

# WORLD TRADE ORGANIZATION

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

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## COMMUNICATION FROM KENYA

The following is the final text of a statement received from the Permanent Mission of Kenya, which was circulated as an advance copy for the Working Group's meeting of 26-27 May 2003.

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### Elements contained in Paragraph 25 of the Doha Ministerial Declaration

#### **I. INTRODUCTION**

This statement attempts to highlight some important issues and questions that have not received satisfactory clarification in the course of discussions in the Working Group on the Interaction between Trade and Competition Policy (WGTCP) on the elements contained in paragraph 25 of the Doha mandate. These views are without prejudice to Kenya's position on the relevance of continuing discussions on competition policy at WTO.

Paragraph 25 lists the elements that need to be clarified. The paragraph goes on to state that "full account shall be taken of the needs of developing and least developed country participants and appropriate flexibility provided to address them". It is therefore Kenya's understanding that such flexibility would involve preserving the right of a country to choose whether and when to have a competition law and the kind of competition policy to adopt. In other words countries should preserve the right to adopt a phased approach in terms of discussion, implementation and enforcement of a competition law. Such approach will ensure that each country adopts a competition regime that supports its industrial policy.

So far, sufficient clarification has not been provided as to whether the proposals made by the proponents in this area would allow such flexibility to be preserved, or would restrict such flexibility in the interest of promoting market access for developed country enterprises and harmonization of competition regime.

#### **II. CORE PRINCIPLES**

The so-called core principles of transparency, non-discrimination and procedural fairness were developed in the context of trade policy and they were not intended as universal principles applicable to all issues including competition policy. It is not self-evident that it is appropriate or desirable to apply these principles to competition policy. Sufficient clarification has not been provided relating to such appropriateness or desirability. Further, the proponents have argued that it is not necessary to attempt a detailed description of how the core principles would operate. On the

contrary, we believe that the manner in which the so-called core principles would operate in practice in the area of competition policy is of critical importance in order to assess the effects on development, and thus this issue requires more clarification.

#### A. TRANSPARENCY

It has been pointed out in the WGTCP that the application of transparency principle requires careful consideration given that differences exist in national legal systems as well as on issues of scope, coverage and the nature of obligations. A realistic assessment of transparency therefore would not be possible until all substantive issues have been satisfactorily clarified. Furthermore there are concerns that transparency requirements would impose unnecessary burden on developing countries. This observation calls for more studies and discussions to enable developing countries have a more realistic assessment of the costs and benefits.

Questions also arise as to the applicability of transparency to case-specific information in possession of national or regional competition authorities. In addition, secret registers of export cartels are kept in certain countries on grounds of confidentiality. It would appear that the regulators are bound by the transparency principle but not the firms they are supposed to regulate - vital evidence on the practices of foreign firms are "protected" by their governments in the name of commercial confidentiality. This potential contradiction requires clarification.

#### B. NON-DISCRIMINATION

In trade policy context, 'non-discrimination' is normally taken to mean the application of most-favoured nation (MFN) and national treatment principles on 'like products' and services. The application of non-discrimination principles, therefore, to competition analysis and enforcement, which is case – specific, remains unclear. For instance it has been pointed out that difficulties would be experienced in determining whether *de facto* discrimination existed with respect to anti-trust enforcement action given the individual focus of such action. This needs to be clarified. Even if the application of non-discrimination principles were limited to *de jure* discrimination, as the proponents had proposed, questions remained. For example, how would sectoral exemptions to competition rules be treated? Would for example GATT Article XX exceptions be available in this area?

With respect to national treatment principle there is need to clarify how it will apply with regard to anti-competitive practices or mergers among small and medium scale producers in developing countries, meant to achieve efficiency *vis-à-vis* mergers among big firms and multinationals in developed countries that promotes anti-competitive practices. There is no doubt that the application of national treatment principle could easily spill over and distort other areas such as industrial policy leading to distortions in development strategies of a country. Further analysis through appropriate studies is therefore needed.

With respect to the application of MFN principle, so far, it remains unclear as to what will be the status of bilateral and regional cooperation arrangements in relation to administration of competition law. This needs to be clarified.

#### C. PROCEDURAL FAIRNESS

During the WGTC discussions, the point was made that, currently, there is no broad consensus on the meaning of procedural fairness in the context of competition law enforcement, because notions of fundamental fairness different between legal systems, which were also influenced by the political and legal cultures in which relevant agencies operated. A number of specific questions have been posed regarding how the principle of procedural fairness would work in practice, including its implications for developing countries and the resources it would require. It has been

stated that there was a need for more studies and discussions to enable developing countries to have a more realistic assessment of the costs and benefits of such provisions; that, among other matters, it would be useful to clarify whether Article X of the GATT was an appropriate reference for discussion of this issue in the working Group or whether a more specific concept of procedural fairness would have to be developed for competition policy. We are not convinced that sufficient clarification has been provided in response to these issues. There is need therefore to clarify these issues.

### **III. PROVISIONS ON HARD CORE CARTELS**

On hard core cartels, there has been recognition among the members that their harmful effects undermine the potential benefits of the multilateral trading system and therefore they should be addressed on a priority basis. However there is lack of consensus among the members on the definition and scope of obligations in relation to hard core cartels, which need to be further clarified. Detailed analysis on the definition of hard core cartels is needed in order to establish its relevance in the case of developing countries. Lack of such clarification would give rise to significant operational problems and costs for developing countries with no potential benefits. The appropriateness of the WTO as the avenue for international action on hard core cartels also needs to be clarified taking into account that these are being addressed in several bilateral, regional and plurilateral arrangements.

### **IV. MODALITIES FOR VOLUNTARY COOPERATION**

With respect to modalities for voluntary cooperation, an important observation has been that purely voluntary cooperation would be ineffective because more advanced competition authorities, with greater information and capabilities, would have little incentive to provide information or assistance to less developed authorities that were not in a position to offer reciprocal benefits. Furthermore, while the sharing of information by developed countries could not be enforced by developing countries in voluntary cooperation arrangements, given the power asymmetry between developed and developing countries, voluntary cooperation by developing countries' competition authorities would in practice become mandatory.

The proponents should therefore clarify the precise cooperation tools that would be used and the nature of potential obligations in this respect. There is need to clarify further how developing countries without competition law and competition authorities will have to participate in voluntary cooperation arrangements at multilateral level.

### **V. CONCLUSION**

Members may observe that complex questions that have arisen in our discussions so far lacked satisfactory clarification and divergent views have also been expressed on such questions as well as on other issues. Further, the question of how a multilateral framework on competition policy will address development needs and concerns of developing countries has not been sufficiently addressed. Given the fact that there has not been sufficient convergence on many of the issues to warrant a different level of discussion, the Group should continue working if necessary until such a time when there is adequate understanding on the implications of these issues.

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