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COMMUNICATION FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

The following communication, dated 9 May 2003, has been received from the Permanent Delegation of the European Community with the request that it be circulated to Members.

Dispute Settlement and Peer Review: Options for a WTO Agreement on Competition Policy

INTRODUCTION

1. Although some references have been made to both a peer review process as well as the application of dispute settlement in written submissions as well as oral interventions in the Working Group, so far neither submissions, nor any specific meeting have been dedicated to this important topic. However, these issues remain no less crucial to understanding what a WTO competition agreement could contain and how it could work in practice.

2. Thus, the EC and its member States have found it both timely and appropriate to table this submission, to complement the clarification of the possible elements of a WTO competition agreement that have been already discussed in the Working Group.

3. The submission addresses both the issue of peer review and that of dispute settlement as being *complementary*. Indeed, the EC and its member States see peer review as a *distinct and separate instrument* aimed at addressing matters different from those which would be subject to dispute settlement.

4. The submission in no way purports to deal exhaustively with all issues relating to peer review and dispute settlement. Nor does it seek to offer any ready-made solutions. Rather, it is intended to stimulate debate in the Working Group on the issues and to point to some possible ways in which peer review and dispute settlement may be used so as to provide optimal results in the trade and competition area, while at the same time duly respecting national sensitivities and prerogatives.

5. Before addressing the issues involved, it is useful to state the underlying rationale for peer review and dispute settlement in a competition context:

- Dispute settlement is a cornerstone of the multilateral, rule-based system. In a system of corresponding rights and obligations, dispute settlement is the instrument by which compliance is ensured thereby upholding the integrity of the system.

- In our view, there is a precise correspondence with the legal obligations that WTO Members assume under an agreement: binding rules must be enforceable through the application of the dispute settlement mechanism. And conversely, any matter which is not the subject of a binding commitment cannot be subject to dispute settlement.

- Peer review, on the other hand, is not an enforcement instrument, but a tool to help WTO Members (collectively, but above all the Members whose practices are under review) verify the effectiveness and efficiency of the laws, regulations and practices through which the WTO Member implements an agreement.

- In other words, peer review would serve both as a valuable "service-check" of a WTO Member's competition law and policy and to help identify areas where improvements could be made, including through the identification of priority areas for technical assistance (TA) and capacity-building (CB) activities. To this end, peer review should apply to all provisions of a WTO competition agreement, whether or not they contain binding commitments.

1. DISPUTE SETTLEMENT

6. The application of some form of dispute settlement in the context of a WTO Agreement on Competition is desirable:

- Firstly, the binding character of any agreement would be severely weakened if the obligations contained therein were not subject to WTO dispute settlement to ensure compliance with the obligations contained in the agreement.

- Secondly, although certain special rules and/or procedures apply with regard to some existing WTO Agreements (cf. Appendix 2 of the DSU), a factor common to all agreements is the application of dispute settlement for all of these "covered agreements", cf. Appendix 1. In other words, non-application of WTO dispute settlement to a WTO Agreement could be seen as creating an anomaly from an overall systemic and institutional point of view.

- Thirdly, to take into account the specificity of competition matters and depending on the actual provisions of the eventual agreement, some explicit provisions reflecting this specificity may be included in a WTO competition agreement.

7. A number of issues, which would need to be addressed when deciding upon the application of WTO dispute settlement to a WTO competition agreement are discussed below (although the list is not exhaustive).

8. Needless to say, in keeping with the spirit of the WTO DSU, including Article 24, due consideration to the specific circumstances of developing country Members, in particular the least-developed among them, should be a guiding principle for the initiation of any WTO dispute settlement proceedings against such Members. It is also worthwhile already at this stage to stress that WTO dispute settlement would be strictly limited - as is also currently the case under the DSU and the covered agreement - to complaints brought forward by WTO Members. Private individuals and firms would have no standing therefore.

1.1 SCOPE OF JURISDICTION

9. Obviously the scope of jurisdiction would strictly depend on the actual obligations contained in a competition agreement. On the basis of what the EC and its member States have proposed, for instance, dispute settlement would apply to the three core principles of non-discrimination, transparency and procedural fairness, as well as to the ban on hard-core cartels. It would not apply to co-operation under the agreement, which would be voluntary and non-binding.

10. Furthermore, as indicated in the EU submission on core principles[1], dispute settlement would apply only to the actual scope of the individual obligations concerning core principles (for instance to non-discrimination in the letter of the laws, regulations and guidelines of general application in the domestic competition law regime and not to their application through individual decisions). Thus, the purpose of any dispute would be to ascertain the conformity of such laws, regulations and guidelines of general application with the obligations concerning core principles and not to challenge the actions of a WTO Member based on such laws, regulations and guidelines of general application.

11. However, this "shorthand" description of the scope would clearly be insufficient, and a WTO competition agreement should be more precise as to the scope of application of dispute settlement. The issue is obviously one for negotiations, but some indications can be given already now, for instance on the basis of the proposals made by the EC and its member States:

(a) In the case of a provision banning hard-core cartels, the corollary is that WTO Members should entrust the public authorities with the enforcement of the ban in a clearly identifiable manner. This would depend on the administrative and legal structure of a WTO Member. For instance, some Members may choose to entrust enforcement to the court system itself by allowing private action against anti-competitive practices. A body entrusted with enforcement need not be a newly-created body (it could for example be an existing administrative authority, or perhaps even in certain instances the police), and the level of resources of this authority would not be subject to dispute settlement, since it would not be the subject of obligations under a WTO Competition Agreement. Absence of a clearly identifiable authority responsible for enforcement under a domestic competition law would be subject to dispute settlement as this could clearly result in lack of enforcement.

(b) If a domestic competition regime had other substantive provisions (e.g. on monopolies or on mergers), the substantive content of these provisions would not be subject to dispute settlement, but substantive provisions in addition to a ban on hard core cartels would become subject to the overriding core principles of a WTO competition agreement, including transparency and non-discrimination.

(c) As regards the core principles, since these would be binding, their absence from a competition domestic regime would be subject to dispute settlement. However, this has to be subject to some very important qualifications:

(i) if a binding principle on non-discrimination is applied only to discrimination in the letter of the law, regulation or guidelines of general application, equally dispute settlement could only cover this discrimination and could not extend

[1] WT/WGTCP/W/222.

to the application of the law, regulation or guidelines of general application through individual decisions[2]. In particular, the "prosecutorial discretion" of a competition enforcement body with necessarily finite resources, to take action in the first place against those cartels or other restrictions of competition which it considers most serious, and dealing with less serious restrictions later, resources permitting, must be respected and not subject to dispute settlement;

(ii) as to procedural fairness, we are of the view that dispute settlement should only apply to whether procedural fairness provisions exist in a domestic competition regime, and to whether these provisions comply with the minimum standards of procedural fairness set out in a WTO competition agreement, dispute settlement could not apply to whether or not procedural fairness has, *in fact*, been applied in a particular case, because this would bring individual competition decision within the scope of dispute settlement, which would be inappropriate for the reasons set out in the next paragraph of this submission;

(iii) as to transparency, application of dispute settlement to transparency provisions is not novel to the WTO and we would suggest that we need not innovate in this respect.

12. As already anticipated above, there appears to be a growing consensus, from the submissions to and discussions in the Working Group, that there should be no obligations on the conduct of individual competition cases. In this situation, dispute settlement could not cover such cases. We also agree with this view, and strongly believe that dispute settlement should be strictly limited to assessing the overall conformity of the actual law, regulations and guidelines of general applications against the core principles contained in a WTO agreement, as well as the possible substantive provisions to be included in a WTO agreement, including a ban on hard core cartels. In order to make sure of this, dispute settlement panels and the Appellate Body should be explicitly barred from second-guessing and overruling individual decisions of competition authorities by having clear text to this effect contained in the agreement itself.

13. The following sections discuss how it could be ensured that panels and the Appellate Body do not exceed the scope of dispute settlement and have the requisite expertise to make correct decisions as to the WTO-conformity of competition laws.

1.2 CONSULTATIONS UNDER THE WTO DISPUTE SETTLEMENT UNDERSTANDING

14. It will be further explained in section 3 below that a WTO competition agreement should have a general consultation mechanism as a key component of the agreement itself. Those consultations would have a general purpose of allowing WTO Members to discuss the operation of the agreement, as well as any bilateral matter, irrespective and quite distinctly from the consultations which form an integral part of WTO dispute settlement.

15. Quite apart from such a general consultation clause relating to the overall operation of a WTO competition agreement, there will also be the need for dispute settlement-related consultations. In fact,

[2] "Discrimination" being understood, as "(..)an obligation according to which domestic competition laws should be firmly based on the principle of non-discrimination as regards the corporate nationality of firms. In other words, what would be at issue would be the *treatment accorded to firms pursuant to the terms of domestic competition laws* as such, and not the treatment accorded to firms under a range of other policies.(..)", cf. WT/WGTCP/W/222, para 12.

should one WTO Member be of the view that the legislation of another WTO Member does not meet the core principles and other obligations contained in a WTO agreement, then this would be a matter that should usefully and appropriately be raised under the DSU consultation mechanism.

16. Where such DSU consultations do not yield any satisfactory result, a party would then have the right to seek recourse to dispute settlement.

17. In keeping with the GATT tradition of amicable settlement of disputes, the DSU in Article 4 sets out the mechanism for mandatory consultations between the parties to a dispute *before* a matter can be brought before a dispute settlement panel. Experience has shown that this consultation mechanism can in fact serve to prevent a number of disputes from moving to the actual panel stage – either due to an amicable solution being found already at the stage of consultations, or, due to clarification of legal and factual circumstances which render panel proceedings unnecessary.

18. Article 4.3. of the DSU sets out that where such consultations have failed to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party can then request the establishment of a dispute settlement panel.

1.3 Ensuring The Involvement of Competition Experts

19. On the probable hypothesis that a WTO competition agreement would explicitly *bar* any review of individual competition decisions, as well as *narrow* the application of non-discrimination to instances of discrimination in the letter of the law, regulation or guidelines of general application, any dispute settlement case arising under the agreement would have as its primary task to assess whether domestic legislation conforms with the provisions of the WTO agreement, in particular the core principles. In this context, competition experts could have an important role to play.

20. Setting aside the technical expertise on competition matters that could be required from the panel Members themselves, it is worth noting that already at present, the DSU would allow for competition expertise to assist the panel in reaching its findings on more technical issues where needed. Article 13 of the DSU establishes the right for a panel to "seek information and technical advice from any individual body which it deems appropriate." The WTO competition agreement might inscribe a right, or even an obligation, on a panel to seek such information.

21. Inspiration for another way of ensuring that technical expertise is made available to a panel when needed can be drawn from existing WTO Agreements, which include innovative approaches to ensuring the necessary technical expertise in certain matters. One such example is found in Article 24 (3) of the Agreement on Subsidies and Countervailing Measures which establishes a "Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations.(…) *The PGE may be requested to assist a Panel* (…)" (emphasis added). A variation of the recognition of the need to ensure the involvement of experts in more technical matters is provided by Article 14 (2) of the Agreement on Technical Barriers to Trade according to which "[A]t the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts." Again, for any panel in the competition field, the consultation of such a permanent expert group could be made either optional or obligatory.

1.4 Terms of Reference for a Dispute Settlement Panel

22. Under the WTO, DSU Article 7 provides for "standard terms of reference" which will form the basis of the panel's work, *unless* the parties to the dispute no later than 20 days from the establishment of the panel have agreed on other "customised" terms of reference. The standard terms of reference read as follows: "To examine, in the light of the relevant provisions in (name of the

covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document … and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

23. The terms of reference of any WTO panel will always have to be read in the light of the substantive agreement(s) at issue, and consequently, in the case of a WTO competition agreement, an explicit provision in that agreement barring review of individual decisions would directly delineate the outer boundaries of the jurisdictional scope of a panel. Another important delineation would flow from of the fact that any non-discrimination provision would be limited to discrimination in the letter of the law, regulation or guidelines of general application.

24. Whatever option or options, among those referred to above, are eventually retained (for instance that of an optional or obligatory consultation of a permanent group of competition experts) such options would obviously need to be clearly set out in the competition agreement itself.

1.5 APPELLATE BODY PROCEEDINGS

25. Unlike panels, which are currently established on an *ad hoc* basis, the Appellate Body ("AB"), which considers appeals by the parties to a dispute on the findings in a WTO dispute panel report, consists of seven individuals out of which three serve on each case brought before the AB. The AB members are appointed on a four-year basis with the possibility of a one-time reappointment, cf. DSU Article 17.

26. Consequently, AB members hear and decide cases much more frequently than an average *ad hoc* panellist, just as the scope of appellate review is strictly limited to "issues of law covered in the panel report and legal interpretations developed by the panel."[3] The AB cannot examine new evidence, nor can the AB at present remit a dispute back to the original panel for renewed consideration. In other words, the scope of review conducted by the AB is narrowly determined by how the case was initially presented before and decided by the panel and by the issues of law and legal interpretations addressed and developed by the panel. And as already shown in the above, that panel stage can be tempered and limited by the drafting of the agreement and other means.

2. WHAT WOULD BE THE PURPOSE OF PEER REVIEW AND WHAT COULD IT HELP OBTAIN?

27. As already stated above, dispute settlement and peer review should be seen as complementary mechanisms and peer review addresses a number of issues which would *not* be subject to WTO dispute settlement. Both the very nature of peer review and the difference in the subject matter addressed serve to underline the complementary nature of the exercises.

28. Unlike dispute settlement which would apply to the obligations contained in the WTO competition agreement (cf. above), peer review would aim at a wider range of competition law and policy matters. As a WTO competition agreement would merely set out a limited number of binding obligations, WTO Members would remain at liberty to decide for themselves whether or not to include additional substantive areas in their domestic competition law, including e.g. abuse of dominance. Given the distinct nature of peer review, it would be natural and indeed appropriate for such a process to address the entirety of a domestic competition law framework.

29. To take just one example, general issues relating to the effectiveness of enforcement of domestic competition laws over a period of time could usefully be included within the scope of peer reviews. This could include best practices regarding investigative techniques, fact-finding, etc.

[3] Cf. DSU Article 17 (6)

However, individual decisions (involving the legal or economic interpretation of facts), or questions relating to the strategy or prioritisation of a competition enforcement body, would be excluded from peer review, just as it would be excluded from dispute settlement.

30. One important result from an effective WTO peer review process is that the WTO Member under review would have its domestic legislation reviewed in such a manner as to help identify ways of improving the legislative framework, including any possible the need for amendments and updating. Another important result could be attaining a greater degree of international convergence in competition policy on a range of issues.

31. In addition to this, peer review in the WTO would aim at ascertaining the adequacy of technical assistance and capacity building work being provided in the competition area and would thus go beyond the scope and purpose of existing systems of peer review.

32. As suggested by the EC and its member States in earlier submissions, a WTO Competition Policy Committee could provide a useful forum for providers and recipients of such assistance to better co-ordinate and develop multi-year programmes for individual WTO Members. By ensuring better co-ordination - and by including a review of the technical assistance and capacity building - this would serve to ensure a more efficient use of available resources, including by amendments and adjustments to TA and CB activities as they are gradually designed and implemented. By using the Competition Policy Committee as the framework for such peer reviews, this would also serve to ensure that the process would be as resource effective as possible.

2.1 How Could Peer Review be Designed To Operate Most Effectively?

33. When considering the introduction of peer review in relation to a WTO Competition Agreement, there are a number of practical issues that would need to be addressed regarding the optimal design for such a process of peer review as applied in an organisation with more than 140 Members.

34. The concept of "peer review" is already known from the WTO Trade Policy Review Mechanism ("TPRM") which broadly covers the trade policy of a given WTO Member, or an issue-specific peer review mechanism such as the peer reviews undertaken in the Competition Law and Policy Committee of the OECD. However, the TPRM covers a wide range of trade-related issues *in addition to* competition and would not allow the necessary time and degree of detail which an effective competition-specific peer review warrants. Such time and detail, on the other hand, is offered by the competition peer reviews undertaken in the OECD, but these reviews are traditionally limited to the actual membership of the OECD, save for the OECD Global Forum on Competition in which e.g. South Africa has recently been the subject of peer review. Consequently, we see a need for a separate peer review mechanism within the WTO for competition, the design of which should avoid duplication with other fora and should draw upon relevant work from such fora, including the OECD Global Forum on Competition, the ICN and UNCTAD where relevant.

2.2 Who Would be Conducting the Review?

35. One issue to be addressed is *who would be considered "peers"* in the WTO as the organisation encompasses countries at widely different stages of economic development as well as experience in the area of competition law and policy? Obviously, the Members of the WTO are the "peers", but it remains to be seen whether the examination should be conducted by the whole membership, perhaps in the Competition Policy Committee (as is the case for the TPRM in the TPRB) or be – at least in a first analytical stage – conducted by a more limited number of Members, which begs the question of how to select such Members.

36. A related question is whether or not the substantive work relating to the peer review would be undertaken by the countries serving as the reviewers (in practice presumably the competition authorities and/or other related bodies), possibly assisted by the WTO Secretariat. The question of capacity and human resources, for all Members, but more crucially so for developing and LDC Members, is obviously most relevant here. Another solution could be for an independent, outside expert to undertake the drafting of the report on the basis of which the review would then take place.

37. Finally, the permanent group of experts discussed above under 1.3. could potentially also play a role in peer review, thus providing a bridge between dispute settlement and peer review being complementary - not alternative - processes.

2.3 HOW OFTEN WOULD REVIEWS TAKE PLACE?

38. Another issue is *how frequently* reviews would take place in an organisation with as many Members as the WTO? One possibility would be to review *all* WTO Members on a revolving basis, but with a higher frequency for the larger trading partners, as is already the case under the WTO TPRM. However, this could raise resource implications, and raise questions for certain WTO Members as to possible overlaps with OECD competition peer reviews. Another possibility is to give priority to those countries which have only recently implemented – or are in the very process of implementing - a domestic competition law and policy[4].

39. If there is no revolving peer review of all WTO Members, then the question would arise as to how a peer review would be triggered. Clearly, at the request of the Member itself, but how should requests for a peer review of another member be treated, if the member in question is not supporting the request? If any Member can trigger a peer review of any other member at any time simply by requesting it, this could lead to the conflictualisation of peer review, which could defeat the object, and blur the distinction between peer review and dispute settlement. One idea in this context, is that for a peer review of a Member to take place without the explicit request of that Member, then a "quorum" of a fixed number of other Members, would have to make the request, and if the Member to be the object of the peer review is a DC or LDC, then the Members making the request should also include a DC or an LDC.

40. Probably, in the early days, there will be enough spontaneous requests from Members to be peer reviewed to fully occupy the WTO resources for this activity. Subsequently, if such requests begin to "dry up", then those Members who have not yet been peer reviewed can be encouraged to do so, with past PRs existing as positive examples of how peer review is a constructive process.

8. GENERAL CONSULTATION MECHANISM UNDER A WTO COMPETITION AGREEMENT

41. As explained in greater detail in a previous EC submission[5], we envisage that a consultation and co-operation mechanism would be a key component of any WTO competition agreement. A range of issues could be raised under the consultation provisions of such an agreement, including one WTO Member's assessment – rightly or wrongly - that the domestic legislation of another WTO does not meet the standards contained in the WTO agreement, in particular as regards the core principles of transparency, non-discrimination and procedural fairness. What is to be noted in this context is that consultations under this mechanism would be distinct from the consultations under DSU Article 4 which form an integral part of formal WTO dispute settlement proceedings and are a precondition for requesting the establishment of a dispute settlement panel, cf. DSU Article 6.

[4] This would also tally well with the fulfilment of one of the envisaged purposes of peer review, i.e. identifying and addressing possible shortcomings in TA and CB assistance.

[5] WT/WGTCP/W/184

42. Such specialised consultation provisions are not novel to the WTO system and would afford Members the opportunity to discuss matters that may or may not be subject to obligations under the Agreement and that may be of such a confidential nature that a discussion in the proposed Competition Committee would not be appropriate or desirable. Such a consultation provision could be drafted in terms of a reference to, for instance, "any matters relating to the operation of this Agreement or the furtherance of its objectives". An example of such a provision can be found in Article 17.2 of the Anti-dumping Agreement.

43. In procedural terms, we would envisage an obligation in a WTO competition agreement for WTO Members to hold such consultations upon duly notified requests, and to maintain these consultations distinct from those foreseen by the DSU in case of an alleged violation of an obligation under the agreement.

44. It is important to stress that, in an area such as competition law, where WTO Members need to strike the right balance between a minimum set of common obligations and a maximum of flexibility for the development of individual domestic competition regimes, this consultation mechanism would afford WTO Members a venue to discuss matters they either cannot or do not wish to bring under the WTO dispute settlement provisions. Such consultations would also provide an essential complement to the more public processes of discussion in the Competition Policy Committee and of peer review.