International Chamber of Commerce
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Policy Statement

Competition policy in the WTO: Doha Declaration issues

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Prepared by the Commission on Competition

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1. Introduction

1.1 In preparation for the 2003 WTO Ministerial Meeting and subsequent negotiations, paragraph 25 of the Doha Declaration mandated the Working Group on the Interaction between Trade and Competition Policy (the "WTO Working Group") to focus on the clarification of:

(i) core principles, including transparency, non-discrimination and procedural fairness;

(ii) provisions on hard core cartels;

(iii) modalities for voluntary cooperation; and

(iv) support for progressive reinforcement of competition institutions in developing countries through capacity building.

1.2 This paper discusses each of these subjects from a private sector perspective, with the objective of providing input to the WTO Working Group. Since business plays a central role in the WTO goal to expand cross border trade in goods and services, ICC assumes that it is helpful to provide input from a business perspective to the WTO as it continues its important work on the interaction between trade and competition policy. ICC represents companies and associations from over 130 countries and is

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the only representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

1.3 ICC continues to support the work of the WTO Working Group and appreciates the opportunity to contribute. ICC's intention is to focus discussion on areas that require consideration from the perspective of international business.

1.4 World business, as represented by ICC, firmly believes that an open multilateral system that facilitates flows of goods, services and investment across national borders is a major force for raising living standards and creating jobs in all parts of the world. Growth in world trade and investment - which far outpaces growth in world output - is an essential condition for the spread of job and wealth creation throughout the world economy. ICC notes that both government and private sector practices can impede these objectives.

1.5 Governments and business must work more closely together to design the multilateral rules for the worldwide marketplace that will be increasingly necessary for the globalization of trade and investment. The special contribution of business is to help governments to develop rules that maximize the scope and ability of business to work productively to create wealth and employment, while maintaining appropriate individual and business freedoms.

1.6 Competition policy is one of the areas in which an international framework is germinating, and in which this necessary balance has to be achieved. Private sector input is necessary to ensure that the work done is realistic, potentially effective, and balanced, therefore more likely to be accepted.

2. Summary

2.1 ICC has actively contributed business views to international discussions on the interaction between trade and competition policy. In its November 1998 "Statement on future WTO work on competition and trade", ICC supported the mandate of the WTO Working Group as established at the December 1996 Singapore Ministerial Conference, but suggested that it should not go beyond educational and informative discussions among its members on market access issues related to competition and trade policies. In that note, ICC recommended that if the WTO Working Group's mandate were to be prolonged, there should be opportunities for the WTO Working Group to receive and consider business views. Dialogue with the business community would be essential should the WTO consider expanding the Working Group's mandate beyond its current analytical and educational focus.

2.2 In a joint statement with the Business and Industry Advisory Committee to the OECD (BIAC), "ICC/BIAC comments on report of the US International Competition Policy Advisory Committee" (3 June 2000), (the "June 2000 Statement") ICC and BIAC stated that "the WTO is not an appropriate forum for the review of private restraints and that the WTO should not develop new competition laws under its framework at this time…" In the June 2000 Statement, ICC also took the view that a dispute resolution mechanism within the framework of a multilateral agreement on competition laws raises many complex issues and was premature at the time.

2.3 There is broadly shared recognition among ICC members that the issues in question are complex and that, while efforts are being made to achieve a workable level of soft harmonization and convergence in the application of the world's already large number of competition regimes, there remain significant differences on substantive competition law principles and their application. Bridging those differences will require time and a great deal of cooperation among governments, competition authorities, private sector interests and other stakeholders. The issue of the inclusion of a competition framework in the WTO system thus should be assessed very carefully as the WTO proceeds at its meetings later this year.

2.4 ICC believes that the "core principles" identified in the Doha declaration that set out this Working Party's present charter - transparency, non-discrimination and procedural fairness - are, as broadly understood, fundamental and that they should be reflected in the competition regime of every jurisdiction that chooses to adopt one.

2.5 ICC identifies in this paper key issues that require consideration in any discussion or analysis of competition policy norms.

2.6 ICC notes that the backdrop for any discussion of procedural or substantive competition policy norms in a multilateral framework is constantly changing. In particular, regard must be had not only to private sector positions such as those put forward by ICC and BIAC, but the ongoing work of other international organizations such as the OECD and the International Competition Network (ICN). Work on many of the issues before the WTO Working Group is proceeding rapidly in various fora shaped by competition policy and legal developments.

2.7 In particular, ICC encourages the WTO Working Group to carefully consider in the broader competition policy context, the application of the principles of transparency, non-discrimination, procedural fairness and protection of confidential information endorsed in the merger context, by the ICN at its inaugural conference in Naples, Italy, September 2002 ("Guiding Principles for Merger Notification and Review") if and when developing recommendations for going forward.

2.8 ICC joins in the condemnation of "hard core cartels," which victimize business consumers and competitors and ultimate consumers alike, while noting the importance of addressing important definitional issues in this connection, as well as the importance of appropriate safeguards for confidential information in the context of investigations of cartel activity.

2.9 With respect to modalities for cooperation, ICC encourages the expanded use of appropriate voluntary "peer review" mechanisms that periodically subject jurisdictions' competition regimes to in-depth scrutiny and comment such as those conducted under the OECD's Regulatory Review program and the WTO's TPRM.

3. Non-discrimination

Competition laws should not discriminate on the basis of nationality

3.1 ICC strongly supports the view that competition laws should not discriminate on the basis of nationality, and that non-discrimination should be considered a core principle of all competition laws. Put another way, the principle of national treatment should apply to competition laws, i.e., the principle that a government should treat the goods, services and persons of other nationalities no less favorably than it treats its own.

3.2 It is generally accepted that competition laws and their implementation should be "nationality-blind," and should be concerned exclusively with the impact on competition of the conduct or transaction in question. The recently adopted ICN "Guiding Principles for Merger Notification and Review" endorse non-discrimination on the basis of nationality in the context of the merger review process. Competition laws that are expressly drafted or implemented so as to favor local as against foreign firms, distort trade and undermine the credibility of competition policy generally. They risk becoming instruments of protectionism rather than a guardian of open and efficient markets.

3.3 Any WTO competition agreement, if one does come about, should include an appropriately tailored prohibition on de jure nationality-based discrimination. ICC considers that including de facto discrimination in such a prohibition would, although attractive at the level of principle, require further consultation and thinking in order to see whether a workable line can be drawn between inappropriate

de facto discrimination and legitimate enforcement discretion, both as an evidentiary matter and as a substantive matter.

3.4 The application of the non-discrimination principle to de facto nationality-based discrimination in the context of competition law raises complex issues. These issues are of two kinds. First, it may prove difficult or impossible to identify instances of de facto discrimination with any assurance. A competition authority that wants to bend its policies or its enforcement decisions to favor its nationals can cloak its actions in ostensible competition-based rationales. Second, competition authorities exercise a wide range of discretion in their enforcement decisions, both in choosing their enforcement targets, in reaching their substantive conclusions, and in choosing remedies. In considering this issue, the WTO should take into account the risk that a binding rule against de facto discrimination, accompanied by dispute resolution, could too easily trigger supranational litigation of individual enforcement decisions or enforcement policies, and deprive competition authorities of a degree of necessary and legitimate discretion to enforce or not to enforce in particular cases.

3.5 In adopting any nondiscrimination principle, it is important not to sweep so broadly as to prohibit legitimate distinctions that may coincide with nationality but that nonetheless have appropriate nondiscriminatory bases. For example, evidence-gathering powers will often differ for firms located abroad, in view of sovereignty and other issues that may arise regarding foreign-located evidence. Similarly, regulatory schemes in local markets result in differences in the way competition law is applied in those markets and the way it is applied to foreign-based firms that are not subject to the same regulations. It is important to distinguish in these cases between discrimination based on corporate nationality or ownership, which generally should be unacceptable, and differences based on where the firm is operating and what markets are affected by its activities.

Important questions remain and need to be considered by the Working Group about the application of a non-discrimination principle to competition laws

3.6 Even a prohibition on de jure discrimination raises difficult questions. Set out below are examples that should be considered and resolved before adopting any binding non-discrimination principle. These examples do not, of course, exhaust those that arise in examining the nondiscrimination issue; but they do suggest that the issue is more complex than it may at first seem, and that it requires careful examination and analysis. Preliminary comments have been offered on some of these examples.

3.6.1 *Example 1:* Under a bilateral or regional antitrust cooperation agreement, a jurisdiction cooperates more closely with, or shares information more extensively with, parties to the agreement than with nonparties.
Comment: This does not constitute impermissible discrimination. Competition authorities must have discretion to tailor their cooperation to considerations that are specific to the other jurisdiction involved.

3.6.2 *Example 2:* Under a positive comity or "who goes first" agreement, a presumption is set up under which each party refers enforcement action to the other party, in whose territory the companies are based, the conduct is centered, or the effects of the conduct predominate. The presumption does not apply to jurisdictions that are not party to the agreement or to a similar agreement.
Comment: As in the last example, this does not constitute impermissible discrimination. Given existing disparities among the world's competition law regimes - disparities that are likely to persist for some time - ICC believes that competition authorities should retain discretion regarding the extent of their cooperation with, or deference to enforcement by, authorities of other jurisdictions. That discretion should not be viewed as inconsistent with the principle of nondiscriminatory enforcement.

3.6.3 *Example 3:* A competition enforcement authority gives explicit priority to effective enforcement against foreign-based cartels whose members sell into its markets.
Comment: While there would be reasons for legitimate concern if this competition authority chose to target foreign cartel participants while ignoring equally culpable domestic participants, or equally

damaging domestic cartels, instances of this nature should not be justiciable under internationally binding rules or dispute resolution. Subjecting prosecutorial decision-making of this nature to supranational review would unduly interfere with legitimate discretion and resource allocation, and in effect impose an unwarranted and artificial obligation to "balance" enforcement efforts among a range of targets.

3.6.4 *Example 4*: A jurisdiction's enforcement policy restricts aggressively competitive activities by large powerful firms in order to protect small and medium firms. In the context of this economy, the large powerful firms are foreign and the small and medium-sized firms are local. Apart from policy questions that are raised by a policy that may amount to protection of less efficient firms, this does not necessarily constitute impermissible discrimination. However, what if the jurisdiction passed a new law designed to increase protection for small and medium firms and there was evidence the law was intended to neutralize their foreign rivals' advantages of efficiency and access to capital?

3.6.5 *Example 5*: A competition law that, by its express terms, deals more harshly with, or denies exemptions or favorable treatment to, non-nationals appears on its face to be discriminatory. Does that mean that any exemption available to domestic, but not to foreign, firms is suspect?

3.6.6 *Example 6:* A competition law requires filing and review of international contracts, but has no such requirement for similar contracts between domestic firms: does this constitute impermissible discrimination?

4. Due Process and Transparency

Overview

4.1 ICC strongly believes that due process and transparency are important core principles to be respected and applied in the design, implementation and enforcement of competition laws at the national level and with respect to any multi-jurisdictional enforcement cooperation. Both principles are essential because they provide stakeholders - the public, consumers and competitors - some assurance that the system will produce consistent and rational results and generate confidence in the system of competition law enforcement. Those jurisdictions with the longest traditions of competition law enforcement have managed to create a consensus for such laws and policies by trying to grapple with these issues and to continually balance the interests of a rigorous competitive process with concerns for due process and fair play. It is perhaps all the more important that laws and policies enacted to safeguard the competitive process be seen to be administered in a transparent and fair manner.

4.2 The following are suggested key due process and transparency elements of competition policy offering a preliminary view of elements that need to be considered and resolved before adopting any binding principles of due process and transparency in the WTO context, should this prove desirable. These questions do not, of course, exhaust those that arise in examining these issues; but they do suggest that the issues are complex ones that require careful examination and analysis. Many of these values are endorsed in the "Guiding Principles for Merger Notification and Review" recently adopted by the ICN which should be an important basis for any discussions on issues of transparency and due process in the WTO . The institutional framework that best provides the checks and balances desirable from a business perspective is one that combines both administrative proceedings and private suits in national courts. However, these suggested elements would apply with equal force to regimes that rely exclusively on formal participation in administrative proceedings or those that rely exclusively on private suits before national courts.

4.2.1 *Mechanism for bringing matters before competition agency*. The process should provide a mechanism whereby anyone can bring a matter to the attention (by complaint or otherwise) of the

competition agency; such complaint should identify the interests and competitive problems they seek to address. Agencies should develop appropriate systems to filter out spurious complaints.

4.2.2 *Right to be advised of progress and reasons for decisions.* Those who bring matters to the attention of the competition authority should, to the extent practicable and appropriate, be kept advised of the progress of the authority's examination and its ultimate determination, including reasons for not initiating an investigation or launching proceedings if applicable, having regard to confidentiality obligations.

4.2.3 *Right to notice and disclosure of investigations.* Persons subject to investigation should be advised at the earliest possible time of the nature of the matters under investigation and the basis for the investigation, unless doing so would materially prejudice the authority's enforcement obligations. Further, persons with a "legitimate interest" in the proceedings should receive notice and disclosure of investigations at the earliest time practicable. Persons with a "legitimate interest" should include complainants and third parties who satisfy the appropriate authority that they will be directly and significantly affected by the conduct being investigated.

4.2.4 *Right to make submissions.* Persons subject to investigation and persons with a legitimate interest in matters being considered by the competition authorities should be allowed to make written or oral submissions to the authorities at any time as well as offer evidence and participate in formal hearings or proceedings.

4.2.5 *Independent and objective decision.* The first decision should be an independent and objective assessment by the deciding body.

4.2.6 *Transparency of substantive and procedural rules.* The substantive and procedural rules, including evidentiary rules must be transparent. In order to foster consistency, practicability and fairness, the process should be transparent with respect to the policies, practices and procedures involved in the review, the identity of the decision-maker(s), the substantive standard of review, and the basis of any adverse enforcement decisions on the merits.

4.2.7 *Right of appeal.* A timely appeal of decisions to an independent judicial authority should be provided.

4.2.8 *Timely decisions.* Decision-making by agency and appellate bodies must be timely. (Deadlines for responding to complaints and for completing investigations and proceedings should be stated in advance, but the agency could have the opportunity to extend these for good faith reasons or, in a merger investigations, with the consent of the merging parties). Competition authorities should be accountable for adherence to stipulated timelines.

4.2.9 *Ability to challenge investigatory measures.* Throughout the investigation, there should be an effective ability to challenge the investigatory measures employed.

4.2.10 *Clear and transparent process standards; adequate protection of information.* The investigatory and judicial process, both within individual jurisdictions and in the multijurisdictional investigation context, should have established standards that are clear and transparent and provide adequate protection of competitively sensitive, proprietary information and information subject to legal or other privilege. Legal privilege should apply without discrimination to both lawyers called to the local bar and to those called to foreign bars, and should also extend to in-house lawyers who are governed by the same code of ethics as lawyers in private practice.

4.2.11 *Adherence to due process standards binding.* The agency should be bound by legal rules to adhere to its due process standards and at least be subject to a rule excluding evidence obtained contrary to due process standards.

4.2.12 *Jurisdictional nexus*. Jurisdiction should be asserted only over transactions and conduct that have an appropriate nexus with the jurisdiction concerned. Determination of the nexus to the jurisdiction of a transaction or conduct should be based on whether the transaction or conduct is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned.

4.2.13 *Reasonable and proportionate remedies.* Remedies for anti-competitive conduct must be reasonable, proportionate and linked by an appropriate causal nexus to the specific anti-competitive harm or conduct alleged, having regard to legitimate enforcement concerns relating to deterrence and compensation.

5. Technical Assistance, Capacity Building and Competition Advocacy

5.1 The Doha Declaration set out two tasks for the WTO in the area of capacity building. In Paragraph 24, WTO commits to cooperating with other intergovernmental organizations in providing technical assistance to developing countries to "better evaluate the implications of closer multilateral cooperation for their development policies and objectives". Paragraph 25 of the Doha Declaration sets out the more analytical mandate of the WTO Working Group to reflect upon and to clarify the issues relating to the reinforcement of competition institutions in developing countries through capacity building.

5.2 Pursuant to paragraph 24 and in the run-up to the Cancun Ministerial meeting, the WTO secretariat has been cooperating with organizations such as UNCTAD in organizing meetings to help developing countries better understand the possible consequences of negotiations on a multilateral framework on competition so that they are prepared for discussions at the Cancun Ministerial.

5.3 ICC supports educational efforts made by WTO to ensure that all WTO members enter into discussions on this important topic with sufficient understanding of the complex issues involved. ICC refers to its views set out elsewhere in this paper on the principles of non-discrimination, due process and transparency, and on hard core cartels, which might be useful to the WTO in raising its members' awareness on different aspects of these issues.

5.4 ICC believes, however, that it would not be appropriate for WTO to advocate any particular substantive principles or approach to competition policy - other than the core principles examined above - unless and until further thinking and consultation allow reaching a common understanding as to the proper premise and substantive underpinnings of competition policy.

5.5 The world's competition policy regimes vary widely in content, with many mandating conflicting rules on business, and many allowing different nation-states and regional groupings to issue conflicting commands to businesses engaged in trade in more than one nation.

5.6 While many governments subscribe to the beneficial effects of competition policy regimes in mature economies as an act of faith, some question their efficacy for other types of economies, while still others strongly advocate their adoption as beneficial for all. There is conflict even among the most mature economies, such as the US and the EU, about the appropriate premise and substantive underpinnings of competition policy, which historically has progressed from populist notions of "fairness" and "anti-large business" to a more refined appreciation of a consumer welfare focus, based on modern economic thinking. Even this is tempered with the realization that innovation is changing the global landscape of business, adding new dimensions to the competitive process that have yet to be assimilated in competition policy rules.
Any WTO-mandated capacity building efforts should therefore be directed in priority toward implementation of "core principles" and, where appropriate, to developing agencies' capacity for sound

economic analysis. Capacity building should not be designed to promote enforcement of substantive competition law rules on which there is not a sufficient level of consensus.

5.7 In this respect, ICC welcomes the Working Group's recognition in its 2002 Report that, in the context of capacity building, a "one size fits all approach" is not appropriate as each country should be free to choose how to apply a competition regime in a way that reflects its economic situation and development objectives. It also supports the Working Group's view that developing countries should be allowed to take a phased approach to the discussion, introduction and implementation of competition legislation. ICC would add that while countries should also have the scope to determine whether to choose to adopt a competition regime, every country that does so should adhere to the "core principles" of non-discrimination, due process and transparency .

Role of WTO

5.8 In considering how the WTO could most helpfully fulfill its mandate to provide technical assistance to developing countries, ICC suggests that the following factors should be considered.

5.9 Numerous international organizations are already actively involved in efforts to bring some intellectual harmonization or convergence to the disparate competition policy rules now in force, and also to promote the adoption of modern competition policy rules. Most recently, some 60 governments (all members of the United Nations and the World Trade Organization) have joined the ICN, a virtual organization of governmental competition agencies, devoted to meetings and working groups exploring the content of competition policy rules, enforcement mechanisms, and technical assistance and capacity building issues. The OECD has for years
undertaken efforts of convergence and advocacy, with programs such as its Global Competition Forum. UNCTAD's efforts now span more than four decades. UNESCO, the World Bank, and the International Monetary Fund have all been involved in promoting the adoption of competition policy rules-with varying content over the years, it might be noted. Many of these organizations are devoting substantial efforts at reducing the conflicts between nations growing out of the varying competition policy statutes. Many individual governments, such as the US agencies and the EC, have devoted, and continue to devote, considerable resources on both promotion and convergence of competition policies.

5.10 To preserve its scant resources and to allow it to focus on its primary role as an organization for negotiating and administering international trade rules, ICC suggests that the WTO should carefully consider whether to devote further resources to capacity building initiatives. If the WTO does pursue such initiatives, it should continue to work in the area of technical assistance in cooperation with, and through, organizations already active in this field.

5.11 ICC also suggests that the WTO deploy its expertise and utilize survey and coordination functions to assist the other international organizations and member governments in the activities they are already conducting in the competition policy area. Because more nations are members of the WTO than are members or participants in the efforts of these other organizations, it might also be useful for the WTO to comment to the other international organizations and member governments on needs, issues, and focus of activity.

5.12 Specifically, because of its broader membership base, a WTO survey of its members (and the other, non-member nations who are members of the United Nations) with respect to various aspects of competition policy, administration and enforcement might be useful. The survey could be designed to elicit their competition policy laws, the budgets and personnel of their enforcement agencies, the exemptions and immunities from the competition regime, the priorities of those agencies, and the perceived needs of the member governments for technical assistance and capacity building.

5.13 Such a survey might form the initial database of information on competition policy regimes, which member governments might make use of in evaluating their own activities, and which the other active organizations in the field might make use of. If this proved useful, the survey, periodically conducted, might be broadened to include questions on the current and planned activities of others in the areas of technical assistance, capacity building, and competition advocacy. The objective of broadening the survey would be to include in the general database information on other agencies' and governments' efforts, which might help coordinate the myriad of activities being undertaken. Periodic monitoring of the situation, i.e. of the elements disclosed in the survey, and reports on the situation might be useful to the world community, as it evaluates whether progress is being made in producing a global trading system where the constituent national elements have competitive free markets.

5.14 Finally, while the instances of competition policy producing impediments to international trade probably constitute a very small subset of such impediments, it might be useful for the WTO to issue reports on the impact of competition rules on international trade, with particular reference to the application of the principle of non-discrimination. This might become a part of the regular Trade Policy Review Mechanism of the WTO, which in essence is a peer review mechanism.

6. Hard Core Cartels

Overview

6.1 ICC fully supports increased international co-operation focussed on the detection and punishment of hard core cartels. Nevertheless, the pursuit of this worthwhile objective does not negate the need for legal safeguards and protections for parties involved in investigations (who may or may not be proved guilty), especially as penalties for antitrust offences are becoming increasingly serious and the risk arises of multiple penalties for the same transgression. The fact that more and more jurisdictions have introduced, or are considering introducing, criminal sanctions for these offences, makes the need for legal safeguards and proportionality in penalties imposed even more imperative bearing in mind human rights statutes, both national and international.

6.2 In addition, as a result of some recent US case developments, businesses and legal advisors, both within and outside the US, are increasingly concerned about the implications of information sharing among competition authorities. These developments may give rise to pressure on competition authorities and governments to reject bilateral or multilateral cooperation arrangements that override domestic protections for confidential and privileged information.

6.3 Recognizing the ever-changing contextual landscape, there are four key issues to consider in any discussion of a possible multilateral framework for addressing "hard core cartel" behavior:

(i) What is a "hard core cartel"? In defining the term, consideration should be given to such matters as whether the proscribed conduct includes only horizontal agreements (not vertical agreement), whether there should be a distinction between covert and overt activities, and what recognition, if any, should be given to efficiency-enhancing activities.

(ii) What are the appropriate procedural safeguards in the context of investigating and prosecuting parties who have participated in hard core cartels?

(iii) What are the appropriate safeguards for protecting confidential business information in the context of inter-agency co-operation in pursuing and prosecuting hard core cartel activity?

(iv) Is the WTO framework suited to address the foregoing and related issues given the great disparity in substantive principles and treatment of hard core cartels among WTO members?

Definition of "Hard Core Cartel"

6.4 Before engaging in any substantive discussion, the various parties and stakeholders must have a common understanding or reference point with regard to the type of activities to which enforcement co-operation is directed. The definition will in part depend on the enforcement measures applicable to the conduct. For example, if the behavior is punishable per se and the penalties for engaging in the activity are serious criminal sanctions, it may be appropriate to define the term narrowly.

6.5 In Draft BIAC Talking Points dated 07/02/01 to the OECD CLP WP3 Roundtable on Information Sharing in Cartel Cases, BIAC noted that the business community has differing views on the definition of a hard core cartel based on the fact that different jurisdictions have different laws which govern activities that may be considered hard core cartel behaviour in one jurisdiction and not another.

6.6 The OECD Recommendation of the Council Concerning Effective Action Against Hard Core Cartels adopted on March 25, 1998 defines "a hard core cartel" as follows:
"A 'hard core cartel' is an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce."
"The hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realization of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorized in accordance with those laws. However, all exclusions and authorizations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives."

6.7 While the OECD definition of "hard core cartel" provides a strong foundation upon which to build, and represents a consensus among the members of the OECD, it does not address the distinction between covert and non-covert activities, which is currently a subject of discussion among stakeholders. For example, many believe that agreements between competitors regarding prices, quantities, markets or customers that are arrived at and carried out in a covert manner are the most egregious activities and should be per se unlawful. A related issue is whether there should be a mechanism for exemption from per se categorization as a result of notification of an agreement to the relevant competition authorities or the public. Another issue is the appropriate treatment to be given to efficiency enhancing agreements. The OECD definition of "hard core cartel" is in terms that the definition judges behaviour in advance.

6.8 ICC recommends at a minimum the following guiding principles:

6.8.1 *Horizontal agreements only*. Hard core cartels ought to be confined to horizontal agreements, properly defined, between competitors, and should not extend, for example, to an agreement between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain. In section 8 of "Discussion Points on Information Sharing in International Cartel Investigations" submitted by BIAC to the OECD Global Forum on Competition on February 15, 2002, BIAC suggested that hard core cartel behaviour means (i) horizontal price fixing agreements, (ii) horizontal bid rigging, and (iii) horizontal market allocation.

6.8.2 *Recognition of efficiency enhancing activity*. Even where a jurisdiction adopts a "per se" category of hard core cartels, there should always be some opportunity to demonstrate in an appropriately unbiased forum the efficiency enhancing aspects of an agreement, even in a case that involves

elements of price fixing, e.g., Broadcast Music, Inc., et al. v. Columbia Broadcasting System, Inc., et al., 441 U.S. 1 (1979).

6.8.3 *Affiliates excluded.* Hard core cartels should not include agreements between affiliates or entities within the same economic unit.

Procedural Safeguards

6.9 The following are appropriate key procedural safeguards to consider in any multilateral framework for addressing hard core cartel activity.

6.9.1 *Non-discrimination.* Competition laws and regulations applicable to hard core cartels should be applied without discrimination on the basis of the nationality or location of the parties.

6.9.2 *Transparency.* The hard core cartel investigation process should be transparent with respect to the policies, practices, and procedures involved in the review, the identity of the decision-makers, and the standard of review. Transparency should foster consistency and predictability of the outcomes of hard core cartel investigations.

6.9.3 *Due process.* Appropriate procedural safeguards should be available to ensure that the hard core cartel investigation process incorporates core principles of due process and procedural fairness. Specific safeguards are discussed in Part 4 - Due Process and Transparency.

Safeguards for Confidential Information

6.10 The exchange of confidential information between competition authorities continues to be of concern to the international business community. Such exchanges should include appropriate safeguards to prevent leaks, and greater transparency to improve business confidence, avoid adverse commercial consequences and protect the rights of companies targeted for investigation. (See ICC Statement on International Cooperation between Antitrust Authorities no. 225/450 rev. 3 of 28 March 1996; ICC Recommendations to ICPAC on Exchange of Confidential Information between Competition Authorities in the Merger Context no. 225/52 of 21 May 1999, and ICC/BIAC Comments on report of the US International Competition Policy Advisory Committee no. 225/554 Rev. of 5 June 2000).

6.11 The hard core cartel investigation process, both within individual jurisdictions and in the multi-jurisdictional investigation context, should have established standards that are clear and transparent, and provide adequate protection of confidential information, consistent with the need for such disclosures as may be necessary for effective enforcement by competition authorities in the jurisdictions concerned. A number of issues relevant to information sharing between antitrust authorities in the context of hard core cartel investigations are discussed in the February 15, 2002 BIAC Discussion Points referred to above.

6.12 The following is a list of safeguards specific to information exchanges among competition authorities

6.12.1 *Prior notification.* The owner or provider of the information should receive prior notice of any proposed exchange of information and an opportunity to be heard on: (a) the necessity of such exchange; and (b) whether information is confidential or not, unless doing so would be prejudicial to the investigation. When, for the latter reason, prior notice is not given, information should be exchanged only with the approval of an independent judicial arbiter.

6.12.2 *Solicitor-client privilege protection*. A receiving jurisdiction should not receive or use information that would be considered privileged under the recipient's own law and a loss of privilege should not occur as a result of the sharing of confidential information between antitrust authorities in different

jurisdictions. The privilege should be respected regardless of the lawyer's bar origin and including communications with in-house lawyers who are subject to rules of ethics comparable to those applied to independent lawyers.

6.12.3 *Substantial convergence and similarity in laws.* The highest standard of protection in either jurisdiction should be provided in order to avoid conflicts.

6.12.4 *Consistency with immunity/amnesty programs.* Rules governing information exchange should encourage, rather than interfere with, immunity/amnesty programs.

6.12.5 *Reciprocity:* The receiving party must agree to reciprocate as a condition of exchange.

6.12.6 *Facilitation, not delay.* Any exchange of information should speed up the investigation process rather than lead to extra delays.

6.12.7 *Substantive case and jurisdiction.* Information exchange should only take place where there is a substantive case as well as jurisdiction over the parties in matters at issue, rather than only suspicion.

6.12.8 *Use of information/no further disclosure.* The information should be used by the receiving authority only for the purpose for which it was disclosed, be subject to conditions of confidentiality at least as stringent as those of the jurisdiction supplying the information, and not be disclosed to any parties outside the receiving authority, in particular, potential third party plaintiffs, other agencies or foreign governments. There should also be an assurance that the authority has exhausted its own administrative procedures and possibilities before making a request.

The Role of the WTO

6.13 Any discussion about the appropriate definition and treatment of hard core cartel activity at the WTO level should recognize that there are significant issues that need to be addressed on which there is little consensus among the various stakeholders. In addition to the foregoing, there are issues regarding the extent to which any framework will address government procurement, exemptions from cartel laws such as state action immunity, and how to recognize differences between common law and civil code jurisdictions.

6.14 Given the complexity of the issues, as reflected in paragraph 2.3 of the summary, the issue of the inclusion of substantive rules on hard core cartels in the WTO system should be weighed carefully as the WTO proceeds with its meetings later this year.

7. Modalities of Cooperation

Introduction and summary

7.1 This part sets out ICC's perspective on the appropriate scope for voluntary cooperation among competition authorities. The Working Group has already reviewed the history of prior and existing bilateral and multilateral cooperation efforts, and we will not reiterate that background except as it bears directly on our suggestions.

7.2 In summary, ICC:

7.2.1 Supports efforts by competition authorities to cooperate with one another with the objectives of :

- formulating and adopting coherent, consumer-welfare oriented competition policies;
- fostering the use of "best practices" in the implementation of their competition laws; and
- ensuring that related investigations and proceedings ongoing in multiple jurisdictions are handled in a way that is efficient for the agencies and for the businesses involved and that promotes economically and legally sound and consistent outcomes.

7.2.2 Stresses the importance of assuring effective and adequate protection for confidential information. (In that regard, see Part 6 - Hard Core Cartels)

7.2.3 Urges that individual competition authorities retain flexibility and discretion in the nature and extent of their cooperation with competition authorities of other jurisdictions, taking into account, among other things, the sufficiency of protections for confidential information, the impact on the cooperating authority's own investigation or proceeding, the degree of policy convergence or divergence, and demands on the authority's resources.

7.2.4 Supports the use of appropriate voluntary "peer review" mechanisms that periodically subject jurisdictions' competition regimes to in-depth scrutiny and comment, but that do not include dispute resolution mechanisms or other compulsory measures that would result in "second guessing" individual jurisdictions' enforcement decisions.

Discussion

7.3 The importance of cooperation among competition authorities has increased in recent years. The reasons include the proliferation of revised or newly adopted competition laws around the world; the frequency with which transactions are subject to review in multiple jurisdictions; a perceived need to combat hard core cartel activity at both local and international levels and a growing appreciation of the importance of an appropriate balance between the need for sound and effective competition law enforcement on the one hand, and on the other hand, the importance to economic growth and efficiency of an environment in which legitimate mergers and other transactions are not impeded or deterred by unnecessary delay, cost and uncertainty.

7.4 Antitrust authorities have responded to the need for expanding cooperation in a number of ways. First, the network of bilateral cooperation agreements has expanded rapidly, while jurisdictions that have had agreements in place are revising or replacing old agreements with new arrangements based on their more recent experience. The US was the earliest jurisdiction to build a bilateral cooperation network, in its early period to deal with jurisdictional conflicts and more recently to manage the growing demand for more extensive enforcement cooperation. Agreements have been entered into between other pairs of jurisdictions in all parts of the world, sometimes similar to the US bilateral model, and in other cases custom-designed to address the particular needs and interests of the jurisdictions involved.

7.5 Most bilateral agreements leave the parties substantial discretion to apply them in a way that does not prejudice their important policy or enforcement interests. Few bilateral agreements allow jurisdictions to share confidential company information with one another.

7.6 Experience with bilateral competition agreements has influenced the development of multilateral arrangements, and vice-versa. Probably the best known multilateral instrument dealing with competition law cooperation is the OECD Council Recommendation Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade. The Recommendation is non-binding, although most OECD members purport to adhere to it in - albeit to differing degrees and with a range of interpretations.

7.7 The OECD Recommendation's provisions are basically similar to - and have influenced and been influenced by - what has become the US's de facto bilateral model agreement, which also has been followed by several other jurisdictions. The OECD recommendation does not call for multilateral cooperation as such. Instead, it is a recommendation about the way in which member countries should cooperate with one another in their bilateral dealings.

7.8 The Recommendation calls for the parties to notify one another when they launch an investigation under competition law that significantly affects the other party's interests. Triggering circumstances include investigations of conduct in the other's territory, or of conduct the other government may have required or endorsed; mergers involving one or more firms incorporated in the other party or one of its political subdivisions; cases in which the remedy will require or prohibit conduct in the other party's territory; and, in some agreements, seeking information located in the other party's territory.

7.9 The Recommendation also includes a "positive comity" provision - i.e., an acknowledgment that one party may ask the other to act against anticompetitive conduct in the latter's territory that adversely affects the interests of both parties.

7.10 In recent years the OECD has expanded its "peer review" examinations of member countries', and in some cases non-member countries', competition law regimes. These reviews are similar to those carried out in the WTO as part of its Trade Policy Review Mechanism, but with a deeper examination of competition policy than has been possible so far in the WTO context.
Although these peer review exercises normally include discussion of individual cases as illustrative of the examined jurisdictions approach, their focus is on the overall competition regime. They are not designed to be critiques of individual agency decisions. By most accounts, these examinations have been a valuable impetus to convergence around best practices and policies.

7.11 In addition, several WTO agreements provide that members will inform the committees established under these agreements of their legislation, regulations and administrative practices. They may be discussed in the committees and other members may and do raise questions. The committees are not mandated to make findings on the member country's legislation, etc. Under some agreements Members are required to report on a yearly or a six-month basis on measures taken. Here again other members may express views on the consistency of these measures with the relevant agreement but the committees are not mandated to make findings.

7.12 The regular meetings of the various WTO committees are often used to raise bilaterally certain issues in the margin of these meetings. It is sometimes surprising to see that potential disputes result from misunderstandings that are cleared up in such bilateral informal discussions.

7.13 In addition to multilateral efforts at the OECD and WTO, the EU is in the process of putting in place an elaborate network for cooperation among the Commission and Member State competition authorities. This network, however, will operate in the context of the extensive legal and political integration of the EU, a level of integration which is not mirrored at the WTO or global level or, in most instances, at regional levels elsewhere in the world.

ICC's recommendations

7.14 ICC endorses constructive efforts among competition authorities to cooperate with one another and supports ongoing voluntary efforts to put into place a basic framework for cooperation . Cooperation can help to achieve important objectives that provide a public benefit both to consumers and to businesses, both as consumers and competitors.

7.15 First, the sharing of experience among authorities at different levels of development, and among authorities applying differing procedures and substantive rules, benefits all participants. It helps identify the policies and procedures best designed to promote coherent, consumer-welfare oriented

competition policies. In addition, it facilitates the identification and use of "best practices" in the design and implementation of competition laws. Further, it helps to ensure that related investigations and proceedings ongoing in multiple jurisdictions are handled in a way that is efficient for the authorities and for the businesses involved and that promotes economically and legally sound and consistent outcomes.

7.16 ICC stresses the importance of ensuring that cooperation among competition authorities is based on effective and adequate protection for confidential information. Competition authorities that receive confidential information from businesses normally are obliged under their national laws to protect that information against further disclosure. These protections serve a range of important and legitimate interests, including due process, damage to competition that could result from the release of competitively sensitive information, property rights in trade secrets and business confidential information, privacy, and respect for the balances struck in individual jurisdictions between these interests and the specific law enforcement objectives and processes in place. In crafting mechanisms to enhance inter-jurisdictional cooperation, it is essential to avoid creating a presumption in favor of the sharing of confidential information that risks damaging these important interests. Appropriate safeguards for confidential information in the context of information sharing are discussed in Part 6 - Hard Core Cartels.

7.17 It is important that individual competition authorities retain flexibility and discretion in the nature and extent of their cooperation with competition authorities of other jurisdictions. If for no other reason, in a world of 100 or more separate competition authorities, the tasks of cooperation and coordination can impose substantial cost and resource drains on individual agencies which could overtax the resources of requested agencies and potentially interfere with their own enforcement responsibilities. Agencies must have discretion to decide when and how to cooperate with other authorities, taking into account, among other things, the impact on the cooperating authority's own investigation or proceeding, the degree of policy convergence or divergence, and demands on the authority's resources. The sufficiency of protections for any confidential information proposed to be exchanged must also be take into account in any such cooperation.

7.18 ICC encourages the expanded use of appropriate voluntary "peer review" mechanisms that periodically subject jurisdictions' competition regimes to in-depth scrutiny and comment. Peer review mechanisms such as those conducted under the OECD's Regulatory Review program and the WTO's TPRM subject competition regimes to the discipline of the "marketplace of ideas," while leaving individual jurisdictions discretion to alter or maintain their laws and policies. Peer review mechanisms should not be used as dispute resolution for "second guessing" of individual enforcement decisions.

7.19 Effective peer review is likely to be a more effective mechanism for convergence toward sound policies and best practices than vaguely-worded multilaterally-agreed rules that leave broad discretion in their interpretation and application.

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