Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

23-Apr-2003

English - Or. English

CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
TRADE DIRECTORATE

CCNM/GF/COMP/TR(2003)6
Unclassified

OECD Joint Global Forum on Trade and Competition

CORE PRINCIPLES OF NON-DISCRIMINATION, TRANSPARENCY AND PROCEDURAL FAIRNESS IN A MULTILATERAL FRAMEWORK ON COMPETITION

-- Note by the Secretariat --

Attached is a background document for Session I of the Joint Global Forum on Trade and Competition to be held on 15-16 May 2003.

JT00143203

English - Or. English

This study was prepared for the OECD Joint Group on Trade and Competition. It was drafted by the Competition Division in the Directorate for Financial, Fiscal and Enterprise Affairs and by the Trade Policy Linkages Division in the Trade Directorate. The Secretary-General has agreed to declassify the document under his responsibility as recommended by the Joint Group on Trade and Competition with the aim of bringing information on this subject to the attention of a wider audience.

The study, which is also available in French, can be found on the following Website: http://www.oecd.org/competition **or** http://www.oecd.org/trade.

CORE PRINCIPLES OF NON-DISCRIMINATION, TRANSPARENCY AND PROCEDURAL FAIRNESS IN A MULTILATERAL FRAMEWORK ON COMPETITION

Further Discussion and Possible Resolution of Some Issues[(*)]

Introduction

1. In its two previous meetings the Joint Group on Trade and Competition has studied the topic of applying the core principles of non-discrimination, transparency and procedural fairness in the trade and competition context, with a view toward their inclusion in a possible multilateral framework on competition (see COM/DAFFE/TD(2002)49 and COM/DAFFE/TD(2002)81). It became apparent that there are difficult issues associated with articulating each of these principles in such a multilateral instrument relating to competition. At the same time the discussions, both in the Joint Group and in the WTO Working Group on the Interaction of Trade and Competition, have suggested certain approaches toward these issues on which there might be broad agreement.[1] Those approaches and some possible resolutions are provided below.

2. The several points reflect the application of two basic approaches: *precedence*, which results from the fact that the core principles are part of existing WTO agreements in some form and which therefore suggests employing the relevant concepts and terms in those agreements in a multilateral framework on competition when it is appropriate to do so, and *simplification*, which requires the avoidance of standards that are unduly ambiguous, complex or burdensome. In this regard, it is especially important to consider each point as it affects developing countries—whether it imposes relatively greater burdens on those countries than on those that already have active competition law enforcement regimes.

3. In the interest of brevity this paper does not repeat many of the general points made in the previous papers on the application of the three principles in the trade and competition context. It may be useful to refer to the Annex to document COM/DAFFE/TD(2002)81, noted above, or to the identical, declassified version of that Annex that was presented to the WTO Working Group, while reviewing this paper.

(*) This paper is also circulated under the code "COM/DAFFE/TD(2003)7/FINAL".

1. See also, WTO, Report (2002) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council (WT/WGTCP/6).

Non-discrimination

National treatment

4. Of the two components of the principle of non-discrimination, national treatment and most favoured nation, it is generally agreed that national treatment has the broadest application in the competition law enforcement context. National treatment is fully part of existing WTO agreements. GATT Article III(4), for example, provides: "*The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.*" GATS applies the same *"no less favourable*" standard to "*services and service suppliers of any other Member in respect of all measures affecting the supply of services,*"[2] and TRIPS applies it to "*nationals of other Members . . . with regard to the protection of intellectual property.*"[3]

5. One could employ comparable terms in a multilateral framework on competition. Thus:

- National treatment would require treatment no less favourable to nationals of other Members than that it accords to its own nationals with regard to laws and regulations protecting competition.

As our discussions have shown, however, within this broad concept there are several specific issues that must be resolved.

De jure discrimination

6. There seems to be general agreement that the national treatment principle should at a minimum apply to de *jure* discrimination, or discrimination that exists in the specific terms of the competition law. It seems that few if any competition laws contain such explicit discrimination. It might be more likely that implementing regulations would have such provisions, however. If regulations and guidelines were included within the national treatment principle, then:

- National treatment would require that competition laws and regulations and guidelines implementing those laws by their terms provide no less favourable treatment to foreign nationals than to domestic nationals.

De facto discrimination

7. There also seems to be general agreement that incorporating de facto discrimination into a multilateral framework on competition would not be feasible. In particular, it seems difficult if not impossible to discern discrimination on a "case-by-case" basis, where the outcomes for each party are fact-specific. Thus:

- Case-by-case de facto discrimination would not be included within the national treatment principle.

---

2. Article VII(1).

3. Article 3(1).

8. There is another type of discrimination, however, that has both de facto and de *jure* characteristics. A law or regulation, neutral on its face, might be written in such a way as to affect domestic and foreign firms differently in application. These could include provisions articulating various forms of industrial policy, which inherently favours domestic firms over foreign ones. A merger control law, for example, might have a provision that permits a competition agency to approve an otherwise anticompetitive merger that enhances international competitiveness of domestic firms, or one that enhances exports. A law or regulation dealing with consideration of efficiencies in merger and rule of reason analyses might specify that only efficiencies that are to be realised domestically are relevant in that analysis. Laws favouring small and medium sized businesses, which would tend to be domestic and not foreign firms, or promoting other socially desirable ends, such as full participation in the domestic economy by "historically disadvantaged persons," in the case of South Africa, are other examples.

9. Of course, it could be argued that such legislation would not be inherently discriminatory if it applies equally to all firms with domestic operations, whether or not their owners and headquarters are located domestically. In any case, the view has been expressed that this type of discrimination, if it is that, should not be subject to the non-discrimination principle in a multilateral framework on competition.[4] If that is the result, one way of dealing with the problem in a competition framework is to articulate these forms of discrimination as exceptions to the generally stated rule. Thus:

- Provisions of competition laws, regulations and guidelines that articulate industrial policy criteria (or other criteria specifically identified) that if uniformly applied would provide less favourable treatment to foreign nationals than to domestic nationals would specifically be excluded from the application of the national treatment principle.

Exemptions, exceptions and exclusions

10. This is a most complex topic. The laws of all countries provide for derogations from the application of the competition law. They may exist for certain sectors, for certain types of conduct or for certain economic entities.[5] It is far from easy to classify or sometimes even to identify instances of such special treatment, however. The effort is complicated by the use of three terms – exemptions, exceptions and exclusions – that have similar meanings in common usage but more specific applications in the competition policy context. Moreover, these applications vary across countries: "exemption" can mean different things in different countries. The Joint Group is working separately on this topic [see *"Coverage of Competition Laws"* in COM/DAFFE/TD(2003)6]. It is sufficient for this discussion to consider that exemptions, exceptions and exclusions (hereafter in this document, "exclusions/exemptions") comprise laws or rules that result in less than full application of the competition law to specified sectors, types of conduct or economic entities.[6] Further, it is important to note that in this context the question is not whether exclusions/exemptions are beneficial or harmful from the competition policy standpoint, but whether those that do exist discriminate against foreign enterprises.

---

4. See, Communication from the European Community and its Member States to the WTO Working Group on the Interaction between Trade and Competition Policy (WT/WTTCP/W/222), 19 November 2002, para. 14-16; Report (2001) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, at para 20-27.

5. See, OECD, Antitrust and Market Access: The Scope and Coverage of Competition Laws and Implications for Trade ("The Hawk Report"), 1996; WTO, Exceptions, Exemptions and Exclusions Contained in Members' National Competition Legislation (WT/WGTCP/W 172), 2001; Khemani, Application of Competition Law: Exemptions and Exceptions, UNCTAD/DITC/CLP/misc.25, 2002.

6. Thus, "exclusions/exemptions" as used herein does not include the exemptions granted by the European Commission under Article 81(3). The Commission considers that these exemptions result in the full application of the competition law to the relevant conduct.

11. Here again a de *jure/de facto* distinction might prove useful. De facto discrimination in the application of exclusions/exemptions from the competition law would be difficult to incorporate into the non-discrimination principle. It would be easier to deal with de *jure* discrimination, however. Thus:

- The non-discrimination principle would apply to laws and implementing regulations establishing exclusions/exemptions from competition laws that by their terms provide less favourable treatment to foreign nationals than to domestic nationals.

The Joint Group has not fully explored this issue in its discussions. It is not clear that there are many such discriminatory laws or regulations. Exclusions/exemptions for state owned enterprises or statutory monopolies would appear to be one type. Those applying to defence industries might be another. It might be decided to create explicit exceptions to the generally stated rule described above for certain types of discrimination.[7] On the other hand, it might be decided not to include the entire subject of exclusions/exemptions within the non-discrimination principle. Some have suggested doing so, preferring to apply the transparency principle to them, as discussed further below.[8]

Export cartels

12. Export cartels are a form of exclusion/exemption. In general, export cartel laws exclude from the application of a competition law agreements among competitors that solely affect exports. There is ongoing debate about the propriety of such laws and about how they should be treated in the multilateral context. Critics of export cartels complain that they can harm consumers in importing countries. Others respond with three points: a) not all agreements that are formed under export cartel laws are anticompetitive in importing countries; some enhance competition, and thereby benefit consumers in those countries; b) importing countries are free to prosecute other countries' export cartels under their competition laws; and c) exporting countries may not have jurisdiction to prosecute agreements that do not harm domestic consumers.[9]

13. In any case, as noted above with respect to other types of exclusions/exemptions, the precise issue here is not whether laws permitting export cartels are on balance harmful, but whether they are in some way discriminatory. It would seem that to the extent such laws permit cartel conduct that harms only foreign consumers they are discriminatory. But given the more basic disagreements over these laws, it would not seem possible to reach consensus over whether they should be subject to the non-discrimination principle in a multilateral framework on competition. More generally, however, an export cartel exclusion/exemption that is not equally available to foreign and domestic firms would also be discriminatory, just as would be any other statutory exclusion/exemption that were drafted in that way. Perhaps it would be possible to include only the second type of discrimination within the non-discrimination principle. Thus:

- Export cartels would be treated like other exclusions/exemptions. If all exclusions/exemptions are excluded from the national treatment principle, the same would be

---

7. In GATT Article III(8), for example, it is provided that national treatment "shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes. . .," and that it "shall not prevent the payment of subsidies exclusively to domestic producers. . . ."

8. Communication from the European Community and its Member States to the Working Group on the Interactions between Trade and Competition Policy, 19 November 2002, WT/WGTCP/W/222; Report (2001) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, at para. 21-27.

9. See, COM/DAFFE/TD(2002)81, Annex A para. 41-42.

true for export cartels. If the principle applies to de *jure* discrimination in laws creating exclusions/exemptions, possibly with specified exceptions to that rule, de *jure* discrimination affecting rights of foreign nationals to participate in export cartels would be subject to the principle, but not the discriminatory effect on foreign consumers.

14. Finally, however, it is necessary to note an important caveat relating to the proposed limits described above on applying the national treatment principle to de facto discrimination, exclusions/exemptions and export cartels. The terms of the existing national treatment provisions in GATT and GATS, if not TRIPS, apparently apply to competition law enforcement (see paragraph 4 above: *in respect of all laws, regulations and requirements affecting …[the] internal sale*" of goods and "all *measures affecting the supply of services*") and to *all* types of discrimination. While there have been no competition cases brought under these provisions to date, it would seem that the effect of a multilateral framework on competition that contained a more restrictive definition of national treatment would be to, at least in theory, narrow the application of the principle to competition law enforcement. This issue might benefit from further discussion.

Most favoured nation

15. Most favoured nation is fully a part of the non-discrimination principle in the WTO agreements. The MFN provisions in GATT and TRIPS are similar in that they apply to *"any advantage, favour, privilege or immunity"* granted by a Member with regard to various measures affecting trade in goods, in the case of GATT,[10] and with regard to the protection of intellectual property in the case of TRIPS.[11] The MFN provision in GATS is more relevant for our purposes. It provides: "*With respect to any measure covered by this Agreement each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to services and service suppliers of any other country.*"[12]

16. Similar language could be employed in a multilateral framework on competition. Thus:

- The most favoured nation principle would require treatment no less favourable to nationals of any other Member than that it accords to nationals of any other country with regard to laws, regulations and guidelines protecting competition.

17. It seems that the most favoured nation principle raises fewer issues in the competition law enforcement context than national treatment. By its terms MFN would apply to the process of international co-operation in competition law enforcement, however. That is, MFN would require a country that has entered into a co-operative relationship with one other country, perhaps through a bilateral agreement, to extend the same privileges to all other countries. It is well known, of course, that countries enter into closer co-operative relationships with some countries than with others. These relationships evolve over time, between countries that have developed mutual trust and a close working relationship. It would clearly be difficult to apply MFN to international co-operation in a multilateral framework on competition, and some commentators recommend that it not be done.[13] Thus:

- The most favoured nation principle would not apply to international co-operation.

10. Article I(1).

11. Article 4.

12. Article II(1).

13. See, WT/WGTCP/W/222(2002), at para. 17.

Transparency

18. The core principle of transparency in the multilateral trading system encompasses two broad obligations: (i) to publish, or at least make publicly available, all relevant laws, regulations, and decisions; and (ii) to notify various forms of governmental action to the WTO Secretariat and WTO Members.

The publication obligation

19. The WTO agreements impose broad, generally worded publication obligations. GATT Article X requires publication of *"laws, regulations, judicial decisions and administrative rulings of general application . . . pertaining to [various requirements and procedures affecting trade in goods*]." These materials must be published "promptly in such a manner as to enable governments and traders to become acquainted with them." TRIPS Article 63 employs almost identical language. GATS requires Members to *"publish promptly, and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement."*[14] It would seem that it would be possible to employ comparable terms in a multilateral framework on competition. They would raise some issues of interpretation, but the precedents established under the existing agreements would be useful in that regard. Some topics specific to competition law enforcement should be addressed, however.

Laws, regulations, guidelines and administrative and judicial decisions

20. There can be no doubt that a publication obligation should encompass publication of the competition law or laws, regulations implementing those laws, including both substantive and procedural regulations, and guidelines or commentaries explaining enforcement standards under the law. One question to be asked is whether the publication requirement encompasses an obligation to *create* any documents or publications. For example, in competition law enforcement, guidelines or commentaries to competition laws can contribute substantially to transparency. Should there be some obligation for competition agencies to create such guidelines? It would seem to be difficult to articulate or enforce such a requirement. What topics should be the subject of such guidelines, and at what level of detail? Such a requirement is probably not workable. Documents of that kind that do exist, of course, would be subject to the publication requirement.

21. More difficult issues would be created by a requirement to publish "judicial decisions and administrative rulings of general application," like that in GATT Article X and TRIPS Article 63. In a majority of jurisdictions, the head of the competition agency has some authority to issue an enforceable decision and to impose sanctions or remedies in a case, if necessary. In a few jurisdictions the competition agency can only ask a court or tribunal to act against allegedly anticompetitive conduct; the agency cannot itself issue an enforceable order. In some jurisdictions the competition agency must publish its reasons for deciding *not* to proceed in a case after a formal investigation has been opened. In others, no such explanation is required.

22. Further, the concept of "rulings of general application" would have different meanings in different jurisdictions. In common law countries, judicial decisions may have a more important precedential effect than in non-common law countries. Some judicial decisions are decided on procedural grounds, and these presumably would not be of general application. In most jurisdictions cases can be appealed to more than one level in the judiciary. Should the decision at each level be published, or only at

14. Article III(1).

the highest level in which the case was heard? Further, in a few countries, competition cases are prosecuted not only by the national competition agencies but also by state agencies and by private parties. What should be the publication obligation regarding these cases? Of course, many of these questions are not unique to competition law enforcement, and experience with these issues under the current WTO agreements would be instructive for a multilateral framework on competition.

23. In any case, it would seem to be possible to resolve these issues in the competition context, by employing the principle of simplification noted above to exclude those requirements that would be unduly complex or burdensome. Thus, given different practices regarding publication by competition agencies of decisions not to proceed in a case or investigation, publication of those decisions would not be required. On the other hand, it would seem that publication of final decisions by competition agencies to declare conduct unlawful and to apply a sanction or remedy, or to ask a court to do so, should be subject to the obligation. Most if not all national agencies currently publish these decisions in some form. In the case of agencies that must take their cases to court, their decision is found either in their court pleading or in a press release announcing their intent to seek a court ruling. There could be questions about the level of detail that should be included in these publications. This issue might be worthy of further discussion. It would probably not be possible to specify any such requirements in detail, but one could, for example, require generally that the publication state the rationale for the decision by the agency.

24. As for publication of judicial decisions, questions noted above include whether intermediate decisions, decisions based on procedural as opposed to substantive grounds and decisions in cases initiated by private parties and by state or regional governments should be published. Publication of all substantive decisions in competition cases would contribute most to transparency. Further discussion of the question of whether it is feasible to impose such a requirement could be useful. If it is considered not feasible, then perhaps a requirement for publication of all final judicial decisions by the highest court in which the case is heard in cases initiated by national competition agencies would be more workable.

25. There is also an issue of timeliness relating to the publication obligation. If publications are not made in timely fashion there is an obvious impact on transparency. As noted above, GATS imposes a timeliness obligation ("*promptly, and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application . . .*"), but GATT and TRIPS do not. It is probably not desirable to try to define timeliness precisely in the competition context, given the variation in procedures across countries, but it would seem to be useful to include the general concept, just as it is included without definition in the existing WTO agreements.

26. To what extent should a publication requirement specify the means by which publication should be made? GATT and TRIPS impose a general requirement in this regard: *. . . in such a manner as to enable governments and [traders] [right holders] to become acquainted with . . . [the laws, decisions, etc.]."* [15] Comparable language could be employed in a multilateral framework on competition. It could also be useful also to require publication of laws, regulations and guidelines on the Internet. Almost all competition agencies currently maintain an Internet site for this purpose. It would be more burdensome to require placing administrative and judicial decisions – especially over an extended period of time – on the Internet, however.

27. Thus, summarising the discussion above:

- The publication requirement relating to competition law enforcement could encompass:

15. GATT Article X(1); TRIPS Article 63(1).

- all competition laws, implementing regulations and enforcement guidelines and commentaries;

- final decisions by national competition agencies declaring conduct unlawful under the competition act or requiring a sanction or remedy for such conduct, or to ask a court to do so, stating the rationale for the agency's decision;

- final decisions by [a court or tribunal] [the highest court or tribunal in which a case is heard] in a case initiated by the national competition agency.

- Publication should be timely, and in such a manner as to enable governments and businesses to become acquainted with them. In the case of laws, implementing regulations and enforcement guidelines and commentaries, publication should also be made on an Internet site.

Confidential information

28. It is agreed that the publication obligation should not require the disclosure of confidential information. GATT,[16] GATS[17] and TRIPS[18] employ identical language in this regard, which seems to be appropriate in the competition context. Thus:

- Members would not be required to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Left unsaid is how and by whom it shall be determined that information is confidential. It is implicit both in these provisions and elsewhere in the agreements, however, that confidentiality is to be determined by the domestic authority. Article XIV of GATS is explicit in that regard. This seems to be the most practical way of dealing with the issue in this context as well. Note, however, that similar issues relating to confidential information arise in connection with the procedural fairness principle, which are discussed below.

Exclusions/exemptions

29. As noted above, there is general agreement that whether or not exclusions/exemptions from a competition law are subject to the non-discrimination principle, they should be subject to the transparency principle. Fashioning a rule that would fairly apply the transparency principle in this context presents some problems, however, because exclusions/exemptions are numerous in many countries and they can exist in several forms.[19] Most common are statutory exclusions/exemptions – created explicitly in laws, including the competition law. Others are created by regulation or by administrative action, and others

16. Article X(1).

17. Article III*bis.*

18. Article 63(4).

19. See generally the Hawk Report, section 2.5 and discussions of individual countries. In the Joint Group's last discussion of this topic, the Chairman pointed out that an inventory in Australia identified more than 2000 laws that affected competition in some way.

may be the de facto result of enforcement policies by competition agencies.[20] Still others are judicially-created in common law countries. In the U.S., for example, important exemptions for activities of states, for professional baseball and for collective bargaining agreements between labour and management are the result of court decisions. It would seem that the transparency principle could apply to de *jure*, statutory exclusions/exemptions. It might also apply to those formally established in regulations or administrative instruments. Presumably these need merely be published in their original form. Publishing information about less formal exclusions/exemptions, however, including judicially-created ones, is more problematic, because these are more subjective. A brief, generally-worded description might be sufficient. The question of how to make such exclusions/exemptions transparent might benefit from additional discussion.

30. The issue of the means of publication is also relevant to exclusions/exemptions. In most countries exclusions/exemptions probably exist in several forms and in several places. Transparency would be materially enhanced if the relevant exclusions/exemptions were compiled and published in one place. If publication of competition laws and regulations on an Internet site is required as suggested above, publication of exclusions/exemptions on the site could also be required. Further discussion of the burdens of creating and publishing such a compilation might be useful. Thus:

- The transparency obligation relating to exclusions/exemptions would require publication, including a compilation on an Internet site, of:
  - all laws, regulations and other administrative instruments that by their terms create an exclusion/exemption from the competition law for specific sectors, activities or commercial entities;
  - brief descriptions of judicially or administratively created exclusions/exemptions that have general application.

The notification obligation

31. The notification obligations in the WTO agreements are many and diverse.[21] GATS Article III(3) is instructive for our purposes: "*Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing , laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement*." TRIPS Article 63(1) employs similar language. The 1995 OECD Council Recommendation on Co-operation contains provisions on notification as well. It recommends that Member countries notify one another of investigations or proceedings that may affect important interests of another.[22] The notifications described in the 1995 Recommendation seem to be outside the scope of a multilateral framework on competition, however. In general, bilateral notifications do not appear to be necessary in this context. Thus, the type of notification in GATS described above would seem to be appropriate for a multilateral framework on competition. The GATS rule does not extend to notification of administrative and judicial decisions, but there does not seem to be a good reason why it shouldn't in the competition context. In general, the notification could be coterminous with the publication obligation. Thus:

20. See generally the Hawk Report, section 2.5.1.

21. See generally, COM/DAFFE/TD(2002)49/REV1, paras. 5-11.

22. C(95)130/FINAL, para. I(A)(1), Appendix paras. 1-4.

- The notification obligation could require annual notification to a WTO body of changes to competition laws, implementing regulations, enforcement guidelines and commentaries, of changes to exclusions/exemptions and of administrative and judicial decisions, [as described in the publication obligation] occurring in the previous year.

32. An issue relating to notification that has not been specifically addressed is whether there should be a requirement for advance notification of proposed changes to laws, regulations and guidelines to permit interested parties – and countries – to comment on the proposals. This practice relates both to transparency and procedural fairness, and many countries regularly do it. The delegates might wish to discuss whether such an obligation should be encompassed within a multilateral framework on competition, noting the potential burdens that it could impose.

Transparency and developing countries

33. It is worthwhile discussing how the transparency obligation as outlined above would affect developing countries. Would it impose relatively greater burdens on them? In some ways it might not, especially for those that have yet to enact a competition law. They would have the opportunity to draft their law and regulations in a way that would be consistent with the transparency requirement. There might be special problems in identifying exclusions/exemptions, however, as well as with publishing judicial decisions, which might not be an established practice in some countries. It would be especially helpful to have insights from developing countries on these issues.

Procedural fairness

34. Administrative and judicial procedures vary substantially across countries, which makes it difficult to fashion rules of general applicability in the area of procedural fairness. Moreover, while the existing WTO agreements do contain provisions relating to procedural fairness, they are for the most part specifically related to the subject matter of each agreement – customs and charges on imports in the case of GATT,[23] qualification and licensing of service suppliers in the case of GATS,[24] and acquisition and enforcement of intellectual property rights in the case of TRIPS.[25]

35. The fundamental question relating to articulation of procedural fairness rules across countries is the level of detail that is required. If timely review of a decision is a necessary element of procedural fairness, for example, how does one define "timely"? If a respondent is entitled to information about the competition agency's concerns about its conduct, how much information must it receive? Here the WTO agreements can provide some guidance. They employ terms and concepts that are appropriate in the competition law enforcement context and which are not defined in precise terms. Thus, in GATT: "… *shall administer in a uniform, impartial and reasonable manner all its laws, decisions and rulings…." "… prompt review and correction of administrative action … such tribunals and procedures shall be independent….*" In GATS: "… *prompt review of, and, where justified, appropriate remedies…. " "… within a reasonable time after the submission of an application … inform the applicant of the decision concerning the application." ". . . not more burdensome than necessary. . . .*" In TRIPS: "*Procedures … shall be fair and equitable … not be unnecessarily complicated or costly or entail unreasonable time limits or unwarranted delays." "Parties to a proceeding shall have the opportunity for review by a judicial*

23. See, e.g, Article X(3).

24. See, e.g., Article VI.

25. See, e.g., Articles 41,42 and 62. See generally, COM/DAFFE/TD(2002)81, Annex A part 4.1.

authority…." In this spirit it should be possible to fashion appropriate rules relating to competition law enforcement in the context of a multilateral framework on competition.

Procedural fairness for respondents or subjects

36. The following points could comprise a list of basic procedural rights for respondents or subjects in a competition law enforcement proceeding.[26]

At the investigation stage

- notice of an investigation and of its subject matter, including the nature of the possible violation;
- access to the procedural rules applied by the investigative agency;
- an ability to submit information and arguments to the agency prior to its decision;
- if the possible offence is a crime, the application of usual constitutional protections in criminal matters, including a right against being compelled to incriminate oneself;
- if the agency is considering a decision or formal action against the person, notice of the grounds for the tentative decision and the ability to respond to the allegations.

In the enforcement proceeding

- notice of the allegations against it and access to relevant evidence in the investigative file, subject to reasonable projections for confidential information;
- the right to representation by counsel;
- the right to present evidence and analysis to the decision maker;
- evidentiary standards that conform to national norms in litigation;
- final decisions in written form, including legal and factual findings.

Appeals

- the right to timely appeal from an adverse decision to an independent authority and/or to the courts.

37. Note that this list of rights is organised according to various stages in the enforcement process, and not specifically to any type of national procedure. Thus, in jurisdictions where the competition agency is the enforcement body of "first instance," having powers both to investigate and to enter enforceable orders, the rights listed under both "investigation" and "enforcement proceeding" would apply to agency procedures. Where the agency must apply to a court for an enforcement order, only the "investigation" rights would apply to the agency.

26. These were first articulated in COM/DAFFE/TD(2002)49, para. 79, and repeated in COM/DAFFE/TD(2002)81, para. 56.

Procedural fairness for victims and private claimants

38. The Joint Group has studied this subject previously,[27] and we noted that procedures relating to rights of private parties differ substantially across countries. In some countries private complainants have enforceable rights to petition a competition agency, to participate in agency proceedings and to appeal from adverse decisions by the agency, including in some countries decisions not to proceed with a formal investigation. In others, private complainants have few formal rights vis-à-vis the competition agency. The agency retains substantial discretion to act on a complaint, and a decision to reject a complaint is not reviewable. But in these countries private parties usually have greater access to the courts in order to pursue their remedies independently. In many countries, but not all, private parties have rights to institute their own actions in court for violations of the competition law. In most of these countries there are few such private cases brought, however.

39. Thus, procedural fairness for victims and private claimants takes different forms across countries, and one could not articulate a single set of procedures that would apply to all. The Joint Group found, however, that there are certain basic rights that private parties should enjoy, and they were articulated in the Group's report. It would seem that they could be applied to a multilateral framework on competition. Thus:

- Procedural fairness for victims and private claimants could include rights:
  - to petition the competition agency, formally or informally, to undertake an investigation or proceeding that would remedy a perceived violation of the competition law that is harmful to the petitioner;
  - to present evidence and analysis to the competition agency, formally or informally, relating to conduct that is the subject of an agency investigation or proceeding;
  - to pursue, through active participation in competition agency proceedings (either directly or by virtue of formal intervention) or through private suits in court, or both, remedies against conduct in violation of the competition law that is harmful to the private party, in a manner consistent with the need to avoid undue interference with the basic mission of the competition agency to enforce the competition law on behalf of all citizens and to protect against the filing of baseless or vexatious private petitions or lawsuits.

Protection of confidential information

40. Protection of confidential information from unwarranted disclosure is a fundamental part of procedural fairness. Businesses have a strong interest in protecting "business secrets" or other proprietary information that, if disclosed to a competitor, could cause harm to the owner of the information in the marketplace. An informant who secretly provides information to investigators in a competition investigation might be physically or economically harmed if his or her identity were disclosed. Public policies exist in every country protecting against disclosure of certain classes of communications, such as deliberative process communications within government agencies and between attorney and client.

41. The problem comes, as it does with all the issues discussed above, in articulating a suitable, generic rule relating to confidential information for a multilateral framework on competition. While

27. Remedies Available to Private Parties Under Competition Laws, OECD, Trade and Competition Policies: Options for a Greater Coherence, ch. 7, also found at COM/DAFFE/CLP/TD(2000)24 FINAL.

confidentiality rules are fundamentally the same across countries – business confidential information is protected virtually everywhere, for example – some information at the margin is treated differently. In the United States, for example, all information in a merger notification is considered confidential, including even the fact that a notification has been filed. Most other countries do not treat the fact of filing as confidential, however. In some, the competition agency issues a public announcement of a notification, inviting comments. European and North American countries treat communications between "in-house" counsel and corporate officials differently under the attorney/client privilege. There are also differences in procedures for identifying, protecting and disclosing (in controlled circumstances) confidential information.

42. Here again, as with the transparency principle, the most practical course would seem to be to employ the language and concepts that are already found in other WTO agreements. That language relates to transparency, not procedural fairness in those agreements, but it seems to be appropriate in this context as well. Thus:

- Procedural fairness for the protection of confidential information would require reasonable protections against disclosure of confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Procedural fairness and developing countries

43. Here again there are almost certainly special issues for developing countries. On the one hand, it might relatively easy for those countries designing their competition enforcement regimes *de novo* to satisfy their procedural fairness obligations from the outset. On the other, if some of the procedures outlined above are not fully practised in some countries, it would probably be difficult to incorporate them for the first time in a competition law. Further discussion on this issue would be enlightening.