法學博士

經濟法

1. 試論穩定、協調和可持續發展原則（40 分）

[請在下列 3 題中選做 2 題（每題 30 分）]

2．反壟斷法的規制對象

3. 金融監管法的目標體系

4. 對外商投資是否需要管制？爲什麼？

商法

1. 試述上市公司收購中的中小股東保護（本題 30 分）

2. 試述保險利益及其運用（本題 30 分）

[請在下列 2 題中選做 1 題（每題 40 分）]

3．簡論商法的私法本質

4．簡論商法的信用原則

East China University of Politics and Law

Economic Law Disciplinary Ph.D Candidate Entrance Exam 2004

1. Based on the article below answer the questions:

(1) What are the core principles in Antitrust Law?(5 points)

(2)What the problem with them?(5 points)

2. Translate the second paragraph marked by bond and italic into Chinese. (20 points)

3. Summarize the article within 1000 words. (70 points)

The Problem with Core Principles in Antitrust Law

A. Non-Discrimination

The principles of non-discrimination – meaning, again, the combination of MFN and national treatment – are fundamental to the operation of the WTO, and so it is only natural that the WTO members would consider extending them to competition law. To some degree, the question is treated as having been asked and answered. As participants in the Working Group have noted, not only is the non-discrimination norm generally applicable within the WTO framework, but it already has some application to competition law. Furthermore, many national laws contain an explicit or implicit nondiscrimination principle.

The ubiquity of the non-discrimination principle is of uncertain significance. On the one hand, it is difficult to credit the argument that this demonstrates the need to incorporate it as a principle of WTO law. On the other hand, though some Working Group participants have suggested that further invocation of the principle would be redundant and presumably wasteful, that argument is not particularly telling. The nondiscrimination principles are applied to competition issues involving goods only through the WTO's most general and abstract obligation, one that has had little practical import even in the trade area. The existing authority for matters touching on services is broader, but again less clear than it might be, and necessarily limited to antitrust matters relating somehow to services. Finally, the notion that many national antitrust regimes already reflect such a norm, explicitly or implicitly, is hardly a decisive objection. For members already having an explicit commitment of that kind, an international agreement would ossify that commitment, and increase the cost of betraying it; for members having an implicit commitment to non-discrimination, a WTO provision would also make that commitment explicit, and improve transparency; with respect to members having no commitment whatsoever, the benefits would be apparent.

Or would they? Even if we assume that adopting non-discrimination principles would not be redundant, why would we want them in the first place? Apart from simply asserting that non-discrimination (together with transparency) is "central to the effective administration of competition law and policy," the Working Group posited several advantages. First, adopting a non-discrimination norm for antitrust ensures better consistency with the fundamental norms and objectives of the WTO. Second, taking

small, uncontroversial steps toward elaborating an antitrust regime helps build confidence and momentum in the broader enterprise, and adopting core principles in particular may help establish a climate of mutual trust. Third, non-discrimination principles may be a bulwark against domestic pressures to favor local companies, and may in the process reassure foreign investors and encourage their investment. The symbolic value may be the more important, since – perhaps for reasons of politesse – the Working Group's proceedings lack examples of any actual discrimination that would be redressed, and there is relatively little evidence of any other official complaints to that effect. Assuming that pursing these ends is appropriate, the prospect of securing them by dint of core principles alone seems dim, both for generic reasons and for reasons peculiar to antitrust. In both cases, the balance of considerations counsels against jump-starting antitrust with non-discrimination.

1. Generic concerns

The most frequently vetted objection to MFN obligations in international trade is the free-rider problem: because a state knows it can secure any benefit extended to another party, it has no incentive to make concessions; because every party knows that, fewer concessions will be made and fewer mutually beneficial bargains will be made. A state may also be deterred from offering a concession to another state or states if it must extend that concession to all states benefiting from MFN status. There are countervailing considerations, of course. MFN avoids certain abuses of bargaining power, and provides security for countries concerned that their bargains will be overtaken by more favorable terms. And trade agreements are clearly reached notwithstanding.

The risk of any disruption appear to turn on the number of parties, their respective

bargaining power, and the sequence of negotiations.

National treatment may create analogous bargaining problems, albeit in a more informal and asymmetric situation. Such obligations may, if credible, serve the valuable function of checking domestic favoritism. But they may also check other impulses. For example, if a state is contemplating lowering the threshold for merger notifications, in order to satisfy the interests of local companies preferring immediate scrutiny to prolonged uncertainty, it may be deterred from doing so by the administrative burden of extending the same benefit to foreign entities – and perhaps as a consequence shrink from attempting pilot programs. Local companies, for their part, may be reluctant to press for legal reform were the reform's benefits unavoidably extended to foreign entities – perhaps especially where those entities have expended none of the lobbying effort – and the admixture of parochialism and free-riding problems may retard any efforts at reform. To be sure, the nondiscriminatory policy is still likely to be the better one in both instances, and WTO members may individually be inclined to elect it in any event, but imposing the obligation is associated with identifiable costs as well.

These drawbacks may seem marginal in nature, but they are made more vexing by virtue of the underdeveloped state of international antitrust. First, MFN's adverse effects are surely heightened when that obligation is unaccompanied by any substantive concessions. Unlike the GATT, GATS, or TRIPS agreements (or, for that matter, numerous bilateral agreements), in which an MFN obligation was adopted simultaneously with a material reduction in barriers to trade, adopting core principles at this point would *precede* any substantive obligations of note. Under these circumstances, the obligation provides very little by way of reassurance to members making concessions to one another (because no

such concessions have yet been made), while accentuating the relative bargaining gains potentially held hostage by free riding. Imagine, for example, that the European Community wished to persuade a developing country to abandon the view that aggressive deregulation made adopting an antitrust law unnecessary (having already, of course, extracted a commitment that any antitrust law it adopted would adhere, hypothetically, to the core principles).Many means of applying pressure would exist, and it is not self-evident that we would want the Community to have any effective means at its disposal. But the MFN obligation – and the national treatment obligation, with which it frequently overlaps in result – would likely deprive it of the ability to make favorable treatment under Community law contingent on the country's adoption of its own laws, and it is difficult to perceive the offsetting benefit.

Such obvious strong-arming is largely hypothetical, but more subtle kinds of discrimination are established policy. Some domestic legislation is reciprocity oriented. Moreover, at least prior to the Supreme Court's decision in *Hartford Fire*, American courts took the state of foreign antitrust law into account in deciding whether to exercise jurisdiction over antitrust cases touching on foreign affairs, and the federal agencies continue to do so as a matter of official policy.

Second, in contrast to the bulk of the trade regime, the "products" at issue are highly differentiated. Trade law is sometimes distinguished from antitrust law on the ground that the former generally addresses governmental measures while the latter addresses private conduct. But that is not the whole story, even if we put to one side state enterprises and regulatory barriers to competition. At this stage of international antitrust's development, such norms as have developed are principally intergovernmental in character. The United

States is obligated under a number of bilateral agreements, for example, to cooperate with coordinate antitrust authorities in pursuing matters of interest to the parties singly or jointly, and other established antitrust agencies have similar webs of agreements. Under these agreements, coordination is less focused on the nationality of the enterprises concerned than with where their conduct has effects.

This is hardly an unusual form of international economic relations, but it complicates the application of non-discrimination analysis. Because such relations rely on mutual trust, the parties involved select one another with an eye toward their partners' expertise, regulatory capacity, and integrity. Indeed, in the International Antitrust Enforcement Assistance Act of 1994 (IAEAA), which authorizes the U.S. antitrust agencies to enter into bilateral agreements with foreign governments for mutual assistance in antitrust matters, Congress required as a precondition that any foreign partner have comparable ability to provide assistance, in addition to the specific capacity to protect confidential information from disclosure. A comprehensive nondiscrimination obligation would, in theory, mean that the United States (and each of its partners, and those involved with each other in similar bilateral agreements) would have to extent its benefits – for example, providing notification of antitrust enforcement activities affecting the important interests of the other party, respect principles of comity in deciding whether and how far to enforce, and provide assistance to the enforcement activities of the other party ("positive comity") – to all WTO members, or commit an international delict.

Anticipating this type of problem, the Working Group has posed the question whether bilateral cooperation would raise MFN issues were a core principles approach pursued. Its tentative answer has been that while guidelines might be necessary to resolve potential

conflict between MFN and bilateral obligations, it would be unmanageable to make cooperation obligatory – in other words, that MFN would of necessity yield. That answer, while perhaps necessary, seems less than satisfactory.

Even under the bilateral agreements themselves, cooperation is not required. *Considering* forbearance or assistance is, however, and it would appear inconsistent with both the core principles of non-discrimination and transparency were some members entitled to such consideration and others not.

Equally important, exempting such agreements derogates significantly from the non-discrimination principle. The treatment of customs unions and free trade areas under the GATT and other agreements is a source of continuing controversy, and one might conclude that the legal limitations on such exemptions are highly ineffective. But there, at least, the exempted agreements sit atop significant concessions applicable to all members, and in theory pursue the complete liberalization of trade that is already substantially liberalized. In contrast, to date the only species of international antitrust involves bilateral relations – or, at most, principles developed in the context of closed clubs like the OECD – and applying their mix of "positive" and traditional comity may result in more or less antitrust enforcement as between the parties, rather than a one-way ratcheting toward liberalization. Bilateral antitrust, in other words, may or may not enhance the application of antitrust law to particular activities, and so exempting it may prove inconsistent with the assumptions of non-discrimination.

2. Antitrust considerations

The above-described difficulties – namely, that of adopting non-discrimination principles

prior to substantive concessions, and adapting those principles to predominantly intergovernmental relations – apply essentially without regard to the nature of antitrust. Other concerns are more topical in nature. To begin with, it is by no means clear how the non-discrimination principles might apply to antitrust problems.

Unlike subsidies and other issues typically assessed for consistency with national treatment, there is relatively little behavior that might be classified as "internal" in character, or that treats foreigners distinctly – though antitrust laws do typically show less interest in foreign effects, and sometimes distinguish between inward-bound and outward-bound commerce having equivalent effects. And such laws still more rarely distinguish between one state (and its persons or products) and another based on their respective nationalities, unlike tariffs and similar measures subject to a traditional MFN analysis. As a result, applying the non-discrimination principles to antitrust would place an uncommon degree of stress on the accurate characterization of corporate nationality, a question fraught with difficulty.

It is hard to tease from the Working Group's proceedings any practical examples as to how either non-discrimination principle might be applied in practice. The Group has been clearer, however, regarding the categorical exemptions it is contemplating, over and above that for bilateral relationships. For one, it emphasizes that the intent of WTO regulation of antitrust is "*not* to encroach upon the domain of industrial, development or social policy," so that the attendant non-discrimination principles "would have no implications for the broader question of the extent to which a market is open to foreign investment." This suggests, for example, that foreign acquisitions of domestic companies could not be resisted on nationality grounds within antitrust law proper, but could be

separately restricted by any number of other legal provisions.

In addition, the consensus view appears to be that non-discrimination in antitrust "would not preclude the enactment of sectoral exceptions, exemptions and exclusions from national competition regimes." On its face, this approach would permit a member to establish a separate regime for a particular industry or service sector. It would also tolerate procedural variations, such as a requirement that labor representatives be permitted to take part in merger review, and the pursuit of potentially divergent objectives, like the preservation of small and medium-sized businesses. Perhaps most strikingly, special provisions could perhaps also be made for "joint activities relating to export promotion" – that is, the much-criticized export cartels -- which not incidentally provide the most obvious evidence that antitrust policy is driven by national self-interest. Such loopholes seem big enough to drive a truck through, but others may be more significant. It would be extraordinarily difficult, most concede, to evaluate whether antitrust laws – however broad their purview – are actually being *enforced* on a discriminatory basis. Enforcement discretion is generally regarded as indispensable to an antitrust regime. Many considerations enter into whether and how enforcement actions are pursued, and it is difficult to envision any effective means for evaluating a particular matter was favored or disfavored on grounds of nationality. Comparing fully litigated cases would require thoroughgoing review, and where cases are pretermitted without conclusive fact-finding or even a complete investigation, something like a *de novo* proceeding would have to be undertaken. Any review would then have to examine differing degrees of culpability, differences in available (and admissible) evidence, differing degrees of assistance from the parties, and differing effects within the country in

question. Even where each of two cases involving discrepant nationalities presents a convincing basis for intervening, they may be treated differently for reasons having nothing to do with nationality. Antitrust enforcers almost certainly have to husband resources in a manner that precludes wholly equitable treatment – such that taking one case does not mean that an identical case will be taken – and may desire, for example, to protect the government's long-term litigating position by choosing the best facts on which to present a new or controversial theory.

No doubt mindful of these and related considerations, the Working Group appears already to have dismissed the possibility of applying the non-discrimination principles to any as-applied challenges to member antitrust policies, instead focusing solely on explicit *de jure* discrimination. However commendable that concession, it virtually eliminates the advantages of adopting non-discrimination norms. Any discriminatory impulse can easily be channeled into as-applied discrimination, which not incidentally is less visible and thus less likely to prompt retaliation. Assuming antitrust officials would otherwise be legally authorized, or temperamentally predisposed, to discriminate on the basis of nationality, it seems unlikely that they would regard continuing to do so as an abuse of their considerable prosecutorial discretion. And even if the adoption of core principles prompts such officials to self-regulate, the diversity of actors entitled to enforce competition laws in regimes like the United States and the European Community will make it difficult to obtain any universal subscription.

(End)