

WORLD TRADE ORGANIZATION

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

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COMMUNICATION FROM THE UNITED STATES

The following submission has been received from the Permanent Mission of the United States with the request that it be circulated to Members.

At Singapore, Ministers agreed to establish a working group on trade and competition policy:

Investment and Competition

"20. Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudice whether negotiations will be initiated in the future, we also agree to:

- establish a working group to examine the relationship between trade and investment; and
- establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.

These groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora. As regards UNCTAD, we welcome the work under way as provided for in the Midrand Declaration and the contribution it can make to the understanding of issues. In the conduct of the work of the working groups, we encourage cooperation with the above organizations to make the best use of available resources and to ensure that the development dimension is taken fully into account. The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations."

This paper represents the initial contribution of the United States to the work of this Group, and provides additional views as to the most fruitful scope for the Group's work beyond those initially expressed by the United States at Singapore.

The United States agrees with the point made in the submission of the European Community and its Member States about rules relating to government subsidies and other trade remedies. These

rules are already addressed under the WTO and there are existing committees under whose purview the implementation and functioning of those rules lies. This Working Group should focus on the role of competition policy in enhancing trade liberalization.

Therefore, the United States fully supports this effort to study competition law and policy issues as they bear on the work and objectives of the WTO. The development and enforcement of effective competition laws and policies help ensure that the gains of trade liberalization are fully realized, and that competition-inhibiting private conduct, the regulation of markets, and market structures do not take the place of other more obvious governmental policies in restricting entry (domestic or foreign) into markets. It is this linkage to trade which makes the study of competition in the WTO appropriate at this time.

Competition laws have been an increasingly important driver of growth, efficiency and innovation in the United States and other market economies over the past century. Recognition of the central role of competition laws in advancing these objectives has spread dramatically in recent decades to all regions of the world. Today approximately 70 countries have competition laws - many of them enacted during the past five or six years - and the number of countries enacting new laws continues to grow. As countries embrace competition principles, they have also sought to deregulate markets where competition can flourish or be fostered (e.g. the recently concluded negotiations on basic telecommunications services) and, when it remains necessary, to regulate markets to the extent possible consistent with competition principles. Increased competition and deregulation of markets have led to accelerating interaction among countries that have and enforce competition laws, in large part because the increasing globalization of economic activity calls for more cooperative and coordinated approaches among competition authorities. The United States, along with others, has strongly supported all of these movements.

At the same time, there remain many WTO Members that do not currently have competition laws. Among those that do, significant differences are found in the terms of these laws, and in the way in which they are implemented and enforced. These circumstances not only can lead to anti-competitive conditions within domestic markets, but also can create or sustain barriers to market access for external actors.

The Ministers at Singapore recognized that these issues require further examination in the WTO, and that considerable additional study must occur before consideration is given to whether there are issues that are appropriate and ripe for negotiation. We suggest in this paper a work programme aimed at advancing this process and laying the groundwork for future discussion of conclusions or next steps.

Suggested outline for the work programme

While some Members have implemented and enforced competition laws for decades, many Members have only recently enacted competition laws, and still others do not have competition laws. Given these circumstances and the nature of the competition policy topic itself, any reasoned approach to the Working Group's analysis must be properly structured and sequenced. It is essential that the work concentrate initially on an analysis of fundamental concepts of competition policy and how they are implemented and enforced. After that foundation is laid, the discussion could then proceed to an examination of the implications of these concepts for the multilateral trading system, with a view toward reaching a common analytical understanding of the role and relevance of the subject of competition policy to the WTO framework.

1. Competition in the WTO framework. This examination might begin with a review of work relating to competition law and policy that has been done up to now in the GATT 1947 and the WTO:

- (a) prior consideration given in the GATT context to developing rules on competition policy: the Havana Charter, the 1960 Recommendation;
- (b) competition provisions in existing WTO instruments: TRIPS, TRIMs, the GATS and the recent Reference Paper on regulatory principles incorporated into country schedules as a result of the successful conclusion of the negotiations on basic telecommunications services;
- (c) consideration of the prior GATT 1947 and existing WTO dispute resolution mechanisms from a competition perspective.

2. Competition law at the national level. The above review could then be amplified and complemented on the basis of presentations and contributions offered by Members relating to their own perspectives and experiences concerning the way in which competition law has developed at the national level, including:

- (a) a brief history of the development of competition law;
- (b) a review of existing competition provisions in WTO Members' laws;
- (c) the core elements of competition law: cartels and other agreements among competitors, distribution restraints and other vertical arrangements, monopolization or dominance concepts, and mergers;
- (d) the economic underpinnings of competition law;
- (e) the benefits of national competition laws to trade liberalization;
- (f) institutions of competition law: how competition law is implemented and enforced both administratively and judicially.

3. International dimensions of competition law and policy. Finally, the Working Group could review the international dimensions of competition law and policy. Matters for examination would include:

- (a) existing instruments for international cooperation, and their objectives: notice, consultation, cooperation and coordination, information exchange, comity and positive comity;
- (b) areas where increased cooperation and coordination could bring benefits: international cartels, multijurisdictional mergers and cross-border practices;
- (c) areas where market deregulation may be important for further trade liberalization in the WTO.

With this background, the Working Group will be in a position to carry out its mandate "to identify any areas that may merit further consideration in the WTO framework". This work could lay the foundation for a later discussion of the role of competition law and policy and deregulation in dealing with public and private anti-competitive conduct that impedes trade liberalization. We do not now

envisage what conclusions the Working Group might reach. These decisions will be informed by the discussion that occurs in the course of examining the matters described above.

Working Group procedures

The nature of the Working Group's mandate, and the discussions envisaged by this proposed work programme, suggest the following procedural considerations:

- (a) After an initial organizational meeting, Working Group sessions should combine presentations by national governmental experts, invited experts, and representatives of other international organizations, as appropriate, with discussion among Working Group Members.
- (b) In view of the often technical nature of competition policy issues, maximum participation of officials from capitals with relevant policy responsibility should be encouraged. Meetings should be scheduled in a way that facilitates this.
- (c) To the extent appropriate, the Working Group should take account of relevant work being undertaken in UNCTAD, the OECD and other international fora.

Conclusion

Although the United States has stated on other occasions, and continues to believe, that there is not the degree of consensus today that would support negotiation in the WTO of constructive competition policy disciplines, the proposed work programme is intended to foster among Member countries a common understanding of the relationship of competition matters to the WTO framework and to be neutral regarding any conclusions that may be reached. Whether or not Ministers subsequently decide to work toward a negotiation, the educational and exploratory process they have mandated should have independent value for all Member countries in the formulation of their own policies in relation to competition and trade.