

COMMUNICATION BY CANADA

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TOWARDS A FLEXIBLE FRAMEWORK FOR COOPERATION

The following paper elaborates on a previous submission by Canada outlining its views on cooperation in a multilateral setting (WT/WGTCP/W/155) which is pertinent to the current discussion of the Working Group on Trade and Competition Policy on "modalities for voluntary cooperation".

I. INTRODUCTION

1. Cooperation at the WTO would enable Members to engage in dialogue and exchange views on a range of competition policy issues relevant to the goals of any future multilateral agreement on competition policy. Over time, this can help in the establishment and fostering of mutual confidence in enforcement capabilities and in respect for confidentiality, arising from a shared commitment to protect the competitive process. In this respect, cooperation will be an important part of any future WTO agreement.
2. In Canada's view, a multilateral agreement on competition policy would provide a flexible framework for cooperation. This recognizes that cooperation at the WTO is a long term and incremental process. It also means that cooperation could include a variety of activities, relating to developing institutional capacity, sharing information among competition authorities, or administering the agreement.
3. Given the growing number of competition cases with an international dimension, international cooperation among competition agencies has become increasingly important to effective and efficient enforcement in many cases. Regular dialogue with foreign counterparts cover a range of competition matters, related to both specific competition cases and more general policy issues. For example, a substantial amount of consultation and discussion occurs between competition authorities on market analysis, such as defining the relevant market and identifying barriers to entry. Sharing this type of economic analysis is relevant on a case-specific and policy level. As far as the types of cases involving greater communication between agencies, international cooperation has been particularly important in reviewing cross-border mergers and for investigating international cartels.
4. The paper will begin by outlining some general issues for the WGTCP to consider when examining "modalities for voluntary cooperation" in any future multilateral agreement on competition policy. These considerations include the inter-relationship with capacity building, the role of bilateral

cooperation arrangements as important instruments in competition law enforcement, and the voluntary nature of cooperation. The final section will present some ideas for developing cooperation among WTO Members, including exchange of information and the role of a possible WTO Competition Policy Committee.

II. CAPACITY BUILDING

5. Capacity building is a different concept from cooperation. Capacity building or technical assistance activities deal with the provision of advice to countries without competition laws, those in the process of drafting or implementing them, or those seeking to enhance their institutional capacity. Cooperation is a general term that may include a range of activities from the exchange of public information and views on issues of common interest to inter-authority enforcement cooperation. While cooperation should be distinguished from capacity building, the two concepts will be inter-related at the WTO.

6. Any modalities for voluntary cooperation, therefore, will have to take into consideration provisions in the agreement for capacity building or technical assistance. For example, at early stages, cooperation at the WTO would largely be educative to help Members develop institutional and enforcement capacity. This type of cooperation could take the form of exchanging public information or engaging in dialogue on current competition law and policy issues, or conducting peer reviews of Member countries. Such cooperation could be valuable for Members with less experience with competition law enforcement, but would be distinct from case-specific cooperation among competition authorities.

III. BILATERAL COOPERATION AGREEMENTS

7. In relation to case-specific cooperation, bilateral cooperation arrangements relating to competition law enforcement remain important instruments for competition authorities. For example, Canada has entered into state-to-state cooperation agreements with the United States, the European Community and Mexico (not yet in force), and the Canadian Competition Bureau has also entered into inter-agency cooperation arrangements with competition authorities in Australia, New Zealand and Chile. Further, the Chapter on Competition Policy in the Canada-Costa Rica Free Trade Agreement includes extensive cooperation provisions¹. Agreements are normally established with those jurisdictions with whom Canada has developed a close working relationship or where increased cooperation is anticipated due to expanded economic ties following trade and investment agreements.

8. State-state cooperation agreements generally have the following elements: mechanisms for exchange of information to the extent permitted by national law, such as confidentiality protections; negative comity² provisions and procedures for notifying the other party of enforcement action that may affect its important interests; consultation provisions to resolve issues arising from enforcement activities; co-ordination of parallel investigations insofar as appropriate; and positive comity³ provisions to request another party to investigate anti-competitive conduct taking place in its territory that may affect the other's important interests. Notification procedures are central to the functioning of these agreements in order to bring a matter to the attention of a domestic competition authority that may affect its interests, providing the authority an opportunity to investigate the matter or engage in further dialogue with its foreign counterpart.

¹ See the Joint Communication from Canada and Costa Rica dated 2 July 2001 (WT/WGTCP/W/173).

² Negative comity is a voluntary policy calling for a country to give full and sympathetic consideration to another countries' important interests while it is making decisions concerning the enforcement of its own competition laws in order to prevent harming another country's important interests.

³ Positive comity involves a country's consideration of another country's request that it open or expand a law enforcement proceeding in order to remedy conduct that is substantially and adversely affecting another country's interests.

9. Although cooperation also occurs in the absence of a formal agreement, bilateral cooperation agreements are nonetheless important instruments for competition authorities. Therefore, modalities for voluntary cooperation at the WTO would not interfere with ongoing case-specific cooperation that occurs under bilateral cooperation agreements, initiatives to enhance existing bilateral agreements or the development of new bilateral arrangements. Multilateral cooperation would serve to supplement, but not replace, bilateral cooperation.

IV. MEANING OF VOLUNTARY COOPERATION

10. Another important element to consider in developing modalities is the voluntary nature of cooperation, which, by definition, cannot be forced. The Doha Ministerial Declaration reaffirms this concept in paragraph 25, however the WGTCP will need to consider what "voluntary" means in relation to dispute settlement and in relation other potential obligations of the agreement, such as non-discrimination. For example, in relation to the former, voluntary could mean that commitments would be "non-binding" and therefore not subject to dispute settlement. In relation to the latter, bilateral cooperation agreements would need to be exempted from non-discrimination obligations.

11. While cooperation is possible among diverse countries, even in the face of disparities in size or level of development in competition regimes, a level of mutual trust is necessary in order to advance meaningful voluntary cooperation. Furthermore, to engage in more advanced forms of cooperation certain institutional prerequisites need to be in place, such as a competition law and enforcement agency with appropriate scope, administration and enforcement capabilities.

12. Given the foregoing considerations, the following sections presents two areas for the WGTCP to consider when developing "modalities for voluntary cooperation" in any future agreement on competition policy - mechanisms for exchange of information and the role a WTO Competition Policy Committee might play.

V. EXCHANGE OF INFORMATION

13. Exchange of information is valuable in a number of ways. It can help improve the understanding of competition regimes of Members, enhance transparency and promote convergence of approaches over time. In this way, exchange of information could contribute to developing institutional capacity in Member countries. In addition, as illustrated above, communication and exchanges with foreign counterparts is increasingly important given the growing number of cases with an international dimension. Sharing and discussing relevant information with foreign counterparts investigating similar matters can result in more timely investigations and effective enforcement actions.

14. Given the level of development of competition institutions in many WTO Member countries, it is likely that information exchanged will be mainly for educative purposes. Information of this type would include national legislation, annual reports of competition authorities, guidelines and other enforcement policies, speeches and presentations, and bilateral cooperation arrangements concluded.

15. In addition to the type of information exchanged, the WGTCP will need to take into consideration that exchange of information necessarily occurs within certain parameters. Most importantly, any exchange must be consistent with national laws, including protections to ensure the confidentiality of information. A broad consensus exists that the exchange of confidential information between enforcement authorities should occur within a transparent legal framework that contains appropriate safeguards to protect privacy and the fairness interests of private parties.

16. As outlined below, a Competition Policy Committee at the WTO could facilitate sharing of non-confidential information. Such exchanges would be beneficial to Members in the process of implementing a competition regime or that have a newly established agency to help them build the necessary tools to enforce their domestic competition laws or to support domestic reform efforts. Over time, a multilateral agreement could provide the practical basis for relationships of trust and convergence on approaches to gradually develop between competition authorities.

17. In order to engage in more case-specific cooperation, a number of factors come into play. For example, Members must have mutual confidence regarding the willingness and ability of other Members to protect confidential information and respond to requests in a timely and effective manner. Such prerequisites will need to be met in order to engage in case-specific cooperation or investigatory assistance.

VI. THE ROLE OF A POSSIBLE COMPETITION POLICY COMMITTEE

18. Within the agreement on competition policy, Canada takes the view that a WTO Competition Policy Committee should be established. Such a Committee could play a significant role in enhancing exchanges between Members and serve as a forum for Members to learn about each other's practices and policies. This type of dialogue would be distinct from the case-specific cooperation, such as exchange of notifications or coordination of investigations, that occurs under bilateral arrangements.

19. An illustration of a working group's role in strengthening relationships between its participants is the North American Free Trade Agreement Working Group on trade and competition⁴. The discussions of the NAFTA Working Group improved the understanding of each Parties laws, institutions, legal procedures and enforcement practices and strengthened contacts and cooperation on enforcement matters. It also served to clarify differences in substantive laws and approaches among Parties and re-affirmed the Parties' commitment to competition law and the importance of promoting competition policy in the free trade area.

20. The principles guiding the Working Group were that the gains from trade liberalization in the NAFTA should not be compromised by anti-competitive conduct and that competition laws should be enforced in ways that preserve and promote opportunities for pro-competitive and efficient business activity in the free trade area. Delegations produced several studies which provided the basis for many of the Working Group's discussions. As listed in Annex 1, discussion papers examined three general topics: (1) comparison of terms and analytical approaches; (2) similarities and differences between the Parties' competition laws, including potential effects on trade, and (3) other specific issues, such as national treatment in the application of competition laws.

21. While bilateral enforcement cooperation was more fully developed between the U.S. and Canadian competition authorities, the NAFTA Working Group was helpful in reinforcing relationships with Mexican officials. Mexico has since concluded separate bilateral cooperation agreements with the United States and Canada (not yet in force) modelled on the 1995 *Agreement between the Government of Canada and the Government of the U.S.A. regarding the Application of their Competition and Deceptive Marketing Practices Laws*, thereby completing the cooperative framework between all NAFTA partners.

22. A WTO Competition Policy Committee could play an important role in enhancing mutual understanding and trust among Members. With this in mind, the following lists possible functions for such a Committee:

⁴ Article 1504 of NAFTA established a Working Group on trade and competition to provide for the discussion of issues concerning the relationship between competition laws and policies and trade in the free trade area.

- Provide a forum for exchange of information. Facilitating exchanges of information, for example through establishing contact points to facilitate requests between competition authorities or by maintaining a WTO Secretariat web site to compile information on competition law and policy issues of Members, is clearly an important role. Developing countries could benefit from sharing experiences on issues of common interest, and over time this will foster greater convergence of competition laws and policies. Exchanges could also include information on projects dealing with cooperation in other international fora, such as the OECD, UNCTAD and the International Competition Network.
- Coordinate or monitor technical assistance. In addition to the capacity building role of the previous function, the Committee could, in consultation with other international fora, coordinate technical assistance activities. Given capacity building is a key component of any multilateral agreement on competition policy, a Committee will need to be involved in this area, though not necessarily as the provider of technical assistance (for example, the Committee could maintain a database of events or experts in the field).
- Examine the interaction between competition policy and international trade policy issues. Discussions of the WGTCP have illustrated that there are a number of interactions between the two policy areas. The Committee could provide a forum to discuss and share research and analysis in this area, for example related to anti-competitive practices that affect international trade.
- Provide a forum for non-binding peer review. The Committee would provide a non-adversarial forum to foster dialogue and experience sharing between Members, which over time should produce more convergence of law and analysis, and provide a better understanding of interaction between trade and competition. Peer review could also improve Members' understanding of cooperation and the requirements for enhanced cooperation mechanisms.
- Consider the long term vision of enhanced cooperation. Cooperation mechanisms may need to be improved or modified in the future. For example, once a greater level of mutual trust is reached between Members, it may be appropriate to consider discussion of procedural and substantive convergence issues, or enhanced cooperation mechanisms, such as the coordination of enforcement actions.

VII. CONCLUSION

23. In Canada's view, cooperation is integral to a multilateral agreement on competition policy at the WTO. Cooperation is also a long term and continuous process, starting with basic elements which can engender greater cooperation in the future. A multilateral agreement will establish communication channels among Members in order to help develop these fundamentals, i.e. an understanding of competition law and policy concepts, similarities and differences in Members' competition system, and the parameters of cooperation. Within a multilateral agreement on competition policy, a Committee would provide institutional support to foster dialogue among Members, and provide a forum for exchanges of information, a basic and important element of cooperation. As experience is gained, WTO Members should be able to consider, step-by-step, more advanced forms of multilateral cooperation.

ANNEX 1

NAFTA 1504 WORKING GROUP PAPERS PRODUCED BY DELEGATIONS

Working Group delegations produced three general types of papers for discussion purposes:

- (i) **Contextual Framework.** Papers which established the general contextual framework for discussion of trade and competition matters, including:

- *Competition and Trade Policies in the NAFTA Countries: A Comparison of Terms, Concepts and Analytical Approaches – (U.S.)*

A technical compendium of key terms, concepts and methodologies in trade and competition law.

- *Objectives and Approaches of the 1504 Working Group – (Canada)*

This paper suggested a work plan on various issues, beginning with the drafting of papers to identify similarities and differences among the competition laws of the Parties and their potential trade-distortive effects, if any.

- (ii) **Comparison of Competition Laws.** Papers which analyzed the similarities and differences between the Parties' competition laws, including potential effects on trade:

- *Scope and Coverage of Competition Laws of Canada, Mexico and the United States – (Canada)*

This paper compared the scope and coverage of competition laws among the Parties as exclusions from the application of competition laws may affect market access; the paper was an adjunct to the detailed comparison of the Parties' laws and exceptions thereto in the National Treatment paper (see below).

- *Vertical Restraints - A Comparative Analysis – (Mexico)*

This paper discussed general elements of antitrust enforcement and compared the treatment of specific types of vertical restraints (*i.e.*, contractual or other restrictive arrangements that affect competition within a particular product brand) in each country.

- *Horizontal Restraints - A Comparative Analysis – (U.S.)*

This paper provided an overview of the treatment of horizontal restraints (*i.e.*, price fixing, bid rigging and other anti competitive practices involving firms that would otherwise be in competition with each other) in each jurisdiction.

- *Merger Review in Canada, the U.S. and Mexico – (Canada)*

This paper analyzed the similarities and differences in merger review, including procedural and substantive issues.

- *Treatment of Abuse of Dominant Position/Monopolization by Canada, Mexico & the United States – (Canada)*

This paper canvassed substantive similarities and differences in the treatment of anti-competitive activity by dominant firms.

- *Export Cartels in North America – (Mexico)*

This paper analyzed the exemption of certain joint export-related activities from the application of the competition laws of each of the NAFTA countries.

- *Private Actions for Violations of Antitrust Laws – (U.S.)*

This paper compared the rights of private parties in each jurisdiction to pursue private actions for the breach of competition laws.

(iii) **Specific Issues Related to Trade and Competition.** Papers which discussed specific competition and trade issues:

- *National Treatment in the Application of Competition Laws by Canada, the United States, and Mexico – (Canada)*

This paper discussed potential national treatment concerns arising from the competition laws of the Parties, and contained a table which contrasted the core standards of the Parties' competition laws.

- *Telecommunications and Competition Policy in Mexico – (Mexico)*

This paper discussed developments in the Mexican telecom sector and the Federal Competition Commission's efforts to promote competition.

- *Treatment of Cross-border Anti-competitive Practices under National Competition Laws of the NAFTA Partners – (U.S.)*

This paper reviewed types of conduct generally covered by national antitrust laws, in the context where such conduct occurs in one or more NAFTA countries and has market access or anti-competitive effects that extend beyond a single country. The paper discussed how national competition laws and enforcement policies would apply to such conduct.
