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REVIEW OF ALL ASPECTS OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

Strengthening the implementation of the Set

The scope, coverage and enforcement of competition laws and policies and analysis of the provisions of the Uruguay Round Agreements relevant to competition policy, including their implications for developing and other countries

Study by the UNCTAD secretariat

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CONTENTS

SUMMARY AND CONCLUSIONS

1. In recent years, there has been a trend towards convergence in the scope, coverage and enforcement of competition laws and policies worldwide. This is due to: the widespread trend towards liberalization of markets and adoption of competition policies; greater emphasis upon consumer welfare, efficiency and competitiveness objectives in the provisions or application of competition laws; greater similarity in economic analyses and enforcement techniques; the universal condemnation of collusive practices (subject to certain exemptions in some countries); the limitation, elimination or abuse control of sectoral, personal or Government-connected exemptions; tightening up of enforcement; a more prominent role for competition authorities in advocating competition principles in the application of other governmental policies; the applicability of competition laws to RBPs outside national territory; and the strengthening of international consultations and cooperation.

2. However, there remain many important differences among competition laws and policies, including in: the priority attached to competition policy vis-à-vis other policies; the importance attached to objectives other than consumer welfare or efficiency under many competition laws; legal approaches to the control of RBPs; analytical techniques utilized; substantive rules applicable in particular to vertical restraints, abuses of dominant positions, mergers, joint ventures and interlocks; the structure or scope of de minimis, functional, intellectual property or other types of exemptions indicated above (although some of these may not really be exemptions, but inherent to the normal application of competition principles); enforcement capabilities and actual strength of enforcement; the legal doctrines under which competition laws are applied outside national territory; the actual ability to apply them or frequency of application; the extent to which different countries participate in international cooperation in this area; and regulatory restrictions upon market entry. Despite these differences, there are now sufficient broad similarities in the objectives, content and application of competition laws and policies to form the substantive basis for strengthened cooperation.

3. Moreover, a strong impetus towards the strengthening of convergence and of international consultations and cooperation mechanisms in this area has been provided by the Uruguay Round Agreements. The extent to which the rules of the international trading system cover conduct by enterprises has been substantially increased, although Governments remain the direct addressees of trade rules. Contracting parties to the Agreements have undertaken legally binding commitments to control private restraints on trade (in some areas such as services), or not to encourage or support such restraints (in other areas such as safeguards), with the primary objective of improving market access for the firms of other contracting parties, or of otherwise furthering their trade interests. Consultation obligations relating to RBPs in international trade have been extended. There are also significant provisions relating to the consideration of competition factors in the implementation of trade measures by Governments, such as anti-dumping or countervail of subsidies.

4. The further reduction of private barriers to market access (for producers and consumers from both exporting and importing countries) and to market entry would be a logical step in the progressive liberalization of international

trade, and would enhance global economic efficiency, growth and consumer welfare while reducing trade or competition policy tensions. Action in this area may be particularly desirable because the Uruguay Round Agreements' tightening-up of controls over trade restrictions by Governments may increase the incentive for enterprises to resort to RBPs. Globalization and technological trends may also lead to new types of RBPs across borders. But to consolidate and expand upon the progress achieved by the Agreements in a balanced manner, complementary mechanisms are needed as well to encourage trade regimes to take greater account of competition and consumer welfare concerns, so as to mitigate protectionist or pro-producer behaviour in such areas as anti-dumping, countervail of subsidies, and safeguards. The strengthening of "safeguard" mechanisms to protect competition and prevent abuses within the rules of the international trading system would encourage trade liberalization. This would support and complement efforts made by competition authorities at the national level to advocate trade liberalization.

5. To face the new challenges in this area, and to encourage better mutual understanding and possible convergence in competition laws and policies, it would be desirable to strengthen consultations and cooperation among competition authorities within the framework of the Set of Principles and Rules (possibly eventually complemented by further guidelines), and technical cooperation could also be addressed in this framework.

6. In some specific areas, there may be a need to add to or clarify the legally binding competition policy provisions already contained in international trade rules thus making more uniform the extent to which competition principles are reflected in different trade agreements. As a first step, the obligation upon Uruguay Round Agreements signatories to consult and cooperate in respect of RBPs emanating from their territories might be strengthened on the basis of "positive comity" or mutual enforcement assistance procedures, taking into account principles taken from the Set of Principles and Rules. Since the Uruguay Round Agreements have substantially encroached upon the traditional concept that national authorities should mainly be concerned only with the effects of RBPs upon their own markets, consultations might also be undertaken on a prohibition in principle of export cartels by trade rules. After further in-depth consultations, controls on other types of practices affecting the overseas market, particularly abuses of dominant position or monopolization, might eventually be envisaged.

7. The treatment of competition policy issues by international trade rules might also be further addressed including in such areas as: the control of State enterprises or enterprises with exclusive rights in the area of trade in goods; safeguards; anti-dumping; countervail; abuse of intellectual property rights (since these have been strengthened), practices in licensing agreements, and the relationship of exhaustion of rights and prohibitions upon parallel imports with national treatment, quantitative restraints and price discrimination; RBPs by firms having effects equivalent to trade-related investment measures (the TRIMS Agreement already provides for future consideration of whether competition policy provisions are required); trade in services (including restrictions upon access to distribution channels and information networks); and the nullification or impairment of benefits through the non-enforcement or inappropriate enforcement of competition law. More

account might also be taken of the interrelationships between the competition and trade policies practised in importing and exporting countries and between RBPs and governmental rules and restrictions, such as the manner in which trade measures facilitate collusion. Appropriate provision might be made in this area for special and differential treatment for developing countries, particularly least developed countries.

8. Apart from consultations and cooperation mechanisms under the Set of Principles and Rules and the Uruguay Round Agreements, some mechanism to coordinate approaches relating to issues in the interface between competition and trade may also be desirable, particularly as competition and trade policies are bound to be brought even closer together in future. On the one hand, competition authorities would need information about how national competition rules need to be modified in the light of both the effects upon competition of the new trade framework and of the competition policy obligations contained therein - including in such areas as the impact of trade measures on prices and industry structures in various markets, the relationships between trade and price disparities, the identification of relevant markets and entry barriers, sectoral or government-linked exemptions, control of abuses or discrimination, and national treatment obligations. Competition authorities might also be informed and consulted as to how the competition policy provisions in the rules of the trading system could be applied and further developed.

INTRODUCTION

9. The present draft study has been prepared by the UNCTAD secretariat in accordance with the agreed conclusions adopted by the Intergovernmental Group of Experts on Restrictive Business Practices at its fourteenth session. 1/ It is based on the outline of the study which was presented to that session of the Group, 2/ taking into account comments made by delegations on the outline. Given the wide subject-matter of the study, it does not aim to provide a detailed description of the scope, coverage and enforcement of competition laws, but rather to sketch a broad and selective picture. A background paper to this study 3/ describes some basic features of the scope, coverage and enforcement of competition laws and policies which have not been dealt with in the present paper because of space limitations. However, the summary and conclusions in the present paper take into account the findings from the background paper.

10. The present paper is composed of five chapters, the first four of which deal with the scope, coverage and exemptions of competition laws and policies in respect of subject-matter, persons and geographical coverage. Chapter I describes some complete or partial de minimis, functional, rule of reason and sectoral exemptions from the application of competition laws. Chapter II describes the application of selected competition laws to some types of entities, as well as to national and foreign governmental entities, public enterprises (PEs) and persons receiving authorization or permission from Governments. Chapter III describes the exemptions granted in respect of the exercise of intellectual property rights, which are treated separately since they are exemptions of both a subject-matter and a personal nature (involving the grant of types of exclusive rights to different persons by the State). Chapter IV describes the geographical scope of application of competition laws, including their application overseas, and their treatment of RBPs originating from national territory affecting foreign markets. Chapter V describes and analyses the implications of some provisions of the different Uruguay Round Agreements relating to the state of competition within domestic markets, or relevant to the scope, coverage and enforcement of competition laws, and makes suggestions for further action.

Chapter I

EXEMPTIONS

A. Overview

11. The term "exemption" is used throughout this study in a broad sense to include: (a) partial or complete exceptions or exclusions from the application of the competition law, whether these exceptions are written into the competition law itself or result from the provisions of other laws or from judicial doctrines; (b) special rules which, although different from the ordinary competition rules, none the less operate within the general framework of these rules; and (c) "block" or individual exemptions granted by competition authorities, other governmental agencies or courts in the exercise of their discretion to exempt or in the application of the rule of reason. Exemptions may not necessarily constitute a non-application or weakening of normal competition principles, but may follow from the normal application of principles of competition and efficiency to the specific features of minor transactions types of practices, functions (such as research), sectors, intellectual property or entities, including entities linked with governments. They may also be intended to increase the predictability of the competition rules applicable to that sector. Exemptions are granted most frequently where there are special circumstances suggesting that competition would not ensure an efficient outcome in the relevant product market (i.e. market failure), or where socio-economic or political considerations other than economic efficiency have been taken into account, such as unemployment, or industrial or agricultural policy. In practice, the line between those exemptions granted to promote pro-competitive efficiency and those granted for industrial policy reasons may also be blurred.

12. The true extent to which exemptions are granted cannot be determined simply from legislative texts; enforcement policies and techniques, case law, and administrative practices also need to be taken into account. Even in the absence of an explicit exemption in a competition law, non-enforcement (or relaxed enforcement) of the law may have the same result. Decisions taken after economic analysis in individual cases may also achieve the same result, particularly if the competition authority or the courts have a considerable discretionary power. The differences between laws and enforcement techniques used under different legal systems are relevant here. Under the "rule of reason" approach utilized by the United States and some other countries, mainly with a common law background, most practices (other than a few practices which are prohibited per se) are forbidden only if their anti-competitive effects outweigh any competitive benefits resulting therefrom. Under the "prohibition" approach adopted by most civil law countries, on the other hand, the competition law forbids a number of practices in principle, but then provides for exemptions in specified circumstances; competition authorities have the authority to decide whether or not a practice in an individual case falls within the terms of these exemptions, and may also have the authority to grant lock exemptions for some practices or some sectors. Article 85 of the Treaty of Rome, for instance, prohibits agreements, decisions and concerted practices affecting trade between Member States and restricting or distorting competition. However, these may be exempted if they contribute to improving the production or

distribution of goods or to promoting technical or economic progress and allow consumers a fair share of the resultant benefit and do not impose restrictions which are not indispensable to achieve the benefit sought, or afford the possibility of eliminating competition in respect of a substantial part of the products in question. A number of block exemptions have been issued, and exemptions are also frequently granted in individual cases.

13. In practice, the differences among these approaches are not as great as would appear at first sight. Moreover, there is a general trend towards the uniform and universal application of competition policy throughout an economy. Increasingly, many countries are allowing exemptions only where and to the extent necessary to achieve the regulatory purpose (as interpreted from the regulated conduct clearly specified in the relevant legislation); separating market from non-market activities, and fully applying competition laws to the former; controlling abuses; and trying to ensure that the regulatory scheme causes the least harm to economic efficiency and provides the least possibility to commit abuses, in the light of changing economic and technological conditions. It is now relatively rare for entire sectors to be exempted, and there is often a residual area where competition authorities have a role to play; broad exemptions for certain activities within a sector may be combined with the full application of competition law or limited exemptions in respect of other activities within that sector. In Chile, for instance, on its enactment, the competition law 4/ repealed all incompatible laws and regulatory and administrative provisions, except for restrictions imposed or authorized by pre-existing laws in the fields of intellectual property, the production of and trade in petroleum, saltpetre, iodine and copper, the creation and functioning of public enterprises (PEs), banking, transport, chartering and coastal traffic, and some other areas. However, this does not mean that the competition law is not applied to these fields, but rather that the specific restrictions permitted in these fields under previous laws are respected.

B. De minimis and functional exemptions

14. De minimis exemptions are those which are granted for transactions involving firms with turnover or market share below a certain threshold, which are not considered to affect competition significantly enough to make it necessary for the law to be made applicable to them or to be applied by them. The types or the threshold for de minimis exemptions vary, and the threshold may sometimes be quite high. Under the Russian law, for example, only horizontal agreements which hold or may hold a combined market share of over 35 per cent are prohibited. 5/ Functional exemptions are those granted for certain activities, usually of a horizontal nature. In the application of the French competition law, 6/ for example, price-fixing arrangements are presumed to be anti-competitive, but they would be exempted if the enterprises concerned are sharing a common property or resource, or are marketing a collective creation. Both types of exemptions are granted under many competition laws, either by the express terms of the law or through its enforcement under the rule of reason. They can sometimes be combined where, for example, certain activities of SMEs are exempted. The Venezuelan law, 7/ which prohibits RBPs in terms similar to the Treaty of Rome, exempts inter alia activities relating to standardization, R&D, and specialization. De minimis exemptions are also granted to concerted activities among

competitors when not more than 15 per cent of the market is affected and when the participating enterprises have a turnover of less than a certain sum.

15. Specialization and rationalization arrangements are exempted under several laws provided each party maintains its freedom to determine pricing and business strategies. In some countries such as Germany 8/ or Japan, 9/ cartels or other horizontal arrangements may be authorized, on a temporary or an indefinite basis, to rationalize activities, because of crisis conditions or a depression or recession in an industry, to increase the bargaining power of a number of weak SMEs vis-à-vis dominant suppliers or purchasers, or because of economic or other public interest considerations. But even in the grant of such authorizations, care may be taken to minimize adverse effects upon competition. Under the German law, for instance, participants in rationalization agreements must be able to demonstrate that these will rationalize economic activities and will be likely to substantially increase the efficiency or productivity of the participating enterprises and thereby improve the satisfaction of demand, and the rationalization effect must also be adequate in relation to the restraint of competition. Even after being legalized, rationalization agreements (like other authorized horizontal arrangements) are subject to controls in case of abuse, and they must not violate principles concerning trade in goods and services accepted by Germany in international treaties.

16. In the United States, a rule of reason analysis is applied to joint ventures (as long as they are not merely devices to facilitate cartels). If both parties would have entered the market alone but for the venture, it would be considered to be anti-competitive; if neither party would have otherwise entered into the market, it would be considered to be pro-competitive. It is specifically provided by statute that R&D joint ventures are to be examined under a rule of reason standard, and they are exempted from claims for treble damages, provided that notification of the venture has been made to the competition authorities; in practice, research joint ventures have rarely been found to infringe the competition rules. Similar treatment is granted for production joint ventures, subject to the additional conditions that the principal production facilities of the venture are located in the United States and that the parties are companies from the United States or from countries that treat United States companies fairly under their competition laws governing joint production ventures. 10/

17. The provisions relating to horizontal arrangements under the European Union rules are substantially different from those in the United States competition laws, but the difference is less in enforcement practice. However, compared to United States law, the treatment of horizontal restraints and joint ventures under European Union law appears to be conducted on a more discretionary and flexible basis, with greater willingness to take into account efficiency and industrial policy considerations. Block exemptions are provided for agreements relating to standardization, specialization and R&D. The latter exempts for five years both research and joint exploitation of the research results, and restraints ancillary to these activities, subject to certain conditions; in particular, the parties must not have more than a 20 per cent market share in the relevant product. Crisis cartels are also permitted in certain industries as long as they are aimed at achieving a coordinated reduction of overcapacity and do not restrict free decision-making

by the firms involved. Cooperative ventures 11/ in general (and ancillary restraints) can be exempted if they fall within the exemption clause in article 85, taking into account the effects of the venture on competition between the parties and on third parties.

18. The Republic of Korea's competition legislation 12/ prohibits in principle collaborative activities between entrepreneurs which substantially restrict competition in any particular field of trade; these include collusive agreements on prices or other sales conditions, on production capacity or output, on customers or markets, on specialization and on joint operating agencies. However, the parties may apply to the Commission for prior approval, and exemptions may be granted if the proposed collaboration is deemed necessary in order to rationalize an industry, to overcome a cyclical recession, to facilitate industrial restructuring, to improve the competitiveness of SMEs, to promote research and development or to rationalize terms of transactions. Authorizations may not be granted if the collaboration exceeds the limit necessary for achieving the purposes thereof, if the interests of consumers and other entrepreneurs may be unreasonably injured, if there is unreasonable discrimination among the participating firms, or if participation or withdrawal from collaboration is unreasonably restricted. By 1993, 95 undue collaborative activities had been remedied, about half of them involving price-fixing. 13/ The Commission has been cautious in exercising its powers to grant exemptions; as of the end of 1993, there were only five exempted cartels in existence. 14/

C. Specific sectoral exemptions

19. In contrast with functional exemptions, sectoral exemptions are specifically directed at certain sectors, though in practice the line between the two is blurred. Primary, manufacturing and service sectors are dealt with below in that order. It is noteworthy that most sectoral exemptions concern mainly primary or service sectors; it is relatively less common for explicit sectoral exemptions to be provided for specified manufacturing sectors, although it is true that some manufacturing sectors may be wholly or partly covered by rule of reason, functional, personal or territorial exemptions.

20. Agriculture and fisheries are key sectors which are often excluded, exempted or treated favourably in many competition laws. Some exemptions are general in scope, while others apply only to particular products. Some exemptions require the approval of a governmental agency, while others are automatic. Conduct may be exempted because it is permitted or regulated in the context of laws organizing a particular market, as in the case of national market organizations. The formation and activities of producer associations and cooperatives, cartels and resale price maintenance may be exempted to a greater or lesser extent. The European Union exempts agreements which are deemed to be necessary for the achievement of the Common Agricultural Policy, as well as agreements forming an integral part of national market organizations. The United States allows cooperation between agricultural producers, including price-fixing, but the Government may order such conduct to be terminated, and anti-trust immunity does not extend to monopolization (or attempts to monopolize) by cooperatives engaging in predatory or otherwise anti-competitive activities. Similar exemptions are provided for the fishing

industry. Japan allows cartels for a number of agricultural and fishery-related products. The Republic of Korea's competition law applies to all sectors except agriculture, fishing and mining. Under the Zambian law, 15/ the ban on allocations by quota as to sales and production does not apply to statutory arrangements relating to the production and sale of coffee.

21. On the other hand, in the implementation of the Venezuelan law, steps have been taken to introduce competition in the agricultural sector, even though special problems were faced because of market structures characterized by bilateral monopolies between concentrated processing industries and organized producer associations which traditionally fixed prices, import quotas, tariff exemptions and other policies with the Government. Taking into account the monopsonistic structures prevailing, producer associations representing no more than 15 per cent of the relevant market have been allowed to agree upon and negotiate prices in a concerted manner, and producers have been ordered to publicize prices they offer (so as to limit discrimination). 16/ Competition enforcement has also been undertaken against monopolies distributing sugar and trading in and guaranteeing minimum prices for coffee and cocoa. Similarly, in Chile, associations for the production and marketing of wheat flour and bread, and a monopsony of edible oil producers formed to purchase agricultural products, were dissolved by the competition authority. 17/

22. The grant of absolute or limited exemptions is also common in the extraction industries. In Mexico, the Government's monopoly in "strategic areas", including extraction of petroleum, other hydrocarbons and radioactive minerals, and in basic petrochemical industries, has the result of exempting these sectors from the competition law. 18/ However, the scope of this exemption is strictly construed to apply only to the specific strategic activities reserved for the Government; thus, the competition authority has recently intervened in respect of the grant of concessions for petrol stations by the State-owned oil company. In the United States, various energy sectors are overseen by regulatory agencies, which typically regulate industry rates and acquisitions, and are required to take competition concerns into account; otherwise, no anti-trust immunity is granted to these sectors. The European Union applies a special competition regime (under the European Coal and Steel Treaty) to its coal and iron and steel industries; the European Commission has the power in certain circumstances to fix production quotas and prices in these industries, while the criteria for analysing the anti-competitive effects of mergers may be less strict than the criteria applied under the Merger Control Regulation. 19/

23. In the area of manufacturing, Japan exempts a cartel for the production of ocean-going ships. It also exempts some pharmaceutical items from its prohibition on resale price maintenance (RPM). Medicaments in general are excluded from the ban on RPM in the United Kingdom. Defence-related industries are wholly or partially exempted in several countries. In the Republic of Korea, apart from the possibilities for exemptions under the competition law, separate legislation provides for rationalization programmes for some declining "sunset industries" and some growing "sunrise industries", which may only last up to three years; relatively few industries have been placed under such programmes.

24. Labour and employment-related activities (or trade unions) are exempted in most competition laws, although some laws may apply to some activities in certain circumstances. In the distribution sector, the European Commission exempts exclusive dealer networks for cars; however, reductions are being made to the restrictions permissible in this area. Exclusive purchasing agreements for petroleum-based and other fuels for resale in a designated service station are also exempted. Japan allows cartels among wholesalers, as well as joint economic business by and among members of retail store owners' associations. Many countries provide special treatment to the media and publishing industries; in some countries such as Germany, Japan, the Republic of Korea and the United Kingdom, the prohibitions on resale price maintenance, for instance, do not apply to transactions in literary works.

25. The financial services, insurance and securities sectors are subject to extensive government regulation for prudential reasons in virtually all countries; this has led to the adoption of sector-specific competition rules in some jurisdictions, as well as to formal exemptions from competition laws in others, and may have led in some cases to reduced enforcement activity in these sectors. In the United States, the banking industry is covered by a specialized anti-trust regime similar to that ordinarily applied, but a lenient enforcement policy with respect to mergers is applied by the banking regulatory agencies if certain conditions are met. An exemption is granted to the "business of insurance" to the extent that it is regulated and actively supervised by states of the United States, but the exemption does not extend to mergers or collective boycotts. The European Union has adopted a block exemption for certain kinds of agreements in the insurance sector. In Japan, insurance rates are fixed by an industry cartel. In the Republic of Korea, banks have been largely exempted from competition enforcement until recently, but are now subject to expanded enforcement; the insurance sector still has a degree of exemption. The banking and insurance industries in India are excluded from the provisions of the competition law 20/ in respect of those matters in respect of which there are specific provisions in the relevant legislation governing these industries (only State-owned banks would be covered).

26. Several countries grant a degree of immunity to internal transport industries (by road, rail or water). The United States grants anti-trust immunity to ocean common carriers, liner conferences and marine terminal operators provided the agreements they enter into are notified. Ocean carriers cannot engage in predatory or discriminatory pricing, and conferences and agreements between liner carriers must be open to new participation. Japan also exempts agreements between ship-operators on freight rates or other conditions of transportation unless unfair methods are used or there is an undue increase of charges through a substantial restriction of competition. The European Union also exempts, subject to certain conditions, several types of horizontal practices among members of liner conferences, as well as some agreements between conferences and transport users. The block exemption is granted subject to certain obligations being met to ensure that conferences operate alongside non-conference lines. In recent years, the European Commission has taken action against allocations of cargo quotas, price-fixing, capacity restrictions, non-competition agreements and exclusionary practices involving shipping conferences or liner carrier agreements between Europe and Africa, 21/ or with the Far East. Based on the approach provided by the

United Nations Liner Code, many developing countries have sought in the past to guarantee 80 per cent of the liner trade to designated national lines at both ends of the trade, leaving 20 per cent to third country lines, but substantial liberalization has occurred in recent years. Germany, Japan and the United States also exempt various pricing agreements between the providers of services related to seaports. The air transport industry also has a degree of immunity from competition law in many countries, although the scope of immunity varies from country to country, and the trend in several countries has been to reduce such immunities. The European Union exempts from article 85 (1) certain agreements relating to the operation of computer reservation systems, schedules, joint operation of services, and consultations on tariffs and slot allocation.

27. Network or infrastructure industries which have a natural monopoly element are usually regulated under special regimes in most countries. Such special regimes may be more stringent than competition regimes in some respects and less stringent in others. Network industries may also concurrently be subject to the general competition law (particularly to its provisions relating to abuse review), or they may be partially or fully exempted from its ambit. The European Union and the United States apply most of their competition laws to the telecommunications sector (the United States exceptionally applies a public interest test to mergers between two telephone companies). In Chile, following the application of the competition law to the telecommunications sector to inter alia control vertical integration between local and long-distance telephone companies, a separate system of industry regulation has been adopted relating to the grant of concessions and conditions to be met by concessionaires. In the United Kingdom, the principal standing agreements in the electricity sector, as well as certain agreements in the gas and telecommunications industries, are exempted from the law relating to restrictive practices, but these sectors are closely regulated under special legislation. The European Union will be liberalizing the electricity market, requiring member States to allow both third-party access to distribution networks and the right of eligible consumers to import supplies and sell them to the network operator, but allowing States the possibility of having a single buyer of electricity.

28. To determine the real extent to which a sector is subject to competitive disciplines, it would be necessary to look not just at their treatment under competition law, but also at the general regulatory framework established in such sectors by Governments (including regulatory restrictions upon market entry, as well as competition-distorting subsidies). It is not a coincidence that many sectors which have a degree of exemption from the application of RBP controls (such as agriculture) are also subjected to pervasive governmental regulation and subsidization. While there has been a universal trend towards liberalization, deregulation and market orientation, 22/ many such governmental restrictions or subsidies continue to exist. The picture is made even more complicated by the fact that partial liberalization in some sectors has been combined with partial application of competition laws (as in some network industries in some countries) and by the fact that regulatory restrictions in a sector may be a response to restrictions followed in the same sector in other countries. In Poland, for example, several sectors are subject to regulatory policies, including power engineering, water supply, telecommunications, postal service, rail transport and the sugar industry -

the regulation of the sugar industry was made necessary by the practice followed in most OECD countries. 23/ Although the possibilities for the competition authority to influence the market in these sectors is therefore limited, the Antimonopoly Office still often intervenes in these sectors, both to control monopolistic practices and to encourage structural changes through the introduction of some elements of competition (such as by insisting on the grant of access to networks).

Chapter II

APPLICATION TO PERSONS AND ENTITIES

A. General application to some types of entities

29. The general principle in all competition laws is that all persons or enterprises are equally subject to the competition law, without discrimination. This general principle is usually qualified in some respects. Different types of entities may be the subject of exceptions or exemptions, or of provisions for stricter application, on account inter alia of their ownership, turnover, market share, structure, or involvement with governmental authorities. Such entities may include small and medium-sized enterprises (SMEs), firms holding monopoly or dominant positions, affiliated firms linked through ownership or control, professions, trade unions, cooperatives or trade associations. However, at least some of the special provisions relating to such entities may not really involve differential treatment. Provisions providing for stricter scrutiny of practices involving dominant firms, or for lenient treatment of SMEs, for example, may merely be a recognition that adverse effects upon competition are more or less likely (as the case may be) to result from practices by such firms. It may also be noted that the border line between personal and other types of exemptions is blurred; exemptions provided for employment-related activities and for trade unions would be similar in effect, for instance.

30. Some competition laws expressly provide for exemptions for SMEs. Japan exempts some types of cartels and contracts by SMEs. In Germany, subject to various conditions, agreements among SMEs for cooperation and joint purchasing and recommendations offsetting structural disadvantages suffered by SMEs with respect to large firms are permitted, SMEs may not be subjected to discrimination and, in merger control, the creation of a dominant market position is more easily presumed if over two thirds market share is held by SMEs. The European Union's block exemptions for distribution and for non-reciprocal exclusive purchase agreements apply to competing manufacturers only if one of them has a turnover of less than ECU 100 million; as under the German law, most agreements between SMEs with a combined market share of 5 per cent or less are exempted. Other competition laws, such as the Mexican law, make no distinction between SMEs and large enterprises. However, even where competition laws contain no special provisions regarding SMEs, they may receive favourable treatment de facto because they fall beneath the thresholds above which certain procedures or prohibitions are applied, or because their activities are assessed as having a de minimis effect upon competition. On the other hand, enterprises having a turnover or market share exceeding a given threshold may be subject to special scrutiny under many competition laws. As described in the previous chapter, this may merely be in relation to thresholds needing to be met before abuse of dominance or merger investigations will be triggered off, or before a presumption of dominance is established, but some provisions in a competition law may be directed solely at dominant firms, and in a few countries, competition authorities keep lists of dominant firms.

31. Although most competition laws do not make any express reference to practices among affiliated enterprises, it would usually be recognized in the evaluation of individual cases that practices between firms constituting a single economic unit should be granted more lenient treatment than similar practices between unrelated firms. Both horizontal and vertical practices between firms under common control are usually considered legitimate, and this may also be the case for practices which might otherwise be considered abuses of dominant position, depending on the closeness of the relationship between the firms concerned and on the effects on third parties. Conversely, interconnected companies would normally be treated as a single firm in assessing market share or market power, or in respect of collusion. Under United States law, it is considered that a corporation and its wholly-owned subsidiary are incapable of conspiring because they must be viewed as a single entity; however, it has been held that a company with a 50 per cent share in a joint venture committed abusive monopolization when it prevented the venture from competing with itself. 24/ In France, the test for whether intra-enterprise agreements are exempted is whether the members of the group enjoy commercial autonomy or not. A more restrictive test is applied under the EU regulations; intra-enterprise agreements are not covered if, in an individual case, the companies concerned form an economic unit in which the subsidiary has no real freedom to determine its course of action on the market and if the agreement is concerned merely with the internal allocation of tasks within the group. The Jamaican competition law expressly provides that a group of "interconnected companies" shall be treated as a single enterprise. The Zambian law, in proscribing abuses of dominant position, makes no specific reference to affiliated firms, but specifies that it applies to mergers or takeovers between two "independent" enterprises and to collusion where enterprises are not dealing with each other in the context of a common entity wherein they are under common control or otherwise unable to act independently of each other.

32. Trade associations are expressly covered in many competition laws (such as the Indian, Kenyan or Zambian laws), and even where they are not expressly mentioned, they would usually still be covered. However, some trade associations, or certain of their activities, may be exempted. Japan’s Fair Trade Commission is proposing to issue new competition guidelines for trade associations; however, the United States Justice Department has stated that the proposed guidelines, while representing a significant improvement on earlier guidelines, do not adequately address exclusionary actions in the context of government-set standards and certification activities, blacklists, boycotts, discrimination in association membership and decision-making, access by non-members to necessary association benefits, and lack of transparency and due process by associations. 25/ The Republic of Korea’s competition law prohibits trade associations and their members from undertaking undue concerted activities and unfair business practices, and also prohibits trade associations from limiting the number of firms which may join them, and from unreasonably restricting the business activities of their members. Cooperative associations are given some degree of immunity in several competition laws, as in the Indian law. In some countries, exemptions for trade associations or for cooperatives may be combined with exemptions for SMEs, who may be allowed to join together in such bodies to negotiate with large firms. Trade unions are usually exempted, as discussed above. The activities of some professions and professional associations are usually not

formally exempted in competition laws, but other legislation regulating such professions may permit some practices, and enforcement policy in this area in several countries has traditionally been slack. Increasingly, however, the rationale for exempting professions is being questioned, and the trend is to permit only those restrictions that may be justified for valid professional reasons. In Venezuela, for example, action has been taken in respect of price-fixing agreements among stock exchange brokers and a call for boycott action by the pharmacists' professional association. 26/

B. Application to governmental entities or persons authorized by them

33. Most competition laws do not apply to Governments when they are undertaking sovereign acts. In the United States, for example, the Federal Government and the different states are not subject to the competition law. On the other hand, the Russian competition law, for instance, prohibits organs of power and administration from adopting legislation or taking actions which limit the independence of economic subjects, or discriminate among economic subjects, if they would result in a significant limitation of competition or encroachment upon the interests of other economic subjects or citizens. Acts which are prohibited include, for example, limitations on the creation of new economic entities in any sphere, as well as prohibitions on the conduct of particular kinds of activity or the production of particular kinds of goods (unless envisioned by legislation) and territorial restrictions on buying and selling goods within the Federation. The formation of governmental bodies with the goal of monopolizing production or sale of goods is prohibited, as are anti-competitive acts among governmental bodies or between such bodies and economic subjects. Under the Chinese law, 27/ local governments and their subordinate departments (but not the central Government) are prohibited from abusing their administrative powers to force other persons to buy the goods of designated operators, to restrict the lawful business activities of other operators, or to restrict the entry of goods from other parts of the country into the local market or the flow of local goods to markets in other parts of the country. The European Union competition rules (which are of a supranational character) control the grant by national Governments of State aids distorting competition and affecting trade among member States by favouring certain undertakings or the production of certain goods, as well as the grant of exclusive rights to providers of public services, unless these are services of general economic interest. 28/ In Poland, the Antimonopoly Office has started to work out a system for the control and monitoring of public aid. In some countries such as Japan or Mexico, a distinction is made between the sovereign acts of Governments, which are excluded from the purview of competition laws, and their acts when they are operating as economic agents or are undertaking private law activities, which would be covered.

34. Some competition laws 29/ exclude public enterprises (PEs) from their application, but most competition laws 30/ apply the same rules to them as to privately-owned firms, although there may be differences in some countries as to whether particular activities of PEs fall within the purview of competition laws. In Mexico, PEs are covered by the competition law when they engage in non-strategic activities not expressly mentioned in the Constitution as constituting a responsibility of the State. In the Republic of Korea, the Fair Trade Commission undertakes annual investigations of major PEs, publicly notes any unfair trade practices committed and enacts guidelines for prior

prevention and inspection. The Chinese law specifically prohibits practices by public utilities or other monopolies to force some enterprises to buy goods of designated enterprises so as to exclude other enterprises from competing fairly. Even in countries where PEs do not come within the scope of the law, they may be required as a matter of policy to abide by its provisions, as in the United Kingdom. Under the Treaty of Rome (art. 90), public undertakings and undertakings to which member States have granted special and exclusive rights are subject to competition rules, unless the application of these rules would obstruct their performance of special tasks in the general economic interest, and provided that the development of trade is not affected to an extent contrary to the interests of the Union. The European Commission has issued directives or individual decisions to member States in the application of this article in respect of such areas as telecommunications, postal services, energy and air transport.

35. In many countries, competition authorities have the mandate to advocate competition policy concerns in the elaboration of other policies or legislation. They may also make representations to different regulatory authorities, which may include inter alia authorities responsible for regulation of network industries, transport industries, public procurement, privatization or international trade. However, such representations may not always be taken into account, particularly in the area of international trade. In some countries, mainly some developing and Eastern European countries, the advocacy and consultation powers of the competition authorities may be quite extensive. In the Republic of Korea, for instance, the central administrative authorities are required to consult with the Fair Trade Commission before they enact, amend, or issue any legislation or administrative measure that is likely to restrain competition, i.e. that gives rise to undue collaborative activities or restricts the number of firms in a given sector. During the 1981-1993 period, out of 897 cases of such consultations, there were 196 rectifications. 31/ In Hungary, while the scope of the competition law 32/ does not extend to governmental authorities, the Office of Economic Competition may request the courts to review administrative rulings violating freedom of competition, and ministers must solicit the authority's opinion on proposed laws which would restrain competition, particularly those relating to market activities or access, providing exclusive rights or regulating prices or marketing. The President of the Office is consulted in governmental discussions affecting the Office's competence, and may request the Constitutional Court to repeal rules infringing both the Constitution and freedom of competition. However, the Office has no legal authority to prevent or request modifications in connection with privatization of firms in monopolistic or dominant positions.

36. The immunity of foreign Governments or PEs from competition law would depend on the general law of the country concerned. Acts of private persons may also be exempted where they have been authorized by national Governments. In India, agreements expressly authorized by or under any law, or having the approval of the Central Government, or to which the Government is a party, are not liable to registration on the Restrictive Trade Practices Register. In Kenya, practices which are directly and necessarily associated with the exercise of exclusive or preferential trading privileges conferred by the Government are exempted from the scope of the law. Even where there are no such express provisions, it is likely that many competition laws would not be

enforced in such circumstances. However, competition laws may sometimes still be applied in respect of abuses of dominant position or other competition infringements; this is the case in Hungary, for instance. In France, the conclusion of an agreement compelled by law or by Government regulation does not fall within the scope of the law, but legislation which merely reduces the scope for competition or mere governmental encouragement does not preclude the application of the law, including control of abuses of dominant positions created through legislation. In Venezuela, entities deriving dominant positions from the law are subject to the provisions of the competition law unless specific conditions stipulated by the appropriate regulatory authority dictate otherwise.

37. In the United States, the governmental activities of a foreign sovereign are also immunized, but commercial activities would not be. A claim brought against the OPEC countries in respect of a rise in oil prices was dismissed on the ground of sovereign immunity, for example; it was held that the establishment by a State of the terms for the removal of a natural resource stemmed from the nature of sovereignty and was a governmental activity, while foreign nations were not "persons" within the meaning of the anti-trust laws. 33/ The situation would be the same for a foreign PE. Under the Act of State doctrine, the courts may also decline to rule on the legality of official acts of foreign Governments acting within their own jurisdiction. As regards acts of private persons, they are exempted from the scope of the competition law, under the state action doctrine, if they are compelled by a state, or if they are undertaken pursuant to a clearly articulated state policy designed to displace competition and the state actively supervises the conduct in question. An implied anti-trust immunity can also result from the procedures for settling disputes under trade laws (which can involve price and quantity agreements by the foreign firms involved), but the Antitrust Enforcement Guidelines for International Operations emphasize that agreements among competitors that do not comply with the law, or go beyond the measures authorized by law, would not be immunized, irrespective of involvement of, or encouragement by, United States or foreign government officials. Under the Noerr-Pennington doctrine, a genuine effort by private parties to obtain or influence action by governmental entities is immune from anti-trust liability even if the intent or effect of that effort is anti-competitive. Immunity does not extend to litigation which is objectively baseless and intended to interfere directly with a competitor’s business relationships by using the governmental process (rather than the outcome of the process) as an anti-competitive weapon, but this does not apply to administrative proceedings, such as proceedings before trade tribunals. It is unclear to what extent petitioning by a private person of a foreign sovereign would be immunized, but the Antitrust Enforcement Guidelines indicate that the federal enforcement agencies would not bring proceedings in such cases. A firm acting under the compulsion of a foreign State would also be immunized, but not if it was merely permitted or assisted by the foreign State.

38. Under European Union competition law, the rules applicable in this area are not clear, but it may be noted that, in a case involving alleged dumping by Eastern European producers which were organs of their respective States, 34/ sovereign immunity arguments were rejected. The action taken in the French/West African Shipowners’ Committees and CEWAL Liner Conferences 35/ would also indicate that where private persons petition

foreign sovereigns to implement policies restricting competition by granting them exclusive rights, such private persons would not be immunized from the application of European Union competition law in respect of the petitioning and the subsequent anti-competitive activity.

39. Several competition laws explicitly exclude from their scope activities expressly approved or required under a treaty or agreement to which the country concerned is a party 36/ (it may be recalled in this connection that article B.9 of the Set of Principles and Rules excludes from its scope intergovernmental agreements and RBPs directly caused by such agreements). Such a provision would be relevant, for example, to trade-restricting agreements that may be entered into by Governments, as well as some commodity agreements. Even without such an explicit provision in the competition law, it is unlikely that a competition authority would enforce RBP controls in such circumstances. However, in the United States, while an implied anti-trust immunity can result from the procedures for settling disputes under US trade laws (which can involve price and quantity agreements by the foreign firms involved), the Antitrust Enforcement Guidelines for International Operations emphasize that agreements among competitors that do not comply with the law, or go beyond the measures authorized by law, would not be immunized, irrespective of involvement of, or encouragement by, United States or foreign government officials.

Chapter III

EXEMPTIONS RELATING TO INTELLECTUAL PROPERTY RIGHTS

40. All competition policies expressly or implicitly exempt from their application the exclusive rights inherent in intellectual property protection granted by the State, which are considered to justify restrictions that would otherwise be subject to controls. Under the doctrine of per se legality applied in some countries, the grant of an intellectual property right (IPR) implies the right to impose restrictions upon licensees which are within the scope of the protected rights, or are closely related to them. In Jamaica, for instance, exemptions are granted to persons or businesses with rights under or existing by virtue of any copyright, patent or trademark and any arrangements that the Fair Trade Commission has authorized. 37/ While patented goods sold by dealers cannot be subject to resale price maintenance, the price of goods produced by a patent licensee or assignee may be laid down by the patent-holder. Under some competition laws, "white lists" of practices which will not be challenged under competition law have been established through legislation, administrative guidelines or enforcement practice. Typically, such exempted practices may include inter alia: prohibitions upon sub-licensing, field-of-use restrictions pertaining to type of use, technical field, or product markets; restrictions relating to volume, territories, or possible customers; reciprocal grant-backs; time restrictions (within the lifetime of the IPR); restrictions on the use after termination of the agreement of IPRs maintaining their validity and of know-how not having lost its secret character; and non-disclosure obligations (in the case of know-how).

41. However, uncertainties regarding the competition law treatment of some IPRs, or enforcement policy in this area, may be arising from the lack of explicit provisions dealing with them in some competition laws or guidelines. Thus, the United States Antitrust Guidelines for the Licensing of Intellectual Property deal only with technology transfer and innovation-related issues arising with respect to patents, copyright, trade secrets and know-how agreements, and not with product-differentiation issues arising with respect to trademarks; however, the Guidelines clarify that the same general anti-trust principles would apply to trademarks. The Japanese Guidelines 38/ apply only to licensing of patents, utility models and know-how. Although the Japanese competition law exempts copyright items, this exemption will be reviewed in future; the Japanese Fair Trade Commission has criticized the system of pricing and sales for products protected by copyright, including compact discs and newspapers, noting that domestically produced compact discs are much more expensive than imported discs 39/ (it may be noted that in some countries such as Germany, copyright collecting societies are exempted from the ban on cartels, on resale price maintenance and on prescription of business terms).

42. Under most competition laws, the exemptions granted to practices in the context of IPRs is not absolute. Corresponding to the "white lists" mentioned above, there are also, under some laws, "black lists" of practices prohibited per se, such as: practices which are not covered by the rights conferred by IPRs at all, such as the transfer of minor or worthless IPRs only as a pretext for imposing restrictions on products or markets not covered by the IPR;

cross-licensing or patent pooling between actual or potential competitors (although the application of competition law to such practices in the United States would depend upon whether the agreement restrains competition between the parties, hinders possible competition from third parties, or confers monopoly power giving rise to substantial anti-trust risk); unilateral or exclusive grant-backs; restrictions after expiry of the agreement on the use of know-how which is no longer secret; and, in some countries, some vertical restraints such as vertical price-fixing. The Japanese Guidelines make a distinction between Japanese and export markets in this connection; while price-fixing of sale and resale prices of protected goods within Japan is prohibited, it is permitted on export markets if the licensor has a protected right in the foreign country, if it has been continuously marketing the item in that market, or if it has assigned exclusive rights to a third party.

43. Under many laws, even though no formal "black list" has been established, the types of practices permitted would be limited by the general principle that an IPR only gives rise to an exemption in respect of restrictions falling within its scope. Under the German competition law, for example, agreements concerning the acquisition or use of patent, utility models or protected seed varieties (as well as know-how or trade secret licences as appropriate) are ineffective in so far as they impose restrictions on business conduct going beyond the scope of the IPR. However, it is expressly provided that restrictions pertaining to the type, extent, quantity, territory or period of exercise of the IPR shall not be deemed to go beyond its scope. Several other types of restraints are acceptable as long as they do not exceed the duration of the agreement; these include inter alia price restraints on the protected object, non-exclusive grant-backs, and restrictions on competition outside Germany. The competition authority may also approve an agreement that does not unduly limit the freedom of the licensee or of any other enterprise, or materially restrain competition in the market by the volume of its limitations. Moreover, in the application of the "inherency doctrine", the exemption embodied in this provision has been extended from the "primary" rights granted by the patent laws to rights inferred by means of economic analysis from the "primary" rights.

44. It is in fact in the application of economic analysis to the large range of practices falling between the two extremes of clear per se legality and clear per se illegality (so-called "grey lists") that most difficulties and controversies have arisen. It is generally accepted that the mere fact of holding an IPR does not in itself signify that the right-holder has a monopoly, since there may be substantially equivalent products. But it has proved difficult to identify whether contractual restrictions not corresponding to the rights directly conferred by the IPR are accessory to the rights or are abusive, enabling the right-holder to restrain competition in a manner not possible if it had directly exploited the IPR. Such difficulties have been even greater in respect of restrictions in licensing agreements for know-how or trade secrets, since they are not usually granted exclusive rights by the State, 40/ so that their protection can only be undertaken through contractual means (although uncertainties in this area have been reduced by the issuing of guidelines under some competition laws). Moreover, some countries have been relatively more reluctant to allow restraints in licensing agreements because of concerns about fairness and safeguarding licensees'

freedom of action, as well as adverse effects on technology transfer and on incentives for licensees to innovate. Difficulties have arisen in particular in those areas where the precise scope of the rights granted by an IPR is not clear, or where there are differences in the solutions adopted by countries or by courts within one country. One such area is copyright and trade secret protection for new technologies, such as certain aspects of computer programmes; competition issues have arisen in this connection, particularly where dominant firms enjoy copyright protection over aspects of programmes which have become industry standards. It is likely that similar problems will arise relating to the scope of copyright protection of databases and information networks, as well as of patent protection of computer programmes and of biotechnology.

45. There are also differences in respect of the scope of exclusivity of the rights of production, sale, importation and distribution granted by patents. Under the doctrine of "first sale" in the United States and "exhaustion of rights" in the laws of some European countries, after the first sale of a branded or patented product by a right-holder, purchasers are entitled to dispose freely of the product. However, there are important differences in this respect. In several civil law countries (particularly in Germany), in order to ensure the free movement of goods, exclusive distribution rights attached to IPRs were considered automatically expended after first distribution effected by or with the consent of the right-holder within the country or abroad; if the right-holder imposed restrictive conditions in the sale or licensing contract, their validity would depend solely on the general competition law, and sub-licensees would not be bound. This principle has recently been amended to some extent in European Union countries; while international exhaustion of IPRs continues to apply to goods placed on the market in European Union countries, IPR owners are otherwise able to block parallel imports from other countries. Under European Union law, the existence of IPRs is protected, but their exercise to prevent parallel importation from other Member States of genuine goods which have been put on the market by the right-holder or with his consent (including through affiliates or unrelated licensees) is contrary to the provisions of the Treaty of Rome relating to free movement of goods, as well as the principle of exhaustion of rights. In Japan, the principle of "international exhaustion of rights" is fully applied; in a recent case involving parallel patents in Germany and Japan, it was held that since the German patent-holder had legally transferred title to a legitimate purchaser of the patented product in Germany, it could not prevent parallel importation into Japan and subsequent sale. 41/

46. In most common law countries, on the other hand, a sale or licence by the right-holder within a country will only free the article from its rights in the absence of any restrictive conditions in the agreement (which conditions would be subject to competition controls). Further sales or licences will be subject to the same conditions even if the subsequent contracts do not expressly include them since, under the "implied licence" theory, a sub-licensee cannot acquire any better right than that already possessed by the licensee. Thus, in one case, a Kenyan court ruled that a local distributor could not import a pharmaceutical product into Kenya due to territorial restrictions imposed by a United Kingdom patent-holder on a United States licensee from which the distributor had bought the

product. 42/ However, under United States competition law, competition rules may be enforced against such restrictions in licences if they affect export trade. In the Pilkington case, for instance, enforcement action was undertaken by the United States Justice Department against restrictions imposed in licences of float glass technology by a British glass manufacturing company to American licensees, restricting geographical and technological field of use, as well as sub-licences of the technology, and requiring grant-backs of improvements. 43/ In respect of importation into the United States itself, imports of foreign goods made under a licence from a United States trademark owner are banned; however, parallel importation of branded goods when the foreign and domestic trademark owners are the same, or are affiliated companies, is legal, as they are under "common control". 44/ In the case of patented goods, the principle of exhaustion only applies in respect of first sale within the United States, but not where the patented product has been obtained from abroad, even where there is a parallel patent abroad for the product.

47. Under United States law, a patent holder can designate territories in which its licensee can sell a patented product even though this would not be permitted in the case of unpatented products, and exclusive territories can be carved out for several licensees. Price-fixing between competitors in the context of a patent licence for the price-fixed product is valid in principle, but there are several important exceptions to this rule. Horizontal restrictions on field of use are valid provided they are imposed on a single licensee, although exclusive field-of-use licences to several licensees may raise problems, as may field-of-use restrictions by a licensor on products manufactured by a patented machine or process. The Antitrust Guidelines for the Licensing of Intellectual Property accept that there is no presumption that an IP owner has market power, and that any market power it has does not oblige it to license the IP. However, the illegal acquisition or maintenance of market power, or unreasonable conduct in connection with the IP, would be considered anti-competitive. The existence of a horizontal relationship (such as where the parties would be actual or potential competitors but for the licence) is not inherently suspect, but it opens up more possibilities for challenge by the authorities. To determine whether a restraint should be given per se or rule of reason treatment, it will be assessed whether it can be expected to contribute to an efficiency-enhancing integration of economic activity, facilitating the combination of the IP with complementary factors of production. The rule of reason analysis applied to IP will be the same general analysis applied to other forms of property, although the specific factors involved, such as the ease of appropriation of IP, or the importance of technology or innovation markets in this area, will be taken into account. Thus, although the principles applicable to licensors' grants of exclusivity to and among licensees will be similar to those applicable to comparable vertical restraints not involving licensing, ease of appropriation of IP will justify some restraints which would otherwise be forbidden. A safety zone has been defined within which the Department will not usually challenge a licence's restraints as long as they are not "facially anti-competitive", 45/ provided the parties' combined market shares of each market significantly affected are no more than 20 per cent.

48. Under European Union law, exclusivity clauses in licensing arrangements are subject to economic analysis; factors which may lead to their being accepted include whether they are "open" (not affecting the position of third parties such as parallel importers and licensees for other territories), if they are for new technology, if they are necessary to provide the licensor with a fair reward or to encourage interbrand competition, other general characteristics of the industry and the technology, and a duration which is not too long. 46/ The acquisition by a market-dominating enterprise of an exclusive patent licence for a process which is exceptionally efficient and crucial for production is considered to be an abuse if the enterprise thereby aims to extend its existing technological supremacy and to block competitors' access to the only equivalent competing technology, unless the risks taken by the enterprise in further developing the licensed technology require exclusivity. 47/ The European Union has adopted separate guidelines relating to the licensing of patents and of know-how and ancillary patents, but is now in the process of revising and combining them. One change proposed for the new guidelines is to limit the power of dominant firms 48/ to secure exclusive licences or to use rights over industry standards to keep out potential competitors from the market. In general, dominance is not considered to arise simply from the possession of an IPR, and abuse of dominance will not be considered to have occurred where a practice is inherent to the "specific subject-matter" and "essential function" of the IPR. The mere refusal to license an IPR, for example, is usually not in itself an abuse, nor is preventing competitors from manufacturing, selling or importing products incorporating the IPR without consent. However, arbitrary refusal to supply or to continue production of spare parts, or unfair pricing of such parts, would constitute abuse 49/ (a controversy is now occurring in the Union relating to the appropriate scope and duration of industrial design protection for car spare parts). In exceptional circumstances, a refusal to license may amount to an abuse where product innovation is prevented, all competition is excluded in downstream markets and the right-holder's refusal is not justified by its activities. 50/ Clauses in licensing agreements restraining exports to non-European Union countries are permitted as long as trade within the Common Market is not affected. On the whole, compared with United States law, European Union competition rules appear to apply more stringent competition controls over the exercise of IPRs within the Common Market. However, the similarities between the two laws are more important, as demonstrated by the joint enforcement undertaken against a dominant computer software firm in respect of its use of price-related licensing practices and trade secret or confidentiality agreements to inhibit competition. 51/

49. The competition laws of developing countries and countries in transition usually provide for some degree of exemption for IPRs, but the enforcement practice necessary to clarify the scope of such exemptions has been very limited. The Venezuelan law does not contain any specific mention of IPRs, but guidelines clarify that the imposition or establishment of limitations on the acquisition or utilization of IPRs, including technical expertise, may be given prior authorization by the competition authority. Under the Indian law, no order may be made with respect to any monopolistic or restrictive trade practice to restrict the right of any person to restrain any infringement of a patent, or to attach conditions to a patent licence in respect of acts which, but for the licence, would be an infringement of the patent; the patent must have been granted in India. The prohibition by the Indian competition law of

resale price maintenance applies to articles covered by a patent or a trademark. The Polish competition law 52/ states that it does not prejudice IPRs, but that it applies to licensing contracts and other actions concerning their exercise. Separate guidelines have been issued covering licences, 53/ which follow the general approach of the corresponding European Union regulations. Clauses in licensing contracts are divided into those which are permitted and those that might be subject to control under the competition law; examples of clauses which may be proscribed include no-compete clauses, territorial exclusivity clauses and restrictions on export prices or volumes. The Republic of Korea's competition law exempts activities recognized as an exercise of rights granted under its IP laws; however, as noted above, there is a public notice relating to potentially unfair practices in international contracts, including IP and technology licences.

Chapter IV

GEOGRAPHICAL SCOPE OF APPLICATION

50. All competition laws are applicable on national territory, in accordance with the principle of territoriality. Some competition laws are also applied outside national frontiers, but there are significant differences in the legal doctrines and practices on the basis of which this is done. "Objective" territorial jurisdiction is asserted by some countries, under certain conditions, in respect of acts formed abroad and implemented within national territory, irrespective of whether or not there is recourse to local subsidiaries to make contacts with purchasers on national territory. In the famous Wood Pulp case, 54/ the European Court of Justice asserted jurisdiction over foreign members of an overseas cartel selling within the EU market on the basis of objective territoriality; however, this decision has now been overruled on other grounds. But the EU Merger Regulation applies to mergers of non-EU companies on the basis of a minimum turnover in the EU, irrespective of whether there is physical presence therein, and overseas mergers among large foreign companies are often screened by the EU Commission.

51. Under the "effects doctrine", United States competition laws apply subject-matter jurisdiction over "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States". 55/ This includes: foreign conduct involving import trade; foreign conduct, or overseas mergers, 56/ having a "direct, substantial and reasonably foreseeable" effect on United States imports or trade; cases where export trade is restrained; and cases where RBPs affect the finance or purchase by the United States Government of goods or services abroad. However, "comity" considerations will lead to an abstention of exercise of jurisdiction where there is a "true conflict" between United States and foreign law, so that compliance with United States law would constitute a violation of the other country's law (mere encouragement or acquiescence in anti-competitive conduct by a foreign Government will not suffice). Jurisdiction will also not be exercised overseas if the legal defences of foreign sovereign immunity, act of State, and foreign sovereign compulsion (of conduct entirely within foreign territory) are available, while the United States federal competition agencies will take into account cooperation agreements or understandings with foreign competition agencies in deciding whether to bring proceedings. It may also be noted that section 301 of the United States Trade Act of 1974 provides that trade action can be taken against any goods from a country that injures United States trading interests by tolerance of systematic anti-competitive activities by firms in that country which restrict access of United States goods or services to purchasing by such firms. Such an investigation was undertaken of procurement policies implemented by the Japanese Government in the construction sector that allegedly limited competition and facilitated collusive bidding, resulting in a positive finding. An interesting linkage between competition, trade and investment policies has also been made in the United States; as noted in chapter II, production joint ventures which are

found to be anti-competitive are exempted from treble damages only if the principal production facilities of the venture are located in the United States.

52. In Germany, the effects principle is also applied in competition cases, but its application is qualified by the public or private international law principles of reasonable forum contacts and non-interference. Thus, in cases of overseas mergers, German competition law will not be applied if the effect of the merger on the German market is relatively insignificant compared to the effects overseas; intervention will in any event be undertaken against only that part of the merger having "concrete" domestic effects (i.e. the merger of the local subsidiaries). 57/ However, pre-notification for overseas mergers is necessary if they produce perceptible and direct domestic effects on the German market (even if the firms concerned have no local subsidiaries). 58/ Recently adopted or revised competition laws of EU countries all proscribe agreements, including agreements formed overseas, that have as their object or effect the distortion of competition or the abuse of a dominant position on national markets; this has been applied by the French courts, for example. 59/ Australia, Brazil, Canada, Chile, 60/ the Czech Republic, Peru, Poland and the Slovak Republic have also adopted the effects principle in their laws. The Republic of Korea's competition controls upon unfair practices in international contracts apply wherever these restrictions are exercised. 61/ On the other hand, in the United Kingdom, enforcement is undertaken only against persons carrying on business within the United Kingdom; discretion as to such enforcement is exercised in the light of the United Kingdom Government's views as to the extent of States' jurisdiction under international law. Under the Indian law, where any party to an RBP does not carry on business in India, an order may be made with respect to that part of the practice which is carried on in India. In general, however, the laws of most developing countries are silent on the question of their applicability overseas, and there is little experience in this area so far.

53. Although the objective territoriality and effects principles for exercising overseas jurisdiction are likely to lead to similar results in many cases, certain conduct overseas such as import cartels or concerted refusals to buy from foreign exporters or supply foreign importers might well fall outside the scope of objective territorial jurisdiction but be caught under "effects" jurisdiction. Differences among competition laws relating to their applicability or their enforcement overseas may also arise in respect of the scope of personal jurisdiction claimed. The concept of "enterprise unity" is used in several countries to establish jurisdiction over foreign-based parent companies of TNCs where they exercise the requisite degree of control over local affiliates. Under United States law, anti-trust suits may be brought in the United States against a foreign corporation transacting business in any judicial district through an agent or through an affiliated corporation that is its "alter ego", provided there are minimum contacts with the United States such that due process requirements are satisfied; 62/ in addition, jurisdiction may also be asserted overseas over actions overseas by foreign subsidiaries of United States companies (considered to be nationals for this purpose). Other differences in competition laws may arise in respect of: the strength or nature of the effects upon national markets necessary for jurisdiction to be asserted; the proscription of RBPs undertaken overseas which have effects upon export trade; the nature and scope of legal principles

or enforcement policies which would take foreign interests into account in extraterritorial application of the law; the willingness to intervene when effective relief depends upon action outside national territory; the frequency with which private actions are initiated; evidence-gathering practices; and the availability of treble damages. Increasing recourse by firms to new telecommunications technologies to commit RBPs across borders should increase the complexities of, and the disparities among, the legal solutions adopted in this area.

54. Whatever the theoretical jurisdiction of competition laws, it would often be difficult in practice to enforce them overseas or even to enforce them on national territory where evidence needs to be obtained from overseas. Such difficulties would particularly be experienced by developing countries and countries in transition, given their limited resource capabilities, their lack of experience in this area, and the relatively lesser likelihood that overseas-based firms will have assets within reach against which enforcement can be exercised. Even though developing countries and countries in transition may have legal provisions in this area similar to those contained in the laws of some developed countries, therefore, there is an important de facto limitation to the actual scope of application of their laws - yet they may be faced with assertions of competition jurisdiction over their territory by other countries. It may be noted in this connection that, despite the provisions of article E.4. of the Set of Principles and Rules, 63/ no competition law is applied to control RBPs undertaken on national territory which have effects solely on foreign markets. Explicit statutory exemptions from the application of competition law are provided to export joint ventures or cartels in several countries, although "spillover" effects of export cartels upon competition in domestic markets would be subject to scrutiny. In some countries, the exemption only applies if formal notification or registration of the export agreement is made to the competition authorities. Confidentiality is usually maintained regarding such agreements even if they have been notified or registered. However, Australia and New Zealand have removed exemptions for export cartels affecting their bilateral trade. The European Union competition laws would also apply to any export cartel based in member countries having effects upon other member countries.

55. Although competition laws normally apply to import cartels or other RBPs aimed at imports, account can be taken in some countries of conduct occurring overseas in deciding whether or not to take action against such RBPs. Under German law, import cartels may be authorized if the importers are faced with market-dominating foreign suppliers and if domestic competition is not substantially restrained. In other countries, exemptions have been granted to joint buying pools to countervail the power of foreign suppliers of sulphuric acid imports into the United Kingdom, sulphur into Australia, or films into Sweden. However, competition proceedings can be taken against such buying pools in some exporting countries; United States competition law has been enforced against import cartels set up overseas to countervail the market power of Webb-Pomerene associations. 64/

56. However, there are several bilateral agreements (mainly among developed countries) or OECD recommendations providing for different forms of cooperation in this area which would serve to facilitate enforcement or to

reduce conflicts in cases having effects in more than one country. The United States has thus concluded agreements with Australia, 65/ Canada, 66/ Germany 67/ and the European Commission, 68/ while Australia has also concluded a cooperation agreement with New Zealand and Germany another agreement with France. 69/ The Czech Republic, Hungary, the Slovak Republic and Poland have also agreed, in their trade and cooperation agreements with the European Union, to adopt and apply competition enforcement policy and procedures similar to those applied by the European Commission, and to cooperate on this basis. 70/ With variations (depending upon the individual agreement), these agreements include such provisions as: notifications of enforcement activities; commitments to take into account the other party's significant interests when investigating RBPs or applying remedies against such RBPs ("negative comity"); consultations to resolve conflicts between respective laws, policies and national interests; voluntary procedures for exchange of non-confidential information exchange regarding RBPs having a substantial effect on the trade of the other party; administrative and judicial assistance to investigation or enforcement by another party; and coordinated action in respect of RBPs in both countries which are related or affected each other. Particularly noteworthy are the "positive comity" procedures contained in the cooperation agreement between the European Union and the United States, under which one party may request the other to undertake enforcement against RBPs in the other party's territory adversely affecting the first party's important interests, and the other party may take such enforcement if considered appropriate. It may also be noted in this connection that the United States International Antitrust Enforcement Assistance Act of 1994 provides the federal enforcement agencies with the authority to enter into mutual assistance agreements with foreign anti-trust agencies or Governments, under which each party may in appropriate cases assist the other party in collecting information and share confidential information. The OECD has recently adopted a new recommendation (replacing an earlier recommendation) setting forth principles for cooperation in this area, including the coordination of investigations, information-sharing, positive comity and mutual assistance in investigations.

Chapter V

COMPETITION POLICY AND THE URUGUAY ROUND AGREEMENTS

A. Overview

57. As appears from the previous chapters, despite the substantial differences among competition laws and policies, there are now sufficient broad similarities in their objectives, content and application ("common ground") to form the necessary substantive basis for strengthened cooperation. A strong impetus towards the further strengthening of convergence and of international consultations and cooperation in this area has been provided by the Uruguay Round Agreements. In a broad sense, all the provisions of the Agreements have a bearing upon competition policy, since the international framework governing trade obviously determines the extent of competition upon national markets. Some major features of the Agreements include: (i) tariff reductions; (ii) some tightening up of existing disciplines on trade measures; (iii) new multilateral rules to cover agriculture, trade-related intellectual property rights (TRIPS), trade-related investment measures (TRIMS) and services; and (iv) the interlinkage of all these agreements within the institutional framework of the newly established World Trade Organization (WTO), subjected to a strengthened dispute settlement mechanism. Moreover, in some areas, the Uruguay Round Agreements provide for further negotiations. Some provisions in the Agreements which specifically relate to control of RBPs by firms, and consideration of competition factors in the implementation of trade measures by Governments, are reviewed below and their substantive and institutional implications are discussed. These provisions are an important example of the general recognition in the Agreements that, in a globalized world economy, market access is affected not only by trade policies at the border, but also by economic policies primarily concerned with the domestic market. As regards competition policy in particular, it was inevitable that its links with trade rules be strengthened, given the similarity of its basic objectives with those of trade liberalization: the enhancement of consumer welfare and economic efficiency.

B. Trade in goods - State enterprises and enterprises with exclusive rights

58. Article XVII of the General Agreement on Tariffs and Trade 1994 (GATT 1994, which incorporates the General Agreement on Tariffs and Trade (GATT 1947)) contains an undertaking (already existing prior to the Uruguay Round) by each contracting party that State enterprises or private enterprises granted exclusive or special privileges (including marketing boards) shall, in their purchases or sales involving imports and exports, act in conformity with the trade principle of non-discrimination, affording enterprises of other contracting parties adequate opportunity to compete for participation in such purchases or sales, unless the goods are for governmental use. Under the newly adopted Understanding on the Interpretation of Article XVIII of the General Agreement on Tariffs and Trade 1994, it is clarified inter alia that the article applies to exclusive or special rights, including statutory or constitutional powers, in the exercise of which the level or direction of imports or exports is influenced through purchases or sales, but it does not apply to purchases by the enterprise concerned for its own use. A main

objective of the Understanding is to increase transparency and to encourage notifications relating to such enterprises to the Council for Trade in Goods.

C. Anti-dumping and subsidies

59. The Agreement on Implementation of Article VI (the anti-dumping agreement) provides that (art. 3), in determining material injury to a domestic industry, injuries caused by other factors must not be attributed to the dumped imports; factors which are relevant in this respect include trade restrictive practices of and competition between the foreign and domestic producers. The anti-dumping agreement also tightens somewhat the conditions to be followed in settling proceedings through undertakings by the exporting firm to revise its prices or to cease exports at dumped prices (art. 8). The Agreement on Subsidies and Countervailing Measures provides that injury to domestic industry from "actionable" subsidies, 71/ and the imposition of countervailing duties are to follow the same criteria and procedures as those under the anti-dumping agreement (including the determination of material injury).

D. Safeguards

60. The Agreement on Safeguards (which recognizes in its preamble the need to enhance rather than limit competition in international markets) prohibits and phases out voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or import side by Governments, whether taken unilaterally or as a result of agreements or understandings (art. 11). Examples of measures similar to such "grey-area measures" include export moderation, export price or import price monitoring schemes, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes. It is provided that Members shall not encourage or support the adoption or maintenance by public and private enterprises of equivalent non-governmental measures. A procedure for compulsory notification and consultations is created regarding, inter alia, the decision to apply or extend a safeguard measure; however, notification regarding non-governmental measures is optional. These obligations under the Agreement do not apply in respect of specific measures taken under other Uruguay Round Agreements, such as measures taken in relation to the textiles, agriculture, or services sectors.

E. Licensing of IPRs and parallel imports

61. The TRIPS Agreement recognizes as a principle (art. 8) that appropriate measures, provided they are consistent with the provisions of the Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology. Under a specific provision on control of anti-competitive practices in contractual licences (art. 40), Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology, and it is provided that nothing in the Agreement shall prevent Members from specifying in their national legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual

property rights having an adverse effect on competition in the relevant market, or from adopting (consistently with the Agreement) appropriate measures to prevent or control such practices, which may include, for example, exclusive grantbacks, prevention of challenges to validity and coercive package licensing. Article 31 provides for certain conditions to be observed by Members in respect of other use without authorization of the right holder, including both use by the Government or by third parties authorized by the Government (i.e. compulsory licences or forfeiture), including a requirement that such use should be authorized predominantly by Members for the supply of their domestic markets. However, where other use without authorization of the right holder is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive, Members do not have to observe some of these conditions, including the condition relating to predominant supply of domestic markets.

62. The TRIPS Agreement also provides that, for the purposes of dispute settlement, nothing in the Agreement (subject to the provisions on national treatment and most favoured treatment) shall be used to address the issue of the exhaustion of intellectual property rights (art. 6). The exclusive rights of use, sale, importation or other distribution provided for patents by the Agreement (art. 28) are subject to the provisions of article 6. The provisions of the TRIPS Agreement relating to exhaustion of rights should be read in conjunction with articles III and XI (1) of GATT 1994 (already present in GATT 1947), respectively providing for national treatment on internal taxation and regulation and prohibiting in principle quantitative restrictions by contracting parties on imports from, or exports of, goods to another contracting party; these provisions are subject to the general exception clause in article XX for certain types of measures, including measures "necessary" to secure compliance with domestic legislation "not inconsistent" with the Agreement, including those relating to the protection of patents, trade marks and copyright. As discussed in chapter III, in some countries or within some regions, an IPR owner cannot control the subsequent distribution of a protected product after its first sale in the domestic market, but can control importation after first sale in foreign markets. The compatibility of this with the requirements of GATT 1994 would therefore depend upon whether the right to prevent parallel imports was necessary to secure compliance with IPR legislation, and upon whether such legislation was compatible in this respect with GATT 1994. 72/

F. TRIMS

63. The Agreement on Trade Related Aspects of Investment Measures (art. 9), which applies to trade in goods only, forbids investment measures incompatible with the GATT provisions relating to national treatment and general elimination of quantitative restrictions. Such measures include requirements for foreign investors relating to local content, trade balancing, foreign exchange, or domestic sales. The Agreement provides that, after not less than five years of its date of entry into force, the Council for Trade in Goods shall review its operation and, as appropriate, propose amendments. In the course of this review, the Council shall consider whether the TRIMS Agreement should be complemented with provisions on investment policy and competition policy.

G. Trade in services

64. Article VIII of the General Agreement on Trade in Services (GATS) provides that each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations relating to most favoured treatment of services and service suppliers of member countries and specific commitments (relating to market access, national treatment and other additional commitments 73/). Where a monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to the Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such specific commitments. These provisions also apply to cases of exclusive service suppliers where a Member, formally or in effect, authorizes or establishes a small number of suppliers and substantially prevents competition among these suppliers in its territory. Under article IV, the increasing participation of developing country Members in world trade is to be facilitated through negotiated specific commitments relating inter alia to the improvement of their access to distribution channels and information networks.

65. Under the Annex on Telecommunications, there are specific provisions on access to and use of telecommunications transport networks and services which recognize telecommunications' dual role as a distinct sector and as the underlying transport means for other economic activities. Members have to ensure inter alia that service suppliers of another Member are both: "accorded" access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory conditions for the supply of a service included in its schedule; and "have" such access and use, including by ensuring such suppliers are permitted to purchase or lease and attach equipment interfacing with the network which is necessary for the supply of their services, and to interconnect their private circuits with public or other private networks and services. However, basic telecommunications are exempted from the obligations relating to most favoured nation treatment; negotiations on this sector are currently proceeding within the World Trade Organization, and some proposals relevant to competition policy have been put forward in these negotiations.

66. The Understanding on Commitments in Financial Services enables participants in the Uruguay Round to take on commitments with respect to financial services by means of an alternative approach, including commitments relating to market access and non-discrimination. The Understanding provides for the scheduling of existing monopoly rights, and requires members to endeavour to eliminate them or reduce their scope. Members are to ensure that financial service suppliers of other Members are to be accorded most favoured nation treatment and national treatment as regards the purchase or acquisition of financial services by public entities in its territory. When membership or participation in, or access to, any organization or association is required or provides privileges or advantages, Members shall ensure that such entities accord national treatment to financial service suppliers of other Members. Negotiations are proceeding in this area.

H. Special consultations and dispute settlement rights and obligations

67. In a 1960 decision relating to RBPs in international trade, 74/ the GATT Contracting Parties recognized that RBPs might hamper the expansion of world trade and the economic development of individual countries. They might thereby frustrate the benefits of tariff reduction and removal of quantitative restrictions or otherwise interfere with the objectives of the GATT. International cooperation was needed to deal effectively with RBPs in international trade, although the Decision stated that, in the circumstances at that time, it would not be practicable for the Contracting Parties to undertake any form of control of RBPs or to provide for investigations. Provision was made for consultations among Contracting Parties on a bilateral or multilateral basis as appropriate. The party to whom a request for consultations is addressed is to accord sympathetic consideration to such a request and to afford adequate opportunity for consultations with the requesting party, with a view to reaching mutually satisfactory conclusions. If it agreed that harmful effects were present, it was to take such measures as it deemed appropriate to eliminate these effects. The outcome of any such consultations was to be conveyed to the Contracting Parties. No notification pursuant to the 1960 Decision has so far been made to the Contracting Parties.

68. Under the TRIPS Agreement, two types of procedures for consultations in respect of RBPs are established. On the one hand, a Member is to enter, upon request, into consultations with any other Member having cause to believe that a national or domiciliary of the Member to which the request is addressed is undertaking practices in violation of the requesting Member's legislation on the subject, and which wishes to secure compliance with such legislation; this is without prejudice to any action under the law and to the full freedom of ultimate decision of either Member. The Member to which the request is to be addressed is to supply relevant information, under conditions similar to those under article IX of the GATS, as described below. On the other hand, a Member whose national or domiciliary is subject to proceedings in another Member concerning alleged violations of that other Member's legislation on the subject is to be granted, upon request, an opportunity for consultations by the other Member under the same conditions as the first procedure.

69. There are two separate provisions in the GATS relating to consultations or monitoring. Under the article VIII procedures applicable to monopoly or exclusive suppliers of services, upon receipt of a complaint by another Member, the Council for Trade in Services may request information from a Member relating to a monopoly supplier's conduct, while Members must notify the Council of grants of new monopoly rights regarding services covered by their commitments. Under article IX (which applies to cases other than those falling under article VIII), Members recognize that certain business practices of service suppliers may restrain competition and thereby restrict trade in services, and undertake to enter into consultations, at the request of any other Member, with a view to eliminating such practices. The Member shall accord full and sympathetic consideration to such a request and shall supply relevant publicly available non-confidential information, as well as other information (subject to its domestic laws and to the conclusion of a satisfactory agreement concerning the safeguarding of its confidentiality). Compared to the 1960 GATT decision applying to trade in goods, the article IX obligations of the GATS do not expressly state that Members should attempt to

reach mutually satisfactory conclusions or to take such measures as they deem appropriate to eliminate harmful effects of RBPs. However, it is true that the consultations are with a view to eliminating the RBPs in question, and that there is an obligation to supply information which is not there in the 1960 decision.

70. Under article XXIII of GATT 1994, contracting parties can complain of nullification or impairment of benefits under the Agreement as a result of the failure of another contracting party to carry out the obligations under the Agreement, the application of any measure whether or not it conflicts with the Agreement, or the existence of any other situation. Under the corresponding provision in GATT 1947, a request was made by the European Economic Community in 1983 for the establishment of a panel because the benefits of trade negotiations with Japan had allegedly been nullified and impaired by, inter alia, the concentration and interlinking of the structure of production, finance and distribution in Japan, which made it difficult for foreign suppliers to establish distribution channels. 75/ However, this panel request was eventually dropped, so the questions of whether GATT benefits might be nullified or impaired on such grounds, or of the specific obligations incumbent upon contracting parties in this connection, have never been clarified.

I. Implications

71. The provisions relating to competition policy contained in the Uruguay Round Agreements reflect a realization that, in an increasingly globalized world, national competition policies need to be complemented by action at the international level to protect and promote the vitality of competition in the global market. There has been a substantial encroachment upon the traditional principle that national authorities should only be concerned with the effects of RBPs on their own markets (or, under United States law, with effects upon export opportunities as well). Under GATT 1994 and the GATS, for instance, it appears that obligations are placed upon contracting parties to take measures to control State enterprises and/or enterprises with exclusive rights, with the primary objective of improving market access for firms of other contracting parties, irrespective of whether or not RBP controls might otherwise be necessary to enhance consumer welfare or efficiency - although it is of course true that measures aimed at improving market access for foreign suppliers would often also benefit local consumers and improve efficiency. Moreover, the rules of the international trading system are becoming increasingly extended to cover conduct by enterprises, and not just by Governments - although it is true that enterprise conduct such as dumping or discrimination by State enterprises or enterprises with exclusive rights was already covered before, and although Governments continue to remain the direct addressees of trade rules. Specific principles that appear to be reflected to a greater or lesser extent in some of the Agreements include the following: Governments should not delegate their powers to regulate their trade (or their markets) to firms; private restraints on trade should thus be controlled (in some areas), or at least not encouraged or supported (in other areas); there should be transparency in this respect; contracting parties should, in applying their competition laws and policies in some areas, take into account the trade interests of other contracting parties, particularly in respect of enterprises with monopoly or exclusive rights; international cooperation is

needed to deal effectively with, or eliminate, RBPs restraining international trade; and Governments should therefore consult and cooperate to tackle problems arising in this area. Competition policy obligations are now well integrated into the rules of the international trading system. Given the continuing process of economic globalization, as well as the ongoing process of negotiations in the post-Uruguay Round framework, it is inevitable that competition and trade policies will be brought even closer together.

72. However, the extent to which the different Uruguay Round Agreements reflect competition principles does not appear to be completely uniform. The links with some competition issues are explicitly recognized in some areas, but other competition issues which may arise in these areas do not appear to be covered, while competition issues which may arise in other areas also do not appear to be covered. The TRIPS Agreement has strengthened the rights of IPR holders, but more efforts may be necessary to address the potential for abuse of such rights, as well as to clarify what may be considered to be abuse, both within or outside the context of licensing agreements. There may also be a need to clarify the important questions of exhaustion of rights (including in relation to parallel imports), national treatment, quantitative restraints upon trade and the use of IPRs to facilitate international market segmentation and price discrimination (outside the IP context, the control of price discrimination through anti-dumping measures is authorized by the Uruguay Round Agreements). There may be an asymmetry in the manner in which the TRIMS Agreement forbids trade-distorting investment measures by Governments, but does not address (in contrast with other agreements) RBPs by firms having equivalent effects - however, there is room for further efforts in this respect, given the commitment under the Agreement to consider later whether it should be supplemented by competition policy provisions. The circumstances under which the non-enforcement or inappropriate enforcement of competition law might be deemed to constitute nullification or impairment of another contracting party's trade benefits may need to be clarified, for instance.

73. Insufficient account also appears to be taken in the Uruguay Round Agreements of the interrelationships between the competition and trade policies practised in importing and exporting countries, and of the manner in which governmental rules and restrictions can facilitate RBPs within the same country. Little account is taken, for example, of the manner in which governmental regulation of the distribution sector can facilitate exclusionary distribution structures and practices (although it is true that the GATS refers to the improvement of developing countries' access to distribution channels and information networks, without specifying the measures necessary for this purpose). Nor is the manner in which trade measures can facilitate collusion between domestic firms, between foreign exporters, or between domestic and foreign producers adequately taken into account, although limited measures are taken in respect of collusion between domestic and foreign producers only (through the conditions established by the anti-dumping agreement relating to price undertakings to settle anti-dumping proceedings). Export cartels, for instance, are often created in response to safeguard action, or anti-dumping or countervailing duty proceedings, undertaken by importing countries. 76/ Dumping is essentially the same as discriminatory pricing. However, compared to the balanced and equitable manner in which RBP control regimes evaluate differences in pricing within national borders,

anti-dumping regimes apply different and more stringent criteria and procedures for the control of such differences when they occur at the cross-border level. No account is taken of valid competitive reasons for such price differences, of possibilities for new market entry, or of the benefits arising for consumers. Although anti-dumping measures are often justified on the grounds that foreign competitors are acting in a predatory manner, their behaviour would often not constitute predatory pricing under competition rules - there is no requirement that the goods in question be priced below cost in the importing country (as long as they are priced less than in the exporting country), nor need there be predatory intent, dominance, or capability of recoupment. This is because anti-dumping regimes protect domestic competitors from foreign competition, while competition regimes protect the process of competition without taking into account the nationality of competitors.

74. It is true that, under the Uruguay Round anti-dumping agreement, as well as under the Subsidies Agreement, competition factors are relevant for determining causality of injury to domestic industry, but there is no requirement that the decision whether or not to grant anti-dumping protection, or what specific remedies to grant, should take into account the effects upon competition in the domestic market. The two agreements also do not adequately address the potential for the abuse of anti-dumping or countervail proceedings to harass exporters. It may be noted in this connection that the OECD Council recommended that care should be exercised that proceedings under laws dealing with unfair trading practices, especially proceedings initiated by enterprises, are not misused for anti-competitive purposes. 77/ The relationship between anti-trust and international trade measures (including anti-dumping, "anti-subsidy" countervailing duties and safeguards), is implicitly recognized in the United States Antitrust Enforcement Guidelines for International Operations 1994. In fact, within the European Union, and in trade between Australia and New Zealand, competition laws or policies are applied instead of anti-dumping measures. However, while competition authorities in some countries may have intervened successfully in some cases to advocate greater attention to competition principles in undertaking trade measures, they have often been unsuccessful, particularly as it is difficult for a country to undertake unilateral efforts in this respect without equivalent efforts by trading partners.

75. To support and complement the efforts of competition authorities at the national level, complementary mechanisms are needed at the multilateral level to address both RBPs affecting international competition and protectionist measures by Governments distorting competition and trade. For the latter purpose, trade regimes might be encouraged to draw upon competition policies' greater emphasis upon consumer welfare and efficiency to mitigate the pro-producer bias of trade policies in such areas as safeguards, anti-dumping or countervail of subsidies, thus enabling the "market access" concerns of both producers and consumers (or exporting and importing countries) to be taken into account. The adoption of a systematic and comprehensive approach to the range of issues in the interface between competition and trade policies, including both private and governmental restraints upon trade, is necessary in order to consolidate and expand upon the progress achieved in the Uruguay Round Agreements in a balanced manner.

76. Following the reduction of governmental trade barriers to be brought about by the Uruguay Round Agreements, efforts to tackle private trade barriers would also be a logical further step, in order to prevent the benefits for competition of trade liberalization from being reduced by the "privatization" of trade barriers - indeed, the lowering of governmental barriers to market entry may leave developing countries in particular more exposed to private restraints. It is likely that the changes in the framework for global competition and trade brought about by the Uruguay Round Agreements, such as the commitment by Governments not to authorize or encourage (but not to prevent) RBPs having effects equivalent to voluntary export restraints or orderly marketing arrangements, would increase the incentive for enterprises to resort to RBPs. Moreover, changes in technology and in marketing strategies may lead enterprises to practise new variations or even new types of RBPs across borders. Taken together with the continuing process of globalization and liberalization, this will make it increasingly essential for competition authorities to have access to information about market operators and market conditions in other countries, as well as detailed information about competition laws, policies and enforcement in other countries.

J. Suggestions for further action

77. To face the new challenges in this area, and to encourage better mutual understanding and possible convergence in competition laws and policies, it would be desirable to strengthen consultations and cooperation among competition authorities, particularly in respect of RBPs having effects in more than one country. This might take place under the mechanisms provided for by the Set of Principles and Rules (possibly eventually complemented by further guidelines) and in line with the proposals put forward by the Intergovernmental Group of Experts on Restrictive Business Practices for consideration by the Review Conference. 78/ In this context, technical cooperation might be strengthened, with a view to assisting countries with less experience to adopt or better implement competition laws, and to inform them of the solutions adopted and the results experienced in this area by developed countries.

78. In specific areas, such action under the aegis of the Set might be complemented by the adoption or strengthening within international trade rules of legally binding provisions for combating RBPs; such provisions might build upon the competition provisions contained in the Uruguay Round Agreements, thus making more uniform the extent to which different competition principles are reflected in the Agreements. Some areas where competition provisions might be strengthened or clarified, as indicated above, might include control of State enterprises or enterprises with exclusive rights, safeguards, anti-dumping, countervail, abuse of IPRs, exhaustion of rights and parallel imports, RBPs by firms having effects equivalent to TRIMS, trade in services (including the question of access to distribution channels and information networks), and the nullification or impairment of benefits. Appropriate provision might be made in this connection for special and differential treatment for developing countries, particularly least developed countries. The strengthening of "safeguard" mechanisms to protect competition and prevent abuses within the rules of the international trading system would encourage trade liberalization.

79. As a first step, the obligations upon Uruguay Round Agreements signatories to consult and cooperate in respect of RBPs emanating from their territories might perhaps be strengthened on the basis of "positive comity" or mutual assistance in enforcement, on the model of agreements or recommendations adopted by OECD countries (as described in the previous chapter). It would also be appropriate to reconsider the possibilities for competition authorities to strengthen action against RBPs emanating from their territories and solely affecting overseas markets. It is true that this may sometimes be difficult, given the divergences among national competition laws and policies, as well as the practical difficulties for a competition authority in one country to undertake an economic evaluation of whether an individual practice adversely affects competition and efficiency in overseas markets. Although controls on RBPs such as abuses of dominant position or monopolization may eventually be envisaged, therefore, in-depth consultations on the nature and scope of such controls would first be required.

80. However, the time may be ripe for multilateral discussions on the insertion into the rules of the international trading system of an obligation to ban export cartels in principle, since "hard-core" RBPs such as cartels or other collusive practices are universally condemned (apart from some exemptions in some countries) and are not subject to extensive economic analysis. A common interest in such reforms should arise from the fact that export cartels can breed countervailing import cartels, and that international production is being increasingly undertaken in a specialized manner, so that production inputs exported from some countries are used for manufacture in other countries and then come back in finished form - a process which will be facilitated by the TRIMS Agreement. Moreover, to the extent that participants in export cartels are TNCs, their affiliates may also collude in other countries, resulting in adverse effects upon all countries. The precise nature and scope of any obligation to ban export cartels would still need to be worked out, given that there are some differences among countries' laws in this area (although there are some similarities in the sectors exempted) and given likely difficulties in gathering evidence. It has been recommended, for instance, that all countries repeal immunity for export cartels to the extent that such conduct would be unlawful if directed at the domestic market. 79/ Another suggestion is that export cartels be prohibited, but subject to an efficiency defence where they can demonstrate that they serve to overcome a genuine barrier to competition in the importing country. 80/ Principles taken from the Set of Principles and Rules might also be useful in this connection. 81/

81. Apart from mechanisms under the aegis of the Set and of the Uruguay Round Agreements, some consultations and cooperation mechanisms to help coordinate approaches to issues in the interface between competition and trade would also be desirable at the multilateral level. Such mechanisms already exist at the plurilateral level; the OECD Committee on Competition and Committee on Trade regularly hold joint sessions. On the one hand, competition authorities would need information about how the provisions or application of national competition rules need to be modified to take into account both: (i) the likely competition effects of the Agreements, including the impact of trade measures on prices and industry structures in various markets and the relationships between trade and price disparities, 82/ or upon market definition and identification of entry barriers for purposes of economic

analysis; and (ii) possible competition policy obligations in the Agreements or in future trade rules, such as in respect of sectoral or government-linked exemptions, abuse control (particularly of utilities), the treatment of discrimination (in relation to the non-discrimination obligations in trade rules), and national treatment obligations in the area of competition policy. On the other hand, competition authorities should be informed and consulted as to how the competition policy provisions in the rules of the trading system could be applied and further developed. This may also help to ensure that competition and trade policies are brought closer in a coherent and balanced manner which would help to open up markets (in both the trade policy and competition policy senses 83/), and eliminate market distortions, while taking into account the interests of all trading firms and countries. Such cooperation would also help to reduce trade tensions among Governments, as well as tensions from enforcement of competition laws overseas.

Notes

1/ Para. I (a) of the Agreed Conclusions states that, in order to assist the Third Review Conference in its work, the Group of Experts requests the UNCTAD secretariat to prepare a draft study on the scope, coverage and enforcement of competition laws and policies in member States and analysis of the provisions of the Uruguay Round Agreements relevant to competition policy, including their implications for developing and other countries, in accordance with the outline as contained in TD/B/RBP/105, and taking into account the comments made during that session of the Group of Experts. See the "Report of the Intergovernmental Group of Experts on its fourteenth session" (TD/B/42(1)/3).

2/ See chap. I of the note entitled "Preparations for the Third United Nations Conference to Review all Aspects of the Set of Principles and Rules for the Control of Restrictive Business Practices" (TD/B/RBP/105).

3/ See "Basic objectives and provisions of competition laws and policies" (TD/ITD/15). See also "Draft commentaries to possible elements for articles of a model law or laws" (TD/B/RBP/81/Rev.4).

4/ Antimonopoly Law, Decree-Law No. 211, 1973.

5/ See the Law of 22 March 1991 on Competition and Restrictions of Monopolistic Activity in Commodity Markets.

6/ Ordinance No. 86-1243 of 1 December 1986 concerning freedom of pricing and competition.

7/ The Law to Promote and Protect the Exercise of Free Competition of 30 December 1991.

8/ Under the Act Against Restraints of Competition of 27 July 1957.

9/ Under the Antimonopoly Act.

10/ See National Cooperative Production Act of 1993 (HR 1313), adopted on 10 June 1993.

11/ A unique distinction is made between cooperative and concentrative joint ventures under European law; the latter would be dealt with under the Merger Control Regulation.

12/ Monopoly Regulation and Fair Trade Law 1980, Law No. 3320 of 31 December 1980, and the Enforcement Decree of the Law, No. 10267 of 1 April 1981.

13/ See "Competition and trade in the post-Uruguay Round" (UNCTAD/ITD/11), consultant report prepared for the UNCTAD secretariat by Mr. Kyu Uck Lee.

14/ Ibid.

15/ The Competition and Fair Trading Act No. 18, 1994.

16/ See A.J. Jatar, "Implementing competition policy in recently liberalized economies: the case of Venezuela" (mimeo), Caracas, October 1993.

17/ See "Handbook on Restrictive Business Practices Legislation" (TD/B/RBP/49).

18/ Federal Law on Economic Competition of 24 December 1992.

19/ No. 4064/89, O.J. L 257/13 (1990).

20/ The Monopolies and Restrictive Trade Practices Act 1969.

21/ See the French/West African Shipowners' Committees and CEWAL Liner Conferences, reviewed in the UNCTAD study on "Restrictive business practices that have an effect in more than one country, in particular developing and other countries, with overall conclusions regarding the issues raised by these cases" (TD/RBP/CONF.4).

22/ See "The role of competition policy in economic reforms in developing and other countries" (TD/B/RBP/96/Rev.2).

23/ See Antimonopoly Office, "Competition law and policy in Poland (1990-1993)", Warsaw, Jan. 1994.

24/ See United States v. Pan American World Airways Inc., 193 F. Supp. 18 (S.D.N.Y. 1961).

25/ See "US advises JFTC to refine trade association guidelines", Antitrust & Trade Regulation Report, 15 June 1995.

26/ See Jatar, op. cit.

27/ Law for Countering Unfair Competition, adopted on 2 September 1993.

28/ See art. 92 of the Treaty of Rome. The Treaty also prohibits all restrictions on the free movement of goods and services and all restrictions on freedom of establishment within the common market.

29/ Such as those of the United Kingdom and the United States.

30/ Such as those of France, Germany, Hungary, India, Jamaica, the Republic of Korea, the Russian Federation, Sri Lanka, or Venezuela.

31/ See "Competition and trade ....".

32/ Act on the Prohibition of Unfair Market Practices 1991.

33/ International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries, 477 F. Supp. 553 (C.D. Cal. 1979).

34/ See Aluminium Products (1987) 3 C.M.L.R. 813.

35/ Reviewed in TD/RBP/CONF.4/6.

36/ See, for example, section 3 of Zambia's Competition and Fair Trading Act 1994.

37/ See the Fair Competition Act 1993.

38/ Guidelines for the Regulation of Unfair Practices with Respect to Patent and Know-how Licensing Agreements of 15 February 1989.

39/ See "Japan criticizes CD prices", Financial Times, 25 July 1995.

40/ The term trade secrets covers both industrial and commercial know-how. Under the laws of some states of the United States, trade secrets are granted a form of protection analogous to IPRs.

41/ Jap Auto Products Kabushiki Kaisha and Another v. BBS Kraftfahrzeug Technik AG (the Aluminium Wheel case), No. 3272 of 1994.

42/ Beecham Group v. International Products Ltd., quoted in D. Gladwell, "The exhaustion of intellectual property rights", 12 European Intellectual Property Review (1986), p. 368.

43/ See U.S. v. Pilkington plc, 7 Trade Reg. Rep. (CCH) 50758 (D. Ariz. 1994) Consent Decree. This case is reviewed in the UNCTAD study on "Restrictive business practices that have an effect in more than one country ...".

44/ See K Mart. Corp. v. Cartier Inc., 108 S.Ct. 1811, 6 USPQ2d 1897 (1988).

45/ This term refers to restraints normally warranting per se treatment, as well as other restraints that would almost always tend to reduce output or increase prices.

46/ See Case 258/78 Nungesser v. Commission (1982) ECR 2015 ("Maize Seed"), and the Coditel cases.

47/ See the Tetrapak I case, No. IV/31.043 of 26 July 1988, O.C.J. L 272 of 4 October 1988, p. 27.

48/ With over 40 per cent market share or with combined market share together with any other firm of over 50 per cent.

49/ See Volvo v. Veng, Case 238/87 (1988) ECJ 6211, and the Renault Maxicar case of 5 October 1988.

50/ See RTE and ITP v. Commission (Magill), Cases C-241/91P and C-242/91, 6 April 1995.

51/ See the Microsoft case, reviewed in TD/RBP/CONF.4/6.

52/ The Law on Counteracting Monopolistic Practices of 1990.

53/ Antimonopoly Office Guidelines for the Application of the Provisions of the Act on Counteracting Monopolistic Practices to Patent Licences and Know-how.

54/ Ahlstrom et al. v. European Commission, (1988) ECR 5193, (1988) 4 C.M.L.R. 901.

55/ See Hartford Fire Insurance Co. v. California, 113 S.Ct. 2891, 2909, (1993). This case is reviewed in "Restrictive business practices that have an effect in more than one country ...".

56/ However, some foreign transactions are exempt from the pre-merger notification requirements of the Hart-Scott-Rodino Act provided they meet certain conditions.

57/ See the Bayer/Firestone case KG Nr. 26 1980 WuW/E OLG, 2419 (Synthetischer Kautschuk II) and the Philip Morris/Rothmans case, 29 October 1985, WuW 6/1986, pp. 481-495.

58/ See the Organic Pigments case (1979) E.C.C. 533.

59/ See François Souty, "Théorie de l'effet: les entreprises des pays tiers et le respect de la concurrence sur le marché européen", Revue de la concurrence et de la consommation, No. 65, p. 6, janv.-fév. 1992.

60/ If criminal penalties are involved, the Chilean law would apply only to RBPs that have taken place in Chile.

61/ See "Handbook to restrictive business practices legislation" (TD/B/RBP/42).

62/ In the Pilkington case, personal jurisdiction over Pilkington was founded on the basis that funds were being transferred to it across United States borders (it was collecting licensing revenue from United States firms).

63/ The article provides that States should seek appropriate remedial or preventive measures to prevent and/or control the use of restrictive business practices within their competence when it comes to their attention that such practices adversely affect international trade, and particularly the trade and development of the developing countries.

64/ See Daishowa International v. North Coast Export Co., 1982-2, Trade Cas. (CCH) 64, 771 (1982). The Webb-Pomerene Act, 15 U.S.C. 61-65 (1988) provides an anti-trust exemption to associations of otherwise competing businesses exporting goods, provided there are no anti-competitive effects in the United States, domestic competitors are not injured, and their statutes and annual reports are filed with the Fair Trade Commission.

65/ Agreement between the Government of the United States of America and the Government of Australia relating to Cooperation on Anti-trust Matters, done at Washington on 29 June 1982.

66/ Memorandum of understanding between the Government of the United States of America and the Government of Canada as to notification, consultation and cooperation with respect to the application of national anti-trust laws, done at Ottawa on 9 March 1984. Cooperation in criminal anti-trust cases is also undertaken on the basis of Mutual Legal Assistance Treaty.

67/ Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany relating to mutual cooperation regarding restrictive business practices. Done at Bonn on 23 June 1976.

68/ Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws. Done at Washington on 23 September 1991. Although the European Court of Justice found that the European Commission did not have the

authority to enter into this Agreement, the Agreement is still valid under international law, and has been implemented.

69/ Agreement between the Government of the Federal Republic of Germany and the Government of the French Republic concerning cooperation on restrictive business practices of 28 May 1984.

70/ See the Interim agreements on trade and trade related matters between the European Economic Community and the European Coal and Steel Community, of the one part, and, respectively, the Czech and Slovak Federal Republics, Hungary and Poland, of the other part, done at Brussels on 16 December 1991.

71/ The Agreement divides subsidies into those which are "prohibited", "actionable" and "non-actionable".

72/ See on this question A. Yusuf and A. Moncayo, "Intellectual property protection and international trade - exhaustion of rights revisited", World Competition, Vol. 16, No. 1, September 1992, p. 115.

73/ Including inter alia limitations on numbers of service suppliers, value of transactions or assets, or numbers of service operations or output. The provisions relating to market access and national treatment are not general obligations (unlike under GATT 1994), but are exchanged as negotiated commitments with respect to individual sectors or subsectors. Some Members have also notified several sectors to be exempted from the most-favoured nation principle. The GATS provides for appropriate flexibility for individual developing country members in the process of liberalization. Particular account is taken of the difficulties of least developed countries.

74/ Decision of 18 November 1960. See Contracting Parties to GATT, Basic Instruments and Selected Documents (BISD) 28, 170-172, (9th Supp. 1961). The decision has been incorporated into GATT 1994.

75/ See GATT Doc. L/5479. The complaint was qualified as a "situation" complaint.

76/ See OECD, "Obstacles to trade and competition", Paris, 1993.

77/ Recommendation of the Council for cooperation between Member countries in areas of potential conflict between competition and trade policies (C(86)65(Final)), 23 October 1986.

78/ See the agreed conclusions adopted by the Intergovernmental Group of Experts at its fourteenth session in TD/B/42(1)/3.

79/ See American Bar Association, Special Committee Report on International Antitrust (1991).

80/ See, "Obstacles to trade and competition", op. cit.

81/ See "Review and assessment of 15 years of application and implementation of the Set" (TD/RBP/CONF.4/5).

82/ See in this connection the Summary of discussions of the Ad Hoc Group on Competition and Trade in the document "Competition and Trade" (UNCTAD/ITD/9).

83/ Whereas trade policy is concerned with eliminating barriers to access to the national markets of potential importing countries, competition policy aims at controlling or liberalizing barriers to entry to product and geographical markets which are defined after thorough economic analysis, and without reference to national borders or to the nationality of the producers concerned.
