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A PRESENTATION OF TYPES OF COMMON PROVISIONS TO BE FOUND IN INTERNATIONAL, PARTICULARLY BILATERAL AND REGIONAL, COOPERATION AGREEMENTS ON COMPETITION POLICY AND THEIR APPLICATION

Report by the UNCTAD secretariat

Executive summary

This report describes analytically the main types of competition policy provisions contained in selected agreements on competition law enforcement and regional trading arrangements. Priority has been given in the selection of the instruments reviewed to those that highlight different variations among the types of clauses; feature agreements concluded in different regions to which the parties are developing countries; involve jurisdictions that have concluded a significant number of such agreements; are relatively recent; and/or that provide for advanced forms of cooperation. Three broad categories of provisions are dealt with: technical assistance and general information exchange; procedural case-specific cooperation; and substantive provisions on the content and application of competition laws for the control of restrictive business practices. An example of one agreement is provided in an annex.

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TABLE OF CONTENTS

INTRODUCTION

1. The present report has been prepared for the Fifth Review Conference at the request of the Intergovernmental Group of Experts on Competition Law and Policy, at its sixth session, called for "studies on closer international cooperation in competition policy for the development objectives of developing and least developed countries, in particular.. (b) A presentation of types of common provisions to be found in international, particularly bilateral and regional, cooperation agreements on competition policy and their application".[1] This report should be read in conjunction with three revised UNCTAD secretariat reports which have been prepared for the Review Conference, also at the request of the sixth session of the Intergovernmental Group of Experts: "Experiences gained so far on international cooperation on competition policy issues and the mechanisms used" (TD/B/COM.2/CLP/21/Rev.3); "Roles of possible dispute mediation mechanisms and alternative arrangements, including voluntary peer reviews, in competition law and policy" (TD/B/COM.2/CLP/37/REV.2); and "Ways in which possible international agreements on competition might apply to developing countries, including through preferential or differential treatment, with a view to enabling these countries to introduce and enforce competition law and policy consistent with their level of economic development" (TD/B/COM.2/CLP/46/Rev.1). Also of particular relevance to the present report is the UNCTAD book entitled *Trade And Competition Issues: Experiences At Regional Level*. Cross-references are made to such documentation where appropriate in order to avoid unnecessary duplication as far as possible.

2. The report contains three chapters, dealing respectively with technical assistance and general information exchange; various forms of case-specific cooperation of a procedural nature; and substantive provisions relating to the content and application of competition laws with respect to control of restrictive business practices (RBPs), a term which is used interchangeably with "anti-competitive practices" in the present report. Within each chapter, the main types of provisions and some salient aspects of each type are reviewed in a comparative manner, in the light of the provisions contained in (a) a selection of agreements on competition law enforcement; and (b) agreements establishing free trade areas, customs unions, economic partnerships or common markets, including regulations or decisions issued within the framework of such agreements (all called regional trading arrangements (RTAs) for the sake of convenience). The annex to the report reproduces extracts from two enforcement cooperation agreements concluded by the United States. While no fixed criteria have been adopted for the selection of the instruments whose clauses are reviewed or reproduced, priority has been given to instruments which (a) highlight different variations among the types of clauses reviewed; (b) feature agreements concluded in different regions to which the parties are developing countries and/or jurisdictions which have concluded a significant number of such agreements; (c) are relatively recent; and/or (d) provide for advanced forms of cooperation.

3. The present report does not review provisions in the above-mentioned agreements relating to control of State aid, or of discriminatory or other action by State enterprises or enterprises with special or exclusive rights (which are substantially covered in the above-mentioned UNCTAD book); peer review, conciliation, mediation and good offices (which are reviewed in TD/B/COM.2/CLP/37/REV.2); or obligatory methods of dispute settlement such as arbitration or adjudication (whose application is often excluded under RTAs from the

competition policy area and which are usually not provided for under enforcement cooperation agreements). The report also does not deal with the organization, functions and powers of the institutions responsible for implementing different agreements and the respective roles and competence of regional and national authorities, since these complex subjects are touched upon in the above-mentioned UNCTAD book; bilateral mutual legal assistance treaties, as they apply only to criminal matters; or provisions of plurilateral and multilateral agreements or recommendations, given the terms of the mandate for this report.

Chapter I

TECHNICAL ASSISTANCE AND INFORMATION

1. Technical assistance

4. Agreements between parties with substantially different levels of expertise in this area sometimes provide for the grant of technical assistance, with the mandatory nature and the detail of such provisions varying from agreement to agreement. The Brazil-United States agreement provides for a number of possible technical cooperation activities, subject to a proviso relating to the respective competition agencies' reasonably available resources.[2] The Australia-Fiji agreement provides for cooperation in the development and provision of education and training programmes where possible and feasible; and the Australian competition authority also undertakes to assist the Fijian authority, where appropriate, in drafting and developing technical assistance proposals for consideration by the Australian aid agency and other donors.[3] The line such between such technical assistance provisions and general information exchange may be thin. The EU-Mexico Decision, for instance, in a provision dealing with technical cooperation lists training and seminars as forms of assistance which the parties "shall" provide to each other, but the same provision goes on to list other possible activities which might also be considered information exchange or transparency, such as internet home pages, dissemination of studies or electronic archives of case law.[4] An explicit reference to development considerations in connection with technical assistance is made in the Cotonou agreement, as described below.[5]

2. Information exchange

5. Another type of provision commonly included in cooperation agreements in the competition policy area deals with general exchanges of information and views on competition laws and their application. The types of information or the degree of detail with which this is specified may vary and the line between such information exchange and technical assistance may be blurred. The China-Russian Federati agreement provides that the

two Governments will provide each other with documents, legislation and rules relating to antimonopoly and countering unfair competition, as well as, if possible, case investigations.[6] The Australia-Fiji agreement provides for exchange of information relating to the following: regular publications; investigations and research; speeches, papers and articles; compliance education programmes; legislative amendments; developments in the respective countries or relating to their companies; and human resource development and corporate resources. The EU-Republic of Korea agreement provides for exchanges of the following: information on major concerns of the parties; expert studies; materials relating to current situations, experiences, and new developments in legislation and enforcement of competition policy; and views with respect to multilateral competition initiatives, with particular attention to the fight against international hardcore cartels.[7] The distinction between such general information exchange and transparency obligations (dealt with in the following chapter) may also be blurred. The Chile-EU agreement, for instance, provides that, for the purpose of improving transparency, and without prejudice to the rules and standards of confidentiality applicable within each jurisdiction, the parties undertake to exchange information regarding sanctions and remedies applied in cases that, in the view of the competition authority which possesses the information, significantly affect the important interests of the other party and that the grounds on which those actions were taken are to be provided when requested by the competition authority of the other party.[8]

Chapter II

CASE-SPECIFIC PROCEDURAL COOPERATION

A. Notification of enforcement activities or anticompetitive conduct

6. Mandatory nature and triggering circumstances: Some agreements do not specifically provide for any obligation to notify enforcement activities. Others which do contain such an obligation may not necessarily indicate what might trigger such an exchange - the Euromed agreements, for instance, provide only that the Parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy (these agreements are to be fleshed out in due course through decisions of the association councils set up under these agreements).[9] Most of those agreements that do provide for notification of enforcement activities refer to this as a mandatory obligation (subject to specified provisos or exceptions). The usual general criterion for notification is that the enforcement activities may affect the interests of the other party. This requirement may be stated in objective terms or left to the subjective appreciation of the notifying authority (as in the EU-Japan agreement).[10] It may be specified that these should be "important interests", "significant interests" or "essential interests", or that they should be "interests in the application of its competition law" (as in the Canada-Chile agreement).[11] Examples which are often provided of circumstances affecting the interests of the other party include the following: investigations of conduct in the other party's territory in general terms or, more specifically, the seeking of information located in the other party's territory

(sometimes including visits on each other's territory in the course of competition investigations); conduct by a national of the other party or of a company incorporated within its territory; conduct considered by the notifying competition authority to have been required, encouraged or approved by the other party; mergers involving one or more firms incorporated in the other party; and remedies requiring or prohibiting conduct or sanctions for such conduct within the other party's territory. On the other hand, the Brazil-United States agreement does not indicate any general criterion for notification, instead providing an exhaustive list of triggering circumstances which is largely similar to the illustrative lists provided in other agreements. Whereas most agreements list the conditions for notification in the alternative, the EU-Mexico Decision provides a cumulative list of conditions which all have to be met before the obligation to notify is triggered. A few agreements such as those between Australia and the United States,[12] the EU and Japan, Japan and Singapore[13], and Mexico and the Republic of Korea[14] provide for notification (to the extent compatible with domestic laws, enforcement policies and other important interests) when one party is aware of anti-competitive conduct that may violate the other party's competition laws; this obligation is triggered even without there being any violation of the notifying party's competition law or any enforcement action being undertaken under it.

7. Details and timing of information to be notified: It is usually specified that the notification should identify the nature of the practices under investigation and the legal provisions concerned, often with the addition that the notification should be sufficiently detailed to enable the party notified to evaluate the effects of the enforcement activity on its own interests. It is also usually specified that notification is ordinarily to be made as soon as possible after it becomes evident (or after a party's competition authorities become aware) that notifiable circumstances are present. Provision is sometimes explicitly made for subsequent notifications in certain circumstances; thus, the Canada-Chile agreement (like the Canada-EU agreement) provides that, once initial notifications have been made, subsequent notifications need not be made unless the notifying party becomes aware of new issues bearing on the interests of the other party, or unless the notified party requests otherwise. Detailed provision is also sometimes made relating to the timing of notifications by reference to different stages of each party's procedures for dealing with merger or non-merger cases, as in the EU-Japan agreement.

8. Exceptions and provisos: Common exceptions or provisos relating to notification obligations (which may be contained either in the clause dealing with notification or in other clauses of the agreement) include the following: consistency with the laws and regulations of the parties; limitations imposed by the requirements of professional or business secrecy; consistency with their enforcement policies (in agreements to which the United States is party); compatibility with their important interests; and sufficient assurances relating to respect for the confidentiality of any information supplied which is not publicly available, for specified limitations upon the purposes for which it is used (or for use exclusively for the purposes stipulated in the agreement), or for transmission to third parties only with the consent of the notifying authority. Thus, many agreements, by referring to consistency with the parties' legislation (which would usually forbid disclosure of confidential information except under very limited circumstances), implicitly exclude notification of confidential information, but some agreements make this more definitive and explicit through a proviso referring to the requirements of professional or business secrecy. Even if confidential

information is in fact notified, its communication is always at the discretion of the competition authority concerned and subject to conditions relating to respect for confidentiality, exclusive use for the purposes stated in the agreement and transmission to third parties only with the express consent of the notifying authority and subject to the conditions that authority specifies[15].

B. Consultations

9. Some bilateral cooperation agreements make no explicit provision for consultations. Most agreements do provide for consultations on different subject-subjects, including issues; whether an investigation may adversely affect important interests of the other party; whether anti-competitive practices are being engaged in by enterprises located in the other party's territory; cases (including before the final decision is taken); or any matter relating to the agreement or its interpretation, operation or implementation, or the application of its principles. Mandatory requirements to consult may be triggered by specific requests, be a necessary preliminary before certain enforcement action is undertaken, or be covered within regular schedules of meetings. Consultations may be held directly between competition authorities, occur through diplomatic channels or the institutional machinery of a FTA. Examples of consultations provisions in some agreements are provided in TD/B/COM.2/CLP/37/REV.2.

C. Traditional comity/avoidance of conflicts

10. Many enforcement cooperation agreements provide for commitments to give "careful consideration" or "full and sympathetic consideration" to the other party's significant or important interests throughout all phases of enforcement activities. While such provisions are usually couched in a mandatory form, some agreements such as the Canada-Chile agreement recite, in a clause dealing with avoidance of conflict, that it is in the parties' common interest to minimize any potentially adverse effects of one party's enforcement activities on the other party's interests in the application of its competition law. Traditional comity clauses are sometimes linked to a best-efforts obligation to provide timely notice of significant developments in enforcement activities once the other party indicates that its important interests may be affected, or to give full and sympathetic consideration to any suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation or proceeding (as in the EU-Mexico decision). Some instruments, such as the EU-Japan agreement or the EU-Mexican decision provide a detailed list of factors to be taken into account in seeking appropriate accommodation of competing interests or a mutually acceptable solution, including the following: the relative significance and substantially lessening of competition relating to the RBPs occurring within one party's territory or markets as compared with those occurring within the other party's territory or markets; the relative impact of the RBPs on the important interests or policies of the respective parties; the intentions of the perpetrators of the RBPs; the degree of conflict or consistency between enforcement activities by one party and the legislation of the other party; whether private persons will be subject to conflicting requirements; the location of relevant assets and parties

to the transaction; the degree to which effective sanctions or other relief can be secured; and the extent to which enforcement activities by the other party would be affected.

D. Coordinated enforcement

11. Many cooperation agreements in this area provide that the parties will consider coordination of enforcement with regard to related matters; this is sometimes supplemented by an obligation of traditional comity, as in the Brazil-United States agreement. A non-exhaustive list of factors to be taken into account in considering coordinated enforcement may be provided, as in the EU-Japan agreement; these include the effect of such coordination on the parties' ability to achieve the objectives of their enforcement activities; their relative abilities to obtain information necessary for conducting such activities; the extent to which they can secure effective relief against such activities; the opportunity to make more efficient use of resources; the possible reduction of cost to the persons subject to such activities; and the potential advantages of coordinated relief for the parties and for these persons. As is usual, the parties to the agreement maintain the discretion to limit or terminate such coordinated enforcement. Requests may be made by the respective competition authorities for waivers of confidentiality from persons providing confidential information. Some agreements such as the Canada-EU agreement provide that such requests for waivers must be made.

E. Positive comity/allocation of competence among competition authorities

12. Many enforcement cooperation agreements provide for “positive comity”, under which each party’s competition authority undertakes to consider requests by the other party to undertake enforcement action against anti-competitive practices in the requested country’s territory that contravene the requested country’s laws and adversely affect the requesting country’s important interests. The requesting country’s laws need not be infringed for it to make such a request; it suffices that its important interests are affected. Nor does the making of such a request preclude it from enforcing its own laws. On the other hand, the requested competition authority always maintains the discretion not to take any action; it is obligated only to give careful consideration to the request and to keep the requesting authority informed of its decisions and its enforcement activities pursuant to the request. A few agreements provide for “enhanced positive comity", which introduces a presumption that the competition authorities of the requesting party will defer or suspend their own enforcement where its consumers are not directly harmed, or where the anti-competitive activities occur principally in and are directed principally towards the other party’s territory[16]. Under these agreements, each competition authority pledges to devote adequate resources and its best efforts to investigating matters referred to it and to inform the other side’s competition authorities on request, or at reasonable intervals, of the status of the case. However, these agreements do not apply to merger control and do not bind each party's courts.

F. Investigatory assistance

13. The Mexico-Republic of Korea agreement contains a provision whereby each competition agency may assist the other agency, upon request, in locating and obtaining evidence and witnesses, and in obtaining *voluntary* compliance with requests for information, in the territory where the requested agency has jurisdiction. The Australia-New Zealand agreement provides in more detail for the preparation of witness statements, conducting of formal interviews and the obtaining of information and documents on behalf of and upon the request of the other party's competition agency, unless it would go against the requested party's laws.[17] The Australia-United States agreement (which does not apply to merger control) appears so far to be the only one providing for the possibility of the use of *compulsory* processes by one country under its laws to acquire information at the request of another country whose important national interests are being affected by anti-competitive behaviour organized in the requested country, even if such behaviour is not illegal under the requested country's laws. However, there are important conditions and provisos in respect of the provision of such assistance relating to confidentiality, the format of the request, reasonably available resources authorization by the domestic law of the requested party or compatibility with its public interest.

Chapter III

SUBSTANTIVE PROVISIONS RELATING TO COMPETITION LAWS

A. General competition rules or rules relating only to RBPs affecting trade or benefits of a common market?

14. Most RTAs contain provisions relating to the adoption or maintenance, content and application of competition laws and policies, but vary as to whether the controls should be in respect of all RBPs, or only those RBPs affecting trade and/or the realization of the benefits of a common or single market among the parties. However, the line between these two types of obligations is blurred, as RTAs providing for the adoption and enforcement of national competition legislations usually specify that the objective is to contribute to trade liberalization among the parties, or the creation of a common or single market. The Japan-Singapore Economic Partnership Agreement, for instance, provides that each party shall, in accordance with its applicable legislation, take measures which it considers appropriate against anti-competitive activities in order to facilitate trade and investment flows between the parties and the efficient functioning of its markets[18.] The EU-South Africa agreement appears to apply a combined trade and competition test, requiring RBPs to be controlled insofar as they affect trade between the parties, but referring for this purpose to practices affecting competition within the parties' respective territories – which appears to amount to

positive comity[19]. However, that agreement has a specific clause which appears to be more trade-related, a type of clause which is similar to those in many of the agreements which the EU has entered into with aspiring EU candidate countries (or had entered into before their accession), as well as some of the EUROMED agreements. This clause provides for the possibility (after consultation within the joint councils set up under these agreements) of measures by either party in respect of a practice which it considers to be incompatible with the general prohibition against practices affecting trade, if that party considers (a) either that the parties' competition legislation (or the implementation rules of the agreement in other agreements entered into by the EU) do not adequately deal with the practice in question; or (b) that in the absence of such rules, the practice is causing or threatening to cause serious prejudice to the interests of the other party or material injury to its domestic industry (including its services industry)[20]. A similar but more far-reaching mechanism is set up under the Andean Pact, whereby member States or any enterprise with a legitimate interest may request the Board of the Cartagena Agreement for authorization to apply measures to prevent or to correct the threat of injury or injury to production or to exports which is a consequence of specified RBPs; the Board may also take the initiative to investigate and apply its own measures[21].

15. There are wide variations in respect of the content, detail and level of obligation relating to both the adoption/maintenance of competition laws and how these should be applied. Some RTAs (such as the NAFTA or the Chile-Mexico agreement)[22] provide only for each party to adopt or maintain measures prohibiting anti-competitive business activities or practices and to undertake appropriate actions in this regard, recognizing that these measures will contribute to achieving the objectives of the agreement. The objectives of both agreements include the elimination of barriers to trade in, and facilitation of, the cross-border movement of goods and services between the territories of the parties as well as the promotion of conditions of fair competition in the respective free trade areas. Similarly, the EU-Mexico Decision simply provides that the parties shall apply their respective competition laws, without specifying what should be the content of these laws.

16. The Singapore-United States agreement is somewhat more far-reaching in providing that each party shall adopt or maintain measures to proscribe anti-competitive business conduct with the objective of promoting economic efficiency and consumer welfare, shall take appropriate action with respect to such conduct and shall establish or maintain a competition authority responsible for the enforcement of such measures. Singapore also unilaterally undertook under that agreement to enact general competition legislation by January 2005 and not to exclude enterprises from that legislation on the basis of their status as government enterprises.[23] Specific rules are prescribed under the agreement relating to how enforcement is to be undertaken, with each party undertaking not to discriminate on the basis of nationality in enforcement policy; to ensure that a person subject to the imposition of a sanction or remedy is provided with the opportunity to be heard and to present evidence, and to seek review of such sanction or remedy in a domestic court or independent tribunal; and, at the request of the other party, to make available public information concerning its enforcement measures and exemptions (there is a recital recognizing the value of transparency in each party's competition policies).

17. Other free trade agreements provide for fairly detailed rules relating to both the RBPs to be proscribed and the manner in which the law is to be applied. The Australia-Thailand agreement, for instance, contains a definition of the "anti-competitive practices" to

be proscribed: these include business conduct or transactions that adversely affect competition, such as anti-competitive horizontal arrangements between competitors; misuse of market power, including predatory pricing; anti-competitive vertical arrangements; and anti-competitive mergers and acquisitions[24]. Each party undertakes to promote competition by addressing anti-competitive practices in its territory, and by adopting and enforcing such means or measures as it deems appropriate and effective to counter such practices; ensure that all businesses are subject to their generic or relevant sectoral competition laws; that these laws and the enforcement action taken pursuant to them are consistent with the principles of transparency, timeliness, non-discrimination, comprehensiveness and procedural fairness; and publish or otherwise make publicly available their laws promoting fair competition and their laws addressing anti-competitive practices. Either party may exempt specific measures or sectors from the chapter dealing with competition policy, provided that such exemptions are transparent and are undertaken on the grounds of public policy or public interest. Somewhat similar provisions are contained in the Canada-Costa Rica agreement, as described in TD/B/COM.2/CLP/37/REV.2.

18. Some RTAs provide for alignment by one party with the competition norms of the other party. Under the EU-Russian Federation agreement, for instance, the parties agree to remedy or remove, through the application of their competition laws or otherwise, restrictions on competition by enterprises or caused by State intervention insofar as they may affect trade between the parties; in order to attain these objectives, the parties undertake to ensure that they have and enforce laws addressing restrictions on competition by enterprises within their jurisdiction.[25] In a clause which applies also to several areas other than competition policy, the parties recognize that an important condition for strengthening their economic links is the approximation of legislation; the Russian Federation is to endeavour to ensure that its legislation will be gradually made compatible with that of the EU, while, several of the partnership and cooperation agreements entered into by the EU with Eastern European or CIS countries refer to "the approximation of the existing and future legislation" of the other party with that of the EU[26].

19. Most of the RTAs signed by the EU do not contain such "approximation" clauses", but usually provide instead for standards similar to those prevailing under EU law – which may indeed also be similar to those prevailing under the law of the other party. Under the EU-Chile agreement, for instance, the parties undertake to apply their respective competition laws in a manner consistent with the agreement, so as to prevent the benefits of the liberalization process in goods and services from being diminished or cancelled out by anti-competitive business conduct; and the parties also undertake to give particular attention to anti-competitive agreements, concerted practices and abusive behaviour resulting from single or joint dominant positions. This agreement, like most of those entered into by the EU, does not refer specifically to merger control. It may, however, be noted that the EU–South Africa agreement provides for substantive competition standards somewhat different from those prevailing under EU law: by adopting a "a substantial lessening of competition" test in respect of controls on horizontal and vertical practices and by requiring controls on abuse of market power rather than abuse of a dominant position.

20. The most detailed rules relating to RBP control are usually contained in common-market or single-market arrangements, which often use the EU system as a model, albeit with variations. Under the CARICOM treaty, for instance, the goal of the Community Competition Policy is to ensure that the benefits expected from the establishment of the

CARICOM Single Market and Economy (CSME) are not frustrated by anti-competitive business conduct[27]. In pursuance of this goal, each Member State is obliged, within its jurisdiction, to prohibit, on the ground that they constitute anti-competitive business conduct, horizontal and vertical practices and abuses of dominance, which are defined in a manner somewhat similar to the definitions in the Treaty of Rome and with a catch-all provision for any other like conduct by enterprises whose object or effect is to frustrate the benefits expected from the establishment of the Caribbean Common Market. Under the COMESA agreement, the member States agree that any practice which negates the objective of free and liberalized trade shall be prohibited; to this end, they agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the COMESA common market. Detailed rules relating to the practices to be prohibited and how the prohibitions are to be applied have been established[28]. Under MERCOSUR, member States undertake to adopt, for the purpose of their incorporation into MERCOSUR regulations, proscriptions of individual conduct or concerted agreements impeding, restricting or distorting competition or free access to markets or abusing a dominant position in a relevant regional market within MERCOSUR and affecting trade between its member States; a detailed list of the practices to be proscribed is provided[29]. However, the distinction between MERCOSUR obligations on member States to adopt and enforce national rules and common MERCOSUR rules may not be clear-cut, given that MERCOSUR does not have a supranational character.

21. Apart from provisions relating to technical assistance, progressivity in general or specified transitional periods, other provisions in RTAs which provide for preferential or differential treatment for developing countries in respect of control of RBPs appear to be relatively few, unlike with respect to control of State aid[30]. Under the Cotonou agreement, the parties undertake to implement national or regional rules and policies controlling agreements, decisions and concerted practices that have as their object or effect the prevention, restriction or distortion of competition, and to prohibit abuse of a dominant position in the European Union and in the territory of ACP States, in order to ensure the elimination of distortions of sound competition and with due consideration for the different levels of development and economic needs of each ACP country. The parties also undertake to reinforce cooperation for formulating and supporting effective competition policies with the appropriate national competition agencies so as to progressively ensure effective enforcement, including through assistance in drafting and enforcing an appropriate legal framework, and with particular reference to the special situation of the least developed countries. The EU-Mexico Decision includes as one of its objectives the elimination of anti-competitive activities by applying the appropriate legislation, so as to avoid adverse effects on trade and economic development, as well as the possible negative impact that such activities may have on the other party's interests. In the context of the FTAA negotiations, guidelines or directives have been adopted relating to the treatment of differences in the levels of development and size of the economies (these are applicable to all the negotiation areas)[31]. The non-exhaustive list of factors to be taken into account includes the requirement that the negotiations should provide a flexible framework that accommodates the characteristics and needs of each of the participating countries; be transparent, simple and easily applicable, while recognizing the degree of heterogeneity among the FTAA economies; be determined on the basis of case-by-case analysis (according to sectors, topics and country/countries); include transitional measures, which could be supported by technical cooperation programmes; take into account existing market access conditions among the countries of the hemisphere; consider longer periods for compliance with obligations; and

provide for technical assistance and training during the negotiations and the implementation process.

B. Common regional competition rules

22. Such common rules applicable at the regional level are provided for (again with a strong EU inspiration) under some regional or subregional arrangements. The COMESA regulations, for instance, prohibit the following: all agreements between undertakings, decisions and concerted practices which may affect trade between member States and have as their object or effect the prevention, restriction or distortion of competition within the COMESA common market; abuse of dominant positions within the common market or a substantial part of it insofar as trade between member States is affected; and cartel practices. Substantial detail is provided with regard to the types of practices prohibited. Similarly, the CEMAC and UEMOA treaties prohibit practices and abuses of dominance along lines similar to those under articles 81 and 82 of the Treaty of Rome; the CEMAC treaty also provides for control of concentrations which have a community dimension, which would be subject to pre-notification for approval by the CEMAC Commission[32]. All of these three regional arrangements have a supranational character, as in the case of the EU (which provides for common regional competition rules to be enforced by both the EU Commission and national competition authorities). In comparison, although the CARICOM system is not of a supranational nature, the CARICOM treaty provides that the Community shall, subject to the treaty, establish appropriate norms and institutional arrangements to prohibit and penalize anti-competitive business conduct; a Competition Commission is set up to oversee the implementation of the Community Competition Policy.

ANNEX

Extracts from the Brazil-United States agreement

Regarding Cooperation Between Their Competition Authorities In the Enforcement of Their Competition Laws

ARTICLE I
PURPOSE AND DEFINITIONS

The purpose of this Agreement is to promote cooperation, including both enforcement and technical cooperation, between the competition authorities of the Parties, and to ensure that the Parties give careful consideration to each other's important interests in the application of their competition laws. For the purposes of this Agreement, the following terms shall have the following definitions: "anticompetitive practice(s)" means any conduct or transaction that may be subject to penalties or other relief under the competition laws of a Party; "enforcement activity(ies)" means any investigation or proceeding conducted by a Party in relation to its competition laws; Each Party shall promptly notify the other of any amendments to its competition laws and of such other new laws or regulations that the Party considers to be part of its competition legislation.

ARTICLE II
NOTIFICATION

Each Party shall, subject to Article IX, notify the other party in the manner provided by this Article and Article XI with respect to enforcement activities specified in this Article. Notifications shall identify the nature of the practices under investigation and the legal provisions concerned, and shall ordinarily be given as promptly as possible after a Party's competition authorities become aware that notifiable circumstances are present. Enforcement activities to be notified pursuant to this Article are those that: to enforcement activities of the other Party; involve anticompetitive practices, other than mergers or acquisitions, carried out in whole or in substantial part in the territory of the other Party; involve mergers or acquisitions in which one or more of the parties to the transaction, or a company controlling one or more of the parties to a transaction, is a company incorporated or organized under the laws of the other Party or of one of its states; involve conduct believed to have been required, encouraged, or approved by the other Party; involve remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at conduct in the territory of the other Party; or involve the seeking of information located in the territory of the other Party. The Parties acknowledge that officials of either Party may visit the territory of the other Party in the course of conducting investigations pursuant to their respective competition laws. Such visits shall be subject to notification pursuant to this Article and the consent of the notified Party.

ARTICLE III
ENFORCEMENT COOPERATION

The Parties agree that it is in their common interest to cooperate in the detection of anticompetitive practices and the enforcement of their competition laws, and to share information that will facilitate the effective application of those laws and promote better understanding of each other's competition enforcement policies and activities, to the extent compatible with their respective laws and important interests, and within their reasonably available resources. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other agreements, treaties, arrangements or practices between them.

ARTICLE IV
COOPERATION REGARDING ANTICOMPETITIVE PRACTICES IN THE TERRITORY OF ONE PARTY THAT MAY ADVERSELY AFFECT THE INTERESTS OF THE OTHER PARTY

The Parties agree that it is in their common interest to secure the efficient operation of their markets by enforcing their respective competition laws in order to protect their markets from anticompetitive practices. The Parties further agree that it is in their common interest to seek relief against anticompetitive practices that may occur in the territory of one Party that, in addition to violating that Party's competition laws, adversely affect the interest of the other Party in securing the efficient operation of the other Party's markets. If a Party believes that anticompetitive practices carried out in the territory of the other Party adversely affect its important interests, the first Party may, after prior consultation with the other Party, request that the other Party's competition authorities initiate appropriate enforcement activities. The request shall be as specific as possible about the nature of the anticompetitive practices and their effects on the important interests of the requesting Party, and shall include an offer of such further information and other cooperation as the requesting Party's competition authorities are able to provide. The requested Party's competition authorities shall carefully consider whether to initiate or to expand enforcement activities with respect to the anticompetitive practices identified in the request, and shall promptly inform the requesting Party of its decision. If enforcement activities are initiated or expanded, the requested Party's competition authorities shall advise the requesting Party of their outcome and, to the extent possible, of significant interim developments. Nothing in this Article limits the discretion of the requested Party's competition authorities under its competition laws and enforcement policies as to whether to undertake enforcement activities with respect to the anticompetitive practices identified in a request, nor precludes the requesting Party's competition authorities from undertaking enforcement activities with respect to such anticompetitive practices.

ARTICLE V
COORDINATION WITH REGARD TO RELATED MATTERS

Where both Parties' competition authorities are pursuing enforcement activities with regard to related matters, they will consider coordination of their enforcement activities. In any coordination arrangement, each Party's competition authorities will seek to conduct their enforcement activities consistently with the enforcement objectives of the other Party's competition authorities.

ARTICLE VI
AVOIDANCE OF CONFLICTS; CONSULTATIONS

Each Party shall, within the framework of its own laws and to the extent compatible with its important interests, give careful consideration to the other Party's important interests throughout all phases of its enforcement activities, including decisions regarding the initiation of an investigation or proceeding, the scope of an investigation or proceeding, and the nature of the remedies or penalties sought in each case. Either Party may request consultations regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each Party shall consult promptly when so requested with a view to reaching a conclusion that is consistent with the purpose of this Agreement.

ARTICLE VII
TECHNICAL COOPERATION ACTIVITIES

The Parties agree that it is in their common interest for their competition authorities to work together in technical cooperation activities related to competition law enforcement and policy. These activities will include, within their competition agencies' reasonably available resources: exchanges of information pursuant to Article III of this Agreement; exchanges of competition agency personnel for training purposes at each other's competition agencies; participation of competition agency personnel as lecturers or consultants at training courses on competition law and policy organized or sponsored by each other's competition authorities; and such other forms of technical cooperation as the Parties' competition authorities agree are appropriate for purposes of this Agreement.

ARTICLE VIII
MEETINGS OF COMPETITION AUTHORITIES

Officials of the Parties' competition authorities shall meet periodically to exchange information on their current enforcement efforts and priorities in relation to their competition laws.

ARTICLE IX
CONFIDENTIALITY

Notwithstanding any other provision of this Agreement, neither Party is required to communicate information to the other Party if such communication is prohibited by the laws of the Party possessing the information or would be incompatible with that Party's important interests. Unless otherwise agreed by the Parties, each Party shall, to the fullest extent possible, maintain the confidentiality of any information communicated to it in confidence by the other Party under this Agreement. Each Party shall oppose, to the fullest extent possible consistent with that Party's laws, any application by a third party for disclosure of such confidential information.

ARTICLE X
EXISTING LAWS

Nothing in this Agreement shall require a Party to take any action, or to refrain from acting, in a manner that is inconsistent with its existing laws, or require any change in the laws of the Parties or of their respective states.

Extracts from the Australia- United States agreement

ARTICLE II:
OBJECT AND SCOPE OF ASSISTANCE

A. Each Party's Antitrust Authorities shall, to the extent compatible with that Party's laws, enforcement policies, and other important interests, inform the other Party's Antitrust Authorities about activities that appear to be anticompetitive and that may be relevant to, or may warrant, enforcement activity by the other Party's Antitrust Authorities.

B. Each Party's Antitrust Authorities shall, to the extent compatible with that Party's laws, enforcement policies, and other important interests, inform the other Party's Antitrust Authorities about investigative or enforcement activities taken pursuant to assistance provided under this Agreement that may affect the important interests of the other Party.

C. Nothing in this Agreement shall require the Parties or their respective Antitrust Authorities to take any action inconsistent with their respective Mutual Assistance Legislation.

D. Assistance contemplated by this Agreement includes but is not limited to:

disclosing, providing, exchanging, or discussing antitrust evidence in the possession of an Antitrust Authority;

1. obtaining antitrust evidence at the request of an Antitrust Authority of the other Party, including

   taking the testimony or statements of persons or otherwise obtaining information from persons,

   a. obtaining documents, records, or other forms of documentary evidence,
   b. locating or identifying persons or things, and
   c. executing searches and seizures, and disclosing, providing, exchanging, or discussing such evidence; and

2. providing copies of publicly available records, including documents or information in any form, in the possession of government departments and agencies of the national government of the Requested Party.

D. Assistance may be provided whether or not the conduct underlying a request would constitute a violation of the antitrust laws of the Requested Party.

ARTICLE IV:
LIMITATIONS ON ASSISTANCE

A. The Requested Party may deny assistance in whole or in part if that Party's Central Authority or Executing Authority, as appropriate, determine that:

1. a request is not made in accordance with the provisions of this Agreement;

2. execution of a request would exceed the Executing Authority's reasonably available resources;

3. execution of a request would not be authorized by the domestic law of the Requested Party;

4. execution of a request would be contrary to the public interest of the Requested Party.

5. Before denying a request, the Central Authority or the Executing Authority of the Requested Party, as appropriate, shall consult with the Central Authority of the Requesting Party and the Antitrust Authority that made the request to determine whether assistance may be given in whole or in part, subject to specified terms and conditions.

6. If a request is denied in whole or in part, the Central Authority or the Executing Authority of the Requested Party, as appropriate, shall promptly inform the Central Authority of the Requesting Party and the Antitrust Authority that made the request and provide an explanation of the basis for denial.

ARTICLE IX:
TAKING OF TESTIMONY AND PRODUCTION OF DOCUMENTS

A. A person requested to testify and produce documents, records, or other articles pursuant to this Agreement may be compelled to appear and testify and produce such documents, records, and other articles, in accordance with the requirements of the laws of the Requested Party.

B. The Executing Authority shall, to the extent permitted by the laws and other important interests of the Requested Party, permit the presence during the execution of the request of persons specified in the request, and shall, to the extent permitted by the laws and other important interests of the Requested Party, allow such persons to question the person giving the testimony or providing the evidence.

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[1] See para. 2 of its Agreed conclusions in UNCTAD, Report of the Intergovernmental Group of Experts on Competition Law and Policy on its sixth session (TD/B/COM.2/48).

[2] Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil regarding Cooperation between their Competition Authorities in the Enforcement of their Competition Laws, Washington, DC, 26 October 1999.

[3] Memorandum of Understanding between the Commerce Commission of the Fiji Islands and the Australian Competition and Consumer Commission, 30 April 2002.

[4] Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000(1) (2000/415/EC).

[5] Partnership Agreement between the African, Caribbean and Pacific States and the European Community and its Member States, adopted at Cotonou, Benin, on 23 June 2000.

[6] Agreement between the Government of the People's Republic of China and the Government of the Russian Federation on Cooperation in the Field of Countering Unfair Competition and Antimonopoly, 25 April 1996.

[7] Memorandum of Understanding on Cooperation between the Fair Trade Commission of the Republic of Korea and the Competition Directorate-General of the European Commission, 28 October 2004.

[8] Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, 30 December 2002.

[9] Euro-Mediterranean agreements establishing an association between the European Communities and their member States, of the one part and of the other part respectively: the People's Democratic Republic of Algeria (22 April 2002); Egypt (25 June 2001); the State of Israel (Brussels, 22 November 1995); the Republic of Lebanon (27 March 2002); the Kingdom of Morocco (30 January 1996); the Republic of Tunisia (17 July 1996); the Palestinian Authority (2 June 1997); and the Hashemite Kingdom of Jordan (24 November 1997).

[10] Agreement Between the European Community and the Government of Japan concerning Cooperation on Anti-Competitive Activities, Brussels, 10 July 2003.

[11] Memorandum of Understanding between the Fiscalia Nacional Económica of Chile and the Competition Bureau of Canada, 17 December 2001.

[12] See Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Enforcement, 27 April 1999.

[13] Implementing Agreement Between The Government Of Japan And The Government Of The Republic Of Singapore Pursuant To Article 7 Of The Agreement Between Japan And The Republic Of Singapore For A New-Age Economic Partnership. While this obligation is so far only applicable in respect of the telecommunications, electricity and gas sectors, the agreement leaves open the possibility of extending it further.

[14] Arrangement Between The Fair Trade Commission Of The Republic Of Korea And The Federal Competition Commission Of The United Mexican States Regarding The Application Of Their Competition Laws , Seoul, 23 April 2004.

[15] See for example the Agreement between Denmark, Iceland and Norway regarding cooperation in competition cases, Copenhagen, 16 March 2001.

[16] See for example the Agreement between the Government of the United States of America and the Commission of the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws (Brussels and Washington, DC 4 June 1998); and Agreement between the Government of the United States of America and the Government of Canada on the Application of Positive Comity Principles to the Enforcement of their Competition Laws, Washington, DC, 5 October 2004.

[17] Cooperation and Coordination Agreement between the Australian Trade Practices Commission and the New Zealand Commerce Commission (July 1994).

[18] Agreement between Japan and the Republic of Singapore for a New-Age Partnership.

[19] Agreement on Trade, Development and Co-operation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, 29 July 1999.

[20] The Agreement between the EFTA States and the Hashemite Kingdom of Jordan (Vaduz, 21 June 2001) contains a similar provision, but establishes a specific time limit of five years within which either party may take

such measures, with the possibility of further five year extensions in the light of the economic situation of Jordan. See on this P. Brusick and J. Clarke, Operationalizing special and differential treatment in cooperation agreement on competition law and policy, in UNCTAD, *Trade and Competition Issues: Experiences at Regional Level*.

[21] Andean Subregional Integration Agreement (Cartagena, 26 May 1969), together with Decision 285 of the Andean Commission, Norms for the Prevention or Correction of Distortions In Competition Caused by Practices that Restrict Free Competition, 21 March 1991.

[22] North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United States of Mexico (Washington, D.C., 8 and 17 December 1992; Ottawa, 11 and 17 December 1992; and Mexico City, 14 and 17 December 1992); The Treaty on Free Trade between the Republic of Chile and the Republic of Mexico, 1998.

[23] Singapore-United States Free Trade Agreement, Washington, 6 May 2003

[24] Australia-Thailand Free Trade Agreement, 5 July 2004.

[25] Agreement on Partnership and Cooperation between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, 30 October 1997.

[26] See for example the Agreement on Partnership and Cooperation between the European Communities and their Member States, of one part, and the Republic of Armenia, of the other part, 31 May 1999.

[27] Protocol VIII on Competition Policy, Consumer Protection, Dumping and Subsidies, amending the Treaty Establishing the Caribbean Community (Chaguaramas, 4 July 1973 and 14 March 2000).

[28] Treaty Establishing the Common Market for Eastern and Southern Africa (Kampala, 5November 1993); COMESA Competition Rules and Regulations, (Lusaka, 7 December 2004). For a commentary, see G. Lipimile, Allocation of competences between national and regional competition authorities, in UNCTAD, *Trade And Competition Issues: Experiences At Regional Level*.

[29] Southern Agreement Common Market (Asunción, 26 March 1991) and Decision 17/96 containing the Protocol on the Defence of Competition (17 December 1996).

[30] See Brusick and clarke, *op. cit*.

[31] See FTAA Trade Negotiations Committee, Guidelines or Directives for the Treatment of the Differences in the levels of Development and Size of Economies, FTAA.TNC/18, 1 November 2002.

[32] Treaty Establishing the Central African Economic and Monetary Community (N'Djamena, 16 March 1994); Traité Modifié de l'union Economique et Monétaire Ouest Africaine (UEMOA), 29 January 2003