Submission on

The Internationalization of Competition Policy

NATIONAL COMPETITION LAW AND INTERNATIONAL LAW SECTIONS
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law and International Law Sections of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law and International Law Sections of the Canadian Bar Association.

Submission on The Internationalization of Competition Policy

I. INTRODUCTION

On May 5, 1999, the Commissioner of Competition requested comments on the draft discussion paper, *Options for the Internationalization of Competition Policy: Defining Canadian Interests* (the Draft Paper). The Canadian Bar Association's National Competition Law and International Law Sections (the Sections) are pleased to offer the following response.

An executive summary of the Sections' views is followed by a general discussion of several of the key issues raised. Given the complexity of the issues raised and the relatively short time frame for comments, our comments are necessarily broad. However, we include suggestions for areas of further study and would be pleased to provide additional comments as this initiative unfolds.

II. EXECUTIVE SUMMARY

The Sections applaud the initiative of the Competition Bureau in addressing the important issues raised in the Draft Paper, and in inviting stakeholders to comment on these issues. Given the increasingly international nature of commercial and economic activity and its impact on the Canadian economy, the initiative is timely and we believe that the undertakings contemplated by the Draft Paper are useful and significant. We note, however, that while the goal of establishing international competition law and policy norms within the World Trade Organization (WTO) may

have advantages in the long run, several key difficult issues remain to be resolved. These include:

- generating and maintaining a commitment on the part of WTO member states to a meaningful and effective approach to competition law and policy, both nationally and internationally;
- generating consensus on the areas of competition law and policy which most urgently require international attention;
- developing effective measures for addressing these areas of concern; and
- reaching agreement on the treatment of confidential and often proprietary business information.

A common theme which runs through and informs all of the above is the need to address the divergent interests of WTO members and, in particular, the interests of least developed countries (LDCs).

The nature of some of the challenges posed by proceeding on a multilateral level leads us to suggest that many issues may be better dealt with, at least initially, at a bilateral or more limited plurilateral level. However, this does not mean that significant achievements cannot now be realized multilaterally. If nothing else, we believe the initiative of the Bureau, and the activities of the Department of Foreign Affairs and International Trade, in advance of the WTO and Free Trade Area of the Americas (FTAA) negotiations will help keep competition policy on the agenda. In respect of the WTO, these efforts may work in favour of extending or perhaps expanding the mandate of the WTO Working Group on the Interaction between Trade and Competition Policy. Realistically, however, the development and implementation of a meaningful agreement at the multilateral level may be more of a long term goal.

III. PROCESS ISSUES

A. Recognizing Divergent Interests

One of the issues raised at the roundtables with the Bureau relates to the Government of Canada's approach to the upcoming WTO negotiations in Seattle, Washington. The keys to negotiating an Agreement on Trade-Related Aspects of Anti-Competitive Measures (TRAMS), or at least setting WTO member countries on the path towards a TRAMS, are to:

- identify the common and divergent perspectives of WTO members and the likely barriers to the development of consensus;
- engage in consensus building by negotiating with groups that have consistent objectives; and
- within these groups, develop workable solutions to address the interests of members states with divergent perspectives.

It will be important to recognize and address the divergent interests of key WTO members, such as the United States, the states comprising the European Union (EU) and the LDCs. It is also likely that tradeoffs in other areas of negotiation may have to be made. Whether such tradeoffs are worthwhile will depend on the competing policy interests at stake.

B. LDCs and Developing Countries

Three-quarters of the 135 members of the WTO fall into the LDC or developing country categories. Of the total WTO membership, only approximately 80 countries have established competition legislation. Many countries with no regime in place may have little interest in introducing competition legislation. They may think of such legislation as an impediment to national economic development or as a means

for developed countries to improperly affect their economies and exploit or redirect resources.

These countries will need to commit to the development of a competition policy regime. As a precursor, a "competition culture" must be introduced into these economies. As recognized by the 1998 Report of the WTO Working Group on the Interaction Between Trade and Competition Policy, this might be furthered by an alliance between governments and the private sector to provide necessary resources and education. For guidance, the Bureau might look to the following recent experiences:

- Indonesia enacted its first competition law on March 5, 1999;
- Vietnam is currently examining how a competition policy regime might work given that the state is a major market participant; and
- over 40 nations are in the process of moving from central planning to greater reliance on market processes and which have enacted new antitrust laws since 1975.[1]

The Sections agree that "first and foremost, signatories would have to establish a sound national competition law regime".[2] Even the United States has said that countries could take serious steps to provide technical assistance to new antitrust agencies. At this early stage of development, legal professionals and trade and competition specialists in developed countries would likely provide educational and technical assistance. In this regard, an assessment of individual LDC economies and infrastructures would have to be undertaken so that appropriate and effective laws could be drafted and implemented. This will likely require a significant amount of educational groundwork, given that the factors generally desirable for a successful

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1 See William Kovacic, "Capitalism, Socialism and Competition Policy in Vietnam", *Antitrust Magazine*, Summer 1999, 57-61.

2 Draft Paper, at 6.

competition law regime include strong political frameworks, a local base of expertise, a functional judicial system, an academic infrastructure and a healthy public sector.

Once policies are defined and implemented, resource and information sharing would have to continue as the LDCs grow into the structure and enforcement mechanisms which are put into place. This might involve: the amalgamation of material currently available — both judicial decisions and academic work — into accessible databases, an exchange of experts, technical assistance, and more traditional education measures. Cooperation between legal professionals, trade specialists, international organizations, the private sector and governments will be important in this regard.

Developing countries that already have domestic competition laws in place might be expected to raise objections to the movement towards the internationalization of competition laws. Countries currently realizing high returns and gaining footholds for their products in foreign markets through protected “national champions”, export cartels and similar mechanisms will likely object to the harmonization or convergence of competition laws, perhaps fearing that its short-term effect will be a decrease in national economic wealth or, in some cases, incumbent financial interests.

C. Developed Countries

Among developed countries, there is a lack of consensus as to whether the time is right for multilateral competition rules. On one hand, the EU is generally in favour of negotiating competition rules at the next WTO round. The U.S., on the other hand, has been sceptical of, if not outrightly hostile to, the consideration of multilateral competition rules at the WTO. Fear of the “lowest common denominator” effect and of losing the independence of domestic competition authorities are commonly cited objections. U.S. officials have also stated that the WTO is currently an inappropriate forum because of its lack of experience in this

area – although introducing it into the WTO agenda would presumably be one way to overcome this objection.

If it remains unchanged, the U.S. position will be a major obstacle to advancing a TRAMS at the next round of WTO negotiations. The U.S. position was recently confirmed at a meeting of the Organization for Economic Co-operation and Development (OECD) by Joel Klein, Assistant Attorney General for Antitrust. Mr. Klein has publicly stated, among other things, that WTO negotiations on this issue would be premature.[3] A similar point was recently made by James Rill:

> WTO is not yet in a position for binding resolution of disputes. Mechanisms for investigative process and agreed legal framework are not yet in place. The WTO can provide a forum for the exchange of views and building a consensus at a basic level.[4]

In light of this position, it is likely that the U.S. will only be interested at a general level in WTO negotiations on multilateral competition law rules in Seattle. Further, it will be interested only if it believes that such negotiations would lead, at least in part, to better enforcement of its own laws, better operation of current bilateral cooperation agreements (particularly regarding confidential information and immunity negotiations in multijurisdictional criminal cases), greater protection of U.S. consumers, greater market access for U.S. businesses and, to a lesser extent, the export of U.S. antitrust laws and economic principles. Canada would have a strong ally in the EU, which, under the leadership of outgoing Commissioner Sir Leon Brittan, has been strongly in favour of negotiating multilateral rules at the Seattle round.[5]

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[3] See *Inside U.S. Trade*, July 9, 1999 at 21.

[4] Outline of remarks by James F. Rill, "Trade and Competition Policy: A Summary of Business Perspective" presented at the Symposium on Competition Policy and the Multilateral Trading System: Issues for Reflection in the International Community, July 25, 1998.

[5] See *Submission from the EC and its Member States to the Working Group on the Interaction between Trade and Competition Policy: The Relevance of Fundamental WTO Principles of National Treatment, Transparency and Most Favoured Nation Treatment to Competition Policy and Vice Versa* (April 12, 1999)

IV. SUBSTANTIVE ISSUES

A. Objectives of Competition Policy

One of the main difficulties will be the development of a consensus as to the goals of a TRAMS. It is important that WTO members reach at least a broad consensus regarding the basic goals and objectives of both domestic and international competition regimes. As history has shown, it will be difficult, if not impossible, to reach a narrow consensus on the goals of competition policy. Should the focus be on economic efficiency, consumer welfare, or market access? Should some other concerns take precedence? How are the concepts "efficiency" and "consumer welfare" to be defined and applied? These are just some of the issues that still remain unclear and contentious in this country, despite more than 100 years of experience.

The Draft Paper states that the purpose of competition law is to maintain and encourage competition in order to promote the efficient use of resources while protecting the freedom of action of various market participants. This statement seems to ignore the dynamic efficiency rationale for competition policy, which has taken on increasing importance, particularly in high tech sectors. It also ignores the view that competition policy is concerned with protecting consumer welfare, which is the predominant standard applied in the U.S. and EU.

Moreover, many LDCs will have difficulty "selling" (and therefore buying into) the importance of competition policy on these grounds. To the extent possible, these concepts should be tied into the overall practical and visible benefits of competition policy. These benefits may include the better use of a country's resources, the diffusion of innovation, higher-paying and better jobs and the creation of wealth that comes from the competitive process. For example, in Indonesia a number of government officials regard competition law as an important ingredient to stimulate

growth.[6] It should be made clear, however, that while these spillovers represent some of the potential benefits of having laws that protect a competitive economy, they should not be articulated as the "goals" of competition law. The goals of competition law are more appropriately directed at the competitive process itself and/or economic efficiency, including allocative, productive and dynamic efficiency.

Initially, it will probably be easier to develop consensus on what the law should be *against* (such as price fixing, market allocation, and so on) rather than what the law is *for*. This has certainly been the perceived experience in Canada, which was initially concerned with *prohibiting* combines under the *Combines Investigation Act* and now has the objective of *promoting* competition under the *Competition Act*.

B. Core Principles

The Sections agree with the Bureau that the substantive provisions of a TRAMS should, at least initially, focus on three primary areas – mergers, cartels and abuse of dominant position. The level of a country's commitment to these aspects will vary depending upon its ability to enforce these laws, its level of development and its need for such laws. Initially, general principles ought to be developed that are flexible enough to accommodate the enforcement interests of developed jurisdictions. LDCs and developing countries will likely need to develop more detailed laws and levels of enforcement in phases, as their local base of resources and expertise expands.

(i) Mergers

Merger provisions of a TRAMS might relate to both substantive review and procedural harmonization. Again, however, the needs of LDCs are likely to differ from those of developed countries.

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[6] William Kovacic, "The New Indonesian Competition Law", *International Antitrust Bulletin*, Vol. 2, Issue 2, (summer 1999) at 35.

(a) Procedural Harmonization

In developed countries, because of the magnitude of cross-border transactions, the greatest opportunity is for procedural harmonization and simplification. Recent transactions involving publicly reported cooperation between the Bureau and foreign antitrust authorities include CIBA Geigy and Sandoz, Guinness and Grand Metropolitan, Kimberly Clark and Scott Paper, Canadian Waste (U.S. Waste) and Waste Management Inc., WorldCom and MCI, Degussa and Dupont, PricewaterhouseCoopers, and the acquisition of certain assets of Holnam by Lafarge in the British Columbia cement industry (where the Bureau was provided with *Hart-Scott-Rodino Act* (HSR) filing materials and other materials by the parties – something currently carved out from the U.S. *International Antitrust Enforcement Assistance Act* (IAEAA)).[7] All signs point to an increase in the number of cross-border transactions in the future.

At the same time, merging companies that conduct transnational business continue to face an array of overlapping and sometimes conflicting merger control regimes. These procedural differences mean that businesses involved in transborder mergers face substantial transaction costs due to the need to determine which jurisdictions require pre-closing or post agreement notification and to prepare and file materials, retain and coordinate different counsel and generally comply with antitrust regimes in multiple jurisdictions. Even in Canada/U.S. transactions, where our substantive legal regimes are similar, procedural differences cause uncertainty and timing problems and can impose additional transaction costs on the merging parties. Serious concerns also remain over the treatment of confidential business information. This concern is reflected in the IAEAA pursuant to which U.S. authorities are prevented from sharing HSR material with foreign authorities. We have previously

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7 Francine Matte, "International Cooperation in the Review of Transnational Mergers: A View from Canada's Competition Bureau", presented at the ABA Conference, August 4, 1998, Toronto.

raised this concern with Canada's federal government, as has the business community.

The increase in multijurisdictional business transactions has also created opportunities – first, to transform the burdens on businesses and governments into greater procedural harmonization, and second, to transform the informal pressures on agencies to share confidential information into concrete, clearly defined and formalized rights and obligations.

Substantial work is ongoing in this area. For example, the OECD Working Party #3 of the Competition Law and Policy Committee, chaired by the Commissioner, has developed a framework for the notification of transnational mergers. In addition, the Commissioner has stated that it is a priority to ensure that future amendments to Canada's *Competition Act* (the *Act*) include amendments to its confidentiality provisions. This would permit Canada to enter into mutual assistance treaties with other countries, such as those contemplated by the IAEAA.[8] In April 1997, Australia and the United States entered into the first antitrust assistance agreement under the IAEAA, which, among other things, will permit the antitrust authorities of these two jurisdictions to share an increased amount of confidential information. However, it still does not allow for information obtained under premerger notification to be shared, as this remains outside of the IAEAA.[9]

In general, the Sections agree with the ABA Special Committee on International Antitrust and the OECD Committee on Competition Law and Policy that procedural

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8 Konrad von Finckenstein, "Speaking Notes for Presentation to the Canadian Bar Association", Competition Law Section Annual Meeting, Ottawa, Canada, September 25, 1998.

9 Federal Trade Commission, "First International Antitrust Assistance Agreement under New Law Announced by FTC and DOJ", Press Release, April 17, 1997.

harmonization in respect of merger review is a promising area for harmonization.[10] It may therefore be an appropriate topic for consensus building at the WTO.

The most appropriate system might be one pursuant to which the merging parties would provide an optional joint filing for cross-border cases. In this regard, a similar suggestion was made in the 1994 OECD Consultant's Report, namely that merging parties should have the option to provide all jurisdictions concerned with a single filing.[11]

In respect of LDCs, merger prenotification regimes can impose significant resource costs for those countries which do not currently have the necessary infrastructure in place. There are also costs associated with determining appropriate notification thresholds and standards, although some LDCs may view filing fees as a source of revenue. While a commitment to substantive merger control may be desirable, it may be premature to require prenotification regimes in LDCs. Moreover, it is not advisable to impose notification requirements in additional countries, as this may add to transaction costs. In the long run, it may be preferable for LDCs to rely upon a centralized optional regime. Setting higher thresholds for filing requirements may be another way of allocating enforcement resources efficiently and ensuring that LDC member states can participate effectively without unduly burdening businesses. This is an area worthy of additional study.

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[10] Global Forum on Competition and Trade Policy, *Harmonization of International Competition Law Enforcement* (June 1995) at 29; see also J. William Rowley and A. Neil Campbell, "Multijurisdictional Merger Review - Is it Time for a Common Form Filing Treaty" in *Policy Directions for Global Merger Review, Global Competition Review* (Summer 1999)

[11] OECD, Consultant's Report, "Merger Cases in the Real World - A Study of Merger Control Procedures", Recommendation No. 2 (1994).

(b) Substantive Merger Review

Substantive merger review is one of the most resource intensive areas of competition policy, and may pose some difficulty for those nations with no developed local base of expertise and no access to the resources required to implement a thorough merger review process.[12]

International merger analysis introduces two problematic cases that require specific attention: transnational mergers and mergers where the relevant geographic market is global or regional.

In transnational mergers, Country A may be able to reap all the benefits (i.e. the monopoly rents from a merger) without suffering the costs (i.e. the consumer welfare losses imposed on Country B). This may lead Country A to treat the situation differently than it normally would have, had all the adversely-affected consumers been located within its own jurisdiction.

In the case where a proposed merged entity might substantially lessen competition in the global or a regional market, the issue may arise as to which agency should assert jurisdiction. One option might be for a lead jurisdiction to be designated by reference to a "primary effects" test. Using this test, the lead jurisdiction could be chosen by identifying the market where the largest percentage of the merged entity's output is likely to be sold. It may be that the WTO could determine the lead jurisdiction in the event of disputes.

This type of regime would be based on a choice of law and forum rule and might be preferred, at least initially, to a common set of competition laws. It would target much more narrowly the area of required agreement and would not overly infringe on, or lessen, policy diversity and national sovereignty.

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[12] William Kovacic, "Competition Policy for Transition Economies" (draft paper) at 6.

(ii) Abuse of Dominant Position

As noted in the Draft Paper, most jurisdictions with competition laws have provisions that are concerned with monopolization or abuse of dominant position. In Canada, the law is focussed on exclusionary (customer or input foreclosure), predatory or disciplinary conduct, which in our view represents a reasonable approach.

Inconsistencies are likely to arise at the international level, however, with respect to determining what percentage of market share constitutes "dominance". The resolution of this issue does not lend itself to easy formulas. For example, U.S. case law seems to indicate that two-thirds of the market share constitutes dominance, while European jurisprudence suggests that a 40 per cent market share is sufficient to constitute dominance.[13] The Bureau has publicly stated that 35 per cent might be enough, but no case has yet been tried in Canada on this basis.

Market share in and of itself should not be indicative of market power. Moreover, the mere possession of market power ought not to violate the antitrust laws. Instead, unacceptable conduct to achieve or maintain such a monopoly ought to be the focus of inquiry. This is largely the approach taken in the U.S. and in Canada. European competition law seems to lean more towards a presumption of abuse, once dominance has been found.

These differences may in part be explained by the objectives pursued in different jurisdictions. In the EU, for example, competition law is derived from the aim of market integration and is closely connected with the core principle of free movement. U.S. and Canadian competition laws, conversely, are more concerned with enhancing consumer welfare and economic efficiency. Thus, any purpose agreed on at the

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13 Eleanor Fox, "US and EU Competition Law: A Comparison" in *Global Competition Policy*, Graham and Richardson, eds., (Washington, D.C.: Institute for International Economics, 1997), 339, at 343-344.

international level is likely to affect the standard accepted and applied to cases dealing with abuse of dominant position.

It is not clear that LDCs should focus on abuse of dominant position. While such provisions are important for new entry to occur, particularly in the case of input or customer foreclosure, the laws are complex and likely to be costly to enforce. This is another area, we suggest, that would benefit from further study and comment.

(iii) Cartels and Export Cartel Exemptions

The differences in this area of antitrust law are not nearly as great as those in other areas.[14] As such, agreement on the subject of cartel prohibition may be more easily established. Export cartels, however, may prove to be a difficult topic for negotiation.

Export cartels are co-operative arrangements among firms attempting to market their goods and services abroad, enter new markets or expand existing markets.[15] The OECD has noted that:

> In a domestic market context, explicit or implicit agreements among horizontal competitors to restrict output and to elevate prices would most likely violate antitrust laws. As such, they would be condemned as being inconsistent with broadly constructed goals of economic efficiency.[16]

Section 45(5) of the *Act* exempts agreements or arrangements that relate only to the export of products from Canada,[17] subject to a number of conditions listed in section

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[14] Matsushita, "The Antimonopoly Law of Japan" in *Global Competition Policy*, Graham and Richardson, eds. (Washington DC: Institute for International Economics, 1997), 151, at 177.

[15] OECD, *Obstacles to Trade and Competition*, Paris: 1993 at 18.

[16] *Ibid.* at 7.

[17] Section 45(5) reads as follows:

> Subject to subsection (6), in a prosecution under subsection (1) the court shall not convict

45(6).[18] Many countries similarly exclude export cartels from the scope of their competition laws.

The justification given by many governments for exempting export cartels from domestic competition policy is that such arrangements enable the exporting firms to achieve economies of scale, or to countervail the buying power of import cartels. In other cases, however, export cartels may serve no function other than to benefit domestic producers at the expense of foreign consumers. They may also facilitate collusion in the domestic market.

Exemptions from, or non-enforcement of, competition laws for export cartels also have the potential to be discriminatory. They may explicitly treat either domestic producers or domestic consumers differently from foreign producers or foreign consumers. Dispensations for export may enhance national income in the short term. However, they are myopic in that they encourage a downward spiral or beggar-thy-neighbour dynamic through reciprocal measures that in the long term reduce both national and global welfare. In this respect, they are similar to reciprocal tariffs.

Such practices generally run counter to the principles of national treatment and non-discrimination espoused by the WTO. Their existence defeats the purpose of implementing an international policy on competition issues. Thus, the exemption from, or non-enforcement of, competition laws for export cartels should be carefully

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> the accused if the conspiracy, combination, agreement or arrangement relates only to the export of products from Canada.

[18] Section 45(6) reads as follows:

> Subsection (5) does not apply if the conspiracy, combination, agreement or arrangement
> (a) has resulted, or is likely to result in a reduction or limitation of the real value of exports of a product;
> (b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
> (c) has prevented or lessened or is likely to prevent or lessen competition unduly in the supply of services facilitating the export of products from Canada.

examined. It is worth exploring whether supranational panel procedures could be established through the WTO. These would address complaints regarding member states who are not faithfully interpreting or enforcing their own domestic competition laws in a non-discriminatory manner, for example in the case of exempt export cartels.

V. CROSS-BORDER ENFORCEMENT AND CONFIDENTIAL INFORMATION

A. Enforcement

A source of friction has arisen between states relating to the appropriate scope of the extraterritorial enforcement of competition laws. While the extraterritorial application of competition laws can help to deter or reduce anti-competitive behaviour, it raises jurisdictional and sovereignty issues. Boeing/MacDonnell Douglas is one example. There, the U.S. threatened trade retaliation against the EU's alleged "extraterritorial" application of its Merger Control Regulation. In addition, when anti-competitive conduct occurs or assets of corporations reside in foreign territories, a country has a limited ability to investigate and challenge foreign conduct, to obtain relevant and comprehensive information and to issue orders.

Many bilateral agreements have sought to circumvent the problems associated with extraterritorial enforcement by introducing principles of comity and a regime of prior notification before extraterritorial measures are implemented. The recent U.S./Japan and Canada/EU Agreements are examples. However, most agreements do not extend in practice beyond loose notification requirements.

In general, the Sections agree with the Draft Paper that a cooperative multinational enforcement agreement might be modelled on the OECD 1995 *Revised Recommendation Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade*. This calls for member

countries to inform each other of possible competition violations, to forewarn each other of cases which may affect the other's interests, to request the other agency to act against practices which affect the requesting country's interests, to collect and share information to the extent permitted under national confidentiality laws and, finally, to coordinate investigations and remedial action.

Like the 1995 Recommendations, a TRAMS could call for positive comity to be respected and furthermore could contain a conciliation process. It may be necessary for coordinated enforcement to be voluntary and non-binding in the early stages, to respect the sovereignty of individual member states. The commitment of member states to concerted enforcement action may become clearer over time as the commitment to competition policy in general strengthens. We believe that this is also an area worthy of further study. In this regard, the views of business should be sought and carefully considered.

B. Confidential Information

Businesses have expressed concern that increased enforcement cooperation among competition law authorities may not adequately protect confidential proprietary information from improper disclosure.[19] We believe that here, too, the views of business ought to be given a great deal of weight.

There are some risks to a system where convergence in competition law and policy leads to greater cooperation among competition agencies or even the centralization of such functions. We believe that many in the international business community would be concerned that a TRAMS could facilitate greater cooperation among regulatory or enforcement agencies. This could lead to a greater exchange of confidential information among these agencies, without adequate safeguards.

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[19] International Chamber of Commerce (ICC), "Statement on International Cooperation between Antitrust Authorities" (March 28, 1996).

The exchange of confidential business information raises issues of serious concern to businesses. The international business community is legitimately concerned that its confidential business information might come into the hands of competitors or authorities in other countries pursuing different competition policy goals in different ways.[20] Such information may also become accessible to third parties, including possible plaintiffs, through access to information statutes or through state-owned competitors. Finally, the owner of proprietary information may not be made aware in the event of its exchange or disclosure.

We would suggest that at least the following procedural safeguards be part of a TRAMS and be implemented to protect against improprieties in the exchange of confidential information:

- prior notification should be given to a business that confidential information will be provided to another governmental authority, unless such notice would jeopardize an investigation – in which case notice should be given as soon as possible;
- there should be the possibility for independent review of any adverse decisions;
- there should be substantial convergence and similarity between one jurisdiction and another on the laws protecting lawyer/client privileged information;
- there should be an assurance that the information will not be disclosed to parties outside of the receiving authority;
- the jurisdiction seeking the information must provide competition-law enforcement immunity equal to or greater than the protection provided in the jurisdiction disclosing the information;

[20] See "Cooperation Among Competition Authorities and the Protection of Confidential Business Information", presentation by Peter Plompen at the ICC Business Dialogue, Geneva, October 8, 1998.

- the party receiving the information must agree to reciprocate; and
- any exchange of information should lead to less delay in the investigation process.

There is a distinction between the views of European and North American businesses regarding confidentiality and convergence. European businesses seem to believe that a required level of convergence needs to exist prior to any exchange of information. North American businesses, on the other hand, generally believe that substantial convergence of competition policies is not a prerequisite to information exchanges.

In summary, the number of cross-border investigations and cross-border transactions is already increasing. As such, information sharing and cooperation are becoming more important from an enforcement perspective. Governments are already taking steps to increase the extent of cooperation and information sharing between them. Greater international cooperation in the competition policy context cannot proceed fairly and effectively unless and until there are satisfactory measures in place to protect proprietary business information that moves between jurisdictions.

VI. OTHER ISSUES AND OBSERVATIONS

A. Dispute Settlement

The debate over possible fora for addressing trade and competition conflicts has generated a great deal of discussion within business and legal circles. Given the disparity in views, achieving broad consensus on substantive rules specific enough to guide conduct, govern investments and yield predictable results is perhaps unlikely in the near future.

One position is that competition should be addressed at an international level such as the WTO. This position is premised on growing concerns about the costs imposed by multi-government review of business transactions, the barriers imposed by private

and public anti-competitive restraints and the potential of these barriers to undermine trade liberalization efforts.[21] To the extent that private and public anti-competitive behaviour can impair the benefits of international trade liberalization initiatives, these issues may appropriately be addressed at the international level.

In its October 1996 statement *Trade and Competition Policy*, the International Chamber of Commerce (ICC) argued that before multilateral dispute resolution rules are negotiated within the WTO framework, there needs to be a greater understanding of the linkages and conflicts between trade and competition policy and of convergence in competition laws. The ICC's Joint Working Party concluded in its draft Report:

> Whatever governmental organizations take action in this area, it is important that there be a structured opportunity for receipt and consideration of business views. The increasingly open opportunity for BIAC [Business and Industry Advisory Committee] to consult with the OECD CLP [Competition Law and Policy] and Trade Committees and the Joint Group on Trade and Competition is a model for cooperation. Finally, there remains a need for dialogue to continue between differing international organizations, including the OECD, the ICC and the WTO, regarding base principles of competition law, the interface with trade laws and their implementation on a global basis.[22]

Bilateral or multilateral agreements, the work of the OECD and the efforts of the WTO, however, each may be effective in various settings. OECD efforts to date and the progress made under bilateral agreements have been instructive and positive.

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21 Business and Industry Advisory Committee to the OECD (BIAC), *Statement to 1994 OECD Council Meeting at Ministerial Level* (June 7-8, 1994); see also International Chamber of Commerce, Policy Statement, *Trade and Competition Policy* (October 22, 1996).

22 ICC Policy Statement, *The present and future agenda of the World Trade Organisation*, prepared for the first ministerial conference of the WTO in Singapore, December 9-13, 1996, Commission on International Trade and Investment Policy, Singapore (April 24, 1996).

The WTO has a record of securing international agreement and reducing international friction. The fact that its primary disciplinary concern is the liberalization of international trade rather than competition or efficiency may create tension between competition and trade objectives. It may also mean that the existing WTO dispute settlement mechanisms are not well suited to dealing with the fact-intensive nature of competition cases. Moreover, the WTO has been criticized as lacking the transparency and institutional integrity necessary to be accepted as an international dispute resolution framework. Finally, issues of sovereignty must be balanced against the benefits of having an effective WTO competition regime. As such, this is an area worthy of further study.

The WTO would likely be more qualified to address disputes regarding whether domestic competition laws conform to the obligations in a TRAMS. It already handles similar disputes and it may be a reasonable forum for this form of dispute settlement. On the other hand, in individual cases dealing with reviews of decisions taken by competition authorities, the existing WTO procedures have several practical limitations. Some of these were illustrated by the recent disputes between the U.S. and Japan involving *Photographic Film*.[23] The U.S. led voluminous evidence and presented extensive arguments in support of its case. However, the WTO ultimately dismissed the complaint. It has been submitted that this is at least partly due to the fact that:

> ...the WTO dispute settlement mechanism does not provide any guidance to disputing parties regarding evidentiary issues, nor does it provide adequate tools to allow the parties and the panel to test the credibility of the evidence provided to it.[24]

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23 *Japan - Measures Affecting Consumer Photographic Film and Paper*, WT/DS44, panel report adopted April 22, 1977, at 18. The U.S. brought a complaint under the General Agreement on Tariffs and Trade (GATT), alleging that Fuji, a Japanese film manufacturer, had acted in concert with the Japanese government to tie up distribution channels with the aim of excluding Kodak from the domestic Japanese market.

24 Milos Barutciski, "The Two Solitudes: Trade and Competition Policy", Canadian Bar Association Annual Competition Law Conference, Ottawa, September 24-25, 1998.

It may be unrealistic to expect the WTO to have experience in an area that has only recently emerged as internationally significant. Some of the expertise necessary for the WTO to adjudicate such matters successfully is currently missing. However, this may be remedied over time, given that the WTO has a dispute settlement mechanism already in place and has experience in resolving cross-border disputes.

B. Transparency, National Treatment and Non-discrimination

Transparency is important to an emerging international agreement on competition policy. Assuming that an agreement on general principles is reached at some point in the future, a diverse system is likely to emerge, with slightly different approaches being applied in various countries. In this instance, the principle of transparency becomes increasingly significant. For businesses to conduct their affairs in accordance with the laws of the countries whose markets they seek to enter, they must be able to access and assess those laws. Transparency fosters consistency, encourages public confidence and helps member states to ensure that domestic laws are not misused or used strategically to protect local business, all of which would defeat the purpose of an international cooperation agreement. Transparency also allows for closer monitoring of the compliance level of member states and a more expedient resolution of any serious difficulties.

The concepts of national treatment and non-discrimination are intended to prohibit the more stringent treatment of foreign firms relative to domestic firms. This prevents government from favouring domestic firms through subsidies and generous policies to the detriment of the foreign competitor. This may meet resistance from LDCs and emerging economies whose domestic industries have little support other than that received from government. On the other hand, national treatment serves to emphasize the central point of competition – that the economy should be open to competition from all enterprises capable of entering a market. It may be appropriate for LDCs to adopt this at least as a statement of principle.

C. Procedural Fairness

While not all aspects of procedural fairness can be addressed in a TRAMS, some provisions will have to be included. This is likely to be an area of great diversity. Even among developed countries there are differing common law and civil law concepts of procedural fairness. The challenge of consensus between LDCs is also likely to require careful attention. This is an important area requiring additional study and debate.

VII. CONCLUSION

We believe that significant groundwork and further study is required before a TRAMS can be successfully negotiated at the WTO level. The Sections do not believe, however, that it is premature to attempt to keep competition policy on the table and to begin to negotiate multilateral rules at the WTO level. We applaud the initiative of the Bureau in this regard. We note, however, that several key difficult issues remain to be resolved, including the need to address the divergent interests of WTO members and, in particular, the requirements of LDCs.

This does not mean that significant achievements cannot now be realized multilaterally. A TRAMS should not be pursued, however, at the expense of continued bilateral and other multilateral efforts. Instead, it should be pursued contemporaneously with these other efforts, which appears to have been the case to date. Continued bilateral efforts on the part of developed countries may provide the opportunity to experiment creatively with some of the major concerns of businesses and other stakeholders, and to come ultimately to an agreement on the most appropriate measures to be introduced at the multilateral level.