Summary of Discussion Points

Presented by Calvin Goldman and James Rill
of the Business and Industry Advisory Committee (BIAC) to the OECD
at the OECD Joint Global Forum on Trade and Competition
Clarification of Core Principles:
Transparency, Non-Discrimination and Procedural Fairness

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BIAC welcomes the opportunity to provide its views to the OECD Joint Global Forum on Trade and Competition on the core principles of transparency, non-discrimination and procedural fairness in a competition policy framework.

BIAC has recommended that the OECD continue its work on the relationship between trade and competition policy and commends the OECD on its successful Joint Global Forum here today. As previously stated, BIAC also supports the work of the WTO Working Group on the Interaction Between Trade and Competition to study the issues in the Doha Declaration, including core principles. (See “BIAC Priorities for the WTO Doha Negotiations and Recommendations to the OECD,” Feb. 20, 2003.)

Businesses seek to compete on a level playing field under known rules. In this context, the core principles of transparency, non-discrimination and procedural fairness are all of great importance to the business community. Through the years, BIAC, jointly with the International Chamber of Commerce (ICC), has issued statements advocating the adoption of procedural safeguards in merger review, all of which are applicable in the broader trade and competition context. The most notable of these statements are the “ICC/BIAC Comments on the Report of the US International Competition Policy Advisory Committee (ICPAC)” (June 5, 2000) and the “Recommended Framework for Best Practices in International Merger Control Procedures.” (Oct. 4, 2001) BIAC also addressed the issues of core principles specifically in a trade and competition context during the June 3, 2002 meeting of the OECD Joint Group on Trade and Competition. (See “Summary of Discussion Points Presented by Peter Plompen, Chair of the Competition Committee of BIAC,” June 3, 2002) More recently, the same issues were addressed by ICC in its recent submission to the WTO, “Competition Policy in the WTO: Doha Declaration Issues.” (Apr. 9, 2003)
BIAC also notes that the ICN has endorsed in the merger context the application of the principles of transparency, non-discrimination and procedural fairness, and encourages the application of these principles in the broader competition policy context.

Endorsing the application of these general principles is, however, only the first step. Determining the scope and the manner of application of these principles are key challenges going forward.

In the following discussion, we set out the business community’s views on these core principles and identify some issues for further discussion.

**NON-DISCRIMINATION**

It is generally accepted that competition laws and their implementation should be nationality blind and should be concerned exclusively with the impact on competition of the conduct or transaction in question. Competition laws that are expressly drafted or implemented so as to favor local as against foreign firms distort trade and undermine the credibility of competition policy generally.

In developing this concept, issues to consider include:

(i) Whether the principle should include *de facto* discrimination and, if so, how to distinguish between inappropriate discrimination and legitimate enforcement discretion;

(ii) How to address legitimate legal or enforcement differences based on where a firm is operating and in which markets;

(iii) Whether all exemptions to competition laws available only to domestic firms violate this principle; and

(iv) Whether obligations imposed only on foreign firms violate this principle.

**TRANSPARENCY & PROCEDURAL FAIRNESS**

Transparency and procedural fairness are vital to the business community as they provide some assurance that the system will produce consistent and rational results and generate confidence in the system of competition law enforcement.

Transparency should apply not only to the laws and regulations of a jurisdiction, but also to the procedures, principles and practices of the competition agencies, including the issuance of guidelines.
There is also a need to balance transparency and confidentiality. Appropriate safeguards should be in place to ensure there are adequate and proper protections of confidential proprietary information of the parties concerned.

Procedural fairness should ensure fair and equitable procedures in administrative and judicial proceedings, both in the first instance and on any available appeal. Mechanisms to ensure an objective decision in the first instance should be established.

Increased transparency will also enhance accountability. Transparency reduces the risks of subjective and selective enforcement. Decision-making is more accountable when the process and standards are transparent. This is especially important in relation to decisions of significance.

For example, ICC has recommended that the WTO consider the following elements before adopting any principle(s) on transparency and procedural fairness.

- Mechanism for bringing matters before competition agency.
- Right to be advised of progress and reasons for decisions.
- Right to notice and disclosure of investigations.
- Right to make submissions.
- Independent and objective decision.
- Transparency of substantive and procedural rules.
- Right of appeal.
- Timely decisions.
- Ability to challenge investigatory measures.
- Clear and transparent process standards, including adequate protection of confidential information.
- Adherence to due process standards binding.
- Jurisdictional nexus.
- Reasonable and proportionate remedies.


This note merely addresses some preliminary issues that need to be considered in developing the appropriate application of these core principles in a competition context. In any exploration of these core principles, BIAC urges the OECD and WTO to proceed cautiously, recognizing that while these principles are common to the competition law systems of most developed countries, their application is not, and there are a number of issues and perspectives to consider. The private sector can play a valuable role in identifying fundamental areas of concern and facilitating a balanced approach to developing more detailed principles.