

# WORLD TRADE ORGANIZATION

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**Working Group on the Interaction  
between Trade and Competition Policy**

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## COMMUNICATION FROM HONG KONG, CHINA

The following communication, dated 28 September 1998, has been received from the Hong Kong, China Economic and Trade Office with the request that it be circulated to Members.

### The WTO Approach: Matters for Further Consideration in the WTO Framework

#### I. INTRODUCTION

The Singapore Ministerial Declaration adopted at the 1996 WTO Ministerial Conference provides, in its section relating to the interaction between trade and competition policy, that the General Council will keep the work of this Working Group under review, and will determine after two years how its work should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines on trade and competition policy will take place only after a consensus is reached among WTO Members regarding such negotiations. This submission by Hong Kong, China seeks to assist this Working Group in making the most of its remaining meetings in September and November 1998. It provides:

- (a) a review of the WTO approach proposed by Hong Kong, China for the Working Group to carry out its mandate (Section II);
- (b) a brief account on how the WTO approach is relevant to deal with a whole spectrum of interaction issues including those relating to intellectual property rights and investment policy which are agenda items for the forthcoming meeting; and
- (c) some preliminary reflections on what this Working Group, in its 1998 report to the General Council, might envisage and recommend for its future work (Section V).

#### II. A BRIEF REVIEW OF THE WTO APPROACH

2. Since the establishment of this Working Group, Hong Kong, China has been advocating a comprehensive and balanced approach in studying the interaction between trade and competition policies which have become all the more interdependent in a globalized world economy. While trade and competition policies should ideally be complementary in promoting economic efficiency, inconsistencies between them are not rare in the real world. In our view, this Working Group is a useful forum for Members to address areas where trade and competition policies interact, with a view to identifying means to optimise economic efficiency and consumer welfare.

3. The WTO and its predecessor GATT are the cornerstone of today's multilateral trading system. Over the years, GATT CONTRACTING PARTIES and the WTO have recognized the importance of addressing anti-competitive governmental restraints rather than private restrictive business practices. However, up till now, international trade and competition are still vulnerable to discriminations arising from governmental actions in such areas as rules of origin, government procurement, anti-dumping and state trading. We firmly believe that this Working Group should study not only the impact of private anti-competitive practices on trade, but also that of governmental measures on international competition.

4. In our earlier submissions, we have recommended this Working Group to follow the traditional GATT and WTO approach and, in accordance with the mandate of the Working Group, to focus firmly on the interaction between trade and competition policies. The Working Group should avoid dealing with private anti-competitive practices in a one-sided manner without according priority attention to more harmful governmental market distortions, and should give priority to pro-competitive remedial measures which correct distortions directly at their source, without creating additional by-product distortions. The proposal by Hong Kong, China, of phasing-out anti-dumping measures vis-à-vis WTO Members which undertake "free trade and competition commitments" for the products concerned is an illustration of such mutually beneficial rules, though detailed modalities will need to be developed.

5. Past deliberations clearly show that much remains to be done for increasing the synergies between trade liberalization and pro-competition policies, and for reducing the welfare-reducing effects of trade restrictions and exemptions from competition rules. Hong Kong, China therefore considers it useful to have more discussions on this broad direction of work and to examine the interaction issues which fit into the WTO approach we have advocated. Such interaction issues actually cut across the whole spectrum of WTO Agreements and are hence of a genuine systemic concern. An examination of the relationship between TRIPS, investment and competition policy, as briefly described in the following paragraphs, reinforces this point and illustrates the relevance of the WTO approach for all interaction issues.

### **III. RELATIONSHIP BETWEEN COMPETITION AND INTELLECTUAL PROPERTY RIGHTS**

6. As stated in the 1997 WTO Annual Report, anti-competitive practices relating to intellectual property rights have been a long-standing issue in international economic relations. Since the 1980s, competition authorities have come to recognize the contribution of intellectual property rights towards promoting innovation and the growing significance of "dynamic efficiency" in economic analysis. The WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS) reflects the prevailing view among Members that intellectual property rights are important for promotion of competition and technology transfer, and that the risks of anti-competitive abuses of intellectual property rights need to be examined on a case-by-case basis.

7. The TRIPS Agreement acknowledges the right of WTO Members to prevent anti-competitive practices involving the use of intellectual property rights. Articles 8 and 40 of this Agreement contain provisions empowering Members to take action against anti-competitive practices involving the use of IPRs. Yet, there is still room for this Working Group to assess to what extent competition policy may help to further clarify the legitimate scope of these provisions in the TRIPS Agreement. For example, this Working Group may explore the feasibility of identifying more specific standards for anti-competitive and pro-competitive practices in the field of trade-related intellectual property rights. International coordination and discussion in the WTO of such competition standards could help to:

- (a) prevent trade-distorting measures and potential conflicts among countries, without limiting Members' rights to decide on their own competition and trade policies; and
- (b) meet some Members' concerns that the TRIPS Agreement should be applied in a manner promoting the economic development of, and transfer of technology to, developing countries.

#### **IV. RELATIONSHIP BETWEEN INVESTMENT AND COMPETITION POLICY**

8. Foreign direct investment (FDI) has superseded traditional cross-border trade as the most popular avenue for multi-national enterprises to meet the demand of foreign markets. Competition policies of the host country may affect FDIs in many ways. For example, an effective competition policy may attract FDIs by preventing the erection of market entry barriers such as foreclosure of access to distribution channels. Conversely, investment policies can have a bearing on competition. Government-imposed investment measures like screening procedures, sectoral restrictions and discriminatory regulatory barriers for the entry and operation of FDIs all serve to reduce competition in the host economy.

9. There is an inherent link between investment and competition in a couple of WTO instruments such as GATS, TRIPS and the Agreement on Trade-Related Investment Measures (TRIMs). For example, the preamble of the TRIMs Agreement recognizes that "certain investment measures can cause trade-restrictive and distorting effects". The Agreement provides for an illustrative list of examples of TRIMs which are inconsistent with the obligations of national treatment and general elimination of quantitative restrictions. Yet, according to the 1997 WTO Annual Report, the list excludes some performance requirements (e.g., export performance requirements, technology transfer requirements) which some Members would like to see included. There are also concerns that the absence of substantive competition rules for restrictive business practices in the Agreement may result in conflicts over trade-distorting measures and make it difficult for the WTO dispute settlement system to function efficiently.

10. In a globalizing economy, it is increasingly difficult to separate those aspects of conditions of international competition related to the trans-border movement of goods and services from those related to foreign investment. Recent discussions in international fora also reflect a growing recognition of the inter-relationship between trade, investment and competition policies, and of the need to ensure their consistencies. To ensure that the benefits of trade and investment liberalization will not be undermined by anti-competitive measures, Hong Kong, China suggests that this Working Group explore how the interaction between competition and investment can be addressed in the WTO framework in a more consistent and comprehensive manner to produce mutually reinforcing outcomes and to ensure effective market access.

#### **V. MATTERS FOR FURTHER CONSIDERATION IN THE WTO FRAMEWORK**

##### Lessons from Past Discussions in this Working Group

11. The establishment of this Working Group has enabled Members to exchange views on the complex relationship between trade and competition policies. Members' submissions to the Working Group and statements made at the previous meetings are most useful in enhancing Members' understanding on the subject. The following paragraphs recapitulate four major lessons which we have learnt from previous deliberations.

(a) Trade and Competition Policy are Inter-linked

12. While trade policy sought to reduce government-imposed barriers to international commerce, competition policy served to address private anti-competitive practices of enterprises that impeded access to markets.<sup>1</sup> They are inter-linked and may impact on each other. It is generally recognized that the impact of their interaction is positive because trade liberalization and competition policy broadly share the same goal of contributing to efficiency and are mutually reinforcing.<sup>2</sup> However, on the negative side, conflicting trade and competition policies undermine the objectives of each and frustrate the functioning of the multilateral trading system.

(b) The Importance of Enhancing Consistency of Trade and Competition Policies

13. While it is widely recognized that trade and competition policies can play complementary roles, inconsistencies between trade measures and competition-related policy instruments do exist in the real world. One often-cited example is anti-dumping action which focuses on "injury to domestic industry" by low-priced imports, but not on the anti-competitive effects of import restrictions on domestic competition. Another example is the exemption of export cartels from competition law in some economies without due regard to their anti-competitive effects in foreign markets. The challenge for this Working Group is to devise strategies to increase the synergies between trade liberalization and pro-competition policies, and to reduce the welfare-reducing effects of trade restrictions and exemptions from competition rules.

(c) The Importance of Addressing Both Governmental Measures and Restrictive Business Practices which may Distort Trade and Competition

14. There is also a general consensus among Members that both governmental measures and private restrictive business practices can distort trade and competition. A balanced discussion in this Working Group is in general favoured by Members. A firm focus on issues regarding the interaction between trade and competition policies will ensure a more balanced discussion on both governmental measures and private restrictive practices. However, there is a case for this Working Group to focus priority attention on the most restrictive trade barriers and competition distortions which adversely affect the economic interests of all WTO Members. In the view of Hong Kong, China, they remain in the domain of governmental measures.

(d) The Importance of Taking into Account Diversities between WTO Members in Attempting to Identify Multilateral Approach to Competition Policy

15. Although the importance of competition policy in promoting economic efficiency and consumer welfare is widely accepted by Members, there is still no consensus on what should constitute an optimal competition policy. While some suggest that antitrust laws, consumer protection laws, regulatory policies and competition advocacy are elements of a competition policy<sup>3</sup>, some consider that a competition policy should encompass also deregulation and privatisation, fair trade, intellectual property rights, and foreign trade regimes as all of them have a bearing on market contestability.<sup>4</sup> Another disparity between WTO Members lies in their approach to promoting competition. It is apparent from Members' presentations that different means, e.g., legal,

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<sup>1</sup> WT/WGTCP/M/3 dated 26 February 1998, paragraph 4.

<sup>2</sup> WT/WGTCP/M/2 dated 12 November 1997, paragraph 18.

<sup>3</sup> WT/WGTCP/W/35 dated 1 October 1997.

<sup>4</sup> WT/WGTCP/W/33 dated 26 September 1997.

administrative and other measures, may be adopted to meet the objectives of a competition policy. The choice of instruments is heavily influenced by the characteristics, development history and socio-economic background of WTO Members.

16. We are aware that in a couple of WTO agreements (e.g. Article IX of GATS, Article 40 of TRIPS Agreement and Article 9 of TRIMs Agreement), due recognition is given to the rights of WTO Members to regulate and limit restrictive business practices without prescribing obligations for introducing and enforcing competition rules. In the absence of a world-wide economic consensus on what should be the optimal competition policy rules and instruments for dealing with such problems, Hong Kong, China submits that if any multilateral approach to competition policy is to be explored, the WTO must take into account the diversities between Members on the instruments they use in promoting competition.

#### The 1998 Report of the Working Group

17. This Working Group has offered a unique forum for assessing the interaction problems of trade and competition policies from a comprehensive trade and competition policy perspective with a view to strengthening the WTO system for the benefit of all WTO Members. The 1997 Annual Report of the WTO rightly stressed: "The issue is not whether competition policy questions will be dealt with in the WTO context, but how and, in particular, how coherent will the framework be within which this will be done". Rather than leaving the review of the competition policy provisions and problems of the GATT and various WTO Agreements exclusively to specialised sectoral committees in the WTO, or to other organizations (e.g. UNCTAD, the World Bank and OECD) which advocate the welfare-increasing effects of competition-oriented regulatory reforms, this Working Group should recommend in its 1998 report to the General Council that its work and mandate should continue in 1999. Only through continual concerted efforts of WTO Members can the 1999 WTO Ministerial Conference be assured of the best possible advice on how to address the ever more important interaction between trade and competition policies in a coherent and comprehensive manner.

## **VI. CONCLUDING REMARKS**

18. Over the past two years, discussions in this Working Group have been instrumental in fostering a better understanding among Members on the relationship between trade and competition policy. Since the General Council will determine at the end of this year how the work of this Working Group should proceed, an immediate matter of concern is how Members would collectively shape the future of this Working Group through its report to the General Council. In this connection, Hong Kong, China would like work in this Working Group to be further continued, and hope its report would facilitate the General Council to set in train a forward-looking agenda leading to substantial recommendations to the Third Ministerial Conference. We think the report should reflect the past work of the Working Group, highlight progresses, proposals and major lessons, and recommend guiding principles and broad direction for future work.

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