesses in agency proceedings and the public at large, which also has certain requirements for procedural fairness.

## I. INTRODUCTION

1. This paper addresses the three "core principles" of transparency, non-discrimination and procedural fairness in the two contexts of the multilateral trading system and competition law enforcement. The Doha Ministerial Declaration set out a number of areas for the WTO Working Group on the Interaction between Trade and Competition Policy to focus on in the period until the next WTO Ministerial Conference. One of the four substantive elements contained in paragraph 25 of the Declaration called for "the clarification of: core principles, including transparency, non-discrimination and procedural fairness".<sup>1</sup> Work on core principles also accords with the work programme of the OECD Joint Group on Trade and Competition (Joint Group), whose mandate includes analysis of the Doha issues leading up to the next WTO Ministerial Conference. As such, clarifying how the three core principles of transparency, non-discrimination and procedural fairness could be applied to a multilateral framework on competition is one of the specific elements of the work programme of the Joint Group.

2. This is not the first time that the Joint Group has worked on core principles at the trade and competition interface. In particular, Chapter 3 of *Trade and Competition Policies: Options for a Greater Coherence* identified the use of core principles as one of the possible approaches to rule-making in this area.<sup>2</sup> This paper builds, in part, upon the platform of that earlier work as it relates to transparency, non-discrimination and procedural fairness.

3. A considerable amount of the Joint Group's early work in this area also related to the use of the terminology of "core principles". What was emphasised is that the term "core principles" does not constitute a legal characterisation or hierarchy but rather broad guiding objectives found across a wide variety of WTO agreements. Furthermore, as this paper illustrates, the form that these principles take in these various agreements, as well as the obligations that they entail, adapts considerably to the subject matter of the agreements to which they relate. Thus, when examining the potential application of these core principles it is important to bear in mind that what form they may ultimately take, and the obligations that they entail, is neither legally nor historically constrained. In fact, as the WTO agreements have moved from the traditional domain relating to trade in goods to various aspects of governmental regulation, approaches to the core principles have adapted considerably. The unique qualities of the field of competition policy would similarly imply that progressive developments may also be required.

4. This paper is meant to be an introduction to the broader, and much more difficult, task of incorporating these three principles into a possible multilateral framework on competition. The following sections discuss each of the three principles in turn, first as they appear in the WTO agreements and then their expression and use in competition law enforcement.

## II. TRANSPARENCY

### In the WTO agreements

5. The core principle of transparency in the multilateral trading system has two component parts: (i) the obligation to publish, or at least make publicly available, all relevant laws, regulations, and

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<sup>1</sup> WTO Ministerial Conference, Ministerial Declaration, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001).

<sup>2</sup> See OECD (2001), *Trade and Competition Policies: Options for a Greater Coherence*, OECD, Paris, pp. 28-58.

decisions; and (ii) provisions on the notification of various forms of governmental action to the WTO and other Members.<sup>3</sup>

6. It should be noted that often linked with the obligation to publish are provisions relating to the impartial administration of such regulations and the right of review of decisions taken under them. As these obligations relate more closely to the principle of "procedural fairness" they will be examined in that section of this paper.

7. The transparency provisions of the three main WTO agreements are:

- (i) GATT: Article X (Publication and Administration of Trade Regulations);
- (ii) GATS: Article III (Transparency); and
- (iii) TRIPS: Article 63 (Transparency).

Most of the other agreements that make up Annex 1A of the Marrakesh Agreement Establishing the WTO (Annex 1A Agreements) also contain a publication obligation.

8. The main notification provisions in the GATS and TRIPS are set out in Articles III and 63 respectively, although in both cases there are other provisions calling for notifications in particular instances. The notification provisions contained in the GATT and other agreements relating to trade in goods are numerous and diverse, with over 165 different notification obligations and procedures.

9. The WTO's notification obligations are of broad application, requiring the notification of implementing legislation and any changes to such legislation. Some call for notifications on a periodic basis, such as biannual reports on countervailing and anti-dumping actions, others only have to be made when a particular trade action is taken or contemplated, such as a safeguard action. Still others only have to be made on a "one-time" basis, for example at the time of the coming into force of the WTO agreements.

10. A consideration, from the competition perspective, is the *extent* to which the transparency principle as embodied in the WTO might extend to individual administrative, judicial or enforcement decisions on competition matters. Under WTO jurisprudence, the requirement of publication does not appear to extend to administrative rulings addressed to specific individuals or entities. Certainly this was the finding of the panel in the *Japan – Film* case, which dealt with a claim regarding an alleged violation of Article X:1 of the GATT due to a failure to publish certain enforcement actions taken by the Japan Fair Trade Commission and local fair trade councils.<sup>4</sup> Nonetheless it did note that "inasmuch as the Article X:1 requirement applies to all administrative rulings of general application, it also should extend to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases."<sup>5</sup> As competition law enforcement tends to be

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<sup>3</sup> For a more detailed treatment of core principles in the multilateral trading system, see WTO, "The fundamental WTO principles of national treatment, most-favoured-nation treatment and transparency", WTO Doc WT/WGTCP/W/114 (14 April 1999), upon which much of the discussion here is based.

<sup>4</sup> As well as administrative "guidance" given by regional offices of the Ministry of Trade and Industry, prefectural governmental and local authorities concerning the Large Stores Law and relevant local regulations, see Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WTO Doc WT/DS44/R (31 March 1998).

<sup>5</sup> Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WTO Doc WT/DS44/R (31 March 1998) para 10.388.

based on a rule of reason approach, the question of the extent to which individual decisions are of general relevance as they contain reasoning which could be important in future cases has been raised.<sup>6</sup>

11. The transparency provisions of the GATT, GATS and TRIPS contain exceptions making it clear that Members are not required to disclose confidential information under a variety of circumstances. For example, GATT X:1 sets out that its publication requirement "shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private". Similar clauses are to be found in GATS Article III*bis*, TRIPS Article 63.4 and many of the other Annex 1A Agreements.

### **In competition law**

12. Competition law must be implemented in a clear and transparent manner. Transparency is a basic requirement for enforcement of any body of law but it is particularly important for competition law, as such laws are often written in general, framework form and are applied in a technical manner on a case-by-case basis. Thus, while it is necessary that the competition law itself and all implementing regulations be published and readily available, genuine transparency in competition law enforcement requires much more - that the competition agency disclose both the substantive basis for its decisions and the procedures by which it arrives at those decisions. Its disclosures should be made in a variety of forms so as to be accessible and understandable to all interested constituencies.

13. Three competition constituencies could be identified: (1) the business community, including experts, such as lawyers, who advise it; (2) potential victims of anti-competitive conduct, including those who would make complaints or supply information to the enforcement agency; and (3) the public at large - citizens whose understanding and participation in an enlightened application of competition law are necessary for the creation of a "competition culture" that underlies a successful market economy. Members of these groups overlap at any given time, but each group has certain requirements for transparency.

### **The business community**

14. Businesses and business people are potential subjects or respondents to competition enforcement actions. Most business people desire to obey the law. Thus, the business community has a need to know what the law is, how it is enforced and how to avoid violating it. Businesses also require an understanding of a country's competition law in order to make intelligent investment decisions. Thus, it is at least as important for business people to know what is permissible under competition laws as to know what is prohibited. The business community's needs are technical, and they include an understanding of the law, the theories and policies that underlie it and the manner in which it is enforced. The following are attributes of transparency that would assist it in this regard:

- access to the competition law and all implementing regulations;
- access to case decisions of the competition authority and, where applicable, tribunals and courts, including the analytical and legal bases for these decisions;
- an understanding of the theories and analyses that are applied by the competition agency, tribunals and courts in enforcing the law;

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<sup>6</sup> See Communication from Switzerland, "Anti-Competitive Practices and Trade: Impact of Basic Principles", WTO Doc WT/WGTCP/W/89 (27 August 1998), paragraphs 8, 9 and 14.

- an understanding of the investigative and enforcement processes that the competition agency, tribunals and courts apply; and
- where possible, guidance from enforcement officials in specific cases on the application of the law to certain conduct.

### **Potential victims or complainants**

15. The business community is part of this group as well, but the group also includes individuals who may have suffered losses from anti-competitive conduct or who wish to submit complaints about suspected violations of the competition law. People in this position may not need to have a technical understanding of the competition law and how it is enforced, but they need at least awareness of the law and of their rights and obligations under it. They require:

- an understanding of the competition law, how it protects them and whether, in a given situation, they may have cause to pursue a remedy or make a complaint; and
- identification of resources for assistance in achieving compliance and redress of harm under the law, including particularly how to access the competition agency for this purpose.

### **The public at large**

16. This is a diverse group – businesses, consumers, academics, government and regulatory officials. Their needs for information about competition law enforcement are equally diverse. Academics and government officials may have need for extensive, technical information about competition law enforcement. Individual consumers ordinarily require much less – as with the second group above, an awareness of the law and how it protects them. Collectively, however, this group forms the constituency for an effective – or ineffective – competition law. Thus, the public at large needs a basic understanding of how competitive markets are essential to the operation of an effective market economy and how competition contributes to consumer welfare.

17. Application of the transparency principle in competition policy must be tempered by the need to protect certain sensitive information from unnecessary disclosure. "Business secrets," or "business confidential" information that is acquired from subjects of the investigation or from third parties in the course of an investigation could, if made available to competitors, cause harm to the owner of the information in the marketplace. An informant who secretly provides information to investigators in a competition investigation might be physically or economically harmed if his or her identity were disclosed. The public policy of encouraging uninhibited communications and deliberations among enforcement officials, and between attorney and client, might be compromised if all such communications were made public. Thus, the laws of virtually every country impose controls over disclosure of such types of information.

18. Such controls are not necessarily absolute, however. A respondent in a proceeding requires sufficient access to information in the competition agency's files to permit it to respond to the allegations against it. In a formal case or proceeding, the public is entitled to as much information about the case as possible, as required by the fundamental principle of transparency. Thus, disclosure of otherwise confidential information in these circumstances may be made on a limited basis. Confidential information may be disclosed to the legal representatives of a party to a proceeding and to a few officers of the business, with instructions not to disclose the information further or to use the information in the conduct of their business. There may be two versions of an evidentiary record in a case or proceeding, one containing all of the evidence and a second, "public" record with the confidential information removed or aggregated in a way that masks sensitive information about particular entities.

19. The OECD's Joint Group on Trade and Competition has previously considered the principle of transparency in the context of competition policy, and it concluded that the following policies exist in varying degrees in all OECD member countries.<sup>7</sup>

#### *Laws*

- Applicable laws and regulations are published in an authoritative source such as an official journal. Alternative methods of dissemination of information, such as the Internet, are used where practicable.

#### *Case Decisions*

- Decisions of the competition authority and the courts resolving or disposing of a proceeding or case are published in a timely manner, as are decisions by reviewing authorities.
- Published decisions set forth the decision-maker's reasoning and pertinent facts, unless protected by confidentiality rules. The evidentiary record on which the decision is based is available for inspection by interested parties, subject to the protection of confidential information.

#### *Enforcement Policy*

- Statements of enforcement policy, commentary on the law or other enforcement guidelines are published, particularly for those aspects of the law subject to case-by-case decision-making.
- Additional guidance in particular cases, e.g., through "advisory opinions," is available and published where practicable, subject to the protection of confidential information.
- Press releases, testimony, speeches and other sources of information about enforcement policy are published.

#### *Investigations*

- Administrative procedures for investigation are published, including the standards for opening or closing investigations.

#### *Procedures*

- Important procedural rights and obligations are codified and published.

#### *Timeliness*

- Information is published with all practical speed.

### **III. NON-DISCRIMINATION**

#### **In the WTO agreements**

20. The core principle of non-discrimination in the multilateral trading system is embodied in national treatment and most-favoured-nation treatment (MFN) provisions. National treatment is set out in the following provisions of the three main WTO agreements:

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<sup>7</sup> OECD (2000), "Remedies Available to Private Parties Under Competition Laws", OECD Doc, Joint Group on Trade and Competition, COM/DAFFE/CLP/TD(2000)24/FINAL.

- (i) GATT: Article III<sup>8</sup>;
- (ii) GATS: Article XVII; and
- (iii) TRIPS Agreement: Article 3.

21. The MFN principle is likewise contained in each of the three main WTO agreements in the following provisions:

- (i) GATT: Article I;
- (ii) GATS: Article II; and
- (iii) TRIPS Agreement: Article 4.

22. The principles of national treatment and MFN are also incorporated in most of the other Annex 1A Agreements.

23. National treatment and MFN obligations can be violated by de facto or de jure discrimination. De jure discrimination concerns measures that expressly discriminate on the basis of origin. De facto discrimination concerns national measures that do not contain any explicit reference to origin. In other words, they are facially neutral. However, when these measures are applied, they discriminate on the basis of origin. For example, the Appellate Body found that a Japanese law imposing a higher tax rate on whisky than on shochu involved de facto discrimination.<sup>9</sup> Although the law did not mention origin, most whiskey was imported and most shochu was domestically made. Since whiskey and shochu were like products the law was discriminatory. De jure discrimination is therefore easier to detect than cases of de facto discrimination. Although both de facto discrimination and procedural unfairness<sup>10</sup> can result in "discrimination" against foreign firms, these are distinct concepts. Unlike violations of procedural fairness, de facto discrimination can occur even where a measure is applied in a uniform, impartial and reasonable manner.

## **Key Objectives**

### ***National Treatment***

24. National treatment requires that a WTO Member not put the goods, services or persons of other WTO Members at a competitive disadvantage vis-à-vis its own goods or services or nationals. The focus of the GATT, at least as originally negotiated in 1947, was on the control and liberalisation of border measures restricting international trade. A key principle is that, as a general rule, any border measures to give a competitive advantage to domestic products should take the form of customs tariffs and that the level of such customs tariffs should be a matter for negotiation and bound in national schedules. Within this scheme of things, Article III on national treatment plays a critical role since, as its paragraph 1 makes clear, it is designed to ensure that all other measures, referred to as "internal" measures, are not applied to imported or domestic products so as to afford protection to domestic production. It thus serves the purpose of ensuring that internal measures are not used to nullify or impair the effect of tariff concessions and other multilateral rules applicable to border measures.

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<sup>8</sup> Of particular relevance is Article III:4, which requires national treatment in respect of all laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of goods.

<sup>9</sup> Appellate Body Report, Japan - Taxes on Alcoholic Beverages, WTO Doc WT/DS8,10,11/AB/R (1 November 1996).

<sup>10</sup> A discussion of procedural fairness begins at paragraph 49.



25. In the area of trade in services, internal measures are particularly relevant since, under the GATS, trade in services includes the supply of a service through commercial presence (which can include foreign direct investment). The approach in the GATS is not to make national treatment a principle of general application but to provide for it to be applied when a specific commitment has been made and recorded in national schedules that form part of the Agreement. As is made clear in Article XIX of the GATS, the scope of the schedules is to be progressively enlarged through successive rounds of trade negotiations with a view to progressively higher levels of liberalisation – in the same way as trade in goods has been progressively liberalised through successive tariff negotiations.

26. In the area of intellectual property, national treatment has traditionally been the cornerstone of public international law, notably as reflected in the Paris and Berne Conventions.<sup>11</sup> The TRIPS Agreement is no different in this respect from the main pre-existing conventions, on which it builds and whose main substantive provisions it incorporates. With some relatively minor exceptions, national treatment applies to all aspects of the protection of intellectual property addressed by the Agreement.

### ***MFN***

27. The standard of MFN is described somewhat differently in the three main WTO agreements. The GATT uses traditional language in referring to the obligation to extend "immediately and unconditionally" to all WTO Members "any advantage, favour, privilege or immunity" granted by a Member. The TRIPS Agreement uses the same formulation as the GATT. The GATS uses a "treatment no less favourable" standard for expressing its MFN obligation. The meaning of this formulation for MFN is broadly equivalent to that used in the GATT and the TRIPS Agreement.

### **Key Exceptions**

#### ***National Treatment***

28. The scope of the national treatment obligations under the GATT and GATS is limited in various ways. In particular, the GATT requirement is limited to "internal" measures and the corresponding requirement in the GATS is dependent on specific commitments having been scheduled by the Member concerned. In addition, there are a number of permissible exceptions to the national treatment principle under these two Agreements. Without attempting to be fully comprehensive and without describing the often complicated experience with their application, the following exceptions should be noted:

- (a) Government procurement of goods and services (Article III:8(a) of the GATT and Article XIII of the GATS). However, it should be noted that 25 WTO Members have made national treatment commitments towards each other under the plurilateral Agreement on Government Procurement (GPA).
- (b) General exceptions covering such matters as measures necessary to protect public morals or maintain public order, to protect human, animal, or plant life or health and to secure compliance with laws and regulations not inconsistent with the provisions of the agreement in question (Article XX of GATT and Article XIV of GATS).
- (c) Security exceptions (Article XXI of the GATT and Article XIV***bis*** of the GATS).

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<sup>11</sup> Berne Convention for the Protection of Literary and Artistic Works, 828 U.N.T.S. 221 (signed 14 July 1967) Article 5; Paris Convention for the Protection of Industrial Property, 11851 UNTS (No. 11851) 305 (signed 14 July 1967) Article 2.

29. As mentioned earlier, in terms of the scope of the TRIPS Agreement, the national treatment obligation in that Agreement is relatively comprehensive. However, where exceptions to this principle have been made under the main pre-existing intellectual property conventions, they are also permitted under the TRIPS Agreement, for example the so-called "comparison of terms" in the area of copyright and, subject to some additional safeguards in the TRIPS Agreement, provisions relating to judicial and administrative procedures in the area of industrial property. Moreover, in respect of performers, producers of phonograms and broadcasting organisations, the national treatment obligation only applies in respect of the rights provided under the TRIPS Agreement.

### ***MFN***

30. There are also a number of important exceptions or qualifications to the application of the MFN principle. These include the general exceptions and security exceptions discussed above in relation to national treatment. In addition, in regard to the GATT, important exceptions to the MFN principle are permitted for customs unions and free-trade area agreements (Article XXIV), and preferences in favour of and between developing countries (the Enabling Clause).<sup>12</sup>

31. Under the GATS, Members are allowed to register a once-off list of exemptions from the MFN treatment standard. These exemptions are subject to review five years after the entry into force of the WTO and, in principle, should not exceed a period of ten years.<sup>13</sup> The GATS also allows an exception from MFN treatment for economic integration agreements, subject to certain conditions, (Article V) and exempts from its rules air transport traffic rights and services directly related to their exercise as well as measures taken for prudential reasons in the financial services sector.<sup>14</sup>

32. The main exceptions to MFN treatment permitted under the TRIPS Agreement relate to international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property; situations in the Berne Convention or the Rome Convention authorizing treatment based on the treatment accorded in another country; the rights of performers, producers of phonograms and broadcasting organisations not provided in the Agreement; and treatment under pre-existing international agreements that have been notified and do not constitute an arbitrary or unjustifiable discrimination. Furthermore, an exception is allowed for international registration systems concluded under the auspices of WIPO.

### **In competition law**

33. There are many situations in which discrimination issues could arise in the course of competition enforcement. The discussion below is an attempt to identify and describe several of them, without offering any judgement as to whether they would, in the context of a possible multilateral framework on competition, actually constitute discrimination. Among the two components of non-discrimination – national treatment and MFN – it would seem that national treatment is the more relevant in the enforcement context.

#### ***Non-discrimination in procedural aspects of competition enforcement***

34. The application of non-discrimination principles to procedural aspects of competition enforcement would seem to be relatively straightforward. The rules of procedure – for addressing the competition agency, for conducting and participating in investigations, cases and appeals, and so forth – should apply equally to all parties without regard to their nationality. In this regard, transparency

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<sup>12</sup> Contracting Parties, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT Doc L/4903, BISD 26S/203 (28 November 1979).

<sup>13</sup> Most of the exemptions listed are in the areas of maritime, transport and audiovisual services.

<sup>14</sup> Annexes to the GATS on Air Transport Services and Financial Services.

reinforces non-discrimination. Transparency is especially important for foreign persons, who would not otherwise be as familiar with national procedures and customs as their domestic counterparts. Non-discrimination reinforces the principle of procedural fairness, as well. In this way all of the three core principles are interrelated.

### *Non-discrimination in substantive enforcement*

35. Here the issues are much more complex. An oft-quoted phrase embodies non-discrimination in competition enforcement: "Competition law protects competition, not competitors." If this principle were applied rigorously and impartially, there could be little in the way of discrimination. It is not easy to move from the general to the specific in this instance, however.

### *De jure and de facto discrimination*

36. These two concepts could be applied to competition law enforcement in the same way that they apply in the trade context. Thus, de jure discrimination would exist when competition laws, or ancillary laws such as those creating exemptions, draw an express distinction on the basis of national origin which places foreign firms at a competitive disadvantage. De facto discrimination could be said to exist in the case of laws, neutral on their face, that in application discriminate against foreign firms. De facto discrimination was found to exist in the trade context in the whiskey case cited above. It might occur in the competition law enforcement context in the case of a statutory sectoral exemption from the competition law, in which the eligible firms are defined in a way that practically, but not expressly, excludes foreign firms.

37. In the competition context, de facto discrimination is used in another way as well, to describe a situation in which a domestic firm receives more favourable treatment than a foreign firm in a particular case or as between two cases. In a case involving an international cartel, for example, a domestic firm could have qualified for leniency under a country's leniency programme, to the exclusion of foreign firms. (Leniency is often available only to the first firm "through the door.") Foreign firms may have received higher fines than domestic ones, notwithstanding that the foreign and domestic firms appeared to have similar roles in the conspiracy. A merger of two foreign firms might have been denied, while a similar transaction involving two domestic firms might have been approved. Exclusionary conduct by a foreign firm might have been considered an abuse of dominance, while similar conduct by a similarly situated domestic firm might not have been condemned. Exclusionary conduct by a domestic dominant firm against another domestic firm might have been condemned, while the same conduct against a foreign firm might have been overlooked.

38. The different outcomes for foreign firms vis-à-vis domestic firms in these examples could arise from discrimination by the decision-maker against foreign firms. Alternatively, they could simply reflect differences in the factual matrices of the various cases. Different treatment in these circumstances would not be discriminatory if the facts justify it. Thus, it could be difficult to establish the reason for the different outcomes as an evidentiary matter. In another context, one Panel has stated that the WTO dispute settlement system was not "intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system, and a function WTO Panels would be particularly ill-suited to perform."<sup>15</sup> Therefore it may be undesirable to apply

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<sup>15</sup> WTO Panel, United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, WTO Doc WT/DS179/R (22 December 2000) paragraph 6.50. In Communication from the European Community and its Member States, "A Multilateral Framework Agreement on Competition Policy", WTO Doc WT/WGTCP/W/152 (25 September 2000), the European Community and its Member States recognised this fact: "We are not suggesting, therefore, to apply in a competition agreement the concept of de facto discrimination. The reason is that, in a competition context, such [a] concept raises

in the WTO context the notion of de facto case-by-case discrimination as used in the competition context.

39. Below are some examples of possible discrimination in competition law enforcement other than that of the case-by-case type.

### *Cartels*

40. In many countries there are exemptions of various kinds from the prohibition against cartels. The agricultural sector is a principal beneficiary of such exemptions. Labour organisations and collective bargaining activity are exempt almost everywhere. Providers of certain professional services may enjoy full or partial exemptions. State-owned enterprises are not subject to competition laws in some (but not all) countries, and certain commercial activities of governments, both national and local, may enjoy an exemption. In some countries, "crisis cartels" and cartels involving small and medium-sized businesses are permitted in some circumstances. If these exemptions are available only to domestic firms they are, on their face, discriminatory.<sup>16</sup>

41. The laws of some countries provide exemptions for what are generically called "export cartels." In general, such laws exempt from the anti-cartel prohibition of the competition law anticompetitive conduct by associations or combinations of exporters that solely affects exports. The first point to be made about export cartel laws is that not all agreements that are formed under these laws are competitively harmful. They may have efficiency-enhancing, procompetitive effects on the exports from the country of origin, and hence benefit, rather than harm, consumers in importing countries.<sup>17</sup>

42. But to the extent that such agreements are on balance competitively harmful in export markets it could fairly be asked whether the laws that permit them are discriminatory. In the broadest sense they might appear to be so, as these agreements would harm foreign consumers but not domestic ones. The simple response to that point, however, is that competition laws are not meant to protect foreign consumers, and indeed many countries, if not most, would consider that they do not have jurisdiction to protect foreign consumers under their competition laws. In another sense, export cartel "exemptions" are like any other: a type of agreement has been exempted, for public policy reasons, from the competition law. In the context of this discussion, which is whether such laws might be discriminatory and not whether on balance they are beneficial or harmful, the question that one might appropriately ask is whether the exemption is available to all firms competing on the domestic market on a non-discriminatory basis.

43. Finally, while in some countries cartel conduct is, legally or effectively, per se unlawful, in others even cartel conduct must be considered in the context of possible offsetting benefits. Here it seems that discrimination in some form is especially possible, given that such benefits are often expressed in terms of their effect on the domestic economy. That topic is addressed more fully below, under mergers and other rule of reason offences.

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complex questions about the enforcement policies followed by competition authorities, including how competition law is being applied to individual cases."

<sup>16</sup> Some proponents of a multilateral framework agreement propose that the non-discrimination principle not apply to sectoral exemptions, and that they be subject only to a requirement of transparency. See, Report (2001) of the Working Group on the Interaction between Trade and Competition to the General Counsel, para. 21.

<sup>17</sup> See, Dick, A.R. (1992), "Are Export Cartels Efficiency-enhancing or Monopoly-promoting: Evidence from the Webb-Pomerene Experience", Vol. 14, *Research in Law and Economics*, Greenwich, CT, pp. 89-127.

### ***Abuse of dominance***

44. Some of the same issues that are relevant to discrimination in anti-cartel enforcement could be applicable to abuse of dominance cases as well. This would be true with regard to exemptions, for example. A state-owned or state-sanctioned monopolist might be exempt from prosecution for conduct that a foreign firm could be sanctioned for. But further, as with cartels in some countries, the abuse of dominance analysis may include consideration of non-competition benefits that could be applied discriminatorily, which is discussed below.

### ***Mergers and other rule of reason offences***

45. The laws of many countries that apply to mergers and other rule of reason offences provide that, usually only in exceptional cases, transactions whose anti-competitive effects are excessive may nevertheless be approved upon a showing of offsetting beneficial effects. The laws of some countries, for example, apply a broad "public benefits" test to merger analysis, theoretically permitting consideration of almost any effect from a merger, including its effect on competition. Other laws are more focused, enumerating specific factors that are relevant. Several of these come under the "industrial policy" rubric: international competitiveness; promotion of exports, national security; technical development (R&D), and promotion of employment. Other non-competition factors that are relevant in some countries are benefits to consumers (apart from enhancement of "consumer welfare," which is a concept employed in competition analysis), market integration, promotion of small and medium sized enterprises, promotion of diversity in media ownership, promotion of diversity of ownership of assets, especially among previously disadvantaged classes, and "social progress."

46. It is probably safe to say that in all cases these factors are considered relevant only to the extent that they apply to the domestic economy. Is there an opportunity for discrimination in the application of these criteria? It would seem so. Industrial policy would seem to be fundamentally associated with the promotion of domestic enterprises over foreign ones. This would certainly be true in the case of "national security," for example. Some countries promote diversity in media ownership, for example, which could be interpreted as excluding foreign ownership at some level.

### ***International co-operation and positive comity***

47. It has been proposed that one element of a possible multilateral framework on competition be a provision for international co-operation in competition enforcement. Such co-operation could include both co-operation in specific cases, through exchanges of case-related information, subject to national laws protecting confidential information, and general exchanges of information and experience and joint analysis of global competition issues.<sup>18</sup> Such an agreement might also include a provision providing for positive comity – proactive response to by one country to a request by another to address anti-competitive conduct in the requested country that is harming the interests of the requesting country.<sup>19</sup>

48. It could be asked whether the MFN principle would apply to such an undertaking. In other words, would a country that had entered into a bilateral co-operation agreement with another country be obliged to offer the same terms to all other parties to a possible multilateral framework on competition? It is well known, of course, that countries enter into much closer co-operative relationships in competition policy with some countries than with others. These relationships evolve

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<sup>18</sup> See, European Community, *supra*, and also Communication from the European Community and its Member States, "A WTO Competition Agreement and Development", WTO Doc WT/WGTCP/W/175 (26 July 2001).

<sup>19</sup> See, OECD (1999), "CLP Report on Positive Comity", OECD Doc Committee on Competition Law and Policy, DAFFE/CLP(99)19.

over time, between countries that have developed mutual trust and a close working relationship. The general view appears to be that MFN should not apply to co-operation arrangements.

#### IV. PROCEDURAL FAIRNESS

##### In the WTO agreements

49. The principle of "procedural fairness" is more entrenched in the domain of competition policy than that of trade policy. Certainly, discussions on core WTO principles within the Working Group on the Interaction between Trade and Competition Policy have traditionally been limited to areas such as national treatment, MFN treatment and transparency.<sup>20</sup> Nonetheless, various provisions in the WTO agreements can be identified which are closely related to the principle of procedural fairness.

50. It should be noted that there are various formulations of the concept of "procedural fairness", which is referred to in certain jurisdictions as "due process" or "natural justice". Nonetheless, two common elements to this concept, that are found in the three main WTO agreements, are the requirements for fair and equitable procedures in administrative and judicial proceedings and the capacity to review administrative decisions.

51. The key provisions relating to procedural fairness in the WTO agreements are:

- (i) GATT: Article X - which contains provisions on the uniform, impartial and reasonable administration of trade measures and the right of review of action taken pursuant to them;<sup>21</sup>
- (ii) GATS: in particular Article VI; and<sup>22</sup>
- (iii) TRIPS: in particular Articles 41-2 and 62.<sup>23</sup>

52. Provisions containing elements of procedural fairness can also be found in various Annex 1A Agreements, such as those on Subsidies and Countervailing Measures, Anti-Dumping Measures, Customs Valuation, Import Licensing Procedures and Pre-Shipment Inspection. Procedural fairness

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<sup>20</sup> WTO, "The fundamental WTO principles of national treatment, most-favoured-nation treatment and transparency", WTO Doc WT/WGTCP/W/114 (14 April 1999) is illustrative, limiting its discussion on fundamental WTO principles to these three traditional domains. In WTO, "Trading Into the Future: The Introduction to the WTO – Principles of the Trading System" [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm), the WTO Secretariat includes freer trade through negotiation and predictability through binding as core principles, but not procedural fairness.

<sup>21</sup> With respect to these elements, GATT Article X:3(a)-(b) requires each WTO Member to administer its laws, regulations, decisions and rulings in a "uniform, impartial and reasonable manner", and to maintain or institute judicial, arbitral or administrative tribunals or procedures allowing for "prompt review and correction of administrative action".

<sup>22</sup> Under GATS Article VI:1, Members must maintain or institute tribunals or procedures allowing for review of administrative decisions affecting services.

<sup>23</sup> Any administrative procedures concerning the acquisition, maintenance, revocation or inter parties procedures of intellectual property rights under the TRIPS Agreement must be "fair and equitable", with prompt decisions based on the merits of the case, at which the parties are offered the opportunity to be heard regarding the evidence offered (Articles 62 and 41). These decisions are in turn subject to review by a judicial or quasi-judicial authority (Article 62).

concerns also permeate the DSU itself, and a considerable amount of attention has been paid to such concerns in WTO jurisprudence.<sup>24</sup>

53. The TRIPS Agreement is notable to the extent that it also provides that civil judicial procedures, concerning the enforcement of the intellectual property rights covered by the agreement, are available to "right holders" (TRIPS, Part III, Section 2). Thus it introduces the concept of private actions into the multilateral trading agreements.<sup>25</sup> An alternative model allowing standing to private parties is GPA Article XX. The GPA requests from all its signatories to establish a forum where private parties can, within short time-limits, bring forward complaints relating to government procurement.<sup>26</sup>

54. To the extent that procedural fairness is seen to include the careful treatment and protection of confidential information in the enforcement process, the discussion and provisions highlighted under the section on "transparency" regarding the protection of confidential information overlaps with this principle.

### **In competition law**

55. Parties to competition investigations and proceedings should have assurance that the relevant procedures adequately protect their rights and interests in the matter. As with transparency, there are different classes of participants in these proceedings, and their interests in procedural fairness differ accordingly. Participants could be classified in three groups: (1) respondents or subjects, (2) victims and private claimants, and (3) other interested third parties, such as complainants, witnesses and public interest groups.

### **Respondents or subjects**

56. This group is potentially liable for sanctions resulting from a proceeding in the competition agency, and accordingly has significant interests in procedural fairness that begin with the investigation and carry through the formal proceeding, if any, decision and appeals. These interests could include the following:

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<sup>24</sup> See: Appellate Body, India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, WTO Doc WT/DS50/AB/R (19 December 1997) where the Appellate Body spoke to due process (procedural fairness) requirements at the consultations stage; Appellate Body, Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and other Items, WTO Doc WT/DS56/AB/R (27 March 1998) which spoke to panel working procedures; European Communities - Customs Classification of Certain Computer Equipment, WTO Doc WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (5 June 1998); Appellate Body, Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States: Recourse to Article 21.5 of the DSU by the United States, WTO Doc WT/DS/132/AB/RW (22 October 2001).

<sup>25</sup> Some observers consider that the right of firms to petition the courts directly in cases of alleged competition law violations ("private actions") is an important aspect of due process.

<sup>26</sup> More specifically, Agreement on Government Procurement, WTO Doc LT/UR/A-4/PLURI/2 (15 April 1994) Article XX sets out under its "challenge" procedures that "[e]ach Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest." These challenges shall be heard by a court or by an impartial and independent review body and shall provide for: "(a) rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. ... an assessment and a possibility for a decision on the justification of the challenge; and (c) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest." With a view to the preservation of the commercial and other interests involved, the challenge procedures are also subject to requirements that they be "completed in a timely fashion".

### ***Investigation***

- notice of an investigation and of its subject matter, including the nature of the possible violation;
- an understanding of the procedural rules applied by the investigating agency;
- an ability to submit information and arguments to the agency prior to its decision;
- if the possible offence is a crime, the application of usual constitutional protections in criminal matters, including a right against being compelled to incriminate oneself; and
- if the agency is considering a decision or formal action against the person, notice of the grounds for the tentative decision and the ability to respond to the allegations.

### ***Enforcement proceeding***

- notice of the allegations against it and access to relevant evidence in the investigative file, subject to reasonable protections for confidential information;
- the right to representation by counsel;
- the right to present evidence and analysis to the decision maker;
- evidentiary standards that conform to national norms in litigation; and
- final decisions in written form, including the legal and factual findings.

### ***Appeals***

- the right of appeal from an adverse decision to an independent authority and ultimately to the courts.

### ***Victims and private claimants***

57. This group would include private parties who consider that they have been harmed by anti-competitive conduct and that they have enforceable rights as a result. The Joint Group has studied the subject of remedies for private parties under competition laws,<sup>27</sup> and concluded that private complainants or claimants generally have the following rights under competition laws in all systems:

- to petition the competition agency, formally or informally, to undertake an investigation or proceeding that would remedy a perceived violation of the competition law that is harmful to the petitioner;
- to present evidence and analysis to the competition agency, formally or informally, relating to conduct that is the subject of an agency investigation or proceeding;
- to pursue, through active participation in competition agency proceedings (either directly or by virtue of formal intervention) or through private suits in court, or both, remedies against conduct in violation of the competition law that is harmful to the private party, in a manner consistent with the need to avoid undue interference with the basic mission of the competition agency to enforce

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<sup>27</sup> OECD (2000), "Remedies Available to Private Parties Under Competition Laws", OECD Doc, Joint Group on Trade and Competition COM/DAFFE/CLP/TD(2000)24/FINAL.



the competition law on behalf of all citizens and to protect against the filing of baseless or vexatious private petitions or lawsuits.

*Other interested third parties*

58. This group, which would include complainants, third party witnesses in enforcement proceedings and public interest or consumer groups, is relatively diverse. In general its members would have an interest in the outcome of a competition investigation or proceeding but not necessarily any enforceable rights in that context. Procedural fairness for this group would include the following:

- for complainants, access to the competition agency for the purpose of submitting their complaint and supporting evidence and analysis, and reasonable protection of confidential information provided by the complainant, including the assurance of confidentiality in situations where the complainant could be harmed if its identity were known;
- for witnesses in formal proceedings, the protection of national norms relating to the giving of testimony, evidentiary standards and representation by counsel, and reasonable protection of confidential information provided by the witness;
- the conduct of formal proceedings in public, supported by a public evidentiary record, subject to reasonable protection of confidential information.

*Timeliness*

59. The concept of timeliness is a part of all aspects of procedural fairness. Enforcement proceedings should be completed in a timely manner. Undue delay harms both those who would seek redress from anticompetitive conduct, which includes a country's consumers, and those who are subjects or respondents in such procedures, whose businesses may suffer from the costs and uncertainty associated with lengthy proceedings.

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