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

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**COMMUNICATION FROM THE UNITED STATES**

The following communication, dated 8 June 2000, has been received from the Permanent Mission of the United States with the request that it be circulated to Members.

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**CREATING A CULTURE OF COMPETITION:  
ISSUES INVOLVED IN ESTABLISHING AN EFFECTIVE ANTITRUST AGENCY**

**INTRODUCTION**

Among the three agreed areas of focus for discussions in this Working Group (Group), as confirmed by the General Council in December 1998, is "approaches to promoting cooperation and communication among Members, including in the field of technical cooperation". While this submission does not strictly address or recommend any particular "approach" to promoting cooperation or communication, it is aimed at contributing to such cooperation and communication by setting forth what

developing and transition countries have implemented or strengthened national competition legislation and related enforcement policies. Often, this has been done as an element of a broader package of market-oriented policy reforms. On the other hand, a number of countries, particularly in Asia and Africa, have not as yet seen fit to adopt comprehensive competition legislation (though they may, at least in some cases, have adopted elements of competition policy).<sup>2</sup>

In this submission, the United States explores some of the issues that should be addressed when a Member decides to enact an antitrust law and create an antitrust agency to enforce it. We do not judge whether every Member *should* enact an antitrust law. Indeed, we will discuss ways in which Members can begin to create a "culture of competition" in the absence of antitrust legislation. (As the Secretariat's

of this law is to protect the process of competition and free market participation, through the prevention and elimination of monopolies, monopolistic practices and other restraints on the efficient operation of goods and services markets".<sup>5</sup> A legislature may specify a number of objectives, as in the Canadian law.<sup>6</sup> Or, as in the United States, the legislature may say little about objectives in the statutory language itself, and instead provide broad statutory language and other evidence of legislative purpose that enable the antitrust agencies and courts, respectively, to enunciate appropriate enforcement policies and statutory interpretations over time.<sup>7</sup>

More important, there are widely differing views about the nature of appropriate antitrust objectives. In a 1997 study, the WTO Secretariat noted that "at the most basic level, a core objective of competition policy in most countries ... is to maintain a healthy degree of rivalry among firms in markets for goods and services".<sup>8</sup> But the Secretariat then identified at least ten other "wider objectives" that appear in at least some antitrust laws, ranging from "promoting trade and integration within an economic union or free-trade area" to "protecting opportunities for small and medium-sized businesses".<sup>9</sup> And

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Indeed, some Members (e.g., the Netherlands, South Africa, and the United Kingdom) recently have largely or entirely replaced old antitrust laws with new ones, for some or all of the above reasons.

### *Institutional Provisions*

Unless enactment of an antitrust law is to be a purely symbolic act, a Member will need to create an antitrust agency to enforce the law, and to set out to some degree the procedures the agency will follow, the agency's decision-making process, the remedies available under the law, the rights that citizens and firms will have with respect to the law, and rights to appeal agency actions in the courts. All of these institutional matters raise important issues that must be resolved sensibly if the antitrust law and agency are to be effective. And, largely in contrast to the broad economic policy issues discussed previously, these institutional decisions should be made with a country's particular political and legal culture in mind. An organizational structure that is effective in one political culture may fail in another, just as legal techniques that work well in one country may be quite ineffective in another.

Organizationally, most antitrust agencies are administrative agencies with decision-making powers, although some (like the US Department of Justice (DOJ)) are prosecutorial agencies that must seek remedial orders in court.<sup>16</sup> Similarly, some antitrust agencies (like the US Federal Trade Commission (FTC)) are collegial bodies, while others have a single agency head and decision-maker. Both of these basic organizational decisions tend to vary with the political and legal cultures of the country in question, and neither decision, once made, tends to engender great controversy.

Turning to a more problematic issue, it is generally agreed that antitrust agencies (like other law enforcement agencies) should be "independent," that is, that their actions should be based on the facts and the law, and not on political considerations, and that they should not discriminate in favor of local firms or against foreign ones.<sup>17</sup> But there is far less agreement as to how that should be accomplished as an organizational matter, or whether an agency that is wholly insulated from any connection with the rest of government is likely to be properly funded, have its views on competition issues respected by other government agencies, or be appropriately accountable in a democratic society. So, while many - perhaps most - antitrust agencies are organizationally independent in some way,<sup>18</sup> many other agencies are clearly part of the executive branch of government.<sup>19</sup> Indeed, the surprising (and sustained) multiplicity of organizational formats for antitrust agencies in many countries<sup>20</sup> suggests that there is little clear guidance on how they should be related formally to the rest of the government.<sup>21</sup>

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<sup>16</sup> In some countries with administrative-type antitrust agencies, like Canada and Japan, criminal antitrust violations such as price-fixing are pursued by prosecutors in the courts, and not before the agency.

<sup>17</sup> The discussion in the Group thus far suggests that antitrust agencies generally apply non-discriminatory enforcement policies. See WTO Secretariat Fundamental Principles Paper, *supra*, para. 39; US Submission, Relevance of Fundamental WTO Principles to Competition Policy, WT/WGTCP/W/131 (June 1999), at 6-11; EU Submission, The Relevance of Fundamental WTO Principles of National Treatment, Transparency, and Most-Favored Nation to Competition Policy and Vice-Versa, WT/WGTCP/W/115 (May 25, 1999).

<sup>18</sup> *E.g.*, the US FTC, and the Australian, Canadian, German, Japanese, Mexican, Polish, South African, and Venezuelan antitrust agencies.

<sup>19</sup> *E.g.*, the US DOJ, Brazil's three antitrust agencies, the EU's DG-Competition, France's DGCCRF, and the United Kingdom's Office of Fair Trading.

<sup>20</sup> *E.g.*, the United States, Brazil, France, Portugal, Spain, and the United Kingdom.

<sup>21</sup> See W. Kovacic, Getting Started: Creating New Competition Policy Institutions in Transition Economies, 23 BROOKLYN J. INT'L L. 403, 424 (1997).

Another significant issue in the drafting of an antitrust law is how to provide means for private persons (both domestic and foreign) that are aggrieved by anti-competitive conduct to obtain relief from either the new antitrust agency or the courts. The methods of doing so vary greatly among countries and legal systems. In the United States, Australia, and New Zealand, for example, there are well-developed private rights of action available to persons who believe that they have been victimized by anti-competitive conduct; these rights are quite independent of any action taken by the antitrust agencies.<sup>22</sup> Such rights either do not exist or are much more limited in most other countries.<sup>23</sup> Instead, many antitrust laws provide procedures whereby private persons may complain to the antitrust agency about alleged illegal conduct. Decisions on this issue obviously are dependent in part on the overall legal system and culture of the country concerned, and where proposed new judicial remedies are concerned, account necessarily needs to be taken of the general characteristics of private litigation in the country in determining whether any particular private right of action is likely to be effective.

There are many other institutional issues that must be addressed in enacting an antitrust law and creating an antitrust agency. These include, but are not limited to: creating a decision-making process for antitrust matters, together with an appropriate process of judicial review of antitrust agency actions; ensuring that the antitrust agency has effective powers for gathering the information it needs to do its job; and ensuring that the antitrust agency has effective remedies available to it when it determines that a violation of the law has occurred. All these matters are complex, and their resolution by a Member drafting an antitrust law will be influenced by the legal system and culture in which the agency must

Creating an agency on paper is one thing; giving it adequate resources to do its job is something else, particularly in a world where government resources are often constrained. Funding problems are, of course, especially acute in developing and transitional economies, and these concerns have been discussed in prior sessions of this Group and related WTO symposia.<sup>25</sup> Moreover, new antitrust agencies are, by definition, "new". Financial resources for them thus must ordinarily be taken from existing programs or new revenues - a difficult task in any context, and one that will tend to limit the resources that a new antitrust agency can expect to receive. Some countries have sought to maximize the resources provided to antitrust agencies by finding special sources of funding. "User fees" are one possibility. For example, for some years the United States antitrust agencies' appropriated funds have come from the pre-merger notification filing fees received by the agencies (though much of these fees are used for other government purposes); other countries (e.g., Romania) impose user fees for processing applications for exemptions in particular transactions. Still other countries have awarded the antitrust agencies a portion of the fines they collect in enforcement actions; one problem with this funding mechanism, however, is that it may give the antitrust agency incentives to take inappropriate actions in order to augment its budget, and whether or not that is true in any particular case, it might be thought by the public (including the business community) to taint many of the agency's actions.<sup>26</sup> In any case, funding issues will influence nearly every major issue facing a new antitrust agency.

One of the first tasks facing the management of a new antitrust agency is to determine how many employees the agency should have, and what the employees' qualifications should be. Once again, a review of agencies around the world yields no clear answer to either question. With respect to size of agency, there are enormous differences. The Russian Federation's antitrust agency is by far the largest, with roughly 2,000 employees; the two US federal agencies have a total of roughly 1,000 people doing antitrust work; other examples range from Japan (with c. 530 employees), to the European Commission (c.500), Turkey (c. 300), Canada (c. 250), Mexico (c. 150), Sweden (c. 120), Hungary (c. 100), Switzerland (c. 40), and Venezuela (c. 25). But it is difficult to identify optimum sizes for antitrust agencies in countries with vastly different economic circumstances and legal structures. Indeed, in small economies - and most Members that do not already have antitrust laws *are* small economies - one might ask how one would go about deciding that 5, 10, or 100 employees are sufficient to staff an effective antitrust agency in the context of a particular country.

Antitrust agencies also have reached rather different conclusions concerning the basic qualifications of the antitrust officials they hire. In the United States, not surprisingly, by far the greatest number of the antitrust agencies' professional employees are attorneys. But, since antitrust is an economics-based discipline, both DOJ and FTC also employ many economists with doctorates, and civil

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*Consumer Protection Programs in the Republic of Georgia*, 43 ANTITRUST BULL. 15 (1998); OECD, COMPETITION LAW AND POLICY IN THE BALTIC COUNTRIES (1999)(OECD BALTIC STUDY); "Antitrust in Israel," GLOBAL COMP. REV.(Feb./March 2000) 8-9, 14-15 (2000); "Competition in Colombia," GLOBAL COMP. REV. (April/May 1999) 30-31 (1999).

<sup>25</sup> See, e.g., Presentation of Gesner Oliveira, President of Brazil's CADE, at the WTO's Third Symposium on Competition Policy and the World Trading System (1999)(charts suggesting that CADE receives, on a relative basis, only one-sixth of the funding provided to US antitrust agencies). As President Oliveira has explained elsewhere: "[t]here is a tendency for underfunding of competition bodies. There are no vested interests which will support . . . independent competition agencies at the national level. . . [T]here are vested interests which are willing to support the regulatory agencies." International Competition Policy Advisory Committee (ICPAC) Hearings, Nov. 2-4, 1998, at 112.

<sup>26</sup> See, e.g., Kovacic, *Perilous Beginnings*, *supra* n.25, 43 ANTITRUST BULL. at 19.





funding for such facilities will be provided. But very often, some or many of these things will be lacking, and the antitrust agency's performance may suffer.

### ***Transparency and Due Process***

If a new antitrust agency is going to be effective, achieve public respect, and make a significant contribution to creating a competition culture over time, it will need to ensure that its procedures and actions are appropriately transparent, that it provides due process to the firms and individuals involved in its law enforcement activities, and that its officials properly protect the confidentiality of business information and otherwise are governed by high ethical standards.<sup>32</sup> There are at least two important aspects to this task: first, there should be readily accessible written guidelines, regulations, or other public guidance on these matters; and second, the agency should take care that it follows its guidelines/regulations. In numerous developing and transition economy countries, antitrust agencies have set good examples for other government agencies in all these respects. For example, as a senior Brazilian antitrust official recently stated: CADE "has been working very hard to build a new kind of institution based on transparency, predictability, accountability, and simplicity. These principles are our cornerstone and guide a process of reputation building".<sup>33</sup>

At an earlier session, the Group discussed and reviewed written submissions on the fundamental WTO principles of transparency, national treatment and most-favoura4anssarier54s0xiF(lic)10.8(it)b,.2(.)]TJ 6.9595 0 (

Indeed, a new antitrust agency should make it a priority to explain - to the public at large, to affected businesses and, not least, to its own staff - what its priorities are, how it investigates and makes decisions, and the reasoning behind its enforcement and policy decisions.

specific subjects and long-term advisory missions largely based on funding by the US Agency for International Development. We also have hosted scores of antitrust officials from many countries on internships at DOJ/ FTC.<sup>47</sup>

Of course, significant assistance in drafting and enforcing new antitrust laws has been provided by other countries with experienced antitrust agencies, as well as by multilateral organizations such as the WTO, OECD, the World Bank, UNCTAD, and APEC.<sup>48</sup> And it also is important to recognize that some of the most valuable assistance a new antitrust agency can receive is advice from agencies in other developing and transition economy countries, which are well aware of the problems encountered by agencies like themselves. But whatever else we can say about technical assistance, we can all recognize that the significant - and sometimes unmet - needs of Members' antitrust agencies for meaningful staff training will continue, and that such training will continue to be a high priority for new agencies, as it is for well-established ones.<sup>49</sup>

### ***Establishing Agency Priorities***

Once a new antitrust agency is established - indeed, while it is being organized - the management of the new agency will have to identify its initial priorities. The answer to that question will, of course, depend heavily on some of the issues we have already discussed: available financial and personnel resources, the state and structure of the country's economy, and the legal system, among other things. Once again, there are many different views on appropriate priorities for a new agency, as it begins to build a culture of competition in its country. These include educating the public about the value of competition generally, competition advocacy on a more focused basis, and law enforcement actions.<sup>50</sup>

### ***Educating Society about Competition***

Whatever else the agency does, it certainly should begin by educating the general public, local businesses, and the courts about the new law and new agency, and more broadly about the valuable role

society.<sup>51</sup> Such an educational programme is instrumental in establishing public support for both the new government policy of encouraging competition; it is one of the foundations of a culture of competition.

One particularly important aspect of an educational programme is explaining the purpose and framework of the new law and agency procedures to the local courts that will apply the law. This task is of obvious importance in a context where judges who previously have had no occasion to think about antitrust issues (or perhaps other market-based economic issues) suddenly find themselves reviewing agency decisions or private lawsuits under the new law.<sup>52</sup> Speeches by agency officials to judicial organizations, special antitrust conferences for judges, and careful agency explanations in judicial review proceedings themselves are possible ways of beginning this aspect of creating a culture of competition.

### *Competition Advocacy*

Previous discussions in the Group have stressed the importance of competition advocacy activities to creating a culture of competition.<sup>53</sup> (As some of these discussions have emphasized, a country does not actually need to have an antitrust law or an antitrust agency in order to have an effective competition advocacy program, so long as an agency with appropriate expertise is charged with acting as an articulate advocate for competition.) There are many possible valuable roles for competition advocacy, depending on a country's legal and economic circumstances. As a recent OECD report explained:

In virtually every Member country where significant reform efforts have been undertaken, the competition agencies have been active participants in the reform process. This "advocacy" . . . can include persuasion offered behind the scenes, as well as publicity outside of formal proceedings. Some competition agencies have the power, at least in

Another important possible focus of competition advocacy is for the new antitrust (or other) agency to participate in proceedings before national regulatory agencies, in order to argue for pro-competitive outcomes in regulated markets, and - as appropriate - before legislatures, in order for pro-competitive legislation and against anti-competitive proposals.<sup>56</sup> Once again, such activities have been



## CONCLUSION

A Member's decision to enact an antitrust law is only the beginning of a long and complex process of resolving both policy and practical issues in legal drafting, institution-building, and making the new law meaningful through agency action. We hope that this paper will assist the Group in its discussions of these issues, and that the Group's discussions, in turn, will help Members that are considering antitrust legislation to make informed and appropriate decisions.

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