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GLOBALIZATION, THE CANADIAN COMPETITION ACT, AND THE FUTURE POLICY AGENDA

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FOREWORD

This draft discussion paper was prepared specially for the May 18-19 Conference on "Trade, Investment and Competition Policies: Conflict or Convergence," to be held in Ottawa at the Centre for Trade Policy and Law on May 18-19, 1993. The paper is based in part on a presentation made by one of the authors, Derek Ireland, to a meeting of the Ottawa Economics Association held about a year ago. The current document is marked as draft because the authors plan to update and finalize the paper based on the discussions at the Conference and the comments received from competition and other policy specialists who will be asked to review the current version.

Regarding the discussion paper series itself, the Economics and International Affairs (EIA) *discussion papers* are intended to disseminate information and to stimulate comment and criticism on economic issues related to antitrust policy. The analysis and conclusions of EIA *discussion papers* represent those of the authors and do not reflect the views of the Department of Consumer and Corporate Affairs. Information on the EIA *Discussion papers* may be obtained by writing to Derek Ireland, Director, Economics and International Affairs, Bureau of Competition Policy, Department of Consumer and Corporate Affairs, Place du Portage, Phase I, 20th Floor, Hull, Quebec, K1A 0C9.

GLOBALIZATION, THE CANADIAN COMPETITION ACT, AND THE FUTURE POLICY AGENDA

The Competition Act of 1986 has now been with us for almost seven years. The purpose of this paper is to briefly review Canadian antitrust developments since then and to place competition policy and antitrust enforcement in Canada into a broader policy context which includes Canadian prosperity and competitiveness, and the great buzz-word of the Nineties, "globalization".

1.0 THE RECORD SINCE 1986

We in the Bureau of Competition Policy believe that the 1986 Act anticipated quite well the broader trends towards enhanced trade liberalization and the globalization of markets, including such developments as the FTA and NAFTA, the yet unfinished Uruguay Round, globalization and the Canadian responses to these global trends -- structural adjustment, corporate downsizing, and going back to your core lines of business -- beer, steel, airlines or whatever.

Responding to the Economic Council's recommendations of nearly 20 years before, the merger provisions were moved from the criminal to the civil side of the Act, thus allowing the Bureau to better play a facilitating role in Canadian structural adjustment over the past few years in particular. As well, the 1986 reforms established a new abuse of dominance provision which established that large size in and of itself is not a cause for concern but provides for appropriate remedies when a dominant firm engages in anti-competitive conduct. The provision also provides for an exception based on superior competitive performance so that only the "mischievous", not the efficient, come under the purview of the Act. Accordingly, with these reforms, the traditional preoccupation in antitrust with size is downplayed; and actual or potential gains in economic efficiency are justified, while at the same time appropriate safeguards against actual or potential abuse of dominant market position are in place.

The 1986 Act also includes specialization agreement provisions which allow two or more firms to reorganize their production and product lines in order to achieve the efficiency gains made possible by specialization and longer production runs. Finally, the 1986 Act provided for the establishment of the Competition Tribunal to review and decide on cases regarding mergers, abuse of dominant position, refusals to supply and other reviewable practices, including those contained in amendments passed by Parliament a decade earlier.

The accomplishments of the Bureau since 1986 are in our view quite significant. The merger provisions were up and running soon after the Act's passage. Significant jurisprudence from Tribunal decisions has been developed in the areas of refusal to supply (Chrysler and Xerox), abuse of dominant position

(Nutrasweet and Laidlaw) -- all four of which were won by the Bureau -- and most recently two merger cases (Hillsdown and Southam) where the Tribunal sided with the parties. Major guidelines have been published and distributed widely in the areas of mergers, predatory pricing, price discrimination, and misleading advertising. Record fines have been realized from bid-rigging and conspiracy cases -- where a fine of over six million dollars was achieved in the compressed gas case -- as well as in fines imposed on individuals, where one individual fine was for $500,000.

In light of these accomplishments in the initial years, the Bureau recently has been able to give greater attention to policy questions and international matters. Major developments in this regard include:

(i) participation in interdepartmental and policy work to show the technical feasibility and economic benefits of replacing anti-dumping with competition policy rules under the Canada-U.S. FTA;

(ii) incorporation of a chapter (Chapter 15) on competition policy and the establishment of a Committee on Trade and Competition under the NAFTA accord with Mexico and the United States;

(iii) Bureau leadership in interdepartmental and international work, particularly with respect to the OECD, to explore the inter-actions between competition policy and trade policy and the potential for competition policy to be incorporated in future multilateral trade arrangements;

(iv) Bureau chairmanship of a special OECD Convergence steering group under the Competition Law and Policy (CLP) Committee, which is to report to the OECD Ministerial Council in June 1994 on the need and potential for greater convergence, coherence and cooperation among members' competition laws, enforcement practices and antitrust agencies;

(v) active participation in interdepartmental work to explore how competition policy rules and instruments can be better used to facilitate structural adjustment among Canadian industries, strengthen the Canadian economic union, and reduce inter-provincial barriers.

Perhaps most important, the Act and the Tribunal have successfully withstood many constitutional challenges directed at the conspiracy and merger provisions as well as the role, rules and composition of the Tribunal. It could be added that all of this was accomplished with virtually no real increase in the resources available to the Bureau. Canadians each year receive competition policy

for the price of a single cup of coffee at a small coffee shop. In a good year, about one-third of that cup of coffee is earned back in fines.

The facet of enforcement which has received the most public comment and criticism over the past seven years is the merger provisions. Here, the Bureau is faced with the "damned if you do and damned if you don't" syndrome. Concerns have been raised when the Bureau failed to reach agreement with the parties in the flour joint venture of about two years ago. On the other hand, we have also heard concerns when the Director of Investigation and Research failed to challenge mergers in such industries as beer, passenger airlines and other major industries and product lines.

In reviewing mergers, the Bureau has employed a pragmatic, case-by-case approach which has involved very little direct intervention in the plans and strategies of corporate Canada. Of the 7,000 or so merger transactions which have taken place in Canada over the last seven years since the inception of the Act, only about one-half of one percent of these transactions have been affected significantly by Canadian merger policy.

And many of these were allowed to proceed after the Director's competition concerns were addressed. Some of these involved high degrees of concentration in certain Canadian markets -- such as the ABB-Westinghouse transaction -- but were allowed to proceed because of the potential disciplining effects of imports on the pricing practices of the merged parties. The importance of potential imports in disciplining the pricing practices of the merged parties after the transaction is completed was underlined in the Competition Tribunal's judgment on the Hillsdown case, the first of two contested mergers (the second was Southam) taken to the Tribunal over the past two years. As noted earlier, the parties were successful in both contested proceedings, further underlining the pragmatic case-by-case approach to mergers under Canadian competition law by both the Bureau and the Tribunal.

In our view, Canadian merger policy proved its value at the height of the merger wave in early 1989, when the Bureau was faced with four major transactions, in four major industries -- oil and gas, beer, airlines, and pulp and paper -- with a total transaction value of many billions of dollars. Three of the four were allowed to proceed with little difficulty and no challenge from the Director of Investigations and Research. The fourth, Imperial-Texaco, was the subject of a difficult, long, but highly instructive, consent order proceeding before the Tribunal. However, in the end, the transaction was allowed to proceed with modifications to address the significant competition concerns of the Tribunal and the Director.

Regardless of this difficult consent order proceeding, we would still argue that the enforcement and administration costs, the public pressures and concerns, and the business uncertainty associated with the review of these four transactions were minimal compared to the cost of past royal commissions -- including the Bryce and

Kent Commissions – established to address public concerns with previous merger waves and increasing corporate concentration in Canada. Canadian merger law and the Tribunal were established by Parliament in 1986 in part to remove merger review from the political forum and to ensure that competition and efficiency concerns were paramount in Canadian merger review processes. The four mergers addressed through 1989 provide clear evidence of the wisdom of Parliament's decision three years earlier.

2.0 KEY ISSUES OF THE PAST SEVEN YEARS

To summarize, the overall record appears consistent with the Bureau's view that the Competition Act of 1986 successfully anticipated enhanced trade liberalization (the FTA, NAFTA, etc.) and the globalization of markets. The evidence for this is found in:

- the efficiency gains defense and the foreign competition, failing firm and other factors under the merger provisions;

- the philosophy underlying the new abuse of dominant position provisions which postulates that dominance based on superior competitive performance is not a competition concern; and

- the various exemptions under the conspiracy provisions; and the support given to R&D joint ventures, specialization agreements, and other efficiency enhancing inter-corporate arrangements under the Act.

Over the past seven years, the Bureau has deepened its experience in case management and alternative case resolution, the application of Industrial Organization theory to specific cases, as well as to broader enforcement policy, the role of competition policy in supporting Canadian prosperity and competitiveness, and international antitrust enforcement and cooperation.

However, the last seven years have not been without concerns and controversy. Under the new Act, the Crown has to date won all of the many constitutional challenges regarding the Tribunal, the conspiracy provisions, the merger provisions, and private actions. The PANS decision in particular underlined the importance of the conspiracy provisions and the Competition Act in general as a significant policy instrument to Canada's economic development. The aggressive pursuit of conspiracy and bid-rigging cases continues to be a Bureau priority; and the PANS decision will help to facilitate our work on these important enforcement matters. Nevertheless, these challenges caused some uncertainty in the business community and deflected significant Bureau and private resources away from the task of making the Act function effectively in the complex economic world of today.

It is said that the Imperial-Texaco consent order proceeding raised serious concerns regarding the complexity and timeliness of the Tribunal's proceedings. This may have encouraged some parties to settle cases directly with the Director rather than to argue their cases before the Competition Tribunal. This response is understandable but could leave the impression of back-room deals, could impede the development of important jurisprudence particularly regarding the merger provisions, and implicitly could place more power in the hands of the Director than was anticipated by Parliament or is sought by the Bureau. It is hoped that this situation will improve in the future with the two favorable rulings in favour of the merger parties from the Tribunal; and the expeditious manner -- albeit with a less than unequivocal judgment -- in which the Tribunal has addressed the Director's request to alter the Gemini consent order. The latter proceeding required less than six months from the request to the Tribunal's judgment.

The flour joint venture case of about two years ago, where the merging parties decided to abandon the transaction rather than address the competition concerns raised by the Bureau or take the case to the Tribunal, brought to the fore a wide range of issues regarding the role of the Competition Act in supporting Canadian industrial restructuring in the face of globalization, lower trade barriers, and changing production economics and marketing methods. The inter-departmental and media controversy surrounding the case pointed out the need for the Bureau to accelerate its efforts to increase business, public and media understanding of the complex issues surrounding antitrust enforcement in a modern economy. As well, it is perhaps regrettable that the Competition Tribunal was not given the opportunity to adjudicate the case and to offer its views on the complex questions posed by the flour joint venture, particularly in the areas of foreign competition, market contestability, and efficiency gains.

Another merger case which generated considerable controversy was the Boeing proposal to sell de Havilland to a consortium of two European aircraft manufacturers owned by the French and Italian governments. The Canadian Bureau decided not to challenge the merger because of the efficiency gains in Canada, the limited competitive effects on the small Canadian market for commuter aircraft, and because of the potential that de Havilland was a failing firm. However, the merger was stopped by the European Commission because of the anticipated anti-competitive effects on the much larger European market, and -- according to critical comments from members of the Canadian legal and business communities as well as the Canadian media -- perhaps because of alleged concerns that the merger would have a negative effect on the market positions of the existing European manufacturers of smaller passenger aircraft. (The authors do not necessarily accept these critical comments about the E.C. decision, but they do point out the potential for frictions between competition and industrial policies -- frictions which could arise, or at least be alleged, more often in the future.)

To many commentators, this case pointed out the need for improved cooperation, and greater convergence in review processes, among different merger review jurisdictions. It should be noted however that even if Canadian and European merger laws and procedures were exactly the same, different market conditions and economic circumstances could still have led to different decisions. This problem could be fully resolved only through some type of supra-national competition authority which supplants national authorities in adjudicating large international transactions. One could question the desirability and feasibility of such a powerful international institution at this point in time, particularly in light of the traditional independence of national antitrust agencies. Moreover, even such a supra-national authority would have faced difficulties in successfully resolving this case given the complex market, efficiency, and distributional issues at play. The notion of comity in antitrust is in its infancy. Quite frankly, we will have to learn to walk together first by developing and implementing bilateral and multilateral agreements, before we learn to run in harmony by administering competition policy from a global authority.

Before closing this section, it should be noted that the Bureau, other government departments, and the Canadian business, legal, and policy communities are perhaps just starting to employ the full potential of the Competition Act, and to understand the complex forces influencing competition policy, industrial restructuring, international competitiveness and economic prosperity in Canada. Our Parliament in 1986 provided us with a number of provisions designed to enhance efficiency, adaptability and competitiveness in the Canadian economy. Some of these, such as the specialization agreement provisions and those respecting joint ventures, have to date been utilized very little by Canadian businesses. All of us -- the Bureau, other government agencies, Canadian business -- must advance our knowledge of how to use these and other instruments to support international competitiveness as well as the interests of Canadian consumers and business customers.

3.0 COMPETITION, COMPETITIVENESS, AND THE PORTER DIAMOND

Before returning to the role of Canadian competition policy in a globalizing world economy, it might be helpful to review the strengths and weaknesses of some recent research on the competition and competitiveness interface. The recent work of Professor Michael Porter of Harvard University, both his well known nine nations study -- "The Competitive Advantage Of Nations" -- as well as his more recent Canadian report, has perhaps helped to improve our understanding of the links between domestic competition and international competitiveness. Effective antitrust enforcement is important to all parts of the Porter diamond: company strategy, structure and rivalry; demand conditions; factor conditions; and related and supporting industries.

Competition policy and law complements the efforts of other government programs and of consumer associations designed to make Canadian consumers better informed and more demanding. These complementary consumer policy initiatives particularly come together when the Bureau makes representations before regulatory boards and commissions, such as the Canadian International Trade Tribunal, in order to promote competition and the consumer interest. Other research has shown that strong domestic rivalry, supported by effective antitrust enforcement, is important to creating the conditions that would attract appropriate technologies and the best skills to a technology importing country like Canada. These technologies and skills are in turn essential to factor upgrading in Canada. Pragmatic competition policy laws and policies, which encourage pro-efficiency business arrangements and challenge those which hurt Canadian efficiency and our ability to compete, are important to developing stronger related and supporting industries and the industry clusters so fundamental to the Porter diamond.

Among the four parts of the diamond, effective competition policy enforcement is particularly important to company strategy, structure and rivalry. In this regard, Porter offered the argument that limited antitrust enforcement in Canada before 1986, in particular our generally ineffective merger policy, was an important reason for the lack of strong domestic rivalry that had traditionally characterized the Canadian economy. Porter therefore reported favorably on the amendments to the Competition Act since 1986, the enforcement of the Act since then, and other government policy initiatives designed to enhance competition in Canadian markets, including the FTA with the United States, privatization and regulatory reform.

The Porter work however raises some serious questions about the appropriateness of the Porter diamond for a small open economy like Canada which must attempt to balance the imperatives of scale, efficiency, and domestic rivalry. Some believe that Porter places too much weight on the number of domestically owned rivals in a specific market, and discounts too much the role of actual or potential imports and the threat of entry by foreign investors, to discipline the pricing and other business practices of current participants in Canadian markets. In many industries with high economies of scale and scope, a small economy like Canada perhaps is unlikely to have more than one or two major domestic producers (with perhaps a few smaller producers "on the fringe" serving niche markets). This is why Parliament, in designing the 1986 Act and the Bureau in enforcing the statute since then, have placed so much weight on actual or potential foreign competitors (either through imports or through entry by investment) in assessing mergers and other business practices.

As well, by focussing more on domestic over foreign-owned rivals, the Porter diamond perhaps discounted to some degree the important role of foreign investment in bringing into Canada the best technologies and skills, in advancing Canadian productivity, and in improving competitive conditions in many Canadian markets. Finally, by treating Canada as a single diamond rather than as a

set of regional diamonds which for many markets can transcend the Canada-U.S. frontier, Porter ignored the role of, for example, Seattle rivals in disciplining Vancouver companies operating in markets which are local or regional in nature. This regional approach arguably would have been more consistent with the geographically dispersed nature of the Canadian economy as well as our growing links with the American economy under the FTA.

Like most economic models, the Porter diamond probably does a better job of predicting the past than forecasting the future. In our view as well, the Porter diamond is a stronger tool for analyzing and predicting the competitive advantages of a large urban agglomeration or a sub-national region, than of providing sound predictions and policy prescriptions for a geographically large and diverse country like Canada. Accordingly, while the Porter work may have advanced our understanding of the links between competition and competitiveness in the unique Canadian economic context, he also left us with a number of policy questions to be addressed in our future work with other government departments as well as with the Canadian business, policy and legal communities. The Bureau is now pursuing this work on a number of fronts, as outlined in the Selected Bibliography.

4.0 CANADIAN COMPETITION POLICY AND FREER TRADE

4.1 Competition Policy As A Complement to Enhanced Trade Liberalization

Critics of Canadian competition policy have suggested that with freer international trade resulting from successive rounds of multilateral trade negotiations, the FTA and now the NAFTA, Canada no longer needs effective competition policy and antitrust enforcement to foster a more efficient Canadian economy and to protect the interests of Canadian consumers and industrial customers. However, the fact remains that competition policy continues to be a fundamental policy instrument in ensuring efficient resource allocation and in enhancing economic welfare through healthy rivalry and innovative production, distribution and management practices.

This is clearly the policy position of the two largest and most highly integrated economies in the world, the United States and the European Community. In the case of Europe, a modern competition law and the capacity to enforce it are key prerequisites for E.C. membership for the ex-EFTA and Warsaw Pact countries who are now seeking full membership in the Community. The U.S. (as well as Canada) displayed a similar policy position in requiring Mexico to develop an appropriate competition law as part of the NAFTA accord. Furthermore, in both jurisdictions, competition policy is vigorously pursued by two levels of government, while the U.S. also has a very active private antitrust bar.

More generally, it would seem strange for Canada, as it imperfectly attaches itself to the American economy through the FTA and in the future the NAFTA, to drop competition policy from our policy arsenal, when antitrust enforcement

continues to flourish in the remaining 90 percent plus of our imperfectly integrated free trade area with the United States. Moreover, having an effective competition law, and being prepared to cooperate on international antitrust matters, will become a treaty obligation for the three signatories of the NAFTA accord (once it is formally ratified by the legislatures of the three countries); and could become an obligation under the GATT in the not-too-distant future.

The major antitrust jurisdictions and the international policy community recognize that strong competition policy is needed to promote efficiency and competitiveness, strengthen the internal market, and ensure that, as government imposed trade barriers come down, they are not replaced by private restraints to trade -- international cartels, anti-competitive mergers and alliances, and abuses of dominant position. With enhanced trade liberalization, smaller economies like Canada could be particularly vulnerable to collusive behaviour elsewhere, which could have negative effects on Canadian markets. Moreover, there is a growing body of literature which indicates that strong rivalry in domestic markets, supported by vigorous antitrust enforcement, helps to ensure that the potential gains from trade liberalization arrangements are actually realized, and that these benefits are shared more equitably among marketplace participants. Strong competition in domestic markets also helps to smooth the structural adjustments which are the inevitable result of any trade liberalization agreement.

As well, competition law provides an important policy safety net which has allowed Canada and other industrialized countries to reduce direct price and market regulation and to privatize state-owned corporations. Without the protection to consumer interests and to public welfare provided by competition law, political support for regulatory reform and privatization could well have been quite limited. Finally, competition policy provides opportunities and instruments to further consolidate the economic benefits from trade liberalization both multilaterally and within regional trading blocs. Competition policy makes possible the replacement of anti-dumping and other trade remedy laws with an alternative set of rules which are more consistent with marketplace principles and international economic integration. Competition policy prescriptions against bid-rigging support trade policy's efforts to open up government procurement markets. The European Commission has shown how competition policy rules can be used to effectively discipline the subsidy programs and other industrial policies of member governments.

4.2 Implications of Freer Trade for Competition Policy

In short, globalization and freer trade has heightened the importance of effective and pragmatic competition policy and antitrust enforcement, which complements the efforts of trade liberalization to lower trade barriers, enhance market access, and further integrate the global economy. At the same time, through lowering trade barriers, opening borders to greater inflows of foreign goods, services, investment and technologies, and making domestic markets more contestable,

globalization and trade liberalization are clearly altering the effectiveness, nature and scope of antitrust enforcement in Canada as well as within and among all OECD member states.

For a small open economy like Canada, liberalized trade and globalization provide a number of important implications.

1. Trade liberalization facilitates the expansion of relevant antitrust markets from local and national in scope to (multi-country) regional and at times even to global markets. As a consequence, mergers and positions of dominance which, in the past, could have generated significant competition issues when borders were closed, may cease to be a concern under a more liberal trading regime. With increased imports and the greater threat of entry through direct investment, merger transactions and other business practices which would result in high levels of market concentration -- and perhaps even a near monopoly position in domestic markets -- when market shares are computed in terms of domestically-based producers, often no longer need to be challenged by the Canadian and other antitrust authorities.

2. With reduced trade barriers and freer flows of factors of production, it is becoming harder for private parties to maintain cartels, abuses of dominant position and similar arrangements within domestic markets. Accordingly, Canadian and other antitrust authorities are having to take greater account of the dynamic marketplace changes resulting from enhanced trade liberalization in their investigations of such cases.

3. More generally, with trade liberalization, Canadian and other authorities are giving greater weight to the ability of imports and of possible entry by foreign investors to discipline the pricing behaviour and other commercial practices of merger parties after the transaction, of companies in a dominant position in the domestic market, and of companies which allegedly are part of a domestic cartel. This approach goes beyond the issue of concentration in the relevant antitrust market to encompass such difficult questions as potential competition and the contestability of markets. This methodological approach is captured in the merger provisions of the Canadian Competition Act, which lists the extent of foreign competition as a separate factor to be assessed after the relevant market and market concentration have been determined; and has been reinforced by the Competition Tribunal in its Hillsdown decision which focussed on the potential competition offered by U.S. facilities which were not yet strongly active in the Canadian market.

4. Trade liberalization offers new remedies to antitrust authorities. In a few Canadian merger cases, the Bureau has addressed competition concerns through either formal undertakings in a consent order before the Tribunal, or through less formal understandings, to seek accelerated tariff reductions under the Canada U.S. FTA, and/or not to proceed with anti-dumping actions against

imports for a specified period of time. Trade liberalization agreements used in this manner, offer the opportunity for antitrust authorities to alter the external environment within which companies conduct their affairs, either as a complement to or substitute for divestitures and other more traditional antitrust remedies.

5. Even in a world with no trade barriers, some markets will continue to be local, sub-national and national in nature. Accordingly, antitrust enforcement in Canada and elsewhere is now placing greater emphasis on ensuring competition and strong rivalry in domestic industries and markets which continue to be protected from import competition and foreign direct investment by: high transportation costs; national and sub-national differences in consumer tastes and industry requirements; government regulation; and market segmentation based on intellectual property rights and other factors. Special emphasis in this regard is being given to industries which are in transition from a regulated to a free market status.

   With globalization, all industries, regardless of their market orientation, must be internationally competitive. (This includes government.) Otherwise, a nation's exporters would be at a serious disadvantage in international markets. Competition policy has a special role to play in ensuring that the remaining protected industries provide exporters and final consumers with goods and services of high quality at globally competitive prices. This perhaps is one of the major reasons why the United States continues to place so much weight on domestic competition policy enforcement in a globalizing world economy. Vigorous antitrust enforcement in turn may have contributed to the higher productivity levels in the U.S. "non-traded" sectors in comparison with many other OECD countries, including Japan whose export industries have enjoyed such great success in international markets. (In fact, based on these productivity findings, Michael Porter has argued that in many respects, Japan has a "dual economy", given the sharp productivity differentials between its export and "non-traded" sectors).

6. With trade liberalization and globalization, antitrust agencies are giving greater attention to international mergers, international cartels, and other types of international anti-competitive behaviour. Lower trade barriers may mean less work on the domestic front. At the same time, countries like Canada with small, open economies, become increasingly vulnerable to the cross-border effects of anti-competitive mergers, conspiracies and other business practices based in other jurisdictions. Under the "effects" doctrine employed by most antitrust jurisdictions, countries can investigate and attempt to challenge the anti-competitive behaviour of companies with no production facilities in their market. The problem, particularly for the smaller players, is to find and apply an effective remedy against foreign-based companies.

There has already been a number of high profile international mergers -- with many involving substantial input from the Canadian Bureau of Competition Policy; and these could well grow through the decade as international corporations respond to the opportunities and challenges posed by globalization. Canada requires a strong merger and conspiracy law in order to participate as a full partner in a multi-jurisdictional review of an international merger, or in an investigation of an international cartel. In short, competition law allows us to be at the table with the other major players. Otherwise, we could find that significant decisions about Canadian industries, markets, assets and jobs would be made by other antitrust jurisdictions with little or no input from Canadian policy authorities.

7. Continuing trade liberalization and the international integration of markets require that competition policy work in tandem with trade, industrial, and other policies and the business community, in fostering an environment which is conducive to the growth of pro-competitive inter-firm arrangements, which help domestic industries employing advanced technologies and selling high value-added products to be successful in the fiercely competitive global marketplace.

   There is evidence that many forms of horizontal and vertical arrangements can be pro-competitive. Accordingly, as noted earlier, the Canadian competition statute provides defenses and/or exceptions in the case of export consortia, R&D joint ventures and other joint venture activity; and includes provisions to promote specialization agreements, to take account of superior competitive performance in abuse cases, and to allow a problematic merger when the efficiency gains clearly exceed any anticipated welfare losses. In addition, the Canadian Bureau is working closely with industry and the policy community to better understand the structure, motivation, competitive effects and enforcement considerations of strategic alliances.

   A key role of the Canadian Bureau in helping to structure these arrangements is to ensure that they are truly pro-competitive, in terms of their effects on both domestic markets and the international marketplace. This requires a clear understanding of questions of marketplace structure and dynamics, as well as how these arrangements can be structured to maximize their pro-competitive characteristics from both a national and global perspective. It is also important that the Bureau continue its work with other antitrust authorities as well as other policy agencies, to help to ensure that these arrangements are subject to essentially compatible and coherent rules regardless of the antitrust jurisdiction or the policy instrument being employed (competition, investment, trade, etc.). Neither corporate strategy nor international efficiency/integration are promoted when a corporate arrangement sanctioned under one policy authority is challenged under a second.

8. Finally, with globalization and freer international trade, the Canadian and other competition policy authorities are giving increasing attention to the interactions, complementary aspects, and frictions between competition policy and other policy fields, including trade, industrial, innovation, science and technology, investment and development aid policies. Trade liberalization and the globalization of markets are altering, and in some cases decreasing, the scope for traditional antitrust enforcement in domestic markets. At the same time, the same forces are enhancing the ability of and need for competition policy -- as distinct from day-to-day enforcement -- to influence other policy fields in a pro-competitive manner.

   This expansion in our broader policy responsibilities now includes the provision of technical assistance to countries with emerging market economies, to assist them with the development of modern competition laws and enforcement capabilities. A growing number of developing and formerly centrally planned economies are now establishing competition laws and agencies as a key component in their market opening strategies. In just the past few months, two countries in our own hemisphere -- Mexico and Jamaica -- passed modern competition laws and are beginning to establish an administrative capability. The Canadian law and antitrust experience hold special appeal to these countries because our statute is modern and well codified, and because these countries appear to believe they can benefit from our very recent experience in launching a new competition statute.

To summarize, because of the basic compatibility between trade liberalization and competition policy and because the Canadian Competition Act was designed to respond flexibly to the changing economic and corporate environment, globalization has not required fundamental changes to antitrust enforcement in Canada; but rather has led to some fine-tuning to the pragmatic case-by-case approach now employed by the Canadian Bureau (as well as other antitrust authorities). Factors like foreign competition and static and dynamic efficiencies are now being given greater weight , while structural approaches based on market share and industry concentration, are less relevant in a more open, rapidly-changing global economy.

5.0 GLOBALIZATION AND THE FUTURE POLICY AGENDA

To repeat, we continue to believe that the Canadian Competition Act of 1986 has held up very well over the past seven years and will continue to provide an effective policy instrument for promoting both the consumer interest and the interests of Canadian business for the foreseeable future. At the same time, globalization and trade liberalization are raising a large number of complex competition related issues that Canadian governments and the Canadian business, legal and policy communities will need to address together over the rest of this decade. Some of these could find their way onto the policy agenda of the next

Canadian government after the fall 1993 election. We would like to comment on some of these questions in the following paragraphs.

5.1 Strategic Alliances and Other Inter-Corporate Arrangements

Canadian and international companies are responding to the forces of globalization and the pressures of freer international trade by establishing strategic alliances and other types of cooperative arrangements with other companies, both in Canada and with firms based in other countries. The growing interest in strategic alliances is related to a second phenomenon -- the increasing importance of services as a separate economic activity as well as an integral component to the design, production, marketing and after-sales service of a growing number of manufactured products. The sale of a service requires a close relationship between the producer, the distributor and the final customer. These close links are very different from the arms-length transactions which are the basis for much of traditional antitrust theory, as well as traditional trade and industrial policies.

These alliances can involve vertical arrangements between suppliers and their customers as well as horizontal arrangements between corporations in roughly the same line of business. The economic literature and the experience of the North American antitrust agencies suggest that the vast majority of vertical alliances do not pose significant competition policy concerns. In fact, many of them can be pro-competitive and can be of substantial assistance in providing real value to consumers and in helping the partners to better compete in the global marketplace. As long as they are not used as a cover for collusive or abusive activities, many and perhaps most horizontal arrangements also will not raise significant competition concerns. In fact, Canadian and other competition policy statutes are designed to facilitate certain types of horizontal cooperation such as R&D joint ventures, specialization agreements and export consortia. With respect to other types of alliances, Canada and other jurisdictions have developed many competition tests with respect to mergers which could be readily applied -- with appropriate modifications -- to less formal horizontal arrangements.

One concern which could be raised by the Canadian business and legal communities in the future is that many horizontal alliances could be reviewed under the criminal conspiracy provision of the Competition Act. This in our view could cut both ways from a competition policy enforcement perspective. On the one hand, the high burden of proof under the criminal provisions of the Act, plus the need to prove an "undue" effect on competition, could raise the potential danger that many alliances having an effect on prices and the volumes available in the market, could fall between the cracks and not be investigated.

On the other hand, it could be argued that because a horizontal alliance could be investigated under a criminal conspiracy provision, Canadian competition law could be having a significant "chilling effect" on the development of innovative efficiency-enhancing cooperative arrangements in Canada. No hard evidence is

available on either side of this debate, but the high degree of business interest in the subject, the large number of known joint ventures and other alliances in Canada, and the encouragement already provided under the Act to some types of horizontal arrangements, suggest that any chill effect is far from obvious.

Still, at some point in the future, the private sector may be interested in consulting government regarding the application of section 45, the conspiracy provisions -- the provisions which are the most relevant to informal horizontal alliances among companies in the same line of business -- as well as other provisions relevant to more informal alliances among independent companies. Based on preliminary research and consultations, some of the issues which the Canadian business community could raise in their consultations with government could include:

(i) whether and to what extent the factors and approaches applied to mergers could also be applied selectively to non-collusive horizontal alliances so that integration through merger and integration through contract/informal arrangement might receive essentially the same treatment under the Act;

(ii) whether non-collusive horizontal arrangements should perhaps receive more flexible treatment than mergers given that informal alliances: often are temporary in nature; can at times create significant efficiencies and technology spillovers which in turn can provide long-term benefits to society; generally cover only a portion of the operations of the parties (only R&D, production, marketing, etc.); and perhaps are easier to fix later compared to mergers (the negative side is their lack of transparency and definition compared to merger transactions, which could provide a useful cover for collusive activity);

(iii) whether and under what circumstances the defense provided to R&D joint ventures under section 45 should be extended to the production, distribution and marketing of the new products and processes resulting from the research and development; this would need to be evaluated in conjunction with the joint venture exception found under the merger provisions in section 95;

(iv) whether the current specialization agreement provisions are too limited to the extent that they apply only to current products and production facilities, not to new products, technologies and operations.

It is not evident at this time how a future government might respond to these issues. One possibility is that a future government may be open to views that new legislative or enforcement approaches may need to be explored to ensure that clearer signals are being sent to the business community regarding appropriate corporate strategies from the perspective of competition policy and law. At the same

time, it could be expected, based on the PANS Supreme Court decision, that corporations and business groups wishing to use informal horizontal and vertical inter-firm cooperative arrangements as a cover for price-fixing and market-sharing arrangements, would receive little comfort from these consultations with government.

In a small open economy like Canada where most alliances will need access to foreign markets in order to gain economies of scale and scope, a greater concern could be the treatment of innovative, efficiency enhancing alliances in foreign markets, particularly our major trading partners, the U.S. and the E.C. There is at least the theoretical danger that a pro-competitive alliance based in Canada could face harrassment-type private action suits in an American court once the alliance has achieved some success in the U.S. market. In the case of the E.C., such an alliance could potentially face problems: to the extent that industrial policy rather than competition policy concerns are given precedence in the debates at the Commission; or perhaps because the E.C. treatment of vertical restraints and territorial restrictions founded on intellectual property rights is not as permissive as in North America.

These are theoretical possibilities only but underline the need for greater convergence among antitrust jurisdictions in the treatment of non-merger horizontal arrangements, vertical restraints and related provisions; and for developing greater international consensus on the market characteristics and alliance properties and structure which help to determine whether an alliance is likely to have positive or negative effects on competition. These possibilities also point out the need for competition policy objectives to not be compromised by other policy objectives, and for strict adherence to national treatment principles in antitrust enforcement.

5.2 Competition Policy, Dynamic Efficiencies and the Innovation Process

A related issue is the treatment of dynamic efficiencies and innovation under competition law. Two American commentators, Jorde and Teece, as well as other U.S. critics, have argued that competition authorities should adopt a more pragmatic approach to mergers, R&D, production and marketing joint ventures, as well as other horizontal alliances in high-technology industries characterized by high R&D costs, high risks, short product life-cycles, significant economies of scale and scope, substantial dynamic efficiencies, and close links between the producer and customer. They further argue that because of the strong inter-relationships and feed-back loops among the various stages in the value chain -- R&D, production, marketing, distribution, final sale, and after-sale service -- it is not sufficient to provide partial antitrust exemption to R&D joint ventures.

In their view, competition and other policies should also be prepared to support appropriate joint ventures in the commercialization and marketing of the resulting products and processes. Otherwise, the information feedback from the

final consumer back through the value chain to R&D, feedback which is seen as critical to marketplace success in many high-technology industries, cannot take place. Information feedback among all aspects of the value chain, is considered to be one of the major reasons for the success of the keiretsu and other vertical arrangements in Japan and other Asian countries.

Possible solutions to the competition issues posed by Jorde and Teece include: clarifying the rule of reason approach to take specific account of the appropriability regime, technology spillovers and the pace of technological change; placing equal if not greater weight on producer compared to consumer surplus in industries likely to generate higher quality products and significant technology spillovers in the longer term; providing a safe harbour according to market power that would shield inter-firm agreements that involve (for example) less than 20 to 25 percent of the relevant market; and tailoring market definition to the context of innovation, focussing primarily on the market for know-how.

Modifying competition policy to take better account of dynamic efficiencies poses special problems for antitrust enforcement agencies. Many agencies are only now becoming comfortable with the concept of static efficiencies in the context of the so-called "Williamsonian trade-off" analysis. At least static efficiencies can potentially be defined, identified, and quantified, and do not lie so far into the future that their expected value is negligible when appropriate discounting is applied. Dynamic efficiencies are less readily identified and quantified, and their social benefits of lower prices and higher quality and product choice often occur too far into the future to be of interest to consumers paying higher prices today. (Consumers also apply discount rates). There are also concerns that blanket immunity to business collaborations based on their strong R&D orientation would offer too much potential scope and incentive for firms to engage in anti-competitive acts.

This is particularly a concern to many competition policy specialists in Canada, which traditionally has had weak rivalry in many domestic markets and quite strong evidence of collusion in certain key industries. Such specialists have at times wondered why corporate arrangements which generate new products, higher product quality and "Schumpeterian" efficiencies in countries like Japan, have in the past more often generated market sharing arrangements, higher prices and lower volumes (i.e. the effects predicted by Adam Smith) in Canada. The potential exists that globalization, freer international trade, the FTA, and now the NAFTA, have so changed the fundamental character and conditions of the Canadian economy to allow the Bureau and the Competition Act to apply a more permissive and trusting approach to these corporate arrangements. However, some Canadian competition policy specialists may remain skeptical for a little while longer.

One question is how relevant this largely American debate is to Canadian competition and technology policies, given current Canadian competition law and practise, our dependence on foreign technologies, and generally weak R&D

performance. For example, the current joint venture provisions in the Canadian statute apply to both R&D and other types of joint venture activities (e.g. joint production ventures). The Canadian statute thus appears to be broader and more permissive than current American legislation respecting R&D joint arrangements which was adopted in 1984. The "undue lessening of competition" test in the conspiracy provision provides another "safety net" for horizontal arrangements which might have only a minimal or incidental effect on competition.

However, this situation could change if the U.S. legislation concerning production joint ventures, now winding its way through Congress, should be adopted. The present bill proposes to extend the coverage of the U.S. National Cooperative Research Act to provide a limited antitrust immunity to joint production ventures. It has been criticized by other countries for two reasons:

(i) because limited immunity -- in the form of a rule of reason antitrust analysis combined with the potential of single damage awards, as opposed to a *per se* treatment and triple damage award possibilities -- is provided only to production joint ventures whose principal facilities for the production are located in the United States; and,

(ii) because it offers only conditional national treatment to foreign companies, in the sense that favorable treatment is provided to foreign firms only when the laws of their home countries provide antitrust treatment no less favorable to American firms than to the home country's domestic firms with respect to participation in production joint ventures.

In light of the treatment given to joint ventures under the Competition Act as discussed above, this bill, if it becomes U.S. law, perhaps may not pose a problem for Canadian participation in U.S. joint ventures. Still, like all antitrust provisions which place doubt on the sanctity of national treatment, the proposed U.S. bill provides cause for concern for the international antitrust community.

More generally, the Bureau may wish to conduct, with input from the Canadian business and policy communities, a more detailed review of the role of the Competition Act in supporting the innovation process in Canada. This review could begin with the Jorde and Teece and related work in the U.S., but would have to build in the distinct characteristics of the Canadian economy:

- Canada's small, open economy;
- our dependence on foreign technologies and investment;
- the relatively low level of industrial R&D in Canada;

- the Canadian approach to intellectual property rights which attempts to balance the needs of different stakeholders;

- the high level of concentration in many Canadian industries; and, corresponding to this,

- the weak rivalry in many Canadian markets at least until recently.

Any future changes to Canadian competition policy to better accommodate the innovation process must be based on a clear understanding of Canadian realities and policy imperatives in relation to innovation, R&D, industry structure, and marketplace behaviour. Borrowing without modification the ideas, concepts and policies of our American neighbours may not provide the anticipated benefits to Canadian innovation and competitiveness.

5.3 Competition Policy and Market Access

Just as globalization is forcing former domestic instruments like competition policy to "go global", trade policy is placing growing emphasis on domestic policy instruments as tariffs and other traditional trade barriers come down. It is argued that virtually any domestic policy which potentially could affect the free flow of goods, services, capital, technologies and people across national borders, could find itself on the multilateral trade negotiating agenda at some point in the future. Trade policy specialists in particular are paying increasing attention to how competition policy and antitrust can either impede or facilitate market access by imports or market presence through foreign direct investment. American concerns, as manifest for example in the SII talks, particularly focus on the allegedly permissive treatment given to vertical restraints, national distribution systems and keiretsu-type arrangements under Japanese competition law and practise, and the alleged barriers to entry, market access, and market presence that these commercial practices pose to foreign companies wishing to do business in Japan.

Export and import cartels and other anti-competitive practices could also present significant market access barriers in the home markets where these arrangements are principally located, or in third country markets. Finally, it is argued that a major factor underlying predatory and strategic dumping is the lack of antitrust enforcement against oligopolies and monopolies which enjoy a protected position in their domestic market. These protected domestic positions allegedly provide the superprofits to finance their dumping activities in foreign markets, leading to "unfair" pricing practices and competition in both the domestic markets and third country markets of competing foreign firms. Anti-dumping actions in these instances could be both justified and effective, but competition policy enforcement in the home market has the added advantage of going directly to the source of the anti-competitive behaviour and providing an effective pro-efficiency remedy.

However, for a small open economy like Canada which is highly dependent on export sales, we could be just as concerned with the effects on market access and presence of overly enthusiastic antitrust enforcement. As noted earlier, this could include private antitrust suits in the U.S. courts against pro-competitive mergers, strategic alliances or business arrangements in Canada which enjoy success in the American market. Or, as noted by some Canadian critics of E.C. competition law, the possible danger that European Commission actions could counter Canadian efforts to enhance our global market position, and/or gain a foothold in the European market, through a merger or alliance.

It is also at least theoretically possible that American efforts to expand Japanese antitrust enforcement against the keiretsu and other vertical restraints, if successful, could lead to actions against Canadian and U.S. firms attempting to break into the Japanese market through linking up with the keiretsu or employing similar business practices. Or perhaps to a counter-response by the keiretsu to vertically integrate through merger rather than through contract and informal arrangements. The latter response -- by further cementing corporate inter-relationships within the vertical structure -- could make it even more difficult for foreign companies to enter the Japanese market.

For the most part, competition policy principles and antitrust enforcement are fully supportive of improved market access. However, competition and trade policy objectives, while essentially compatible, are not the same. Competition policy focuses on economic efficiency while trade policy focuses on market integration and maximizing trade, capital and technology flows across national borders. Therefore, an efficient business arrangement which dominates a domestic market and "prevents" entry by less efficient foreign suppliers may be a source of concern for trade policy specialists but not for competition policy.

Moreover, from a competition policy perspective, a business arrangement which enjoys a strong market position based on superior competitive performance should not be undermined by artificial trade measures designed to expand market access and provide less efficient foreign competitors with an arbitrary market share in the arrangement's home market. The result would be a loss of national and international economic efficiency, higher prices world-wide, and trade and investment distortions in the global economy. Countries outside the generally bilateral arrangement -- with small open economies like Canada more often than not being an outsider -- would also likely be hurt by losing access to the market subject to the artificial trade measure.

A similar set of issues are raised by the exhaustion or non-exhaustion of intellectual property rights (IPRs) after first sale, parallel imports (i.e. grey market goods), and territorial restrictions based on IPRs or other intangible assets. Trade policy specialists focussed on maximizing the flows of goods and services across national borders would view territorial restrictions which segment markets and prevent parallel imports as a trade restraint and an impediment to market access.

This is essentially the position taken in the European Community in response to the priority given to market integration over economic efficiency in the Treaty of Rome.

In contrast, based on efficiency rather than trade maximization criteria, North American antitrust agencies generally permit territorial restrictions based (for example) on IPRs, as long as there are no horizontal market effects. This enforcement stance reflects the "free-rider" problem posed by parallel imports/grey market goods, which leads to under-investment by IP rights holders and their licensees in technology transfer, production, marketing and/or distribution systems, with a consequent loss in producer and consumer welfare. There is also a growing body of literature which suggests that international market segmentation and price discrimination can enhance global welfare under certain quite realistic demand conditions, particularly when levels of demand vary greatly between countries or blocs of countries (for example, between the OECD countries and the developing world). Parallel imports therefore provide another example where trade policy's emphasis on cross-border flows could lead to suboptimal welfare consequences nationally and/or internationally from a competition policy perspective. (This global welfare perspective admittedly provides little comfort to consumers who find themselves stuck in high priced markets and have limited access to the international markets for these products.)

More work is needed therefore by members of the trade and competition policy communities, to better understand: the concept of market access; the differences and similarities between market access and the related terms in antitrust -- relevant markets, market power, and barriers to entry; and the legitimate role of competition policy in opening markets to imports and foreign direct investment.

5.4 Anti-trust Enforcement and International Cooperation

The globalization of markets and in particular the emergence of large international -- or "stateless" -- corporations, which transcend national borders and make business decisions on a global basis, are placing new pressures on the international antitrust system. (The globalization of corporations is perhaps the major single reason for the "globalization" of competition policy.) These pressures take many forms -- international mergers and acquisitions which are reviewed by several antitrust jurisdictions; international strategic alliances and other forms of inter-firm cooperative arrangements, which typically are non-transparent and ill-defined; new forms of international cartels which at times can be promoted by trade measures such as voluntary export restraint agreements, or by price undertakings which are used in place of anti-dumping measures; and intra-firm and inter-affiliate trade which generally is outside the purview of antitrust enforcement as well as trade-remedy law.

The first response of the antitrust community to these pressures is to improve the system of international antitrust cooperation now in place. Canada and the United States have been at the forefront in the development of new instruments of cooperation between antitrust authorities. Starting with the Fulton-Rogers Agreement of 1959, our two countries now have in place the Memorandum of Understanding on Antitrust Cooperation (MOU) of 1984, the Mutual Legal Assistance and Extradition treaties which are proving to be of significant value in investigating and prosecuting criminal cases which have a cross-border dimension, and twice annual meetings of senior officials from the two U.S. antitrust agencies and the Canadian Bureau to share experiences and discuss matters of current mutual interest. Perhaps just as important, this formal structure has led to almost daily informal contacts among our three agencies in order to share information and to discuss cases and broader developments in the antitrust field (while honouring the confidentiality provisions in our respective statutes).

As well, the United States has similar arrangements with Australia and Germany, and about 18 months ago signed a "state-of the-art" antitrust Accord with the European Community. This Accord encompasses provisions on "positive comity" which expands the scope for antitrust cooperation to allow for the joint investigation of cases where commercial practices in one jurisdiction -- such as import or export cartels or abuses of dominant position -- are hurting the commercial interests of the second party to the agreement.

With the new benchmark provided by the U.S.-E.C. accord and the growing importance of Europe to the international economy, Canada is now having detailed discussions with the European Community to develop an antitrust agreement which builds on the best features of the U.S.-E.C. accord and as well captures the unique features of the Canada-E.C. competition policy relationship. We are holding similar discussions with the United States antitrust agencies with the view of further modernizing our cooperative instruments and overall relationship in line with the experience gained over the past seven years and our increasing economic integration under the FTA and now the NAFTA.

The Bureau has also been expanding its bilateral relations with other countries, including Mexico (where Canada and other OECD countries played an active role in the development of Mexico's new modern competition law), Japan, France, the United Kingdom, and Australia. Once these bilateral relations have become more extensive, Canada may wish to consider the development of antitrust cooperation agreements with some of these countries along the lines of our current arrangement with the U.S. Also in place are two multi-lateral arrangements designed to facilitate international antitrust cooperation, the UNCTAD "Set" and the OECD Recommendations.

However, all of the multilateral and bilateral arrangements now in place share a number of limitations in common. All of the provisions take the form of recommendations, or "best-efforts" statements, and thus fall far short of treaty

obligations. None of them have dispute adjudication and settlement procedures to discipline the behaviour of signatories in such areas as enforcing their own laws or in relation to extra-territorial application. Information sharing through these arrangements is restricted by the strict confidentiality provisions in each of our competition policy statutes. As well, the existing instruments provide no mechanism for designating a lead agency when two or more agencies are investigating the same merger or other competition matter. The major antitrust authorities have come some distance in using these less formal instruments to pursue international antitrust matters, but the global pressures and limitations of the current accords, as described above, could force us to explore new mechanisms and instruments in the future.

5.5 Convergence in Competition Laws and Enforcement Practises

One issue being explored by Canada and other member countries of the OECD is whether and to what extent there can be greater coherence and convergence among antitrust jurisdictions in competition policy principles and objectives, in the substantive provisions of competition policy statutes, and in enforcement practices. This is the major question now being addressed by the OECD's Competition Law and Policy (CLP) Committee (and its Working Parties) which recently established a special Convergence Steering Group with Canada as Chair.

This Group is to develop a report to the OECD Ministers on this subject for the June 1994 Ministerial and as well will guide the Committee's medium-term work on the convergence agenda. In the convergence debate to date, most attention has been focussed on differences among jurisdictions in merger policy with respect to the substantive provisions, enforcement procedures and analytical techniques. Driven in part by concerns raised by the trade policy community, greater attention in the future could be given to strategic alliances and other forms of horizontal cooperation among firms, the competition issues raised by state owned and sanctioned monopolies and oligopolies, and the differing treatment given by competition policy authorities to import cartels, vertical restraints, territorial restrictions based on intellectual property rights, and distribution systems.

Through exchanging information and experiences and holding discussions and roundtables on the proposed policies, guidelines and legislative reforms of member states, the OECD's CLP Committee has made a contribution to promoting informal or "soft" harmonization among the policies, laws and practices of member countries. This progress is seen in the recent development of merger guidelines by the United States, Canada, Australia, and other jurisdictions which possess many features in common, the establishment of a merger control regime by the European Community in 1991 which was not significantly different from those of other major antitrust jurisdictions, and the modernization of competition policy statutes by a number of the smaller industrialized countries.

It should be noted however that there are clear limits to the convergence process. Full uniformity of competition laws and enforcement practices across all jurisdictions is neither feasible, necessary, nor desirable. The antitrust statute of each nation-state reflects a host of country-specific factors, including its legal system, institutional maturity, current stage of economic development, its business culture, and its past experience with antitrust law and enforcement. As long as the nation-state continues to exist, these differences cannot be ignored in the name of international harmonization.

Just as important, recent research and developments underline that complete harmonization is not necessary to facilitate international coordination and integration. For example, the Canada-U.S. Chambers of Commerce study on anti-dumping replacement, and the policymakers responsible for the adoption of the replacement option under the Australia-New Zealand Closer Economic Relations Agreement, came to the same conclusion -- that a certain compatibility of competition policy rules augmented by the uniform application of national treatment, are all that is needed to replace anti-dumping with competition policy under a free-trade arrangement. Complete uniformity in competition law and practices is not needed for competition policy authorities to work closely together in the application of their respective statutes and to achieve commonly shared goals.

Finally, and perhaps most important, complete uniformity among nation-states would not be desirable. Such uniformity, policed for example under a multi-lateral agreement, could totally thwart all innovation and experimentation in the antitrust field in response to global forces and new economic thinking. Just like the marketplace itself, the competition policy community requires some diversity, innovation and, yes, competition, in order to advance and meet the competition policy and business needs of the future.

The process of convergence poses both dangers and opportunities for smaller jurisdictions like Canada. The danger is that smaller countries will be forced to accept the laws and practices of the two largest antitrust jurisdictions, "warts and all", and whether they fit our needs or not. The opportunities arise from the fact that the convergence process at the OECD, UNCTAD and elsewhere is based more on the marketplace of ideas than on power politics. In this regard, Canadian competition law and enforcement practices could have a comparative advantage. Compared to U.S. law, the Canadian Competition Act is recent and well codified; therefore, countries looking for a useful model do not have to go through 100 years of jurisprudence and learned articles which attempt to interpret the more general provisions of U.S. antitrust statutes. E.C. competition policy offers many positive features -- for example its emphasis on the anti-competitive behaviour of member countries (discussed below) -- but it is designed more to promote economic integration and trade within a multi-country commercial arrangement, than to promote competition, rivalry and efficiency within a single nation-state. Finally, Canadian competition law and practise are based on the realities of a small open

economy -- the same realities shared by many countries now considering the adoption or modernization of competition statutes.

However, Canada and the other smaller antitrust jurisdictions cannot assume that the marketplace of ideas on convergence operates through an "invisible hand". Canada and other countries in a similar position must make major efforts at the OECD, UNCTAD, and bilaterally with interested countries, to ensure that their interests are fully reflected in the convergence process. This is why Canada and other smaller countries place so much weight on promoting the convergence agenda at the OECD and on the intensive developmental work with a wider range of countries at UNCTAD, (two multilateral fora where there is less danger that small country interests will become marginalized by major power concerns). Once the NAFTA has been ratified, similar benefits could flow from Canada's work with the U.S. and Mexico in the Trade and Competition Committee established under Chapter 15 of the NAFTA Accord.

5.6 Competition Policy and Future Multilateral Trade Arrangements

In the final analysis, the existing cooperative arrangements and the convergence process at the OECD may meet only a portion of the international competition policy needs of national governments and the international business community. Accordingly, the international policy community, particularly trade specialists, are giving increasing attention to the potential for competition policy rules to be incorporated directly into multi-lateral trade arrangements. There is growing consensus that competition policy -- together with the environment -- will be the principal "new issues" at the next round of multi-lateral trade negotiations (premised on the perhaps heroic assumption that the current Uruguay Round will ever come to an end).

The incorporation of competition policy rules and disciplines into multilateral trade arrangements could offer some important benefits to Canada. As a smaller power, Canada has traditionally believed that its commercial interests are best promoted through multilateral arrangements which place international disciplines on the use of key policy instruments by member states, and provide dispute settlement mechanisms which ensure that the rule of law rather than power politics is paramount in resolving disagreements between countries. As competition policy goes global, the benefits to Canada from subjecting antitrust to international rules and disciplines could increase accordingly, particularly in the areas of market access and presence, ensuring national treatment, and extra-territorial application. For Canada and other smaller players, multilateral arrangements are strongly preferred to unilateral and bilateral measures such as the emphasis given to competition policy in the recent Structural Impediments Initiative negotiations between the U.S. and Japan, and the so-called Barr initiative of the Bush administration which would have used U.S. antitrust litigation to open up foreign markets to American exports.

Multilateral trade negotiations on competition policy would also provide a new, more expansive forum with over 100 members, for promoting Canadian competition policy models; and the convergence in competition laws and practices likely to result would help to promote Canada's commercial interests in foreign markets through providing transparent, more uniform and more familiar rules on appropriate pro-competitive business practices. It is hoped as well that the incorporation of competition policy rules would introduce the concepts of consumer welfare and economic efficiency into international trade agreements, and therefore would strengthen other provisions designed to improve market access and promote greater flows of goods, services, investment and technology among member states.

Canada's commercial interests could be particularly well served if incorporation led to greater disciplines being placed on the application of anti-dumping and other trade remedy laws by signatories, and if it led ultimately to the replacement of anti-dumping and perhaps countervail by competition policy rules. Such a replacement regime could be particularly welcome from a longer-term growth perspective, since these trade remedy measures can at times distort international flows of investment and technology, and are often applied to high-technology products and industries with economies of scale and strong "learning curve" effects. The adverse impacts of such distortions can also be asymmetric, affecting smaller companies, smaller countries and countries with emerging market economies more than the major powers and multi-national corporations. Finally, the incorporation of competition policy could provide a strong signal to countries in Eastern Europe and the developing world to develop antitrust statutes and enforcement practices which satisfy international norms. The resulting harmonization in rules and instruments would further serve Canada's commercial interests abroad.

The incorporation of competition policy in future trade arrangements is not without its concerns and critics. It would add yet another layer of complexity to an already highly complicated GATT system; and would run counter to the traditional independence of national antitrust authorities. Competition policy specialists could also be concerned that the incorporation of competition policy rules could subject antitrust to the less well defined objectives and principles of trading arrangements, and therefore could water down and compromise competition policy and enforcement. A related concern is that once competition policy rules are entrenched in international trade arrangements, competition policy could become less flexible in its application and less responsive to new learning and global developments. The flexible "rule of reason" approach now favored by most antitrust authorities could run up against the more "black and white" solutions of international trade law. The Bureau and competition policy specialists in Canada are well aware of these concerns and dangers and will want to ensure that they are factored into Canadian negotiating positions regarding whether, to what degree, and under what principles and rules, competition policy becomes a more integral part of the international trading system.

Compared to most other antitrust jurisdictions with the important exception of the European Community, Canada may be better placed than many other GATT members to develop negotiating positions for incorporating competition policy into future multilateral trade agreements. Through previous work on the MTN, FTA and NAFTA, close links have already been developed, and some preliminary joint work has already been completed, between the Bureau of Competition Policy, External Affairs and International Affairs, and other relevant federal departments. More substantial joint work programs involving various federal agencies are now proceeding. The Bureau has also developed close relations on this issue with the Canadian policy and academic communities, through for example our participation in the project: "Competition Policy in a Global Economy", involving the Centre for International Studies at the University of Toronto, Hitotsubashi University of Japan, the University of California, and two European research institutes. It is necessary now to seek the views and direct participation of the Canadian business community in developing possible options and policy positions for future Canadian negotiating teams on this topic. It is hoped that the May 1993 Conference on Trade, Investment and Competition Policies, co-sponsored by the Centre for Trade Policy and Law, Consumer and Corporate Affairs Canada and other groups, will help to launch this process of business consultation.

5.7 Canadian Competition Policy and Technical Assistance

As more and more countries discover the merits of free and open markets, there are growing demands on the resources of the Bureau of Competition Policy to provide technical assistance on the development and enforcement of competition laws. These requests for assistance are coming from the emerging market economies of Eastern Europe, as well as from developing countries. To date, the Bureau has provided six weeks of training to three interns from the Russian Anti-Monopoly Committee, and, with other OECD countries and the OECD Secretariat, assisted the Government of Mexico in the development of its modern competition statute which was passed by their Congress in December, 1992. As follow-up to that, the Bureau is providing a seven-week training program to two officials of the Mexican competition office in the Spring of 1993.

As well, a senior economist with the Canadian Bureau of Competition Policy was part of a three-week technical assistance mission to Malaysia to advise their policy authorities in the development of a possible Malaysian competition policy statute. In addition, through shorter periods in the Bureau and our attendance at conferences and seminars outside Canada, the Bureau has provided assistance to a large number of other countries with emerging market economies, including: the People's Republic of China, Lithuania, Poland, Algeria, Jamaica, Trinidad and other Caribbean countries, Brazil, and members of the transition team from South Africa.

Many other OECD countries are also receiving requests from countries with emerging market economies, and the two U.S. antitrust agencies in particular are very active in Eastern Europe based in part on funding from U.S. AID. At the same time, it seems to some of us that the requests for Canadian assistance exceed our prominence either in the competition policy world or in the global economy as a whole. The interest in Canadian antitrust experience could reflect a number of the factors cited earlier: the recent and relatively well codified nature of the Canadian statute; our recent experience in starting implementation of a new statute; and the fact that the Canadian statute and enforcement experience attempt to meet the needs of a small open economy. Canada's active participation at the OECD, UNCTAD, and other international fora, are other reasons for the strong interest in Canadian competition policy models and experience.

Bureau officials are pleased and gratified by this interest in Canadian competition models, but regrettably the demands are now exceeding our resources of both human and financial capital. It is hoped that, over the longer term, the Canadian policy, legal, academic and business communities can play a larger role in assisting emerging market economies in developing and beginning application of their competition laws. This however will require financial resources from other federal agencies, perhaps CIDA in the case of the developing world and External Affairs in the case of Eastern Europe. The Bureau is aware that both agencies have started to be active in this field but in the future even more emphasis may need to be given to competition policy and other framework laws in formulating and implementing Canada's technical assistance and other aid programs. Canada clearly has a great deal to offer in this regard.

However, the authors would like to offer two caveats based on our admittedly quite limited experience in providing technical assistance in competition policy.

(i) More thought may need to be given regarding when in the market opening process it is appropriate to develop competition law and competition policy institutions. We question whether competition law should be the very first priority of countries emerging from a command and control economy into a free market system. At an early stage of market development, the inappropriate application of competition law -- for example in the areas of distribution systems, other vertical arrangements and pricing -- could seriously impede the establishment of new marketplace institutions, relationships, systems and business arrangements which are so critical to the development of a market economy.

Government officials who have little understanding of market economics and how markets operate in the real world, may simply replace price controls with another form of intervention in the marketplace, competition law enforcement. Europe, North America and Japan had market economies for decades and even centuries before the

need for competition law became evident. We are not suggesting the current countries with emerging market economies should wait centuries, but they may want to give their markets a few years to develop before introducing competition law and other forms of selective market regulation. And when it is introduced, these countries, with their limited resources and administrative experience, may want to limit their efforts to the most serious violations of competition law.

(ii) We are concerned with the quality of technical assistance provided by antitrust experts who visit a country for a few days and provide advice on competition policy and law without having a deep understanding of the historical, legal and economic context and forces at play in the recipient country. Competition policy and law, like other domestic policy instruments, must mirror the economic, legal, institutional and historical realities and conditions of each country. There is no competition law model or "cook-book" which can be applied to all countries and circumstances.

This is why we prefer longer-term training programs and relationships between established and emerging competition policy agencies, along the lines of the six-week program provided by Canada to the three Russian interns (and even this was deemed to be too short by both sides); and the longer-term multi-faceted relationship we and the American antitrust agencies are in the process of developing with the Mexican competition authorities. Longer term programs allow both sides to become familiar with each others circumstances, constraints and differences, and allows the providers of technical assistance to tailor their programs to better meet the real needs of the recipient countries.

5.8 Canadian Competition Policy and the Domestic Economic Policy Agenda

Recent political developments have ensured that Canada will have a new federal government, with a number of new faces, after the fall election of this year, regardless of the political affiliation of the party (or parties) in power. Therefore, Ottawa officials and the Canadian policy community in the coming months will be absorbed in the development of new policy issues and proposals for the next federal government. We would like to suggest that competition law and policy could play a useful role in the formulation of proposals to (for example) strengthen the Canadian economic union, reduce inter-provincial barriers to trade, investment and technology flows, bring additional regulated sectors into the free market economy, and facilitate the structural adjustment and competitiveness of Canadian industry.

In this regard, the European Community could provide us with a useful starting-point in illustrating how competition policy can be used to: replace anti-dumping; discipline the subsidy programs, government procurement practices, and the state owned entities of member states; and replace direct regulation with

competition policy rules in key sectors -- energy, financial services, telecommunications, transportation, etc. Relative to Canada, competition policy has also been very active in the United States in integrating the American "common market", ensuring that inter-state trade barriers are not erected, and promoting strong rivalry, efficiency and productivity in services and other so-called (traditional) "non-traded" sectors.

In the months and years ahead, Canadian competition policy could play an important part in the internal trade negotiations to take place between the federal and provincial governments in order to achieve the announced goal to fully remove all inter-provincial barriers to trade, investment, technology, and human capital flows by 1995. In this regard,the competition policy principles of national treatment, transparency, and due process could be usefully applied to inter-provincial restrictions on investment flows, government procurement, and service sector transactions; and could also be used to discipline the business practices of provincially owned and regulated utilities and other monopolies. Competition policy rules could also be applied to discipline federal and provincial subsidy programs as part of joint governmental efforts to reduce and better focus government expenditures, reduce the public debt of federal and provincial governments, and better ensure that subsidies are not used in the future to weaken the economic union and distort trade and investment flows among provinces. Similar issues could be addressed by the Trade and Competition Committee established under the NAFTA, which could be expected to explore how competition policy could be used to reduce trade irritants and further integrate the three national economies.

The Bureau will also remain active on the intellectual property front, in working with other policy authorities to ensure that: IPRs are not used to support anti-competitive business practices and anti-competitive dominant positions in the market-place; and, the appropriate balance is maintained within intellectual property and competition policy statutes and their application between the rights of IP creators, IP users, consumers and the general public.

Questions of more direct relevance to competition policy could also find their way on to the domestic policy agenda of a future Canadian government. These could include:

- possible reforms in the areas of non-merger horizontal and vertical arrangements;

- possible decriminalization of aspects of Canadian conspiracy law;

- opening up the adjudicative process to allow greater scope for private actions and to allow groups other than the Bureau to take a civil case to the Competition Tribunal; and

- possible adjustments to Canada's competition policy institutions.

However, while some preliminary policy work has been conducted on these issues, more detailed consultations with the Canadian business and legal communities and other stakeholders, as well as further work on the benchmarks provided by other jurisdictions, are needed in the months and years ahead.

To summarize, the Bureau will continue to work closely with other federal agencies, provincial governments and the private sector, on how competition policy can be used more effectively to facilitate: structural adjustment; regulatory reform; competitive sectoral policies; efficiency-enhancing inter-corporate arrangements in the areas of mergers, strategic alliances, R&D joint ventures, specialization agreements, and voluntary environmental agreements; and the competitiveness of key sectors.

6.0 CONCLUDING COMMENT

Globalization and freer international trade is clearly having a significant effect on competition policy and antitrust enforcement. Relevant antitrust markets, the number of international mergers and other corporate arrangements, and the need for antitrust cooperation among jurisdictions are all expanding; as are the number of countries wanting to modernize their existing competition statutes or develop new ones. Through regulatory reform and privatization, competition policy is now being applied to industries and corporate entities which previously were insulated from the rigours of domestic and international market forces.

The international policy community is placing increasing weight on the potential for the competition policy principles of transparency, national treatment, and legal process to be used to discipline trade remedy measures, subsidy and other industrial/investment policies, intellectual property rights and other policy instruments of nation-states. At the same time, critics are suggesting that competition laws and antitrust agencies should be more responsive to the rapid technological changes, the revolution in information technologies, the dynamic efficiencies, the new innovative business arrangements, and the closer customer/supplier relationships that are part and parcel of the globalization process. The trade policy community is also concerned that lax or overly zealous antitrust enforcement can prevent market access and could become a new "instrument of choice" of trade protectionists as the more traditional trade barriers come down.

When we place the 1986 Competition Act and its enforcement since then within this global context, the authors would argue that there is no need for radical surgery at the present time. We continue to believe that Canada's Parliament by and large anticipated recent developments in the Canadian and global economies, and that the current Act offers the pragmatism and flexibility needed to address many of the future challenges posed by globalization and freer international trade.

However, longer-term pressures for change could build over the rest of this decade, from essentially four sources:

- from the domestic front, as business and government perhaps come to a consensus view that further changes are required to provide additional scope for Canadian industry to achieve the structural adjustment, dynamic efficiencies and innovative arrangements necessary to be competitive in global markets;

- additional pressures from the domestic front to further open up the Competition Act to allow private actions under the civil provisions before the Competition Tribunal, and perhaps to allow provincial attorneys general to investigate Competition Act cases of a local nature; these changes could be designed to better allow the Bureau to concentrate its resources on national cases of national and international significance, and to respond to future demands for federal government downsizing;

- from the international front, as the incorporation of competition policy in multilateral trade arrangements result in new treaty obligations which require changes to Canadian law and practices;

- from the more normal processes of evolution, learning and working together which could lead to a consensus among stakeholders that further reforms may be needed to respond to developments that were not fully anticipated earlier.

Our current view is that, before contemplating fundamental changes to Canadian competition laws, policies, practices and institutions, more attention needs to be given to how the existing features of the Act can be better used to facilitate the efficiency and adaptability of the Canadian economy in response to global change. Specific issues include the application of: the foreign competition factor and the efficiency gains defense under the merger provisions; superior competitive performance under the abuse of dominance provisions; and the conspiracy provisions to non-merger horizontal arrangements in light of the recent decision of the Supreme Court which upheld the constitutionality and further elaborated the economic framework of Canadian conspiracy law. The Bureau is also somewhat mystified that the specialization agreement and joint venture provisions incorporated into the 1986 Act at the direct request of the Canadian business community, have been utilized so little by Canadian businesses over the past seven years.

Accordingly, the Canadian Bureau of Competition Policy will continue its pro-active program of research, policy analysis, consultations and education with the Canadian business, legal, policy and academic communities -- as well as the international antitrust community at the OECD and elsewhere -- to ensure that Canada's competition law, institutions, and enforcement practices, continue to meet

the needs of Canadian businesses operating in Canada and in the fiercely competitive global marketplace.

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