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Working Group on the Interaction between Trade and Competition Policy

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Addressing Needs and Concerns Expressed by WTO Members

I. INTRODUCTION

1. The Doha Ministerial Declaration mandates that negotiations on trade and competition policy will take place after the fifth Ministerial Conference (MC5) on the basis of a decision to be taken, by explicit consensus, at that MC on modalities of negotiations. It also highlights that full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them. It follows that the launch of any negotiations at MC5 will hinge on whether an explicit consensus could emerge at that MC on modalities. Also, the provision of appropriate flexibility to address the needs of developing and least-developed country participants will be crucial in preparing the ground for a decision to be made.

2. To enable Members to make an informed decision on whether or not they will be ready to undertake any multilateral obligations in the area of trade and competition policy, it is necessary for them to know the breadth and depth of possible obligations as well as the provision of any flexibility in areas they have limited capacities or difficulties. Only with such knowledge would Members be in a position to assess realistically the costs and benefits of a possible multilateral framework on trade and competition policy (MFC) and its practical implications to their economies. HKC therefore urges this Working Group to have more studies and discussions in this respect. To help address the issue from a pragmatic and forward-looking perspective, HKC would like to share some ideas with Members with a view to stimulating further deliberation. In this paper, we hope to highlight the needs and concerns of developing Members as well as Members without horizontal competition laws regarding a possible MFC and to canvass how to address those needs and concerns.

II. CONCERNS OF DEVELOPING MEMBERS UNDER A POSSIBLE MFC

3. Past discussions in this Working Group indicate that the practical implications of a possible MFC on WTO Members, developed or developing alike, will depend on the breadth and depth of the relevant obligations versus the regimes of Members. Given the extensive diversity among Members of their economic development, industrial policies, socio-economic circumstances, legal traditions, competition approaches/institutions/culture, etc, it is only natural that a possible MFC would not be entirely consistent with the present regimes of certain Members. Such Members would have to align

their regimes in a progressive manner in order to achieve full compliance. Obligations under a possible MFC will therefore carry implications in terms of policy, legislative and institutional changes, and resources requirements.

4. As suggested by the OECD, regardless of whether competition regimes have been put in place, developing countries face special challenges in establishing effective competition laws and policies. This is often attributable to the problems of developing a "competition culture", weak enforcement capabilities and court systems as well as markets that may be characterised by high degrees of concentration and histories of state intervention.[1] Besides, developing countries may not yet have adequate legal, institutional or economic capacity. It is not uncommon to find valid economic justifications to allow a treatment different from developed Members to deal with particular circumstances. For instance, a developing Member may have the need to allow a monopoly so that its own indigenous company can achieve the economies of scale to survive global competition.

5. Since Doha, this Working Group has examined in depth the various core principles listed in paragraph 25 of the Declaration. Past discussions have fully demonstrated that the practical implications of implementing these principles could be very different for different Members. To name a few examples, many Members have horizontal (e.g. statutory monopolies, small and medium enterprises (SMEs), Research and Development agreements, efficiency enhancing measures and other efficiency enhancing arrangements) or sectoral (e.g. agriculture and petroleum) exemptions or exceptions in their competition laws and/or policies. These exemptions and exceptions may not be fully consistent with the principle of **non-discrimination**, particularly in respect of national treatment. Developing Members, in particular, may have provided for exemptions or exceptions in their competition policy in view of other overriding economic, industrial or developmental policies. Therefore, certain elements of non-discrimination, if included as obligations under a possible MFC, may cause difficulties for some Members.

6. For **transparency**, there are two levels of transparency from the perspective of existing WTO requirements. First, laws, policies and decisions that are relevant to or bear upon a WTO obligation should be published or otherwise be made available publicly. Second, relevant government actions bearing on a WTO obligation should be notified. To put these two levels of requirements in the context of a possible MFC, not only laws, policies and decisions directly relating to competition may be required to be notified, but those bearing *de facto* upon competition (e.g. laws regulating specific sectors with certain competition-related clauses) may also be subject to the notification requirement. The second level of transparency may extend to government actions that affect competition in other policy areas (e.g. allowing or restraining new entry into a particular sector). Clearly, these two levels of transparency carry very different implications for Members depending on the scope of the obligations.

7. The principle of **procedural fairness** would likely require Members to set up and maintain some procedures, or even a judicial framework, for handling appeal cases.[2] Appeal and review proceedings involved in a due process can be very costly to developing Members, in particular small economies. Even for those Members who have already put such proceedings in place, the exact institutional setup, scope of application and jurisdiction, appeal and review process, etc vary from one Member to another. If the unique features of individual regimes are not fully taken into account, obligations in this area are likely to create costly or even insurmountable compliance problems.

[1] See OECD's paper, COM/TD/DAFFE/CLP(2001)21, para. 29.

[2] In its submission, WT/WGTCP/W/212, para. 18(c), Korea suggests that both domestic and foreign individuals and firms should be guaranteed the right to appeal to and to request remedy measures from competition authorities or courts against anti-competitive practices.

8. For provisions on **hardcore cartels**, further deliberations are needed on whether and, if so, how the MFC should cover hardcore cartels. Some relevant issues may include the definition and scope of hardcore cartels, implications on domestic regimes in terms of any requirements for establishment or harmonisation of laws/institutions, the effect of hardcore cartels on international trade flow, the exemptions required from cartel prohibitions, the rationale and merits for the WTO to venture into this area, the possible scope of multilateral obligations, and possible ways for implementation. Due to the vast differences in legal and administrative structures, any possible obligations must embrace those differences and provide for adequate flexibility in order to command the necessary consensus for their inclusion in the MFC. If the obligations are prescriptive, developing Members will face serious compliance problems. Some argue that whatever the multilateral obligations would be developed, the burden of adjustment lies with developing Members as the developed ones have already had the institutional capacity and basic legislation in place.

9. **Voluntary cooperation**, while voluntary in nature, nonetheless causes resources and capacity concerns to developing Members, especially in the context of a possible MFC under the WTO. Different types of international cooperation arrangements in the competition field require different levels of resources. At the basic level, cooperation may simply seek to allow dialogues between competition authorities to foster greater understanding of one another's regime and to promote dissemination of general information of common interest. At a higher level, cooperation may entail the establishment of a dedicated forum to facilitate peer review of competition policies and/or joint analysis of regional or global competition issues. At the most sophisticated level, cooperation can extend to case-specific collaboration among competition authorities to tackle cross-border anti-competitive practices. For this type of cooperation, a high degree of similarity in enforcement approach and experience is called for, not to mention the resources implications. There are also worries that certain developing Members are frequently required or targeted to provide cooperation assistance to developed Members, thus creating tremendous burden to the former.

10. Putting aside the question of whether the above elements should be included in a possible MFC under the WTO, obligations in respect of these elements will possibly require changes in different extents to the laws and institutional setup of certain Members. New multilateral obligations will add certain compliance costs in many cases. Members, in particular the developing ones lacking legal or economic capacity, will need to make a realistic assessment on the breadth and depth of possible obligations under an MFC before they can decide whether or not they are capable of taking on the obligations involved.

III. CONCERNS OF MEMBERS WITHOUT HORIZONTAL COMPETITION LAWS

11. Apart from the above developmental considerations, HKC has maintained that the domestic policies and concerns of Members should be fully respected in deliberating and designing any possible multilateral obligations. These concerns may include public policy considerations such as industrial and economic development, SMEs support, employment, environment, need for prudential supervision in the sectors, need to maintain service reliability, need to meet social service commitments, safety needs, and other public interest considerations. Only by respecting the domestic policies and concerns of Members could they achieve some common will to negotiate and implement a possible MFC.

12. One of the domestic policies and concerns that HKC hopes to highlight in this paper relates to the absence of a horizontal competition law. As suggested by Japan, flexibility in the form of S&D should be considered for those economies without competition laws, irrespective of whether the country is developing or not.[3] Up till now, about one quarter of WTO Members does not have a competition law. Some of them may have capacity constraints, while others may choose not to enact

[3] See Japan's submission, WT/WGTCP/W/217, p. 3.

competition laws because of valid domestic policy concerns. There is no reason why the concerns of these economies should be sidelined. A consensus for any MFC could not possibly emerge without addressing these concerns.

13. As we have highlighted in previous WGTCP meetings, many of the past discussions in this Working Group have focussed on proposals requiring Members to have a competition law. Yet, from the economic point of view, there is little, if any, systematic evidence indicating that there have been significant improvements in the performance of developing economies that have adopted a generic competition law. Similarly, economies without competition laws are not necessarily less competitive than the others.[4] Taking HKC as an example, whilst not having a horizontal competition law, we have long been a small, open, and externally oriented economy that maintains free trade, minimal barriers on market entries as well as free flow of capital and investment. An IMF study has noted empirically that "Hong Kong SAR is neither significantly more nor significantly less competitive than the average OECD country".[5] The Trade Policy Review on HKC in 2002 also commended HKC as one of the most open economies in the world.[6]

14. In this connection, the Secretariat has pointed out that "[i]n cases where no such law exists or the law is not effectively applied, or where competition rules are applied through sector-specific legislation, the relevance of the fundamental WTO principles to competition rules is unclear".[7] Without a clear picture of the scope of possible obligations, it is as yet unclear how certain elements in paragraph 25 of the Doha mandate (such as provisions on hardcore cartels) can be put into effect by those economies without competition laws. Moreover, even among Members with a competition law, the scope and application of their laws vary considerably. These Members would face compliance problems should there be an MFC imposing an obligation to enact competition laws or introducing requirements inconsistent with their existing regimes.

IV. FLEXIBILITY ARRANGEMENTS TO ADDRESS CONCERNS

15. As illustrated above, competition policy is an area where one size does not fit all. Time and again, past discussions in this Working Group have underlined the difference between this subject and other traditional trade issues. The above analysis also indicates that any possible MFC would inevitably carry with it substantive and substantial implications which stretch out and straddle Members' domestic policy, legislative and institutional set-ups. Certain new obligations may also bring compliance problems due to inadequate capacity or domestic policy considerations.

16. In the light of the above and in recognition of the diversity among Members of social and economic development levels, differences in scope and emphases of competition policy, different choices of implementation instruments, and variations in legal traditions, sufficient flexibility has to

[4] There does not seem to have any authoritative objective measurements for a lack of competition in an economy or a particular sector. Any such measurement must rest on some concept of what is and what is not an anti-competitive practice. On this, while there is consensus on a subset of practices that are considered anti-competitive, there is no complete consensus. The correlation of the Herfindahl index, used as a measure of market concentration, with the competitiveness of a market is also imperfect. If a market is contestable, the conduct of sellers in that market is not likely to be anti-competitive even if the number of such sellers is low (such that the Herfindahl index is high). In addition, while the IMF has provided a methodology for measuring competition by using the extent of the company's profit margins (price less average cost) to ascertain the intensity of competition in particular sectors, this approach is arguable conceptually. The application of different measures of profit margins shows results which are not entirely consistent.

[5] See "Domestic Competition, Cyclical Fluctuations, and Long-Run Growth in Hong Kong SAR", IMF Working Paper WP/00/142.

[6] See minutes of Trade Policy Review meeting WT/TPR/M/109, para. 134. (Subject to finalisation of the minutes of the TPR meeting.)

[7] See Secretariat's Notes, WT/WGTCP/W/209, para. 25.

be incorporated into any possible MFC to make it workable and acceptable to the wide membership. Needless to say, even if a decision could be reached by explicit consensus on the modalities at MC5, the conclusion of any subsequent negotiations for an MFC would again hinge upon a consensus among the WTO membership on the outcome, i.e. the exact scope and coverage of obligations under the MFC.

17. As HKC sees it, flexibility can be built into both the "breadth" and "depth" of obligations. In terms of "breadth", obligations under different core principles or major issues can be divided into blocks of common and optional obligations. Common obligations could encompass *general obligations and disciplines* as well as any *best-endeavour provisions* (e.g. on the core principles and capacity building) that are to be subscribed by all Members. Optional obligations could include *non-binding guidelines or specific commitments* that are to be adopted by each Member individually and voluntarily. In our view, detailed elements under the core principles as well as other elements set out in paragraph 25 of the Doha mandate (i.e. hardcore cartels and voluntary cooperation) should be under this category. Individual Members are free to choose what optional obligations they agree to abide by and what specific commitments to undertake, when they are ready to do so. It provides adequate flexibility for Members to undertake specific commitments commensurate with their needs and circumstances, without impeding their pursuit of other domestic policy goals. This could also help minimise the compliance problems of Members, including those without horizontal competition laws.

18. Japan has suggested that in a possible MFC, a general rule could be worked out leaving the possibility to give a more detailed explanation or examples in the form of non-binding guidelines or a menu of options.[8] Moreover, the experience of the GATS Basic Telecommunications Reference Paper, which provides a set of regulatory principles/disciplines for basic telecommunications services, may serve a relevant reference. Members can choose to incorporate the Reference Paper with or without modifications in their Services schedules as additional commitments.

19. In terms of "depth", a consensus on a satisfactory outcome is only achievable by avoiding overly prescriptive and burdensome provisions that entail significant adjustments to domestic regimes. To address the concerns about onerous obligations and compliance problems**, it is most important that any possible MFC should avoid prescribing the means through which relevant obligations are to be fulfilled by Members**. It should focus on the ends, not the means. We have to accept the reality that the community of trading nations is very diverse with different domestic circumstances and levels of development. The appropriate means for implementing the obligations is therefore no better than left to a domestic policy decision by each Member. A Member should be free to choose how to apply a competition regime in a way that reflects its economic situation and development/policy objectives. In the circumstances, **allowances have to be made for differences in domestic regimes provided they are not contradictory to or in conflict with the underlying consensus expressed in the fundamental WTO principles**. The fact that GATT and GATS do not specify the means (legislative or otherwise) through which individual Members implement the fundamental WTO principles does not hamper the effectiveness of enforcement of such principles.

20. Where appropriate, flexibility such as transitional period should also be provided to address Member's concerns. In the end, a Member must be satisfied that its concerns have been adequately addressed and it will not have compliance problems before that Member could readily accept the final package of an MFC.

V. CONCLUSION

21. HKC believes that whatever multilateral outcomes to be achievable should take due account of the needs of developing and least-developed Members as well as fully respect the domestic policies

[8] See Japan's submission, WT/WGTCP/W/217, p. 2.

and concerns of Members. We hope this submission could provide some basis for further deliberation on the relevant issues in the Working Group with due regard to the needs of all WTO Members. We also hope that our ideas on flexibility arrangements will be able to meet the needs of pro-negotiation Members whilst retaining sufficient flexibility for those with different domestic circumstances and concerns.

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