Submission on

Competition Policy Considerations in the GATS Negotiations

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

September 2001

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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 Section 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 by the Executive Officers as a public statement by the National Competition Law Section of the Canadian Bar Association.

Submission on Competition Policy Considerations in the GATS Negotiations

The National Competition Law Section (the Section) of the Canadian Bar Association (the CBA) is pleased to respond to the discussion paper, *Competition Policy Considerations in the GATS Negotiations*, dated May 1, 2001 (the Discussion Paper). This submission has been reviewed and approved by the CBA's National Media and Communications Law Section.

The Section applauds the initiative of the Competition Bureau in addressing the important issues raised in the Discussion Paper. It also appreciates the Bureau's invitation to stakeholders to provide input on these issues, given the increasingly international nature of commercial and economic activity and its impact on the Canadian economy.

For ease of reference, we provide an executive summary of the Section's views, followed by the answers to the eleven questions set out on page iv of the Discussion Paper. The Section would be pleased to provide additional comments or to respond to additional questions as this initiative unfolds.

I. EXECUTIVE SUMMARY

We generally support the framework outlined in the Discussion Paper and believe that an international approach to competition policy is important to the success of a liberalized agreement on services. We recommend that the Bureau continue to support efforts toward developing a multilateral agreement on competition. In

most circumstances, an effective competition law should contain adequate enforcement provisions and should also address anti-competitive mergers, monopolization or abuse of dominance and cartels. However, it should not be so restrictive as to pose barriers to market access by foreign companies.

We believe that the Reference Paper appended to the GATS Agreement on Trade in Telecommunications (the Reference Paper) should be refined further in a number of areas before it can be used to liberalize trade in network sectors other than telecommunications. It lacks specificity, particularly concerning key definitions and principles. It has been implemented unevenly among WTO members, which also raises concerns. Despite these problems, the Reference Paper could be used as a starting point for liberalization in network sectors other than telecommunications services.

Physical barriers may tend to limit entry in specific network sectors. These barriers can be directly addressed by developing provisions within sectoral annexes or sector specific reference papers. However, it is critical that innovation not be deterred by regulatory or competition law regimes contemplated by any future reference papers. Provisions mandating access in markets must take into account factors such as rapid technological development and change, recognizing that each case will depend on its own facts.

The key elements of the GATS that relate to competition policy (and thus the provisions which most need strengthening) are, in order of importance, Articles VI, IX and VIII.

The regulation of foreign direct investment raises potential concerns. All regulation which attempts to limit the scope of foreign investment or foreign participation in a domestic economy and which raises barriers to entry may limit the number or effectiveness of competitive entities participating in an economy.

II. ANSWERS TO SPECIFIC QUESTIONS FROM THE DISCUSSION PAPER

1. International approach as a component of market entry approach

Is an international approach to competition policy an integral component of an effective market entry approach to liberalization of services markets? What are the limitations of this approach? Please explain.

An international approach to competition policy is very important to the market entry approach to the liberalization of services markets. The Discussion Paper presents a framework that illustrates the limitations of multilateral service liberalization which is not accompanied by effective competition policy in participating countries. Thus, effective competition policy is required to achieve the welfare gains that the GATS seeks to provide. This view has been widely supported in policy fora and in recent literature. In particular, the Organization for Economic Co-operation and Development (OECD) project on Regulatory Reform and International Market Openness recognizes the importance of regulatory reform (i.e., competition policy) as a "powerful instrument for contributing to market openness in the post-Uruguay Round trading system."[1]

Trade in services is particularly vulnerable to "within the border" barriers. Barriers to trade in services tend to be less transparent than barriers to trade in goods. Most often, they are built into domestic regulation (e.g., licensing regimes) rather than being imposed as distinct barriers at the border. Subject to the CBA's comments on the Accountancy Disciplines (see Question 9, below, and Appendix 1), we agree with the approach offered at page 13 of the Discussion Paper as a means to address these issues. More specifically, we agree that dismantling barriers at the border is insufficient to ensure effective competition. Effective

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[1] OECD Proceedings, Regulatory Reform and International Market Openness, Paris, 1996.

liberalization requires a commitment by governments to pursue regulatory reform inside the border. This includes developing and enforcing an effective competition law. We also agree that many countries lack the institutional capacity to implement effective competition regimes. In short, an international approach to competition must go hand-in-hand with the GATS, but the central challenge concerns implementation. What is the best way of adopting an international approach to competition policy that recognizes the limitations that many countries have in implementing competition policy?

We attempt to address this challenge in the two questions that follow. Question 2 examines the challenges in pursuing an international approach to competition policy and Question 3 outlines the fundamental building blocks to an effective competition policy.

2. Recommended approach

What approach would you recommend? What would the limitations be? What are the advantages and disadvantages of each?

The Competition Bureau should continue to support efforts toward developing a multilateral agreement on competition. At the same time, there is some scope for competition principles to be included within the GATS framework as well. These approaches should work in tandem. The question of how competition principles can be incorporated into the GATS is dealt with in Questions 6 and 7. The remainder of our answer under this question examines the challenges of an international approach to competition policy. We examine two alternatives: the WTO and the Global Competition Initiative (the GCI).

i) WTO

The Discussion Paper outlines the challenges inherent in an international approach to competition policy. The goal of establishing international competition

law and policy norms within the WTO may have advantages in the long run. However, several key, and difficult, issues remain to be resolved. These include:

- generating and maintaining a commitment from WTO members to an 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;
- reaching agreement on the treatment of confidential and often proprietary business information; and
- effectively addressing least-developed-country (LDC) interests.[2]

This issue was addressed by the International Competition Policy Advisory Committee (the ICPAC), which released its final report on February 28, 2000 (the Final Report). The Final Report was the culmination of over two years of work by a committee of experts. It involved senior competition officials from around the world, investment bankers, economists and academics from the United States, Australia, Brazil, Canada, the European Union, France, Germany, Japan, Mexico, Spain and Venezuela.

ICPAC considered three broad potential approaches for the WTO to regulate competition among its members. Each related to some form of international agreement on competition principles or rules. The approaches were:

- **Multilateral Antitrust Code –** a world antitrust code, with substantive principles to be administered by a supranational competition authority. The Final Report concludes that a harmonized and comprehensive

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[2] These issues were previously addressed by this Section. See Canadian Bar Association National Competition Law and International Law Sections, *Submission on the Internationalization of Competition Policy* (Ottawa: Canadian Bar Association, August 1999).

multilateral antitrust code administered by a new supranational competition authority or the WTO is unrealistic and unwise.[3]

- **National Competition Regimes –** the adoption of WTO competition rules requiring countries to enact and enforce antitrust laws. The Final Report notes that purely national approaches are insufficient and that broader international engagement is necessary.
- **Binding Principles –** the adoption of an antitrust market access principle, including a duty not to block access to markets by anti-competitive means. A nation would be responsible for implementing this principle in its national laws. Such a duty would apply to governmental and private restraints. The Final Report concludes that the WTO, whose central focus has been on the trade-distorting conduct of governments, should remain as an intergovernmental trade forum focusing solely on governmental restraints.

At the same time, the Final Report suggests that the U.S. government take steps to ensure the WTO continues to work on the intersection of trade and competition policy. In doing so, it notes that the WTO Working Group on the Intersection between Trade and Competition Policy is one constructive effort to examine anti-competitive or exclusionary practices that inhibit international trade. In particular, the Final Report notes that the WTO should increase its competition policy expertise and continue to conduct summary reports or reviews of countries which have competition laws or policies. The Final Report also concludes that the WTO is not the appropriate forum for the review of private restraints. National authorities are best suited to address anti-competitive practices of private firms that are occurring in their territory. The Final Report does recognize that:

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[3] See Final Report at 271, where ICPAC states that "it is fanciful to imagine that jurisdictions with established competition policy regimes would be prepared to cede national authority to review cases that adversely affect them to a new supranational authority."

- mixed governmental and private restraints (i.e., where private practices that foreclose access to markets are encouraged or supported by government) are an appropriate subject for WTO scrutiny, and
- the anti-competitive closing of foreign markets is a significant disruption in the world trading system.

We support the work of the WTO Working Group and believe that it could function as an effective forum for the study of the intersection of international trade and competition policy.

ii) A Global Competition Initiative

One additional recommendation found in Chapter Six of the ICPAC Report was the development of a GCI, which the ICPAC described as "a new venue where government officials, as well as private firms, nongovernmental organizations (NGOs) and others can exchange ideas and work toward common solutions of competition law and policy problems".[4] A GCI would "foster dialogue directed toward greater convergence of competition law and analysis, common understandings, and common culture."[5] It would also serve as an information centre and offer technical assistance to transition economies. Recently, former U.S. Assistant Attorney General for Antitrust Joel Klein endorsed the concept of a GCI stating that the U.S. "should move in the direction of a [GCI] cautiously and on an exploratory basis, but in the end, I think such a development is inevitable."[6]

A GCI appears to be a promising venue for international competition policy development and holds significant potential. However, there are limitations which

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4 Final Report at 300.

5 *Ibid.*

6 Remarks of Joel Klein, U.S. Department of Justice, made at the EC Merger Control 10th Anniversary Conference, September 14, 2000.

require further study.[7] First, it will only be as effective as the commitment and political support given by participating countries. Second, as a forum for negotiation, it risks stagnating at the stage of dialogue between various stakeholders. Care should be taken to avoid this result and to ensure that it remains relevant and feeds into ongoing policy development in this area. Prof. Eleanor Fox once described the U.S. administration's attitude toward the absence of an international competition law regime as a "no problem" problem. In the same vein, a GCI should not turn into a "no solution" solution.

3. Addressing anti-competitive business practices

What provisions need to be in a country's competition law to effectively address and remedy anti-competitive business practices?

The rate of implementation of different aspects of competition law (and the pace at which additional competition laws may be introduced) will vary depending upon a country's ability to enforce these laws, its level of economic and social development, and its need for such laws. In general, the elements of an effective competition law include:

- a clear statement of the objectives of the country's competition law;
- an enforcement regime that is transparent, independent, predictable, timely, accountable (including its treatment of confidential and proprietary business information), flexible and fair;
- a regime to address anticompetitive mergers;
- laws to address abuse of dominance or monopolization; and
- provisions to address cartel activity.

We address each of these in greater detail below.

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7 See, for example, "Canadian Competition Chief Rejects Concept of Supranational Authorities", *Antitrust & Trade Regulation Report,* vol. 80, no. 2013 at 593.

(i) The Objectives of Competition Law

As evidenced from the history of antitrust law in the United States and Canada and from recent developments in Canadian competition law and in cross-border cases, it is important that competition laws have clear primary objectives. At a very general level, most competition laws appear consistent with each other. However, there are significant differences in emphasis which can become apparent in difficult cases, causing international friction.[8] For example, should the focus be on economic efficiency (i.e., productive efficiency, allocative efficiency and dynamic efficiency), on competitors, on consumers, on market access or on small business interests? Should some other concerns take precedence? How are the concepts of "efficiency" and "consumer welfare" to be defined and applied? Despite more than 100 years of Canadian experience, these are just some of the issues which remain unclear and contentious in this country.

Moreover, many LDCs will have difficulty recognizing the importance of competition policy on some of these grounds. To the extent possible, these concepts should be tied into the overall practical and visible benefits of competition policy. These include better use of a country's resources, diffusion of innovation, creation of world-class national industries, higher paying and better jobs and creation of wealth that comes from the competitive process. In Indonesia, for example, a number of officials regarded a competition law as an important ingredient to stimulate growth.[9] These spillover effects represent some of the potential benefits of having laws that protect a competitive economy. However, 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 economic efficiency.

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8 For example, the European Commission recently did not approve General Electric's proposed acquisition of Honeywell, despite clearance obtained in the U.S. and Canada.

9 See William Kovacic, "The New Indonesian Competition Law", Vol. 2, Issue 2, International Antitrust Bulletin, Summer 1999, 35.

Initially, a more useful articulation of goals might focus on what the law should be against (price fixing, bid rigging, market allocation, etc.) rather than what the law is for. This has certainly been the perceived experience in Canada, as suggested by contrasting Canada's initial concern with prohibiting combines under the *Combines Investigation Act* with our current objective of promoting competition under the *Competition Act*.

(ii) Enforcement Principles

Competition law enforcement raises three related areas of concern. First, there is the issue of designing a law that is "administratively efficient". This means that the cost of its application (in terms of public and private enforcement resources) should be less than the harm attempts to prevent. This issue is compounded in jurisdictions where private litigants can enforce the law in addition to public authorities, particularly if enforced in ways which makes antitrust law a discouragement to foreign participation in domestic markets. In the United States, for example, there have been proposals to revise the "treble damages" rules to address this issue.

Second, there is the difficult issue of the relationship between the competition authority as investigator and the legal system as adjudicator.[10] The enforcement regime should be transparent, independent, predictable, timely, accountable (including in its treatment of confidential and proprietary business information), flexible and fair.

Third, there is the more subtle issue of the relationship between the competition authority and the executive of the government. It is crucial, especially for LDCs

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[10] See Canadian Bar Association, National Competition Law Section, *Submission on Public Policy Forum Consultation Concerning Amendments to the* Competition Act, (Ottawa: Canadian Bar Association, 2000) and American Bar Association Section on Antitrust Law, *Submission to the Public Policy Forum on Amendments to the* Competition Act (Chicago: American Bar Association, 2000).

establishing a competition law regime, that the competition authority be independent from both direct and indirect political influence of the government. The competition authority should be an independent agency with its own budget and staff. Many times an agency will have to make decisions that may be adverse to national corporations but necessary to protect competition. The agency's independence will permit it to make such principled decisions.

(iii) Mergers

Provisions to address anti-competitive mergers are an essential component of an effective competition law regime. It is important, however, that merger regimes – and, in particular, pre-merger notification regimes – are not inappropriately introduced. Otherwise, in respect of multi-jurisdictional merger review, there may be significant transaction costs to the merging parties. Mergers that substantially lessen or prevent competition can result in the misallocation of resources, reduce innovation competition and reduce incentives to lower production costs. They also have other effects such as higher prices and reduced quality of service to consumers as well as effects on employment. Competition policy is only one of many tools that governments may use to remedy the effects of business conduct. The objectives of a country's merger laws should be clearly articulated and the law should be applied consistent with those objectives.

(iv) Cartels and Export Cartel Exemptions

Agreements between competitors to substantially lessen or prevent competition can also misallocate resources, reduce innovation competition and reduce incentives to lower production costs. They also have similar economic effects such as higher prices to consumers. In contrast to mergers, however, there is rarely an underlying efficiency rationale for such arrangements. As such, most would agree that an anti-cartel law is an essential component of an effective competition policy. The differences in this area of antitrust law are not nearly as

great as those in other areas.[11] The Section does not support export cartel exemptions in a multilateral approach such as that considered here.

(v) Abuse of Dominant Position

Most jurisdictions with well-established competition laws have provisions that are concerned with monopolization or abuse of dominant position. In Canada, the law is focused on exclusionary (customer or input foreclosure), predatory or disciplinary conduct, which ultimately has a horizontal effect. This represents a reasonable approach for Canada and other countries with well-established traditions of competition law enforcement.

Countries with existing competition law regimes define "dominance" differently, leading to inconsistencies at the international level. The issue of what level of market share qualifies as dominance does not lend itself to easy formulas. For example, U.S. jurisprudence indicates that two-thirds of market share constitutes dominance, while European jurisprudence suggests that a 40% market share is sufficient to constitute dominance.[12] The Bureau's Abuse of Dominance Guidelines provide that 35% might be enough; however, 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, the focus should be on unacceptable conduct to attain or maintain such a monopoly. This is largely the approach taken in the United States and in Canada.

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11 Matsushita, "The Antimonopoly Law of Japan" in *Global Competition Policy*, Graham and Richardson, eds. (Washington, D.C.: Institute for International Economics, 1997), pp. 151-197, at 177.

12 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), pp. 339-354, at 343-344.

European competition law seems to lean more towards a presumption of abuse, once dominance has been found.

4. Liberalization in other network sectors

Is the Reference Paper a good starting point for liberalization in other network sectors? If so, what sectors do you consider a priority for this type of approach? What are the benefits and drawbacks of applying the principles in the Paper to other sectors? Please explain.

If the Reference Paper is to be used as a starting point for liberalization in other network sectors, the definition of network sectors should be restricted to those sectors in which the ownership and control by the incumbent, dominant service provider of essential physical infrastructure would, in the absence of regulatory intervention, effectively preclude competitive service providers from competing with the incumbent. Obviously, the Section's comments (except under question 6, below) do not apply to the telecommunications industry, which has been addressed in the Reference Paper.

The international regulatory framework governing trade in telecommunications services in the context of the WTO is the product of incremental progress through several rounds of negotiations. The obligations applicable to individual WTO members fall into two different categories:

- multilateral GATS commitments applicable to all WTO members; and
- individual member-specific commitments included in each member's GATS Schedule.

GATS commitments specifically applicable to telecommunications are set out in the Annex on Telecommunications. The Annex essentially requires WTO members to permit service suppliers from other WTO members to have the rights of reasonable and non-discriminatory access to (and use of) the public

telecommunications transport network and services for the supply of a service included in a member's Schedule.

While the Reference Paper incorporates language that is specific to the telecommunications sector, it also enshrines a number of principles designed to facilitate access to the infrastructure for the delivery of telecommunications services. These include:

- definitions of "essential facilities" and "major supplier";
- incorporation of domestic competition law principles designed to prevent anti-competitive behaviour by major suppliers; and
- provisions designed to promote interconnection with major suppliers on a non-discriminatory basis in order to facilitate access to the network for alternative service suppliers.

It was left to individual WTO members to incorporate Reference Paper commitments in their Schedules. Accordingly, the applicability of Reference Paper obligations is not consistent among WTO members, or even among Reference Paper adherents. This creates potential for patchy and uneven implementation of Reference Paper obligations.

The possible application of the Reference Paper to other network sectors requires careful case-by-case consideration of the scope of the sectors to which such rules would apply and also to the definition of terms such as "essential facilities" and "major supplier". There is a danger that mandating access in inappropriate cases could actually lessen and prevent competition, rather than foster it. Competitors could use such rights to obtain a "free ride" on the efforts and innovations of the industry leader. They would therefore be less likely to devote significant resources to the development of competing products or services.

There is a positive aspect of allowing each member to incorporate commitments in its Schedule. This increases the likeliood that a smaller group of members interested in broadening liberalization may move forward where other members' reluctance would otherwise preclude the conclusion of a multilateral agreement. For this reason, from a process perspective, the approach taken and the basic principles included in the Reference Paper could be used as a starting point for trade liberalization in other network sectors. Ideally, a template would be developed to address the concerns outlined above, minimize the time required for negotiation and maximize the likelihood of achieving similar end results.

5. Barriers to entry in network sectors

What are the barriers to entry in these sectors and how can they be addressed in a sectoral agreement?

Generally speaking, the barriers to entry that may exist in network sectors include, but are not limited to, the following:

- control of essential physical infrastructure facilities by a dominant supplier;
- restrictions (whether legal, economic, physical or some combination thereof) on the ability of competitors to duplicate the essential physical infrastructure, which restrictions may include:
    - restrictions on foreign investment in domestic operators;
    - high sunk costs; and
    - prohibitions or inordinate delays in obtaining building permits or access to required rights-of-way;
- government procurement practices or policies which favour certain suppliers;
- restrictions on the ability of market entrants to apply for or obtain subsidies that are received by certain suppliers within the sector; and

- cross-subsidies flowing from monopoly-supplied network sector services or facilities to competitively supplied network sector services or facilities.

A sectoral agreement can address barriers to entry in industries operating over physical network infrastructure by first identifying barriers to entry. Provisions can then be developed within sectoral annexes or sector specific reference papers to address each of the barriers to entry in the network sector in question. For example, section 2.2 of the telecommunications Reference Paper ensures interconnection with the network of a major supplier at "any technically feasible point in the network". This provision guarantees a right of access to the networks of major suppliers and, in conjunction with sections 2.2(a) and (b), requires that such access be provided on a timely basis and on non-discriminatory terms, conditions and rates. Absent this right of access, a major supplier may refuse access to essential facilities over which it exercises control, despite the fact that such access might be necessary to permit the subscribers of the interconnecting supplier to communicate with subscribers of the major supplier.

However, care must be taken to ensure that regulation and competition law provisions do not operate to inhibit competition. Inappropriately mandating access in rapidly changing sectors can actually penalize firms that develop superior network technologies by requiring them to provide access to their competitors. Mandatory access may inhibit "leapfrogging" innovation typically found in sectors characterized by rapid technological change because it allows competing firms to "hook on" to the technology developed by their competitors, rather than seeking to develop their own new technology.

6. Precision of the Reference Paper

The Reference Paper has been criticized for a lack of precision. Do you agree? Please explain.

Although the Reference Paper was heralded as an important first step in liberalizing trade in basic telecommunications services, it has also been criticized as lacking sufficient specificity, particularly concerning certain of its principles and definitions. The Reference Paper could benefit from further refinement in the following areas:

- **Definition of "Basic" –** the Reference Paper neither incorporates nor provides a definition of basic telecommunications services. This leaves open to argument the scope of application of the Reference Paper's principles and, consequently, the rights it confers on market entrants;
- **Definition of "Major Supplier" –** a "major supplier" is defined in the Reference Paper as a supplier having "the ability to materially affect the terms of participation in the relevant market for basic telecommunications services" as a result of either its "control over essential facilities" or "use of its position in the market." This latter criterion is vague because it suggests that some sort of competitive analysis is required, without specifying what the parameters of that analysis might be;
- **Competitive Safeguards –** the list of anti-competitive practices referred to in Article 1.2 could potentially be expanded to include other practices such as denial or delay of network access on spurious grounds;
- **Sanctions –** the Reference Paper is silent on the issue of sanctions for non-compliance with the prohibition against anti-competitive practices;
- **Interconnection at "cost-oriented rates" –** in Article 2.2(b) of the Reference Paper, interconnection is to be provided at "cost-oriented rates that are transparent, reasonable, having regard to economic feasibility." This term lacks meaning without further definition;
- **Licensing Criteria –** transparency of licensing criteria is essential. However, a principle should be added to prohibit (in the absence of reasonable grounds such as bandwidth limitations) the use of licensing as a means of limiting the number of suppliers in the market.

7. Adapting the Reference Paper for other network sectors

How should the Reference Paper be adapted if it is to be used as a model for other network sectors? What are the most important elements in the Reference Paper and how can they be applied to other sectors?

Although the Reference Paper was drafted with a view to liberalizing trade in the telecommunications sector, several of the concepts and principles in the Reference Paper may apply in some other network sectors. These include:

- a definition of "major supplier";
- a definition of "essential facilities";
- the obligation of an adopting member to maintain measures to safeguard against specific forms of anti-competitive conduct;
- rights of interconnection with or access to the network of a major supplier on non-discriminatory rates, terms and conditions;
- transparency of interconnection agreements or a reference interconnection offer;
- impartial and independent regulators;
- dispute settlement by an independent domestic body;
- transparent licensing criteria, including the terms and conditions of individual licences, the period of time normally required to reach a decision concerning an application for a licence and the reasons for the denial of a licence;
- the obligation to administer universal service obligations in a transparent, non-discriminatory and competitively neutral manner;
- the carrying out of procedures to allocate scarce resources in an objective, timely, transparent and non-discriminatory manner.

While some of these principles were adopted specifically with the telecommunications sector in mind, concepts such as an impartial regulator,

safeguarding against anti-competitive conduct and transparency in the regulatory process can be transferred conceptually to other network sectors with relative ease. At a minimum, these principles can serve as a starting point for negotiations with respect to other network sectors.

8. Key elements of the GATS

What are the key elements of the GATS related to competition policy? Which provision(s) is it most important to strengthen? Please explain.

While many provisions of the GATS touch upon areas which relate to competition policy generally, the agreement was not informed by competition policy considerations. Nor does it specifically reference competition, which would facilitate the development of a conceptual framework for industry sectoral negotiations. The key elements of the GATS as it relates to competition policy (and correspondingly the provisions in need of strengthening) are, in order of importance, Articles VI, IX and VIII.

(i) Article VI

Commitments to liberalize service markets can be undermined by government regulation which is overly burdensome and imposes unnecessary restrictions on the supply of a service. While the provisions of Article VI purport to prevent these occurrences, certain changes to Article VI would increase the likelihood of such a result. Especially important is the general requirement of transparency. Members could state the objectives of government regulation. This would establish the principles of fairness and transparency in regulatory action and would facilitate the examination of whether a regulation is "more burdensome than necessary to ensure the quality of [a] service".[13]

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13 GATS, Article VI(4)(b).

In addition, Article VI could be revised to encourage members to regulate sectors only to the extent necessary to achieve their stated objectives. Article VI could be amended to require members to focus on regulating access to a network monopoly, while allowing open competition in services provided through that network. Finally, where possible, Article VI should mandate the use of market mechanisms (i.e., market-based incentives and disincentives) to achieve regulatory objectives.

(ii) Article IX

While Article IX recognizes that business practices may be anti-competitive, it fails to articulate what constitutes anti-competitive business practices. Future GATS negotiations should clarify what constitutes anti-competitive activity. It may also be appropriate for Article IX to specifically reference the possibility of plurilateral agreements between members on joint co-operation or joint enforcement of competition principles.

(iii) Article VIII

The activities of monopoly service suppliers are excluded from the disciplines of Article VIII. However, a monopoly provider could potentially leverage its position in a monopoly market to its advantage in another market. Anti-competitive behaviour may take place domestically, but it may also extend to the territory of other members. While Article VIII.2 purports to prevent anti-competitive leveraging domestically, it does not address the behaviour of the monopolist beyond its own country. The capacity to act in an anti-competitive manner is, to some extent, facilitated by the domestic legal framework in which a firm operates. Members should therefore be required to help prevent monopoly suppliers within their jurisdiction from distorting competition beyond their borders. Article VIII should be amended to extend the existing obligation to conduct of the monopoly supplier.

9. Disciplines in the accounting sector

Could the WTO Agreement on disciplines in the accounting sector be applied to other professions? If so, what elements would apply? Please explain.

In August 2000, the CBA delivered a submission to the federal Departments of Industry and of Foreign Affairs and International Trade, setting out the Association's views on the extent to which WTO rules adopted for the accounting profession could be applied to the legal profession. The submission, which is attached as Appendix I, was entitled *The General Agreement on Trade in Services and the Legal Profession: The Accountancy Disciplines as a Model for the Legal Profession*.

The submission noted that the legal profession has unique characteristics arising from its role as intermediary between the citizen and the law and between the citizen and the state. Lawyers do not simply trade in services; they perform public duties. Lawyers have obligations flowing from their special role which are fundamental to the operation of the justice system and of a free and democratic society, such as preserving independence, maintaining client confidences and avoiding conflicts of interest. Therefore, any GATS rules for the legal profession should not be blindly copied from those applying to other professions. They must be tailored to the unique characteristics of the legal profession and must accommodate differences in national regulatory regimes.

In the submission, the CBA strongly urges the government of Canada to insist that international trade rules respect the self-regulating nature of the profession. To ensure independence from the state, law societies must be able to determine the standards of admission to the profession, establish standards and rules which govern members of the profession and discipline those who fail to meet those standards. This maintains independence of the profession, ensures that lawyers establish a connection with the locality in which they will practice, assures the

public and the profession that practising lawyers have a minimum accepted knowledge of local laws, and protects the unique characteristics and values of the profession.

10. Necessity test

Generally, in the context of services liberalization, are there competition policy concerns regarding a necessity test? Please explain.

The necessity test balances the promotion of expanded and liberalized trade in services with the legitimate regulatory prerogatives of a state. Subject to the concerns raised about the necessity test in the CBA's submission on the Accountancy Disciplines (see Question 9, above, and Appendix 1), the necessity test raises competition policy concerns because (i) it assumes the existence of regulatory objectives which are superior to pro-competitive outcomes, and (ii) as currently worded, the necessity tests in the GATS and elsewhere do not impose upon a regulator the obligation to enact the most economically efficient form of regulation in pursuit of a legitimate policy objective.

11. Regulations on foreign direct investment

Are regulations on foreign direct investment a particular concern? Which discriminatory investment measures should be the focus of further discussion and negotiation? Please explain.

We recognize that foreign direct investment regulations are sometimes intended to serve legitimate national policy objectives. However, from a competition policy perspective, regulations which attempt to limit the scope of foreign investment or foreign participation in a domestic economy raise, by definition, potential concerns. They may limit the number or effectiveness of competitive entities participating within, or seeking to enter, an economy by: (i) directly preventing foreign investment or participation; (ii) discouraging or hindering

foreign investment or participation; or (iii) causing foreign controlled companies to operate at sub-optimal levels in terms of economic efficiency. This, in turn, prevents or limits the development of a liberalized pro-competitive marketplace.

Examples of foreign investment barriers faced by businesses are noted in a recent report entitled *Foreign Investment Barriers* prepared by the Canadian Chamber of Commerce. A survey conducted in connection with this report uncovered certain types of foreign participation restrictions, including: (i) specific prohibitions on foreign participation in certain sectors of domestic economies as well as ownership restrictions; (ii) discriminatory treatment with regard to procurement policies, local financing and access to governmental assistance policies; (iii) forms of performance requirements; (iv) human resource requirements; and (v) restrictions on capital flow.

Absolute restrictions on foreign participation within a domestic economy may represent the most serious example of anti-competitive regulation. However, there are also less transparent measures that may effectively result in foreign investment barriers. The Canadian Chamber of Commerce survey indicates that only 56% of restrictions encountered by responding businesses involved transparent barriers. Consequently, before foreign direct investment barriers can begin to be dismantled, efforts need to focus on increasing the transparency of these barriers so they are more easily identified.

Any effort to remove absolute restrictions or limits on foreign participation should not be accompanied by a corresponding increase in bureaucratic review. For example, the use of the so-called "net benefit" test found in the *Investment Canada Act*, can sometimes be a "moving target" for parties considering investment in Canada. Restrictions on investment and vague standards potentially have chilling effects on investment and, consequently, on competition in Canada.

III. CONCLUSIONS AND FUTURE ISSUES

An international approach to competition law is necessary to capture the gains offered by liberalized trade in services. The GATS should include competition law principles. The essential components of a competition law regime outlined above should guide the development of any future international competition regime.

The WTO Reference Paper is a starting point for the inclusion of competition law principles in other network sectors. However, many aspects of the Reference Paper need to incorporate key competition law principles to achieve the goal of liberalized trade in services. While some of these principles were adopted specifically with the telecommunications sector in mind, concepts such as an impartial regulator, safeguarding against anti-competitive conduct and transparency in the regulatory process can be transferred conceptually to other network sectors with relative ease. The physical barriers to entry which may tend to limit entry in specific network sectors can be addressed by developing provisions within sectoral annexes or sector specific reference papers which directly address such barriers. However, in certain cases, regulatory or competition law regimes can deter innovation by mandating access in markets characterized by rapid technological development and change.