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The following is the final text of a paper received from the Permanent Mission of the United States which was circulated as an advance copy for the Working Group's meeting of 26-27 September 2002.

PROCEDURAL FAIRNESS

I. BACKGROUND ON PROCEDURAL FAIRNESS

The Doha Ministerial Declaration created a work program for the Working Group on the Interaction Between Trade and Competition Policy which includes clarifying the core principles of procedural fairness, transparency and non-discrimination - the topics to be addressed at the Working Group's September session. Since this is the first time the Working Group will address the concept of procedural fairness in any detail, the United States has elected to submit two papers for this session of the Working Group. This submission is devoted entirely to procedural fairness, while transparency and non-discrimination, which were discussed previously by this Working Group in June 1999, are addressed in a separate, accompanying paper entitled, "Transparency and Non-Discrimination."

The United States begins this submission with a background discussion about the procedures that the US antitrust agencies have in place to ensure that their actions are fair and impartial. The paper concludes with a discussion designed to raise issues on which the Working Group might focus as it considers a possible multilateral WTO framework that would include commitments relating to procedural fairness in antitrust matters. The United States hopes that its submission will encourage a productive exchange of views among the Members and will assist the Working Group in its efforts to clarify procedural fairness concepts.

A. PROCEDURAL FAIRNESS AT THE US ANTITRUST AGENCIES

In our March 2001 submission entitled "Administering a Competition Law and Policy: The Mechanics of Setting and Pursuing Policy Goals with Finite Resources," we described in detail the case selection and review procedures of the US antitrust agencies.[1] We do not intend to repeat at length what was contained in our previous submission, but instead will summarize those aspects of the submission that dealt with the procedural provisions that the US antitrust agencies have in place to

[1] WT/WGTCP/W/164.

ensure that their decisions are made fairly and impartially, and supplement the summary with additional information where appropriate.[2]

1. Antitrust Investigations

By way of background, both US antitrust agencies possess very broad discretion in determining whether to open an investigation on the basis of a complaint or pursue enforcement action.[3] The concept of broad prosecutorial discretion[4] to bring or not bring cases is a familiar one in common law countries.[5] In the case of the Department of Justice ("DOJ"), there is no formal procedure for making complaints, which may take the form of telephone calls, faxes, electronic messages, letters or presentations by individuals, firms, or their legal counsel.[6] Consistent with the protection of prosecutorial discretion, there is no requirement that the DOJ respond or act in response to complaints. The DOJ, following its internal procedures,[7] retains discretion in determining whether to open and pursue an investigation, taking into account the law and the evidence, as well as its policy priorities and resource constraints. It is important to note that the DOJ does not have the power to issue orders to block mergers or stop anticompetitive conduct on its own. Instead, the DOJ enforces the antitrust laws through lawsuits brought in the federal courts. A critical factor in the decision whether to bring a case is, therefore, the need to persuade a federal judge (or jury in a criminal case, see below) that an offense has been committed.[8]

The Federal Trade Commission ("FTC", or the "Commission"), much like the DOJ, has wide discretion regarding whether to open an investigation and to pursue enforcement action. The FTC Rules of Practice and Procedure ("Commission Rules") provide that "any individual, partnership, corporation, association, or organization may request the Commission to initiate an investigation in respect of a matter over which the Commission has jurisdiction."[9] Complainants are encouraged to provide a signed statement that includes a description of the alleged violation, any available supporting documentation and the name and address of the complainant. In addition to this formal complaint process, and far more important numerically, are the many informal complaints that reach

[2] This submission focuses on the procedures utilized by the federal antitrust authorities in the United States, but, as noted in previous submissions, e.g., WT/WGTCP/W/164, US statutes and court decisions confer standing to enforce the US national antitrust statutes on state attorneys general and injured private parties as well. Most US states also have antitrust laws closely paralleling the federal antitrust laws. The state laws generally apply to violations that occur wholly in one state.

[3] The US antitrust agencies may initiate investigations on their own initiative as well as in response to a complaint. Investigations are triggered by the staff's monitoring of press reports and/or can arise out of other cases, investigations, or agency projects.

[4] 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.

[5] In Canada, the Attorney General of Canada (usually through the Crown counsel) exercises a broad discretion in the public interest in deciding which cases to prosecute; decisions whether to prosecute rest solely with the Attorney General and his or her counsel. This has also been the view long taken in the United Kingdom. In 1925, the then-Attorney General of England explained, "I understand the duty of the Attorney General to be this. He should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute. His first duty is to see that no one is prosecuted with all the majesty of the law unless the Attorney General ... is satisfied that the case for prosecution lies against him. He should receive orders from nobody. " J. Edwards, *The Law Officers of the Crown* 215 (1964).

[6] For a fuller discussion of the procedures utilized by the US Department of Justice in antitrust investigations, see the 550-page manual of the Antitrust Division. Antitrust Division Manual (1998), available at http://www.usdoj.gov/atr/foia/divisionmanual/three.atr.htm.

[7] See generally Antitrust Division Manual at Chapter III.

[8] See generally the United States's March 2001 submission, WT/WGTCP/W/164, for a more detailed account of the considerations that go into a decision by the FTC and the DOJ to file a case, including the standards for filing criminal matters.

[9] Rule 2.2 (a), 16 CFR 2.2 (a).

the agency through the mail, telephone, fax and other media. While there is no requirement that the Commission respond to requests to initiate an investigation, FTC Bureau of Competition staff does acknowledge receipt of such requests, and usually engages in a brief discussion of the legal issues involved, either in writing or, more commonly, by phone. Telephone responses have been increasingly used in the interest of speed, convenience, dialogue, and offer direct contact between the complainant and the agency. The final decision to investigate is based in part on the seriousness of the allegations, the Commission's enforcement priorities, and its enforcement constraints (e.g., resources). This decision is entirely discretionary.

Once a civil antitrust investigation begins, the DOJ's and the FTC's investigatory procedures leading up to the filing of a case in court (or an administrative complaint in those FTC cases that are adjudicated within the FTC) are similar. To ensure that the investigatory process is carried out in a fair manner, at every point in the investigatory process - from opening an investigation to issuing a second request in a merger investigation to using compulsory process to recommending enforcement action or closing an investigation - staff must consult with management before proceeding to the next phase. Throughout the course of an antitrust investigation, the subjects of an investigation (and/or their representatives) may, and usually do, meet with staff conducting the investigation. For example, in criminal cases, the DOJ Antitrust Division Manual instructs that the staff should afford counsel for the parties an opportunity to present their views to the staff before a staff recommendation is made and to senior Antitrust Division officials before a decision to file suit or seek an indictment is made.[10] The agencies frequently confer with interested third parties. As the case reaches important decision points, meetings often take place between the subjects of an investigation and senior DOJ and FTC officials. In the case of the Commission, this may include meetings with the individual Commissioners, who make the ultimate enforcement decision but who are outside the day-to-day chain of command. Throughout the entire process, both staff and management are well aware that if an enforcement action is brought, it may ultimately have to be proved before an independent tribunal.

Both US federal agencies are bound by strict confidentiality rules. Most criminal antitrust matters are investigated through the grand jury process, which is conducted in secret.[11] All persons present inside the grand jury room, except the witnesses, are prohibited by law from disclosing matters occurring before the grand jury.[12] Most mergers come to the attention of the agencies through the pre-merger filings that are made pursuant to the Hart-Scott-Rodino Act ("HSR"), which provides that all "information or documentary material" filed with the Division or the FTC pursuant to the HSR Act may not be made public except "as may be relevant to any administrative or judicial action or proceeding."[13] Barring this limited exception, HSR material may not be disclosed to state or foreign enforcement agencies or to third parties without the consent of the party producing the information. A significant amount of information in merger and civil non-merger antitrust investigations is obtained

[10] Antitrust Division Manual at III-113.

[11] In the United States, federal prosecutors investigate crimes through the grand jury system. The grand jury is a body of citizens, ranging from 16 to 23 in number, who are responsible for hearing evidence against that targets of an investigation and returning indictments against the targets if they determine that probable cause exists to believe that the targets have committed a crime. The only persons allowed to attend the grand jury hearing, in addition to the grand jurors, are the prosecutors, the witness under examination, interpreters if necessary, and the person who records the hearing.

[12] Knowing violations of grand jury secrecy may be punished as contempt of court. Grand jury secrecy encourages witnesses to testify freely and honestly, minimizes the risks that prospective defendants will flee or use corrupt means to thwart investigations, safeguards the grand jurors themselves and the proceedings from extraneous pressures and influences, and protects persons under investigation who ultimately are not charged. The transcript of the witness testimony is generally kept secret during the grand jury phase of the investigation and is usually only revealed if the target is indicted and goes to trial and the disclosure of the testimony is used as evidence at trial or required by applicable pre-trial discovery rules.

[13] Section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h). The agencies interpret this provision to mean an administrative or judicial action to which the agency is a party.

through compulsory process, which includes interrogatories, requests for documents and depositions. This type of material may be disclosed to third parties in only very limited circumstances.[14] Even information provided to the agencies voluntarily (i.e., outside compulsory process) receives substantial protection from disclosure.[15] Due to the strict confidentiality rules governing information obtained pursuant to the grand jury process and information obtained under the HSR and civil investigatory demand ("CID") statutes, staffs do not provide interested third parties access to the evidence gathered, nor do they disclose the fact that a firm or individual is under investigation, unless that fact is already known publicly, in which case the agencies will confirm that they are investigating, but generally will not disclose any additional details about the investigation.

The US federal antitrust agencies effectively balance confidentiality with the important interest in maintaining overall transparency of antitrust process, decisions, and policies.[16] The DOJ and FTC typically inform the subject of a potential enforcement action of the allegations they intend to make, so that the subject has the opportunity to respond before a final agency decision on enforcement action is taken. Both agencies publish their settlements and seek public comment before finalizing settlements.[17] Decisions not to take action are not ordinarily publicly announced, although they typically are made known to the subject of the investigation and, on a case-by-case basis, interested third parties are advised of the outcome. Of course, antitrust trials and appeals (discussed more fully below) occur almost entirely in public circumstances.

2. Antitrust Trials

With respect to civil antitrust matters, which include mergers and most monopolization offenses, the DOJ must seek relief from a federal court of general jurisdiction, which will issue a decision after a trial on the merits. The defendant of such an action is accorded a number of procedural protections during the course of litigation, including, among other things, the ability to call witnesses on its behalf and the right to cross examine hostile witnesses. In addition, prior to trial, both the government and the defendant may obtain information from each other and from third parties that may be relevant to the claim or defense through interrogatories, document requests, and depositions. The trial court's decision is appealable by both the government and the defendant.

The DOJ can, and often does, also prosecute violations of the Sherman Act criminally. The vast majority of cases prosecuted criminally have involved allegations of per se violations of Section 1, such as horizontal price-fixing, bid-rigging and market or customer-allocation conspiracies. Criminal proceedings involve additional procedural protections that are designed to satisfy the due process requirements of the US Constitution and the extensive case law interpreting the concept of

[14] The Antitrust Civil Process Act, 15 U.S.C. § 1311-1314, governs compulsory process in DOJ investigations. Material obtained pursuant to the Antitrust Civil Process Act may be disclosed without the consent of the producing party: (1) to Congress; (2) to the FTC, which is bound by the same rules as the DOJ with respect to the use of the material; (3) to third parties "in connection with the taking of oral testimony" pursuant to the CID statute; and (4) for official use in connection with court cases, grand juries, or a Federal administrative or regulatory proceeding in which the DOJ is involved. The FTC's confidentiality obligations with respect to its information it obtains under its compulsory process procedures are similar.

[15] While confidential information provided voluntarily in the course of an antitrust investigation does not receive the broad statutory protection afforded material provided in response to compulsory process or in connection with grand jury proceedings, it is the DOJ's policy not to disclose sensitive business information unless the disclosure is required by law or is necessary to further a legitimate law enforcement purpose. At the FTC, information provided voluntarily, in lieu of compulsory process, receives the same protection as information provided pursuant to compulsory process.

[16] Transparency will be discussed in detail in our accompanying paper entitled, "Transparency and Non-discrimination."

[17] See ABA Section of Antitrust Law, Antitrust Law Developments 686 and 756-763 (5th ed., 2002). Also, plea agreements in criminal cartel matters are not subject to public comment but must be approved by a federal court.

due process and concepts of fundamental fairness. US criminal antitrust cases are litigated in federal court, and defendants have the right to call their own witnesses and cross-examine those who testify against them. However, defendants benefit from additional procedural rights, including a trial by jury, access to documents that are in the US's possession and that are material to the preparation of the defense, discovery of statements of government witnesses, disclosure of exculpatory information in the possession of the United States, and the right against self-incrimination. In criminal matters, the government must prove its case beyond a reasonable doubt. This is a higher standard than the "preponderance of the evidence" standard used in civil antitrust matters. Defendants in a criminal cartel prosecution may appeal an adverse trial decision, but, with very rare exceptions, the government may not.

The FTC brings some of its actions independently in courts while others are adjudicated within the FTC in proceedings much like a court trial. In both cases, decisions are subject to review by a US Court of Appeals. With respect to those matters that are adjudicated before the FTC, various procedural rules seeking to ensure fairness are in place, including requirements that adjudicative proceedings be conducted expeditiously, and provisions that the administrative law judge be independent. The respondent also has certain procedural rights, including the right to discover documents from the FTC and third-parties, depose government witnesses, and call and cross-examine witnesses on its own behalf during the proceedings.[18] Where the FTC brings actions before federal courts of general jurisdiction, the same procedural safeguards discussed above in relation to the DOJ's civil antitrust cases apply.

II. ISSUES RAISED BY INCORPORATING PROCEDURAL FAIRNESS IN A MULTILATERAL WTO FRAMEWORK

A. WHAT IS MEANT BY PROCEDURAL FAIRNESS?

There is currently no broad international consensus on what constitutes procedural fairness in the antitrust context, and reaching agreement on elements for inclusion in a possible multilateral framework addressing procedural fairness will be a very challenging exercise. Notions of fundamental fairness in the context of law enforcement disciplines such as antitrust differ greatly from legal system to legal system and naturally will be influenced by the political and legal culture in which an antitrust agency must operate. Achieving a consensus on detailed and specific guidelines that respect differences in legal systems and do not infringe on national sovereignty or violate the independence of enforcement agencies and courts seems unlikely. On the other hand, it may be too easy to read individualized notions of fairness into procedural fairness guidelines that are not specific enough. If they are made overly abstract or general, not only will they fail to provide much in they way of guidance, but they may also create significant uncertainty and become a ready invitation to attack any Member's system for failure to comply.

Although the Working Group has neither discussed procedural fairness in any detail nor analyzed the connection between antitrust procedural fairness concepts and the world trading system, previous submissions to this Working Group by the European Union ("EU") offer some insights into a few of the elements that the Working Group might consider in a prospective WTO instrument. In the interest of stimulating a discussion among the Working Group members, we summarize the EU's work below. We then discuss the main concepts raised by the EU and raise issues and questions for consideration by the Working Group. We close by addressing the concept of timeliness since many of the procedural fairness elements discussed below are not worth a great deal unless an antitrust authority is able to resolve its matters in a timely fashion. We hope that such a discussion will clarify the potential benefits, costs and issues that a multilateral framework on procedural fairness may entail.

[18] 16 C.F.R. § 3, available at http://www/access.gpo.gov/nara/cfr/cfrhtml_00/Title_16/16cfrv1_00.html.

As noted above, previous submissions by the EU may offer some ideas for the Working Group to consider during its first discussion of procedural fairness. In its June 2000 submission to the Working Group, the EU argued that transparency provisions in any WTO agreement on competition "should include the issue of 'due process' . . . [including] procedures through which private parties can have access to the competition authorities, guarantees of due process in competition investigations and enforcement, basic standards of protection of confidential information, a right of appeal against administrative decisions and the role of the judiciary in the enforcement process."[19] The EU also addressed procedural fairness concepts in its May 1999 submission, where (in the context of a discussion on non-discrimination and transparency) it noted that "[t]he rights of private parties in competition proceedings are central" and stressed the importance "both of the right to bring complaints before competition authorities and of the right of action before courts." The EU shared its initial thoughts about elements that could be considered for WTO rules on competition and suggested that the Working Group study the following topics for inclusion as possible elements: "[p]rocedures through which private parties can have access to the competition authorities;" the protection of confidential information; and the "role of the judiciary . . . including both direct access to the courts and review of administrative decisions."[20] The submission also summarized the basic rights of firms under EC competition law which consists of: (a) notification to all the parties concerned of a "statement of objections" setting forth the objections raised by the Commission; (b) the right to reply to these objections in writing and orally; (c) the right to have access to the Commission's file with the exception of documents of a confidential nature; (d) the right to protection of confidential information; and (e) the right to judicial review of competition decisions.[21]

The work done by the EU presents a number of themes for this Working Group to consider, including the importance of access to the antitrust authority, the notion of an antitrust authority informing parties of its objections before taking final action, confidentiality protections, and the role of the judiciary in enforcement, including appellate review. We discuss each in turn.

B. ACCESS TO THE COMPETITION AUTHORITY

Obviously, for an antitrust regime to be fair, it should not arbitrarily treat the complaints of some more favorably than those of others, but what does appropriate access to an antitrust authority entail from a procedural fairness perspective? Does it simply mean the right to express one's views to the antitrust authority? Or, does the concept mean more than that and include the right to a formal meeting with or response from the antitrust authority? If so, would access require an antitrust agency to implement formal procedures for handling complaints or conduct hearings before taking (or declining to take) action? Would it further require that all complaints be answered formally, including obviously meritless claims? And, if a formal system for handling and responding to complaints is considered necessary, how would antitrust authorities with limited resources (particularly new regimes or small agencies) implement such systems without compromising more critical priorities, such as focusing on urgent enforcement matters and competition advocacy? Would requirements for formal procedures interfere with an agency's prosecutorial discretion - a notion that is central to the operation of the legal systems of many jurisdictions? If formal procedures for

[19] WT/WGTCP/W/152 at page 7.

[20] Id. at 13.

[21] WT/WGTCP/W/115 at pages 6-8. See also WT/WGTCP/W/45 at p. 6-7 (suggesting that the working group explore the "right of firms to bring complaints," administrative proceedings, decisions, judicial review, and access to the judiciary for private enforcement.) Other EU papers discuss the concept of procedural fairness but only in a general way. For example, the EU's June 2000 submission also addresses due process without expanding on the concept by stating that the transparency provisions of a multilateral agreement on competition "should include issues of 'due process' as an important contribution to the effective enforcement of antitrust law. WT/WGTCP/W140 at page 8. The EU addresses due process in the context of transparency in its June 1999 submission as well, by stating that "[transparency] . . . also includes guarantees of "due process." WT/WGTCP/W/130 at page 3.

handling and responding to complaints were considered unnecessary, how would a Member that utilized informal procedures demonstrate that its decisions to follow up on some complaints but not others were fair?

With respect to access and other areas of procedural fairness, WTO Members will need to consider whether all persons should be treated equally regardless of circumstances or whether more expansive rights should be conferred on certain classes of parties. For example, it is common for a US antitrust authority, in the context of a significant merger review, to meet repeatedly with a customer of the merging parties but to meet with a small competitor of the parties less frequently (or not at all, particularly if that competitor has expressed its views in writing). Is the antitrust authority acting "fairly" for treating the customer differently from the small competitor? Should the antitrust authority be required to meet with, or accord procedural rights to, classes of third parties (such as labor unions or shareholders in the context of a merger), that may be harmed by a transaction but not in a traditional antitrust sense? Must antitrust agencies affirmatively seek out third parties who might be affected by the conduct at issue and give them notice of the investigation?

Finally, some Members - such as the United States - provide broad rights of action for private parties to pursue antitrust claims directly regardless of what government antitrust agencies might do. Should all Members be required to provide similar rights? Should the antitrust agencies of Members whose legal systems allow for private rights of action be required to grant as much access as those that operate in regimes that do not allow for such rights?[22]

Answering these and other questions regarding procedural fairness questions might well require discussion and a better understanding of the relationship between antitrust procedures and the world trading system, as well as further work and consensus on the proper focus of antitrust policy. Members who view antitrust policy as having more of a consumer-welfare and efficiency focus will put emphasis on customer evidence, whereas Members who believe that an antitrust regime should be used as a tool to promote industrial policy or protect competitors likely would favor expansive rights for competitors. And, Members whose antitrust legislation includes consideration of broader social policy objectives would probably favor access for a larger class of complainants than those Members whose antitrust statutes are more conventional.

C. KNOWING THE BASIS FOR A COMPETITION AUTHORITY'S OBJECTIONS BEFORE FINAL ACTION IS TAKEN/RIGHT TO RESPOND

Informing subjects of an investigation of the basis for the antitrust authority's objections before it takes action promotes fairness. This practice gives the subject an opportunity to respond and clarify any misunderstandings, and, to the extent that such a discussion fosters a dialogue between the antitrust authority and the parties in which the merits of a potential case are discussed, the accuracy of the ultimate decision can only be enhanced. The EU's previous submissions seem to recognize this when it cites to its own procedures which involve issuing a Statement of Objections prior to the Commission's final decision and enabling parties to respond orally and in writing.

If WTO Members decided that this practice should be included in a possible multilateral framework on competition, they would need to determine the form that such a practice should take and what such an obligation would entail. Questions the Members might wish to consider involve whether the subject of an investigation is entitled to this information in writing, similar to what is done in the EU. Or, could Members comply by communicating their objections orally and in a more

[22] The EU made this observation in its September 2000 submission to the Working Group. WT/WGTCP/W/152 at page 7 ("For instance, effective guarantees as regards the right to bring petitions to administrative competition authorities are of greater importance in the case of countries where direct access to the judiciary is a significant limitation."). See also OECD, "Remedies Available to Private Parties Under Competition Laws," COM/DAFFE/CLP/TD(2000)24/FINAL.

informal fashion? In addition, the Working Group might want to consider how extensive obligations in this area ought to be. In other words, to what extent (and when) would an antitrust authority be required to divulge the details of its potential case to the subject of the investigation? How would confidential information or information from informants (particularly those in cartel cases) be handled in this regard?

D. ROLE OF JUDICIARY/APPEAL RIGHTS

Previous US and EU submissions highlight the important role that the judiciary and appeal rights play in an antitrust regime.[23] There is no question that independent review of antitrust decisions disciplines agency decisionmaking, leading to more accurate and equitable results. If Members were to address appeal rights, a number of additional issues will need to be addressed. First and foremost, Members will need to determine what type of decisions are reviewable by the judiciary. Would a decision not to investigate or a decision to close an investigation without taking action be subject to review? Or, would appeals be limited to and ultimate, adverse decision on the merits? Would the answer to this question depend at all on whether the Member's legal system had private rights of action for antitrust matters? Would compulsory process or other requests for information by the antitrust authority be appealable? To the extent that an antitrust authority shares jurisdiction for competition matters with other government agencies or regulators, would the decisions of those entities also be reviewable?

WTO Members will also need to consider issues concerning the appeals proceeding itself. To encourage fairness, it would seem necessary for an appeal to be heard by a tribunal that is truly independent of the antitrust authority. Should there be a requirement that the judiciary be involved in appeals? Would systems that do not provide for open appeal proceedings be considered fair? To what extent should appeals be open to the public or other parties interested in the matter? Would systems that do not allow for the filing of *amicus curiae* briefs for consideration by the appeals tribunal be considered fair?

If WTO Members decide that appeal rights are an important element of procedural fairness, they also will need to determine who ought to possess such rights. This issue was discussed more fully above in Section II.B. on access to the antitrust authority.

E. CONFIDENTIALITY

Providing adequate safeguards for confidential information relates to fairness, although it is also a necessary component of any effective antitrust regime. Antitrust cases are fact-intensive, and an antitrust authority will not be able to investigate adequately without access to confidential information from the subject of an antitrust inquiry, as well as its customers and competitors. If the authority acquires a reputation for divulging sensitive information, firms will not cooperate and the effectiveness of the agency ultimately will be compromised. Questions involving confidentiality are not always easy and an antitrust authority must balance confidentiality concerns against a number of other competing interests throughout the course of an investigation. For example, an antitrust authority frequently must reveal some of the details of the transaction - or the details of a possible settlement - in order to elicit useful information from third parties in a merger investigation. Additionally, as discussed above, the subjects to an investigation should be informed of the antitrust authority's concerns before it takes action. Balancing the desire of subjects to know the nature of the claims made against them against the preference of firms (e.g., complaining customers) not to have the firms under investigation know they have assisted the antitrust authority is a sensitive and difficult exercise in practice. In the United States, this issue also comes up not only during investigations but also in antitrust trials, where the court attempts to balance the needs of the defendants to have full

[23] See, e.g., United States's June 2000 submission, WT/WGTCP/W/142 at p. 7.

access to all the evidence against them against the confidentiality of third-party materials. This is typically handled by a protective order (e.g., a court order that permits disclosure of sensitive information only to outside counsel for the parties, keeping it nonpublic, etc.). And, generally speaking, an antitrust authority is constantly presented with issues that involve balancing general transparency - the public's right to know what their government is doing - against a firm's right to keep confidential business information secret. Because many of these decisions are made by antitrust authorities on a case-by-case basis, designing a new WTO provision that would contain appropriate exceptions to deal with the host of confidentiality situations faced by antitrust authorities each day will be a challenging exercise.

The WTO Members would also need to determine what commitments Members would have regarding confidentiality. What if a Member had confidentiality laws and policies but did not establish adequate penalties for those who disclosed confidential information?[24]

F. TIMELINESS

An antitrust authority may have extensive procedural fairness mechanisms in place but if it cannot resolve its investigations, cases, and appeals in a timely fashion, these protections are not worth a great deal. Undue delay hurts parties who may be harmed by the conduct at issue and creates uncertainty, ultimately imposing unwarranted costs on the subjects of the investigation.

In addressing the concept of timeliness, the Working Group will need to consider a number of challenging issues. What would be considered timely and who would make such a determination in the WTO context? For the significant number of antitrust enforcement regimes whose laws and regulation do not impose deadlines for action, or that rely on the judicial system as the final arbiter of decisions, how would timeliness be evaluated without inquiring into the specifics of individual cases or infringing on the independence of the judiciary? Would the concept of timeliness be sufficiently flexible so as to reflect the reality that some antitrust matters are more complex and take longer to investigate and resolve than others? Similarly, some antitrust matters require expeditious review, and a lengthy investigation may, in and of itself, force an outcome. For example, if an antitrust authority does not reach a decision on a merger in a timely fashion, the delay can derail an otherwise legitimate deal. Would a merger review system that did not provide the opportunity for review and appeal of adverse decisions within sufficient time for the merging parties to consummate their transaction be fair?

III. CONCLUSIONS ON PROCEDURAL FAIRNESS

The above discussion addresses only a limited number procedural fairness elements for the Working Group to consider. In many ways, the possibilities are nearly endless, and determining what to include and what to exclude would be a difficult exercise absent a better understanding of which antitrust procedures in particular bear a close relationship to world trade. As the discussion in Section I more fully detailed, the US antitrust agencies - like most mature antitrust authorities - have in place a variety of different policies, procedures and rules designed to enhance fair and equitable results. However, devising detailed provisions on procedural fairness that would not lead to interminable arguments on the comparable merits of various legal systems would be a difficult exercise because notions of fundamental fairness differ greatly from legal system to legal system. What may be considered a sound and fair policy in one jurisdiction may not be transferable or even necessary in

[24] In the United States, antitrust employees who disclose confidential information are subject to removal from office and may be prosecuted criminally. 18 U.S.C. §1905 (1948). In addition, employees are subject to a large collection of laws and regulations designed to prohibit corruption. See, e.g., 18 U.S.C. §§201-209 (1948) (criminal statute prohibiting bribery of public officials and witnesses and addressing conflicts of interest and outside employment by government officials).

another. On the other hand, a bare-bones framework on procedural fairness may not provide enough guidance to WTO Members or the general public on what meets minimum standards, and any Member's system could become subject to challenge with unpredictable results.

The United States hopes that this paper's presentation of some of issues relating to procedural fairness will assist the Working Group in its clarification efforts, consistent with the mandate of the Doha Declaration.