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

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COMMUNICATION FROM INDIA

The following communication, dated 22 September 1998, has been received from the Permanent Mission of India with the request that it be circulated to Members.

The Relationship Between Trade Liberalization and Competition Law and Policy

(This paper is based on the intervention made by India on the relationship between trade liberalization and competition law and policy in the July meeting of the Working Group.)

I. INTRODUCTION

1. This Working Group has already spent a fair amount of time considering how issues of competition policy impinge upon trade and vice versa. While the discussions have been general, exploratory and educative, it does seem clear that these two facets have linkages. Just like trade can be affected by competition laws and policies; in the same manner competition in any market can be affected by a wide array of trade policy measures. Any measure, which effectively protects domestic markets from foreign competition, can contribute to a certain degree of concentration in the domestic market and lead to possible abuses of a dominant position, to the detriment of the consumer. Therefore, the impact of trade policy measures on competition needs to be closely reviewed, especially in those sectors or areas where there is an implicit inconsistency between trade laws and the objectives of competition laws.

2. In contributions of intergovernmental organizations, a dominant theme along with the issue of mergers and acquisitions is the issue of contestability of markets. Although not clearly defined, an impression is created that every aspect of domestic government policy, economic and social - would, in one way or the other, affect fair trade and the contestability of markets. In a more concrete sense this debate on contestability of markets has been witnessed during the so-called Structural Impediments Initiative in the US-Japan context. With developing countries, the dangers of the doctrine of contestability of markets eroding their ability to take domestic social and economic action are even greater. Moreover, in the name of contestability, an increase in market access for MNCs may be sought by suggesting that all sectors of WTO, in one way or another, be put to the test of contestability. This may have implications for services, intellectual property rights, subsidies and a host of other areas, not to mention investment. It will, therefore, be necessary to define it clearly and narrowly in relation to specific issues and disciplines that we wish to address in the WTO regime. Some issues to be addressed would be market allocation, refusal to deal (boycott), price fixing, collusive dealing, and differential pricing (all of which are vertical RBPs). All of these practices distort or restrict trade and affect the international contestability of markets. This action is particularly called for as developing country markets and their commercial entities are more

vulnerable to the effects of such RBPs and at their receiving end. Experiences with RBPs encountered by developing country firms in developed country markets illustrate how RBPs by the large MNCs put these firms at a competitive disadvantage. Instances of other so-called privately led restrictive business practices such as debarring Indian participation in the Dutch Flower Auction or the Basle Jewellery and Watch Fair are also relevant.

Inconsistencies between Trade Policy Measures and Competition

3. The deliberations of the Working Group have shown that there are a number of areas where trade policy measures strengthen competition. A number of WTO Agreements have the facilitation of trade and the removal of non-trade barriers as underlying objectives. However, as experience has shown, not only does the implementation of these provisions often leave much to be desired, there also may be certain areas where there are inherent and strong inconsistencies between trade laws and competition. There are numerous instances where trade policy measures have been used in a manner contrary to the objectives of competition. It is therefore important for this Working Group to address those areas of trade policy where there is inconsistency between the objectives of trade policy and those of competition. To illustrate this we would like to give a few examples.

4. While some Members have highlighted the effect that tariffs have in creating higher domestic prices and in affecting competition in domestic markets, very little has been said about tariff quotas and the similar effect that they may have. Restricting the import of particular commodities through quotas gives a distinct protection to the domestic market against the tenets of universal competition. In fact, as Members are aware, the exports of textiles from a number of developing countries, which enjoy a distinct competitive edge over other producers, have been placed under stringent restraints under the Multifibre Arrangement (MFA). Similarly, maintaining tariff peaks even while adhering to market access reduction commitments creates a protectionist environment for domestic producers. Resistance to opening domestic markets goes against the tenets of universal competition.

5. Some discussions have already been held on anti-dumping *vis-à-vis* competition. While there are obvious differences in perception, it is obvious that punitive measures, of which anti-dumping is one, can inhibit competition. It has been our experience that producers, particularly in developed countries, rarely hesitate to lodge a complaint of material injury, although what they are facing is an inflow of naturally competitive products. Apart from inhibiting competition, such measures also impose a prohibitive cost on the exporting countries/producers in defending the anti-dumping investigations. We, therefore, strongly support what has been said by a number of other delegations that there are inconsistencies between anti-dumping measures and competition policy, which need to be adequately addressed by this Working Group, especially since empirical studies have clearly shown that anti-dumping measures are often abused for restricting imports and insulating domestic industry from competition.

6. Just as tariffs and tariff quotas can distort competition, in much the same way provision of export subsidies can also distort competition since then the same products are available in the international market at artificially subsidized prices. A similar anti-competitive effect arises from setting national technical and sanitary and phytosanitary measures at a level much higher than the generally accepted international level. While such measures are adopted with the ostensible objective of safety or of protecting human, animal or plant life, they provide a certain definite protection to the domestic industry by insulating them, to some extent, from outside competition. The protectionist effect of these measures becomes even more telling when viewed in the context that the involvement of the developing countries is still rather minimal in international standards-setting organizations.

7. These are but some examples of the possible anti-competitive effects of some measures. There could be many other areas, other than those mentioned in paragraph 3, in which measures could create anti-competitive effects such as repression of unfair competition, consumer protection, cartels

and voluntary restraints etc. These and other areas of measures may also have to be addressed before any conclusions can be drawn.

II. CONCLUSION

8. It is clear that certain trade policy measures are inconsistent with competition policy and hence such trade policy interventions can be detrimental to international trade and the fostering of universal competition policies. The problem gets particularly compounded when such measures are not applied in accordance with multilateral rules. Until and unless effective implementation of existing commitments, which entail fostering competition, is ensured, it would be premature to engage in discussions on how WTO provisions can be further strengthened to support competition. It is our view that simply by improving the efficacy of the implementation of the existing provisions, and perhaps by reviewing those provisions, which have predominantly been used for protecting domestic industry, we would succeed in creating a more competitive environment. In this regard, it will also have to be kept in view that developing countries may have socioeconomic and development priorities necessitating regulatory solutions until market forces mature. We would, therefore, strongly encourage Members to ensure strict respect of WTO disciplines and would like Members to avoid or minimize taking such steps, which have an adverse effect on competition. In addition, we also suggest consideration of the areas where regulatory solutions may be advisable for development, trade and finance needs. One way of doing this would be by ensuring the effective implementation of the existing WTO provisions, including the special and differential provisions which may be necessary for development, trade and finance needs of developing countries. We would also agree that competition authorities also have an important role to play in achieving this objective of greater harmonization between trade policy and competition policy. Obviously, the specific modalities would depend on the domestic legal and institutional framework of each WTO Member. Even though perceptions can differ, what is abundantly clear from the discussions that we have had on this issue is that a great deal of further exploratory work needs to be done before considering the alternatives for future work in this area.
