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COMMUNICATION FROM THE UNITED STATES

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TRANSPARENCY AND NON-DISCRIMINATION

The United States previously addressed the WTO fundamental principles of transparency and non-discrimination (both national treatment and most-favored nation treatment (MFN) in its July 1999 submission, "Relevance of Fundamental WTO Principles to Competition Policy."[1] That submission provided background on each of these principles, including their treatment in the WTO and US-antitrust contexts. Relying on that background, this submission addresses fundamental questions raised by the application of these principles to antitrust policy and enforcement. We address procedural fairness concerns in a separate, accompanying paper.

Whereas both trade and antitrust laws promote a competitive environment for national and foreign producers and service providers, they differ significantly in application. Trade law aims to reduce tariffs and other trade barriers by addressing governmental, rather than private, action, with limited exceptions (e.g, antidumping). Antitrust laws, by contrast, generally provide for the assessment of individual, private transactions and/or agreements to determine whether they promote the central objectives of economic efficiency and consumer welfare.[2] Antitrust authorities typically review each case individually, balancing a wide array of factors as part of a complex analysis to determine whether a particular transaction or agreement meets these goals. As discussed more fully below, many questions regarding the application of the WTO's fundamental principles of transparency and non-discrimination to antitrust law and enforcement arise from the focus of antitrust on individual cases involving private rather than governmental actions.

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[1] Communication from the United States of 13 July 1999 (WT/WGTCP/W/131).

[2] As noted in the Secretariat's paper of the Fundamental Principles of Competition Policy, the goals of promoting economic efficiency and consumer welfare are central objectives of competition policy in many, if not most, jurisdictions with antitrust laws. Background Note by the Secretariat (WT/WGTCP/W/127) of 7 June 1999, at § III. Other objectives cited in various antitrust rules include, *inter alia*, the promotion of business rivalry and entrepreneurial opportunity, the protection of small business, the creation of national champions, employment, and assistance to industries in crisis. Many jurisdictions also use antitrust rules to address state aids and other governmental conduct.

I. NON-DISCRIMINATION (NATIONAL TREATMENT AND MFN)

A. BACKGROUND SUMMARY

Background Summary

Fundamental WTO principles of non-discrimination include national treatment and MFN. As a general matter, national treatment requires that WTO Members treat like goods and services from other WTO Members no less favorably than those of their own nationals.[3] While the terms of the MFN principle differ across the varying WTO documents, the basic principle requires that a WTO Member treat like goods, services and persons of another Member no less favorably than those of any other country -- what we have previously deemed "general (overall) reciprocity."[4] Together, these WTO non-discrimination principles aim to promote equality of competitive opportunity for Members' goods, services and enterprises, to avoid distortions of the competitive process. Importantly, these principles are applied in the WTO context to both *de jure* and de facto discrimination, respectively, against facially discriminatory legislative provisions and the discriminatory application of facially-neutral legislative provisions.

What is Discrimination in the Antitrust Context?

The US experience has been that antitrust rules and their application are supportive of and consistent with the WTO's basic non-discrimination principles. Antitrust enforcement should be aimed at the protection of competition and not individual competitors.[5] Thus, discrimination on the basis of nationality, in favor of an individual competitor or group of competitors, is inconsistent with the purpose of antitrust rules. This is clearly the case in the United States, where the Department of Justice (DOJ) and Federal Trade Commission (FTC) Antitrust Enforcement Guidelines for International Operations explicitly state that "[t]he Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties."[6] Moreover, this is supported more generally by the consumer welfare goal of US antitrust law, pursuant to which the nationality of a firm is irrelevant because foreign firms provide healthy rivalry, stimulating lower prices and innovation.

Nevertheless, the application of WTO national treatment and MFN principles in the antitrust context raises complex issues.

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[3] *See* e.g., Article III of the General Agreement on Tariffs and Trade (1947); Article XVII of the General Agreement on Trade in Services (1994) (applying only to areas subject to sector-specific commitments) and Article 3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994). The Communication from the United States "Relevance of Fundamental WTO Principles to Competition Policy," WT/WGTCP/W/131 of 13 July 1999 and Background Note by the Secretariat, "The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency," WT/WGTCP/W/114 of 14 April 1999 provide additional detail with respect to these provisions.

[4] *See* e.g., Article I of the General Agreement on Tariffs and Trade (1947); Article II of the General Agreement on Trade in Services (1994) and Article 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994). We have referred to this as general or overall reciprocity in Communication from the United States "Relevance of Fundamental WTO Principles to Competition Policy," WT/WGTCP/W/131 of 13 July 1999 at para. 19.

[5] See supra. n. 1.

[6] Antitrust Enforcement Guidelines for International Operations, issued by the US Department of Justice and the Federal Trade Commission, April 1995, available at http://www.usdoj.gov/atr/public/guidelines/internat.htm, at § 2.

As a preliminary matter, both WTO national treatment and MFN principles are generally applied with respect to Alike@ products or services.[7] Pursuant to these rules, discrimination can be determined only when two products or services are considered sufficiently comparable, and when the law, regulation or other government measure treats an imported good or service less favorably, either de jure or defacto. WTO disputes regarding discriminatory treatment may be fact intensive, but they rarely involve examination of individual prosecutorial or judicial decisions for alleged patterns of bias. Competition analysis and enforcement is, however, case and fact-specific, and no two situations will be wholly similar.

An antitrust authority assessing domestic and foreign firms under the same rules and procedures might come to differing decisions with respect to similar conduct, based on the facts of the cases rather than discriminatory purpose. For example, the United States may deny a merger of two foreign firms that increases anti-competitive potential in the United States but creates efficiencies only outside of the United States. However, a similar domestic transaction, which creates efficiencies in the United States, may be permitted. Similarly, the United States may require a less restrictive remedy with respect to a transaction involving foreign firms from country A vis-à-vis foreign firms from country B, because the antitrust authority from country A is enforcing its national antitrust rules with respect to the first transaction. Whereas these two actions may appear to be discriminatory, the differentiated treatment should in fact be consistent with the WTO's national treatment and MFN principles, respectively, based on the differing factual situations of the two cases.

In practice, it is extremely difficult to determine whether de facto discrimination exists with respect to antitrust enforcement actions, given their individual focus. For example, a Member enforcing its competition provisions with any eye toward protecting small and medium-sized firms may disparately impact foreign firms which are less likely to be small and medium-sized enterprises. Should this be considered discriminatory under a WTO Competition agreement? These difficulties are exacerbated by the extensive prosecutorial discretion[8] afforded antitrust authorities in many countries, and discussed more fully in our accompanying submission on procedural fairness.[9] This raises fundamental questions with respect to the application of the WTO non-discrimination provisions to de facto discrimination. For example, is it possible to determine whether de facto discrimination exists in the antitrust context? If this can be assessed, what is the standard by which this determination should be made?

Even assuming that the possible future application of WTO national treatment and MFN principles were to be limited to de jure discrimination, questions, such as those discussed below, still remain.

How should Sectoral Exemptions to Antitrust Rules be Treated?

Most, if not all, countries exempt certain sectors from the application of antitrust rules or regulate them through sectoral legislation, in lieu of or in addition to standard antitrust rules. National antitrust exemptions reflect important policy choices for each WTO Member. But, what if a Member's exemptions do not apply to firms operating outside its territory and that Member's rules are challenged as discriminatory? Should a prospective Competition agreement address such issues? For example, are there factors that might make otherwise discriminatory antitrust exemptions acceptable, such as the need for effective, national regulatory oversight? Given the myriad of national

[7] *See* e.g., Articles I and III of the General Agreement on Tariffs and Trade (1947) and Articles II and XVII of the General Agreement on Trade in Services (1994). *But see* Articles 3 and 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) (applying to nationals of Members, not products).

[8] The term "prosecutorial discretion" generally refers to the freedom conferred on an investigative agency to decide which civil, criminal and administrative cases or matters are appropriate to pursue.

[9] "Procedural Fairness," Submission of the United States prepared for the Meeting of the Working Group on the Interaction between Trade and Competition Policy, 26 & 27 September 2002.

exemptions concerning antitrust rules and enforcement and the policy choices that they reflect, is it practicable or even appropriate to adopt specific WTO non-discrimination rules regarding such legislation? In the alternative, might mandatory publication and notification of such legislation suffice to minimize the discriminatory object and/or enforcement of such exemptions?

GATT Article XX Exceptions, e.g., pertaining to the protection of public morals, law enforcement, and human health,[10] would be available for such national exemptions. Are there specific elements to assess in the context of a competition case, e.g, the state of market liberalization, that might have a particular bearing on an Article XX Exception analysis in the competition domain and which should be addressed in a prospective Competition agreement?

In addition to these issues, fundamental questions arise with respect to the application of the WTO's MFN principle to cooperation agreements.

Might MFN be used to Challenge Bilateral/Multilateral Cooperation Agreements?

The Secretariat's recent note on "Modalities for Voluntary Cooperation" states that a multilateral agreement on voluntary cooperation could be an efficient tool to facilitate cooperation, and adds that "[m]ore intense cooperation could still be pursued with individual partners, as desired."[11] Many countries have entered into bilateral and/or multilateral agreements to promote antitrust cooperation. The United States summarized its successful experiences with such agreements in its submission to this Working Group in July 2002.[12] However, cooperation with one Member and not another could arguably raise discrimination concerns in a potential WTO Competition agreement. The United States believes that such cooperative situations should not be considered "like," and also notes that discrimination against a foreign government divorced from a particular trade application, such as may be the case with antitrust cooperation agreements, should not be considered to violate MFN. Nevertheless, it is unclear whether this position is shared by other Members.

Thus, even with strong support for bilateral and multilateral cooperation outside of the WTO context, it is not assured that such cooperation would be considered valid in a potential WTO Competition agreement including MFN provisions. Similarly, could a country cooperate with a particular Member, without the benefit of a particular agreement, but deny similar assistance to a second Member? Would such situations require a specific exception from the MFN principle? If so, how should this be phrased? Might guidelines, as suggested by the Secretariat,[13] rather than an exception, be sufficient to remedy this potential incongruence? Moreover, if both enforcement cases and bilateral/multilateral cooperation agreements were to be excluded from the purview of a potential WTO antitrust MFN principle, would the remaining elements subject to any such MFN provision be sufficiently meaningful to warrant the adoption of such a principle?

A similar host of questions is raised with respect to the application of the WTO's transparency principle in the antitrust context. We limit ourselves to a discussion of three issues: (i) Types of decisions subject to the publication obligation; (ii) Transparency and the Protection of Confidential Information; and (iii) Transparency and Resource Allocation.

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[10] *See* e.g., Article XX of the General Agreement on Tariffs and Trade (1947) and Article XIV of the General Agreement on Trade in Services (1994).

[11] WT/WGTCP/W/192 of 27 June 2002 at para. 29.

[12] Submission of the United States, "Modalities for Voluntary Cooperation," of 15 August 2002 (WT/WGTCP/W/204).

[13] *See* Background Note by the Secretariat, "Modalities for Voluntary Cooperation, of 27 June 2002 (WT/WGTCP/W/192) at para. 29.

Types of decisions subject to the publication obligation; (ii) Transparency and the Protection of Confidential Information; and (iii) Transparency and Resource Allocation

II. TRANSPARENCY

Background Summary

Transparency, in the WTO context, is generally understood as comprising two separate components: (i) an obligation to publish, or otherwise make publicly available, relevant measures of general application prior to their entry into force; and (ii) the notification of such measures to either a WTO body or WTO Members.[14] Importantly, these requirements are subject to an exception for the protection of confidential information.[15] As indicated in our prior submission, the United States advocates the transparency of rules, laws, and enforcement procedures. Transparency is important to the sound application of antitrust law and maintaining the effectiveness, impartiality and credibility of such law. However, a number of questions remain concerning the application of transparency principles in a potential WTO Competition agreement. As in the non-discrimination context, these concerns generally arise at the point at which WTO rules and fundamental principles are discussed as applying to individual enforcement actions.

A. WHAT IS SUBJECT TO PUBLICATION AND NOTIFICATION?

WTO transparency obligations generally cover laws, regulations, judicial decisions and administrative rulings of general application. The Panel in the *Japan – Film* case found that administrative rulings in individual cases are to be considered rulings of general application if such individual rulings establish or revise principles or criteria applicable in future cases.[16] WTO transparency provisions require the publication and notification of such administrative rulings.[17]

Antitrust laws generally are written in broad language. As noted above, many, if not most, jurisdictions' laws have, as their central objectives, the promotion of economic efficiency and consumer welfare.[18] In determining whether a particular transaction or agreement meets these goals, antitrust authorities assess each case individually, which may involve a complex analysis of factors. Each such individual assessment potentially raises issues that may establish principles or criteria applicable to future cases (e.g, market definition analysis). Accordingly, if the existing WTO transparency principle were to be adopted in a potential WTO Competition agreement, governments may attempt to rely on the *Japan-Film* case to challenge a Member's non-publication of individual antitrust rulings. Should the transparency provisions in a potential WTO Competition agreement apply to individual antitrust cases? Can administrative assessments that do not result in formal decisions, e.g, determinations not to pursue a merger or third-party complaint or decisions to use compulsory process during the course of an investigation, potentially be subject to publication requirements under this logic?

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[14] *See* Communication from the United States "Relevance of Fundamental WTO Principles to Competition Policy," WT/WGTCP/W/131 of 13 July 1999 and Background Note by the Secretariat, "The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency," WT/WGTCP/W/114 of 14 April 1999.

[15] *See* e.g., Article X:1 of the General Agreement on Tariffs and Trade (1947); Article III bis of the General Agreement on Trade in Services (1994); and Article of the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994). The Communication from the United States "Relevance of Fundamental WTO Principles to Competition Policy," WT/WGTCP/W/131 of 13 July 1999 and Background Note by the Secretariat, "The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency," WT/WGTCP/W/114 of 14 April 1999 provide additional detail with respect to these provisions.

[16] Japan – Measures Affecting Consumer Photographic Film & Paper, para. 10.388, WT/DS44/R.

[17] *See* e.g., Article X of the General Agreement on Tariffs and Trade (1947) and Article III of the General Agreement on Trade in Services (1994).

[18] Background Note by the Secretariat (WT/WGTCP/W/127) of 7 June 1999, at § III.

The role, if any, of private persons in enforcing WTO transparency provisions would also have to be considered. In order to comply with transparency provisions in a WTO Competition agreement, would Members be required to enact legislation or regulations that would give private parties, including competitors of investigation targets, the ability to challenge antitrust agency non-disclosure decisions in national courts? What limits should be placed on this to prevent "gaming" and other abuses by private persons?

The potential application of the WTO's transparency rules to individual enforcement actions also raises implications concerning, *inter alia*, the protection of confidential information, and resources allocation.

B. CAN THE BALANCE BETWEEN TRANSPARENCY AND THE PROTECTION OF CONFIDENTIAL INFORMATION BE MAINTAINED AT NATIONAL LEVEL?

As noted above, the WTO transparency principle includes an important exception for confidential information. This exception provides that Members are not required to disclose confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.[19]

Each Member interprets this exception differently, according to its own legal culture and traditions. As noted in the prior submission of the United States, US statute or regulation requires much of the information obtained in the course of US antitrust enforcement proceedings to be treated as strictly confidential.[20] This is particularly the case with respect to the investigative stage of an enforcement proceeding, where commercially sensitive information, including the identity of informants and witnesses, is protected, and special secrecy rules apply to criminal investigations. These confidentiality safeguards were adopted, in part, to ensure that respondents are not prejudiced by the submission of confidential information to the antitrust agencies enforcing the antitrust rules.[21] Thus, these provisions, which clearly fall within the WTO's confidentiality exception, would impede the US agencies from publishing basic information, including clearance reports, on notified merger transactions.

Given the varying national approaches to the protection of confidential information provided in antitrust cases, could obligations requiring publication and notification effectively be required with respect to individual cases in a possible Competition agreement? Instead, might any such provision be limited to the publication and notification of antitrust laws and guidelines? If not, should a potential WTO Competition agreement explicitly require Members to adopt procedures allowing private parties to challenge an antitrust agency's assertion of confidentiality? Finally, with respect to notification, should a possible Competition agreement address remedies that might be available to a notifying Member for failure of a recipient Member to adequately protect the confidentiality of such information?

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[19] *See* e.g., Article X:1 of the General Agreement on Tariffs and Trade (1947) and Article III bis of the General Agreement on Trade in Services (1994).

[20] Communication from the United States "Relevance of Fundamental WTO Principles to Competition Policy," WT/WGTCP/W/131 of 13 July 1999 at para. 9, highlighting such laws as the Hart-Scott Rodino Pre-Merger Notification statute, 15 U.S.C. §18a, the Antitrust Civil Process Act, 15 U.S.C. §§1311-14, and Rule 6(e) of the Federal Rules of Criminal Procedure.

[21] *See* e.g., Lieberman v. FTC, 771 F.2d 32, decided 20 August 1985, citing to Senator Hruska's remarks regarding the legislative history of the HSR Act at n. 14.

It is important to address these and related questions prior to the adoption of a WTO Competition agreement that includes transparency provisions, so that these provisions do not jeopardize current national antitrust enforcement mechanisms. To ensure the continued cooperation of private parties in antitrust proceedings, answers to these and related questions should be clarified as part of the Working Group's discussions.

C. WHAT RESOURCES ARE NEEDED TO COMPLY WITH WTO TRANSPARENCY REQUIREMENTS?

It is our understanding that all countries with antitrust laws publish such laws and accompanying regulations. However, many countries, including the United States, do not publish and/or notify other Members of various individual case assessments, including whether to follow-up on a complaint and/or pro-forma merger control reviews, and doing so could cause a significant drain on resources for both the Member subject to the publication and notification requirements as well as potential recipients of such information. For example, in fiscal year 2000, the US antitrust agencies received notification of 4,926 proposed transactions pursuant to the notification and filing requirements of the Hart-Scott-Rodino Antitrust Improvements (HSR) Act alone.[22] This is in addition to numerous non-merger enforcement investigations. Extrapolating from these statistics, the sheer number of possible publications and notifications that could potentially be required pursuant to WTO transparency in the antitrust context is staggering.

Given these concerns, the Working Group may wish to consider both the costs and benefits of the transparency principle in the antitrust context, particularly with respect to requiring publication and notification of individual rulings of general application. What are the costs involved in such publication and notification? To respond to this question, Members must have a clear idea as to the specific obligations required by the WTO's transparency rules. For example, what form and content would be considered adequate for publications and notifications? Would a strict timetable for publication and notification be imposed on notifying Members? What mechanism would or should be employed to ensure proper distribution of both required and voluntary notifications to Members? These latter practical questions regarding the form and substance of, and mechanisms for, publication and notification apply equally to antitrust laws, regulations and judicial decisions.

In balancing these costs and benefits, it is of interest to note that of the 4,926 cases reported under the HSR Act in fiscal year 2000, the US Antitrust agencies allowed over 97% of these transactions to proceed within the statutory 30-day waiting period, and granted over 70% of such transactions early termination of the statutory waiting period.[23]

III. CONCLUSIONS ON TRANSPARENCY AND NON-DISCRIMINATION

Like our accompanying submission on procedural fairness, this communication raises only some of the many questions surrounding the application of the WTO principles of transparency and non-discrimination in the antitrust context. Within the transparency and non-discrimination context, many questions stem from the overarching issue of the application of such principles to individual enforcement assessments and rulings. Whereas these questions need not create intractable issues, they deserve to be adequately addressed as part of the discussion on these core principles, and the United States looks forward to examining and clarifying these issues in the Working Group.

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[22] *See* Federal Trade Commission, Performance Report Fiscal Year 2000, 31 March 2001, at p. 18, available at http://www.ftc.gov/opp/gpra/prfy2000.pdf.

[23] Id.