

OPTIONS FOR THE INTERNATIONALIZATION OF COMPETITION POLICY

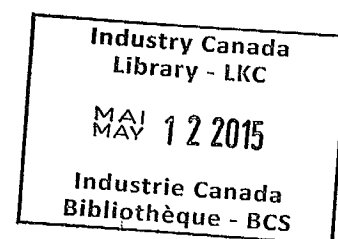
Defining Canadian Interests

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EXECUTIVE SUMMARY

As countries liberalize and open up markets by dismantling government barriers to entry, there is concern that those barriers may be replaced by less transparent private barriers. There is also debate about whether competition law enforcement is sufficiently vigorous to prevent anti-competitive conduct that restricts foreign competitors from entering a market. Certainly, enforcement cooperation among competition authorities has prompted growing support for the internationalization of competition policy to ensure an effective and smooth enforcement of competition law and to avoid the risk of jurisdictional conflicts.

Competition principles already exist in WTO agreements such as the Anti-dumping Agreement, the Technical Barriers to Trade Agreement, and the GATS Agreement on Basic Telecommunications, and in the North American Free Trade Agreement (NAFTA) and the Canada-Chile Free Trade Agreement (CCFTA). The OECD has produced a number of non-binding instruments dealing with hard core cartels, cooperation and pre-merger notification and report form for mergers. The Competition Bureau is increasingly involved in formal and informal cooperative efforts with foreign competition authorities.

In the event that Ministers agree to initiate negotiations on competition policy, negotiators will be confronted with several complex issues. The objectives and goals of competition policy are defined differently among WTO Members. There are differences in the orientation between competition and trade policies, with the former emphasising the competitive process while the latter focuses on individual competitors. Also, WTO rules deal with government measures and not private corporate decisions. These are examples of some of the issues that will need to be addressed and successfully resolved.

Perhaps at the outset, a multilateral agreement on competition policy should not be comprehensive in scope, but rather focus on achieving consensus on core elements or provisions. A number of academics have advanced the Agreement on Trade-related Aspects of Intellectual Property -- TRIPS -- as a conceptual starting point for a possible WTO agreement on competition policy.

An Agreement on Trade-related Aspects of Anti-competitive Measures ("TRAMS") would contain basic principles and procedural safeguards. In this configuration, the agreement could include: an obligation to establish a competition law, with appropriate scope and independence in investigation and adjudication; commitment to the principles of transparency, national treatment, non-discrimination and procedural fairness; common substantive approaches to cartels, abuse of dominance and mergers; mechanisms to facilitate and foster cooperation between competition authorities. Disputes about whether domestic competition law conforms to the obligations in a TRAMS could be accommodated under existing WTO dispute procedures. However, the application of WTO dispute procedures to a review of individual decisions by a national competition authority is complex as it would touch directly upon the independence of competition agencies, and enforcement decision-making processes, thereby raising fears of WTO second guessing of individual decisions of competition authorities.

The establishment of support mechanisms would be a key prerequisite to the successful implementation of a WTO agreement on competition policy. A peer review process similar to the existing Trade Policy Review Mechanism – a Competition Review Mechanism (CPRM) – could provide countries with an objective review both of the substantive provisions of the law to determine if they are in compliance with the TRAMS provisions and the competition agency's enforcement record. A peer review would also have the added benefit of fostering transparency. A council of experts could provide a forum for consultations and for discussions on the establishment of arrangements for cooperation. Additionally, a TRAMS Council could offer members a forum to consult and seek mutually satisfactory resolution of problems related to market access. Technical assistance will be essential for those countries without a competition policy or who are in the first stages of implementing one to help them get up to speed with the requirements set out under the TRAMS.

In seeking an arrangement on competition policy, the Competition Bureau is mindful that its independence is instrumental in the enforcement agenda and ensures that this agenda is motivated by competition concerns. Canada's competition law and policy has contributed substantially to the success in achieving efficiencies in the Canadian economy and to the vitality of firms, as well as protecting consumers from the exercise of market power. Any future WTO competition framework should reinforce Canadian competition policy goals and principles.

OPTIONS FOR THE INTERNATIONALIZATION OF COMPETITION POLICY

Defining Canadian Interests

I. INTRODUCTION

Competition policy is now prominent on the international trade policy agenda, and has begun to play an increasingly important role in certain regional trade arrangements. The trade agenda is increasingly about strengthening markets, in addition to opening them. With the gradual reduction or elimination of public barriers such as tariffs and quotas, private conduct takes on greater importance in potentially restraining competition both within and across borders.

While competition policy has been the subject of in-depth study and discussions for many years within the OECD, the focus of discussion has been on the appropriate application of domestic competition policy, and the need for better coordination and cooperation in the enforcement of competition policy. The growing interest in multilateral rules in the competition policy field is related to the multi-market effect of anti-competitive activity, the effectiveness of national investigation and enforcement actions in respect of multi-jurisdictional cases, and the corresponding challenges this poses for national jurisdiction and enforcement. Transactions such as horizontal agreements, mergers and joint ventures are increasingly being scrutinized concurrently by a number of competition authorities. The interjurisdictional nature of these activities is increasing the attractiveness of cooperation between competition authorities in the application of competition law as a way to deal with transborder anti-competitive practices.

The internationalization of competition policy poses complex challenges for policy makers. In this regard, it is important to appreciate that significant differences remain in the substantive competition policy standards and enforcement processes of major international trading nations, notwithstanding more than a decade of soft convergence in analytical techniques. These differences are deeply ingrained and reflect distinct economic, legal, cultural and historical characteristics of the respective countries. Moreover, a number of countries have not adopted competition laws. Therefore, any movement toward the adoption of multilateral rules on competition policy will require extensive deliberations specifically addressing these issues. In Canada, competition policy has traditionally been tailored to reflect the country's special characteristics as a small, open economy. In any work leading potentially to a multilateral code on competition policy, it will be important to assess the implications of such an agreement for Canadian policy options.

Another important set of considerations relates to the implications that possible international competition rules and dispute settlement provisions would have for domestic enforcement processes and institutional structures. In this regard, the relative independence of competition agencies, and enforcement decision-making processes, from political influence is widely perceived, particularly in Canada, as being vital to their success and credibility in ensuring a level playing field for all marketplace participants. A key Canadian interest in any multilateral deliberations on competition policy would relate to maintaining such independence with respect to enforcement decision-making and related powers.

The growing importance of competition policy as an aspect of national economic policy is particularly evident in Canada. Canada's *Competition Act*, has undergone systematic modernization in order to keep abreast of new economic thinking on economic arrangements and business strategies employed by firms reacting to global competitive pressures. Indeed, Canada's competition law and policy contain significant elements that respond to the needs of the globalizing economy, and has contributed substantially to the success in achieving efficiencies in the Canadian economy and to the vitality of firms, as well as protecting consumers from the exercise of market power.

It is now anticipated that a new round of international trade negotiations will be launched at the Ministerial Conference of the World Trade Organization (WTO) scheduled to take place in the Seattle, November 30- December 3, 1999. The primary purpose of this paper is to solicit views from Canadian competition and trade laws experts, their clients, and academics on a number of topics that could arise if competition policy were to be part of the next round of multilateral negotiations. It should be noted that the principles and concepts advanced in the paper are also being assessed in the context of the Free Trade Area of the Americas (FTAA) negotiating group on competition policy. First, the paper sets out the dimensions of the debate concerning the international implications of enforcing competition law. Second, it discusses the approaches to the internationalization of competition policy. Third, the paper discusses some of the obstacles in negotiating rules on competition policy. Finally, the paper discusses approaches and, in particular, the application of the WTO dispute settlement understanding in competition policy cases. Appendix A provides a summary of Canada's current international commitments with respect to competition policy. Appendix B provides a consolidation of the boxed questions that appear throughout the paper.

II. DIMENSIONS OF THE DEBATE

Competition policy is properly perceived as an instrument that can assist in maintaining and safeguarding the competitive process. The recent study of the OECD on Regulatory Reform underscores the point that enforcement of competition policy is a key element in ensuring that when reform is undertaken, it is pro-competitive and enhances market forces as the driving force in the utilization of resources. It should be noted that this also applies to trade and investment liberalization. The OECD Regulatory Reform report demonstrated that regulatory reform may pose particular problems for foreign firms when regulatory barriers are replaced by less transparent private barriers. In this context, competition law enforcement is a key complement to regulatory reform, and the attention of the competition authority is all the more needed to address these concerns.

A second broad dimension is the substantive standards and enforcement processes followed under national laws. This reflects a general recognition that the mere existence of a well-drafted law is not, by itself, sufficient to prevent anti-competitive exclusion of foreign producers or other restrictive effects on international trade and investment. This particular matter is most vividly highlighted in recent U.S. trade negotiations with Japan on semiconductors and auto parts, and the photographic film dispute litigated before the WTO in 1997.

A third dimension of the internationalization of competition policy that has received growing support relates to international cooperation in enforcement activities. Cooperation in enforcement activities may involve joint or parallel investigations by different countries' competition agencies and/or the sharing of information across borders. In the North American context, there is the *Canada-U.S. Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws*. Additionally, the Canada/EU cooperation agreement in competition matters will come into effect in 1999 and is expected to foster greater enforcement cooperation between the Bureau and the European Union's competition authority. At the plurilateral level, the OECD adopted in 1995 a *Revised Recommendation Concerning Co-operation Between Members Countries on Anticompetitive Practices Affecting International Trade*, and in 1998 adopted a Recommendation encouraging cooperation in eradicating "hard core" cartels. None of these instruments affects domestic statutory confidentiality protections that are incorporated in most advanced countries' laws that limit the circumstances in which competition agencies may engage in cooperative activities.

The OECD Competition Law and Policy (CLP) Committee has undertaken extensive analytical

work in respect of cooperation among OECD member countries on competition policy issues. The most recent example is the adoption of a framework for notification of transnational mergers on February 5, 1999. It is believed that this framework will promote harmonization in notification forms, and assist competition authorities in determining information requirements on a case-by-case basis, thereby enhancing efficiency in merger enforcement. As well, the OECD is assessing principles of positive comity and means to improve cooperation in enforcement against hard core cartels which may serve as a useful guide in further exploring concepts of enforcement cooperation. Working Party 3 of the CLP will soon conduct a roundtable on information gathering/sharing of confidential information.

III. APPROACHES TO THE INTERNATIONALIZATION OF COMPETITION POLICY

In the 1990s a number of proposals related to convergence of competition rules have been made. One such proposal is the Draft International Antitrust Code (the "DIAC") proposed by a group of competition scholars (the Munich Group).¹ The group recommended that there be a comprehensive international antitrust code covering the major areas of competition law such as horizontal agreements, vertical agreements, mergers and acquisitions, the relationship between competition law and industrial policies, and the establishment of an international antitrust agency which shares the responsibility of enforcement of international competition rules with national governments.

A task force established by the American Bar Association issued a report (the "ABA Report") in which it advocates an agreement among states with regard to some basic principles such as unlawfulness of cartels and unification of filing requirements under the merger laws of various states.² The proposal of the report is much more modest than the DIAC, and advocates partial harmonization through an agreement among states of some basic principles without establishing a comprehensive international authority to enforce international rules.

A group of experts commissioned by the European Community submitted a report which presents an approach to introducing competition policy into the WTO.³ It recommends a two track approach: increased bilateral cooperation, and an agreement in the WTO that provides for core principles, including the prohibition of cartels and boycotts.

There has been a significant amount of work undertaken by individual antitrust jurisdictions in promoting greater cooperation. There are bilateral agreements on competition law and policy among major industrialized nations that provide for cooperative relationships between the parties including consultation and exchange of information, including confidential information within the ambit of national laws. An example of closer cooperation is the agreement reached between Australia and New Zealand in 1990 to harmonize their competition laws applicable to trans-Tasman trade by agreeing to extend the prohibitions on the anti-competitive use of market power in the applicable sections of their respective competition laws.

Finally, there has been a great deal of pioneering work undertaken by the academic community

¹Draft International Antitrust Code (July 19, 1993) reprinted in 65 Antitrust and Trade Reg. Rep. (BNA) No. 1628 (Special Supp.) (Aug. 19, 1993).

²American Bar Association, Report of ABA Special Committee on International Anti-Trust (1991).

³Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules, European Commission, 1995.

which has advanced thinking on the merits of incorporating competition policy under the WTO framework.⁴

IV. POTENTIAL IMPEDIMENTS TO OBTAINING A MULTILATERAL AGREEMENT ON COMPETITION POLICY

Before reaching a WTO framework agreement on competition policy, several difficult issues will have to be addressed and successfully resolved.

First, and most importantly, a number of competition policy agencies and practitioners in the field have expressed concerns about the constraining effect an international agreement would have on their abilities to formulate their own law and to manage their enforcement agenda. The reservation centres on providing an international body with oversight responsibility to revisit or review judgments and remedies for cases that have already been decided, including criminal cases. Are WTO members prepared to allow a WTO panel to overrule their national competition agencies or domestic adjudicative bodies on questions involving both objective evidence and subjective judgments or decisions, or to supervise their competition agencies in lieu of national courts of appeal?

A second issue relates to the significant differences among anti-trust jurisdictions in the objectives and goals of competition laws [efficiency v. consumer welfare, market integration], level of independence, scope and coverage [special treatment for specific sectors and activities], and enforcement standards for particular types of anti-competitive conduct [*per se* v. rule of reason]. These differences in large measure are attributable to the fact that competition law is based on economics, and thus the differences in competition law reflect the varied economic structures, policies, legal regimes and actual experience in the enforcement of competition policy.

A third issue relates to the difference in orientation between competition and trade policies. Competition law is a framework law and is for the most part set at the national level. It is applied economy wide, with certain exceptions. The focus is on maintaining and promoting the competitive process. This is in contrast to international trade policy, which is typically set at the sector or goods level and focuses primarily on national economic interests and the concerns of domestic competitors in their efforts to serve foreign markets and to protect their domestic market base. This difference is most readily perceived in the trade policy expression of "market access", which emphasizes the role of "foreign" competition in the marketplace. The primary purpose of trade liberalization is to ensure that government measures do not have the effect of disadvantaging foreign competitors in the domestic marketplace. There are obligations to guarantee equality of opportunity; failure to respect commitments made under trade agreements can lead eventually to the aggrieved party seeking recourse to the relevant dispute

⁴Eleanor Fox and Cooperation Ordovery, "The Harmonization of Competition and Trade Law", in *Competition Policy in the Global Economy*, Eds: Leonard Waverman, William S. Comanor and Akira Goto, Routledge Studies in the Modern World Economy, 1997; F.M. Scherer, *Competition Policies for an Integrated World Economy*, The Brookings Institution, Washington, D.C. 1996; Mitsuo Matsushita, "Reflections on Competition Policy/Law in the Framework of the WTO", in the *1997 Annual Proceedings of the Fordham Corporate Law Institute*, Ed Barry Hawk; *Competition Policies for the Global Economy*, Eds: Edward Graham and J. David Richardson, Institute for International Economics, Washington, D.C., 1997; Michael J. Trebilcock, "Reconciling Competition Laws and Trade Policies: A New Challenge to International Cooperation", in *Comparative Competition Policy, National Institutions in a Global Market*, Eds: G. Bruce Doern and Stephen Wilks, Clarendon Press, Oxford, 1996; Milos Barutciski, "The Two Solitudes: Trade and Competition Policy", Canadian Bar Association, 1998 Annual Competition Law Conference.

settlement process. On the other hand, competition law is neither well suited, nor intended, to address the specific problem of exclusion of particular competitors or classes of competitors.

Fourth, WTO rules deal with government measures and do not purport to restrict private company decisions within WTO member states. Nothing in the WTO system threatens the fundamental principles of freedom of contract. Quite the contrary: the international trading system is built on the principle that governments should not intervene or intrude in the ability of private companies to trade internationally. Therefore, decisions to conduct business with only its own nationals or not to engage in business with foreign nationals, would not violate competition principles unless the firm(s) had abused market power and the competitive process itself were threatened. Yet such discrimination is a significant concern for the international trade community. It has been contended therefore by some antitrust practitioners and antitrust jurisdictions that competition agencies should not become involved in 'market access' issues unless competition principles are clearly at play.

Fifth, only approximately 70 WTO members have a competition law and others are in the process of adopting one. Convincing those members who have yet to adopt such laws to do so could require a commitment from other members with significant experience in this policy area to provide some form of ongoing technical assistance.

V. COMPETITION LAW AND THE WTO

a. An Agreement on Trade Related Anti-Competitive Measures (TRAMS)

Conceptually, a number of avenues⁵ have been advanced as offering potential to bring competition law into the WTO framework. As suggested by a number of observers, WTO members could negotiate a new agreement on competition law and policy in the spirit of existing agreements on Trade-related Investment Measures (TRIMS), and especially Trade-related Aspects of Intellectual Property Rights (TRIPS).

The TRIPS Agreement provides that members are obligated to maintain the minimum requirements for the protection of intellectual property rights (such as the protection of computer programs under the copyright law and the minimum 20- year period for the protection of patents) and implement these requirements in their domestic laws and regulations. It has been suggested that at the outset, a multilateral framework agreement on competition policy -- Trade Related Anti-competitive Measures (TRAMS) -- should not be comprehensive in scope, but rather focus on achieving consensus on core elements or provisions.

b. Core Provisions

A TRAMS could include the following elements:

- obligation to establish a sound competition law and an independent competition authority;
- obligation to adopt shared principles: transparency, national treatment, non-discrimination, access to the justice system, reasonable protection of confidential and proprietary information;

⁵Brian Hindley, "Competition Law and the WTO: Alternative Structures for Agreement", in *Fair Trade and Harmonization: Prerequisites for Free Trade? Vol.2. Legal Analysis*. Edited by Jagdish Bhagwati and Robert E. Hudec. Cambridge and London: MIT Press, 1996. P. 339.

- obligation to adopt common substantive approaches on cartels, abuse of dominant position/monopolization and pre-merger notifications;
- encouragement to cooperate; and
- dispute settlement.

i. ESTABLISHMENT OF SOUND COMPETITION LAW

First and foremost, signatories would have to establish a sound national competition law regime, backed by an independent competition authority, with adequate powers and resources, a recognized advocacy role, and access to effective deterrents.

The objectives of the law would have to be clearly articulated in the domestic legislation, which would apply across virtually all activities and sectors of a domestic economy, with a minimum of exceptions or preferential treatment. The basic objective of competition policy should be to maintain and encourage competition in order to promote efficient use of resources while protecting the freedom of action of various market participants⁶.

Question #1

In light of the preceding discussion, what elements are necessary and sufficient to meet the objective that countries adopt a sound competition policy?

Question #2

Some countries may not be in a position to incorporate all the elements of a sound competition policy at once. What are the most important elements that should have to be established at the outset?

ii. SHARED PRINCIPLES

Issues of procedural fairness, transparency and non-discrimination in the context of competition policy define the rights of, and judicial or administrative remedies available to, private parties affected or interested by particular provisions of competition law.

(a) Transparency

As markets become more integrated, the enforcement decisions and policy choices of one competition agency are increasingly likely to affect firms in other countries. It therefore becomes desirable that competition agencies in each country make available information about their enforcement policies and specific decisions to both their counterparts in other countries and to foreign businesses.

Transparency of laws and law enforcement would foster greater confidence on the part of private

⁶Efficiency is the overarching objective in Canadian and U.S. competition laws. In the case of the EU and Japan, while efficiency is not the only purpose of their laws, it does constitute one important objective. Moreover, efficient trade is the norm in the WTO, while the UNCTAD set of principles on restrictive business practices is intended to foster global efficiency.

actors and could increase the likelihood that firms will pursue opportunities to trade and invest in foreign markets. This is particularly relevant in the international context because foreign laws and practices as opposed to domestic ones, are more likely to be poorly understood and treated with some suspicion.

A TRAMS could follow the lead of TRIPS, with members required to publish and notify the WTO regarding its laws, regulations and international commitments relevant to its obligations. There would, however, have to be some qualification for the practice in some countries where not all their decisions are published. Countries could commit to the publication of those documents relevant to an enhanced transparency of competition laws, such as annual reports, speeches, publication and explanation of decisions by competition authorities, and guidelines and decisions of the courts and Competition Tribunal.

(b) National Treatment, Non-discrimination

The national treatment obligation is enshrined under Article III of the GATT and requires that foreign products (including goods, services and intellectual property) will be accorded treatment no less favourable than that extended to domestic products in respect of all internal measures excepting those of a fiscal nature. While most competition laws do not discriminate between domestic and foreign businesses, it is the case that certain exemptions from competition law do have the effect of discriminating against foreign competition. Therefore, there will need to be a mechanism to deal with such matters.⁷

Article 1 of the GATT [the Most Favoured Nation (MFN) principle] requires that states not discriminate among foreign goods and services on the basis of nationality. Under the MFN principle all foreign firms should enjoy the same rights and remedies available in a given antitrust jurisdiction. Under the *Competition Act*, all foreign firms enjoy the same rights and privileges to pursue private remedies before national competition agencies or courts.

Question #3

Are the WTO principles of transparency, national treatment and non-discrimination compatible with the enforcement of competition law and policy? Would they be desirable attributes in a TRAMS?

(c) Procedural Fairness

Minimum guarantees for procedural fairness in a TRAMS could require a competition law regime to provide, for example, reasonable access to the justice system (encompassing such matters as intervenor status for interested parties and rights of appeal), a right of petition to competition authorities, fairness in the conduct of investigations and rights to bring private actions.

An OECD study on the rights of foreign firms under competition laws found that the roles of the competition authorities and courts vary widely from country to country. Some allow private parties to initiate their own private lawsuits in court, whereas in other countries, no such recourse exists, and the competition agency is obliged to investigate and remedy all legally valid complaints. Most countries have adopted some combination of these two approaches.

⁷The compatibility of s. 9 of the *Competition Act* with WTO principles of national treatment will have to be reviewed. Section 9 provides that any six persons resident in Canada who are not less than eighteen years of age may apply to the Commissioner for an inquiry.

Question #4

To what degree should issues of procedural fairness be addressed in a TRAMS?

iii. COMMON SUBSTANTIVE APPROACHES

Three domains have been identified in the literature as most relevant to ensuring that the opportunities created by trade liberalization are not closed off because of private anti-competitive conduct: cartels and conspiracies, abuse of dominant position and mergers.

(a) Cartels and Conspiracies

Cartels or forms of co-ordinated behaviour between competing undertakings are ordinarily divided into two categories: those which constitute “hard-core” restraints, such as price-fixing, output restraints, market division, customer allocation and bid rigging which can normally be expected to reduce or eliminate competition and have no redeeming effects on economic efficiency, and those which may not harm competition significantly, or which may be pro-competitive or have beneficial effects outweighing the anti-competitive effects. Examples of the second category might include research and development, and specialization or rationalization agreements.

In some jurisdictions the former are considered *per se* offences, while the latter are considered under a “rule of reason” analysis to ascertain their likely impact in the circumstances of the individual case. Most countries view hard-core cartel agreements as unambiguously harmful and as the most serious competition offences. This type of collusive arrangement can severely undermine the competitive process, to the detriment of consumers and to intermediate goods producers. Such collusion is also damaging in that it undermines public confidence in the competitive market system.

On March 25, 1998 the OECD Council adopted a recommendation concerning effective action against hard core cartels.⁸ The Recommendation states that Members should (1) ensure their competition laws effectively halt and deter hard core cartels; and (2) cooperate in enforcing their laws in this domain. Bringing the OECD Recommendation into the WTO would expand the scope of enforcement against such arrangements, strengthening the resolve of countries to deal with international cartels and fostering cooperation.

Question # 5

Do you agree that there ought to be a common approach in a TRAMS relating to cartels? Please elaborate.

Export cartels have been exempted from competition laws in a number of countries on the theory either that their exporters needed some sort of countervailing power to compete effectively with foreign

⁸The Recommendation defines “hard core cartel” as an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.” The term anti-competitive is to be interpreted by each country in light of their own laws.

rivals⁹ or that harm abroad was not their business. However, with the proliferation of such exemptions in antitrust jurisdictions, any national benefits have become diminished by the actions of other nations' export cartels. It can also be argued that export cartels, being anti-competitive in nature from a global welfare standpoint, are incompatible with sound competition policy.

Question #6

Do you believe that a TRAMS ought to permit an exemption for export cartels? Other exemptions (please specify and provide your rationale)?

(b) Abuse of Dominant Position/Monopolization

In a number of anti-trust jurisdictions, competition laws contain a concept of single firm exploitation of market power or use of improper means of attaining or retaining market power. These concepts are variously called "abuse of dominant position" or "monopolization" or "abuse of market power". Competition laws may also contain a related concept, called "joint dominance" which involves multiple firms but which is a distinct concept from firms pursuant to an "agreement". Activities under abuse of dominance include exclusive dealing, tied selling, control of scarce facilities, and exclusionary contractual arrangements.

Competition policy aims at avoiding not market power *per se*, but the abuse of a dominant position. The basic idea is that competition law should not penalize efficient firms which have established a dominant position in their market due to their better performance compared to their competitors. This is the case in Canada, where abuse of dominant position sections in the *Competition Act* do not penalize a company that has captured a dominant share of the market because of its better performance. The conduct must lead to a substantial lessening or prevention of competition for it to violate the *Act*. And in the case of the U.S., market power alone is not enough to violate U.S. anti-trust laws; there must be an element of unacceptable conduct to achieve or maintain that position. In contrast, EU competition law is more inclined to regulate that power.¹⁰

Question #7

What prohibited practices in respect of abuse of dominant position ought to be included in a TRAMS? What are the prospects that agreement can be achieved on this subject?

(c) Mergers

The control of mergers is of vital and growing importance in competition policy. There are two sets of issues related to mergers. The first relates to the effects of a merger on competition. While on the

⁹If national exporters can collectively exercise market power in foreign markets, they can appropriate economic rents from foreigners to the benefit of domestic residents.

¹⁰Article 86 of the EC Treaty is aimed at individual enterprises and the special problems raised by market power. The article prohibits any undertaking with a dominant position within the common market from abusing its position in so far as that abuse affects trade between member states. Article 86 does not contain any exemption to the principle of prohibition. The article contains several cases of abuse, including limiting production, markets or technical development to the prejudice of consumers. For Article 86 to apply, the undertaking must have a dominant position within the common market. This is interpreted to mean that the undertaking has a capacity to act in a market independently from its competitors. Such a capacity is often, but not always, signalled by a large market share.

face of it merger analysis is similar across competition authorities in most industrialized countries, the reality is that the analytical frameworks, methodologies and emphasis differ. While Canadian and U.S. competition laws emphasize economic analysis, the EU and Japan are more inclined to let other factors into the equation, for example employment impacts.

In Canada, the assessment of mergers by the Competition Bureau focuses on the question of whether a proposed transaction is likely to prevent or lessen competition substantially. The assessment is not based strictly on market share or concentration. Rather, the *Act* specifies that the Competition Tribunal (and therefore the Bureau) may also consider a number of qualitative factors relevant to competition in markets including, *inter alia*, the extent of effective foreign competition, whether one of the merging parties is a failing business, the existence of any barriers to entry (including regulatory barriers), and the nature and extent of innovation in the markets under examination. As well, while the *Competition Act* provides for an explicit efficiencies justification in the event that a substantial lessening of competition is found to be likely,¹¹ U.S. and EU competition laws do not explicitly recognize the efficiency justification, although efficiencies may be relevant in analysing competitive effects.

The second set of issues is procedural and jurisdictional. Where two or more jurisdictions are involved in the assessment of a merger, different notification and procedural requirements in each of the jurisdictions may be of concern. The coexistence of numerous, sometimes conflicting, national competition rules entails private cost in terms of information requirement and uncertainty. Discrepancies with respect to threshold levels, waiting periods before a transaction may be consummated and information requirements can pose serious concerns, imposing potentially significant costs and thereby deterring investment. It is alleged that the sheer number and diversity of merger regimes to contend with could act as a deterrent against potentially efficiency-enhancing mergers.

Anti-trust jurisdictions do offer the possibility of alternative routes to deal with these concerns. Some countries, such as Canada, have a well established practice of enforcement officials being accessible for consultation with merging parties before any formal filing is made or investigation is initiated. Such consultations can narrow the scope of filing requirements and/or preliminary discussions of substantive or even remedial issues, and thereby facilitate timely, effective and compliance oriented merger regulation.

In Canada, an alternate route for merging parties is to seek an "authorization" from the Commissioner of Competition for the merger. The idea is that private parties make fair disclosure of their plans to the relevant agency in exchange for some reduction in their potential competition law exposure. Under Section 102 of the *Act*, an Advanced Ruling Certificate (ARC) precludes the Commissioner from challenging a transaction "solely on the basis of information that is the same or substantially the same" as that considered in issuing the ARC. An ARC also exempts the merging parties from the pre-notification rules.

The recently adopted OECD notification and report form for mergers would seem to hold the most promise. However, the proposed notification form does not deal with the key issue of thresholds,

¹¹The merging parties must demonstrate that the gains in efficiency which will likely arise from the merger will be greater than, and will offset, the effects of any likely substantial prevention or lessening of competition, and that these gains would not likely be attained if a prohibition order were obtained. In this context, the Competition Bureau requires the provision of meaningful and verifiable information by parties to back up their claims of efficiency gains, expanded exports and import substitution predicted to result from a merger. For an elaboration, see Margaret Sanderson, *Efficiency Analysis in Canadian Merger Cases* (Competition Bureau, 1996).

that is what criteria trigger pre-merger notification requirements. Notwithstanding this omission, a pre-merger package along the lines of the OECD model offers some promise in an effort to rationalize (and render objective) information requirements and thereby reduce costs to the private sector.

In negotiations on pre-merger notification requirements, the Competition Bureau will wish to ensure that the elements of an agreement do not impair its current flexible practices regarding required information.

Question # 8

Do you believe that a TRAMS should provide for a common pre-merger notification form (or forms)? Ought negotiations towards a TRAMS attempt to seek to establish common (or converging) pre-merger notification thresholds and waiting periods?

iv. COOPERATION

As economic activity becomes more and more international, countries may find their economic interests suffer from anti-competitive conduct occurring abroad. The absence of a multilateral authority to deal with such matters has led to a corresponding increase in the importance of cooperation between competition authorities.

The jurisdictional limits on unilateral enforcement increase the need for cooperation. These limits circumscribe a country's ability to assert jurisdiction over foreign conduct that affects its interests, to investigate such conduct within the territory of other countries, to obtain comprehensive information on domestic and foreign companies that may be involved in anti-competitive conduct and to challenge and issue orders against such conduct in proceedings against persons located in other countries. Differences in countries' positions on these limits have from time to time lead to jurisdictional disputes.

Clearly there are limitations to bilateral cooperation. The effectiveness of cooperation agreements can be limited by differences in substantive laws, the degree of independence of the competition agency, whether a competition agency is adequately resourced, the risk of rousing foreign sovereignty and differences in national laws governing the exchange of confidential information.

Notwithstanding those limitations, ultimately cooperative mechanisms will need to be found that are sufficiently effective in eliminating anti-competitive conduct to reduce pressure for the kinds of unilateral action that in turn undermine cooperation. Cooperation within a TRAMS can certainly contribute to detecting and deterring anti-competitive conduct across borders.

As a starting point, cooperation at the multilateral level might be modelled on the current OECD 1995 *Revised Recommendation Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade* which calls for member countries to:

- (a) inform each other of possible violations of the other's law;
- (b) forewarn each other of cases which may affect the other's interests;
- (c) request the other agency to act against practices which affect the requesting country's interests;
- (d) collect and share information to the extent permitted under national confidentiality laws;

- (e) co-ordinate investigations; and
- (f) co-ordinate remedial actions.

The 1995 Recommendation urges members to cooperate in ways respecting positive comity. It also contains a voluntary conciliation process, which has not yet been tested.

A TRAMS could also include the principle of positive comity. If a signatory believes that anticompetitive practices being carried out in the territory of another signatory are adversely affecting its important interests, it may notify the other signatory and may request that the other signatory's competition authorities open or expand a law enforcement proceeding in order to remedy the anticompetitive practices. However, the signatory's competition authority so requested would retain the discretion to grant or refuse the request.

Finally, several countries have enacted blocking statutes in response to over-aggressiveness in the enforcement of antitrust laws. The use of such statutes tends to escalate rather than reduce tensions between countries. Accordingly, the consistency of such legislation with any eventual commitments on positive comity and closer cooperation on information gathering and exchanges will have to be assessed.

Agreement on cooperation at the international level could support Canada's bilateral cooperation agreements in attacking anti-competitive conduct with a transborder dimension. However, this would depend on *inter alia* the principles guiding international cooperation, the modalities of the agreement and confidence in other jurisdictions' processes and procedures. Cooperation should not be made subject to any obligation, but rather be modelled on the non-binding, voluntary process presently pursued bilaterally and under the auspices of the OECD.

Question # 9

Do you believe that the subject of enforcement cooperation ought to be included in a TRAMS, assuming adequate confidentiality safeguards are established?

v. DISPUTE SETTLEMENT AND COMPETITION POLICY: POSSIBLE OPTIONS

(a) The Current WTO Dispute Settlement Understanding

The existing WTO dispute settlement understanding would seem to be reasonably well adapted to dealing with some types of dispute which could arise in relation to a TRAMS. Disputes regarding whether domestic competition law conforms to the obligations in a TRAMS could be accommodated under the existing procedures. The work of the WTO dispute settlement procedures under such circumstances would not be significantly different from that currently being done in regard to other WTO obligations. If a WTO panel found that a member's competition law were in breach of the obligations established under a TRAMS relating to the adoption of a competition law or did not appropriately cover agreed-upon anti-competitive conduct, then the member would be required to bring its domestic law into accordance with the TRAMS.

However, the question of whether existing WTO dispute resolution procedures could apply to a review of decisions taken by the competition authority in individual cases is more complex. A number of concerns have been raised in this regard:

- there is the question of the standard of review to be applied in dispute settlement proceedings.

Would a review cover just one case, or would it look at a pattern of decisions. The standard of review would have to be crafted specifically with competition policy in mind.

- competition law enforcement is fact and data intensive, and requires detailed investigation and frequently the development of innovative economic theoretical approaches that are case specific. The WTO has yet to be used, and is not well adapted, for this type of decision-making. In most WTO cases, the narrow issue is the extent to which a state's laws are inconsistent with the member's WTO obligations.
- information and data gathering in competition law enforcement must be comprehensive if the underlying economic and statistical analyses are to be thorough, and trusted by all parties to a dispute. Questions have been raised as to the adequacy of WTO rules and practices in protecting confidential information. It is often unclear who is entitled to disclosure of confidential information and who is not.¹²
- another issue is the ability of the WTO to summon the expertise required to address complex competition law cases, including expertise in the areas of competition law, economic theory, statistical analytical techniques as well as a detailed knowledge of the sector.¹³
- there is the issue of the suitability of WTO remedies for resolving competition disputes. Remedies available under competition law are limited to fines to the public treasury or payment to the winner in a private suit, or to changes in behaviour in the market(s) in which the offence occurred. In contrast, remedies under the WTO allow for counter-retaliation and may, in general, be applied to any product traded between the parties to the dispute.

Question #10

Do you agree that applying the WTO dispute settlement procedures to decisions in individual cases would be inappropriate?

(b) A Competition Policy Review Mechanism

Market efficiency requires that all players have the information needed to make informed investment and trade decisions. Repeated decisions by a competition authority to not take cases can raise suspicions on the parts of investors and traders. The Competition Policy Review Mechanism (CPRM) could offer a forum where these matters could be discussed. The objective would be to make known to the private sector and other members those antitrust jurisdictions that repeatedly fail to undertake enforcement procedures against anti-competitive conduct that forecloses market opportunities.

The effectiveness of the TRAMS would be enhanced by the establishment of a Competition Policy Review Mechanism (CPRM) similar to the existing Trade Policy Review Mechanism (TPRM). The TRAMS Council (see below) would be tasked with the responsibility of preparing a report on the

¹²See Mavroidis and Van Siclen, *The Application of the GATT/WTO Dispute Settlement Resolution System to Competition* (1997), 31 *Journal of World Trade* p.5 at 40.

¹³*Supra*, note 26, at 41. Mavroidis and Van Siclen observe that under WTO rules, recourse to expertise is at the discretion of the adjudicating panel. In their view, "limits to this discretion may be desirable."

competition law of the country under review. The report would critically review both the substantive provisions of the law to determine whether they are in compliance with the TRAMS provisions and the competition agency's enforcement record. The country would then come under a peer review. A peer review report would offer comments on the country's competition law, including enforcement efforts, with non-binding recommendations on where and how improvements can be made. Both the CPRM report and the peer review report would be made public.

(c) A TRAMS Council

An oversight body along the lines of the TRIPS Council might offer members a forum to consult and seek mutually satisfactory resolutions of problems related to market access. If the aggrieved member felt that the offending member had not acted in good faith in cooperating to resolve a matter of important interest to it, then a panel of experts could be formed under the direction of the TRAMS Council. The group of experts would undertake its own analysis and assessment of the case, and would issue a report indicating whether the complaint was valid. The report would only address whether the conduct in question constituted a barrier to entry and whether the competition law in the offending member could be used to address the problem. The panel's decision and any recommendations would not be binding.

VI. CONCLUSION

Discussions in the WTO Working Group on the Interaction between Trade and Competition Policy (the "Working Group") have reflected a high degree of interest in exploring the option of negotiating a framework agreement on competition policy in the next round of multilateral negotiations. The European Union has been at the forefront in advocating the inclusion of competition policy on the negotiating agenda. Several developing countries and economies in transition, have expressed support for including competition policy as a topic for negotiations in the 1999 Ministerial. The U.S., however, has expressed concerns about the effect such an agreement would have on its national sovereignty, preferring instead broader and deeper cooperation amongst competition policy agencies as the most effective way of attacking anti-competitive conduct with an international dimension. While Canada has yet to signal formally its position on this matter, it supported the establishment of the Working Group with the goal of determining the potential use and effectiveness of the WTO framework for competition policy matters.

In the short term, reaching a broad agreement on a competition policy code in the WTO has limited possibilities. However, regardless of the short-term difficulties, the issues raised are too important to dismiss and advantage should be taken of the momentum created through the establishment and work of the WTO Working Group. While the objective of reaching an agreement is still desirable, it might be necessary to take a long-term perspective of achieving the goal of designing a TRAMS that is both realistic in terms of expectations and measured in respect of the eventual outcome.

A multi-staged approach might be employed to achieve consensus on a fully elaborated TRAMS that could address sequentially the issues of shared principles, common substantive approaches, cooperation mechanisms and adequate instruments to resolve disputes. Each stage would be conditional upon progress in the previous stage.

Canada will therefore need to design a strategy to build support for a staged approach for the inclusion of competition policy on the WTO agenda. This strategy would include a clear explanation of both the benefits of including competition policy on the WTO agenda for Canada and other WTO members, and the need to adopt a long-term, measured approach to achieving this objective.

APPENDIX A

a. Bilateral Experience

On the enforcement side, the Bureau has been increasingly involved in formal and informal cooperative efforts with foreign competition agencies in investigating restrictive business practices with trans-national dimensions.

To date, Canada's strongest relationship is with its largest trading partner, the U. S. The 1995 Canada-U.S. *Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws* and the 1985 Canada- US *Treaty on Mutual Legal Assistance in Criminal Matters*¹⁴ allow the competition agencies of Canada and the U.S. to better address, cooperate and consult with regard to anti-competitive activities with an impact on the economies of both Parties. Requests for assistance are an increasingly frequent element in Canada-U.S. competition enforcement cooperation, which has resulted in significant success in prosecuting foreign-directed conspiracies. Joint or parallel investigations and other examples of co-operation and co-ordination such as discussion on remedies sought have occurred to deter and punish several significant anti-competitive cross-border practices, specifically related to cross-border or foreign directed horizontal price fixing. Informal cooperation and contact between the competition authorities occurs regularly.

b. Regional Experience¹⁵

Both the Canada-US Free Trade Agreement ("the FTA") and the North America Free Trade Agreement ("the NAFTA") include competition law and enforcement commitments. Chapter 15 of the NAFTA contains obligations requiring the Parties to maintain competition laws and cooperate in their enforcement. These obligations are not subject to dispute settlement. The NAFTA also contains obligations subject to dispute settlement regarding the notification of, and non-discrimination with regard to, state enterprises and monopolies.

NAFTA Chapter 15 also provides for a Working Group of competition and trade officials from the three countries to report and make recommendations regarding the relationship between competition policy and trade in NAFTA.

Competition principles have also been incorporated in the Canada-Chile and Canada-Israel Free Trade Agreements¹⁶.

Canada is currently involved in regional negotiations in competition policy within the Free Trade Area of the Americas (FTAA), and the four country European Free Trade Area (EFTA), and supports the

¹⁴The *Mutual Legal Assistance in Criminal Matters Act* was enacted to implement the Canada-U.S. MLAT as well as similar treaties in the future. It has been in force since 1990. Among other things, it provides for specific mechanisms, such as search warrants and orders for oral examination, to be used by Canada in assisting U.S. and other foreign investigations.

¹⁵It is expected that the Agreement between the Government of Canada and the European Communities Regarding the Application of their Competition Laws will be signed and come into effect later this year (1999).

¹⁶The Competition Bureau is currently exploring with the Chilean competition authority ways of deepening cooperation on competition policy issues.

competition policy work program within APEC.

c. Multilateral Experience

At the international level, discussions on competition policy have focussed on one main forum: the Organization for Economic Cooperation and Development (OECD). Discussions at the OECD have the advantage of bringing together major developed countries with well-established competition law regimes. The Competition Bureau has provided leadership in leading discussions at the OECD focussing on the consideration of international problems common to trade and competition. Studies have included the scope and coverage of competition laws, exceptions and exemptions from such laws and the core principles that may be included in a multilateral agreement on competition policy. The Commissioner of Competition currently serves as the chairman of Working Party Three of the Competition Law and Policy Committee.

A positive outcome of these discussions is an agreement concerning cooperation amongst the OECD member countries. The most recent example is the 1998 Recommendation on Hard Core Cartels. Additionally, the cooperation is based on successive Recommendations of 1967, 1973, 1979, 1986 and most recently the 1995 *Revised Recommendation Concerning Co-Operation Between Member Countries on Anticompetitive Practices Affecting International Trade*. While compliance with the Recommendation is voluntary, notifications occur on a regular basis. Resort has not been made to the provision allowing to use the "CLP" for consultation and conciliation.¹⁷

Canada has also participated in several rounds of multilateral negotiations under the auspices of the GATT. The results of the Uruguay Round, and subsequent service negotiations, highlight the importance of competition in trade liberalization agreements. Some examples are the Antidumping Agreement, the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), the General Agreement on Trade in Services (the GATS), the Agreement on Technical Barriers to Trade (the TBT Agreement), the Agreement on Trade-related Aspects of Investment Measures (the TRIMS) and the Safeguard Agreement. All these agreements contain provisions related to competition policy.¹⁸

¹⁷For a fuller elaboration of the guiding principles governing the Recommendation, please see the Appendix to the Recommendation, Guiding Principles for Notifications, Exchange of Information, Cooperation in Investigations and Proceedings, Consultations and Conciliation of Anti-Competitive Practices Affecting International Trade. Paris: OECD/C(95) 130 Final.

¹⁸In the TBT Code, Article 3.4 requires that members shall not encourage private organizations to discriminate against foreign products with regard to testing and certification contrary to the national treatment principle. If a member engages in such behaviour, it constitutes a violation of the agreement

In the Anti-dumping Agreement, Article 3.5 states that the administering authority must take into consideration restrictive business practices when determining injury to a domestic industry if there are such practices. Article 9.1 of the GATS requires that members take measures to ensure that a monopoly supplier of services within their territories not abuse its market power in such a manner as to be inconsistent with the most-favoured-nation (MFN) principle. Such abusive conduct would include, for example, refusal on the part of a telecommunications company with a bottleneck monopoly over local telephone networks in the territory of a Member to allow connection to international telephone companies that belong to another Member thereby discriminating against them in comparison to other companies in other Members.

Article 40 of the TRIPS agreement states that Members are authorized to enact domestic laws to combat

Finally, Canada has been an active participant in the WTO Working Group on the Interaction between Trade and Competition Policy. The Working Group was established at the 1996 Singapore Ministerial to "study issues raised by members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework."

While it has only been only recently that the WTO has expressed interest in the international implications of competition policy enforcement, developing countries have pursued the question of the impact of multinational enterprises on their economies and, by extension, the role of competition policy in fostering economic growth.¹⁹ The Bureau has participated actively in UNCTAD deliberations on competition policy. The International Group of Experts of UNCTAD reached an agreement in 1980 on a *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*²⁰. The *Set* provides rules and principles regarding the conduct of governments and private enterprises for the control of restrictive business practices and also provides for international consultation and cooperation. The *Set* is non-binding; compliance is voluntary.

The OECD also established a set of Guidelines for Multinational Enterprises (MNEs). The Guidelines are incorporated in the Declaration on International Investment and Multinational Enterprises. The Declaration was originally adopted in 1976 and has been reviewed three times (1979, 1984, 1991) since its adoption; the Guidelines are currently under review. The Guidelines contain a chapter on competition which sets a framework (code of conduct) on how MNEs should operate regarding the effects of their practices on competition include how enterprises should behave in respect to the competition rules in foreign jurisdictions. The Guidelines cover practices such as predatory behaviour, unreasonable refusal to deal and the participation in, or strengthening the restrictive effects of, international or domestic cartels or restrictive agreements which would limit or eliminate competition.

restrictive provisions involved in technology licensing agreements.

Article 11.1 of the Safeguard Agreement prohibits Members from encouraging or supporting the adoption or maintenance by private enterprises of measures equivalent to voluntary export restraint exercised by the government. For example, if the government of a Member encourages the creation of an export cartel, thereby restricting the exportation of products, this would constitute a violation of Article 11.1 and open to challenge by the competition authority of the exporting or importing country.

The above are illustrative of current WTO approaches to competition policy issues. One of the criticisms of this approach is that it is a patchwork plan, leaving wide gaps in interpretation and enforcement of the competition provisions. It is felt that bringing competition policy under the WTO in an integrated and more comprehensive fashion will help to overcome this haphazard and ineffective application of competition principles .

¹⁹The harmful effects of restrictive business practices is not new to the international trade policy community. The Havana Charter of the still-born International Trade Organization contained provisions requiring member states to prevent, and to cooperate in deterring practices which restrain competition, limit market access or foster monopolistic control. This was rejected by the U.S. Congress as an unacceptable intrusion on national sovereignty.

²⁰UNCTAD, UN Doc. TD/RBP/Conf/10 (May 2, 1980), adopted by the UN General Assembly on November 12, 1980, UN Doc. A/C.2/35/L.75.

APPENDIX B

Question #1

In light of the preceding discussion, what elements are necessary and sufficient to meet the objective that countries adopt a sound competition policy?

Question #2

Some countries may not be in a position to incorporate all the elements of a sound competition policy at once. What are the most important elements that should have to be established at the outset?

Question #3

Are the WTO principles of transparency, national treatment and non-discrimination compatible with the enforcement of competition law and policy? Would they be desirable attributes in a TRAMS?

Question #4

To what degree should issues of procedural fairness be addressed in a TRAMS?

Question #5

Do you agree that there ought to be a common approach in a TRAMS relating to cartels ? Please elaborate.

Question #6

Do you believe that a TRAMS ought to permit an exemption for export cartels? Other exemptions (please specify and provide your rationale)?

Question #7

What prohibited practices in respect of abuse of dominant position ought to be included in a TRAMS? What are the prospects that agreement can be achieved on this subject?

Question #8

Do you believe that a TRAMS should provide for a common pre-merger notification form (or forms)? Ought negotiations towards a TRAMS attempt to seek to establish common (or converging) pre-merger notification thresholds and waiting periods?

Question #9

Do you believe that the subject of enforcement cooperation ought to be included in a TRAMS, assuming adequate confidentiality safeguards are established?

Question #10

Do you agree that applying the WTO dispute settlement procedures to decisions in individual cases would be inappropriate?

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**Options for the internationalization of
competition policy defining Canadian
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