WORLD TRADE ORGANIZATION

WT/WGTCP/W/226
12 March 2003

(03-1404)

Working Group on the Interaction between Trade and Competition Policy

Original: English

COMMUNICATION FROM CANADA

The following communication from the Permanent Delegation of Canada incorporates oral interventions made by that delegation at the Working Group's meeting of 20-21 February 2003.

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I. INTRODUCTION

1. The Canadian delegation would like to thank the Secretariat and Members who have to date made a contribution to this very important discussion and we look forward to three days of very useful and thought provoking exchanges on the possible elements of a multilateral framework for competition.

2. We feel that the discussions in our working group to date have been valuable in fleshing out the objectives and expectations of Members in terms of a multilateral framework for competition policy. Canada continues to support the establishment of such a framework and sees benefits for all Members in its development. In this context we welcome the report by Professor Evenett (circulated as JOB (03)/31), and while we have not yet had a chance to review it in detail, we look forward to an opportunity to consider his findings.

– First and foremost we believe that a framework for competition policy will ensure that the gains from liberalization are not undermined by the anti-competitive behaviour of private actors. In this respect, developing countries that lack enforcement powers are often more vulnerable to the effects of anti-competitive activities, such as international cartels.

– A multilateral agreement on competition policy would establish a coherent set of principles for sound competition policy among all Members and ensure a competitive environment and more transparent and predictable climate to encourage foreign trade and investment.

– An agreement would also contribute to the important objective of building institutional capacity in developing countries. It could help guide Members without competition laws as they draft such laws and establish an enforcement authority.

– Such an agreement will help ensure progress in reducing the enormous costs to the world economy, and specifically to developing countries, of global anti-competitive practices, such as hard core cartels. An agreement will also have benefits to consumers by promoting competitive prices and product choice.

– Finally, an agreement will encourage cooperation among Members. Given the prevalence of cross-border anti-competitive activities that can affect the interests of more than one country, cooperation among competition authorities is increasingly important to effectively remedy such activities.

3. We do recognize, however, that to achieve the stated benefits of a multilateral framework for competition, we must first recognize the challenges involved in reaching and ultimately implementing such a framework. These challenges will be borne disproportionately by developing countries.

4. For this reason, Canada believes that developing countries need to the at the centre of our discussions on a multilateral framework for competition policy. Competition law and policy aims to ensure efficiency in the marketplace and help put scarce resources to their best use. Without competition law and policy, the scarce resources of developing countries can be wasted. We believe that each WTO Member should have the capacity and tools to effectively deter and remedy anti-competitive practices to ensure more competitive and efficient marketplaces.

5. We will need to focus very seriously on how to address the challenges faced by developing countries, for example through firm commitments, perhaps in the timing of capacity building and technical assistance. In addition, recognition of the need for flexibility and progressivity is crucial to ensuring commitments made by Members do not hinder their ability to pursue important policy objectives at home.

6. Canada is committed to developing a multilateral framework on competition policy and to advancing the discussions in our working group. We believe that paragraphs 23-25 of the Doha Declaration will serve as a useful guide to defining the elements of a possible agreement and we have sought during past meetings to provide some clarity on where we stood on these issues. We welcome the opportunity to further discuss these again over the coming days.

II. DOHA ELEMENTS

A. CORE PRINCIPLES

7. We turn first to the issue of the core principles. We have had an opportunity since the last meeting to consider the most recent submissions on this issue by other delegations, in particular the submission by the European Community and its member States (WT/WGTCP/W/222).

8. There seems to be agreement that a multilateral framework for competition should be consistent with the principles of non-discrimination, transparency and procedural fairness. But there has been much debate over how these principles should be tailored for the purposes of competition policy.

9. We would agree with the European Commission that a multilateral framework would establish a solid basis for dealing with competition policy issues which impact international trade and that a long term goal might be to work towards greater convergence.

10. We also see the value in highlighting the principles of progressivity and flexibility in any commitments to establish a law and authority (including at the regional level), in not prejudging the substantive scope of such a law, regarding the powers of enforcement authorities, and in a member's ability to define scope and modalities for exclusion and exemptions.

11. On non-discrimination, we are strongly committed to competition law and policy that does not make distinctions on the basis of nationality. To do otherwise, would be against competition

principles. However, we also need to preserve discretion of competition authorities and ensure that their decisions are not subject to scrutiny by dispute settlement panels. While we will discuss our views on compliance matters later in greater detail, we would note at this time that Canada has serious concerns about subjecting competition obligations to binding WTO dispute settlement. We support a non-binding mechanism like peer review. With peer review, Members could address a wide array of issues of mutual interest through a non-binding process.

12. We also note the discussion on market access in the EC's paper. We agree that by making the operation of the domestic market more efficient and transparent, the effective domestic competition policy enables traders and investors to benefit from existing market access conditions but does not necessarily infer greater access. However if there is not effective application of competition policy these existing market access concessions will not be achieved. While we agree binding core principles is not the solution, we will need to explore how we can ensure concerns regarding application of the law can be addressed in a non-binding way.

13. Any multilateral framework, however, will need to be flexible to allow Members to pursue other national policies or strategies. From the perspective on those Members who lack a competition law or enforcement capabilities, a multilateral framework will encourage all Members to have the tools and capacity to effectively address anti-competitive business practices within their markets.

14. We would agree that non-discrimination provisions should not be extended to cover existing or future cooperation agreements to avoid implication of MFN.

15. The EC has identified the need for transparency commitments in terms of laws, regulations and guidelines of general application. We agree that it is clearly important for these items to be transparent, through publication and notification. We also recognize, however, that transparency obligations can place more of a burden on Members with less experienced competition regimes. A multilateral framework for competition should establish sufficiently high standards of transparency while balancing progressivity with the necessary technical assistance. In addition, while flexibility in the area of exclusions and exemptions will be necessary, it is in this area that transparency is particularly crucial to ensuring a predictable rules based trading system without being overly intrusive in domestic policy making.

16. Canada takes the view that certain basic provisions for procedural fairness should be enumerated in a WTO agreement on competition policy. We believe that these provisions are necessary to provide assurances to parties affected by competition investigations that the proper procedures are followed in order to protect their rights and interests. We would concur with other delegations that a notice of charges, fair and equitable administrative proceedings, and an appeal process, could provide the required checks and balances to the claims of relevant parties. Clearly, we recognize that Members will differ in the implementation of these elements to reflect their different legal traditions.

17. We would also note that there is a need to distinguish between the obligations and commitments of signatories or Member countries versus the rights of private parties to recourse in a WTO agreement. Like other WTO Agreements, we would assume obligations in a competition agreement would be on Member States, as oppose to private parties.

18. Finally, we would highlight the complementarities or linkages between core principles and the other elements. For example, adherence to common principles will enhance cooperation among Members and reduce likelihood for conflicts between jurisdictions. As we will discuss, this is increasingly important in a world of international anti-competitive activities. This cooperation is vitally important in detecting and remedying international hard core cartels. Developing common

core principles can also help contribute to the objective of improving institutional capacity of competition regimes in developing countries.

III. HARD CORE CARTELS

19. The Doha Declaration and our discussions in the Working Group in July 2002 have clearly reinforced that hard core cartels have harmful effects on the economies of Member States and on international trade. This has led to the need for a multilateral ban on hard core cartels.

20. Our discussions have illustrated that cartels are not just a developed country phenomenon. In fact, cartels Members will often try to evade authorities by carrying out their activities in jurisdictions without competition laws or that lack experience in prosecuting cartels. As for the effects of cartels on developing countries, higher prices caused by hard core cartels have obvious implications for the development and competitiveness of developing countries, but there is also the possibility for broader effects on developing countries, for example by inhibiting international transfer of technology.

21. In light of the issues raised in our previous discussion on cartels, Canada would like to present some further views on the structure of provisions on hard core cartels in any multilateral agreement on competition policy.

22. First, a clear statement to prohibit hard core cartels is required. In this respect, we need to ensure a balance between a clear and precise definition of the types of cartels that are banned and flexibility to allow pro-competitive arrangements or partnerships. While there are differences between domestic cartel laws and exemptions, at the same time there is a growing convergence among the competition community as to the types of agreements among competitors that are clearly anti-competitive.

23. In Canada, we are currently considering reforming our conspiracy provisions so that truly egregious agreements among competitors are prohibited outright under the criminal provisions, while other agreements that might have pro-competitive aspects can be assessed under civil provisions. It is believed that such reforms would provide more clarity and certainty to the business community, as well as improve the compatibility of the Canadian Competition Act with the laws of other countries. While consultations are still ongoing regarding these reforms, they point to the need for clear and articulate definition of hard core cartels.

24. Any definition of hard core cartels should include those activities that are clearly harmful to competition. For example, we had suggested looking at the OECD recommendation for guidance. A definition, for instance, would be any agreement or arrangement between competitors to fix prices, allocate market shares, restrict output or rig bids.

25. Furthermore, Canada believes that any definition should be sufficiently broad to include domestic and international cartels. Domestic cartels are as harmful as international cartels, not only on the domestic economy and to consumers, but also on trade and the interests of other countries.

26. Second, for a ban to be effective, we have discussed how to address the issues of effective sanctions to deter cartels, as well as enforcement powers and investigative tools to detect secretive cartel activities. While cartel prosecution will be up to the discretion of each Member, at the same time, we can identify appropriate investigative tools and effective sanctions for cartels. As we mentioned, the OECD Recommendation can provide some guidance in this respect. At the last meeting, some Members commented that the enforcement powers of their competition agencies were underdeveloped, and this was hampering enforcement efforts. This underscores the importance of an effective enforcement structure. It also underscores the need for flexibility in any multilateral provisions dealing with cartel enforcement.

27. In this respect, one possibility would be for provisions in the agreement on hard core cartels to be supplemented by guidelines in order to elaborate on the types of enforcement powers or penalties expected in the domestic regime in order to ensure the ban is effective. These guidelines could be a subject of peer review to share Members' experiences and contribute to improved capacity of Members to enforce their cartel laws.

28. Finally, a key component to effective cartel enforcement is international cooperation.

IV. MODALITIES FOR VOLUNTARY COOPERATION

29. First, a comment on the scope of cooperation among WTO Members. We would note that cooperation at the WTO could include cooperation beyond the area of cartels. As Canada has previously stated, we take the view that hard core cartels should be part of a horizontal national competition law and policy. Given the inter-relationships between different types of anti-competitive activities, there are certain complementarities to having broad law and enforcement regime. Without prejudging the outcome of any WTO agreement, at this time, we don't believe that when we discuss modalities for voluntary cooperation, this needs to be limited to cartels. In any event, as will be discussed, Canada believes that cooperation is voluntary in nature, and while case specific cooperation will be a component of any modalities in a WTO agreement, cooperation at the WTO will to a large extent involve more general exchanges of information and experiences at this time.

30. Discussions last meeting focussed on two levels of cooperation - general and case-specific. For general cooperation, we considered what role a possible Competition Policy Committee could play. Canada suggested a number of roles for such a Committee, including providing a forum for exchange of non-confidential information, coordinating or monitoring technical assistance, examining the interaction between trade and competition policy issues, providing a forum for non-binding peer review and considering the long term vision of enhanced cooperation.

31. The intention of any Committee is primarily to enhance exchanges among Members to help improve an understanding of competition policy issues faced in Member countries, and their potential relationship with international trade. Through peer review, Members could share experiences about anti-competitive practices that can affect the interests of other Members, and the kind of cooperation that would be valuable to effectively address such activities.

32. On case-specific cooperation, at the last meeting, a number of Members outlined their experiences with bilateral cooperation and the types of cooperation mechanism in bilateral cooperation agreements.

33. It was agreed that any cooperation at the WTO would complement, rather than replace, case enforcement cooperation between agencies pursuant to bilateral cooperation agreements, recognizing that these bilateral relationships are based on mutual trust and have developed over time. Nonetheless, it was also recognized that many anti-competitive practices are international in nature and can affect the interests of several countries. To successfully combat these activities, a collaborative effort is often required.

34. We saw that many Members, including Canada, rely on bilateral cooperation agreements to cooperate with foreign counterparts, but that such arrangements do not cover the relationships between all Members. We need to further explore whether there is the possibility to replicate certain aspects of bilateral cooperation agreements at the multilateral level.

35. Like bilateral cooperation agreements, cooperation at the WTO would be voluntary. Cooperation is not any area where binding commitments would be appropriate.

36. In addition to being voluntary, a framework for cooperation at the WTO should be flexible. Cooperation can evolve over time, from informal exchanges to formal procedures. Any WTO provisions on cooperation will need to be flexible in order to take into consideration the differences in Member's regimes, but also the fact that cooperation could evolve over time as more experience is gained. Canada had suggested that, as a first step, provisions for the exchange of information could be a valuable cooperation mechanism among Members. While any exchanges will need to respect protections in domestic laws for confidential information, a significant amount of cooperation can still take place through dialogue and exchange of non-confidential information.

V. NATURE AND SCOPE OF COMPLIANCE MECHANISMS

37. When considering an appropriate compliance mechanism, we need to consider what the objectives are that we want to achieve in any multilateral agreement on competition. As we had mentioned at the outset, we believe that a WTO framework for competition policy could achieve a number of objectives, for example promoting sound competition principles and more open and competitive markets for trade and investment as well as encouraging cooperation among Members to combat global anti-competitive practices. This will ensure that private anti-competitive do not undermine the benefits of trade and investment liberalization. In Canada's view, these objectives are best achieved through the establishment of a multilateral framework for competition policy that would include a commitment to the core principles, provisions to combat hard core cartels, a flexible framework for cooperation and commitments to flexibility and progressivity in order to take into account needs of developing Members.

38. We recognise the importance of and the challenges to developing a compliance mechanism that will ensure free and open markets for companies to invest and trade abroad, while at the same time preserving the discretion of domestic competition authorities and Member's ability to pursue other policy objectives. As previously mentioned, we currently support a non-binding peer review process and look in particular to the existing WTO mechanism which provides for peer reviews of Members regimes through the Trade Policy Review Mechanism.

39. A Peer Review approach provides a non-adversarial forum to query and better understand other countries' policies and practices with the goal of sharing best practices and improving domestic policies or institutions. In the WTO, Canada has advocated a peer review approach in the past to achieve two objectives 1) as a substitute for dispute settlement and 2) as an ongoing, long term educative and information sharing mechanism to allow Members to better understand each other's competition law and policies and their enforcement.

40. Questions remain as to the appropriate scope or coverage of a peer review mechanism as well as whether it should explore trends in the application of enforcement of a country's law, or be limited to ensuring conformity by the country with its obligations under the framework agreement. We would also question whether such a process should be voluntary or mandatory and whether a process for follow-up on recommendations made by the peer group would be appropriate.

41. We believe that peer review could foster cooperation among Members and contribute to institution building for those countries with newly established competition law and policy regimes. Additionally, with no binding obligations, peer review would clearly ensure that individual enforcement decisions are not reviewed or challenged, yet might allow Members to explore the systemic application of competition law and policy over time.

42. The challenge remains in crafting a compliance mechanism system to achieve our objectives. We have outlined some ideas for peer review. The working group could also explore the value of combining different compliance options in an effort to develop the most appropriate and comprehensive compliance system.

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