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MODALITIES FOR VOLUNTARY COOPERATION

Paragraph 25 of the Doha Ministerial Declaration provides that in the period until the Fifth Ministerial Session, the Working Group on the Interaction Between Trade and Competition Policy shall undertake further work to clarify, among other things, "modalities for voluntary cooperation". The Working Group has, in previous meetings, addressed antitrust cooperation in the general sense of the benefits, costs, and issues that such cooperation can raise, and the United States has contributed papers conveying its experience with such cooperation[1]. The Doha Ministerial Declaration focuses our work on the potential ramifications of incorporating commitments on cooperation into a possible multilateral framework. Thus, in this paper, we briefly review the benefits and goals of cooperation[2] summarize the United States' experience with antitrust cooperation, and then raise several issues on which the Working Group might focus as it considers the role and modalities of voluntary cooperation in a possible multilateral framework.

I. GOALS AND BENEFITS OF ANTITRUST COOPERATION

1. An early function of antitrust cooperation was to minimize conflicts that sometimes arose when one jurisdiction's application of its antitrust laws implicated interests of other jurisdictions. For example, seeking evidence abroad or taking enforcement action against anti-competitive conduct that took place outside the jurisdiction sometimes raised comity and sovereignty concerns on the part of the foreign jurisdiction. Thus, conflict avoidance was a primary motivation for some of the early bilateral antitrust cooperation agreements entered into by the United States[3].

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[1] See "US Experience with Antitrust Cooperation Agreements", Submission of the United States, WT/WGTCP/W/48 (97-5158), 24 November 1997 and "Approaches to Promoting Cooperation and Communication among Members including in the Field of Technical Cooperation", Communication from the United States, WT/WGTCP/W/116 (99-2099), 25 May 1999.

[2] "Cooperation" is sometimes used to include technical assistance, but we use the term herein to refer only to enforcement-related assistance. For further information on the technical assistance and capacity-building experience of the United States, see "National Experience in Antitrust Law Technical Assistance: a Ten Year Perspective", Communication from the United States WT/WGTCP/W/185 (02/2277), 22 April 2002.

[3] The antitrust cooperation agreements of the United States are available at http://www.usdoj.gov/atr/public/international/int_arrangements.htm.

2. As business practices have increasingly involved conduct with cross-border or even global effects, it has become correspondingly important for antitrust agencies reviewing cross-border conduct to cooperate with their counterparts abroad. Hence, the more recent bilateral cooperation agreements into which the United States has entered reflect the goal of enhancing mutual enforcement effectiveness, as well as conflict minimization. A third benefit of cooperation is that working together on issues of mutual concern fosters substantive analytical convergence among the jurisdictions involved. Even when the laws and procedures of the cooperating jurisdictions differ, sharing information and ideas on concrete matters can move one or both of the agencies toward a common approach to the case at hand, which can in turn influence the agencies' general policy direction toward "best practices" in antitrust enforcement.

3. For example, the United States and Canada have cooperated in a wide range of criminal cartel investigations, including the plastic dinnerware, graphite electrodes, and vitamins investigations, which resulted in US fines exceeding US$1.3 billion and commensurate Canadian fines of more than CDN$115 million. This cooperation has included simultaneously executed search warrants, as well as searches by one authority on behalf of the other. In many of these investigations, the United States and its Canadian counterparts would have found it far more difficult, if not impossible, to conclude such investigations successfully without the other's assistance. In addition, cooperation between the United States antitrust agencies and the European Commission's Directorate General for Competition has generally led to consistent analyses of proposed mergers subject to review in the United States and the EC, and the development of compatible remedies in both jurisdictions[4].

II. SUMMARY OF THE UNITED STATES' EXPERIENCE WITH ANTITRUST COOPERATION

4. The United States has had extensive experience with voluntary cooperation among antitrust agencies in bilateral and multilateral contexts.

Bilateral Arrangements

5. Most antitrust cooperation by the United States occurs pursuant to legal frameworks set forth in bilateral cooperation agreements. These agreements tend to be with the jurisdictions with which the United States has significant economic relationships, which give rise to the most frequent instances of conduct that raises antitrust issues in both jurisdictions.

6. The United States has entered into several types of bilateral antitrust agreements. The United States has entered into eight "soft" or "first-generation" agreements providing for, among other things, notification of enforcement actions implicating the other party's important interests, provision of investigative assistance, coordination of enforcement activities, consideration of comity, and a consultation mechanism[5]. Pursuant to these agreements, the United States antitrust agencies share

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[4] See *e.g., In the Matter of Novartis AG; AstraZeneca, PLC; and Syngenta AG*; see FTC Press Release (1 Nov. 2000), FTC's Complaint, Consent Agreement, Order, and Analysis to Aid Public Comment, available at <http://www.ftc.gov/opa/2000/11/astrazeneca.htm>; *AstraZeneca/Novartis*, Case No COMP/M.1806, European Commission Decision, available at http://europa.eu.int/comm/_competition/mergers/cases/decisions/m1806_en.pdf; MCI WorldCom/Sprint, Case No. COMP/M.1741, Commission Decision of 28 June 2000; United States v. WorldCom, Inc. and Sprint Corp. (D.D.C. filed 27 June 2000), Complaint available at http://www.usdoj.gov/atr/cases/f5000/5051.htm.

[5] Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, 29 June 1982; Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their Competition Authorities in the Enforcement of Their Competition Laws, 26 October 1999; Agreement between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, August 1995; Agreement between the Government of the United States of America and the Government of the Federal Republic of

public information and what is known as "agency confidential" information, meaning information that the agencies do not normally disclose but the sharing of which is not prohibited – for example, the identity of investigation targets or the analysis of relevant markets in merger cases. The United States has entered into one agreement devoted specifically to elaborating a framework for "positive comity," although it has not yet been invoked. The United States is a party to roughly forty Mutual Legal Assistance Treaties that provide for sharing information, including confidential information, in criminal matters, often including criminal antitrust cases. The United States currently has one agreement, pursuant to specific authorizing legislation, enabling the sharing of confidential information in civil as well as criminal antitrust cases. Given the sensitivity of the information that may be exchanged pursuant to all of these types of agreements, each such agreement is subject to safeguards committing the recipient of such information to protect its confidentiality. None of the agreements is subject to dispute settlement.

7. In the United States' experience, formal agreements have proven useful in providing a legal framework for cooperation. An additional benefit to these agreements is that they have acted as a catalyst to encourage contact between the antitrust agencies of different countries, fostering closer relationships among the agencies and facilitating analytical convergence. Some cooperation also takes place in the absence of agreements. This most often takes the form of sharing publicly available information, which can be useful to agencies that may find this easier than locating the information themselves.

Multilateral and Regional Arrangements

8. Antitrust cooperation has also been facilitated by the work of several regional and multilateral fora. The OECD's Recommendation on antitrust enforcement cooperation[6] provides a framework for its thirty members to engage in cooperation, including notification, provision of non-confidential information, coordination, and consultation. The OECD's Cartel Recommendation[7] has facilitated cooperation in the prosecution and punishment of international cartel arrangements. Discussions in other regional and multilateral fora, such as the WTO, UNCTAD, NAFTA, APEC, and FTAA have facilitated cooperation by highlighting issues of mutual concern and the benefits of cooperation in addressing anti-competitive practices with an international dimension.

9. The discussions in these bodies also make clear the diversity of experience that jurisdictions have with antitrust laws and enforcement, ranging from an absence of an antitrust regime, to new regimes established as part of economic reform programs, to older regimes that are being modified in view of new learning and globalization, to well-established, sophisticated enforcement systems. The types of cooperation in which jurisdictions engage is significantly affected by the nature of the national regime, the relationship between the cooperating parties, and the nature of the specific matter in which cooperation is being undertaken. Thus, cooperation has many forms and meanings, and its nature, use, and value are highly context-specific.

Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, 23 June 1976; Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, 23 Sept. 1991; Agreement Regarding The Application of Their Competition Laws Between The Government of the United States of America and the Government of The State of Israel, 15 March 1999; Agreement between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anti-competitive Activities, 7 Oct. 1999; and, Agreement between the Government of the United States of America and the Government of The United Mexican States Regarding the Application of Their Competition Laws, 11 July 2000.

[6] OECD, Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anti-competitive Practices Affecting International Trade adopted on 27 and 28 July 1995, C(95)130/Final.

[7] OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, C(98)35/Final.

III. ISSUES RAISED BY INCORPORATING VOLUNTARY COOPERATION IN A MULTILATERAL WTO FRAMEWORK

10. As indicated above, the United States' experience, which appears to be shared by many other jurisdictions, is that antitrust cooperation can be very beneficial in minimizing conflict, enhancing enforcement effectiveness, and promoting analytical convergence. Cooperation has been successfully promoted by bilateral agreements and by non-binding multilateral instruments. One task the Doha Ministerial Declaration has assigned to this Working Group is to consider how modalities of voluntary cooperation might work in a possible multilateral WTO framework. Translating the experience of antitrust cooperation from bilateral agreements and non-binding multilateral instruments to a prospective WTO instrument among a very large number of jurisdictions raises a variety of issues and questions. We raise some of these issues below in the interest of stimulating a discussion that we hope will crystallize the potential benefits, costs, and open questions that a multilateral cooperation discipline may entail.

What is meant by "cooperation"?

11. The term "cooperation" does not have a fixed meaning when applied to the antitrust enforcement context. Various agreements and other instruments provide for several different arrangements that can be characterized as cooperation. The Report of the Working Group's discussions of this subject in its 2001 meetings notes that many Members arrived at a common understanding on the basic outline of a possible framework of voluntary cooperation on competition matters, which could include, *inter alia*: (i) case-specific cooperation, (ii) provision of technical cooperation and assistance with institution building, (iii) sharing of information and experiences and discussions of common areas of interest, and (iv) cooperation regarding notification and coordination, though dissenting views have been and are likely to continue to be expressed in relation to these individual framework elements[8]. These forms of cooperation obviously encompass a wide range of conduct and potential obligations. The Working Group may want to focus on exactly what "cooperation" means in the context of a multilateral agreement.

What is meant by "voluntary"?

12. A WTO multilateral framework is generally perceived as imposing legal obligations. Yet, the Working Group discussions have emphasized that meaningful cooperation is an inherently voluntary activity, *i.e.*, there is little point to trying to coerce one jurisdiction to cooperate with another, given possible concerns over, *inter alia*, confidentiality of shared information, resource allocation, and commonality of prohibitions and sanctions.

13. There have been references in the Working Group's prior discussions of cooperation to the possibility of requiring jurisdictions receiving cooperation requests to give such requests "sympathetic consideration" and of requiring jurisdictions that decline a request to provide reasons for doing so. Such requirements could detract from the "voluntariness" of the cooperation mechanism. Yet if cooperation can be freely given or withheld, it is not clear how this concept would fit into a WTO framework. Thus, the Working Group may want to consider the meaning of voluntariness as applied to a potential WTO antitrust cooperation provision.

How, if at all, would MFN apply to voluntary cooperative arrangements?

14. A related issue is the potential application of the WTO principle of MFN treatment to voluntary cooperation arrangements. It has been argued that a jurisdiction' s entry into a cooperative relationship with one party could raise MFN issues if the relationship provides benefits not available to a third party – for example, providing for a notification, coordination, or consultation mechanism

[8] *Id.* at para. 55.

not available to all others. Applying MFN could potentially require jurisdictions to engage in a level of cooperation with other jurisdictions that they did not intend or desire, and where the mutual knowledge and trust so necessary to a sound cooperative relationship is absent. Alternatively, applying MFN could chill jurisdictions from entering into mutually beneficial bilateral relationships for fear that this will require them to extend the same terms to jurisdictions as to which they do not feel such terms are appropriate. Conversely, it has also been argued that MFN is inapplicable to this scenario because each bilateral relationship is different, *i.e.*, the circumstances as to another jurisdiction would not be "like" and MFN would not apply. The Working Group may want to consider how MFN might apply or not apply to a voluntary cooperation mechanism in the WTO.

What would a notification obligation entail?

15. As mentioned previously, many cooperation instruments provide for notification to the other party or parties of antitrust enforcement activities that affect the other's interests. In an agreement potentially among 140 or more participants, it is important to consider the ramifications of such an obligation. One question is what would trigger a notification obligation. Existing agreements often specify the type of conduct subject to notification. These are often phrased in terms of activities that affect the other party's "interests" or "important interests." While the agreements often specify examples of such activities, the circumstances triggering notification are typically not comprehensively defined. The specific examples of covered enforcement activities can include, for example, those: that are relevant to the other party's enforcement activities; that involve anti-competitive activities carried out in the other party's territory; that pertain to mergers involving a party organized under the other party's laws; that involve conduct encouraged, required, or approved by the other party; or that involve remedies that would require or prohibit conduct in the other party's territory.

16. In considering a cooperation provision that included notification, the Working Group may want to examine when such an obligation would apply. It may also want to consider how the notification would be carried out – *e.g.*, through bilateral diplomatic channels, informally between competition agencies, or through a WTO mechanism.

What resource implications would a cooperation instrument entail?

17. Assuming that a workable and beneficial cooperation instrument could be devised, it is still necessary to consider the costs associated with implementing its provisions. Each aspect of cooperation involves the expenditure of resources - for example, responding to requests for investigative assistance, coordinating enforcement with another jurisdiction, consulting as to whether cooperation is appropriate, determining whether notification is required, providing such notifications, handling incoming notifications, and responding to requests for public information. Resources for these activities must come either from existing funds allocated to antitrust enforcement and other agency functions or from new funds allocated by governments. In either case, the resources needed to implement cooperation activities would compete with and ultimately displace resources that would have gone elsewhere, *e.g.*, for direct law enforcement activity, infrastructure for the antitrust agency, higher salaries, or other, non-antitrust priorities of the government.

18. The experience of the United States has been that enforcement cooperation can be resource intensive, even in a context of formal cooperation relationships with a relatively small number of jurisdictions. For example, the United States antitrust agencies submit roughly 150 notifications per year to other antitrust agencies pursuant to such relationships. As mentioned, the US agencies derive significant benefits from international cooperation. However, given the number of jurisdictions that might participate in a WTO antitrust cooperation framework and the potentially significant costs to each jurisdiction of undertaking cooperation responsibilities, the Working Group may want to consider how the possible benefits of a cooperation regime compare to the likely costs – direct, indirect, and opportunity – that it would entail.

IV. CONCLUSION

19. Cooperation with other antitrust enforcement agencies has yielded significant benefits to the United States and others in enforcing their antitrust laws. Bilateral cooperation agreements and non-binding multilateral instruments have played an important role in promoting such cooperation. Translating this experience into a prospective multilateral framework raises new and significant issues. In this paper, we have attempted to raise some of the questions that the Working Group may want to consider in greater depth in fulfilling the Doha Ministerial mandate as it applies to voluntary cooperation. We look forward to examining these issues in the Working Group to determine the potential nature and suitability of antitrust cooperation disciplines in a possible WTO framework.

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