UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Trade and Competition issues: experiences at the regional level

Competition Provisions in Regional Trade Agreements: How to Assure Development Gains

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Unless indicated otherwise, Regional Trade Agreements (RTAs) is used as a generic term for bilateral or plurilateral free trade agreements, customs unions and common markets. Non-reciprocal preferential trade agreements such as Generalised System of Preferences (GSPs) are excluded.

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FOREWORD

In recent years, regional trade agreements have been proliferating among and between developed and developing countries. Currently there are around 300 bilateral and regional agreements, of which more than 100 contain commitments on competition policies with implications at both regional and national level. To date, little is known about the impact and role of such regional initiatives and there is growing awareness among developing countries, including the least developed countries (LDCs), of their special needs in this area.

Along with many other UNCTAD research and technical cooperation activities over more than three decades in the competition policy field, this publication is a contribution to address these needs and implement UNCTAD's mandate. UNCTAD was mandated in Paragraph 104 of the *São Paulo Consensus* to "further strengthen analytical work and capacity building activities to assist developing countries on issues related to competition law and policies, including at a regional level". In response to this strengthened mandate, the publication covers a wide range of regional experience that should lead to a better understanding of competition provisions in RTAs for trade and competition policy makers and authorities that implement such policies. With its focus on regional trade agreements, this book complements last year's publication "*Competition, Competitiveness and Development: Lessons from Developing Countries"*, which was launched at UNCTAD XI.

The chapters collected in this publication shed light on the competition provisions found in different types of RTAs in order to support and guide policy makers on the negotiation and implementation of regional and bilateral agreements with respect to competition policies. The publication makes a number of policy recommendations and identifies institutional arrangements needed to promote synergies between trade and competition at regional level. A fundamental message to be derived from the empirical findings and policy experiences presented in the publication is that competition provisions at regional level can act as a major complement to the current efforts to develop an open, rule-based, predictable, non-discriminatory trading system, with a fair distribution of benefits for all developing countries.

In recognition of the relevance of this fundamental message, this publication is being launched at UNCTAD's *Fifth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* in Turkey, November 2005. It is my hope that it will raise awareness and enhance expertise among public policy officials, private sector stakeholders, consumer organizations and civil society in general about the crucial importance of competition law and policy cooperation at national, regional and multilateral levels for creating competitive enterprises in developing countries.

I would like to take this opportunity to thank the International Development Research Centre (IDRC) for its invaluable support in carrying out this research project.

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EXECUTIVE SUMMARY

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During the last decade, national, regional and international initiatives aimed at promoting competition policy have proliferated. In particular, of the around 300 bilateral and regional trade agreements (RTAs) in force or in negotiation, over 100 include competition-policy related provisions. About 80% of the over 100 have been negotiated in the last decade and are part of a trend for 'deeper' RTAs which often include articles for liberalizing trade in services, investment, labour and other trade-related provisions. Interestingly, developing countries negotiate about as many RTAs among themselves ('South-South' RTAs) as with developed countries ('North-South' RTAs), and about 65% of the South-South RTAs completed since 1995 contain provisions related to competition policy.

In this connection, important questions come to mind. What are the reasons for including competition law and policy provisions in RTAs? What are the main types of such provisions? Are countries receiving any special and differential (S&D) treatment from a trading partner that is more developed? Can developing countries reasonably expect to benefit from effective provisions in sensitive sectors? How costly is it to implement a RTA's competition provisions? What has been the experience of competition agencies of developing countries with RTAs?

Answers to these questions and others are summarized below by drawing on the 13 chapters of this publication, which have been written by competition practitioners or academics that focus on developing country concerns. The chapters are divided into two parts: Part 1 contains cross-regional analyses, and; Part 2 contains region- or sector-specific experiences.

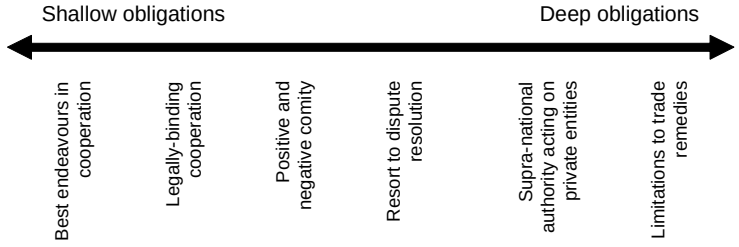
RTA competition provisions exist for several reasons

Competition provisions in RTAs have many objectives. Nearly all RTAs with competition provisions state that such provisions are needed so that the benefits of trade and investment liberalization are not compromised by cross-border anti-competitive practices. The full benefits of free trade can be enjoyed only if state-constructed trade barriers are not substituted by other forms of private restrictive practices (such as for instance market-sharing or price-fixing agreements).

A second reason for including competition issues in RTAs was to create region-wide competition policies and institutions that seek greater levels of integration including, in the limit, forming common markets or economic and political unions. RTAs characterized by a higher level of trade integration are more likely to contain competition provisions. If parties to an RTA are seeking an integrated common market (such as the EU), then anti-competitive practices must not replace government restrictive schemes within the integrated market for the initiative to bear fruit.

Also with the opening of domestic markets to foreign competition, countries become susceptible to anti-competitive practices originating outside their national border. These include: cross-border competition concerns, international cartels, and mergers and acquisitions (M&A) that risk monopolizing or creating dominant power in the internal market. The latter may arise from both cross-border M&A and M&A within one country (usually in the developed world) which consequently combines their subsidiaries in another

Figure 1 The spectrum of RTA competition provisions



Illustrative only: actual positioning would depend upon specific wording in the agreement

country (including those subsidiaries in a developing country). Either form of merger may result in positions of dominance and may lead to anti-competitive abuse.

Developing countries may be particularly vulnerable to anti-competitive practices. They have generally smaller consumer markets with less depth (both in terms of the quantity and range of products) which can be abused by dominant companies. Also developing countries may not have the competition law or may not have the resources and expertise in prosecuting international cartels. Hence developing countries may be an easy target for international cartels because of their weaker enforcement of competition laws.

Yet at the same time, the increased flow of goods associated within a RTA, could hurt developing countries that may have benefited from international price discrimination. Arbitrage and flow-back (as for instance in pharmaceuticals from Africa back to Europe) becomes more problematic in a RTA. Companies may no longer be able to discriminate among markets in order to price their products according to the ability to pay. Some techniques such as vertical restraints (e.g. manufacturer-distributor agreements) used to discriminate between markets may or may not constitute an anti-competitive practice that may infringe the competition provisions of a RTA.

Developing countries and their policy makers – dealing with trade and competition matters – should be concerned about the implications of competition provisions in RTAs for development and for access of the poor to essential goods and services. Why? Because to ensure that trade liberalization and markets work towards the goals of RTAs, complementary measures to liberalizing trade policies must be taken by governments in the area of competition policy. These measures are sometimes purely domestic but they can involve international cooperation.

RTA competition provisions vary widely

In this publication, RTA competition provisions were classified in several ways (See Chapters 1 through 3) encompassing a wide spectrum of potential obligations. Some RTAs simply have 'best endeavours' measures to adopt, maintain and apply competition law.

The language used in some other RTAs is more legally binding than best endeavours. Either language can apply to non-discrimination, due process or transparency in the statement and/or application of competition law. There may also be provisions for cooperation or coordination of activities by competition law enforcement bodies. Although not often found in RTAs, a competition authority of one trading partner can, under some conditions and reasonable expectations, request proceedings in the jurisdiction of the other partner against a national of that partner (positive comity) or be required to advise the other partner of proceedings against a national of the trading partner (negative comity) (for a more rigorous description, see Chapters 1 and 6). At the deeper end of obligations, there can be an independent dispute resolution or consultation mechanism, a supra-national authority that can apply competition law directly on private entities within the RTA (such as the EU), or limits put on the application by RTA partners of trade remedies (such as anti-dumping).

There is some consistency on provisions in North-South RTAs depending upon the developed country partner. Canada and US RTAs emphasize cooperation of competition authorities. EU RTAs emphasize harmonization of competition law including establishing a supra-national agency (Chapter 2 and 3).

Despite the various countries' eagerness to sign RTAs with competition provisions, there is very little experience concerning their implementation and their effectiveness with regards to improving competition. Particular care must be taken not to draw erroneous conclusions on what might be useful for a particular developing country, bearing in mind the diversity of development objectives.

RTA competition provisions should match its members' integration expectations but follow-through is needed

The expected level of trade integration intended for a RTA tends to dictate the existence and depth of its competition provisions. For example, about three quarters of all association RTAs (principally the EU partnership agreements) have competition provisions and yet only about 40% and 20% of the bilateral and plurilateral free trade agreements have such competition provisions (Chapter 1).

Such a correlation is understandable. Typically RTAs characterized by higher levels of trade integration are more likely to contain competition provisions to ensure coherence between trade and competition objectives. At the extreme end of integration expectations, a few RTAs have limited their members' ability to use trade remedies such as anti-dumping, replacing them instead to use competition principles. Such a provision requires extensive policy integration and is considered by some as the deepest of obligations imposed by a RTA's competition provisions (Chapter 3).

But a warning is appropriate. There have been cases where the textual interpretation of the competition provisions implies deep integration but the effectiveness of such provisions has been wanting. A case in point may be the Caribbean's CARICOM agreement which after a revision in 2001, calls for extensive integration including effective implementation of regional competition policies. However, implementation does not seem to have matched expectations because of capacity constraints at the national level or a reluctance to relinquish sovereignty (Chapters 9 and 10).

The textual interpretation of dispute settlement mechanisms (DSMs) may also suggest more integration than perhaps effective integration. In a questionnaire to developing country competition authorities, related institutions and experts, respondents were generally unenthusiastic about DSMs. DSM is viewed as a mechanism for cooperation rather than enforcement. Some form of DSM may assist countries in complying with competition agreements, and deter cross-border conspiracies, but this was not seen as an immediate priority (Chapter 4).

S&D treatment within RTA competition provisions may have a particularly useful role

One interesting aspect of RTA competition provisions is the use of S&D treatment. They broadly conform to four main types: (i) provisions that safeguard the interests of less-developed partners; (ii) exceptions and exemptions from some obligations; (iii) transitional time periods, and; (iv) technical assistance (Chapter 5).

S&D treatment within the North-South RTA's competition provisions does make sense. Many developing countries do not as yet have a domestic competition law or have yet to effectively implement such law. It has been argued that competition provisions in RTAs may directly impact domestic industries and hence developing countries may need the S&D treatment to ensure reasonable adjustment for their industries.

S&D treatment also makes more sense in these circumstances because it is frequently the anti-competitive practices of foreign companies – which tend to be more established globally vis-à-vis developing country companies – that affect the developing countries' domestic market and the domestic countries' exports into foreign markets. For addressing these practices then, the developing countries may need extra cooperation from the developed countries.

The growth of international trade may increase the potential for international cartels. Hence, competition authorities must cooperate in order to successfully identify and prosecute cross-border anti-competitive practices. But relative technical competence is a concern. Some developed countries resist divulging case-specific information with their trading partner if their competition authority's competence in keeping confidential information is perceived as inadequate (Chapters 4 and 19). To overcome this possible imbalance in competence, special measures such as transition periods and unilateral technical assistance from the developed partner are often included within the RTA competition provisions.

The existence of S&D provisions within RTAs shows, at minimum, that weaker partners feel that there is a necessity for S&D and that it is beneficial to them. This also supports UNCTAD's position in the UN Set of Competition, which is that unilateral provisions in favour of developing countries may be necessary for their social and economic development.

But not only developing countries want to protect national champions

While S&D may provide policy space for development of critical industries, even the countries with the oldest and most advanced

competition law systems do not apply the same standards to every sector of the economy. Agriculture and energy are two example sectors frequently exempted from the full application of competition law. For instance export cartels in both sectors are not only tolerated but actively promoted in some developed countries. The structure of these industries and their strategic significance to the national economy is cited as justifying the special treatment.

There are implications for developing countries. First is that these sectors such as agriculture and energy that are resilient to reforms under multilateral trade liberalization, are likely to resist reform under RTA competition principles. In a sector as sensitive and vital (at least to developing countries) as agriculture, private trade barriers such as refusals-to-purchase and abuse of dominance by retailers in developed countries can substitute for, or add to dwindling tariff and non-tariff protection. This is a concern particularly for developing countries to ensure market access for their agriculture products in developed countries.

If S&D would be really meaningful, it should involve undertakings by more advanced countries to eliminate exemptions and deregulate sectors before their developing-country counterparts. Developed countries should set an example in liberalizing sectors before developing countries, and without expecting immediate reciprocity (Chapter 13).

Another consideration for some infrastructure service sectors is that natural monopolies arise because of economies of scale. Such natural monopolies (for instance energy transmission) are typically regulated either in lieu of, or in addition to, being subject to competition authorities.

Cost-benefit considerations for competition provision obligations assumed within RTAs can be very complex.

The costs and benefits of a RTA's competition provisions will vary depending on the nature of the agreement and on the objective intended. The challenge for any country is to enter into agreements in which the agreement's burdens do not exceed its potential benefits (Chapter 6).

The benefits are hard to estimate. They will depend upon the structure of the domestic and foreign industries and the state of the wholesale and consumer markets both at home and abroad. There are examples of international cartel costs on developing countries. One estimate values total imports to developing countries of 16 cartelized products at over $80 billion making up 6.7% of all imports to developing countries and equal to 1.2% of their combined GDP. Specific cartel examples of vitamins, heavy electrical equipment and graphite electrodes used in steel, were noted as particularly affecting some developing countries (Chapters 4, 10 and 12). The difficulty in estimating the benefits of better competition policy is that the projected costs of anti-competitive practices and the probabilities of successfully addressing them are speculative.

But the benefits of signing onto a RTA's competition provisions may extend beyond detection and correction of anti-competitive practices. Companies operating within a region that apply RTA competition provisions may have less costs of compliance. For instance, a RTA's M&A provisions might clarify costs and time required for an approval of a merger. Several RTAs are incorporating 'one-stop shop' approaches to merger analysis, for example the EU and COMESA (Chapters 9 and 11). Such clarity and transparency may encourage mergers and acquisitions that improve efficiencies, better allocate resources and reduce consumer prices. To the extent that these companies are from countries in South-South RTAs, it may encourage developing internationally competitive companies with sufficient economies of scale amongst the developing countries.

The costs of abiding to RTA competition provisions will vary greatly depending upon the current competence of the competition authority within the country and the prior commitments already made. Those countries with existing competition legislation and commitments in other RTAs may find the cost of agreeing to another RTA's competition provisions marginal if the provisions between the RTAs overlap in their obligations (Chapter 6).

For developing countries, S&D treatment may help achieve a proper balance between costs and benefits. A delay, exemption or technical and financial assistance in implementing a RTA's

competition obligations would reduce the effective cost. Developed countries are offering technical assistance willingly in the framework of a RTA (Chapter 4). It is hoped that with this technical assistance, developing countries without a domestic competition law may be able to establish the domestic legislation and related authorities more cost-effectively.

Adopting regional competition rules can act as interim domestic legislation.

Establishing an effective competition regime in a small developing country is a lengthy process. This entails (i) enacting the appropriate legislation and physically establish the authority; (ii) building the competence and credibility to avoid the political economy appeal of industrial policy measures which use anti-competitive practices; and (iii) coordinating effectively with other foreign competition authorities to address cross-border practices which distort competition in the domestic market.

An alternative for some jurisdictions without domestic competition law is to adopt a RTA's competition provisions directly into domestic law. For instance those member states of West Africa's UEMOA which have not yet adopted a domestic competition law, may apply within their boundaries regional competition law even to practices which do not have a trade effect. Similarly Latin America's Andean Community rules are applicable in Bolivia and Ecuador and could be used to challenge domestic anti-competitive practices (Chapters 4 and 9).

A similar circumstance was proposed for East and South Africa's COMESA as part of implementation guidelines. It was suggested that if a COMESA member did not have a domestic competition law, then the regional body might investigate cases even if there was no cross-border impact. Those are the cases typically handled at the national level. This should probably be considered only an interim step because anti-competitive practices are likely to thrive where there is no national law (Chapter 11).

RTA cooperation on competition rules may be useful but informal cooperation may be more effective.

In practice, there is a limit on the effectiveness of competition provisions contained in any agreement, particularly if competition policy officials are not involved in the discussion of the trade agreements. As a result, it is not surprising that the questionnaire discussed in Chapter 4 noted that competition officials found other less formal methods more effective than the formal RTA cooperation competition rules. Some believe that formal agreements such as agency-to-agency agreements (ATAs) or Mutual Legal Assistance in Criminal Matters Treaties (MLATs) that are directly negotiated and implemented by the legal competition authorities of the respective countries may have more relevance. The contact between competition authorities resulting from membership in the International Competition Network (ICN) was also particularly noted. Even when two countries were party to a RTA with competition cooperation provisions, informal cooperation depended upon the closeness of the competition authorities rather than the textual wording of the agreement. It was also noted that the proliferation of RTAs with competition provisions is also having a network effect. Two competition authorities may effectively cooperate even if not intended, simply because they are both signatories to RTAs which have a common third party.

The EU modernization package may not be readily applicable for developing countries

The EU modernization package was enacted in May 2004 to more effectively combat anti-competitive practices in the EU. It consisted of five elements: (i) a reallocation of cases shifting more competence to the national authorities; (ii) a more explicit mandate to exchange information (including confidential information) between national competition authorities; (iii) a cooperation arrangement whereby national authorities are required at times to assist in investigations; (iv) various articles outlining when the Commission will control enforcement of EU law by national authorities, and; (v) a revised definition of the relationship between the Commission and national courts.

How applicable is the EU modernization package to other RTAs? In considering the possible adaptation of these main elements into two Latin American regional agreements (the Andean Community and MERCOSUR), West Africa's UEMOA and CARICOM, the conclusion was that this was currently not very much. None of the four regional agreements enforce regional law concurrently with the national authorities. The most important lesson may be the system of cooperation among national and regional institutions using their European Competition Network (ECN). This could be emulated by other RTAs. However, the fundamental problem may be the inexperience of competition officials at the national level amongst members in the other regional agreements. This was emphasized for COMESA (Chapter 11).

There is an essential role for the consumer advocates

Amongst the EU and USA RTAs other than the EU itself, there may only be two agreements (EU-ACP and USA-Australia) with explicit consumer protection provisions. Having said that, a RTA which requires domestic commitment to implement consumer protection laws and policies may make sense particularly in countries where there is little record of implementing consumer protection laws successfully. Consumer policy cooperation with its demand side orientation may complement the supply-side focus of competition policies. It may also have increasing relevance with the growing use of e-commerce. Consumers are more often purchasing and shipping goods across borders even though the current share of international trade is relatively low (Chapter 7).

Possibly more constructive, is the potential role of consumer organizations in representing the interests of consumers – typically the beneficiaries of freer trade – in the RTA process. They can be advocates both at the time of negotiation and implementation to balance the protectionist interests of some producers. As an example, the competent European Consumers' Organization has been very successful in recent years raising competition issues at the EU in part because of the European Commission's openness to civil society. Two other RTAs investigated (Chapter 8), Caribbean's CARICOM and Eastern and South Africa's COMESA have had less success involving consumer civil society organizations. Both RTAs suffer because the

civil society organizations are not sufficiently organized in making the difference, but also the COMESA regional body has yet to significantly encourage such involvement.

Policymaking requires coherence for effective implementation

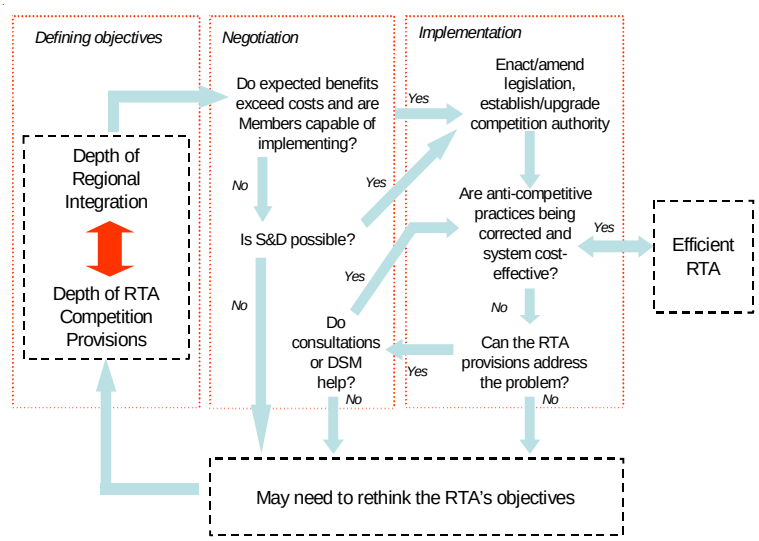
Many of the arguments against a multilateral agreement on competition policy in the WTO seem to have lost their significance in a regional context, as often the same countries opposing a binding WTO agreement on competition have accepted various competition provisions at the regional level. These RTAs may be the stepping-stones necessary so that competition law and policy may be advanced further at multilateral level (Chapter 2).

Trade and competition have an important nexus. Trade is frequently the instigator of competition in markets and benefits RTA members usually with better resource allocation, higher efficiencies and improved productivity. But it is often the potential of increased competition that provokes protectionist sentiment and damages the political will to enter into trade agreements. Competition is a trade policy makers' best friend but at the same time, competition in local markets for local producers is a concern for trade policy makers. One of the interesting highlights from the questionnaire (Chapter 4) is the apparent disconnect between trade and competition policy makers. Yet their objectives are very much intertwined. They may need to have greater cooperation and coordination in fulfilling their complementary roles.

Drawing on all the above, a conceptual framework might be considered for negotiating and implementing RTAs with competition provisions (Figure 2).

The first step in the negotiation process is to define regional integration and competition objectives that are compatible in terms of their ambition. Once such objectives are defined, one needs to ensure that the expected benefits arising from RTA formation exceed costs. If there are reasons to believe that this is not the case, or if developing country RTA members will have difficulties in complying with some of the competition-related RTA requirements, special and differential provisions may need to be actively pursued during actual

Figure 2 Conceptual approach to negotiating and implementing RTA competition provisions



negotiations. In their absence, countries need to rethink the RTA objectives.

When the cost-benefit analysis is favourable (with or without the need for S&D provisions), the RTA can be concluded and members can then proceed with implementation. In the implementation phase, setting up the necessary institutional infrastructure (enactment or amendment of appropriate legislation, establishment or upgrading of competition agencies, as necessary) becomes a key ingredient for an efficient and cost effective control of anti-competitive practices. In such a case, it can be considered that the RTA achieved its trade and competition objectives but it needs frequent monitoring and benchmarking against other countries.

If anti-competitive practices are not corrected in an efficient manner, then this can be due to either deficient implementation of existing regional competition provisions or to the lack of appropriate competition provisions. If deficient implementation is the reason, then consultation or dispute settlement mechanisms, if any, may be used to address the outstanding issues. If, on the contrary, the existing

provisions are *per se* unable to tackle the anti-competitive practices that have a negative impact on intra-regional trade, or if effective implementation can be achieved, then members may need to reconsider the RTA objectives.

In all cases in which the RTA has to be rethought, a possible mechanism is a recent advent of an evolving or revision clause designed to give flexibility to the parties to jointly amend their RTA (Chapter 1). Circumstances can change: new economic conditions, technologies, techniques or industrial organizations can be introduced. Such may require policy makers - both trade and competition - to reconsider the role and objectives of their competition provisions within their RTAs.

More potential avenues for research

As emphasized at the beginning of this Executive Summary and in Chapter 1, these RTAs and particularly those with competition provisions are proliferating especially for developing countries. As argued by many authors, it may be too soon to draw conclusions on what might be useful for a particular developing country, given their diverse development objectives.

This growing phenomenon offers many more potential avenues for research. Many authors have identified in their individual chapters topics for further research and many more related questions could be thought of.

There are for instance economic questions. The estimation of economic benefits from competition provisions in RTAs is particularly complex. The private-sector benefits of regional competition rules are hard to assess. Clearer rules not only reduce the costs of compliance but may improve economic efficiencies through greater regional merger activity but estimates are difficult and guidance may be appropriate. Yet at the same time, the limitations on sovereignty and the loss of flexibility for a small developing country is also a cost hard to estimate. The costs can also be compounded by the potential of smaller developing countries devoting a large part of their resources to information requests stemming from RTA competition provisions that require them to cooperate with other more established

competition authorities. There are also various questions with regards to competition provision effectiveness to address anti-competitive practices as they differ between goods and services. Anti-competitive practices in the infrastructure services (e.g. telecom, distribution services) may have negative spill-over effects on market access opportunities for developing countries in other sectors including trade in goods. They may also have implications for universal access to essential services such as water and electricity. These are important issues to tackle, which explains why many RTAs contain sector specific competition provisions. However when signing such RTAs, developing countries must strive for a fair balance between foreign market access and domestic interests.

There are also many legal questions. What is the legal practicality of using regional trade rules in lieu of domestic legislation? This may differ by type of law and even by country. Furthermore, as the evidence in this publication suggests, it would be interesting to assess why the more informal arrangements (bilateral or otherwise) cooperative arrangements are possibly more effective than textual obligations of RTA competition provisions? Some questionnaire respondents seem to have been expecting more from regional competition provisions than they experienced in effectiveness. Was this justified? What measures could be envisaged to redress this gap and improve the implementation record of regional competition provisions?

These are a few of the many questions still of interest. This publication hopes to make a seminal contribution to the knowledge about the impact and role of such regional initiatives on the enforcement of competition rules, but there are many more to be answered.

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ABBREVIATIONS

AC	Andean Community
ACCC	Australian Competition and Consumer Commission
ACP/EU	African, Caribbean, Pacific/European Union
AD	Anti-dumping
ADB	Asian Development Bank
AERC	Africa Economic Research Consortium
AFTA	ASEAN Free Trade Agreement
AIA	ASEAN Investment Area
ANZCERTA	Australia New Zealand Closer Economic Relations Trade Agreement (also called CER agreement)
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
ATA	Agency to Agency Agreement
BEUC	Bureau Européen des Unions de consommateurs (European Consumers' Organization)
BIDPA	Botswana Institute for Development Policy Analysis
CA	Consumers Association of UK
CACM	Central American Common Market
CAFTA-DR	United States-Central America-Dominican Republic Free Trade Agreement
CARDS	Community Assistance for Reconstruction, Development and Stabilization
CARICOM	Caribbean Community
CARIFTA	Caribbean Free Trade Area
CARIFORUM	Caribbean Forum
CCA	Caribbean Consumers Association
CCA	Croatian Competition Agency
CCFTA	Canada-Chile Free Trade Agreement
CCRFTA	Canada-Chile Free Trade Agreement
CEECs	Central and East European Countries
CEMAC	Communauté Économique et Monétaire de l'Afrique Centrale (Economic and Monetary Community of Central Africa)
CER	Australia New Zealand Closer Economic Relations Trade Agreement (also called ANZCERTA)
CIS	Commonwealth of Independent States
CET	Common External Tariff
CI	Consumers International
COMESA	Common Market for Eastern and Southern Africa
COPROCOM	Comisión para Promover la Competencia, Costa Rica
COTED	Council for Trade and Economic Development
CPA	Cotonou Partnership Agreement
CRNM	CARICOM Regional Negotiation Machinery
CRP	Competition Related Provisions
CSME	CARICOM Single Market and Economy
CSO	Civil Society Organization
CU	Customs Union
CUSFTA	Canada-United States Free Trade Agreement
CUTS	Consumer Unity & Trust Society
CVD	Countervailing duty
DG	Directorate General (European Commission)
DSM	Dispute Settlement Mechanism

EA	Europe Agreement
EAC	East African Community
EC	European Community
ECA	Economic Commission for Africa
ECLAC	Economic Commission for Latin America and the Caribbean
ECN	European Competition Network
EEA	European Economic Area
EFTA	European Free Trade Association
EU	European Union
EUMFTA	European Union-Mexico Free Trade Agreement
FC	Fair Competition
FDI	Foreign Direct Investment
FIFA	Fédération Internationale de Football Association (International Federation of Football Association)
FTA	Free Trade Agreement
FTAA	Free Trade Area of the Americas
FTAA-NGCP	FTAA Negotiating Group on Competition Policy
FTZ	Free Trade Zone
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade and Services
GDP	Gross Domestic Product
IBRD	International Bank for Reconstruction and Development
ICN	International Competition Network
IEA	Institute of Economic Affairs
IGD	Institute for Global Dialogue
INCSOC	International Network of Civil Society Organizations on Competition
IRZ	Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit
JESPA	Japan-Singapore Economic Partnership Agreement
KFTC	Korea Fair Trade Commission
KOICA	Korea International Cooperation Agency
LAC	Latin American and Caribbean
LAIA	Latin-American Integration Association (ALADI)
LDCs	Least Developed Countries (UN definition unless referring to Less Developed Countries internal to CARICOM)
M&A	Mergers and Acquisitions
MDCs	More Developed Countries (internal to CARICOM)
MERCOSUR	Southern Cone Common Market - MERCOSUL
MLAT	Mutual Legal Assistance Treaty
MNCs	Multinational Corporations
MOU	Memorandum of Understanding
MRFTA	Monopoly Regulation and Fair Trade Act
MSG	Melanesian Spearhead Group
NAFTA	North America Free Trade Area
NEPAD	New Partnership for Africa's Development
NEPRU	Namibian Economic Policy Research Unit
NGO	Non-governmental Organization
NPR	nominal protection rate
NZAFTA	New Zealand and Australia Free Trade Agreement
OAU	Organization of African Unity
OCTG	Oil Country Tubular Goods
OECD	Organization for Economic Co-operation and Development
OECS	Organization of Eastern Caribbean States

PTA	Preferential Trade Agreement
RBPs	Restrictive Business Practices
R&D	Research and Development
RTA	Regional Trade Agreement
SAARC	South Asian Association for regional Cooperation
SACU	Southern African Customs Union
SADC	Southern African Development Community
SAWTEE	South Asia Watch on Trade, Economics & Environment
SAA	Stabilization and Association Agreement
SACU	Southern African Customs Union
SADC	Southern Africa Development Community
S&D	Special and Differential Treatment
SMEs	Small and Medium Enterprises
TCA	Turkish Competition Authority
TDCA	South Africa-European Union Trade, Development and Co-operation Agreement
TNCs	Trans-national Corporations
TNG	Trade Negotiating Group (of the OECS)
TRALAC	Trade Law Center for Southern Africa
UEMOA	Union Économique et Monétaire Ouest Africaine (WAEMU)
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UN Set	United Nations Set for the Control of Restrictive Business Practices
UOKIK	Office of Competition and Consumer Protection
US/USA	United States of America
US DOJ	United States Department of Justice
US FTC	United States Federal Trade Commission
US DOJ	Department of Justice of the United States of America
WAEMU	West African Economic and Monetary Union
WTO	World Trade Organization
WTO WGTCP	World Trade Organization Working Group on Trade and Competition Policy

PART ONE

CROSS-CUTTING CONCERNS IN REGIONAL COOPERATION AND COMPETITION LAW AND POLICY

1

Eager to ink, but ready to act? RTA proliferation and international cooperation on competition policy

LUCIAN CERNAT

1. The proliferation of RTAs and the advent of 'deep integration'

Since the mid-1990s, the number of regional trade agreements (RTAs) has significantly increased, with virtually all countries being part of one or more RTAs. Regionalism, defined as both an increase in intra-regional trade flows and in the number of RTAs, has progressed rapidly in many regions, especially in Europe and the Western Hemisphere. The exact number of RTAs currently in operation worldwide is not known precisely. However, various assessments (including World Trade Organization (WTO) estimates) place the total number of RTAs between 250 and over 300.

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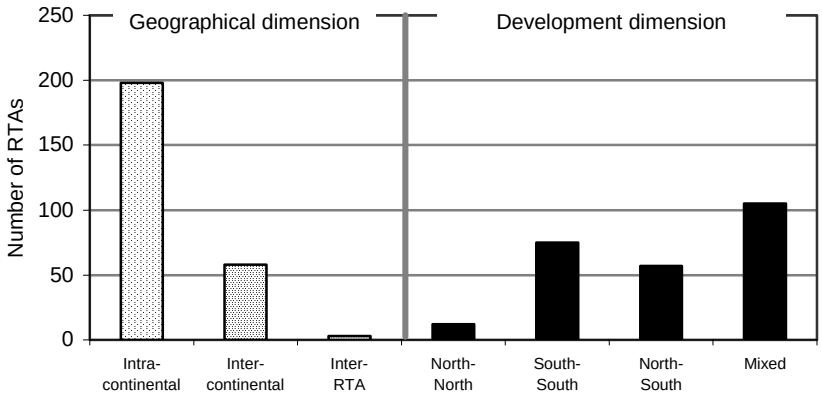
These new developments in RTA formation have led to a renewed interest in RTAs, with many academics questioning the impact RTAs have had on members and third countries. The early theoretical and empirical work started in the 1950s with Viner's seminal work (Viner, 1950). Viner advanced that the welfare effects stemming from the formation of an RTA are ambiguous. In a simple partial equilibrium model under perfect competition, an RTA may increase the level of trade between members at the expense of less efficient domestic producers (*trade creation*) but also to the detriment of more efficient third countries (*trade diversion*). The net effect of an RTA on trade and economic welfare thus depends on the relative size of these two effects. Further refinements were brought when dynamic effects were incorporated into this stylized static approach to regional integration. One dynamic effect resulting from regional integration usually cited is the *competition effect*. The model assumes that RTA formation leads to increased intra-RTA competition and such dynamic effects of regional integration are often used to justify and explain the proliferation of RTAs.[1]

Recent economic integration tends to encompass partners that are economically and geographically diverse. Overall, new RTAs are increasingly expanding to other regions and becoming more complex inter-regional integration systems between countries at different stages at development (Figure 1.1). For instance, almost one quarter of RTAs signed in the post-1990 period are inter-continental. New inter-continental integration projects with a potentially significant impact on global trade and investment have been proliferating. EU-induced regionalism has extended to countries and regions outside of Europe. At the same time, 65 per cent of them are signed between partners at different stages of development (North-South, North-East, or South-East). Developing countries are also major players in this trend, being partners in more than half of all the RTAs formed as part of the 'new wave of regionalism'. North-South RTAs with reciprocal commitments between developed and developing countries are becoming more frequent in all regions. These include agreements with the United States and the EU as the 'Northern' partner, but also agreements between Australia, Canada, New Zealand and Japan and developing countries, particularly in Asia and Latin America. The countries in transition in Central and Eastern Europe have also adopted an active role in regional integration (42 per cent of post-1990 RTAs), not only *vis-à-vis* the EU, but also among

Figure 1.1 Trends in post-1990 RTA formation



Legend: Intra-continental RTAs refer to agreements between countries belonging to the same geographical region; Inter-continental RTAs counts the number of new RTAs between countries situated on different continents; Inter-RTA agreements refer to those trading arrangements between two or more existing RTAs; North-North RTAs refer to agreements involving developed-only, while South-South and refer to developing-only; North-South RTAs refer to agreements between developing and developed countries. Mixed RTAs refers to RTAs among transition economies or between them on the one hand, and developed or developing economies, on the other.

themselves, reformulating their mutual relationships as market economies to forge new trade relationships after the collapse of communism.

Paralleling these theoretical predictions, the 'new wave' of regionalism is not only characterized by an increased dynamism but also by more ambitious levels of integration, taking steps towards integration that go beyond tariffs or non-tariff border measures. Deep integration, defined as 'beyond the border measures' (Lawrence, 1996), place considerable emphasis on liberalization of services, investments and labour markets, government procurement, strengthening of technological and scientific cooperation, environment, competition-related provisions (CRPs) or monetary and financial integration. These are among the distinguishing components not only of RTAs among developed countries but also

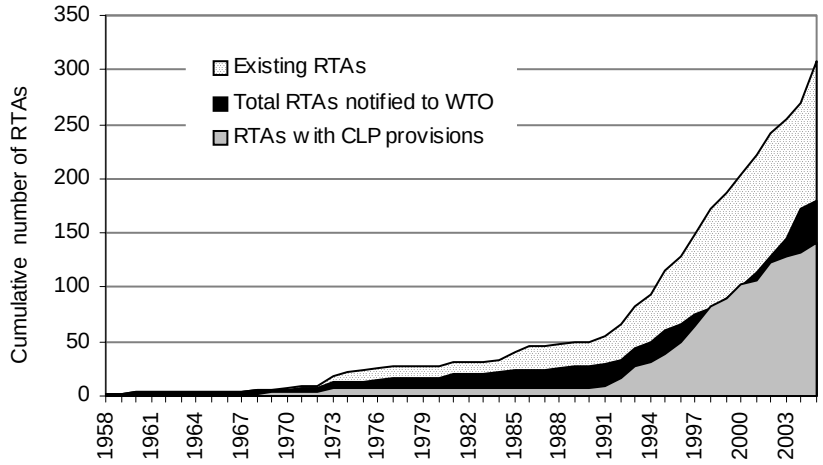
of those between developed and developing countries. Among the early manifestations of this 'new regionalism' were the North American Free Trade Agreement (NAFTA), Mercado Común del Sur (MERCOSUR), the 'deepening' of EU integration through the Single Market programme, and the 'widening' of integration towards the East, all of which took place in a relatively short period. Regionalism has moved far beyond pure trade/tariff or market integration associated with free trade areas or customs unions. Integration has now become much deeper, much more multifaceted and multi-sectoral, encompassing a wide range of economic and other political objectives (Bora and Findlay, 1996; Whalley, 1996). Thus, recent RTAs include not only tariff abolition or reduction on goods, but also provisions on a broad range of areas such as competition-related provisions.

The recent proliferation of massive international mergers, the existence of international cartels and their potentially negative impact on developing countries (Evenett, 2003) puts forward a case for all countries to equip themselves with the tools needed to deal with the increased market power of multinational companies and their anti-competitive practices. Such evidence suggests that, once the 'deep waters' of government-imposed trade barriers are gradually removed, the 'mountain peaks' of trade-related private anti-competitive practices become even more apparent. Since national competition policies are usually poorly equipped to deal with such potential negative influences as cross-border anti-competitive practices, and in the absence of a binding multilateral framework on competition policy, the importance of regional competition policies becomes apparent.

As a result of this and other more complex motivations, the number of RTAs with CRPs increased significantly in the last two decades. Thus, the number of RTAs containing CRPs reached a peak of 141 agreements (Figure 1.2). Most of these agreements have been enacted since the mid-1990s. An often-stated rationale for including CRPs in RTAs is that during the 1990s, many economies came to recognize the importance of competition policy to ensure that the benefit of RTAs is not thwarted by anti-competitive practices.

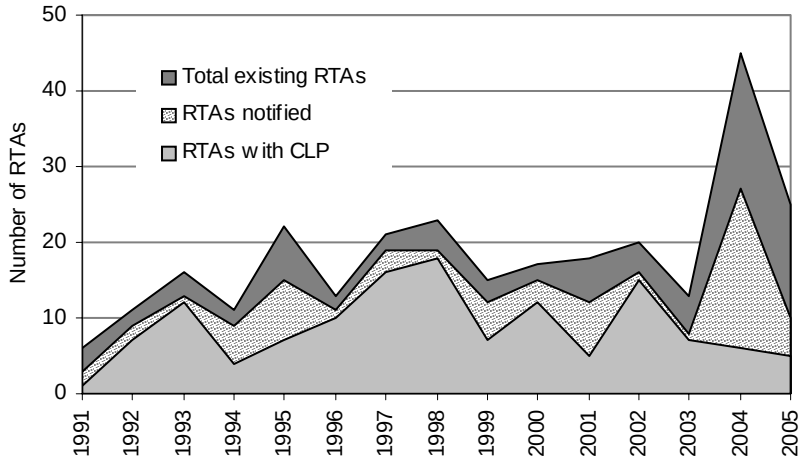
However, as seen from Figure 1.2, in the last three years, the pace of formation of RTAs containing CRPs is less steep than that of total

Figure 1.2 The evolution of RTAs with CRPs, 1958-2005



Source: Based on Crawford and Fiorentino (2005), WTO (2003a) and author's compilations. The figures for 2005 are to date (as of June 2005).

Figure 1.3 Annual formation of RTAs, in the post-1990 period



Source: Based on Crawford and Fiorentino (2005), WTO (2003a) and author's compilations. The figures for 2005 are to date (as of June 2005).

RTAs, implying that, although a fashionable trend, most recently many more RTAs that entered into force did not contain CRPs. Incidentally, this relative decline in the trend of RTAs containing CRPs coincides with the post-Cancun difficulties faced in the WTO on trade and competition issues.[2]

2. The motivation for this study

However, despite progress being made on these issues, far less is known about the types of 'deep integration' provisions such as CRPs in RTAs, their rationale and impact on members. Recent noteworthy attempts in this regard are OECD studies (2002, 2005a). The OECD (2002) study covered several themes, such as the extent of co-ordination of substantive competition standards and rules, the treatment of monopolies and enterprises with special and exclusive rights, the mechanisms for consultation, co-operation and enforcement, and the relationship of competition policy rules to the application of trade remedies. The OECD (2005a) study focused more specifically on the various types of competition provisions included in selected RTAs.

The inclusion of CRPs in RTAs, particularly those signed by developing and transition economies, is also justified by the fact that competition law plays a more important complementary role to trade liberalization than in developed countries. In less mature markets, as is the case of many developing and transition economies, given the inadequacy of business infrastructure (poor physical infrastructure, dysfunctional legal and regulatory frameworks, legacy of excessive state intervention and weak governance, and so on) there is a much greater proportion of 'localized' markets and 'non-tradable' products. Furthermore, developing country trade is constrained by more limited distribution channels and other public and private barriers that cannot be disciplined by import competition. Therefore, merely removing conventional trade barriers among RTA partners may not necessarily lead to increased trade, in the absence of complementary competition provisions (either as competition advocacy or enforcement actions).

Therefore, what seems to emerge at this stage is that countries have been eager to ink an ever-increasing number of RTAs containing CRPs, with different levels of ambition and among countries at various levels of development. Such CRPs provide for different types of actions ranging from adoption of national competition laws, to cooperation, positive comity and even dispute settlement. Given this diversity, one legitimate question would be to know what CRPs provide the best prospects for successfully contributing to the broader integration objectives of RTAs. Is there a correlation between level of trade integration, stage of development and type of regional CRPs? Is there any synergy between various trade provisions and CRPs or among various CRPs? For instance, does the inclusion of CRPs affect the ability to implement other trade-related policies at regional level? More specifically, do certain CRPs (for instance soft convergence and 'policy transfer' provisions) increase the ability of RTA members to make use in a more effective manner of other CRPs (such as consultation, exchange of information, positive or negative comity)? Lastly, what are the relationships between the proliferation of CRPs in RTAs and the discussions on trade and competition issues at multilateral level?

Notwithstanding the relevance of such questions, answering them or, more generally, evaluating the implementation and enforcement record of CRPs in RTAs is no easy task. Despite this CRP and RTA diversity, there is, however, astonishingly little information available about RTA members' readiness to act and implement such CRPs. The use of CRPs by RTA members is generally not published, and few competition authorities include information about international cooperation in their public annual reports. This lack of information would suggest that most of these CRPs are still to be tested.

In such conditions, definite answers about 'best-practices' in negotiating and implementing CRPs in RTAs would be premature. Therefore, apart from offering preliminary answers to some of the questions and testing several hypotheses formulated above, the main purpose of this chapter is to create a taxonomy of CRPs found in a large variety of RTAs based on multiple criteria that would account for the recent trends in RTA formation: (i) various levels of integration and trade-related objectives (bilateral free trade areas, customs unions, or more ambitious forms of integrations such as the creation of common markets or EU accession); (ii) competition-related

provisions (ranging from simple cooperation procedures to more advanced forms of cooperation, including comity principles or harmonization of national competition laws); and (iii) development criteria taking into account the development status of RTA members (developed, developing, transition economies) and their specific needs. Based on this taxonomy, a number of distinctions can be drawn regarding the coherence between the level of trade integration, the development status, and the most appropriate competition provisions that would suit the needs of RTA partners and enhance their trade potential.

In order to arrive at a general taxonomy of competition policy regimes at regional level and to identify certain trends, the next section briefly describes the theoretical framework used in this chapter and presents a number of working hypotheses. Section 4 will test empirically these hypotheses using several statistical indicators with regard to the key trade-competition-development linkages characterizing the plethora of existing RTAs. After testing these trade and development hypotheses, a more in-depth analysis of specific competition provisions in selected RTAs will be provided in Section 4.3. The final section provides an overview of the likely role that CRPs in RTAs could play in addressing their stated objectives concluding with some tentative thoughts on the shape of the future policy debate on the role and impact of competition policy provisions in regional trade agreements.

3. Towards a taxonomy of CRPs: brief methodological considerations

The landscape of RTAs containing CRPs is characterized by great diversity. Agreements differ along many important dimensions, including:

- on trade-related objectives: elimination of tariffs on goods, adoption of common external tariffs, liberalization of trade in services, creation of a customs union, liberalization of factor movements, and so on;
- with regard to their membership (bilateral agreements vs. regional agreements, agreements among developed countries, between developing and developed countries, and so on);

- on institutional arrangements (supranational institutions, joint committees, and so on); and
- on types of competition provisions (general consultation, formal cooperation, comity, establishment of supranational competition rules, harmonization, dispute settlement, and so on).

In order to understand the ways in which these multiple dimensions are reflected by existing RTAs containing CRPs, a tri-dimensional taxonomy is constructed. The three pillars of such a taxonomy are: trade-related characteristics, development dimension and main types of competition-related provisions.

3.1 The trade dimension

On *the trade dimension*, RTAs can be grouped into the following categories:

- *bilateral free trade agreements* (BFTAs) – agreements aimed at eliminating trade barriers between two trading partners;
- *plurilateral free trade agreements* (PFTAs) - agreements aimed at eliminating trade barriers between more than two trading partners;
- *customs unions (CUs)* – agreements aimed at eliminating border measures among partners and the establishment of a common custom territory;
- *association agreements* – bilateral agreements that reflect the special role played by the EU, and to a lesser extent the European Free Trade Association (EFTA), in proliferating RTAs in general, and those containing CRPs, in particular. Although they do not adopt a common trade policy, such agreements aim for a high level of integration in various trade-related areas with neighbouring countries, such as Central and Eastern Europe and the Mediterranean region; and
- *common markets and economic unions* – agreements aimed at further integration beyond trade policies, including free movement of capital and labour, as well as regulatory convergence and supranational economic governance.

The trade dimension is important since trade and competition objectives, although to a large extent overlapping, may differ, depending on the level of ambition of regional integration. The inclusion of competition provisions in a trade agreement does have implications. In certain instances, the trade policy may conflict with the objectives set out by the competition policy, pointing to the need for a coherent approach to trade and competition provision at regional level. One, mentioned above, is the scope of the competition rules in relation to the trade objectives being pursued.

There is a difference in the type and applicability of competition provisions required in an agreement limited to free movement of goods and one whose aim would be to liberalize trade in services. If the RTA only applies to trade in goods, for instance, CRPs contained therein do not apply to trade in services. This has potentially a major implication for the benefits that could be derived from RTA formation, given the fact that the services sector accounts for a large share of most developed markets and coincidentally many services sectors are significantly affected by non-negligible cross-border competition issues that may have negative spillover effects even for the good functioning of a free trade area for goods.[3] A new set of issues comes into play when regionalism leads to the establishment of a common market or economic union. When investment and labour issues are taken into account, regional trade and competition provisions may lead to conflicting objectives or adverse welfare effects (Vandenbussche, 2000).

Therefore, based on the above-mentioned considerations, the following hypotheses can be formulated:

> *H1: RTAs characterized by a higher level of trade integration are more likely to contain CRPs.*

Based on this hypothesis, one could assume that RTAs characterized by a higher level of trade integration tend to contain specific CRPs that would ensure coherence between various regional policies. This is the case for instance in anti-dumping rules. Actions that may look legitimate from a trade policy perspective may turn out to be illegal from a competition policy perspective.[4] In the absence of strong competition policy provisions in a bilateral FTA, for instance, anti-dumping actions may be instigated by cartel members

against competitors from RTA partners that refuse to join or otherwise distort the functioning of the cartel.[5] Anti-competitive effects are even more likely when price undertakings are used instead of anti-dumping duties (Veugelers and Vandenbussche, 1999).

Therefore, effective CRPs that could trump anti-dumping rules when necessary would have a strong trade creation effect. Well-designed CRPs may also induce a harmonizing effect on anti-dumping or other trade policies, such as countervailing duties. Assume, for instance, that an RTA member may take action against intermediate imports (for example steel or chemical products) benefiting from state aids that distort or threaten to distort competition in its own market. However, if the other RTA partner has more lax policies *vis-à-vis* state aids that allow domestic producers to use such subsidized inputs, when final products incorporating such subsidized intermediate inputs are exported to the other RTA partner with stricter state aid rules, this may be considered an anti-competitive practice that affects trade between RTA members. In such cases, corrective actions could be required, including the need to further harmonize other aspects of trade policies.

Thus, a second hypothesis on the level of trade integration and existence of specific CRPs is the following:

> *H2: RTAs characterized by a higher level of trade integration are more likely to contain CRPs that ensure coherence between trade and competition objectives, for example on anti-dumping rules.*

Given this interdependence between the type of RTA, the level of integration and the competition provisions, the trade-related hypotheses will be tested against the existing evidence on regional CRPs in Section 4.

3.2 The development dimension

A second important feature refers to the *level of development* of RTA members. A typical distinction in this regard is between agreements among developed countries (North-North RTAs) and

agreements among developing countries (South-South RTAs). A further category of agreements is the one between developed and developing countries (North-South RTAs). Lastly, an additional dimension is obtained when taking into account the agreements formed by transition countries among themselves (East-East), with developed countries (North-East) or with developing countries (East-South).

Several analyses have drawn a distinction between the expected trade-creation and diversion effects of RTAs, depending on the development level of the participants. Several authors concluded that, whereas North-South RTAs are usually benign, South-South regional blocs are problematic in several respects (Schiff, 1997; Yeats, 1998; World Bank, 2000).[6] The above discussion however does not consider whether CRPs could make a difference to the functioning of the different types of RTAs.

When competition policy is introduced as an additional dimension in South-South and North-South RTAs, several additional hypotheses can be formulated. Although all types of RTAs share, to some extent, common objectives with regard to the promotion of competition, several specificities can be highlighted. CRPs in North-South RTAs for instance, may be shaped by the different objectives pursued by developing and developed countries at regional level.

For developing countries, tackling anti-competitive practices originating in developed countries is a major priority. It has often been argued in many fora (such as UNCTAD, WTO, OECD, ICN) that developing countries are exposed to a range of anti-competitive practices (in particular international cartels and abuses of dominant position) by large multinational companies located in developed countries (see Levenstein *et al*., 2003, for instance). If this is the case, and in the absence of other more effective frameworks for cooperation on competition policy at international level, developing countries should try to negotiate specific CRPs that would deal with such anti-competitive practices. Such CRPs could range from simple notification procedures to exchange of confidential information and positive comity provisions whereby competition agencies in developed countries will safeguard market competition in RTA partners.[7]

For developed countries, such provisions (for example tackling export cartels or abuse of dominance by domestic firms in RTA partners) tend to be less important. In contrast, developed countries might be more interested in ensuring that their developing country RTA partners adopt national competition laws. Furthermore, it will be more fruitful for developed country RTA members if their developing country counterparts would adopt a similar approach to the one used in developed countries (soft convergence).

Hence, based on these specificities, two hypotheses related to CRPs in North-South RTAs could be formulated:

> *H3: From the viewpoint of developing countries, North-South RTAs would require CRPs dealing with cooperation (for example consultation, notification, and so on) on anti-competitive practices affecting developing countries.*

> *H4: Developed countries would tend to include in North-South RTAs provisions regarding the adoption and implementation of national competition laws in developing country RTA members.*

In the case of South-South RTAs, the focus of attention should be rather different. Many of these South-South RTAs in Africa and Latin America contain CRPs, at different stages of implementation. Given that many South-South RTAs aim for a high level of economic integration (customs unions, common markets, and economic unions), the focus of such RTAs should be to create an effective regional competition enforcement mechanism and the promotion of competition at national level in those RTA members lagging behind in this regard.

Under these assumptions, the following pattern is expected to be observed from the empirical analysis:

> *H5: South-South RTAs tend to focus more on fostering their competition-related 'deep integration' objectives.*

In turn, RTAs signed by transition economies have their own specificities. East-East RTAs, for instance, were deemed necessary to preserve the economic links forged during the communist period,

either as part of the former USSR or the Council for Mutual Economic Assistance (COMECON). Furthermore, during the difficult restructuring process from socialism to market economies, enhanced preferential access to neighbouring countries was considered a major advantage for transition economies suffering from significant reductions in the level of economic activity during the early 1990s. For Central and Eastern European countries, North-East RTAs were also encouraged and deemed essential, as part of their accession process to the European Union (EU). In both types of agreements, given the institutional legacy of Central and Eastern European countries, East-East and North-East CRPs played an important role in ensuring a level playing field among RTA partners that were dominated by state monopolies and largely dependent on state aids and other interventionist policies. Hence, one would expect to see many references to state aid in agreements signed by transition economies with other RTA partners eager to reduce the trade distortion impact of state aids.

On the other hand, from the transition economies' viewpoint, such RTAs should also contain more stringent disciplines on the use of anti-dumping. Transition economies have the highest intensity of anti-dumping cases against them (Finger *et al.*, 2001).[8] Their non-market economy status in many countries of the world is the decisive reason for disproportionately high anti-dumping cases against these countries by both developed and developing countries. Given these potentially discriminatory trading relations, it would seem reasonable for transition economies to discipline the use of anti-dumping procedures by their RTA partners, particularly if the level of trade integration is high.

Therefore, based on these two considerations one could assume the following specificities for agreements signed by transition economies:

> *H6: RTAs of transition economies tend to have disciplining CRPs on state aid and the use of anti-dumping.*

Such an hypothesis should be valid in the case of Association FTAs, given their ambitious objectives, but also other North-East and East-South agreements.

3.3 The competition dimension

So far, the previous discussion has drawn some hypotheses regarding the various implications of trade and development dimensions on the type of competition provisions that should be present in RTAs. However, beyond an appropriate balance between trade and competition policy provisions at regional level, a key aspect that has to be taken into account are the specificities of CRPs themselves.

In dealing with specific competition provisions in RTAs, rather that formulating general hypotheses as in previous sections, a more in-depth analysis of key competition provisions in selected RTAs will be carried out in Section 4.3. Such competition provisions include general provisions against various anti-competitive practices, adoption of national competition law requirements, harmonization of national competition rules, consultation provisions, comity principles, sectoral exemptions, dispute settlements, and so on.

For instance, it will be interesting to see the extent to which RTAs seek co-ordination of competition standards and rules. Similarly, information on the extent to which regional CRPs contain obligations to adopt and enforce competition laws or lead to convergence and harmonization of specific competition standards and rules among RTA members would provide useful information and would allow an assessment of the degree of coherence between the level of trade integration contemplated by the various agreements and the CRPs contained therein.

4. Empirical analysis of CRPs in RTAs: trade, competition and development considerations

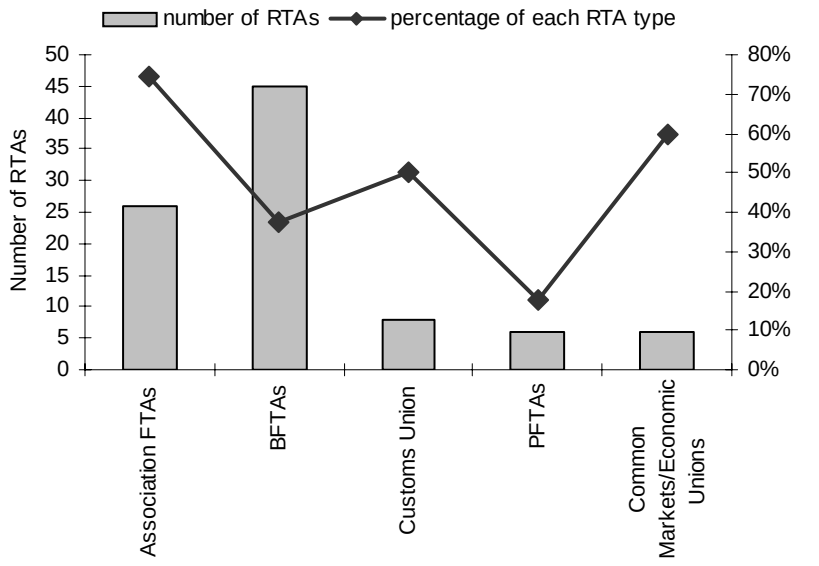
In this section, the taxonomy described above will be used to guide the empirical work on the existing landscape of RTAs with CRPs. The statistical analysis will in turn try to test empirically some of the hypotheses formulated in Section 3. Based on this tri-dimensional taxonomy, more than 300 RTAs are analysed. The data set on RTAs is based on several sources. The WTO database on notified RTAs was supplemented with information collected from

various sources on non-notified RTAs, as well as agreements among some non-WTO members. The final data set that served for the remainder of this analysis comprised 141 RTAs containing various competition policy provisions. However, due to the fact that EU enlargement led to the abrogation of a large number of RTAs with CRPs signed by former Central and Eastern European countries prior to EU accession, the subsequent analysis is based only on those RTAs that are currently in force.

4.1 The trade dimension

On the *trade dimension*, as stated in Hypothesis 1, a direct correlation between the level of trade integration and existence of CRPs is expected. The statistics confirm this hypothesis to a large extent (Figure 1.4). Virtually all Association FTAs contain competition provision. Similarly, a significant proportion of existing common

Figure 1.4 RTAs with CRPs, by RTA type



Source: Author's compilations.

markets or economic unions (60 per cent) and half of the customs unions contain CRPs. In contrast, only 38 per cent of total existing BFTAs and 18 per cent of PFTAs contain CRPs.

Unlike Hypothesis 1, the second hypothesis is not confirmed by the empirical evidence. Only a handful of RTAs (for example EU, EEA, EFTA, Chile-Canada FTA and ANZCERTA) have eliminated the ability of members to use anti-dumping rules on their internal trade.[9] All other bilateral FTAs, particularly among countries at different levels of development, have maintained the possibility to use anti-dumping rules on intra-RTA trade. Moreover, South-South RTAs that have more ambitious objectives than just a bilateral FTA have maintained the applicability of anti-dumping on trade among members. In the case of the Caribbean Community (CARICOM), for instance, WTO anti-dumping rules have been explicitly included in the recent protocol signed in March 2000, which amends the original CARICOM treaty on matters related to competition policy, consumer protection, dumping and subsidies.[10] In such cases, it is still possible for anti-dumping actions to trump competition policy considerations. This leaves open the possibility of conflicts between trade and competition policy objective, as mentioned in Section 3.1.

Beyond this statistical evidence, two interesting examples offered by the EU and US experiences with regional CRPs would further illustrate how trade and competition issues interact. In the case of US, the *Bipartisan Trade Promotion Authority Act of 2002* provided a new impetus for RTA negotiations. Thus, this led to several bilateral trade agreements (with Chile, Singapore, Australia, Morocco, Bahrain, SACU, CAFTA). One of the objectives sought in regional trade negotiations by the US is to conclude trade agreements that anticipate and prevent the creation of new trade barriers that may put US exports at a competitive disadvantage. Anti-competitive practices are one such example.

However, there is little evidence in favour of a clear nexus between existing anti-competitive practices affecting US bilateral relations and a deliberate policy to include competition policy provisions in recent US FTAs, in the first place, or to make subsequent use thereof. For instance, the United States Trade Representative (USTR) publishes annually a compendium entitled the *National Trade Estimate Report on Foreign Trade Barriers*, covering, *inter alia*, anti-

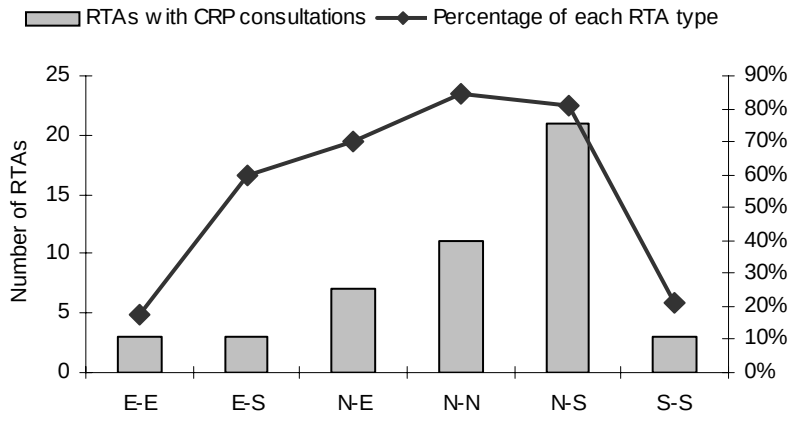
competitive barriers negatively affecting US exports. Over the years, the various issues of the report described anti-competitive practices that the US Government believed may have restricted market access for US exports in many countries (for example China, Egypt, Hong Kong, Japan, Korea, Poland, South Africa, Switzerland, Turkey, and so on). Yet, in only a few instances were explicit linkages made between such alleged anti-competitive practices and attempts to use CRPs in existing or future RTAs to address these practices. One such example refers to alleged private anti-competitive practices and governmental measures having an equivalent effect in several services sectors (for example telecom, banking, insurance) in Guatemala, which were considered as priorities in the Central American Free Trade Agreement (CAFTA) negotiations (USTR, 2004:177-78), even though CAFTA does not contain general CRPs. Instead of using existing CRPs in RTAs or attempting to negotiate new ones, trade disputes settlement mechanisms at multilateral or bilateral level (or unilateral trade measures such as Section 301 in the case of the US) have been used more often than cooperation provisions on competition to address such alleged anti-competitive problems.

However, the case of US-signed RTAs is not unique. The EU, for instance, despite having concluded the largest number of RTAs containing often very detailed CRPs, seems to have made little use of such provisions in addressing alleged anti-competitive practices abroad.[11] In the annual report published by the DG-IV Competition on international cooperation, the only agreements cited as being used are the ones with the US, Canada and Australia. Instead, as in the case of US RTAs, various trade disciplines, such as anti-dumping, are likely to be used more often than CRPs.

4.2 The development dimension

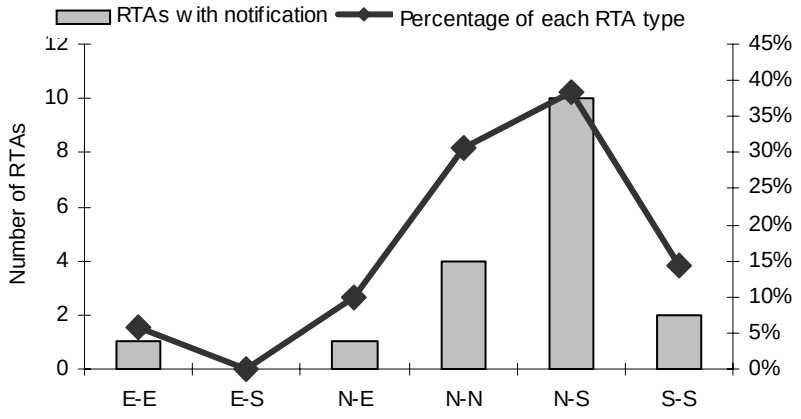
On the development dimension, as discussed in Section 3, a number of hypotheses were advanced for various types of RTAs. The statistical analysis brings some *prima facie* evidence in favour of Hypothesis 3. Figure 1.5 shows the number of RTAs with CRPs pertaining to consultation mechanisms and their share in the total number of RTAs with CRPs. As intuitively predicted, a large

Figure 1.5 RTAs with CRP consultation provisions



Legend: In this and subsequent figures, N, E and S stand for North, East and South, respectively.

Figure 1.6 RTAs with notification provisions



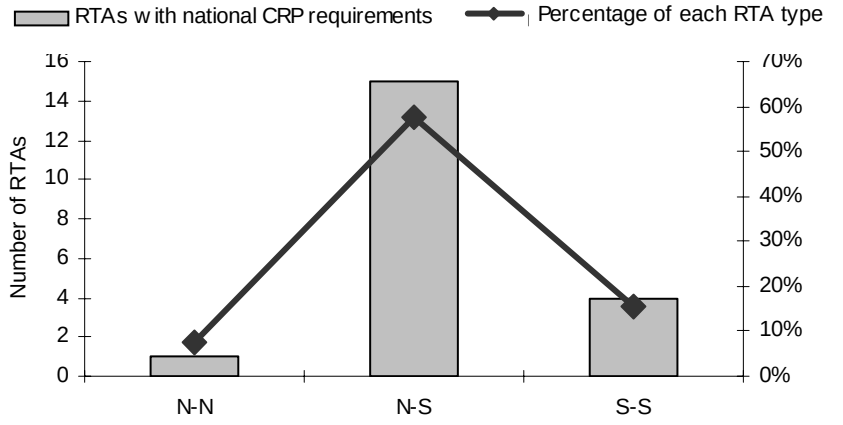
Legend: In this and subsequent figures, N, E and S stand for North, East and South, respectively.

proportion of North-South RTAs have some sort of consultation provisions, compared to East-East, East-South or South-South RTAs.

Another specific CRP that can provide developing countries with further information on anti-competitive practices having a negative impact on their intra-RTA trade are notification procedures. The data presented in Figure 1.6 show that a relatively large share of North-South RTAs (38 per cent) contains such notification procedure, proportionately more than North-North (31 per cent), South-South (14 per cent) or North-East RTAs (10 per cent).

However, such analysis is too aggregated to look into the details of each type of consultation procedure and conclude whether they provide an adequate basis for developing countries to safeguard their interest against anti-competitive practices originating in developed RTA partners. However, given the lack of information on their implementation, it is highly unlikely that such provisions have been so far used successfully in tackling intra-RTA anti-competitive practices.

Figure 1.7 RTAs with national CRP requirements



Legend: In this and subsequent figures, N, E and S stand for North, East and South, respectively.

Hypothesis 4 regarding the inclusion of national competition law requirements is also upheld by the data (Figure 1.7).

Fifty-nine percent of North-South agreements with CRP provisions contain reference either to the adoption of national competition laws or their effective enforcement. As discussed in greater detail in Section 4, this confirms the hypothesis that developed countries make use of RTAs to promote a competition culture in developing country RTA partners that will go beyond CRPs applicable to intra-RTA trade.

Another hypothesis advanced in Section 3.2 concerned South-South RTAs. The *a priori* prediction of Hypothesis 5 was that South-South RTAs should focus on promoting their deep integration objectives. This hypothesis can be tested by looking at the percentage of different types of South-South RTAs (free trade areas, customs unions, common markets and economic unions) containing CRPs in the total number of South-South RTAs (Figure 1.8).

Figure 1.8 South-South RTAs with CRPs by different level of economic integration

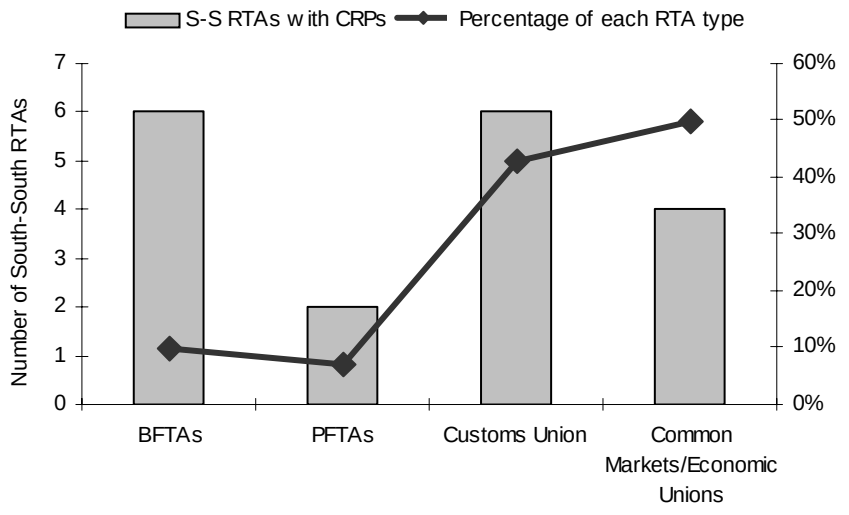


Figure 1.8 shows that a large proportion of 'deeper' integration RTAs (50 per cent of South-South common markets/economic unions and 43 per cent of South-South customs unions) contain CRPs in comparison with 10 per cent of bilateral and 7 per cent of plurilateral South-South FTAs. However, although the large proportion of deep South-South RTAs that contain CRPs seems encouraging, the evidence presented above does not reflect their implementation, which could be considered, at best, as mixed. In certain cases, many CRPs are still to be operationalized, whereas in others enforcement agencies are poorly equipped to implement the various CRPs. Therefore, this suggests that there is still room for improvement in South-South RTAs, not only in adopting CRPs in those agreements that lack such provisions but also in improving their implementation record in those agreements that have already adopted CRPs.

Lastly, the theoretical expectation about RTAs signed by transition economies was that they will contain detailed CRPs aimed at disciplining the trade-distorting effects of state aids and anti-dumping or countervailing procedures (Hypothesis 6). The evidence is mixed. On the one hand, virtually all RTAs involving transition economies contain detailed provisions on state aid, often with special and differential treatment provision in their favour, in the case of Accession FTAs (see Chapter 5 by Brusick and Clarke in this publication for a more detailed discussion). However, despite such provisions aimed at disciplining the use of trade-distorting state aid by transition economies, there was no competition-related disciplining provision on anti-dumping or countervailing duties in North-East RTAs or East-East RTAs (see Chapter 3 by Holmes *et al*. in this publication for more evidence on this).

4.3 The competition dimension

After discussing the various trade and development considerations regarding the existing CRPs in RTAs with different levels of integration objectives signed by developed, developing or transition economies, another major dimension that needs to be explored in greater detail is the relationship between such trade and competition dimensions and specific competition provisions. In this section, the statistical analysis is supplemented by selected examples from various RTAs with regard to competition provision such as

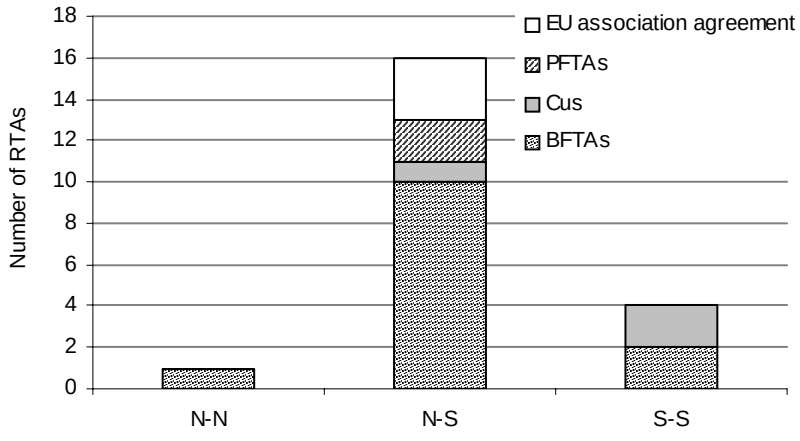
national competition law requirement, harmonization effects, abuse of dominant position, consultation provisions, exchange of confidential information, comity principles, sectoral exemptions and dispute settlements.

4.3.1 National competition law requirements

One distinct feature of several RTAs is the inclusion of specific provisions with regard to existence and enforcement of national competition laws. Twenty-one agreements (three EU agreements, 13 bilateral FTAs, three customs unions, and two RTAs) contain such requirements. From a development perspective, a large majority of these agreements (76 per cent) are North-South agreements. Hence, North-South RTAs can be seen to act as 'national competition policy-transfer' mechanisms from developed to developing countries.

The language referring to the need to adopt national competition laws and policies varies from reference to the proper functioning of existing institutions entrusted with competition law enforcement (for example the Canada-Israel FTA) to provisions requiring a party to put in place the necessary legal and institutional infrastructure. For

Figure 1.9 RTAs containing a requirement to adopt and implement national competition laws



Legend: In this and subsequent figures, N, E and S stand for North, East and South, respectively.

instance, in the case of the US-Singapore FTA, the adoption of a national competition law by Singapore is 'hardwired': Article 12 of the agreement stipulates that Singapore should enact general competition legislation by January 2005.[12]

Having a national competition law is important for the manner in which CRPs are included in RTAs. In the absence of a domestic law, there is no legal basis for a member to take any action against practices organized in another Member State in respect of the effects upon its own territory, no matter how difficult it may be to actually enforce such a law against non-resident actors.

In the case of South-South agreements, several agreements containing national competition law requirements (for example the Southern African Customs Union (SACU), MERCOSUR) have not been successful in implementing these provisions in all Member States.

4.3.2 Harmonization effects

One typical case of harmonization provision on competition policy by way of RTA formation is provided by the EU agreements with Central and Eastern European countries (Europe Agreements), as part of the broader objective of EU membership. However, the Europe Agreements are not alone in having harmonization provisions. In the case of the EU-Morocco Agreement there is also a harmonization effect regarding the rules governing anti-competitive practices. The relevant provisions included in the EU-Morocco Agreement state that the Association Council is charged to adopt, within five years of the entry into force of the agreement, the necessary rules against anti-competitive practices covered by the EU-Morocco Agreement. Most importantly, Article 36(2) states that such anti-competitive practices '…shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Community'.[13] Hence, the rules governing anti-competitive practices having an impact on the trade between FTA members are 'hardwired' to follow the EC competition principles, although to a lesser extent than those contained in the agreements between the EU and acceding Central and Eastern European countries.[14]

Less explicit but potentially equally ambitious provisions are also contained in several agreements between the EU and the former Commonwealth of Independent States (CIS). One example is provided by the EU-Armenia Partnership and Cooperation Agreement, which provides in Article 43(4) for parties '…to examine ways to apply their respective competition laws on a concerted basis in such cases where trade between them is affected.' The harmonization and 'policy-transfer' elements are present also in other parts of Article 43 of the EU-Armenia agreement that calls for 'soft harmonization' of competition rules through the provision of technical assistance on competition law and policy, including exchange of experts and aid for the translation of relevant EC legislation.

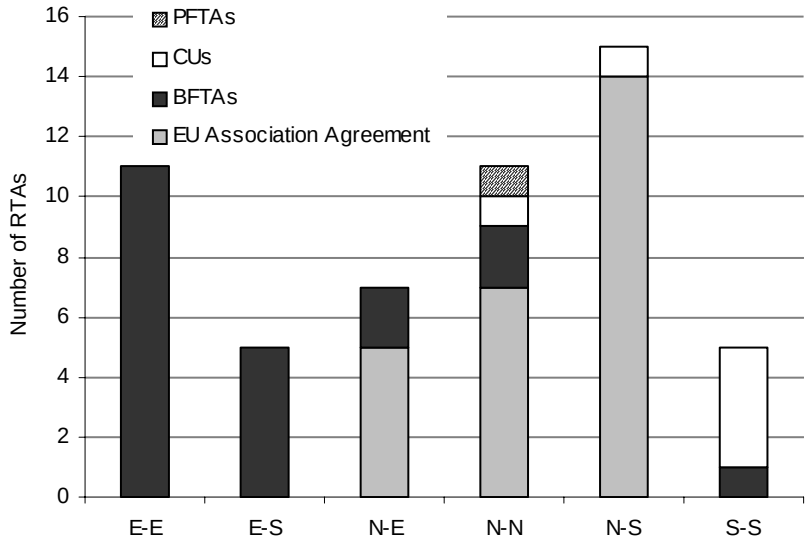
One interesting hypothesis that deserves further analysis is that such competition-related harmonization, 'policy transfer' and convergence provisions contained in RTAs would lead to a more effective implementation of other regional CRPs or to increased cooperation among national competition agencies. However, so far there is little available evidence, if any, in support of such a hypothesis. Furthermore, the evidence included in other chapters in this publication (in particular Chapters 3 and 4 by Alvarez *et al*. and Holmes *et al*., respectively) seems to invalidate this hypothesis.

4.3.3 Abuse of dominant position provisions

Provisions on abuse of dominant position are contained in EU agreements or EU-shaped agreements among former Central and Eastern European countries (CEECs) or CIS countries, as well as a few South-South agreements. Figure 1.10 offers a breakdown of RTAs containing dominant position provisions, by trade and development criteria. As can be shown, the largest number of RTAs containing abuse of dominant position provisions are North-South Agreements, which are all agreements signed by the EU and EFTA with mostly Euro-Med partners (the only exceptions being the EU-Turkey CU and the EFTA bilateral agreements with Turkey and Singapore).

However, prior to EU enlargement, the most prevalent type of RTAs containing abuse of dominant position (more than the total number of RTAs with such provisions currently in force) were

Figure 1.10 RTAs containing dominant position provisions



Legend: In this and subsequent figures, N, E and S stand for North, East and South, respectively.

agreements signed by CEECs among themselves and with former CIS countries (36 agreements) and with EU and EFTA (24 agreements).

In the case of South-South RTAs, this logic was not followed. The few South-South RTAs that have included CRPs related to abuse of dominant position are usually aiming at a more ambitious level of economic integration (custom unions, common markets). In addition, some of them (for example the Andean Community, the Common Market for Eastern and Southern Africa (COMESA), CARICOM) have also advanced at different degrees towards the adoption and implementation of region-wide competition rules.

The merits or demerits of dominant position provisions in South-South RTAs can be debated. Given the limited implementation record of such provisions in South-South RTAs, it is premature to assess their usefulness and the relative importance for other types of South-

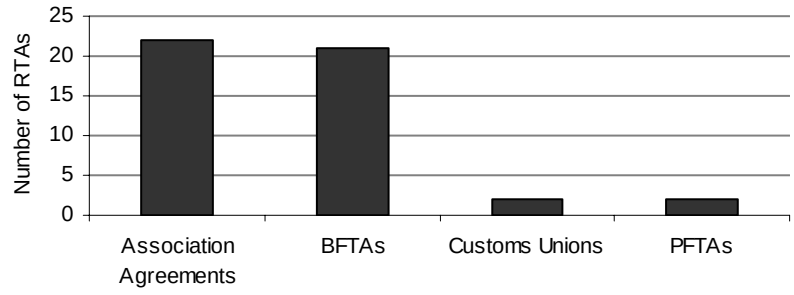
South RTAs such as bilateral free trade agreements, particularly among countries without a national competition law, to follow the example of East-East or North-East RTAs and consider the adoption of such provisions at regional level. However, for a developing country forming an agreement with a developed country, having provisions on abuse of dominant position may be an advantage, in so far as such provisions provide for effective cooperation among competition agencies to curb potential abuses of dominant positions by large companies located in the developed trading partner.

4.3.4 General consultation provisions

Fifty-four RTAs including 22 EU agreements, 27 bilateral FTAs and two customs unions provide for general consultation mechanisms regarding competition issues. Such consultations could be conducted in an *ad hoc* manner or, in certain cases, could be facilitated by the institutional architecture of the RTA (for example the Association Councils and Committees in the case of EU agreements).

Interestingly enough, general provisions on consultations are found in Association agreements, essentially EU or EFTA agreements with non-EU members in Central and Eastern Europe, Euro-Med region, Singapore and South Africa and Mexico.

Figure 1.11 RTAs containing provisions for general consultations on competition policy



Other specificities of consultation provisions across RTAs can be highlighted. For instance, the CARICOM-Dominican Republic FTA and the CARICOM-Costa Rica FTA provide for the creation of a Standing Committee on Anti-Competitive Business Practices (Articles XIV and I.08, respectively). The Committee is mandated, *inter alia*, to monitor the implementation of the CRPs contained in the agreement or its annexes, to consider all matters relating to competition policy, including such matters as may be referred to it by the FTA members, to consult on competition issues of mutual concern that arise in international fora, to facilitate information exchange among FTA members, to create working groups or convene expert panels on topics of mutual interest, and so on. There is no predefined schedule of meetings of the Committee (the agenda is to be agreed by its members) and the Committee can regulate its own proceedings. However, the evidence so far suggests that these institutional arrangements have not been used in practice (see Chapter 10 by Stewart in this publication).

Similarly, Article 14-05 of the Chile-Mexico FTA provides for the formation of a Committee on Trade and Competition that would convene at least once a year. The Committee is requested to report and make recommendations on matters regarding the relationship between competition laws and policies and trade in the FTA. However, as with other such Committees, despite their potential usefulness, little is known about their actual impact.

4.3.5 Confidentiality

Most agreements do not provide for the exchange of confidential information. However, even without the exchange of such information, there is still room for meaningful cooperation on competition matters among RTA partners. Therefore, the mere inability of prospective RTA partners to agree on the exchange of confidential information should not be construed as an argument against the inclusion of CRPs in RTAs.

4.3.6 Comity principles

Comity principles are rarely found in RTAs. One notable exception in this regard is the EU-South Africa Agreement.

Article 38 of the EU-SA FTA provides for the following positive comity actions:[15]

> 1. The Parties agree that, whenever the Commission or the South African Competition Authority has reason to believe that anti-competitive practices, defined under Article 35, are taking place within the territory of the other authority and are substantially affecting important interests of the Parties, it may request the other Party's competition authority to take appropriate remedial action in terms of that authority's rules governing competition.
>
> 2. Such a request shall not prejudice any action under the requesting authority's competition laws that may be deemed necessary and shall not in any way encumber the addressed authority's decision-making powers or its independence.
>
> 3. Without prejudice to its respective functions, rights, obligations or independence, the competition authority so addressed shall consider and give careful attention to the views expressed and documentation provided by the requesting authority and, in particular, pay heed to the nature of the anti-competitive activities in question, the firm or firms involved, and the alleged harmful effect on the important interests of the aggrieved Party.

The same agreement also contains what could be best coined as negative comity.[16] Article 38(4) states:

> When the Commission or the Competition Authority of South Africa decides to conduct an investigation or intends to take any action that may have important implications for the interests of the other Party, the Parties must consult, at the request of either Party and both shall endeavour to find a mutually acceptable solution in the light of their respective important interests, giving due regard to each other's laws, sovereignty, the independence of the respective competition authorities and to considerations of comity.

4.3.7 Sectoral exemptions

Most EU agreements and agreements among EU 'spokes' in Central and Eastern Europe and the Euro-Med area contain explicit exemptions from regional CRPs for agricultural products. Apart from

agriculture, few agreements explicitly exempt sectors from competition-related provisions included in RTAs.[17] When read in conjunction with the sovereign application of national competition laws (with their own exceptions and exemptions), this implies that such sectoral exemptions are unaffected by the RTA. This issue becomes particularly important in cases where RTAs cover trade in services, in particular services sectors that are within the realm of sectoral regulators. With the exception of telecommunications, there are few, if any, sector-specific CRPs included in RTAs.

4.3.8 Dispute settlements

RTAs have adopted two broad strategies to address bilateral trade disputes. One strategy is a legalistic, formal dispute settlement process, such as the ones adopted by the EU or NAFTA. However, many RTAs do not have a legalistic dispute settlement mechanism. Instead, they rely on a more diplomatic mechanism. Trade disputes are referred to a joint body (often called the Joint Committee) to solve trade disputes between parties.

In the case of competition, the majority of RTAs exclude CRPs from the purview of formal dispute mechanisms. Several EU agreements, however, allow for dispute settlements. A limited dispute settlement mechanism is also provided for in the US-Singapore FTA. However, interestingly enough, the US-Singapore FTA explicitly exempts from dispute settlement issues related cooperation and consultation procedures on competition issues.

Another unusual example is the Australia-Thailand FTA. Unlike most other BFTAs, non-compliance with the CRPs, including provisions on transparency and information requests regarding government enterprises and designated monopolies, is subject to dispute settlement.

It is difficult to say which model is more appropriate to diffuse competition disputes. Information on disputes referred to joint committees is not readily available and therefore their efficiency or deterrent properties cannot be assessed. On the other hand, some RTAs that rely on joint committees rather than on formal legalistic arrangements (such as the Europe Agreements for instance) have so

far avoided trade disputes at multilateral level. Yet, unlike the Europe Agreements, other RTAs have not excluded the potential for acute trade tensions among their members, either at multilateral or at regional level.

5. Conclusions

The analysis carried out in this chapter was based on a combination of theoretical discussion of the trade-development-competition nexus and the ways in which this could be pursued in a coherent manner by various types of RTAs (free trade areas, customs unions, common markets, and so on). A descriptive statistical analysis tested the theoretical predictions formulated based on the trade-development-competition nexus. A detailed analysis of key CRPs also led to a number of insights. This chapter has shown in great detail that in recent years countries at different levels of development (developed, developing, transition economies) have been eager to ink RTAs containing a wide range of CRPs. Various justifications for the inclusion of CRPs in RTAs were given, many of them reflected in the actual shape of CRPs negotiated in RTAs.

Despite this negotiating dynamism, little action has been recorded in the implementation phase of such CRPs. Therefore, it seems that RTA partners are more eager to ink CRPs in RTAs than to put them into practice. The actual impact of this gap between negotiations and implementation efforts is obviously difficult to quantify. In theory, the adoption of competition law and policy (CLP) rules at regional levels should be welcomed, but what is their practical impact? What is the actual use of such CLP provisions (negative/positive comity, notification, and so on)? Are economic operators, for instance, aware of the benefits that they could gain from efficiently invoking such provisions? Do they file complaints to the appropriate competition authorities that could then be subject to CRP implementation?

In the absence of such *ex post* data regarding the performance of various CRP provisions in safeguarding the integration objectives of RTA members, these questions cannot easily be answered. Things are easier to assess when it comes to the requirement to have a

national law or establishing adequate regulatory frameworks. In such instances, a causal relationship between CRPs in RTAs and the track record of implementing agencies may be more easily established.

However, beyond these difficulties stemming from inadequate information about implementation record, a more difficult question arises from the theoretical ambiguity of RTA formation, pointed out by Viner (1950) and mentioned earlier in this chapter. When imperfect competition is taken into account, there is a wide consensus that anti-competitive practices can impair or even nullify the predicted welfare benefits and the dynamic competition effects as a result of RTA formation. Hence, RTAs need to contain CRPs. However, in terms of net trade effects (trade creation *vs* trade diversion), the impact of such provisions on the trade and welfare effects of RTAs is dependent on the specificities of the CRPs. Despite these analytical advances, however, the initial Vinerian ambivalent conclusion that RTAs could enhance or reduce welfare remains. The issue of the net effect of RTAs on the welfare of the Member States and on the world economy is therefore an empirical issue. Moreover, even if there were a clear-cut analytical answer to the question of the sign of the effects, the magnitude of these effects would still be of interest.

For instance, an RTA that provides for members to adopt national competition laws and apply them in a non-discriminatory manner *vis-à-vis* national, intra-RTA, and third-party firms will, *ceteris paribus*, have *trade creation* effects. On the other hand, an RTA that only contains CRPs that would tackle anti-competitive practices *in so far as they may affect trade between RTA members*, has a *de jure* discriminatory effect on non-RTA firms and may induce an additional trade diverting potential against competitive third-party producers.

Two other trade and competition issues that may be of relevance for RTAs are worth mentioning: merger control and evolving clauses. Firstly, despite the growth in cross-border mergers and acquisitions and its obvious implications at regional level, with the exception of those RTAs establishing regional competition rules, explicit provisions in this field are virtually non-existent.[18] Given the disparities in capacities, approaches and objectives of domestic competition policies among RTA members with regard to merger control, this gap is not entirely surprising. However, for streamlining merger control, as well as for other competition provisions with

significant economic implications at regional level, including an evolving clause allowing members to adopt a gradual approach to enlarge the scope of regional competition provisions may introduce an additional flexibility. However, despite their potentially useful role (in both South-South and North-South RTAs), as in the case of merger control, the number of RTAs containing such evolving clauses remains limited.

Another important question that stems from the great variety in terms of scope, objective, membership characteristics, and specific CRPs included in the recent RTAs is the interrelationship between trade and competition provisions at regional and multilateral levels in the WTO context. Such an interrelationship can act both ways: (i) the impact of RTAs on the multilateral process; and (ii) the impact of the trade and competition at multilateral level on the various CRPs adopted at regional level. Regarding the first aspect, given this variety of approaches at regional level, it seems that there is no emerging regional model that could currently serve as a major driving force in the discussions on trade and competition issues at multilateral level.

On the second aspect, one way to identify the impact of multilateral processes on regional integration would be to identify regional CRPs that reflect the discussions regarding a WTO multilateral framework on competition. Such a comparison is further justified by the fact that the discussion in the WTO Working Group on Trade and Competition (WGTC) and the proliferation of RTAs with CRPs happened simultaneously. However, rather surprisingly, out of the multitude of RTAs signed in recent years, very few RTAs include discernable references to issues raised at multilateral level. Among them, Canada-Costa Rica, Australia-Thailand, Australia-Singapore, and Mexico-Japan FTAs contain explicit reference to WTO principles, as evolved through the work of the WGTC.

For instance the Australia-Thailand FTA states in Article 1203 that '… any measures taken by a Party to proscribe anti-competitive practices, and the enforcement actions taken pursuant to those measures, shall be consistent with the principles of transparency, timeliness, non-discrimination, comprehensiveness and procedural fairness.' Although the FTA does not make any explicit reference to the WTO work on competition or its broader competition-related objective, based on the similarity of the wording used in the FTA and

that of Australia's submissions to the WGTC, it would be reasonable to believe that such CRP provisions were induced by the WTO discussion on trade and competition. Furthermore, the Australia-Singapore FTA contains competition provisions applicable to the telecom sector that seem, *prima facie*, to be similar to the provisions contained in the WTO Reference Paper, although somewhat stronger in certain respects.

However, given the relatively small number of RTAs containing CRPs similar to the ones discussed at multilateral level, it seems that the inclusion of CRPs is not greatly influenced by the debates held at multilateral level, despite the fact that the inclusion of CRPs at both regional level and on the multilateral agenda was advocated by the EU. On the other hand, as mentioned earlier, the lack of consensus on trade and competition issues at multilateral level seemed to have had a 'chilling effect' in recent years on the inclusion of CRPs at regional level.

While some aspects related to the design and implementation of competition policy may still deserve further investigation, the discussion in the previous sections resulted in one clear conclusion: the available evidence shows that countries are eager to ink RTAs with CRPs but are far less eager to implement them. This weak implementation record can be partly explained by the fact that RTAs with CRPs is a relatively new phenomenon. The history of regional integration has shown that 'deep integration' rules, such as competition provisions, need time to fully materialize, particularly in RTAs involving developing countries. However, expeditious progress can only be expected if strengthening of implementation capacity in developing and transition RTA members is accompanied by reinforced commitment from developed countries to effectively address the main competition-policy concerns of their trading partners.

NOTES

[1]Both the European Union project and NAFTA have been justified on economies of scale that not only allowed RTA members to increase their intra-regional exports but also their trade with the rest of the world.

[2]Another possible factor accounting for this effect may be the EU enlargement and the termination of all the agreements signed by newly acceded countries prior to enlargement.

[3]Take for instance the possibility of anti-competitive practices negatively affecting the transport or distribution sector of goods within the RTA. Such anti-competitive practices will certainly reduce or even nullify the expected trade creation effects as a result of RTA formation and would maximize the potential for trade diversion effects, rendering regional exporters less competitive. Moreover, a large number of services are characterized by monopolies subject to sectoral regulation, which may prevent the applicability of regional or domestic competition rules.

[4]There is a significant theoretical and empirical literature on the potential anti-competitive effect of anti-dumping rules. See for instance Staiger and Wolak (1989, 1992) for a game-theoretical argument, Prusa (1992) for an analysis of US anti-dumping actions or Messerlin (1990) for the case of the EU.

[5]Although not directly related to the functioning of any US-signed RTA, the case of the ferrosilicon cartel in the US is an illustrative example of how cartel members can disguise their activities and successfully benefit from the imposition of anti-dumping duties. The likelihood of such actions is increased in the case of RTA formation that generates trade creation effects, given the fact that RTA members would have preferential market access leading to lower prices and increased competition with domestic producers.

[6]For an argument in favour of the positive trade-creating effects of South-South RTAs see for instance Cernat (2001).

[7]See Hoekman and Saggi (2003) for further details on a similar argument about the negotiation of effective development-friendly CRPs at multilateral level.

[8]Finger et al. (2001) define anti-dumping intensity as a measure of how many cases were initiated against a country per dollar of exports.

[9]The Canada-Chile FTA provides a distinctive example on how anti-dumping measures can be eliminated in an RTA that is otherwise rather 'shallow' both on trade integration and competition policy objectives.

[10]See for instance Article 30 of Protocol VIII amending the treaty establishing the Caribbean Community.

[11]In addition to CRPs contained in various types of trade agreements, the EU has forged a multitude of other competition-related cooperation relations with more than 130 countries.

[12]In accordance with its commitments, Singapore enacted the Competition Act 2004. The Act will be implemented in three phases, beginning with the establishment of a Competition Commission on 1 January 2005, followed by completion of implementing regulations (except for mergers and acquisitions) by approximately January 2006, followed by implementing regulations for mergers and acquisitions by approximately January 2007 (USTR, 2005).

[13]Similar provisions are found in the EU-Tunisia Euro-Med Agreement but not in the EU-Egypt agreement for instance. Instead, the EU-Egypt Euro-Med Agreement contains a 'soft harmonization' provision stating that the future national competition law of Egypt should take into account the competition rules developed within the European Union (Joint Declaration on Article 35).

[14]The degree of intensity it would seek to achieve with respect to the convergence of competition rules in the context of the Euro-Med Partnership is unclear. According to Geradin (2004), such convergence may range from a voluntary approximation of the EU model on competition policy to the transposition of EC competition rules in domestic competition laws by the Euro-Med partners.

[15]The OECD (1999:17) describes positive comity '…as the principle that a country should (1) give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests, and (2) take whatever remedial action it deems appropriate on a voluntary basis and in considering its legitimate interests'.

[16]According to the OECD (1999:18), negative comity may be described as the principle that a country should (i) notify other countries when its enforcement proceedings may have an effect on their important interests, and (ii) give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming those interests.

[17]See Chapter 13 by Desta in this publication for a more detailed discussion of this topic.

[18]Notable exceptions are the EU-Mexico and Canada-Costa Rica FTAs, for instance.

2

What can we really learn from the competition provisions of RTAs?

SIMON J. EVENETT

1. Introduction

When considering the negotiation of international binding rules on competition law, competition policy, and associated enforcement matters, something of a paradox has emerged in recent years. On the one hand, the members of the World Trade Organization (WTO) decided not to negotiate a binding multilateral framework on competition policy during the Doha trade round. Yet, many of the same countries have signed, in principle, binding international rules on competition law and policy in regional trade agreements. Even though it did not claim to be comprehensive, one analysis (OECD, 2005a) identified competition policy-related provisions in 47 recently concluded regional trade agreements (RTAs). Relatedly, the number of RTAs has mushroomed in recent years, and

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competition provisions are often part of such initiatives. This seemingly paradoxical outcome raises a number of questions not all of which, admittedly, will be pursued here. One question that is considered here, however, is what are the implications of the recent proliferation of competition law provisions in RTAs for the negotiation of potential future multilateral agreements on competition law and policy? This chapter examines various possible answers to this question and offers a note of caution about what lessons can be properly drawn from the recent experience with rule making on competition law and policy in RTAs.

Section 2 of this chapter summarizes the principal components of competition provisions in RTAs and makes some comparisons with a leading proposal for a multilateral framework on competition policy advanced in 2002-03. Section 3 poses a number of questions that might help establish the implications of rule making in RTAs for future multilateral decision making. Section 4 attempts to answer some of those questions, drawing on the factual record established in Section 2. Concluding remarks are offered in Section 5.

2. An overview of the competition provisions of recent RTAs

Depending on how one counts RTAs in 2005, the cumulative number of such agreements signed lies between 225 and 275 (World Bank, 2005:27).[1] The number of such agreements that were concluded rose sharply after 1990 with 10-20 agreements typically signed annually. In certain years in the mid- to late-1990s, the number of RTAs signed exceeded 25, indicating that a significant amount of rule making was taking place outside the auspices of the WTO.

Many of the recently signed RTAs contain provisions on competition law and policy. Recently the OECD Secretariat analysed the competition provisions of 47 RTAs and this has shed considerable light on their prevalence and content (OECD, 2005a). Notwithstanding concerns about the representative nature of this sample of 47 RTAs, a point the OECD Secretariat properly acknowledges, in what follows here extensive reference is made to this OECD study. Readers are cautioned that the interpretations given

here to the evidence presented are the author's own and any criticism of these interpretations should be directed at the author and not at the OECD Secretariat.[2]

The OECD analysed 47 RTAs, 36 per cent of which are between developing countries (which are often referred to as South-South agreements), 3 per cent were between industrialized economies (the so-called North-North agreements), and the remainder have signatories from developing and industrialized economies (the so-called North-South agreements.) Eight types of competition policy-related provisions were identified in these 47 RTAs. It is important to appreciate that not every agreement contained all eight types of competition provisions, although to be included in the OECD study presumably at least one such provision must have been present. The classification of competition provisions in the OECD study was as follows:[3]

1. 'Measures'[4] relating to the adoption, maintenance, and application of competition law;
2. Provisions relating to the cooperation and coordination of activities by competition law enforcement bodies;
3. Provisions relating to anti-competitive acts and measures to be taken against them;
4. Provisions relating to non-discrimination, due process, and transparency in the statement and application of competition law;
5. Provisions to exclude the use of anti-dumping measures against the commerce of signatories;
6. Provisions concerning the circumstances and conditions under which recourse to trade remedies (such as anti-dumping measures, countervailing duties, and safeguards) are permitted;
7. Provisions relating to the application of dispute settlement procedures in competition policy-related matters;
8. Provisions relating to flexibility and progressivity, sometimes referred to as special and differential treatment (SDT) provisions.[5]

It should be evident from the above list that certain provisions are related to others. For example, the first and third provisions could be similar, and the fifth and sixth provisions address similar (but not identical) matters. Care must therefore be taken when interpreting

the summary statistics concerning the prevalence of different types of provisions that are presented below. Any analysis of this kind is likely to raise questions about the nature of the classifications used, misclassification errors, and double-counting, points that the reader may want to bear in mind.

As the OECD study notes, the overwhelming impression is that of the substantial diversity in the competition provisions adopted in RTAs. Having said that, one common feature of the agreements analysed was that statements that anti-competitive acts, orchestrated by both the state and the private sector, could frustrate the broad liberalizing objectives of the RTA in question. It seems, therefore, that the competition provisions were included not for their own sake, or because of their own intrinsic value or merit to signatories, but rather as an important measure to support the barrier-reducing objectives of the RTA. This is a statement about the purported rationale for including competition provisions in RTAs and not about the effects of such provisions which, in principle, need not be confined to influencing cross-border commerce.

Broad agreement on the ends, however, does not imply agreement on the means. As the OECD study shows, the types and prevalence of competition commitments taken on vary markedly across RTAs. The following provisions were found in at least 35 of the 47 RTAs considered in the OECD (2005a): provisions relating to the exchange of evidence and information, provisions relating to the abuse of dominance or monopolization, provisions relating to anti-competitive agreements between firms such as cartels, provisions relating to non-discrimination (in particular as they relate to state monopolies), and provisions establishing, or encouraging, consultation mechanisms for the resolution of disputes on competition policy-related matters.

In contrast, the following provisions were found in five or fewer of the 47 RTAs studied: provisions relating to negative comity, provisions relating to positive comity, provisions relating to anti-competitive mergers, provisions relating to the elimination and use of anti-dumping measures between signatories, provisions relating to less-than-full reciprocity of commitments for lesser developed signatories,[6] and provisions directly related to exemptions and exceptions for lesser developed signatories.

It would seem, then, that the recent batch of RTAs contains relatively more provisions on anti-competitive practices than on forms of special and differential treatment, as well as more provisions on consultations and broader cooperation mechanisms between competition enforcement agencies than specific obligations relating to negative and positive comity, the latter often being thought of as 'deeper' forms of inter-agency cooperation on competition matters.

Given that a majority of the agreements analysed in the OECD study are North-South agreements, and that the Northern parties are often the United States, Canada, or the European Communities and its Member States (EC), the diverse picture alluded to above does include certain similarities across distinct groups of RTAs.[7] The OECD (2005a) notes that agreements involving the EC tend to be oriented more around substantive rules than around cooperative provisions, the latter being found more in agreements involving Canada and the USA. Two broad 'families' of competition provisions can, therefore, be identified (OECD, 2005a:14).[8] Having said that, readers should note that a clear majority of RTAs in the OECD study do not include the EC, the USA, or Canada as a signatory, and these RTAs do not necessarily fall into the two families identified above. Diversity, it would seem, is the dominant attribute of RTA provisions on competition law and policy.

Since the principal matter to be addressed in this chapter is the potential lessons of rule making in RTAs for future multilateral initiatives on competition law and policy, it would be remiss not to compare the above findings with the ill-fated proposals for a multilateral framework on competition policy that were advanced before the Cancun Ministerial Meeting of WTO members in 2003. Although a number of WTO members made submissions concerning the potential elements of such a multilateral framework, the European Community and its Member States advanced the most comprehensive set of proposals in this respect and here they will form the comparator to the RTAs analysed in the OECD study.

The EC proposed that a binding multilateral framework on competition policy should have the following components: a commitment to ban so-called hard-core cartels and to take measures at national or regional level to give effect to such a ban, a commitment to adhere to so-called core principles (of non-discrimination, due

process, and transparency) in the statement of national competition laws, modalities for voluntary cooperation between agencies responsible for the implementation of competition law, and progressivity and flexibility, including technical assistance and capacity building, for developing country members of the WTO. It was also argued that dispute settlement would only apply to the first two of the above elements. This, in turn, implies that the application of competition law would not be subject to the Dispute Settlement Understanding (DSU) of the WTO, at least under the provisions of the multilateral framework proposed by the EC.

In a few respects, the proposed multilateral framework would have gone further than the competition provisions negotiated in RTAs in recent years. Special and differential treatment provisions are relatively scarce in the latter[9], as are provisions relating to the core principles (although, in so far as they concern state monopolies and state aids, they are quite common in recent RTAs.) The dispute settlement provisions of the proposed multilateral framework stand in contrast to the consultation mechanisms and arbitration procedures found in most RTAs.

Conversely, most recent RTAs do not confine their provisions on anti-competitive practices to hard-core cartels and typically refer also to abuses of a dominant position and to state monopolies and enterprises. Indeed, in this respect, it is worth noting that the substantive provisions that the EC proposed for inclusion in a multilateral framework are in fact narrower than those they often negotiate in RTAs with trading partners.[10] It would be unwise, therefore, to conclude that the principal proponent of a multilateral framework on competition policy was seeking to 'multilateralize' the provisions that it had agreed to in numerous bilateral and regional trade agreements. Rather, the proposed multilateral framework on competition policy would have taken international rule making in yet another direction. This framework would have added to the diversity of international rules on competition law and policy rather than replicated or merely extended those competition provisions found in RTAs.

In the light of the recent competition policy-related rule making in RTAs, it is interesting to note the objections from developing country officials and analysts to the ill-fated proposals for a

multilateral framework on competition policy.[11] At first some argued that hard-core cartels were not a concern for developing countries, a view that was tempered once the range and extent of the international cartels prosecuted in the 1990s began to be better understood. Later, some argued that the multilateral framework would not do enough to tackle the harm done by such cartels to developing countries. Others argued that abuses of a dominant position, rather than cartels, were more important for developing countries and that the proposed multilateral framework did not reflect this priority. A different group argued that rule making of this nature was not directly related to the market-opening objective of the multilateral trading system, while others saw such proposals as attempting to prise open markets in developing countries 'through the back door' (presumably through tackling import-impeding anti-competitive practices.)

Some opponents in developing countries felt that the proposed non-discrimination provisions would compromise their government's ability to influence mergers and acquisitions on the grounds of industrial policy and the like. Concerns about implementation costs worried others, as well as fears that developing countries did not have enough expertise to negotiate in 'new' areas such as competition policy. Insufficient attention to special and differential treatment in the proposed framework, it was said, was another ground for opposition. The proposed cooperation provisions of the multilateral framework, essentially being voluntary, were felt to offer little benefit to developing countries. Others argued that negotiations on a multilateral framework should not advance because of a lack of progress in other areas of the Doha Round. Moreover, those WTO members that never really wanted the Doha Round in the first place, which according to some careful observers in Geneva could account for over half of the WTO membership, were a natural constituency to oppose negotiations on multilateral rules on competition policy or on any of the Singapore Issues for that matter.

It might be useful to ask what the grounds for opposing the multilateral framework might reveal about the true level of support by developing countries for rule making on competition policy in RTAs. For the sake of argument, let us take the criticisms of the multilateral framework at face value,[12] putting aside the possibility that some of these criticisms were advanced merely for tactical reasons. It would seem that developing countries' emphasis on the

abuse of dominant position does manifest itself in the competition provisions in recent RTAs. Of the RTAs involving developing country signatories in the OECD study (OECD, 2005a) only COMESA omits such provisions.[13] In contrast, more RTAs involving a developing country—five in fact—omit provisions on anti-competitive agreements, including hard-core cartels. (Interestingly, most of those five agreements involve Chile as a party.)

Moreover, developing country concerns about general non-discrimination provisions do seem to find counterparts in recent RTAs. Only the agreements between Bulgaria and Israel, between Canada and Costa Rica, between the members of CARICOM, and between Chile and the USA appear to contain broad non-discrimination provisions. The other RTAs involving poorer countries do not. These two considerations may account, in part, for the opposition of developing countries to a multilateral framework, yet their willingness to sign RTAs with competition provisions. (If this is the case then the paradox alluded to in the Introduction of this chapter may well be resolved.[14])

Yet, if their opposition to a multilateral framework is anything to go by, certain aspects of the competition provisions in recent RTAs cannot surely find favour with developing countries. First, the special and differential treatment provisions of most RTAs are limited or non-existent. Where they do exist, according to the OECD (2005a) study, almost all refer to transition periods and to technical assistance, not to less-than-full reciprocity.[15] This is true of both North-South and South-South agreements.

Developing country opposition to a multilateral framework on the grounds of market opening sits very oddly with the fact that most RTA competition provisions are explicitly motivated by the desire to support other market-opening measures, such as tariff reductions. Moreover, developing country agreement to take on substantive provisions on hard-core cartels in RTAs (and in other areas of competition law for that matter) is hard to square with their concerns about implementation costs. Furthermore, as noted earlier, the voluntary cooperation provisions of many RTAs are pretty limited, yet developing countries agreed to them while they opposed what they regarded as insufficiently robust provisions on voluntary cooperation in the proposed multilateral framework. It could be

argued, of course, that unsatisfactory experiences in RTAs were the reason why developing countries opposed similar provisions at the multilateral level. If this is the case, then one also ought to see greater opposition to such provisions in negotiations over future RTAs.

A further perspective on these matters can be obtained by asking, given the arguments made by developing country officials against a multilateral framework, what they imply for their 'real' view of the two families of competition provisions in RTAs identified in the OECD study.[16] The broader range of substantive obligations that is a characteristic of RTAs in which the EC is a signatory is, on the basis of what was said about the proposed multilateral framework, a mixed blessing. The inclusion of abuse of dominance provisions would appear on this metric to be a plus, but concerns about the implementation costs of taking on a number of substantive provisions (many of which are based on intra-EU experience) is a negative. Meanwhile, the so-called North American family of agreements, with their emphasis on cooperation provisions and on fewer substantive provisions, and a tendency to exclude competition provisions from dispute settlement, might be attractive to developing countries in saving them implementation costs and limiting the enforceability of the competition provisions. But such agreements are unlikely to allay any fears about the likelihood of precious little cooperation actually resulting from these RTAs.

To summarize, this section has described the principal characteristics of competition provisions in RTAs and contrasted them with the components of the ill-fated multilateral framework on competition policy, which was proposed by the EC. Even though there is a broad agreement on the goal of the former, there was significant diversity in their legal content. It was also argued that the latter was neither a direct expansion, nor a multilateralization, of the competition provisions that the EC has negotiated in recent RTAs with its trading partners.

Moreover, the grounds stated by many developing countries for opposing the multilateral framework on competition policy were used to assess what they might reveal about the developing country's preferences concerning competition provisions in RTAs. It would seem that the recent batch of RTAs contains provisions that do not match up with the stated preferences of many developing countries,

a finding that may reflect the give and take of commercial diplomacy. This finding also holds in RTAs among developing countries, and therefore cannot be attributed solely to the limited bargaining power of developing countries when negotiating with industrial countries over the terms of an RTA.[17] This finding concerning South-South RTAs is unfortunate, as there appears to be no set of current RTAs whose experience, if deemed over time to be satisfactory, could satisfy the developing country critics of the previous multilateral initiative on competition policy.

3. Questions raised by the recent rule making in RTAs on competition policy

The purpose of this section is to describe the questions that might arise in thinking through the implications for future multilateral rule making on competition law and policy of the recent proliferation of RTAs containing such rules. The next section will go some way to answering those questions. The separation of the discussion of questions from answers is deliberate as readers may be more persuaded of the arguments made in one section than in the other.

A number of important preliminary comments are in order as they provide some context and boundaries to this investigation. First, in thinking through the lessons for possible future multilateral rule making, one should be clear what institutional parameters a new multilateral initiative might add to. For example, have the lessons drawn taken account of the potential future relationship between a multilateral initiative and the set of RTAs that prevail at that time?[18] A number of logical possibilities present themselves here. Do the lessons drawn imply that a future multilateral agreement would substitute for or strengthen the competition provisions in prevailing RTAs? Or, implicitly, are the lessons being drawn on the assumption that the potential multilateral initiative will operate independently of the prevailing set of RTA provisions? A related matter would concern the sequencing of any potential future multilateral and non-multilateral initiatives on competition law and policy. Moreover, the standing of the latter's provisions in any future multilateral agreement would have to be thought through.[19]

Another preliminary comment is that, *a priori*, the circumstances of WTO members differ so markedly and this ought to condition the lessons we draw from the competition provisions in existing RTAs. A competition provision in a given RTA may be successful, but to what extent is the success due to the characteristics of the RTA signatories, the circumstances that those signatories have faced, or the provision itself? Likewise, a competition provision in a given RTA may be barely used or used with few positive results, but does this imply that the provision would perform as well in every RTA or indeed if incorporated into a future multilateral framework? Separating out the effects of different influences to draw generalizable lessons is very difficult, especially as little is known about the operation of competition provisions in more than a few RTAs. (Hopefully initiatives such as this book and others will remedy this deficiency over time.[20]) We should not be surprised, therefore, that most of the arguments made are of a conceptual nature or involve reasoning by analogy.

When discussing lessons from RTAs, it is worth noting that multilateral initiatives could differ along (at least) the following important dimensions: membership, the inclusion and nature of substantive provisions to enact or enforce certain competition laws (recognizing that there are a variety of anti-competitive acts, including state-induced acts), the inclusion and nature of cooperation provisions, the inclusion and content of provisions for special and differential treatment, mechanisms for the resolution of disputes, and provisions relating to the statement and enforcement of competition laws in general. The fact that a multilateral initiative could differ along any of these dimensions suggests that there is a wide range of logical possibilities that readers should bear in mind. Therefore, if an analyst argued that an RTA's experience with competition provisions undermined the desirability or viability of one type of multilateral initiative, this does amount to a case against all multilateral initiatives. Moreover, readers might ask themselves whether the multilateral initiatives or initiatives being considered by an analyst are comprehensive, representative, or illustrative of the potential future set of such initiatives.

In interpreting recent experience another factor to bear in mind is that many bilateral, regional, and cross-regional initiatives on competition law and its enforcement between 1996 and 2003 have

been influenced by the discussions in the WTO concerning the possible negotiation of a multilateral framework on competition policy. Some opponents, often found in the community of competition law practitioners and enforcers, preferred to see international cooperation take place outside of international trade fora.[21] As a result, the amount of effort that went into designing, negotiating, and eventually using the competition provisions in RTAs was almost surely less than could have been the case. Indeed, the growing number of bilateral accords between competition enforcement agencies and the prominence of the International Competition Network stand as evidence of where many in the competition law community have placed their efforts in recent years.[22]

Related factors were at work when RTAs including competition provisions were negotiated. It has been said that some developing country negotiators were well aware of the potentially precedent-setting nature of competition provisions in RTAs for discussions on a multilateral framework in the WTO. In addition, others have noted that linkages between competition provisions and trade remedies, such as anti-dumping, that were found in some earlier RTAs were avoided in subsequent RTAs precisely because such linkages might be explored in a multilateral context.

In short, it would be unwise to evaluate the content and performance of the current set of competition provisions in RTAs without bearing in mind the multilateral context in the run-up to the Cancun meeting of WTO ministers in September 2003, when a decision on the modalities for negotiations on competition policy in the WTO was made. To the extent that that decision and the prior debate condition current discussions on the efficacy of competition provisions in RTAs, including, in particular, the Economic Partnership Agreements between the European Union and selected African, Caribbean, and Pacific countries, the drawing of appropriate lessons from experiences after Cancun can be challenging too.

So what are the questions raised by the competition provisions in RTAs that may be relevant to the design of potential future multilateral initiatives on competition law and policy? In what follows, these questions have been organized around four themes.

The first theme concerns the *rationale for multilateral rules*. Here the following questions arise: What do the actual and stated rationales for competition provisions in RTAs imply about the appropriate rationale, or rationales, for a multilateral framework? 'Appropriate' here could be taken to mean 'widely acceptable', 'coherent', 'economically important', 'consistent with the long-standing goals of the multilateral trading system', and 'value adding', all of which are distinct, yet in some cases related, criteria for evaluating a proposed rationale for multilateral rules. The value-added criteria, for example, should make an analyst ask whether future multilateral rules are needed, given the current set of RTAs and other inter-governmental or inter-agency accords on competition law and related matters. Analysts should also be open to the possibility that the appropriate rationale differs across different types of anti-competitive activity. Moreover, the logical possibility that a rationale may be appropriate for a multilateral initiative without being an appropriate rationale for competition provisions in an RTA cannot be ruled out.

The second theme concerns the *impact of competition rules in RTAs on non-signatories* and whether this provides a rationale for multilateral action. Ever since the path-breaking research of Jacob Viner, RTA analysts have considered the possibility that these accords effectively discriminate against non-signatories, with possibly detrimental effects. In the present context, the question arises as to whether competition provisions in RTAs introduce discrimination (differential treatment) between WTO members? If so, what form does that discrimination take? Does it represent a violation of the Most-Favoured Nation (MFN) principle? Moreover, is there any evidence, or means to suppose, that the discrimination harms the commercial interests of non-signatories? If so, are there any non-discriminatory alternatives to the discriminatory provision that can attain the same legitimate goals as the latter? Or, is there another discriminatory provision that attains the same goals as the latter but does less harm to the commercial interests of non-signatories? Should any plausible alternatives exist to the discriminatory provision, can a ranking be established among them in terms of their desirability for inclusion in a multilateral initiative?

Analysts should also be open to the logical possibility that the commitments to non-discrimination in competition provisions are, in fact, implemented in such a way as to benefit all WTO members.

In which case one might ask whether, given the prevailing set of RTAs, there is much additional bite from implementing generalized non-discrimination provisions in a multilateral initiative on competition policy? Here much would turn on the nature of the non-discrimination provisions in prevailing RTAs, whether there are differences in such provisions across RTAs, as well as the substantive content of non-discrimination provisions in a multilateral framework.

A third theme concerns the *effectiveness of certain competition policy-related provisions of RTAs* that the debate over the proposed multilateral framework on competition policy from 1996 to 2003 revealed to be of particular interest to developing countries such as the provisions that relate to cooperation between signatories and the provisions relating to special and differential treatment. With respect to voluntary cooperation, the nature and likely extent of such cooperation is of interest, as are the factors conditioning the degree of such cooperation. It would be useful in this respect to know if 'harder' (that is more demanding) obligations to cooperate actually induce more cooperation, or at least make non-cooperation more costly or more transparent.

With respect to special and differential treatment, the following questions arise. In any particular RTA, were the transition periods appropriately tailored to the circumstances of, and technical assistance received by, the developing country signatory?[23] Did the transition periods merely postpone compliance to the last minute or were the transition periods used to nurture capacity (perhaps through programmes of capacity building and technical assistance) in the developing country? What factors, perhaps unrelated to the RTA itself, affected this outcome? Concerning less-than-full reciprocity provisions, to what extent, if at all, were the benefits of the RTA compromised by the signing of such provisions? For example, are there reasons to believe that certain anti-competitive practices exist that reduce the value of the RTA to its signatories and that could only effectively be tackled by full reciprocity on the part of a developing country signatory or signatories? Analysts should also be open to the possibility that the effective types of special and differential treatment vary across developing countries, and that the effects of different types of special and differential treatment depend critically on the other provisions contained in an RTA or in a future multilateral initiative.

The fourth theme concerns the *lessons for the political economy of successfully negotiating a potential future multilateral initiative*. Within signatories to an RTA it would be useful to know which interest groups, if any, were galvanized to support the inclusion of, and subsequent compliance with, the competition provisions of an RTA? The answer to this question might provide important clues as to the circumstances under which such interest groups would support a similar multilateral initiative. (The word 'similar' is used here with care, as surely any multilateral initiative must add value along some dimension to the set of prevailing RTAs for interest groups to support the former.) Analysts should be open to the possibility that an RTA indirectly strengthens the popular or interest group-based support for the enforcement of competition law in a signatory country through reinforcing the legal status of the competition enforcement agency and the resources that the national legislature gives to such an agency. Thus, the political economy linkages within signatories may be more varied than support for, or opposition to, a competition provision in an RTA at the time of negotiation or ratification.

There are also political economy factors at international level worth exploring. It would be useful to know which signatories to an RTA were keen on the inclusion of competition provisions, and which were opposed. How 'deep' was the opposition of any signatory and, relatedly, what if anything did these parties obtain in return for acquiescing to the inclusion of the competition provisions? Did proponents of such provisions come to regret their inclusion and, if so, why? Did initial opponents or sceptics change their view after the RTA was signed and, if so, why? How significant were concerns about negotiating and implementation costs in determining the level of support for competition provisions? Were concerns about implementation costs assuaged by the provision of technical assistance, capacity building, aid, or by weak dispute settlement provisions? Are there concerns that multiple RTA negotiations have placed too great costs on developing country parties and have increased the potential for adopting conflicting, or at least inconsistent, obligations? Alternatively, have trade negotiators in developing countries become more comfortable with competition provisions in RTAs as they have negotiated more such RTAs?

Other political economy questions relate to the relationship between existing provisions in RTAs and potential multilateral

initiatives. To what extent has the emergence of two families (recall the OECD Secretariat's finding of the so-called EU and US families) of competition provisions in RTAs imposed additional costs on signatory countries? What multilateral initiatives, if any, would be consistent with both families of RTA provisions? To what extent, if at all, would negotiators of a multilateral initiative be willing to substitute one set of competition provisions in RTAs for another set of provisions?

This section has argued that, while there is a wide range of interesting questions concerning the lessons for multilateral rule making of competition provisions in RTAs, there are a number of important factors that condition our ability to effectively answer them. Moreover, the efficacy of any future multilateral initiative on competition policy is likely to depend on some factors wholly independent of the experience of competition provisions in RTAs. These points ought to be borne in mind when considering the arguments advanced in the next section and in the rest of this book.

4. Some thoughts on the lessons from competition provisions in existing RTAs

As the OECD (2005a) study made clear, the often-stated motivation for competition provisions in RTAs is to ensure that the gains from implementing such agreements are not undermined by anti-competitive practices. Often this is articulated in market access terms, where the fear is that state-erected impediments to local markets are replaced by private anti-competitive acts.[24] It is worth dwelling on this rationale for international collective action, exploring what multilateral initiatives it appears to be consistent with and also those it is inconsistent with. In this respect the following points could be made. First, this motivation could be interpreted as being only concerned with a subset of the possible cross-border spillovers created by anti-competitive practices. Specifically, it is concerned solely with the effects of those acts on a country's export interests in so far as those interests can, or are attempting to, supply overseas markets. From this perspective, therefore, such a rationale would not consider as relevant the effects of anti-competitive practices in markets where a country's export interests source parts, components, or services.

Nor would this rationale place any weight on anti-competitive acts that harmed a country's consumers, including its government (which is typically a large purchaser of goods and services.)

Arguably, such a narrow conception of the purpose of multilateral competition rules would sit well with the long-established practice in trade negotiations whereby reciprocal exchanges of market access take place. Moreover, such multilateral rules would, in preserving or ensuring that previously agreed market access is secured, not be out of place with other WTO provisions that discourage Member States from nullifying or impairing the effects of reductions in border barriers.

Such a narrow conception would logically focus on those anti-competitive acts that block the entry into, or that directly impair the competitive position of those firms attempting to enter, overseas markets whether by direct exporting, by foreign direct investment, or by other legitimate means. Arguably, therefore, the focus here would be on some of the anti-competitive practices that fall under the heading of abuse of a dominant position and on anti-competitive vertical restraints. Cooperation provisions, including negative and positive comity provisions, could reinforce presumptions to take enforcement action against market access blockages.

A challenge faced by this approach is that the same mercantilist calculus that might encourage a government to seek the removal of privately inspired market access impediments abroad is the same calculus that seeks to delay, avoid, or prevaricate in investigating such practices at home. This consideration places a significant burden on the dispute settlement provisions of an agreement based on this narrow motivation for multilateral competition rules. Any arbitration or dispute resolution mechanism would have to judge the degree of inaction, or the ineffectiveness of action, of a signatory against an alleged blockage to market access. Judging whether a signatory has gone far enough, or has acted in good faith, is a lot harder than judging whether a government has done something at all. The nature of such disputes would be extremely contentious. These concerns would be exacerbated if the agency tasked with enforcing the competition law and associated international obligations rejected the mercantilistic calculus in favour of a welfare standard. Employing either a total welfare standard or a consumer welfare standard is

unlikely to satisfy the demands of a trading partner whose sole interest in any market access-related investigation is going to be the interests of its exporters.

It would be useful to examine how well the current set of RTAs has fared in the face of these challenges. In particular, in jurisdictions with independent competition agencies, many of whose officials would openly reject a mercantilistic calculus, surely there are doubts as to how effective the competition provisions have been in clearing market access blockages? This is an empirical question and it would be helpful to know more about the factual record in this regard.

Another way of looking at this matter is to note that a multilateral framework based on a narrow market access perspective would almost surely require a change in the competition laws of signatories so as to entrench the market access objective. In this way, even independent competition agencies would be forced to consider market access objectives when examining complaints of firms in the import-competing sector. (Of course, if the competition agency has multiple objectives, as many do, the agency could still find reasons to demote the market access objective.) These points are mentioned not because competition agencies should as a general proposition take on market access-related objectives, but because it seems that the logic of the narrow market access conception of multilateral rules would almost surely require that steps be taken to ensure that competition agencies take those objectives seriously. These considerations, and the others detailed above, would surely become important if the market access objective of current RTAs was to be generalized into a multilateral agreement.

Although a narrow market access motivation for a multilateral framework aligns well with the traditional emphasis on border barrier reduction in the WTO system and its predecessor, developments during the latest round of multilateral trade negotiations suggest that an exclusive focus on market access may no longer command universal support. At the Doha Ministerial meeting in 2001, WTO members added promoting economic development as an explicit objective to the multilateral trading system. Without doubt the export opportunities of developing countries, and the private anti-competitive acts that may impede them, have some bearing on the economic development prospects of poorer countries. But other cross-

border competition-related knock-on effects do too, and a development focus might therefore provide a rationale for a multilateral initiative on competition policy that goes beyond securing market access. (Of course, what is logically possible need not be uppermost in the minds of trade negotiators at the moment, or indeed at any future point in time, and the following remarks should be seen in that light.)

The first point to be made in this regard is that many developing country exporters do not sell directly to customers in industrialized countries. Instead, they often sell to intermediaries, some of which are large oligopolistic trading companies. These intermediaries may have good access to the markets of industrialized countries while at the same time exerting considerable buyer power over suppliers located in developing countries. The potential for abuses of a dominant position by these intermediaries could motivate a different type of multilateral initiative on competition policy. Very recent World Bank research that has tried to demonstrate how little benefit non-reciprocal preferences are to the African, Caribbean, and Pacific countries has placed considerable weight on buyer power-related arguments. In their discussion of the determinants of the value of non-reciprocal preferences Hoekman and Prowse (2005:5) argue that:

> "to the extent there is market power on the part of either importers/distributors (Francois and Wooton, 2005) or the transport and logistics sector (Francois and Wooton, 2001), the benefits of preferential tariff reductions will be captured at least in part by those intermediaries with market power rather than the exporters. If preferences apply to highly protected sectors in donor countries, they will result in high rents for those able to export free of trade barriers. However, the existence of these rents will be known to buyers, and if they have the ability to set prices (have market power), the rents may predominantly be captured by distributors or other intermediaries (Tangermann, 2002). There is evidence, based on the African Growth and Opportunity Act, AGOA preference scheme, that the pass through of preference margins is indeed partial at best. Olarreaga and Özden (2005) find that the average export price increase for products benefiting from preferences under AGOA was about 6 percent, whereas the average MFN tariff for these products was some 20 percent. Thus, on average exporters received around one-third of the tariff rent. Moreover, poorer and smaller countries tended to obtain lower shares—with estimates ranging from

> a low of 13 percent in Malawi to a high of 53 percent in Mauritius. In the case of market power, the result is a simple redistribution of the benefits of preferences: rents are transferred to importers."

It would be useful to see if other research and experience reinforce these findings.

The second non-market access-related spillover that could influence the development prospects of poor countries is that related to cartels with cross-border consequences. There is now a growing body of literature on these matters, which is quite well known, and there is no need to repeat all of the findings here.[25] National decisions about cartel enforcement can generate two cross-border spillovers, which may form the basis for international collective action. Non-enforcement of a cartel law, or more simply non-enactment of such a law, may encourage internationally minded cartels to organize and hide evidence in that jurisdiction—so harming those trading partners whose consumers and producers source goods from cartel members. In contrast, the successful prosecution of an international cartel by a jurisdiction may result in the cessation of its activities in other jurisdictions, either directly through the collapse of the cartel or indirectly through other jurisdictions taking measures to prosecute the cartel and to demand an end to its anti-competitive acts. Either way, the latter jurisdictions have benefited from the prosecution in the original jurisdiction. Both spillovers imply that, in the absence of a global norm to enact and seriously enforce a cartel law, there will be a sub-optimal degree of cartel enforcement. To the extent that the victims of such sub-optimal enforcement are the poor and the defenceless, then a development-related rationale for a multilateral initiative could be advanced.

The third cross-border spillover created by anti-competitive acts that could motivate international collective action relates to mergers and acquisitions that have international reach. The effects of consolidation on markets need not be confined to the jurisdictions where the headquarters of the participating firms are located. Given the resurgence in merger and acquisitions activity after the first quarter of 2005, and the last wave of such activity between 1995 and 2000, these matters deserve at least some thought, even if action is unlikely to result in the foreseeable future. Now, it could be argued that, like industrialized economies, developing countries could

undertake merger reviews that evaluate the effect of the proposed transaction within their jurisdiction and, where appropriate, place conditions on the approval of the transaction. This argument is not without its problems, however. Leaving aside concerns that developing countries may not have the technical expertise to evaluate complex transactions, from the perspective of the merging parties and their legal counsel surely there are concerns that the decisions of many competition agencies might conflict, that the total impact of the remedies sought by such agencies individually are sub-optimal compared to other alternatives, and that delays and expenses are greater than otherwise.

These factors suggest that firms with international operations may have an interest in some international coordination and cooperation on merger enforcement (that arguably goes well beyond the current approaches pursued by members of the International Competition Network). Competition enforcement agencies may see advantages in coordinating and sequencing investigations, and even in specializing in certain types of investigations, much in the same way that certain national competition law enforcement agencies in the same jurisdiction cooperate with one another. Arguably, the current discussions on international cooperation on competition law and enforcement are a long way from this type of outcome, but the goal here is not to show what is practicable immediately but where the logic of internalizing cross-border spillovers leads to in terms of international collective action.

To summarize, so far in this section it has been argued that the narrow market access-related perspective that has apparently motivated many competition provisions in RTAs would face significant (principally implementation-related and political economy-related) challenges if generalized at the multilateral level. The first challenge is created by the fact that market access objectives are not entrenched in the competition laws of many countries. Difficulties are likely to arise in reconciling—or at least accommodating—a new objective with existing ones. The second challenge relates to the fact that preserving and expanding market access is no longer seen as the sole legitimate goal of the multilateral trading system. The inclusion of development objectives implies that, as far as anti-competitive acts are concerned, a multilateral initiative that is confined to market access-related cross-border spillovers is

likely to be seen now as too limited in scope. Indeed to the extent that, as a general proposition, multilateral competition provisions stimulate inter-firm rivalry within national markets then one should expect non-trade-related developmental benefits to accrue also.[26]

Turning now to a different matter, what are the implications for multilateral initiatives on competition policy of the fact that many RTAs involving developing countries have few competition-specific provisions relating to special and differential treatment? Should we infer from this that developing country calls for such treatment at the multilateral level are all smoke without fire? One should be cautious about drawing this conclusion as the following four explanations could account for the factual record in this regard.

First, developing countries may have found in negotiations on RTAs that they could not persuade richer counterparts to accept special and differential treatment provisions on competition matters. Relatedly, developing countries may well feel more confident of successfully demanding these provisions in multilateral negotiations where there are more like-minded parties arguing together. Second, the generalized special and differential treatment provisions of RTAs may, from the perspective of developing countries, satisfactorily cover the competition obligations of those agreements and so additional competition-specific SDT provisions are unnecessary. Third, developing countries may not have demanded strong special and differential treatment provisions in RTAs, or at least acquiesced in having few of them, precisely because the binding competition obligations in an RTA were covered by limited dispute settlement provisions. Finally, developing countries may well have acquiesced in having few SDT provisions in RTAs precisely because they received something valuable in return somewhere else in the agreement (which might include preferential market access to the large economy of another signatory.) In the absence of a significantly large non-competition-related payoff in ongoing multilateral negotiations, this may well account for developing countries sticking to their demands for elaborate provisions on special and differential treatment.

Likewise, does the fact that few RTAs have strong dispute settlement provisions relating to their commitments on competition policy imply that a future multilateral framework on competition policy must have similarly weak (often taken to mean limited in scope

and non-binding) mechanisms for resolving disputes between parties? Here it is worth noting that, with a few exceptions, generally RTAs have much weaker dispute settlement procedures than WTO agreements. Therefore, there may not be anything intrinsic about competition provisions in trade agreements that call for alternative, weak, or no dispute resolution methods. Second, the strength of dispute settlement procedures required is often a function of the nature of the provisions taken on in a trade agreement, not the least of which is whether the provisions are binding at all. To the extent, therefore, that competition provisions in RTAs contain few binding commitments of what to do, and what not to do, by signatories, there may be little point in seeking strong dispute settlement procedures for these provisions. An ambitious future multilateral initiative would, based on this logic, probably have to include robust dispute settlement provisions, and there may be little to learn from the current set of RTAs in this regard.

5. Concluding remarks: some notes of caution

It is not surprising that policy makers, government officials, practitioners, and scholars are interested in establishing lessons from one type of international rule making on competition law and policy for other potential international initiatives, especially given the differential rates of progress in agreeing competition-related measures in bilateral, regional, cross-regional, and multilateral fora. Indeed, as suggested in Section 2 of this chapter, there are a substantial number of policy-relevant questions that arise, in particular if one is exploring the lessons for future multilateral rule making from recently agreed RTA.

It has also been argued repeatedly, however, that our ability to draw solid inferences may at the moment be more limited than one might otherwise think. Not only is the available evidence on the operation of competition provisions in RTAs limited—arguably a concern that will be mitigated over time by research projects, such as those assembled in this book—but it must be recalled that many such provisions were negotiated at a time when the ultimately ill-fated proposals for a WTO multilateral framework on competition policy was being discussed. The legacy of those proposals is being

felt to this day, not least in negotiations over the Economic Partnership Agreements between the European Commission, on behalf of the European Union Member States and their former colonies. Furthermore, the nature and extent of one set of competition provisions agreed to in an RTA may well have depended on the nature of the other competition provisions in that agreement, and on other factors; this consideration again qualifies what conclusions we might draw about the preferences of signatories concerning international competition commitments and the associated implications for multilateral rule making.

It is also worth bearing in mind that the case for future multilateral rule making may well be made independently of developments in RTAs. Although there may be relationships between decision making in different international fora, and potential lessons to be learned from initiatives in each fora, care should be taken not to focus on these matters to the exclusion of other factors that might independently account for future international collective action on competition law and its enforcement.

NOTES

[1]The number of reported RTAs varies across studies for the following reasons: not all RTAs are reported to the WTO; RTAs involving countries that accede to the European Union are not always treated the same way by researchers; some RTAs that do not involve the creation of a free trade area on 'substantially all trade' are nevertheless included in some counts. For further discussion of the number of RTAs notified to the WTO in recent years, see the contribution of Alvarez et al. to this volume (Chapter 4).

[2]Readers may also want to bear in mind that this OECD study focuses on the nature of the competition provisions in RTAs and not on whether those provisions have been used, whether the parties to RTAs are satisfied with their use, or on other analyses of the effectiveness of such provisions. Generally, limitations in data availability seem to constrain the ability to address the latter points.

[3]It should be noted that the OECD study further sub-divided the following eight types of provision into component provisions, providing an even richer taxonomy of the competition provisions of RTAs.

[4]The word 'measures' here is taken to mean 'best endeavour' clauses and other promises as well as formal commitments to enact and enforce certain competition laws.

[5]The question does arise as to whether special and differential treatment (SDT) as traditionally understood in the context of trade negotiations and agreements is the appropriate way to think about the potential role and form of special and differential treatment in the competition law context. For example, some have argued that, in the trade context, SDT is motivated by the goal of deferring or avoiding international obligations and that, in the competition law context, SDT is motivated by the goal of furthering the effective implementation of competition law. The differences in goals, it is argued, may have implications for the different types of SDT deemed appropriate in a given situation.

[6]Here the phrase 'lesser developed signatory' is taken to mean a signatory to an RTA that is at an earlier stage of development than another signatory, and should not be confused with the United Nations classification of Least Developed Countries.

[7]Of the just under 30 North-South RTAs analysed, at least 18 include the USA, Canada, or the EC as one of the signatories.

[8]The differences between these two families may be less than they appear at first because many of the RTAs involving the EC, in fact, tend to refer to existing legislation and the anti-competitive practices referred thereto. The author thanks Stefan Amarasinha for drawing attention to this point.

[9]Readers may wish to note that, in Chapter 5 of this volume, Brusick and Clarke find that 13 per cent of the 157 RTAs that they examined include some type of flexibility for the less-developed partners. Brusick and Clarke also provide an interesting discussion on the difficulties in classifying provisions as being related to special and differential treatment, which ought to be borne in mind when counts of such provisions are presented.

[10]These points can be inferred from the statistics presented in the OECD (2005a) study.

[11]In what follows a pretty comprehensive list of the objections raised is presented. Readers should not assume that every critic of the proposed multilateral framework subscribed to each of the objections listed here.

[12]In doing so it should not be assumed that this author endorses those criticisms.

[13]Information provided in Dean (2004) and on the relevant web page of COMESA would, however, seem to contradict this finding of the OECD study. (The competition policy web page of COMESA is http://www.comesa.int/trade/issues/policy/). If the latter information is correct, then it reinforces the point made here, namely, that the concerns of developing countries about abuse of a dominant position have found themselves incorporated into the RTAs that they have signed. This is not to say that those RTA provisions have

satisfactorily addressed those developing country concerns, just that those provisions exist in the first place.

[14]The author thanks Pierre Horna for drawing attention to this point.

[15]Again, the manner in which legal provisions are classified appears to matter. In their contribution to this volume (Chapter 5), Brusick and Clarke found 14 instances of provisions in RTAs that 'safeguard [the] interests of less-developed partners', seven provisions relating to exemptions and exceptions, another seven provisions relating to transitional time periods, and only one provision relating to technical assistance (see Table 5.1 of Brusick and Clarke).

[16]Here readers are encouraged to bear in mind the point made in Footnote 11.

[17]The matter of asymmetries in bargaining power is taken up again under the fourth theme addressed in Section 3 of this chapter.

[18]A similar question might be asked of the relationship between any future multilateral initiative and the bilateral agency-to-agency cooperation agreements on competition law and enforcement matters. The author thanks Stefan Amarasinha for drawing attention to this point.

[19]The author thanks David Round for the reminder about these important points concerning sequencing.

[20]Marsden and Whelan (2005a,b,c) and Acevedo (2005) are promising examples of the latter.

[21] Amarasinha (2004) evaluates the criticisms levelled by some in the competition law community towards the proposals for a multilateral framework on competition policy.

[22]In less than five years the International Competition Network (ICN) has undertaken work on a number of important competition law and enforcement-related matters, including merger notification and review, cartels, the implementation of competition law (including analyses of technical assistance and capacity building programmes), and antitrust enforcement in regulated sectors. In the coming year, a working group will be established on matters relating to abuse of a dominant position, a long-standing concern of certain prominent developing country participants in the ICN. The rate of progress made in the ICN stands in contrast to the developments in other non-binding fora. Having said that, it is too early to say whether the ICN membership can sustain the current level of momentum or whether all of its membership is satisfied with the resulting degree of international cooperation and convergence on competition law and enforcement matters.

[23]In answering this question, analysts might consider the views of private-sector practitioners and scholars. These parties may view the transition times and technical assistance necessary to meet the obligations in an RTA differently

from the trade negotiators representing a given country.

[24]One's view of the merits of such arguments may depend on whether the competition provisions are supposed to ensure that previously agreed to market access concessions are not impeded by private anti-competitive practices or whether such provisions are supposed to expand market access beyond previously agreed levels.

[25]See, for example, Levenstein and Suslow (2003).

[26]The author thanks Oliver Solano Castro for the reminder about this important point.

3

Trade and Competition in RTAs: A missed opportunity?

PETER HOLMES
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1. Introduction

1.1 The proliferation of Preferential Trade Agreements (PTAs) and Regional Trade Agreements (RTAs)[1]

The adoption of RTAs is not a new phenomenon in the international arena. The first RTA was the German Zollverein, signed by 18 small states in 1834 (Cho, 2001:420). Furthermore, in the second half of the 19th century a number of agreements, which

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were based on the most favoured nation clause, were signed between European countries (Kenwood and Lougheed, 1971:75–8), and this same clause was used by the US at the beginning of the 20th century in a number of bilateral Treaties of Commerce, Trade and Navigation (Krueger, 1999:105). A second wave of RTAs emerged in the 1930s. Following the Great Depression, the idea of liberalizing international trade by reducing the level of tariffs imposed on foreign imports prevailed in the US, which during 1934-45 concluded a total of 32 reciprocal trade agreements (Trebilcock, 1999:20).

More recently, and following the successful experiment of the European Union (EU), the establishment of plurilateral regional trade agreements proliferated mainly in the 1990s. EFTA (European Free Trade Area), EEA (European Economic Area), NAFTA (North America Free Trade Area), APEC (Asia-Pacific Economic Cooperation), MERCOSUR (the Southern Common Market), CAN (the Andean Community), COMESA (Common Market for Eastern and Southern African), CARICOM (the Caribbean Community), WAEMU (West African Economic and Monetary Union), and CAFTA-DR (Central America Free Trade Agreement) are examples of such agreements.[2] The main characteristics of these agreements are that they are concluded by more than two countries and that the signatories are neighbouring countries, so the regional element is dominant.

On the other hand, and mainly since the second half of the 1990s and throughout the last five years, it seems that there has been a tendency by industrialized and developing countries to be involved in bilateral free trade agreements with selected trade partners. The prominent example here is the EU, which has been involved in agreements with countries that pursued (and pursue) EU accession,[3] with Mediterranean countries, with Eastern European and Central Asian countries (countries formerly members of the USSR), and lately with Mexico, Chile and South Africa. Most of these agreements have been signed in the context of the EU's neighbourhood policy,[4] and thus encompass strong regional elements, nonetheless with regard to the agreements signed with Mexico, Chile and South Africa, the regional element is absent.[5] The US has also concluded a number of bilateral free trade agreements lately, namely with Australia, Bahrain, Chile, Israel, Jordan, Morocco, and Singapore.[6] As is obvious, and given the involvement of the US in NAFTA and CAFTA-DR, both concluded with neighbouring countries, US bilateral free trade

agreements have been signed with selected trade partners, which geographically are distant from the US. Furthermore, Canada has also used this instrument by signing agreements with Chile, Costa Rica, and Israel. Australia has signed agreements with Singapore, Thailand, the US, and New Zealand.[7]

1.2 Competition provisions in RTAs

The importance of RTAs in the world trading system is clearly increasing.

As a recent World Bank study has highlighted, the total number of such agreements has quadrupled since the 1990s and trade between RTA member states currently accounts for 40 per cent of global trade (World Bank, 2005:27). In terms of competition, Alvarez *et al*. have shown in this volume that there are more and more RTAs with competition rules (Alvarez *et al*., 2005). The study of competition rules in RTAs is not a new trend in the related literature. For instance, Bellis was among the first commentators to review a number of bilateral and plurilateral RTAs and to examine their competition provisions and their relationship with anti-dumping measures and subsidies (Bellis, 1997). Hoekman (1998b) also reviewed the competition elements of a number of plurilateral RTAs and their relationship with anti-dumping measures.

The establishment of the WTO working group on trade and competition in 1996 unavoidably shifted the interest of the observers of the relationship between trade and competition to the analysis of the possible inclusion of competition rules in the WTO context. Nonetheless, and given the decision by WTO member states in Cancun not to proceed with negotiations on competition, the study of the operation of competition rules in RTAs has gained more attention lately.[8]

This Chapter aims to explore the reasons for which competition provisions have been included in RTAs and the relationship of these provisions with anti-dumping measures and subsidies countervailing duties. Section 1 of this Chapter discusses general issues regarding the importance of competition provisions in RTAs and includes a general analysis of the main arguments

presented on the possible interrelation between competition law and anti-dumping, subsidies and countervailing duties.

Section 2 examines a number of bilateral agreements in detail. Specifically, the Australia-New Zealand (ANZCERTA), Canada-Chile, Canada-Costa Rica, EU-Poland, EU-Turkey, EU-Croatia, EU-Mexico, and EU-South Africa agreements have been reviewed. Several reasons have led to the choice of these particular agreements. First, with the exception of ANZCERTA, all the agreements reviewed here are signed between developed and developing or transition states. Hence, it has been possible to make useful observations as to the particular function of competition provisions in RTAs, mainly from the less-developed contracting party. Furthermore, two of these agreements (namely ANZCERTA and Canada-Chile) have abolished the application of anti-dumping measures between the contracting parties and are thus definitely important with regard to the examination of the interrelation between competition and trade measures. The case studies will try to cover, albeit briefly, a number of other dimensions of these RTAs.

Economists since Viner have argued that the only valid reason for the use of anti-dumping measures is to combat predatory pricing, and this has led to considerable discussion about the use of competition provisions in RTAs as a way to abolish anti-dumping. The authors shall argue with Hoekman (1998b) that anti-dumping addresses issues quite different from predation, and that competition provisions in RTAs cannot be expected to be a substitute for anti-dumping. However, they also agree with Mathis (2005b) that this should not be the main focus of discussions about regional competition policy. The value of competition provisions in an RTA must surely depend on their effectiveness in promoting competition as such rather than the impact on contingent protection.

2. Competition and RTAs: why so important?[9]

There is a clear link between trade policy and competition policy. Competition policy sets the parameters for the intensity of competition between producers within the national market including foreign investors, while trade policy sets the rules for competition

from foreign-based suppliers, including those owned in the home country. It is customary for economists to suppose that competition policy is generally designed to promote a stronger degree of competition than the unregulated market would deliver but that trade policy, as it is usually understood, implies the use of instruments that restrict competition compared to a situation of free trade. Trade *negotiations* in this perspective are seen as seeking to reduce the use of the anti-competitive instruments. Trade policy makers see the world slightly differently. They argue that unregulated trade does not create an efficient competitive market, and certainly not a 'fair' one. They see instruments such as anti-dumping and safeguard measures as designed to correct problems arising from alleged distortions in trading partners.

In any case, it is widely accepted that the aim of competition law and policy in an RTA is to ensure that the benefits expected from trade liberalization of intra-regional trade are not frustrated by restrictive business practices conducted by private firms (Mathis, 2005b)

In reality, domestic competition policy often contains elements intended to promote the idea of a 'level playing field', for example the promotion of small business through greater toleration of agreements among them in the EU, or black empowerment in South Africa. Neither trade nor domestic competition rules have aims that address efficiency alone.

Regional trade agreements have some special features that are midway between domestic and multilateral provisions: they open up additional competition between the partners but they reduce the scope for external sellers to compete on equal terms as a result of their preferential, and occasionally trade diverting, character. As will be seen, these features create special issues for RTAs that are different from those relating to multilateral liberalization.

2.1 The growth of competition-related provisions in RTAs

The decision of the WTO member states in Cancun not to proceed with negotiations on the Singapore issues is likely to intensify

the pursuit of bilateral agreements. Some countries feared that the EU, which was the most prominent supporter of a WTO agreement on competition, was seeking additional market access commitments over and above those which countries were ready to give. Other countries were concerned about an excessive harmonization to norms that might not be suitable for developing countries. Others felt that even if the principle of linking trade and competition was acceptable in principle, the EU's proposals at the WTO did not address the key issues relating to cooperation on international anti-competitive behaviour. In fact, the authors' own earlier work (Mathis *et al*. in Winters and Mehta (eds) 2003) suggests that the position of the EU and its arch-opponent India were not as far apart on the principle as it seemed. India argued that they would accept a WTO agreement based on UNCTAD's United Nations Set Of Principles And Rules On Competition,[10] and in fact, when carefully examined, the EU's proposals were not far removed from those principles. India was sceptical about the degree of development-related cooperation that was likely to be realized as a result of the EU's proposals. Examination of the EU's arrangements with its closest partners sheds some light on EU practice where it is in a position to define the terms of competition provisions in trade agreements.

The decisions of WTO members on the trade and competition agenda is likely to create additional pressure to go down a bilateral or a regional route, and the discussion now turns to what is specific to that agenda.

2.2 *What is special to competition provisions in RTAs as such?*

Regional or preferential trade agreements create challenges and opportunities that do not exist in the multilateral context: opportunities for agreement may be easier among fewer parties but challenges remain because firms have an incentive to try and frustrate market opening, and to preserve rents.

With a small regional group of countries involved, it is more likely that there are common perspectives and common problems and the ability to develop a framework for common rules. The literature on regional integration distinguishes shallow and deep integration (Hoekman, 1998b; Lawrence, 1998), or negative versus

positive integration. Shallow or negative integration refers to the removal of barriers to trade at the border, such as tariffs and quotas, and excessive administrative burdens. Deep integration refers to the inclusion in RTAs of measures to address non-tariff barriers – it becomes positive integration when common policies are adopted, as opposed to negative integration when unnecessary rules are simply abolished without any common element. So a firm commitment to ensure national treatment in competition rules is a form of deep but negative integration. The establishment of common norms is both positive and deep.

An active competition policy is more likely to be needed to address imperfect competition in an RTA than in cases of non-discriminatory market opening because there is less pro-competitive pressure from a more limited number of new entrants than would be the case from multilateral market opening (Bilal and Olarreaga, 1998).

Moreover, not only can an RTA promote competition less than non-discriminatory market opening, but it also may even create incentives for new anti-competitive forms of behaviour. There are likely to be risks of:

- cartels being formed at regional level to prevent the erosion of the natural market-sharing arrangements arising from border barriers
- barriers to entry being created by firms in each country in order to keep out firms from their partners via collusion.
- predation which means that one part of the RTA contains dominant firms with high profits
- vertical marketing agreements to segment the RTA market, making price discrimination possible
- mergers designed to create pan-RTA dominant positions.

These effects are all linked to the risk of trade diversion.

As will be seen, competition provisions in RTAs can take many different forms. They can:

- improve market access – directly, by removal of private barriers to entry and pure 'obstacle'-based barriers, and indirectly, by creating bases for other policies that can allow market access so

that contingent protection can be lessened, especially anti-dumping and countervailing duties.
- harmonize competition law, including the establishment of supranational agencies.
- facilitate cooperation without harmonization.

As shown in Chapter 1 of this volume (Cernat, 2005), there are two sets of competition provisions that can be found in RTAs. Provisions that provide for harmonization of competition rules of the contracting parties, and/or provisions that provide for cooperation on competition-related issues. EU bilateral agreements are the main examples of RTAs that provide for harmonization of competition rules of the contracting parties. In contrast, bilateral RTAs signed by the US and Canada include provisions that provide for cooperation on competition matters (Holmes *et al.*, 2005).

'Harmonization' can clearly be at a number of different possible levels. One limited form of harmonization is where countries take on similar obligations to modify or apply their laws with specific reference to preventing practices that affect cross-border trade. The prominent example is bilateral agreements signed between the EU and accession, candidate and Mediterranean countries. The common characteristic of these agreements is that they include a standard set of provisions, which oblige the partners to have or adopt competition rules either identical or similar to the rules of the EU Treaty (Articles 81 and 82).[11] In addition, in the agreements with Eastern European and Central Asian countries, the parties commit themselves to approximate their competition rules (among others); however, only three of these agreements[12] include specific commitments to EU co-signing parties to adopt competition legislation.[13]

In contrast, the agreements themselves do not include detailed provisions for cooperation between the parties. Some of the agreements only provide for exchange of non-confidential information, and only a small number of them include provisions relating to technical assistance on competition matters.[14] The EU–Chile, EU–Mexico and EU-South Africa agreements are exceptions to this general observation, since they include a detailed list of soft-law measures that could enhance cooperation between the two signing parties on competition law and policy.[15]

It is clear that harmonization of laws at one level or another is the main strategy of the EU in the field of bilateral RTAs, which include competition law and policy elements. This strategy is obviously different from that of other developed countries, which mostly pursue cooperation on the enforcement of competition rules rather than harmonization of these rules. An illustrative example is the US which has traditionally been the most frequent user of self-standing enforcement cooperation agreements on competition (Papadopoulos, 2005). In addition, as noted above, only three of the bilateral RTAs signed by the US (the agreements with Australia, Chile and Singapore) include particular provisions on competition. These agreements oblige the signing countries to have and enforce competition rules, irrespective of whether these rules are similar or not. They further express a commitment by the parties to cooperate on competition issues. The cooperation-on-competition model has been also used by Canada in its bilateral RTAs. As shown below, similar provisions have been included in the agreements Canada signed with Chile and Costa Rica.

Even if two states have similar competition laws, this does not necessarily imply they will accept a supranational regime to deal with cross-border issues, nor does it even mean that the two harmonized regimes will cooperate or exchange information, as we shall see graphically from the EU-Turkey and EU-Poland cases. Turkey's agreement explicitly requires Turkey to have a competition authority (though the Polish EA did not include this). These pre-accession agreements did not make any explicit provision for formal cooperation or information exchange. The Central and Eastern European countries (CEECs) had to wait for accession and the creation of the European Competition Network (ECN) to be allowed to exchange information. In fact, the authors understand that there was limited information exchange within the EU before the creation of the ECN.

The more integrated the markets of an RTA, the more likely it is that cross-border competition issues will arise. In fact, the obligations in EU RTAs are strong and require close partnership, in particular with candidate countries. Geradin and Petit (2003, 2004) argue that stronger rather than weaker convergence of competition laws in the Euro-Med region would assist economic integration, and they note that these agreements all contain competition law

harmonization obligations which are much softer than in the case of the ex-CEECs and Turkey.

The implementation of such measures should of course effectively reduce distortions and promote the so-called level playing field, thus allowing for reduction in other forms of 'retaliatory' state protection. The role of competition policy in addressing anti-dumping and countervailing duties is now examined.

2.2.1 Anti-dumping, countervailing duties and competition policy

Anti-dumping

Anti-dumping duties were traditionally seen by economists (such as Viner, 1923) as a way of addressing the risk for the cases of monopolists in one country using their domestic market power to enable predatory pricing, that is cutting prices in another market to drive local firms out of business thus extending the dominant firm's monopoly. Such an outcome is unlikely if the higher profits the dominant firm can earn can attract new entry (see Bilal and Olarreaga, 1998; Bourgeois and Messerlin, 1998) but, in the case of an RTA, there are barriers against third country firms. If there are no effective competition laws, pressure will mount for anti-dumping to be used.

Hoekman (1998b) has argued very strongly that most anti-dumping actions have nothing to do with the absence of cross-border competition rules. Rather the aim of current anti-dumping is 'to level the playing field', that is to say compensation for unequal market conditions that give firms in one territory an allegedly unfair advantage over another, whether via tax systems, distorted fuel prices, situations that are not dealt with by competition laws at all – and only in exceptional cases lack of effective controls on a dominant position.

The GATT anti-dumping code does not require proof of any predatory intent, nor even evidence that prices are below cost: dumping is defined since GATT 1947 as sales below the normal value in the home market, so that profitable exports can be said to be dumped if the profit margin is less than at home.

Anti-dumping addresses some issues that competition policy cannot. For example, anti-dumping may be introduced in cases of distortions that are not all actionable under countervailing duty codes, such as energy prices. Plus, anti-dumping duties are often levied on steel or petro-chemical exports of countries that are alleged to allow energy prices to prevail that are below world prices, hence creating an alleged but not WTO-illegal subsidy.

Bourgeois and Messerlin (1998) argue that there have been almost no cases where dumping could have been caused by predatory pricing. Belderbos and Holmes (1995) argue that the US colour television (CTV) case might just possibly have constituted an exception here, but the main lesson of that case is that anti-dumping and antitrust laws treated the same facts differently, meaning that conduct penalized under trade law was judged acceptable under competition law. Interestingly in the CTV case, the US applied an anti-dumping law (based on the legislation of 1921) that was not congruent with antitrust rules, but the courts did not find any violation of the original 1916 US Anti-Dumping Act, which was based on antitrust principles. But the EU has successfully challenged the decision concerning the US Anti-Dumping Act of 1916 at the WTO.[16] Thus, one can indeed say that the WTO Dispute Settlement (DS) system has determined that basing anti-dumping laws on competition principles is against the spirit of GATT. (In fairness the condemnation of the 1916 Act was not simply because it was based on competition principles.)

There are in fact only very rare cases where anti-dumping is in the hands of competition authorities; for example, EU post-accession transition periods between new and old Member States, and ANZCERTA. In addition, only the EU (internally), ANZCERTA and the Canada-Chile agreement abolish the use of anti-dumping measures between members of these agreements, (see also OECD, 2002).

Essentially as Hoekman (1998a) argues, anti-dumping is defined to offset a whole range of practices that can be termed 'industrial policy' and which may create a privileged market for one set of producers.[17] Hence it is only when all the conditions such as state aids rules, special tax regimes, and industry specific regulations are harmonized that one can expect a strong partner to give up the

right to use anti-dumping.[18] This principle is clearly stated in the EU's often-repeated statement of its conditions for opening the internal market to pre-accession partners.

> Once satisfactory implementation of competition and state aids policies (by the associated countries) has been achieved, together with the application of other parts of Community law linked to the wider market, the Union could decide to reduce progressively the application of commercial defence instruments for industrial products from the countries concerned, since it would have a level of guarantee against unfair competition comparable to that existing inside the internal market.[19]

It is clear from a EU perspective that a competition policy is necessary but not sufficient for the removal of anti-dumping. It is worth noting that the abolition of anti-dumping in the European Economic Area Agreement only applies to sectors where the entire *acquis* are applied by partners, hence the possibility of anti-dumping action against Norway on salmon fisheries is being excluded from the harmonization.

Hoekman (1998a) therefore argues that competition policy framework is only one small feature of what is necessary for removal of anti-dumping and countervailing duties (CVDs).

> Even far-reaching regulatory commitments (deep integration) that extend beyond antitrust *per se* may not be sufficient to make elimination of anti-dumping feasible (e.g. the Europe Agreements).

However, he goes on to say that a competition provision is not only not sufficient, but it is also not *necessary* in circumstances where distortions due to private anti-competitive behaviour are a minor part of any intra-regional trade barriers.

> Examples can also be found where intra-regional free trade was attained without any move towards incorporation of rules on antitrust regimes (e.g. Canada-Chile).

But in fact Canada and Chile did include some competition provisions in the RTA and they did subsequently sign a Competition agreement. In fact, Canada and Chile have not been major users of anti-dumping against each other, so the mutual elimination of anti-dumping may have been relatively uncontroversial.

Countervailing Duties (CVDs) and competition policy

Countervailing duties are designed to deter and compensate for direct subsidies. Under the WTO/GATT subsidy code, some aids are declared violations of the code and can lead to DS action: others are legal but can be countervailed. Other types are allowed and are not countervailable.

Countervailing duties are extensively used by the US but much less by the EU. Within the EU state aids are strictly policed and illegal aids must be repaid, with no use of CVDs. It is clear that a tough and enforced subsidy code in an RTA can prevent GATT-legal but countervailable subsidies from giving rise to actions. The EU has clearly included state aids rules into its Europe agreements, but retains the right to use CVDs. Jordan, Morocco, the Palestinian Authority and Tunisia have committed themselves to applying EU state aids laws eventually.[20]

The EU-Egypt agreement provides for the eventual elimination of CVDs *if* state aid competition rules are agreed, but as far as the authors are aware this has not come into effect yet. The EU–Turkey agreement requires Turkey to inform the EU of all state aids and allows the EU to object to any that go against EU rules, but does not appear to make any provision for eliminating CVDs.

The danger of course is asymmetry of rules, e.g. restricting legitimate policies[21] that may be appropriate to less-developed partners.

2.2.2 Dispute settlement on competition in RTAs

Another important aspect of the operation of competition provisions in RTAs is the conflict resolution mechanism these agreements provide for. It could be argued that there are two main models of conflict resolution mechanisms provided. First, some plurilateral RTAs provide for the establishment of a central enforcing institution (competition authority), to enforce the competition rules of the agreements. They also provide for the establishment of a regional court to review the decisions of the central competition authority. The main example of agreements that have been based on this centralized model is the EU, which has been exceptional in the degree to which the European Commission was given powers to

police anti-competitive behaviour that affected trade between Member States. Other such examples are CARICOM and COMESA; they both provide for the establishment of a regional competition authority.

On the other hand, bilateral RTAs usually provide for a dispute settlement mechanism to resolve conflicts that may arise from the general application of the agreements. Nonetheless, many bilateral RTAs clearly exclude competition provisions from the application of the dispute settlement procedures. Examples include bilateral agreements signed by the US and Canada.[22]

In contrast, EU bilateral RTAs provide for two levels of competition-related conflict resolution. With the exception of the EU–Chile agreement,[23] all EU bilateral RTAs state that the parties may refer to the Association Council[24] regarding any dispute arising from the application of the agreement. The Council will settle such disputes by means of decision, in most of the agreements,[25] or recommendation, in the case of the agreements signed with Eastern European and Central Asian countries. The Association or Cooperation Council consists of members of the Council of the EU and members of the European Commission on the one hand, and members of the government of the EU's contracting Party on the other, so any conflict from the application of the agreement has to be solved at a ministerial level. That said, and in cases where the Association or Cooperation Council is not able to reach a decision, most of these agreements also provide for an arbitration procedure.[26]

3. Case studies

This section describes in more detail eight bilateral trade agreements signed by the EU and by Canada that have specific and quite developed competition provisions. It examines how these competition provisions interact with trade provisions and it includes material based on interviews carried out by the authors and their colleagues on the operation of these particular agreements.

3.1 ANZCERTA

The Australia New Zealand Closer Economic Relations Trade Agreement (known as ANZCERTA or the CER Agreement) is the main instrument governing economic relations between the two countries. It entered into force in 1983.

ANZCERTA built on a series of earlier RTAs between Australia and New Zealand, including the 1966 New Zealand and Australia Free Trade Agreement (NZAFTA).[27] Each country is a significant investment destination for the other.[28]

Its central provision is the creation of a World Trade Organization (WTO)-consistent Free Trade Area consisting of Australia and New Zealand. The objectives of the Agreement, according to Article 1, are 'to strengthen the broader relationship between Australia and New Zealand; to develop closer economic relations between Australia and New Zealand through a mutually beneficial expansion of free trade between the two countries; to eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable and with a minimum of disruption; and to develop trade between New Zealand and Australia under conditions of fair competition'.[29]

The provisions of the Agreement apply in respect of goods traded in the Free Trade Area, which is defined in Article 2 of the Agreement.[30] The Agreement allows standard exceptions from its provisions, for *specified purposes*, provided they are not used 'as a means of arbitrary or unjustified discrimination or as a disguised restriction on trade'.[31]

All tariffs and quantitative import or export restrictions on trade in goods originating in the Free Trade Area are prohibited under the Agreement.[32] The rules determining the origin of particular goods are set out in Article 3 of the Agreement.[33] Article 12(1)(a) of the ANZCERTA requires the two countries to 'examine the scope for taking action to harmonize requirements relating to [...] restrictive trade practices.'

Article 22 of the Agreement sets out the review and consultation mechanism to ensure the Agreement's satisfactory

implementation. This includes an annual review of the operation of the agreement, and further stipulates that the countries should consult with each other to resolve contentious issues, as there is no dispute settlement procedure under the Agreement.[34]

The process of business law harmonization is aimed at identifying differences in areas that increase the transaction and compliance costs faced by companies operating in both markets. A Steering Committee of Officials, which was established to coordinate the examination of the scope for harmonization, focused on the implementation of a 1988 Protocol, according to which both countries were to eliminate tariffs, quantitative import restrictions and tariff quotas on goods originating in the other country.[35] It was considered that anti-dumping provisions were inappropriate in a free trade area and that anti-competitive business practices by firms operating across the Tasman should be subject to the appropriate competition laws of each country.

It is argued that full trade liberalization was judged necessary but not sufficient to eliminate the need for anti-dumping in the ANZCERTA context.[36] 'Such elimination required active enforcement of similar competition laws and agreement that the jurisdiction of competition agencies extended to matters affecting trade between New Zealand and Australia. In this connection it was agreed that nationals of one state could be made the subject of an enquiry by the competition authorities of the other state and be required to respond to requests for information'(Hoekman, 1998a:21).

Competition rules in the two countries were significantly different in 1983 when Australian antitrust laws followed a US model, and NZ followed that of the UK. In 1986, NZ moved to a system that was closer to Australia's.[37]

'Australia and New Zealand eliminated the availability of anti-dumping actions on goods originating in each other's markets on 1 July 1990.[38] In parallel, Australia and New Zealand simultaneously extended the application of their competition law prohibitions on the misuse of market power. The new provisions (s.46A of the Australian Trade Practices Act 1974 and s.36A of the New Zealand Commerce Act 1986) prohibit the use of substantial market power (Australian law) and dominant position (New Zealand law) in a "trans-Tasman market" for certain anti-competitive purposes.'[39]

'The 1990 Steering Committee report to Governments provided a list of recommended follow-up actions to progress harmonization and a list of matters in respect of which future monitoring and review activity were recommended. In July 1992, the Steering Committee reported to Governments on a number of substantial harmonizing outcomes that had occurred since the signing of the MOU.'[40]

'The Foreign Judgments Act 1991 in Australia and the Reciprocal Enforcement of Judgments Act 1992 in New Zealand provide for more extensive arrangements for enforcing each country's judgments and orders in the other country. Consultation has taken place between Australia and New Zealand about ensuring the compatibility of Australian and New Zealand evidence law, especially in relation to business records and secondary evidence, in the context of enactment of new evidence legislation by Australia and examination of possible evidence reforms by the New Zealand Law Commission.'[41] At the 1995 meeting of the Steering Committee of Officials, focus groups were established in five areas, including competition policy. However, it was decided in the 1996 meeting that 'the Committee would focus on key areas of business law rather than defined "focus group" areas'.[42]

Under ANZCERTA, each country's competition authority and courts have a model of concurrent jurisdiction, whereby each competition authority may control the misuse of market power in the trans-Tasman market. The agreement provides for extensive investigatory assistance, the exchange of information (subject to rules of confidentiality) and coordinated enforcement.

The ANZCERTA partners did not formally eliminate the use of CVDs however, even though disciplines on subsidies are included. ANZCERTA includes disciplines on subsidies (Article 11) that are stronger than those contained in the WTO. The 1988 Protocol banned industry-specific subsidies. Export subsidies are also prohibited (these were eliminated by 1987). The OECD (2002) notes that no CVDs have in fact been imposed since ANZCERTA was agreed.

In 1994, the Australian Trade Practices Commission and New Zealand Commerce Commission concluded a bilateral Cooperation and Coordination Agreement to reduce the possibility for inconsistencies in the application of legislation, (Cernat and Laird,

2003). It is worth noting that ANZCERTA does not have dispute settlement provisions pertaining to the RTA as such.[43]

The ANCERTA agreement is very special because of its elimination of anti-dumping. It is clear that there was a direct link between the ending of anti-dumping and the completion of a harmonized and integrated competition regime in this case. The use of anti-dumping appears to have been ended *de facto* in 1988, but it continued after 1983. Hoekman (1998a) (citing Ahdar, 1991) reports that there were numerous mutual anti-dumping initiations in the period 1983-88 but very few findings that led to measures. Thus the difficulty of using the instrument may have led to a willingness to end its use. Hoekman (1998a) argues, however, that the key factor was the ability of the two economies to engage in a form of deep integration that went well beyond competition, even though it showed far fewer obviously supranational features than the EU. The comparison springs to mind of the pre-1995 EFTA, where a group of like-minded states were able to practice very free trade with each other due to a very common economic culture. In the case of Australia and New Zealand, the RTA perhaps provided a framework for a joint trajectory from protectionism to openness, with the enhanced role of competition policy in both being an important, but not the only, element.

3.2 Canada-Chile Free Trade Agreement[44]

Signed in Santiago, Chile, in December 1996, the Canada-Chile Free Trade Agreement (CCFTA)[45] came into force on 5 July 1997. Chile was Canada's first bilateral free trade partner outside NAFTA. The CCFTA aims at the comprehensive liberalization of goods and services trade and claims to comply with GATT Article XXIV and GATS V.[46]

For Chile, the main aim of the agreement was to secure market access to Canada, while providing a boost to the Chilean government campaign to enter NAFTA (Marsden and Whelan, 2005a:4). The CCFTA has helped to improve trade between Canada and Chile and, since the signing of this agreement, two-way trade has more than doubled.

The CCFTA's two key liberalization features are the following: immediate duty-free access for 85 per cent of Canadian exports and the elimination of Chile's 11 per cent import duty on almost all remaining industrial and resource-based goods over five years, and improved access for a range of agricultural goods. Both parties agreed to seek further liberalization and in annex H-08 they set out their commitments to liberalize quantitative restrictions, licensing requirements, performance requirements or/and other non-discriminatory measures (CCFTA, Article H-08).

To ensure that the benefits of the CCFTA were not undermined by private barriers to trade, the parties included provisions on competition policy and cooperation. The CCFTA provisions were very general obligations relating to cooperation in the issues of competition law enforcement policy, 'including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.' (CCFTA, Article J-01(2))

The CCFTA contains obligations to adopt or maintain measures to proscribe anti-competitive business conduct, to take appropriate action to enforce such measures, and to consult from time to time about the effectiveness of such action.[47] Lastly, in common with NAFTA, the CCFTA dispute settlement provisions do not apply to competition policy.[48]

In 2001, the competition authorities of both countries signed a more detailed Memorandum of Understanding (MOU).[49] This provides for *inter alia* notification of 'the enforcement activities that may affect the other party's interest in the application of its competition law' (Canada-Chile MOU, Article II.1), cooperation and coordination (Canada-Chile MOU, Article III), avoidance of conflicts procedure (Canada-Chile MOU, Article IV) and the holding of meetings of competition officials (Canada-Chile MOU, Article V). The MOU Article II states that:

> *1.* Subject to Article VI, each Party will notify the other Party with respect to its enforcement activities which may affect the other Party's interests in the application of its competition law.'

The subsequent wording is fairly general in scope and contains special provisions with respect to mergers.[50]

The parties to the CCFTA may still maintain or establish state enterprises (CCFTA, Article J-03(1)). However, both parties must ensure that any state enterprise applies 'non-discriminatory treatment in sale of its goods or services to investments in the Party's territory of investors of the other Party.' (CCFTA, Article J-03(3)). In fact, neither party is prevented by the agreement from authorizing ('designating') a monopoly (CCFTA, Article J-02(1)).

Articles M-01, M02 and M0-3 of the CCFTA provided that anti-dumping measures between Canada and Chile would be eliminated by January 2003 or earlier for goods whose tariffs were reduced to zero before that date.[51] In introducing legislation to give effect to this, the Canadian government expressed the hope that this might eventually create a precedent for the elimination of anti-dumping in NAFTA.[52] The elimination of anti-dumping provisions is consistent with the Canadian trade position in Canada-United States Free Trade Agreement (CUSFTA) negotiations.

> Canada's traditional position from the time of the Canada-United CUSFTA, has been to seek the elimination of countervailing duty and antidumping mechanisms. It was reported that the trade negotiators generally agreed that antidumping might be replaced by competition law principles, but a basis for reform of countervailing duty provisions could not be developed. (Leach and Gastle, 2000)

The CCFTA established a Committee on Anti-dumping and Countervailing Measures to further define subsidy disciplines and to eliminate the need for countervailing duty measures on trade between Canada and Chile, but both parties retain the right to use these in the meantime (CCFTA, Article M-05(a)). This agreement reaffirms the GATT rules on subsidies and countervailing duties in general terms, but goes a little further than GATT in Agriculture. From January 2003, 'neither Party [can] introduce or maintain any export subsidy on any agricultural goods originating in, or shipped from, its territory that are exported directly or indirectly to the territory of the other Party' (CCFTA, Article C-14(2)).

Although the CCFTA requires the parties to consult on the effectiveness of their competition laws and to cooperate in the

enforcement of competition laws, these obligations are not subject to the specific dispute settlement provisions of the agreement (see OECD, 2005).

The CCFTA did not require the establishment of a competition authority as both sides already had one. Nonetheless, each party is obliged to designate a contact point to facilitate communication between the parties in any matter covered by CCFTA, including competition policy (CCFTA, Article L-01). The CCFTA does not require either party to align their competition laws to each other.

Under the MOU, Canada has notified Chile on one occasion and there has also been an exchange of non-confidential information between the competition authorities (Marsden and Whelan, 2005a:30). Despite the non-binding nature of the co-operation obligations under the CCFTA and the MOU, Marsden and Whelan (2005a:28) conclude that the competition chapter of the CCFTA has contributed towards the establishment of an effective cooperation framework between the antitrust agencies of Canada and Chile.

The authors concur with Hoekman (1998:32) that the CCFTA is an example of an FTA that eliminates anti-dumping in the presence of effective but not harmonized antitrust regimes. In fact, the agreement provides for elimination of the anti-dumping mechanism but maintains countervailing duties. The parties clearly did not regard the antitrust provisions as irrelevant, as the FTA was followed by a MOU, later used as a template for Canada–Costa Rica FTA. Marsden and Whelan (2005a:34) conclude that the most important part of the competition arrangements was the MOU, which was more detailed. They argue that the softness of the obligations made the agencies more willing to work with it in the informal manner they find more congenial. They say: 'The FTA introduces and the agency-to-agency consolidates a working relationship between the antitrust agencies of the parties' and 'Cooperation agreements promote trust and confidence between the competition agencies of the parties.'

3.3 Canada–Costa Rica Free Trade Agreement[53]

The Canada–Costa Rica Free Trade Agreement (CCRFTA)[54] came into effect on 1 November 2002. The agreement created a free

trade area *in goods*, but unlike Canada-Chile did not cover services. For Costa Rica the agreement was a stepping stone to the Central America Free Trade Agreement (CAFTA-DR). For Canada the negotiation process of the agreement was an opportunity to 'experiment with the kind of trade law reform that would be impossible with American participation in the negotiations' (Leach and Gastle, 2000).

Costa Rica eliminated tariffs on two-thirds of its imports from Canada, with the rest being eliminated over a period of 14 years. On the other hand, Canada immediately eliminated tariffs on 86 per cent of its tariff lines (Customs Reporter, 2001), leaving the rest to be removed over an eight-year period.

The chapter on competition policy does not require Costa Rica to adopt any specific provisions of Canadian rules, but calls for adherence to certain basic principles including the existence of an agency with autonomy and compliance to certain due process rules (not unlike those discussed in the WTO working Group on Trade and Competition), in order 'to ensure that the benefits of trade liberalization are not undermined by anticompetitive activities and to promote cooperation and coordination between the competition authorities of the Parties'. (CCRFTA, Article XI.1) The cooperation provisions are fairly broad and mainly involve notification: 'each Party will notify the other Party with respect to its enforcement activities which may affect the other Party's interests in the application of its competition law', including mergers, with specific wording in this area.

The Competition provisions of the CCRTA largely replicate those of the Canada-Chile MOU and so serve as a guide for the cooperation and coordination of enforcement activities (Marsden and Whelan, 2005b:9).

The CCRFTA provided for WTO rules to govern anti-dumping or countervailing duties. However, the text recognizes the 'desirability' of introducing further disciplines such as lesser duty rules and a public interest test.

According to Leach and Gastle (2000) the inclusion of anti-dumping measures in the CCRFTA demonstrates that 'Canada

appears to have abandoned its traditional trade policy position that the anti-dumping mechanism should be eliminated.' In the Canada-US Free Trade Agreement (CUSFTA) signed in 1987, Canadian negotiators sought the elimination of countervailing duty and anti-dumping mechanisms, arguing that 'anti-dumping might be replaced by competition law principles, but a basis for reform of countervailing duty provisions could not be developed'(Leach and Gastle, 2000).

Costa Rica has a widespread Free Trade Zones (FTZs) regime, which is thought to be WTO compatible, having the effect of subsidizing certain Costa Rican products on condition that they are exported (International Trade Canada, 2003). The solution was explained as follows:

> The Parties to the CCRFTA do not have a general rule regarding FTZ, but rather agreed to delay the reduction of tariffs applied to specific tariff lines. The approach is therefore not one of a general nature but one that is case specific.[55]

There have been no notifications to the WTO of countervailing duties imposed on any of the parties.

The CCRFTA provides for a Free Trade Commission for dispute resolution based on NAFTA Chapter 20, but the wording on competition is obscure. The OECD report (OECD, 2005a) categorizes the dispute settlement in the CCRFTA both as 'competition policy excluded' and as 'consultation mechanism' in competition provisions.[56] So far, there has been no notification to the WTO of any dispute settlement between Canada and Costa Rica in any matter.

Marsden and Whelan report that the CCRFTA has introduced a working relationship between competition authorities, allowing them to benefit from an increased awareness of each other's interests and approaches. (Marsden and Whelan, 2005b:27). Nonetheless, to date they find that there has been little cooperation on specific cases between these two competition agencies, with no formal notifications made under the agreement. Marsden and Whelan (2005b) report satisfaction by officials on both sides with the emerging relationship: one competition official admitted that the cooperation agreement works best when it is approached in an informal way and the FTA provides for a formal framework for informal contact means (Marsden and Whelan, 2005b:28, n. 108). Additionally, a variety of trade officials

said that 'trust and confidence are also developed by the informal meetings of trade officials at various multilateral fora such as the Organisation for Economic Cooperation and Development (OECD) or the International Competition Network (ICN)'.[57] The authors' own sources confirmed that Costa Rica is content with the CCRFTA competition provisions and would have liked to see competition provision in CAFTA-DR.[58]

This case is more evidence for Hoekman's (1998a) rejection of the link between anti-dumping and competition provisions in RTAs but it suggests that there are other positive benefits of such provisions perceived by the developing partner here, largely through closer interaction.

A note on CAFTA-DR

The US-Central American-Dominican Republic Free Trade Agreement (CAFTA-DR)[59] was signed in 2004[60] by the US, El Salvador, Honduras and Guatemala who have ratified it and by Costa Rica, Nicaragua and by the Dominican Republic who at the time of writing have not yet done so. Implementation of CAFTA-DR is therefore pending.

CAFTA-DR is described as similar in form to the US–Jordan FTA, but with stricter rules governing domestic environmental standards.[61] However, it does not contain a competition chapter, apparently since the four Central American countries do not have competition policies.[62] Nevertheless, Chapter 13.4.2 of the CAFTA-DR text on telecommunications states: 'Each Party shall maintain appropriate measures for the purpose of preventing suppliers who, alone or together, are a major supplier in its territory from engaging in or continuing anti-competitive practices.'

However, Cost Rica has been exempted from the commitments of Chapter 13 of CAFTA-DR and has scheduled a different set of commitments reflecting its social aims in telecommunications policy, and including the following paragraph on competition:

> Costa Rica shall maintain appropriate measures for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in anti-competitive practices, such as not making available, on a timely basis, to suppliers of public telecommunications services, technical information about essential facilities and commercially relevant information that is necessary for them to provide public telecommunications services.[63]

3.4 EU-Poland Europe Agreement

In 1991, Poland and the EU signed the Europe Agreement (EA),[64] which came into force in 1994. The trade and trade-related provisions (among them competition policy rules) of this agreement were implemented on 1 March 1992 under an Interim Agreement.[65] The main aim of signing this agreement for Poland was future accession to the European Union (EU), which eventually occurred in 2004.[66] It was superseded by the Accession Treaty.

The EA facilitated trade liberalization by creating a free trade area in industrial goods. The EA further required that Poland adopt some form of competition policy, declaring incompatible with the Agreement 'practices that restrict or distort competition such as agreements between undertakings restricting competition, or abuse of dominant position, behaviour of state-owned enterprises and state aid, insofar as they affect trade between the Community and Poland'.[67] The EA obliged Poland to prevent such practices, though the EA formally left the details of how to implement this with Poland. Anti-competitive practices were to be assessed against the criteria arising from the application of the rules of Articles 81, 82 and 87 of the EC Treaty.

The Commission's oft-rehearsed position on approximation of laws was that competition law alone was not sufficient to end all contingent protection: the internal market *acquis* had to be in place in order to create 'a level playing field'.[68]

The EU thereby created an obligation for EA signatories, which did not apply to existing members. (Holmes, 1998:101).

After it was established in 1990, the Polish Competition Authority (PCA),[69] first received substantial help from the United States. However, the EA led to the approximation of Polish competition law with the *acquis communautaire* and assisted the PCA in supporting liberalization.

According to Hoekman and Mavroidis (1995:125), uniquely among Central and Eastern European countries (CEEC)s, the Polish Anti-monopoly Office was given responsibility for carrying out anti-dumping investigations at the beginning of the 1990s. The Anti-monopoly Office, and later UOKIK,[70] gave an opinion in cases brought by enterprises to the Ministry of Economy related to 'excessive importation of goods to the Polish custom territory' (OECD, 2003:11), which included cases of alleged dumping. The Minister of Economy was obliged to consult the Chairman of the UOKIK (UOKIK, 2000) before deciding to use protectionist measures. Of course, since its accession to the EU, Poland applies EU anti-dumping measures against third parties and is essentially exempt from actions by other EU states.[71]

Article 33 of the EC-Poland EA imposed the obligation that the Association Council be informed of dumping cases as soon as the authorities of the importing party have initiated an investigation; but left parties free to impose what measures to take. Hoekman and Mavroidis (1995:131) argue that the EU had more scope for applying measures. Indeed, there was an asymmetry between the initiations of anti-dumping investigations between 1995 and 2004[72] – ten initiations from the EU against Poland and none by Poland against the EU.

The competition chapter of the agreement included regulation of public aid which 'distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods'.[73] Any practices contrary to this provision were to be assessed on the basis of criteria arising from the application of the rules of Article 92 (later Article 87) of the Treaty establishing the European Community (Gwiazda, 2005: 171). Each Party needed to ensure transparency in the area of public aid, *inter alia* by reporting annually to the other Party on the total amount and the distribution of the aid given.[74] The EA provided for the subsequent establishment of implementing rules on state aid. This involved the creation of a national monitoring

authority and rules parallel to those of the EU. Cremona (2003) comments that there was a multi-layer approach in all the Europe Agreements. EU law did not have a direct effect and if the EU disagreed with a decision of the national authority, the matter could be referred to the Association Council, but the EU also had the right to act unilaterally.[75]

Until the adoption of implementing rules, GATT rules with respect to countervailing of subsidies would continue to apply. Since 1995, there has been no notification to the WTO of initiation or use of countervailing duties between the parties[76]

Ensuring transparency of state aids was a new task for the PCA. The absence of a domestic law controlling the granting of state aid contributed to the Commission's less than positive opinion on Poland's ability to comply with and implement the EA in the field of state aid (European Commission, 1998). The situation only changed after January 2001, when a law regulating state aid entered into force[77] and granted responsibility for monitoring state aid to the UOKIK. Lastly, the European Commission noted that 'with regard to state aid, the state aid law and the secondary legislation appears to provide a satisfactory basis for initiating effective control of state aid in Poland'(European Commission, 2001:50). The OECD report indicates that in 2003 the UOKIK 'approved' 166 cases related to state aids.[78]

The steel industry was one of the sensitive sectors where aid for restructuring purposes was permitted, in line with the requirements set out in Protocol 2 of the EA.[79] Poland, however, introduced Special Economic Zones (SEZs) where public aid was granted, which included elements contrary to the *acquis* and Poland's immediate obligations under the EA. (European Commission, 2000:42) Agriculture and fisheries products were exempt from the application of State aid rules under the EA.[80]

Matters relating to the application or interpretation of competition provisions of the EA could be referred to the Associate Council.[81] The Council had a right to settle the dispute by means of a decision and the parties were bound by this decision. In cases where the Council could not settle the dispute, arbitrators could be appointed[82] and a decision was taken by majority vote. However, Cremona (2003:284) notes that, in the case of state aids, the EU was

not bound by the Association Council and could impose countervailing duties. The national regimes and the Association Council were supplemented by the right to use trade remedies, reflecting the fact that until Poland was a full member of the EU, EU law could not be directly effective.

The EC-Poland EA explicitly indicated that Poland committed itself to the approximation of its legislation to that of the European Union, particularly in the areas relevant to the internal market, though the actual legal obligation was vague:

> On the approximation of laws Article 68 simply stated:
> (…) Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation.

Obviously with the prospect of accession to the European Union, the reference to legislation relating to competition policy was slightly stronger: it needed to be compatible with the EU treaties in order to ensure compliance with Article 63. More detailed goals for the candidates were laid down in the 1995 White Paper (European Commission, 1995:63), but it was only the political pressure of the accession negotiations that allowed the EU to dictate precise details of Polish law *before accession*.

Despite harmonization of competition law, however, there was no formal antitrust cooperation under the EA between DG Competition and the Polish competition authority.[83] Before accession, Poland was treated as an outsider by the Commission and there was no exchange of information in competition cases.[84] The situation diametrically changed after entering the European Union and the European Competition Network (ECN) at the same time. The creation of the ECN was in some ways a logical consequence of enlargement: the EU now had ten new members with competition authorities set up to police anti-competitive behaviour affecting trade with other member states. The creation of the ECN shared responsibility among DG Competition and national agencies for cross-border cases.

The ECN has institutionalized competition policy cooperation. Before 1 May 2004, cooperation for existing member states was not formalized. The cooperation between UOKIK and DG Competition is regarded as highly valuable by the former.[85] The ECN allows for a flow of information from DG Competition and other agencies inside the ECN, exchange of confidential information and

access to full decisions coming from European institutions. Despite approximation of competition law in the EA, before accession only publicly available information had been circulated.

Despite an obvious asymmetry in the adoption of rules in the EA, the absence of cooperation in its early years and continued anti-dumping, the Polish authorities were content with the competition provisions of the EA as necessary step in creating a modern market economy and facilitating integration with the EU.[86]

2.5 EU-Turkey Customs Union

After many years in which Turkey had an association agreement with the EU,[87] it was agreed in 1995 at the Association Council that Turkey would create a customs union (CU) with the EU, with industrial tariffs reduced to zero by 1999.[88] Turkey is also to start accession negotiations with the EU.[89]

'Under the Customs Union, Turkey is committed to align with part of the internal market *acquis*, including free circulation of industrial goods, intellectual and industrial property rights, competition policy (state aid control and antitrust) and to adopt the common external tariff. Public procurement, services and establishment are currently not covered by the Customs Union [...]'.[90] The CU offers rapid liberalization of trade for industrial commodities.[91] However, there are loopholes in the process as anti-dumping and safeguard measures remain available (Articles 38, 44, and 63).[92]

CU rules also require adoption of other *acquis* for fully free trade, as stated above. The EU has consistently stated that adoption of competition rules is not enough to ensure elimination of all contingent protection including anti-dumping.[93] Between 1995 and 2004, the EU initiated nine anti-dumping proceedings against Turkey while Turkey used this instrument once against the EU.[94] The EU applied anti-dumping measures in two instances. Turkey has never applied anti-dumping measures against the EU.

Nevertheless, the EU, which is an active user of countervailing measures, has never used this tool against Turkey in the period between 1995 and 2004. Turkey has never initiated countervailing

proceedings, but was targeted twice, and applied countervailing measures once.

Relations in the competition field between Turkey and the EU are primarily governed by the agreement on the CU with the European Community. Generally, Turkey's antitrust legislation appears to be largely modelled on the main principles of Community antitrust rules, as required by the EC-Turkey Customs Union, and Turkey has created a functionally independent body with the administrative structures to allow for the implementation of the rules.[95]

In the EU-Turkey Customs Union Agreement, Articles 32 to 43 clarify the obligations with regard to competition law and policy. Article 32 deals with cartels following a similar wording to Article 81 EC. Articles 33 and 34 clarify the rules on abuse of dominance and state aid mirroring EC rules. Article 35 states that the basis of assessment with regard to cases will be on the basis of criteria arising from the application of the rules of ex. Articles 85, 86 and 92 (Articles 81, 82 and 87 EC according to the new numbering) following the Treaty of Amsterdam.

Article 36 of the Agreement deals with the limitations to information exchange between the Parties, 'the limitations imposed by the requirements of professional secrecy and business secrets'. Article 37 prescribes a two-year period with regard to adoption of necessary rules for the implementation of Articles 32, 33 and 34 and related parts of Article 35 by the Association Council. 'These rules shall be based upon those already existing in the Community and shall *inter alia* specify the role of each competition authority.' Until these rules are adopted the authorities of the Community or Turkey will rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in accordance with Articles 32 and 33. Besides, the provisions of the GATT Subsidies Code shall be applied as the rules for the implementation of Article 34.[96]

Article 38 prescribes the procedure with regard to the issues regarding the terms of Articles 32, 33 or 34, which are not 'adequately dealt with under the implementing rules referred to in Article 37, or in the absence of such rules, and if such practice causes or threatens

to cause serious prejudice to the interest of the other Party or material injury to its domestic industry'. In such cases, Turkey or the EU may take appropriate measures 'after consultation within the Joint Customs Union Committee or after 45 working days following referral for such consultation. Priority will be given to such measures that will least disturb the functioning of the Customs Union. In cases that are incompatible with regard to Article 34, GATT rules apply'.

The CU text states that 'Turkey shall ensure that its legislation in the field of competition rules is made compatible with that of the European Community, and is applied effectively'.[97] Article 39(2) further clarifies the obligations. 'The Community and Turkey [will] communicate to each other all amendments to their laws concerning restrictive practices by undertakings. They shall also inform each other of the cases when these laws have been applied.'[98] In relation to information supplied regarding state aid, the Community has the right to raise objections against an aid granted by Turkey, which it would have deemed unlawful under EC law, had it been granted by a Member State. If Turkey does not agree with the Community's opinion, and if the case is not resolved within 30 days, the Community and Turkey shall each have the right to refer the case to arbitration.[99] In exchange, Turkey shall have the right to raise objections and seize the Association Council against an aid granted by a Member State which it deems to be unlawful under EC law. If the case is not resolved by the Association Council within three months, the Association Council may decide to refer the case to the Court of Justice of the European Communities.[100]

'The Community [will] inform Turkey as soon as possible of the adoption of any decision under [Articles 81, 82 and 87 EC] of the EC Treaty which might affect the interests of Turkey.' 'Turkey shall be entitled to ask for information about any specific case decided by the Community under Articles [Articles 81, 82 and 87] of the EC Treaty'.[101]

Article 41 of the Agreement lays down obligations on Turkey with regard to public undertakings to which special or exclusive rights have been granted (Article 86 EC). Turkey is under an obligation 'to ensure that, by the end of the first year following the entry into force of the Customs Union, the principles of the Treaty establishing the European Economic Community, notably Article 86 EC, as well as

the principles contained in the secondary legislation and the case-law developed on this basis, are upheld'. Turkey is obliged to progressively adjust any state monopolies of a commercial character so as to ensure that there should be no discrimination regarding the conditions under which goods are procured and marketed between nationals of the Member States and of Turkey.[102]

Article 43 deals with the voluntary notification (as there is full discretion) possibility for either Party, if either believes that 'anti-competitive activities carried out *on the territory of the other* Party are adversely affecting its interests or the interests of its undertakings'. The request will be made with a view to initiating appropriate enforcement action by the relevant competition authority. 'It will also include an offer for such further information and other cooperation as the notifying Party is able to provide.[103] Upon the receipt of such a notification and after discussions between the Parties, the competition authority of the notified Party will consider whether or not to act and to inform the other of its intentions.[104] . The notifying party remains free to use its own procedures if it wishes.[105] This does not however oblige parties to notify or act if they see an anti-competitive action in their own territory affecting the other.

Turkey is obliged to adopt a substantive competition law that follows the EU model as a result of the Customs Union Agreement. The provisions in Turkish law appear in Articles 4, 6, and 7 of the Competition Act. Article 4 deals with agreements and concerted practices and therefore parallels Article 81(1) EC. Article 6, directed to the abuse of dominance, is designed to follow Article 82 EC, while Article 7 on mergers and acquisitions follows the EU merger regulation.[106]

Regarding state aid control, the European Commission notes that 'the degree of alignment is very limited, and there is no state aid monitoring authority. In the absence of a legal framework and administrative capacity, no enforcement record has yet been established'.[107]

'Despite the deadline in Article 37, the required rules have not yet been adopted, essentially because Turkey has been unable to reach a consensus on a mechanism for aligning its aid system with the EU's requirements. A draft version of the Article 37 implementing

rules has been developed that specifies the organic entities in Turkey and the EU responsible for enforcing the competition laws and controlling state aid. […] The provision relating to state aid lists only a non-existent "Turkish State Aid Monitoring Authority".[108] The EU constantly criticized the failure to resolve the issue and called for the establishment of an operationally independent state aid monitoring agency.[109] The OECD made a similar recommendation in its 2002 Report (p.30).' 'One such important issue related to approval and monitoring of state aid is the restructuring of the steel sector.'[110]

Another interesting issue with relevance to trade and competition is the international aspects of enforcement. The Turkish Competition Authority (TCA) has not established any formal cooperation arrangements with enforcement agencies of the other countries. It sought the assistance of the EU in enforcement matters on two occasions in the past year. 'In May 2004, the Authority initiated an informal request to EU's [DG Competition], inquiring whether the EU's ongoing investigation of a cartel in the electrical equipment industry had revealed any information about the cartel's activities in Turkey.' DG Competition replied that it could not provide any information as the material collected was subject to the rules on confidentiality.[111]

'In June 2004, the TCA initiated a more formal request to DG Competition under Article 43 of the Customs Union Agreement. […] The TCA's request arose from an investigation into a possible cartel in the coal industry that involved enterprises based in the EU Member States but whose activities affected the national market. The [Authority] sought an investigation by DG Competition and also requested that, if no EC enforcement action resulted, any relevant investigative information be provided to the TCA. In its response, DG [Competition] referred to the discretion under Article 43(3) and noted that the Commission saw no appreciable effect in the EU arising from the conduct in question. [Besides], the response observed that any information obtained during an investigation would be subject to confidentiality rules and this would prevent disclosure to the TCA'.[112]

Furthermore, 'it should be noted that the TCA has no direct role in government proceedings that entail other competition issues raised by international trade. The Prime Ministry's Undersecretariat

of Foreign Trade holds all responsibility for implementing Turkey's law dealing with anti-dumping and unfair import competition.[113] Therefore, the Authority has had no involvement in those matters'.[114]

The most serious problems with competition law and policy in Turkey involve statutory deficiencies that require parliamentary action to remedy. Necessary legislation involves instituting a mechanism to control state aid, as noted above, elimination or control of state-created commercial enterprises that are vested with monopoly concessions or anti-competitive privileges, establishment of a mandatory role for the TCA in reviewing proposed laws and regulations, and modification of the Competition Act to improve the law enforcement capacity of the TCA.

The EU Turkey agreement is an interesting example of very close harmonization but very modest rules on cooperation. GATT rules on anti-dumping and CVDs still apply but there is hope that as the full *acquis* are applied their use will eventually be discontinued. This has not yet happened.

2.6 EU-Croatia[115]

In 2001, the European Union and Croatia signed a Stabilization and Association Agreement (SAA).[116] The agreement came into effect on 1 February 2005, but the trade provisions of the SAA were implemented in 2002.[117] According to the EU, the SAA provides for:

> 'The four freedoms, with the creation of a free trade area by 2007 for industrial products and most agricultural products'

and creates an obligation to approximate laws:

> 'Approximation of Croatian legislation to the Community *acquis*, including precise rules in the fields of competition, intellectual property rights and public procurement'.[118]

Croatia intended that the SAA would both liberalize trade within an RTA and pave the way for full membership of the EU.

In common with the Europe Agreements, the SAA calls for the adoption of the EU *acquis*, in particular competition policy. The terms of the required alignment were actually slightly stronger in the SAA than, for example, the EC–Poland Europe Agreement which

merely stated that: 'Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation.'[119] In reality of course, the pre-accession process drove full adoption of the *acquis* for Poland.

The SAA lays down rules for competition policy that are similar to the Europe Agreements, using the precise wording of the Rome Treaty to declare that any anti-competitive agreements, abuses of dominant positions (cf. Articles 81 and 82), and state aids (cf. Article 87) whenever any of these might affect or distort trade between Croatia and the EU,[120] are incompatible with the agreement.

Unlike the EC–Poland agreement which allowed Poland to decide how to eliminate these distortions to trade, the SAA requires a competition authority which has the power to authorize state aids on the basis of the principles governing state aids in the less-developed regions of the EU as specified in the EU Treaty Article 87(3)(a). It further requires that all authorizations are reported to Brussels.

The SAA does not eliminate the use of anti-dumping or countervailing duties between the partners and, as has been notedearlier,[121] the EU position has been that 'once satisfactory implementation of competition and state aids policies (by the associated countries) has been achieved, *together with the application of other parts of Community law linked to the wider market*, the Union could decide to reduce progressively the application of commercial defence instruments for industrial products'.[122] Article 70, which calls for harmonization of competition law, reiterates that both parties 'may use anti-dumping or countervailing measures in accordance with the relevant Articles of GATT'[123]

The SAA provides for harmonization of competition laws but not for formal cooperation procedures between the EU and Croatia and, from a competition policy perspective, could be regarded as a highly asymmetric arrangement as with the EU-Turkey agreement. However, as mentioned above, Croatia sees the SAA very much as a stepping stone to membership of the EU in which the adoption of EU-type laws is a way to integrate Croatia into the European economy. According to the authors' interviews with Croatian experts in the

Croatian Competition Agency (CCA), the asymmetric obligation to adopt EU norms has not been excessively burdensome.[124] The Croatian competition law of 2003 was drafted by the CCA with technical assistance from German IRZ Stiftung[125] and CARDS[126] and was indeed based on the principles required by the EU, but the Croatian competition authorities did not feel that the harmonization was inappropriate.[127] In fact, they welcomed the advice and assistance from DG Competition in drafting the competition law.[128] There was, for example, no concern about the provisions required by the EU on vertical restraints, the most trade-related element of EU law.

The EU sees the SAA as requiring the CCA to regularly report to Brussels on its activities, but there is no obligation on the part of DG Competition to supply information about its cases to the Croatian authority. The authors understand that the willingness of DG Competition to supply information on a voluntary basis has not yet been put to the test. Nonetheless, informal bilateral cooperation between individual agencies is already reported to be good, especially with Austria, Italy, Slovenia and Hungary. Only one request to a Member State Authority has ever been flatly refused.[129] Confidential information cannot however be given by members to non-members of the European Competition Network ECN. Croatia has been advised that there is no possibility of having observer status.[130] Only EU membership will mean entry to the ECN, at which point matters affecting trade with other member states will be governed by the direct effect of EU law.

State aids rules have proved more problematic for Croatia. The State Aids law was drafted by the Ministry of Finance, but the CCA is responsible for authorizing, monitoring and if necessary recovering illegal state aids. The CCA has expressed some dissatisfaction with the existing law and in January 2005 declared:

> Furthermore, the practical work on authorization of state aid has proved the inconsistency and lack of clarity relating to some provisions of the State Aid Act which have not been brought in compliance with the EU *acquis* and which result in uncertainty with respect to the interpretation and application of the State Aid Act.[131]

Despite several high profile cases and some rejections of aids by the CCA, total state aids in Croatia are falling and were 1.11 per cent of GDP according to the EU definitions in 2004.[132]

In conclusion, the CCA acknowledges the asymmetric character of the competition provisions of its SAA but does not see this as problematic.[133] From the competition authority perspective, the accession process is itself expected to open and intensify competition in the Croatian market, and competition law harmonization is part of this process. The main opportunity for Croatia is being part of the wider European integration process.

2.7 EU-Mexico[134]

Relations between the European Union (EU) and Mexico are based on the Economic Partnership, Political Coordination and Cooperation Agreement (the so-called Global Agreement), the Interim Agreement and a Final Act signed in Brussels on 8 December 1997,[135] which laid the basis for the EU-Mexico Free Trade Agreement (EUMFTA).[136] The EUMFTA came into force on 1 July 2000 and was the first agreement signed between the EU and a Latin American country. Diplomatically the EUMFTA was seen as a way of ensuring that Mexico did not fall totally under the US sphere of influence.

Article 1 of the EUMFTA specifies the main objectives of the agreement:

- the creation of a free trade area *in goods*, including public procurement markets,
- the establishment of a cooperation mechanism in the field of competition,
- a consultation mechanism for intellectual property matters,
- and a dispute settlement mechanism (Marsden and Whelan, 2005c:8).

Both countries were to eliminate all industrial tariffs, the EU by 1 January 2003 and Mexico by 1 January 2007. A partial removal of agricultural and fishery tariffs is due by 2010. The EUMFTA does not cover services but a separate agreement was concluded by the EU-Mexico Association Council on services in 2001.[137] Article 11.1 of the

services agreement refers to the need to agree on how to manage anti-competitive practices. The discussion here relates to the EUMFTA, which certainly applies to goods trade, and *may* apply to services.[138]

The competition provisions within the EUMFTA are outlined in Annex XV to the agreement. This emphasizes mutual recognition of each party's existing laws. Annex XV also comprises cooperation, including notification of enforcement activities,[139] coordination of enforcement activities, exchange of information, avoidance of conflicts, rules on confidentiality and technical assistance. According to Marsden and Whelan (2005c:28) the competition authorities of the EU and Mexico confirmed that 'the provisions of Annex XV are practically as useful and effective as those that could be included in an agency-to-agency agreement' and therefore there are no plans for the conclusion of such an agreement in the future.

The EUMFTA leaves both parties free to use WTO provisions for anti-dumping.[140] In the period 1995–2004 Mexico brought three anti-dumping actions against the EU, and the EU brought one against Mexico.

The EUMFTA has no provisions on state aids and leaves WTO rules in place. Mexico in fact started a countervailing duty investigation against the EU in 2003 but did not impose measures.

The EUMFTA contains elaborate provisions on dispute settlement that appear to cover competition. The EU website states that 'Dispute settlement mechanism: binds for the parties and covers all aspects of the Agreements'.[141]

Garcia-Bercero (2005) notes that competition issues are excluded from dispute settlement provisions of the EU-Chile agreement, but does not suggest that this is the case for EU-Mexico. The OECD (2005a:20) categorizes the dispute settlement provisions for competition in the EUMFTA as 'arbitration' and as a 'consultation mechanism'.[142] However, Marsden and Whelan (2005c) query whether the EUMFTA dispute settlement system could be effectively applied to competition.

Anti-dumping and countervailing between the EU and Mexico remain in the WTO dispute settlement system, not in a bilateral regime.

The EU and Mexico have in fact had recourse to the WTO dispute settlement procedure five times between 1995and 2005, once since the agreement came into force in 2000. Three cases concerned bananas, which did involve competition in services (Holmes and Read, 2001), although they have never been treated as such.

The EUMFTA does not require the establishment of competition authorities, since both countries have well-established competition law jurisdictions and competition agencies. There is also no obligation imposed on either party to harmonize its domestic competition law with its counterpart.

Besides the explicit recognition of both parties' competition laws, the agreement specifies coordination and cooperation in a variety of fields, and lays out detailed procedures on how these provisions should be implemented. According to Marsden and Whelan (2005c:26) the 'EU-Mexico cooperation has become more official, more open and more intense since the agreement has been signed, at least on the Mexican side'. Nonetheless, regarding the commitment of notification, the Mexicans have notified the EU of their enforcement activity on 31 occasions; they have only been notified of European enforcement activity on one occasion (Marsden and Whelan, 2005c).

A possible reason for this imbalance is that the European Commission is always very cautious to disclose any kind of sensitive information 'The issue of confidentiality is the *chief limitation* of enforcement cooperation agreements' (Marsden and Whelan, 2005c:26).

An alternative explanation is that the EU may be interpreting the agreement narrowly. Article 6.1 of Annex XV creates an obligation (albeit non-binding) on both parties to report to the other if it finds their interests are being affected:

> A competition authority which considers that an investigation or proceeding being conducted by the competition authority of the other Party may affect such Party's important interests

> should transmit its views on the matter to, or request consultation with, the other competition authority…

One can speculate that the EU interprets this to mean that the EU should contact Mexico if its investigation is affecting Mexican firms in the EU, rather than if it finds activity originating in the EU affecting the Mexican economy (an export cartel, for example).

The obligation to report bilaterally is matched by a slightly weaker *right* to ask for information.

The competition authority of a Party, which considers that the interests of that Party are being substantially and adversely affected by anticompetitive practices of whatever origin that are or have been engaged in by one or more enterprises situated in the other Party may request consultation with the other competition authority.

The Article calls for sympathetic consideration to be given to such requests.

The limited use of the agreement up to now leaves open the question whether this was 'a missed opportunity' or whether Mexico is too remote from the EU for the close, if imbalanced, relationship that exists between the EU and its neighbours. But in practice it is too early to say whether the agreement will lead to closer ties between Mexico and the EU.

2.8 EU- South Africa Trade, Development and Co-operation Agreement (TDCA)[143]

The Trade, Development and Co-operation Agreement (TDCA) governs South Africa's bilateral relations with the EU[144]and was signed on 11 October 1999.

The Agreement was concluded after lengthy negotiations. It covers around 90 per cent of current bilateral trade between the EU and South Africa. The key element of the agreement is the creation of a Free Trade Area (FTA) between the EU and South Africa.[145] Due to the restructuring of the South African economy, the agreement has an asymmetric timetable. The EU will open up its markets faster and more extensively than South Africa. It will liberalize around 95

per cent of its imports from South Africa within ten years, whilst the respective figures on the South African side are around 86 per cent in 12 years. Similarly, gradual liberalization is envisaged for industrial products.

'The EU, already South Africa's largest market, source of foreign investment and development aid, pledged to drop average duties on South African goods from 2.7 per cent to 1.5 per cent. For its part, South Africa agreed to cut average duties on EU goods from 10 per cent to 4.3 per cent.

An UNCTAD SMART assimilation study found that the impact of the agreement is likely to have an uneven effect - with a large impact on European exports to South Africa and a small effect on South African exports to the European market.'[146]

The TDCA will also have an effect on the economies of South Africa's SACU neighbours Botswana, Lesotho, Namibia and Swaziland (BNLS),[147] who may lose 15 per cent of fiscal revenue as tariffs go, and may impose considerable adjustment costs on BNLS countries as they enter a *de facto* free trade area with the EU.[148]

The agreement deals with competition policy in Section D, Articles 35 to 40. It stipulates that restrictions of competition and abuses of dominance affecting trade between the EU and South Africa are incompatible with the agreement.[149] It must be noted that the TDCA does not specifically cover other aspects of competition policy.

Even though South Africa had competition law in place when the EU–South Africa agreement was signed, Article 36 states that if at the entry into force of the Agreement, the contracting Parties do not have the necessary laws and regulations for the implementation of the competition-related provisions of the agreement, they would have to do so within a period of three years.[150] The agreement provides for the establishment of cooperation mechanisms between the parties in the field of competition law and policy.[151] At present cooperation is good on some issues but the level of cooperation depends on particular individuals. According to the authors' interviews, only one person in the Competition Commission (CC) had personal ties with a colleague in Brussels. Without a formal cooperation arrangement only that person in the CC could call their counterpart in DG

Competition to ask for advice or information. But it was thought that with a formal agreement in place all the CC staff would feel able to approach colleagues in Brussels freely.[152]

The EU-South Africa trade agreement (TDCA) does not explicitly mention mergers but it does provides for positive comity in general without specifically excluding them.[153] In at least one case, the EU has vetoed a merger approved by the South African Authorities. But the EU has not always acted without exchanging information with the SA authorities. There has been very valuable informal cooperation between the EU and South Africa[154] (Chetty, 2005), and the South African authorities expect that the TDCA will facilitate informal cooperation.[155]

'Appropriate measures' can be taken by either side, after consultation with the Co-operation Council, if it considers that a particular practice has not been adequately dealt with and is harmful to its interests.[156] Hence, the TDCA also recognizes the competency of both competition authorities, but prescribes consultation before any further action is undertaken.[157]

Where the EU or South Africa considers that anti-competitive activity affecting its important interests is taking place in the other's territory, a request that the matter be investigated ('appropriate remedial action') should be given serious consideration.[158] The authority receiving the request must carefully consider the views and documents provided by its counterpart. However, this does not prejudice the former's 'functions, rights, obligations or independence'.[159]

In case either competition authority decides to undertake an action that 'may have important implications' for the other party, another consultation round is provided for upon request.[160] 'Hence, the agreement commits the competition authorities of both parties to engage in effective communication (or consultation) on those matters where mutual interests are concerned, without setting out specific procedures or any mandatory course of action.'[161]

The agreement also provides for the granting of technical assistance in the competition field by the EU to South Africa.[162]

The typical limitation to information exchange with the EU applies, due to the requirements of professional and business secrecy.[163]

Section E of the agreement deals with 'public aid', Articles 41 to 43. The agreement provides that 'public aid favouring certain firms or the production of certain goods, which distorts or threatens to distort competition, and which does not support a specific public policy objective or objectives of either Party, is incompatible with the proper functioning [of the] Agreement'.[164] The parties also agreed that granting public aid in a fair, equitable and transparent manner is in their interests.[165] The agreement sets out procedures for consultation but essentially leaves both sides with their rights under the WTO to use countervailing duties.[166]

It should be noted that both South Africa and the EU are very active users of anti-dumping proceedings.[167]

Despite the somewhat asymmetrical character of the competition obligations in the agreement, it has been welcomed by the South African Authorities, but interestingly this has been for the anticipated cooperation that is expected but not mandated. Since mergers are the main area where the competition policy concerns of the EU and SA interact, only time will tell whether this is a missed opportunity or an opportunity to create a closer relationship.

Conclusions

The theme of this chapter is that competition provisions in RTAs can fulfil several different functions including:

a) facilitating trade liberalization and in particular providing an opportunity to eliminate anti-dumping or countervailing measures.
b) facilitating cooperation on competition enforcement
c) harmonization of rules.

These have had varying weights in the different agreements surveyed and below there is a summary of the results showing the characteristics of the agreements analysed. Table 3.1 summarizes the

main findings about the cases examined. The table shows the diversity of experience. The data on the use of anti-dumping between parties indicates how serious an issue that has been in recent years. The data are for 2003 (the last year before Polish accession to the EU and for the whole period 1995-2004). The data suggest that there were no CVD measures implemented between the parties to any of these agreements in the period 1994–2005. In cases where anti-dumping has not been eliminated, it has in fact been used in recent times, notably but not only by the EU. Canada and Chile were not significant users against each other before their RTA and it may be that the Canadian motivation was to send a signal to NAFTA rather than to deal with a concrete problem. On the other hand the ANZCERTA agreement did link the abolition of anti-dumping to competition policy. Meanwhile, the retention of the availability of CVDs even where there are RTA-specific anti-subsidy rules and no anti-dumping allowed, is slightly more surprising.

The findings are also summarized with respect to harmonization and cooperation. The intention is to summarize the workings of the agreements not just the formal provisions. On harmonization, agreements are classified as

0) no provisions on harmonization (Canadian and also US agreements)
1) very loose: EU's looser agreements
2) firm/hard harmonization, which normally applies to the EU and its neighbours

In general there is a dichotomy between EU agreements with close neighbours that require adoption of rules like those governing intra-EU trade, and other agreements that do not have such requirements. EU–South Africa sits uneasily in the middle.

None of the agreements have binding rules on co-operation, although *de jure* the EU's near neighbours do not have cooperation provisions in their pre-ECN status; *de facto* they must report very regularly to the EU on their activities. The classification is therefore:

1 soft but symmetrical rules on cooperation, including any procedures for consultations, notification, or comity at all.
2 asymmetric *de facto* obligation of the 'junior' partner to cooperate, which essentially applies to EU candidates.

The categorization of the role of dispute settlement is very tentative given the softness of the obligation in the competition field, and the ambiguities of interpretation. The categories are either whether rules are included or not. It is worth noting that ANZCERTA has no specific DS provisions in the RTA as such.[168] It is very clear that EU agreements move furthest into DS that may affect competition policy (see Garcia-Bercero, 2005).

Table 3.1 Summary of the main characteristics in the case studies

Agreements	Harmoni-zation	Cooperation	Anti-dumping (AD)		State Aid Rules	Dispute Settlement
Description	0- no statement 1- very loose 2- firm/hard harmoni-zation	1- soft but symmetrical rules on cooperation[a] 2- asymmetric *de facto* obligation of weaker states to cooperate[b]	0- no limits on use of AD 1- limits on use of AD	Imposition of AD measures by the contracting parties against each other[c]	0- no specific rules 1- state aid disciplines	0- no rules affecting competition 1- DS covers comp. policy
ANZCERTA	2	1	1	Aus: 0 (0) NZ: 0 (0)	1	0
Canada-Chile (incl. MOU)	0	1	1	Can.[d]: 0 (0) Chile: 0 (0)	1[e]	0
Canada-Costa Rica	0	1	0	Can.: 0 (0) CR: 0 (0)	0	0
EU-Poland	2	2	0	EU: 1 (8)[f] Pol.: 0 (0)	1	1
EU-Turkey	2	2	0	EU: 1 (2) Tr.:0 (0)	1	1
EU-Croatia	2	2	0	EU: 0 (3) Cro.: 0 (0)	1	1
EU-Mexico	0	1	0	EU: 0 (3) Mex.: 0 (1)	0	1[g]
EU-SA	1	1	0	EU: 1 (3) SA: 0 (0)	1	1

[a] Consultations, notification, comity, and so on.
[b] EU accession agreements.
[c] Here the first figure shows the number of measures in place in 2003 (the year before Polish accession) and the figure in brackets for the whole period 1995–2004 – NB.
[d] The indicated country is the one that imposed the measures.
[e] Agriculture only.
[f] No anti-dumping since accession.
[g] According to OECD (2005a) and EU, but see Marsden and Whelan (2005c).

NOTES

[1] Many of the agreements that the authors discuss are between non-contiguous partners and would be better described as preferential rather than regional agreements but we will use the latter term which is more usual.

[2] For a general analysis of these agreements see Cernat and Laird (2003).

[3]Following the accession of the ten new Member States (Cyprus, Czech Republic, Slovakia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, and Slovenia), Bulgaria, Croatia, Romania and Turkey are currently official candidates to joint the EU. Furthermore the EU has signed a Stabilisation and Association Agreement with FYROM (Former Yugoslav Republic of Macedonia).

[4]See the communication from the European Commission (2004c).[5]All these agreements include provisions dedicated to competition law and policy For a comprehensive analysis of the competition elements of these agreements see Holmes *et al*., supra n.2.

[6]Only the agreements with Australia, Chile and Singapore contain specific provisions devoted to competition law and policy.

[7]For an analysis of the Australia–New Zealand Agreement (ANZCERTA) see Section 2.1 of this chapter. It has to be stressed that this list of bilateral agreements is by no means exhaustive. All the free trade agreements can be found at the trade agreements database of the Tuck School of Business at Dartmouth, available at http://cibresearch.tuck.dartmouth.edu/trade_agreements_db/.

[8]See Holmes *et al*. (2005) and OECD (2005a).

[9]This section draws heavily on discussions with our colleague Jim Mathis. See Mathis (2005b).

[10]www.unctad.org/competition

[11]The agreements also include provisions relating to state monopolies, public undertakings and undertakings that have been granted exclusive rights.

[12]The agreements with Moldova, Russia, and Ukraine.

[13]The remaining agreements with CEECs and CAs include a more general provision which stipulates that contracting Parties will examine ways to apply their respective competition laws on a concerted basis in cases where trade between them is affected. See Holmes *et al*., supra n.2.

[14]The agreements with Egypt, Moldova and Ukraine. A similar provision is included in the EU–Russia agreement. Nonetheless, it has to be noted that the EU has signed further separate agreements with accession countries, which implement the competition-related provisions of the agreements, and

also provide for enforcement cooperation mechanisms. Similar competition implementing agreements have been signed with Morocco and Algeria.

[15]See analytically, Holmes *et al*., supra n. 2.

[16]United States — Anti-Dumping Act of 1916, Complaint brought by the EC, Dispute DS 136.

[17]Hindley and Messerlin (1996) refer to a 'sanctuary market'.

[18]See also Estrin and Holmes (1998) and Wooton and Zanardi (2002).

[19]http://europa.eu.int/en/agenda/peco-w/en/chap6.html citing Communication of 13 July 1994 on the pre-accession strategy.

[20]See Szepesi (2004).

[21]See Cremona (2003) on the CEECs.

[22]See analytically OECD (2005a). The OECD study also includes a detailed review of the agreements that provide for consultations as a mechanism for resolving conflicts that arise from the application of the competition rules found in these agreements.

[23]This particular agreement excludes competition provisions from the application of dispute settlement rules (Article 180 of the agreement).

[24]Or the Cooperation Council in the case of the agreement signed with Central Asian ad Eastern European countries.

[25]All the agreements with Candidate Countries, the Euro-Mediterranean agreements and also the agreement with South Africa.

[26]Such an arbitration procedure is not applied in the agreement concluded between the EU and its candidate countries, and the EU–Palestinian Authority interim agreement.

[27]See http://www.fta.gov.au/Default.aspx?ArticleID=1183. 'By the late 1970s, [NZAFTA] and its predecessors had led to the removal of tariffs and quantitative restrictions on 80 per cent of trans-Tasman trade. But [NZAFTA] was complex and lacked an automatic mechanism to move ahead. In March 1980 the concept of 'closer economic relations' between the two countries, to improve living standards and international competitiveness, was introduced in a joint communiqué issued by Prime Ministers Malcolm Fraser and Robert Muldoon'.

[28]See http://www.fta.gov.au/default.aspx?FolderID=284. 'Australia is the largest investor in New Zealand and over half of Australia's total investment in New Zealand is Foreign Direct Investment, reflecting the high level of economic integration'. New Zealand is now Australia's third largest trading partner and its third largest export market. Australia is New Zealand's largest trading partner.

[29]See Department of Foreign Affairs and Trade, Commonwealth of Australia (1997), at point 2.

[30]See Department of Foreign Affairs and Trade, Commonwealth of Australia (1997:79–81) at: 'The 1988 CER Trade in Services Protocol provides for free trans-Tasman trade in all services, with the exception of a number of services which were subject to existing government regulations when the Protocol was signed and which are inscribed in the Annex to the Protocol. Australia currently has inscribed telecommunications, airport services, domestic air services, international aviation (passenger and freight services), coastal shipping, broadcasting and television (limits on foreign ownership), broadcasting and television (short-wave and satellite broadcasting), basic health insurance services, third party insurance, workers' compensation insurance and postal services. New Zealand currently has inscribed airways services, international carriers flying, cabotage, telecommunications, postal services, and coastal shipping.'

[31]See Department of Foreign Affairs and Trade, Commonwealth of Australia (1997), at point 18: 'Some of the specified purposes include protection of essential security interests, protection of public morals and prevention of disorder or crime, protection of human, animal or plant life or health, protection of intellectual or industrial property rights or to prevent unfair, deceptive, or misleading practices, the application of standards or of regulations for the classification, grading or marketing of goods.'

[32]This provision is contained in Articles 4 and 5 of the 1983 CER Agreement and Articles 1 and 2 of the 1988 CER Protocol on the Acceleration of Free Trade in Goods, under which all transitional arrangements and temporary exceptions to the basic free trade rule were eliminated as of 1 July 1990.

[33]See Department of Foreign Affairs and Trade, Commonwealth of Australia (1997), at point 21: 'The rules were amended by an Exchange of Letters of 6 October 1992. The provisions of Article 3 have been clarified in a further Exchange of Letters also dated 6 October 1992 and in the 1988 Exchange of Letters and Joint Understanding on Harmonization of Customs Policies and Procedures. These documents together constitute the CER rules of origin.'

[34]See Department of Foreign Affairs and Trade, Commonwealth of Australia (1997:85–9).

[35]See Department of Foreign Affairs and Trade, Commonwealth of Australia (1997:67–8).

[36]See Ahdar (1991).

[37]See Hoekman (1998a:21).

[38]Pursuant to Article 4 of the 1988 ANZCERTA Protocol on Acceleration of Free Trade in Goods. Both countries are active users of anti-dumping procedures against other Parties. Between 1995 and 2004, ANZCERTA countries initiated anti-dumping proceedings 219 times while they were targeted at 25

instances. ANZCERTA countries applied anti-dumping measures at 68 instances while they were applied anti-dumping measures on 11 occasions. ANZCERTA countries are also active users of countervailing measures. ANZCERTA countries initiated countervailing proceedings in 12 cases while they were targeted only once. Australia used countervailing measures once while New Zealand used them four times. Australia was the target of countervailing measures once while New Zealand was never the target.

[39]See Department of Foreign Affairs and Trade, Commonwealth of Australia (1997), at point 70.

[40]See Department of Foreign Affairs and Trade, Commonwealth of Australia (1997:71–2). 'These included initiatives relating to company accounting standards, takeovers, consumer protection, enforcing each country's judgments and orders in the other country, the settlement of investment disputes, patents, circuit layouts, and mutual assistance in business regulation.'

[41]See Department of Foreign Affairs and Trade, Commonwealth of Australia (1997), at points 73–4.

[42]See Department of Foreign Affairs and Trade, Commonwealth of Australia (1997), at point 75. 'The business law harmonization process is being coordinated by the Business Law Division of the Australian Treasury and the New Zealand Ministry of Commerce.'

[43]See An Australia–United States Free Trade Agreement – Issues and Implications, annex 7 http://www.dfat.gov.au/publications/aus_us_fta_mon/

[44]This case study draws heavily but not exclusively on Marsden and Whelan (2005a). Their paper was written for the CEPR project funded by the European Commission (through the Sixth Framework Programme EC Contract no. SCS8-CT-2004-502564). The current authors are responsible for any errors in interpreting their conclusions.

[45]The full text of the Canada-Chile Free Trade Agreement is available at http://www.sice.oas.org/trade/chican_e/chcatoc.asp

[46]Article A-01: Establishment of the Free Trade Area CCFTA.

[47]See Article 1501.2 NAFTA and Article J-01(2) CCFTA, also cited in Marsden and Whelan (2005a).

[48]See Article 1501.2 NAFTA and Article J-01(3) CCFTA, also cited in Marsden and Whelan (2005a).

[49]The full text of the Memorandum of Understanding between the Commissioner of Competition (Canada) and the Fiscal Nacional Economico (Chile) regarding the application of their competition laws is available at http://www.oecd.org/dataoecd/37/39/1818084.pdf

[50]In Article II.1c of MOU parties agreed to notify the enforcement activities of the party which may affect the interest of the other party including those that: 'involve mergers or acquisitions in which one or more of the parties to the transaction, or a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other Party's territory'.

[51]According to the WTO website the anti-dumping measures were never used against either party and as far as the authors are aware the elimination of anti-dumping measures was indeed implemented.

[52]See http://www.parl.gc.ca/english/hansard/130_97-02-14/130GO3E.html

[53]This case study draws heavily but not exclusively on Marsden and Whelan (2005b). Their paper was written for the CEPR project funded by the European Commission (through the Sixth Framework Programme EC Contract no. SCS8-CT-2004-502564). The current authors are responsible for any errors in interpreting their conclusions and are grateful for additional material from the Costa Rican Embassy in Washington DC.

[54]The full text of the Canada–Costa Rica Free Trade Agreement is available at http://www.sice.oas.org/Trade/cancr/English/cancrin.asp

[55]Statement by Costa Rican official, e-mailed to the authors 8 August 2005.

[56] See Table 1. Taxonomy of competition-related provisions in 47 regional trading agreements in OECD, 2005a:20.

[57]See Marsden and Whelan (2005b:28) and footnotes 106–108.

[58]The full text of CAFTA-DR is available at http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp. It has no competition provisions, except in the telecommunications chapter, which however does not apply to Costa Rica.

[59]For full text see: http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp

[60]http://usinfo.state.gov/wh/americas/regional_trade/drcafta.html

[61]http://www.sice.oas.org/TPD/USA_CAFTA/USTR%20Briefing%20book/Environm_Prov.pdf

[62]Statement by Costa Rican official e-mailed to the authors 8 August 2005.

[63]See Annex 13 Specific Commitments of Costa Rica on Telecommunications Services, paragraph 8.

[64]The Europe Agreement signing between Poland and the European Communities and its Members States in December 1991 available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=21993A1231(18)&model=guichett

[65]Article 122 EC-Poland Europe Agreement

[66]Other Central and Eastern European countries (CEECs) who signed the Europe Agreement were: Bulgaria (March 1993), the Czech Republic (October 1993), Estonia (June 1995), Hungary (December 1991), Latvia (June 1995), Lithuania (June 1995), Romania (February 1993), Slovakia (October 1993), Slovenia (June 1996). Apart from Bulgaria and Romania, the rest of these countries together with Poland, Malta and Cyprus entered the European Union on 1 May 2004.

[67]Article 63.1 EC–Poland Europe Agreement.

[68]See Chapter 6.5 of European Commission (1995), citing Communication of 13 July 1994 on the pre-accession strategy. Available at http://europa.eu.int/en/agenda/peco-w/en/chap6.html

[69]This body was initially called the Antimonopoly Office. Since October 1996 the Polish Antimonopoly Office has been called the Office for Competition and Consumer Protection (UOKIK).

[70]UOKIK stands for the Polish abbreviation from Office for Competition and Consumer Protection.

[71]Articles 37 and 38 of the Act Concerning the Conditions of Accession provide for the possibility of contingent protection imposed by the Commission between old and new member states during a three-year transition period. See http://www.europarl.eu.int/enlargement_new/treaty/default_en.htm

[72]See http://www.wto.org/english/tratop_e/adp_e/adp_e.htm

[73]Article 63.1(iii) EC-Poland EA.

[74]Article 63.4(b) EC-Poland EA.

[75]See Cremona (2003).

[76]See http://www.wto.org/english/tratop_e/scm_e/scm_e.htm

[77]The Conditions for Admissibility and Supervising of State Aid to Entrepreneurs Act entered into force in January 2001. This Act applied the basic principles of the EU state aid legislation (Gwiazda, 2005:173).

[78]OECD Competition Committee 2003 "Annual Report on Competition Policy Developments in Poland" p. 11 available at http://www.oecd.org/dataoecd/37/29/34720956.pdf

[79]Article 63.8 EC-Poland AE.

[80]For example Article 63.5 EC-Poland EA.

[81]Article 105.1 EC-Poland EA.

[82]Article 105.4 EC-Poland EA.

[83]From the interview with a senior official of the Polish Office for Competition and Consumer Protection (UOKIK) July 2005.

[84]*Ibid.*

[85]*Ibid.*

[86]*Ibid.*

[87]See Agreement establishing an Association between the European Economic Community and Turkey, 24 12.1973, C 113/2.

[88]See Decision No 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union, L 35/1. See, also, Mercenier. and Yeldan (1997) and Togan (2001).

[89]See European Council, Presidency Conclusions on Turkey – Brussels, 16/17 December 2004, at p.2. For a study of Turkey–EU trade relations and the effects of possible Turkish accession to the EU, see Togan (2004).

[90]See European Commission (2004b:17), SEC 1202.

[91]See, Metin-Özcan *et al.* (2002) for the structural consequences of Turkey's post-1980 orientation on the market concentration and accumulation patterns in Turkish manufacturing industries.

[92]See Togan, S. (2001:18).

[93]See Chapter 1.

[94]At the same period the EU initiated anti-dumping proceedings 303 times while the EU was targeted on 55 occasions. The EU applied anti-dumping measures in 193 instances, while the EU was applied anti-dumping measures 38 times. Turkey initiated anti-dumping proceedings on 89 occasions, while Turkey was targeted 34 times. Turkey applied anti-dumping measures 77 times while Turkey was applied anti-dumping measures in 22 instances (twice by the EU).

[95]The Turkish Competition Authority ('Rekabet Kurumu').

[96]See Article 37(2).

[97]See Article 39(1).

[98]See Article 39(3).

[99]See Article 39(4).

[100]See Article 39(5).

[101]See Article 40.

[102]See Article 42.

[103]See Article 43(1).

[104]See Article 43(2).

[105]See Article 43(3).

[106]See OECD (2005b), at points 8 and 9.

[107]See European Commission (2004b:21), SEC 1202.

[108]See OECD (2005b), at point 53.

[109]See, for example, European Commission (2004a:93–4).

[110]See European Commission (2004a:21).

[111]See OECD (2005b:91).

[112]See OECD (2005b:92).

[113]See Act on Prevention of Unfair Competition in Imports (Law No. 3577) and Regulations on Prevention of Unfair Competition in Imports.

[114]See OECD (2005b:93).

[115]The authors are very grateful for information provided by the Croatian Competition Agency officials through telephone interviews and e-mails, July 2005

[116]European Union website 2005 "The Stabilisation and Association Agreement with Croatia enters into force today", 1 February, available at http://europa.eu.int/comm/external_relations/see/croatia/com01_371en.pdf

[117]As the *Interim Agreement on trade and trade-related matters between the EC and Croatia*

[118]Available at http://europa.eu.int/comm/external_relations/see/news/2005/ip05_122.htm

[119]Article 68 EC-Poland EA.

[120]Article 70.1 EU-Croatia SAA.

[121]See http://europa.eu.int/en/agenda/peco-w/en/chap6.html

[122]Communication from the European Commission of 13 July 1994 available at http://europa.eu.int/en/agenda/peco-w/en/chap6.html. Italics introduced by the authors.

[123]Article 70.9 EU–Croatia SAA.

[124]From an interview with the Croatian Competition Authority.

[125]German Foundation for Internat Legal

[126]Community Assistance for Reconstruction, Development and Stabilisation programme

[127]*Ibid.*

[128]*Ibid.*

[129]Source: interview

[130]This is true for all EU non-members.

[131]Initiative on amendments to the State Aid Acthttp://www.crocompet.hr/slike/en_InitiativeAmendmentsStateAidActG.pdf

[132]Press release 21.07.05 http://www.crocompet.hr/eng/press.asp?id=85

[133]From an interview with theCCA.

[134]This case study draws heavily but not exclusively on Marsden and Whelan (2005c). Their paper was written for the CEPR project funded by the European Commission (through the Sixth Framework Programme EC Contract no. SCS8-CT-2004-502564). The current authors are responsible for any errors in interpreting their conclusions.

[135]The full text of the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, and the United Mexican States is available at http://europa.eu.int/comm/external_relations/mexico/doc/a3_acuerdo_en.pdf

[136]Technically this was a decision of the EU–Mexico Joint Council of 23 March 2000.

[137]Decision No 2/2001 of the EU–Mexico Joint Council 27 February 2001 implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership, Political Coordination and Cooperation Agreement http://www.sice.oas.org/Trade/mexeufta/english/dec201a.asp

[138]Article 3.3.b of the Competition Policy Annex XV to the EUMFTA makes references to services.

[139]Annex XV of EUMFTA Article 3 specifies on which occasion the competition authority should notify the other party on its enforcement activities.

[140]Interestingly, Mexico belongs to the WTO coalition 'Friends of Anti-dumping Negotiations' seeking to curtail the use of anti-dumping law (Young and Wainio, 2005).

[141]http://europa.eu.int/comm/trade/issues/bilateral/countries/mexico/index_en.htm

[142]See Table 1. Taxonomy of competition-related provisions in 47 regional trading agreements in OECD, 2005a:20.

[143]This case study draws heavily but not exclusively on Chetty (2005), which was written for the CEPR project funded by the European Commission (through the Sixth Framework Programme EC Contract no. SCS8-CT-2004-502564). But the current authors are responsible for any errors in interpreting their conclusions and are grateful for interview material from South African Competition Commission officials, Pretoria, September 2004.

[144]See http://www.dfa.gov.za/docs/2005/euc0623.htm. 'At the regional and continental levels, several processes relate Africa (South Africa included and playing a very significant role) to the EU. These include the Berlin Process (SADC), the Cairo Process (Africa), the Cotonou Partnership

Agreement (CPA) and the New Partnership for Africa's Development (NEPAD).'

[145]See http://www.europa.eu.int/scadplus/leg/en/lvb/r12201.htm. 'The aim of the agreement is to provide an appropriate framework for dialogue between the parties, to support the efforts made by South Africa to strengthen the economic and social foundations of its transition process, to promote regional cooperation and economic integration in southern Africa in order to contribute to its economic and social development, to encourage the development and liberalisation of trade in goods, services and capital between the parties, to encourage the integration of South Africa in the world economy and to promote cooperation between the Community and South Africa.'

[146]See Bertelmans-Scot (2000) available at: http://www.uwc.ac.za/ECSA-SA/projects/papers/development&cooperation.htm. It is also reported that 'The study projects an increase in EU exports to South Africa of between 2.3 per cent and 12.3 per cent from 1996 volumes and between only 1.3 per cent and 1.4 per cent increase in South African exports to the EU from 1996 volumes.'

[147]See Irving (1999:3): 'Having achieved the deepest form of regional integration on the African continent, SACU links the trade regimes of its five members and also interlinks the value of the currencies of SACU members, with the exception of Botswana's currency, the pula. Since trade between SACU economies is tariff free, a South African free trade agreement with the EU would therefore in effect be extended to the smaller BLNS economies.'

[148]See Irving (1999:1 and 3). See also Melber (2005b) for a substantive analysis of issues regarding Africa.

[149]See, for the definitions, Article 35.

[150]It has to be noted that Annex VIII of the Agreement clearly states that anti-competitive practices will be assessed in the case of the EU on the basis of Articles 81 and 82 of the EC Treaty, while with regard to South Africa will be assessed on the basis of South African competition law. Thus, there is no obligation created for South Africa to approximate its competition laws to those of the EU. Szepesi (2004).

[151]See Holmes *et al.* (2005:7 and 22).

[152]Interviews with Competition Commission SA Pretoria 14 September 2004.

[153]See Article 38.

[154]See Chetty (2005).

[155]Interviews with Competition Commission SA Pretoria 14 September 2004.

[156]See Article 37.

[157]See Szepesi (2004:3).

[158]See Article 38.

[159]See Article 38(3).

[160]See Article 38(4).

[161]See Szepesi (2004:3).

[162]See Article 39.

[163]See Article 40.

[164]See Article 41(1).

[165]See Article 41(2).

[166]See Article 44(1).

[167]South Africa was the initiator in 173 cases and South Africa was the target in 49 instances. The EU has initiated anti-dumping proceedings in three cases against South Africa but South Africa has never used it against the EU. In all three cases, the EU imposed anti-dumping measures against South Africa. As far as we are aware neither South Africa nor the EU have used countervailing actions against each other.

[168]See Footnote 44.

4

Lessons from the negotiation and enforcement of competition provisions in South-South and North-South RTAs

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1. Introduction

Regional trade agreements (RTAs) have multiplied in recent years. They have become an increasingly popular means of cementing trade relationships bilaterally, plurilaterally and regionally. The popularity of these agreements has taken place against the backdrop of the perceived failure of consensus-driven negotiations on competition issues at the World Trade Organization (WTO). The contents of the RTAs notified to the WTO over the past several years have been characterized by the inclusion of non-core trade-related issues, one of which is competition.

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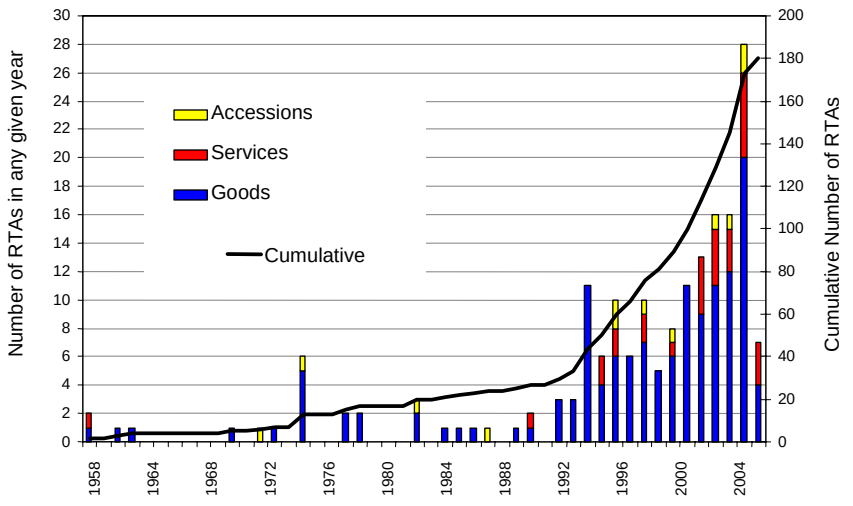
Competition law and policy was placed on the multilateral agenda in 1972 at Santiago, Chile, when UNCTAD III decided to study restrictive business practices adversely affecting trade and development. It culminated with the negotiation of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (UN Set on Competition) under the aegis of the United Nations Conference on Trade and Development (UNCTAD) and unanimously adopted by the UN General Assembly in the Resolution 35/61 of 5 December 1980. It was the first and remains the only multilateral agreement to address anti-competitive behaviour. In the UN Set, developed States are encouraged to make provision for the needs of less-developed countries. The UN Set as a whole aims at facilitating the adoption and strengthening of laws and policies in this area at national and regional levels. In Article E, "*Principles and Rules for States at National, Regional and Subregional Levels*", the UN Set calls upon States to establish appropriate mechanisms at regional and subregional levels to promote exchange of information on restrictive business practices and on the application of national laws and policies in this area, and to assist each other to their mutual advantage regarding control of restrictive business practices at regional and subregional levels. The inclusion of competition provisions in the majority of RTAs - including those that involve at least one less-developed partner – can be read as a signal that developing countries have recognized the importance of competition as a means of preventing trade initiatives from being undermined by restrictive business practices.

This Chapter analyses competition-related provisions used by developing countries in their RTAs. In accordance with UNCTAD's emphasis on capacity building, a questionnaire was designed to gather information from competition policy professionals for the analysis presented here. The aim of the questionnaire was to assess the characteristics of competition provisions in RTAs from a developing country perspective – their scope, their application and success or otherwise in fulfilling the goals originally set for them. In addition to the questionnaire, extensive research was undertaken into competition provisions included in RTAs that took place among and between developing and developed countries. RTAs signed exclusively between developed countries were not included. The results of both the UNCTAD Questionnaire[1] and the accompanying research have provided information from which a number of lessons

and conclusions can be formulated. These conclusions are offered to competition law and policy officials and experts in developing countries in the hope that future negotiations, informed by this work, may be increasingly fruitful.

As an indication of the popularity of RTAs, between January 2004 and February 2005 alone more than 43 RTAs were notified to the WTO under their General Agreement on Tariffs and Trade (GATT) Article XXIV and General Agreement on Trade in Services (GATS) Article V obligations, a fact that makes this period the most prolific period of RTA creation to date. There are 317 RTAs currently notified to the WTO, of which 56 involve at least one developing country.[2] The WTO estimates that there are approximately another 65 RTAs in operation that have not yet been notified. WTO Members are obliged to notify their agreements under Article XXIV of the GATT and Article V of the GATS, but the increasing popularity of RTAs, as well as the legal

Figure 4.1 Notified RTAs to the GATT/WTO by the date of entry into force, 1948-2005



Legend: The column on the right-hand side of the chart is a cumulative figure that refers to the total number of RTAs in force and does not count inactive RTAs or accessions of new members to existing RTAs. Source: (Cawford and Fiorentino, 2005).

ambiguities surrounding the notification process, means that notifications lag behind the number of active RTAs (Cawford and Fiorentino, 2005).[3]

Figure 4.1 shows the number of notified RTAs to the GATT/WTO since the 1950s. The fact that both the numbers of RTAs and also the rate of increase of RTAs being signed are rising indicates that RTAs are becoming the vehicle of recourse for countries that wish to settle outstanding trade issues, as well as trade-related issues that cannot be effectively dealt with on a multilateral level. The inclusion of provisions pertaining to restrictive business practices in these agreements has ensured that a certain level of familiarity and competence in competition law and policy has been achieved in developing and transition countries as a result of their membership in various RTAs. Competition law, policy, enforcement and expertise have all increased as a result of this trend towards regionalism.

Developing countries seem almost as likely to consolidate RTAs among themselves as with developed countries. Table 4.1 shows that developing countries have been prolific in signing agreements with each other. This is indicative of the fact that, as per the replies to the UNCTAD Questionnaire examined in more detail below, RTAs are being signed between countries for cooperative reasons (the ability to exchange information and assessment reports with counterparts in other developing countries), as much as for developmental reasons (in the sense of benefiting from the technical cooperation and expertise normally offered by developed countries.) Table 4.1 shows this trend.

Table 4.1 The profile of developing country partners in regional trade agreements

Developing country partner with …	Number	Percentage
Developed partner	28	54
Developing partner	24	46
Total	52[1]	100

Source: Compiled from Table 4A.1 in Appendix 1.

[1] Four observations are missing here because the treaty texts could not be found by the time of publication.

The stated aim of competition clauses, as made clear in the UN Set on Competition, is that the benefits of trade are not undermined by anti-competitive practices. Several other factors are also important: firstly, the agenda-setting power of larger trading powers and institutional donors has an influence on less-developed partners during the negotiation of an RTA; secondly, developing countries can grant credibility to internal reforms by including them in an RTA; and, thirdly, competition provisions can assist in economic integration and market access.

Firstly, larger trading partners have encouraged the inclusion of competition provisions within RTAs. The European Union (EU), for example, has concentrated heavily on the adoption of competition law because of its importance to the common market. Likewise, the European Free Trade Area (EFTA) has emphasized competition agreements in its RTAs with developing countries. The United States also typically includes competition provisions in its RTAs. Despite this, developing countries are still less likely to include competition provisions in RTAs if no developed country partner is involved. Table 4.2 shows the number of RTAs containing competition provisions signed: between developing and developed countries (the EC and the US have been used as examples of developed country partners because they are the most prolific initiators of trade agreements with developing countries); and, between developing and other developing

Table 4.2 Number of RTAs that contain competition clauses involving developing countries signed with the EC or US

	EC		USA		Developing Countries	
	Number	%	Number	%	Number	%
No. of RTAs with developing countries containing competition provisions notified to the WTO	8	72	3	75	24	46
Total number of known RTAs with developing countries notified to the WTO	11	100	4	100	52	100

Source: Compiled from Table 4A.1

countries. Institutional donors such as the World Bank or other regional development banks have encouraged emerging economies to adopt competition laws and have provided assistance to those countries to help them establish such regimes.

Secondly, RTAs have been seen by developing countries in particular as a useful means of formalizing fundamental economic reforms such as the privatization of state monopolies. By formalizing competition obligations within treaties, the governments of developing countries seek to avoid interest groups from interfering with trade liberalization. (This is particularly true of transition economies, where entrenched monopolies constitute a small, well-organized group with strong connections to the government. The particular case of transition economies, however, lies outside the scope of this chapter, and has been covered in detail by other authors.)[4]

Thirdly, the adoption of competition rules prevents vertical restrictions and cartels from forming. Both vertical restrictions and cartels may divide markets along national lines. Competition provisions should also help to prevent the formation of cartels, which have a market-partitioning effect between countries. Competition provisions therefore may have a positive effect on economic integration between treaty partners.

The inclusion of competition clauses was rationalized by the recognition among developing countries that 'unilateral liberalization does not guarantee the openness of target markets; in an economy that is undergoing globalization and regionalization simultaneously, countries seek strategies for positioning themselves in major import markets in ways that will give their products greater and more reliable access to those markets' (Kuwayama, 2005). For developing countries, including competition clauses in regional treaties has theoretically opened the doors to these markets.

By highlighting developing country experiences associated with competition provisions in RTAs, the reader will be able to assess the most useful and the most troublesome elements of these treaties from a developing country perspective. This section below refers to the 56 RTAs involving developing countries notified to the WTO since its inception in 1995 (of which four treaty texts were unable to be found

at the time of writing), plus some other agreements not yet notified but that were mentioned by respondents to the UNCTAD Questionnaire. Although this chapter refers to the views, opinions and needs of developing countries, it is important to note that the heterogeneous nature of this categorization of countries necessarily masks important differences between individual countries. To a certain extent, these differences will be of an ideological nature, but disagreements are also likely to arise from the countries' individual features.

Occasional reference to peripheral agreements involving competition law and policy such as agency-to-agency agreements (ATAs) has been made throughout the text. Their inclusion is as a result of references made to them by questionnaire respondents. Mutual Legal Assistance Treaties (MLATs) were also referred to sporadically by questionnaire respondents and have likewise been included. The growth of competition agreements outside of RTAs is an interesting development and one that will hopefully attract further research.

This chapter is divided into several sections. This introduction is followed by Section 2, which outlines the motivation for this study. Section 3 briefly examines the peripheral issues of ATAs and MLATs. Section 4 deals with some caveats associated with the techniques employed in gathering the data. Section 5 sets out the major themes drawn from the UNCTAD Questionnaire, which leads to the lessons learnt and conclusions drawn from the experiences of developing country competition policy practitioners in Section 6. A useful table summarizing every RTA notified to the WTO involving at least one developing country can be found in Appendix I.

2. Motivation for this study

The authors have been guided by the assumption that policy makers from developing countries would welcome practical advice in addition to the theoretical arguments that have proliferated around the subject of RTAs.

This work is significant for two other reasons. Firstly, by examining the lessons from several countries' implementation of their trade agreements, it is possible to learn about the practical realities of engineering a response to commitments made under RTAs – what works? What doesn't work? What practicalities run counter to the original intention of the treaty? Secondly, the real world examples portrayed by the answers to the questionnaire may suggest some proposals for making these bilateral or regional negotiations more effective in the future. It is hoped that negotiators will be able to use this chapter as a reference to assist them build more substantial competition provisions.

The methodology adopted in this chapter is not new. Several international organizations and civil society groups have undertaken research in this area, using a similar approach. The work of the OECD on competition provisions in RTAs is a recent example. The OECD (2005a) surveyed existing RTAs and contrasted the breadth of competition provisions within them. Their approach provided a useful starting point for researchers interested in the means by which competition has been incorporated into bilateral and plurilateral agreements between countries, and indicated the issues of importance to individual countries. Silva (2004) carried out a similar exercise with countries from the Latin American and Caribbean (LAC) region. The analysis presented here builds upon their work and adds to it in several ways. It complements previous work by submitting a questionnaire to a select group of competition policy experts and practitioners active in the field of competition and knowledgeable about their own country's RTA commitments. This questionnaire has identified aspects of competition clauses in RTAs that have been most useful to them. Their experiences will in turn ensure that negotiators officials and experts in developing countries can seek guidance from the examples included in this chapter.

To make the chapter as practical as possible, competition policy officials and experts in developing countries were surveyed and their responses to a number of questions were recorded. The UNCTAD Questionnaire on competition provisions in RTAs was devised by the UNCTAD Secretariat, and carried out between May and July 2005. The respondents came from developing countries but shared in common the fact that they were all active researchers or practitioners within the field of competition law and policy and were familiar with

the various RTAs to which their own country was a party. In several places throughout the chapter, the answers of these respondents have been quoted. The anonymity of the questionnaire participants has been preserved.

Of the RTAs examined in this chapter, the majority were signed after 1995 (though several are far older) and can be said to represent recent trends in developing country trade agreements with respect to the scope – broader and deeper than before – of their commitments and the partners with whom they have drawn up treaties. It is worth noting that of the 52 developing country agreements examined in the process of compiling this chapter (for which treaty texts were available), 34 (or 65 per cent)[5] contained some sort of competition provision. The widespread inclusion of competition in RTAs involving developing countries indicates the importance of this issue.

The UNCTAD Questionnaire has generated ample evidence and useful information. For ease of reference, this information has been extracted and discussed under several headings. Several themes emerged from the questionnaire. Each of these themes has been discussed and analysed with the intention of assisting negotiators and practitioners from developing countries to understand the problems and issues based on real-life cases described by their counterparts while working in the field of competition law and policy. These experiences were distilled into the following subject areas: cooperation, technical assistance, and the interaction between national and supranational law and dispute settlement.

Every RTA involving at least one developing country that has been notified to the WTO since 1995 has been examined in the writing of this chapter. In addition, the authors received feedback from a number of competition authority officials and experts in select developing countries. Their experiences with the application of competition clauses in RTAs gave additional depth to the findings discussed here. Table 4.3 lists the countries that replied to the UNCTAD Questionnaire or in which interviews were carried out.

Table 4.3 Countries that replied to the Questionnaire or in which interviews were carried out

Respondents country of origin	Profile(s) of respondent(s)	Agreements (including those with competition provisions) on which the respondent commented
Argentina	Competition authority; Competition expert	MERCOSUR, Brazil
Brazil	Competition authority	MERCOSUR, Argentina, US, Russia and Portugal
Burkina Faso	Competition expert	WAEMU
Chile	Competition authority; Negotiator	US, Canada, Peru, EU, EFTA, South Korea
China	Ministry of Commerce	Hong Kong, Macau
Colombia	Competition authority	Andean Community, US, G-3[1]
Costa Rica	Competition authority	Canada, US, CARICOM
Jamaica	Competition authority	Caribbean Community, CARICOM, Dominican Republic, Venezuela, Cuba, Colombia, Costa Rica.
Jordan	Competition authority	Turkey, EC
Kenya	Competition authority	COMESA, EAC
South Korea	Competition authority	Chile, Australia, CIS, Latvia, Romania, Mexico, EC
Mexico	Competition authority	NAFTA, US, Canada, G-3, Costa Rica, Uruguay, Israel, South Korea, Chile, Japan, EFTA, EC, Russian Federation
Namibia	Ministry of Trade and Industry	COMESA, SACU, SADC
Paraguay	Competition expert	MERCOSUR
Peru	Competition authority	Andean Community, US, Chile, Singapore (APEC)
South Africa	Competition expert	SACU, SADC
Thailand	Competition authority	APEC
Uruguay	Competition authority	MERCOSUR
Zambia	Competition authority	COMESA, SADC, Zimbabwe, South Africa

Source: UNCTAD Questionnaire results.

[1]Colombia, Mexico and Venezuela.

RTAs are signed for a multitude of reasons. For small countries, RTAs represent a means of accessing the markets of larger trading partners, and as a means of ensuring that they are not excluded from future trade agreements (Anderson and Blackhurst, 1993) .The proliferation of RTAs since the 1990s, particularly on the part of large countries such as the United States and the European Union, has increased the pressure on smaller trading partners to create a network of bilateral RTAs to ensure they are not excluded from further alliances (Baldwin, 1994). For smaller countries, an RTA may create an opportunity to gain from product areas in which they would not have an international comparative advantage, and to act as a signalling device of regulatory quality to potential investors (Clarke, 2004, WTO, 2003b). When the RTAs are signed among countries with similar levels of development (less asymmetry between the partners), especially those taking place in regional integration schemes, they can generate knowledge leading to greater globalization through an 'open regionalism' strategy (ECLAC, 1994).[6]

The inclusion of competition clauses in RTAs has been particularly beneficial for developing countries, because they stand to lose the most from the anti-competitive practices of multinational corporations. Representatives of developing countries in the negotiations leading up to the Cancun meeting of the WTO have noted that the majority of cross-border anti-competitive practices stemmed from firms based in developed countries.[7] Levenstein and Suslow (2001) note that many examples of international cartels involve firms headquartered in the developed world with substantial exports to developing countries. Looking at a group of 'cartelized' products, they note that:

Examining these sixteen products – which were cartelised at some point during the 1990s and for which we were able to obtain reasonably reliable trade data – the total value of such 'cartel-affected' imports to developing countries was $81.1 billion. This made up 6.7% of all imports to developing countries. It is equal to 1.2% of their combined GDP.

RTAs therefore represent a means whereby the benefits of competition clauses can ensure that the most harmful effects of opening their markets to developed countries will be mitigated.

3. Other competition agreements: Agency-to-Agency Agreements and Mutual Legal Assistance Treaties

Cooperation between competition agencies also exists outside the framework of RTAs. Several respondents to the UNCTAD Questionnaire reported close contact with their counterparts in other countries even though no RTA had been signed between them.[8] Developed countries seem more likely to formalize this process through an ATA (Canada-Australia, Canada-New Zealand) than developing countries, which rely upon informal contact with their counterparts at foreign competition authorities.

ATAs are used by competition authorities to arrange cooperation regarding competition when there is no regional trade agreement. ATAs signal that the competition clauses in RTAs are not considered to have gone far enough. Several respondents implied that RTAs were engineered to the satisfaction of trade negotiators, and that ancillary issues, such as competition, were not negotiated to an extent that satisfied competition authorities.

Marsden and Whelan (2005a) point out that the Canada–Chile ATAs was modelled on the competition provision provided as part of the RTA, but that it went into much greater detail. In other words, the RTA served as a template for the design, implementation and application of the subsequent Memorandum of Understanding (MOU) on competition law and policy. The latter included a framework for notification, cooperation and coordination of enforcement activities, information exchange and conflict avoidance. The Canada-Costa Rica agreement, on the other hand, contains a comprehensive chapter on competition, and a further agreement in the form of an ATA was not considered necessary. ATAs have complemented the scope of cooperation, particularly in instances when RTAs were not comprehensive.

The motivation for ATAs and MLATs, according to respondents, stems from a lack of satisfaction among competition authority staff members about the trade focus of the provisions on competition included in RTAs. This motivates them to forge networks independent of the trade agreements. One questionnaire response from Uruguay

commented that the MERCOSUR Protocol for the Defence of Competition (also known as the Fortaleza Protocol) was too ambitious and not considered a genuine tool to solve issues of competition policy as it was too trade centred. A similar response from a Latin American respondent stated that there was a coordination problem between the trade negotiators and the competition negotiators during the process of creating the RTA, leaving the competition authority of the respondent's country dissatisfied with the end result.

MLATs differ from ATAs_in the sense that the former are more specifically focused on governing the ways in which two or more countries may cooperate on legal matters. It provides a framework for cooperation on information exchange, particularly in regard to serving warrants and interviewing witnesses in criminal prosecutions, notification of specific enforcement activities that will affect the interests of the other party, and for avoiding disputes. An MLAT may allow the authority of one country to request authorities in the MLAT partner state to take a testimony on their behalf and assist in imposing fines. A detailed MLAT may even allow extradition for competition law issues or even technical assistance. As with ATAs, MLATs are a recent phenomenon and are not common among developing countries. The issue of MLATs was only briefly touched upon in the questionnaire results and is included here as an indicator of future trends in competition agreements.

4. Caveats concerning data

The details of many agreements have been notified to the WTO but not yet ratified or, at least, are not yet in official operation. The authors have included these agreements because non-ratification does not necessarily mean that the treaty is not functioning, even if those functions remain informal. Notification of such a treaty to the WTO indicates the intention of ratification and the authors felt that inclusion was more useful than exclusion in such cases.

Finally, this chapter does not claim to universally include every bilateral, plurilateral or regional agreement involving a developing country. Given that the only resource for all RTAs is the database maintained by the WTO of RTAs notified by Member States under their GATT Article XXIV and GATS Article V obligations, the chapter

focuses mainly on those agreements notified to the WTO with some reference to other agreements mentioned by questionnaire respondents. The authors were restricted to the RTAs, plus some agreements mentioned by the questionnaire respondents (see Table A.1 in Appendix 1 and Table 4.3[9] for a full summary of all agreements referred to in the compilation of this Chapter). The WTO is commonly notified after the RTA has been agreed, sometimes after it has been ratified and occasionally not at all. Therefore, it may be possible to uncover RTAs relevant to this chapter that have not been included here. Thanks to a network developed by UNCTAD technical cooperation activities and ECLAC research, several agreements that have not yet been formally notified to the WTO are also included.

5. Major themes from questionnaire results

The inclusion of competition provisions in RTAs was felt by many respondents to the UNCTAD Questionnaire to possibly represent a reaction to the lack of agreement on a multilateral framework for competition. The removal of competition from the negotiating agenda of the Doha round at the WTO was felt to have exacerbated this difficulty. This was emphasized by the stagnation of the Free Trade Area for the Americas (FTAA) negotiations which showed clearly the diverse criteria from the LAC countries and the US and Canada, on issues including competition law and policy.[10] The efforts of other international organizations have not been deemed sufficient (in the eyes of many of our respondents) to compensate for this perceived setback.

5.1 Cooperation

Cooperation between competition agencies has arisen from and complemented RTAs. Several respondents to the above-mentioned UNCTAD Questionnaire reported close contact with counterparts in other countries even though no RTA had been signed between them. The contact between competition authorities, resulting from membership of the International Competition Network (ICN), has facilitated this phenomenon. Developed countries and more advanced developing countries seem more likely to formalize this process

through an ATA (for example, US-EU, Canada-Australia, Canada-New Zealand, and recently Argentina-Brazil)[11] than developing countries. The Mutual Legal Assistance in Criminal Matters Treaties (MLATs) are a relatively recent development and are becoming more widespread through the activity of the US, which has concluded MLATs with Australia, Canada, the EC, Israel and Japan but only recently has concluded MLATs with developing countries such as Brazil and a number of others[12] (US Department of Justice (DOJ), 2005).

Cooperation between competition authorities may take several forms. It may be informal, in the sense that personal relationships may play a role, or formalized via an agreement. Agreements on competition may take the form of an ATA, an MLAT or a competition provision embedded within an RTA. RTAs and, more recently, ATAs have become a popular means of formalizing cooperation between competition authorities as a result of the failure to reach consensus on a set of binding multilateral competition rules.

Globalization has created pressure on competition agencies to cooperate. The cross-border nature of firm behaviour in the form of mergers and acquisitions, and anti-competitive behaviour such as international cartels, has made it necessary for competition authorities in different countries to rely on each other for assistance in gathering information and conducting successful prosecutions.[13] Without these agreements, the benefits of trade liberalization may be undermined by anti-competitive practices.

The benefits of cooperation for developing countries are magnified when they take place with a developed partner. In this regard, some experiences are straightforward: Brazil stated that it benefited greatly from the bilateral cooperation it received through its agreement with the United States. In particular, the exchange of information between the US and Brazil assisted it to identify conspiracies and prosecute anti-competitive behaviour.[14] Both countries share an ATA and an MLAT, according to the respondents to the UNCTAD Questionnaire. The Brazilians also stressed that they also benefited from their cooperation with other competition authorities and from their participation in the ICN.

Cooperation is not always formalized within the agreement. Indeed, one of the benefits reported by several respondents to the questionnaire was that the bilateral or regional treaty tended to spur informal, as well as formal, links. Zambia and South Africa have extended their bilateral arrangements into a type of informal judicial recognition of the effect of anti-competitive behaviour taking place in each other's territory. Several cases of anti-competitive behaviour have been prosecuted under the competition provisions of the Zambia-South Africa agreement[15] which involved exchange of information and assessment reports. This exchange of information and assessment reports allowed for 'a better utilization of meagre resources in the quest for effective and efficient enforcement of the national competition law', according to the Zambian respondent.

A respondent from Argentina stated that confusion arising from cooperation provisions under the draft FTAA, to which his country was a party, prompted an interest in seeking out a more specific bilateral agreement. For example, the Argentina-Brazil ATA facilitates information exchange between the two competition authorities, implying that such exchange of information between the two authorities was not so easy before an agreement was finalized. The Brazilians confirmed this assessment of their relationship with Argentina, stating that their reason for negotiating a bilateral agreement with Argentina was that 'not enough' cooperation was taking place within the framework of MERCOSUR, the Protocol de Fortaleza. As for Argentina, it has not yet ratified the Protocol; therefore, this agreement could not be used for exchange of information purposes.

This informal cooperation seems to be a function of the closeness between the two countries party to the RTA, rather than the competition provision specifically. For example, Costa Rica has signed several RTAs, some of which establish formal mechanisms of cooperation and coordination for competition-related matters, including conditions for publication and notification, such as the agreement between Costa Rica and Canada. Other RTAs contain no specific coverage of competition issues, but the competition agencies of both countries nonetheless maintain close contacts. Costa Rica used its relationship with Mexico as an example. Although the bilateral agreement between these two countries does not specifically cover

competition issues, the Costa Rican competition agency (COPROCOM) maintains good relations with its Mexican counterpart (Comisión Federal de Competencia). This suggests that an RTA facilitates cooperation between competition agencies even if competition is not specifically included in the treaty.[16]

Does cooperation depend upon the level of detail accorded to competition provisions in RTAs? The evidence is ambiguous. A Mexican respondent claimed that the vague competition provisions within the North American Free Trade Agreement (NAFTA) stirred both the US and Canada to initiate separate cooperation agreements with Mexico. In this sense, the loose competition provisions of the RTA induced the parties to enhance the cooperation between them. On the other hand, the competition provisions within RTAs signed between developing countries and the EC were extremely comprehensive, yet these also stimulated further cooperation between the parties, according to the respondent from Chile. From this mixed evidence, it can be inferred that competition authorities are motivated to cooperate with each other independently of the strength of the competition provisions in the RTA that has been signed. The evidence from the UNCTAD Questionnaire suggests that the RTAs are a means of opening communication channels, and that these channels are subsequently expanded by competition authorities using the mechanisms described above until a satisfactory level of cooperation has been achieved.

Finally, it is important to note that the domino effect of RTAs tends to spread competition legislation to new countries and that this increases the opportunities for cooperation and experience sharing among competition authorities. The popularity of competition provisions in RTAs pressurizes signatories to new agreements to enact competition legislation if they have not already done so. Respondents from China, Jordan, Namibia and Singapore all claimed to have been motivated to initiate competition legislation because of RTA agreements that they had signed with other countries, though not all of them have yet done so. This network effect has the general result of spreading competition legislation. This benefits the staff of competition agencies everywhere as it allows them to cooperate more extensively with partner countries.

5.2 Technical assistance

In general, developing countries rely upon technical assistance to increase their expertise and reach their economic potential. In the field of competition, developing countries can benefit from technical assistance by exchanging information and attending seminars and workshops designed to train developing country staff members by financially assisting such activities. For example, UNCTAD undertakes a variety of activities on an annual basis designed to increase the competence of competition officials in developing countries. These include national activities, such as publishing draft model laws of competition, promoting a competition culture through seminars and workshops at both national and regional levels (UNCTAD, 2002a). Likewise, the OECD (2004) reports that, in 2004, it held seminars in developing countries on merger analysis, competition advocacy, the training of judges and legal professionals and the concept of independence from the legislature. Peer reviews by international organizations, developed countries or within the aegis of a regional treaty are also helpful as a means of benchmarking progress achieved by the developing country and providing a channel through which further improvements can be suggested. Some commentators recommend that a comprehensive plan of technical assistance should be simultaneously undertaken with the adoption of competition legislation, and that technical assistance needs to focus equally on the promotion of strong civil society pressure and engagement.[17] Technical assistance can be thought of as a means of enabling appropriate policy changes through structured interaction between developed and developing countries.

Seminars, workshops, communication with counterparts in other countries and financial assistance have all been useful examples of technical assistance, according to the officials and experts contacted for this chapter. Three themes emerged from the questionnaire responses in regards to technical assistance. Firstly, staff expertise was a priority for developing countries; secondly, cooperation was itself a type of technical assistance because communication with more developed partners increased the competence of competition authorities; and, thirdly, international organizations had a distinct role to play in the provision of technical assistance. For example, the lack of expertise faced by Zambia was highlighted by a respondent

from that country, who emphasized the importance of the staff retraining necessary if Zambia was to successfully carry out its obligations under its two most recent regional treaties, including Southern African Development Community (SADC) and Common Market for Eastern and Southern Africa (COMESA). Zambia does not have the internal resources required to train its staff to a more proficient level and technical assistance will be required if Zambia is to be able to effectively shoulder its responsibilities under the new agreements. A respondent from Brazil mentioned that his country had profited from the experience of the US in the field of competition policy and has drawn upon the expertise of staff members in the US competition authority to facilitate actions undertaken domestically. Although technical assistance was not specifically written into the ATA between Brazil and the US, the US has nonetheless provided it. The EC in turn actively assisted Jordan to fulfil its requirement to enact a domestic competition law. As in the Brazilian example, this technical assistance was not foreseen in the agreement but was provided by the EC without question. Participation in international fora such as the ICN, was also considered to be beneficial.

The mechanisms for providing technical assistance were commented upon by a respondent from Jordan. Citing the technical assistance offered to it by the EC, the respondent reported that its adoption of competition law was actively supported by the EC mission in Jordan. The assistance included training the staff of the new competition authority and sponsoring awareness campaigns helping to educate the public and legislators about competition issues to help reduce the risk of legislative obstacles that may have arisen to block the implementation of competition policy. Finance was provided for a series of academic enquiries into the impact of competition on various sectors of the economy and EC officials were made available to answer questions from the competition authority.

5.3 National versus supranational competition legislation

The existence of competition legislation in RTAs does not guarantee that each party to the agreement will have enacted their own domestic competition law. The Southern African Customs Union (SACU) contains provisions on competition (Articles 40 and 45), but

South Africa is the only one of these countries to have its own competition law. Similarly regarding MERCOSUR, the AC and CARICOM, there are some countries without a competition law. The RTA between the United States and Singapore contains competition provisions, even though Singapore did not have a competition law when the RTA was signed.[18] Does the lack of a competition law at domestic level undermine the competition provisions of an international treaty? Evidence from the UNCTAD Questionnaire indicates that it does. For example, the South African respondent claims that the SACU competition provisions are undermined by partner countries unwilling to enact a domestic competition law, because of the possible negative repercussions of competition legislation upon investment in domestic markets and upon local entrepreneurs.

There are two important reasons to be concerned about countries within an RTA that do not yet have their own competition legislation. The first reason is that without legislation there is no competition authority. Without a competition authority there is no opportunity for cooperation between countries on competition cases because the competition authority acts as a medium through which information is exchanged and cooperation takes place. This has further ramifications for the technical assistance accorded to weaker partners to the agreement because the competition authority houses and trains staff, allowing them to develop a proficiency in competition-related issues. The questionnaire results indicate that the most beneficial learning occurs when the staff of the various competition authorities interact. South Korea nominates the consultation mechanism as the most useful benefit of its RTAs. Those countries that fail to enact competition legislation are limiting the amount of interaction they may have with more developed countries. Without a competition authority, there is no central repository for expertise or a contact point for fellow treaty members seeking information. In this way, countries without domestic competition legislation miss out on the benefits of this interaction and cooperation.

The second reason is the question of which treaty should have primacy. This issue was raised several times by respondents to the UNCTAD Questionnaire. Parties to several treaties are faced with the question of which treaty law on competition should apply. Members of regional organizations are faced with the question of

whether domestic or regional treaty law has effect. The results of our questionnaire showed that this question has not been adequately addressed in RTAs. A respondent from CARICOM outlined the difficulty in applying supranational versus national law. The supranational legislation technically only applies to cross-border offences, which have the effect of disrupting inter-regional trade. In reality, however, domestic concerns may take precedence.

Other RTAs are even less cohesive. For example, the SACU treaty is openly ambiguous. Member States, when presented with conflicting legislation on competition policy, are sometime free to choose which treaty should prevail. A respondent gave the examples of: i) Kenya choosing between its commitments under COMESA or East African Community (EAC), or ii) South Africa choosing between agreements between the SACU and the EC. In case of conflicting laws, the gap between the obligations of different treaties creates wriggle space that governments may exploit to the detriment of other treaty members. It is not clear, therefore, even to Member States how rigorous the application of competition laws will be in the different countries. The lack of cases prosecuted under the SACU, as compared to the active cooperation between South African and Zambia, for example, cannot be just attributed to the fledgling nature of the SACU agreement. It suggests confusion surrounding the applicability of each Member State's obligations under the agreement. On this point, another respondent described the case of a merger of a Trinidadian company with a company in Guyana. Here was a potential case for both national and supranational competition authorities. However, before the case could be examined by the appropriate competition authorities, the government went ahead and resolved the case due to populist and nationalist pressures, without considering it from the perspective of competition policy. This is one example of the tension created between national and supranational laws, and shows that confusion between the primacy of laws may have the effect of creating policy space that can be abused by domestic interest groups.

The situation differs in other regional agreements. The AC has a new regional competition law (Decision 608). With the amended legislation, Member States that do not have competition laws may use the regional framework to speed up the process of implementing the appropriate institutional framework in their own economies. The AC has enacted a regional competition law that has superseded

domestic competition laws within the member states, based on the principle that the most recent legislation prevails. For example, Bolivia has no competition law of its own. Therefore, the regional law has validity by virtue of Article 3 of Decision 608, but Bolivia has no competition authority to enforce competition legislation. (Although, Article 49 establishes a mechanism by which they can use the regional Decision for national problem solving, it is not clear how this would compensate for the lack of a competition authority to enforce it.) In the case of Ecuador, by virtue of Decision 616 it was agreed that an interim national authority must be appointed by 1 August 2005 to deal with the new law on anti-competitive practices. According to Article 5 of Decision 608, the AC competition law does not apply when the origin and effect of the anti-competitive conduct is taking place within one single Member State. Therefore, national competition legislation is still key to tackling domestic anti-competitive practices, and Bolivia and Ecuador will need to pass national laws accordingly.

Another crucial issue is the relationship between regional and domestic competition law. For example, the domestic competition laws of Peru have come to reflect aspects of both EC and US competition legislation through the influence of the supranational law on domestic legislation. By virtue of the Peruvian Constitution and the AC Treaty, community decisions are immediately implemented and applied by the Peruvian Competition Authority at domestic level. This means that the community law is automatically part of the domestic legislation. The sweeping difference between EC and AC laws is that the latter are clearly used by domestic institutions regardless of the intra-regional effect of the matter being judged. In EC law, the supranational law only applies to anti-competitive behaviour having inter-regional effect, even though domestic laws are normally so harmonized with EC law that there is no real difference between them. In the Andean case, the law is equally applied by national authorities with the supranational authority becoming involved, via the actions of the AC Secretariat, only in those cases in which the anti-competitive behaviour extends across national borders.

According to one questionnaire respondent, the fuzzy delineation between the domestic and regional laws in the Andean case has become an issue in trade agreements with the United States. The

respondent surmises that the US is particularly interested in state monopolies and state aid practices in RTAs, because the domestic US competition legislation is effective enough to protect themselves from the effects of international anti-competitive practices in the domestic US market. This may require clarification by the Peruvians when they negotiate with the United States as they may find it difficult to incorporate the full range of Peruvian competition law into the RTA. In this context, it is worth noting that Peru, whose domestic competition legislation was previously biased towards EC law, now incorporates the US legal test of anti-competitive behaviour (i.e. that it 'substantially lessens competition') in addition to the exemptions of Article 81(3) of the EC Treaty.

5.4 Dispute settlement mechanism

The goal of dispute settlement is to ensure compliance with the rules laid down in the RTA. If a party to the agreement fails to comply with the rules, dispute settlement of some type should take place and the violating party punished (or 'brought into compliance') within a certain period of time. At the multilateral level, this should take place through the WTO, although this does not happen as competition provisions are not yet covered. At the regional level, separate mechanisms must be set up to adjudge cases and be empowered to suspend concessions under the trade agreement until the offending party is brought into line with the law.

The majority of RTAs do not contain a Dispute Settlement Mechanism (DSM) for competition provisions. The reasons for this tend to diverge, and may signal that these provisions are often included for cooperation rather than for specific enforcement. A respondent from Costa Rica, listing the numerous trade agreements to which his country was a part, denied that any of them contained a DSM. The priority of Chile in forming alliances with other competition authorities, reported the respondent, was to enforce consumer rights and develop a culture of competition, as much as to strengthen existing institutions and cooperate with foreign competition authorities. A Chilean respondent noted that in one RTA - signed with the US - a type of dispute settlement has been included, but it is restricted to cases of controversy between investors and

governments.[19] As per the respondent from Mexico, the advantage of having competition-related provisions in RTAs, as opposed to ATAs, is that the former offer the possibility of subjecting competition-related provisions to DSM although this option is not always used. An African respondent, commenting on the SACU, responded that the agreement did contain a DSM but that no cases had been tried so far, and that the expertise did not exist to try a case anyway. South Korea was more upbeat about the possibility of a DSM, listing two agreements that contain DSMs for competition, without commenting on whether these had actually been used.

One point that has been raised in the context of the disparate nature of trade agreements is that RTAs themselves could be brought within the DSM of the WTO.[20] The tone of the replies received from the UNCTAD Questionnaire indicates that dispute settlement is not highly sought by developing countries within the context of RTAs. It seems unlikely, therefore, that developing countries would be in favour of subjecting their RTAs to the binding mechanism of the WTO DSM at this time. Unfortunately, the issue of bringing RTAs within the framework of the WTO DSM has not been directly addressed by any of the questionnaire respondents contacted for this chapter. The following comments, therefore, relate to the more general subject of dispute settlement related to competition provisions in RTAs.

There are two goals for dispute settlement in competition within the context of an RTA. The first is that of ensuring that the partner country maintains commitments that have been set out in the RTA. This is the focus of most of the WTO's dispute settlement procedures. The second goal is that of ensuring that positive comity can be enacted within the framework of the RTA to prosecute perpetrators of restrictive business practices in foreign territories. It is unlikely that the first goal of dispute settlement, that of ensuring that the other party(ies) to the agreement conform to the rules laid down within it, would be necessary. The questionnaire results show a refreshing unanimity about the dangers of anti-competitive practices both at home and abroad. The second goal, that of undertaking positive comity, has been interpreted by the majority of respondents as being superfluous to effective cooperation with other competition authorities.

MLATs may represent a tentative step towards formal dispute settlement in several of the RTAs that have been studied for this

chapter. The positive comity provisions that are being initiated by the US and several other countries could be perceived as a technique to avoid disputes. This question of dispute settlement also has potential links to the relationship between national and supranational law (discussed above) and the issue of which law is the most effective at uncovering and punishing anti-competitive practices.

Certainly none of the DSMs that were commented upon by the questionnaire respondents fitted into the typical concept of DSM as understood by the WTO. The treaties examined and from which questionnaire responses were gathered displayed a limited scope and a narrow vision for the potential of dispute settlement in a regional context. This raises the question of whether dispute settlement provisions are really necessary at a regional level, given the incentives for both sides to benefit from cooperation. It may be that domestic legislation, combined with comity agreements in the form of ATAs or MLATs where necessary, is sufficient for developing countries.

6. Concluding remarks

From the results of this research, a number of lessons can be drawn. These are, in particular, that:

i. Parties to RTAs would benefit from enacting a domestic competition law. This will allow them to benefit from the advantages offered by having a competition authority. These advantages include the creation of an institutional structure to build a domestic competition culture and to foster competencies in the field of competition, cooperation with other competition authorities, and the facilitation of technical assistance. It will also allow those countries to align their laws with those mandated by supranational agreements, where relevant.

ii. Submitting RTAs to some type of DSM is not necessary at this point. Respondents were generally unenthusiastic about DSMs at the RTA or multilateral level. A DSM seems to be viewed as a mechanism for cooperation in most countries rather than as a tool for enforcement. The results of the questionnaire led the authors to conclude that some form of dispute settlement would

assist countries in complying with competition agreements, and would be an effective weapon against cross-border conspiracies, but that it is not an immediate priority.

iii. Bilateral agreements between countries at different levels of development generate the exchange of information. In fact, it helps if one of the partners to the RTA is a developed country, as cooperation can stimulate the exchange of knowledge and experience. The ICN has greatly facilitated the exchange of information and cooperation, according to several respondents.

iv. Cooperation agreements do not necessarily have to take the form of an RTA, which implies government participation and obligations. Respondents indicate that MLATs and ATAs can be equally effective means of formal cooperation between competition authorities, and even go beyond RTAs in some instances. Anecdotal evidence suggests that cooperation mechanisms such as ATAs and MLATs may be a viable alternative for developing countries that are otherwise limited in their ability to formalize agreements through RTAs due to internal capacity constraints. Even informal cooperation is positive.

v. Most developed countries are willing to provide technical assistance that will assist the developing country meet the obligations of the competition treaty. Evidence of this stems from the actions of both the US and the EC in providing technical assistance to countries even when that technical assistance is not mandated by the treaty.

vi. In practical terms, it would be useful to enhance dialogue between trade and competition officers in order to fully exploit all the possible cooperation efforts in the field of competition. Perhaps both parties need to focus on working together to incorporate their balanced interests in the agreements.

Although the RTAs have been criticized by several respondents to the UNCTAD Questionnaire of falling far short of the ideal levels of cooperation envisaged by ambitious competition authorities, the benefits of the increased level of cooperation between countries on competition-related matters should be recognized independently of the complaints made about the shortcomings or limits of that cooperation. Director-General of the WTO, Dr Supachai's interesting proposal that RTAs should eventually be brought within the WTO DSM indicates the recognition that RTAs are currently responsible for initiating a significant amount of international trade law. The proposal to examine competition provisions indicates that a type of jurisprudence in relation to competition is also emerging as a result of the RTA phenomenon. The relationship between regional agreements and domestic law may be more easily defined within the context of a multilateral setting, as there seems to be a certain level of confusion within competition authorities about the scope and application of regional competition law versus domestic legislation.

The overall picture taken from the questionnaire results and from the research conducted in the creation of this chapter indicates that competition provisions in RTAs are beneficial for developing countries. The lessons outlined above indicate that practical measures and increased knowledge on the part of developing countries' competition authorities can foster their capacity for enforcement and strengthen cooperation with foreign counterparts. The spread of RTAs has been responsible for propagating competition laws and broadening of competition knowledge and expertise among developing countries. As RTAs continue to proliferate, the positive effects of the proliferation of competition law and policy displayed in the questionnaire results are sure to be enhanced.

APPENDIX I

Table 4A.1 Table of all RTAs involving at least one developing country, as notified to the World Trade Organization (WTO) since 1995

Name of RTA	Contains a competition clause? Yes (Y), No (N), or U (Unknown)	Location of competition clause in the RTA
AFTA - ASEAN Free Trade Area	N	
ASEAN-China	N[i]	
Bangkok Agreement - Bangladesh, India, Laos, South Korea, Sri Lanka	U[ii]	
CACM - Central American Common Market	N	
CAN - Cartagena Agreement: Bolivia, Colombia, Ecuador, Peru, Venezuela	Y	Chapter VIII
CARICOM – Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago	Y	Chapter 10.3
Canada-Chile	Y	Chapter J
Canada-Costa Rica	Y	Chapter 11
CEMAC – Cameroon, Central African Republic, Congo, Gabon, Equatorial Guinea, Chad	Y[iii]	Article 13
Chile-Costa Rica[iv]	Y	Chapter 15
Chile-El Salvador (*idem* Costa Rica)	Y	Chapter 15
Chile-Mexico	Y	Chapter 14
China-Hong Kong	N	
China-Macao	N	
COMESA – Angola, Burundi, Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe	Y	Article 55
EAC – Kenya, Uganda, Tanzania	N[v]	
EAEC – ASEAN 7, China, Japan, South Korea	N	
EC-Algeria	N[vi]	

.../...

Table 4A.1 (continued)

Name of RTA	Contains a competition clause? Yes (Y), No (N), or U (Unknown)	Location of competition clause in the RTA
EC-Chile	Y	Title VII
EC-Egypt	Y	Article 34
EC-Jordan	Y	Article 53
EC-Lebanon	Y	Article 27
EC-Mexico	Y[vii]	Article 39
EC-Morocco	Y	Article 36
EC-Palestinian Authority	Y	Article 30
EC-South Africa	Y	Article 35
EC-Syria	U	
EC-Tunisia	N	
EFTA-Chile	Y	Article 72
EFTA-Jordan	Y	Article 18
EFTA-Mexico	Y	Chapter IV.I
EFTA-Morocco	Y	Article 17
EFTA-Palestinian Authority	Y	Article 16
EFTA-Singapore	Y	Article 50
GSTP	N	
India-Sri Lanka	N	
Japan-Singapore	Y	Chapter 12
South Korea-Chile	Y	Chapter 14
LAIA	N	
Laos-Thailand	U	
MSG - Melanesian Spearhead Group – Vanuatu, Papua New Guinea, Solomon Islands, Fiji	N	
MERCOSUR – Argentina, Brazil, Paraguay, Uruguay	N[viii]	
Mexico-Israel	Y	Chapter 8
NAFTA – Canada, Mexico, United States	Y	Chapter 15
New Zealand-Singapore	Y	Article 3
PATCRA – New Guinea, Australia	N	

.../...

Table 4A.1 (continued)

Name of RTA	Contains a competition clause? Yes (Y), No (N), or U (Unknown)	Location of competition clause in the RTA
SADC – Angola, Botswana, Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe	Y	Article 25
SAPTA – Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka	N	
SPARTECA – Australia, New Zealand, Cook Islands, Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu, Western Samoa	N[ix]	
Singapore-Australia	Y	Chapter 12
Thailand-Australia	Y	Chapter 12
TRIPARTITE (Egypt, India, Yugoslavia – not operational)	U	
US-Chile	Y	Chapter 16
US-Singapore	Y	Chapter 12
US-Jordan	N	
WAEMU	Y	Article 88

[i]Under negotiation.

[ii]Tariff concession agreement only.

[iii]Competition clause contained in CEMAC.

[iv]The competition chapter is included in Chile-Central America FTA, 1999.

[v]There is a reference to negotiations on competition in Article 75.

[vi]Under negotiation.

[vii]Obligation to set up a competition authority.

[viii]The parties signed an agreement in 1996: the Fortaleza Protocol. In 2002, they adopted its regulations, but two countries haven't internalized it in their domestic rules yet.

[ix]SPARTECA is a preferential trade agreement for South Pacific Island countries wishing to access Australian or New Zealander markets and contains tariff preferences only.

APPENDIX II

Negotiating and enforcing competition provisions in bilateral/regional agreements: South-South and North-South selected cases

UNCTAD Questionnaire on the

Impact of bilateral/regional agreements on the development strategy of developing countries

(in collaboration with ECLAC)

UNCTAD, in collaboration with ECLAC, is carrying out research on the specificities of competition provisions at bilateral and regional levels: South-South and North-South arrangements.

The ultimate aim of the chapter is to provide lessons from developing countries' experiences, which may guide them in future agreements and/or provide lessons for other developing countries. This chapter will draw on the experience of practitioners and institutions from developing countries and will make an attempt to present their views and concerns on the agreements and their implementation.

The attached questionnaire seeks to obtain first-hand information from competition practitioners and representatives working in relevant institutions of selected developing countries. The questionnaire contains open-ended questions. You may feel free to add your thoughts and you are kindly requested to attach any relevant documents.

If there is a need for further clarification of your responses, you may be contacted by phone. Please let us know when it will be possible to call you.

Unless required, names of respondents will not be specifically referred to in the compilation of the results of the questionnaire and the full anonymity of all respondents will be guaranteed.

1. Participation in bilateral/regional agreements containing competition provisions

1a. Please provide a list of all such agreements in which your country is a partner. You are kindly requested to fill in the following table. Please feel free to expand the table if necessary.

Country X: participation in bilateral and regional agreements comprising competition provisions.							
Type of agreement – specify partners *	**Date** (of signature, date of ratification and/or date of entry into force)	**Scope**** Broad Sectoral	**Practices covered**	**Cases effectively dealt with**	**Formal cooperation mechanisms** (e.g. regular meetings, mutual notification)	**Contains DSM or equivalent?** (Yes or No)	**Provisions in support of developing country partners***** (e.g. technical assistance, exemptions, etc.)
FTAs							
1.							
2.							
Customs Unions							
1.							
2.							
Other RTAs							
1.							
2.							
A to A (MOU)							
1.							
2							

*RTA: Regional trade agreement; FTA: Free trade agreement; Other trade agreement: Economic complementation agreement, Economic partnership agreement, other (and specify), A to A: Agency-to-agency agreements; MOU: Memorandum of Understanding.

Reference guide:

**Broad/Sectoral: in terms of scope of application, whether general or sectoral, including especial provisions for SMEs, ["IPRs"?], telecommunications, state enterprises, etc.

***For example: exemptions to sectors, transitional period for the implementation of the agreement Practices covered: monopolies, state enterprises, mergers, cartels.

1b. Please list the main competition-related features of each agreement (e.g. notification, reciprocity, etc.).

1c**.** In case the country has several agreements, please rank them in terms of their frequency of application.

2. Reasons for country participation in bilateral/regional agreements (this part draws on the phase of negotiation of the agreement, before implementation):

Please reply to the following set of questions:

(i) What reasons prompted the country to undertake bilateral or regional agreement(s)? For what reason(s) were CLP provisions added to this agreement?

(ii) Was there any cooperation between the competition agencies of your country and the other signatories to the agreement before its signature? If so, has cooperation increased as a result of the agreement?

(iii) Were there any obstacles to the adoption of the agreement and particularly the competition provisions that had to be overcome before the agreement could be reached? If so, please describe the obstacle(s) involved.

3. Scope of agreements

(i) Please list the main CLP provisions and explain them.

(ii) What specific actions, if any, are required from CLP authorities?

(iii) What specific anti-competitive practices are covered by such agreements?

(iv) Do the agreements contain some sort of a Dispute Settlement Mechanism (DSM)? Do they cover the provisions on CLP? Please elaborate.

(v) If your country is a party to more than one agreement containing CLP provisions, are there differences between these provisions with respect to CLP? Please elaborate.

(vi) If your country is a party to more than one agreement containing CLP provisions, are there differences between these agreements with respect to CLP? In particular, you may have South-South and North-South agreements. Are there major differences between the two? Please explain.

(vii) Were these agreements modelled on existing standard provisions found in other agreements?

4. Special conditions for less developed parties to such agreements: Special and Differential Treatment (S&D)

(i) Do the agreements include some form of non-reciprocal facilities in favour of less-developed parties to the agreement? If so, please elaborate.

(ii) Does the agreement require parties to adopt/modify/implement national CLP? If so, are the weaker parties afforded longer deadlines to comply? Are they able to adopt a a less complete CLP, for example without merger control?

(iii) In setting up the competition provisions, was there a perceived need for any sectoral exemptions (i.e. industries that would be exempted from the competition provisions?) If so, were these exemptions included in the agreement?

(iv) Does the agreement allow a more flexible implementation of CLP for less developed parties to the agreement?

(v) Is technical assistance in the field of CLP included in the agreement? If yes, does it also include cooperation in case proceedings?

(vi) To what extent is this cooperation limited by confidentiality rules? What has the experience been so far?

5. Lessons from country's participation in agreements (this part refers to the phase of implementation/enforcement of the agreements comprising CLP provisions).

Please provide general thoughts on the following issues:

(i) Once the agreement is in force, do you face difficulties enforcing commitments? If so, which ones?

(ii) What specific CLP provisions provided for in the agreements have been implemented? To what extent have they been implemented?

(iii) In case the agreement contains a DSM, please comment on whether this has been used so far, and with what results?

(iv) Please state your thoughts on the effects of the agreement at national level on (a) the national competition law and its enforcement and (b) other governmental policies.

(v) What are your experiences of case handling (please give details on each agreement).

(vi) Do your available human and financial resources allow you to comply with this agreement satisfactorily?

(vi) Are there any new agreements in the pipeline? Please provide details about present talks for agreements that are under way and which may contain CLP-related provisions

6. Proposals for improving bilateral/regional agreements to make them more effective

(i) What in your opinion are the weaknesses (if any) of the agreements to which your country is party? Please elaborate.

(ii) Which provisions, in your opinion, provide the best results? Please elaborate.

(iii) Would you propose further provisions? If so, why?

(iv) Other comments.

NOTES

[1]A copy of the questionnaire sent by UNCTAD is attached to this document in Appendix II.

[23]The 'developing country' category does not include CIS or Southern European economies. It coincides with the Members of the Group of 77 at the UN and UNCTAD.

[4]The number of reported RTAs varies across countries for the following reasons: not all RTAs are reported to the WTO; RTAs involving countries that have acceded to the EU are not always treated in the same way by researchers; some RTAs that do not involve the creation of a free trade area on 'substantially all trade' are nonetheless included in some counts. In certain cases, agreements are notified more than once, either under GATT Article XXIV or GATS Article V. This may lead to double-counting of existing agreements in official WTO statistics. See Chapters 2 and 5 in this volume for further discussion.

[5]Interested readers may ascertain the prevalence of competition clauses in transition economies from Table 5A.1 in Appendix I of Chapter 5 in this volume.

[6]Compiled from Table 4A.1 in Appendix I.

[7]'Open regionalism' is a process of growing economic interdependence at the regional level promoted both by preferential integration agreements and by other policies in the context of liberalization and deregulation, geared towards enhancing the competitiveness of the countries of the region and, in so far as possible, constituting the building blocks for a more open and transparent international economy (ECLAC, 1994).

[8]WTO (2003b).

[9]In Latin America, generally ATAS have complemented RTAs between parties; they are also more detailed procedurally speaking.

[10]Several RTAs were perforce omitted from this study because the text of their agreements was not available, even though the WTO had been notified of their existence. These RTAs are marked with a U (denoting 'unknown') in Table 4A.1 in Appendix I.

[11]The most recent Draft of the Chapter on Competition Policy, in November 2003, can be seen on the FTAA website: www.ftaa-alca.org.

[12]In LAC countries : Mexico, Costa Rica and Chile are active also.

[13]MLATs in force: The United States has bilateral Mutual Legal Assistance Treaties (MLAT) currently in force with the following developing countries: Antigua/Barbuda, Argentina, Bahamas, Barbados, Belize, Brazil, Dominica,

Egypt, Grenada, Hong Kong, Jamaica, Korea (South), Mexico, Morocco, Panama, Philippines, St. Kitts-Nevis, St. Lucia, St. Vincent, South Africa, Thailand, Trinidad and Tobago, Uruguay. Source: US Dept. of State. Mutual Legal Assistance (MLAT) and Other Agreements,http://travel.state.gov/law/info/judicial/judicial_690.html

[14] UNCTAD (2003); In Auckland Declaration, 1999, APEC Economic Leaders endorsed the APEC Principles to Enhance Competition and Regulatory Reform (The APEC Competition Principle). They also have a cooperative program with the OECD, see: http://www.apeccp.org.tw/doc/APEC-OECD/APEC-OECD.html

[15]Some of these experiences can be also seen in Tavares (2002).

[16]The respondent cited investigations into South African breweries, Illovo Sugar, Lafarge, Coca Cola and Cadbury Schweppes.

[17]Costa Rica also has an agreement with Panama that has resulted in much less cooperation but it is an old treaty, signed in 1973, and concerned mainly with trade remedies.

[18]For example, Ratnakar Adhikari notes that his NGO (SAWTEE) took the innovative step of undertaking a workshop to train economic journalists in the concept of competition advocacy in Nepal, as a means of supporting a draft competition act . See Consultation on Role of Media in Promoting Competition Culture in Nepal. 23-24 July, Nagarkot, Nepal, SAWTEE and Society of Economic Journalists. http://www.sawtee.org/Competition_Brt_Report.html

[19]Singapore was obliged to adopt a competition law by 2005 as part of the treaty (US-Singapore FTA- Article 12.2:1).

[20]In strict terms a DSM doesn't exist for: anti-competitive practices, cooperation and consultations (US-Chile FTA-Article 16.8).

[21]Comments of Dr Supachai, Director-General of the WTO at Asia Leadership Forum, as reported by *Bangkok Post Business Today*, 15 June 2005.

5

Operationalizing special and differential treatment in cooperation agreements on competition law and policy

PHILIPPE BRUSICK
JULIAN CLARKE

1. Introduction

Irrespective of progress in trade liberalization at the multilateral level, regional trade agreements (RTAs) have proliferated in the last two decades or so. The issue of special and differential (S&D) treatment in competition law and policy has been a long-term debate, often inconclusive, such as during the World Trade Organization (WTO) discussions on a multilateral framework on competition, which were subsequently dropped out of the Doha Round for Development, along with other so-called Singapore issues such as trade and investment.

S&D treatment for developing countries, especially least developed countries (LDCs) on competition law and policy is duly

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acknowledged in the UN Set of 1980[1], in its section dealing with 'preferential or differential treatment'. Accordingly, it has long been observed that S&D should be part and parcel of a possible multilateral framework on competition. Some experts have argued that it is the lack of attention given to the policy space needed by developing countries in the non-discrimination and national treatment principles discussed at the WTO that led to the rejection at Cancun of competition law and policy from the issues to be negotiated in the Doha Round. Others have observed that, while competition policy seeks to challenge industrial policy and promote free market forces, many governments, including those of developed countries, have recently supported national champions, whenever possible, protecting them from free market forces.

Meanwhile, numerous RTAs, bilateral and regional (or plurilateral) Free Trade Agreements have been negotiated after Cancun, and an increasing number include specific competition rules. Moreover, numerous developing countries, including LDCs, have queued up at UNCTAD to request technical assistance and capacity building in order to adopt domestic competition rules as a matter of urgency. Competition clauses within RTAs have undoubtedly played a role in this interest in competition law and policy at the domestic level.

RTAs examined in this chapter include bilateral as well as regional (or plurilateral) agreements between developed countries and what are called 'less-developed partners', to include both developing countries and LDCs, but also economies in transition, because these agreements shed light upon the issues of interest to developing countries.

The existence of S&D treatment in competition provisions of RTAs is one of the neglected aspects of competition law and policy. Special provisions in favour of 'less-developed partners' have steadily made their appearance in the competition clauses of RTAs over the past several years. The types of S&D treatment extended to less-developed partners in competition clauses are in line with the so called 'preferential or differential treatment' set out in the United Nations (UN) Set 25 years ago, and match the types of S&D treatment that were included in specific Uruguay Round Agreements. This chapter therefore, explores the frequency and nature of S&D

treatment within competition clauses of RTAs and tries to shed some light on the following questions: (i) What are the main forms of S&D that can be envisaged in competition provisions of RTAs? (ii) To what extent can S&D treatment be found in provisions related to competition policy in existing RTAs? (iii) What are the principal types of S&D provisions in competition law and policy, if any, that can be found in RTAs? (iv) To what extent do such provisions respond to the needs of developing countries? (v) To what extent can S&D provisions in RTAs serve as models for the operationalization of S&D in competition law and policy provisions in future agreements?

Accordingly, Section 2 briefly examines the history of S&D in the WTO trade negotiations and more specifically S&D in the field of competition law and policy in the UN Set of Principles of Rules, while Section 3 tries to operationalize or conceptualize what typical S&D provisions can be found in competition clauses in RTAs. Section 4 draws attention to difficulties in identifying S&D and Section 5 provides examples of S&D provisions by types of S&D uncovered in RTAs. Finally, this chapter concludes by summarizing the main findings and lessons learnt in this respect.

2. S&D treatment in the multilateral context

S&D treatment was not a part of the original General Agreement on Tariffs and Trade (GATT) at its inception in 1947. Until 1955, developing countries participated in tariff negotiations as equal partners and were subject to the same rules of non-discrimination and the universal and reciprocal application of commitments as the wealthy industrialized nations. In 1955, the first provisions were adopted to address the needs of developing countries as a group. Initially, these provisions allowed developing countries to derogate from their scheduled tariff commitments, use quantitative restrictions for balance of payments purposes and certain other measures to promote domestic industries. This process of special allowances was formalized in the adoption of Part IV of the GATT at the Kennedy Round of WTO negotiations. Part IV of the GATT addressed 'Trade and Development' and contained various provisions that committed WTO Members to recognize the need for positive measures to improve market access in the developed world for the output of developing countries by reducing obstacles to trade in these products.

Two other measures adopted by the multilateral trade community in favour of developing countries were equally important in this respect. The first was the principle of non-reciprocity, which was introduced during the Kennedy Round within Part IV of the GATT. This principle requested developed countries to assume unilateral concessions towards developing countries. The second important aspect of S&D treatment was a commitment by developed countries to provide enhanced and preferential market access to their markets for exports from developing countries. This was formally secured through the Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries agreement, introduced during the Tokyo Round in 1979. This measure has since been abbreviated to the 'Enabling Clause' and has created a permanent legal basis for the preferential tariff treatment accorded under the Generalized System of Preferences (GSP).

An important shift in S&D treatment took place during the Uruguay Round and led to the adoption of specific types of S&D provisions in the various agreements that form part of the Uruguay Round. Less emphasis was placed on the principle of non-reciprocity in commitments, limiting S&D treatment basically to transition periods for developing countries, with longer periods for LDCs and calls for technical assistance to facilitate implementation of the agreements by developing countries.

The UN Set adopted in 1980 in the form of a recommendation to all Member States of the UN in General Assembly Resolution 35/63 of 5 December 1980 enshrined the concept of 'preferential or differential treatment for developing countries' in its Section C, Paragraph 7. The UN Set, which has undergone review four times since 1980 (1985, 1990, 1995, and 2000) and was found to be still valid by unanimity, remains the only multilateral agreement on competition in force today.

The relevant section of the UN Set states:

> C. Multilaterally agreed equitable principles for the control of restrictive business practices
>
> (iii) *Preferential or differential treatment for developing countries*

> 7. In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:
>
> (*a*) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy, and
> (*b*) Encouraging their economic development through regional or global arrangements among developing countries.

Hence, the set recognizes the need for S&D treatment in the field of competition law and policy in favour of developing countries, particularly for LDCs, especially in promoting industrialization in these countries and in encouraging regional agreements among developing countries. However, the Set does not specify which types of S&D treatment in competition law and policy should be considered.

More recently, specific references to S&D treatment in the context of competition arose during the discussions surrounding a possible multilateral framework on competition policy at the WTO. During the Fourth Ministerial Conference (Doha) at the end of 2001, the Working Group on Trade and Competition Policy (WGTCP) at the WTO was charged with taking account of the 'the needs of developing and least developed country participants and appropriate flexibility provided to address them.'[1] The subject was also addressed in May 2002 at the Organisation for Economic Cooperation and Development (OECD), when the Joint Group on Trade and Competition Policy was charged with examining flexibility in a future WTO multilateral agreement on competition.[2]

The importance of S&D treatment for less-developed countries was sharply illuminated by the hesitancy of developing countries to launch negotiations on a multilateral framework on competition at the Cancun Ministerial. The subsequent omission of trade and competition from the present Doha round of negotiations at the WTO is arguably the result of serious concern on the part of developing countries about committing to an agreement in which their needs might not be properly encompassed and which might reduce further their policy space to implement industrial policies.

Thus, from the past history of S&D at multilateral level, what specific types of S&D treatment can be envisaged in the context of competition? (i) Technical assistance, which is a non-reciprocal treatment in favour of the less-advanced party to an agreement, can be considered as a form of S&D treatment. (ii) Transition periods for the adoption and/or implementation of competition legislation or aspects of competition regulation constitute a second operational type of S&D. This may include extended time periods for adopting implementation of clause, and/or the possibility of adopting competition law by phases, moving from a basic regulation to a more elaborate measure over time. (iii) Exceptions and exemptions from competition law and policy constitute a third possible aspect of S&D. Such provisions generally include more flexibility in favour of developing countries. Typically, exceptions are related to sectors or to certain anti-competitive practices. Such exemptions are regularly applied with a 'sunset clause', meaning that the exemptions will endure for a certain period of time at which time they will be either renewed or lapse. In this way, exemptions and exceptions may coincide with transitional periods. (iv) Specific undertakings designed to protect social and economic needs of developing countries constitute a fourth type of S&D treatment. This could also include special undertakings by developed partners that are non-reciprocated, such as undertakings to liberalize specific sectors without reciprocal undertakings by the less-developed party.

3. Typical S&D provisions in competition clauses of RTAs

The authors have examined the RTAs notified to the WTO as indicated in Annexes I and II. The first conclusion was that competition clauses within RTAs were more prevalent than anecdotal evidence might suggest. This shows that developed and developing countries alike have recognized that trade cannot be liberalized without being protected from anti-competitive practices. S&D treatment within competition clauses of RTAs was also quite common. Of the 157 agreements involving at least one less-developed partner notified to the WTO since 1995,[3] 21 (13%) contained some type of flexibility in favour of the less-developed partners. Broadly the types of S&D treatment extended by the RTAs examined conformed to four main categories as follows:

1. provisions safeguarding the interests of less-developed partners
2. exceptions and exemptions
3. transitional time periods
4. technical assistance

These types of S&D treatment appeared with different frequencies. The most common forms of S&D treatment involved some form of flexibility of undertakings and transitional time periods in favour of the less-developed partner. Table 5.1 summarizes the types of S&D treatment uncovered in the competition clauses of RTAs:

Table 5.1 Type and frequency of S&D provisions in competition clauses in RTAs

Type of S&D	Number of RTAs containing such provisions[i]	Manifests as…
Safeguard interests of less-developed partners	14	Identical treatment for public aid as accorded to EC Members (*EC-Bulgaria, EC-Croatia, EC-Czech Republic, EC-Estonia, EC-FYOM, EC-Latvia, EC-Lithuania, EC-Jordan*, *EC-Morocco, EC-Romania, EC-Palestinian Authority, EC-Turkey, EC-Tunisia, Romania-Turkey*)
Exceptions and exemptions	6	Protection for service industry (*EC-Latvia*) Poverty relief (*EC-Jordan*) Promote economic development (*EC-Morocco, EC-Palestinian Authority, EC-Turkey, EC-Tunisia, Romania-Turkey*)
Transitional time periods	7	Setting up of competition authority (*EC-Croatia*) Implementation of competition law (*EFTA-Bulgaria, EFTA-Hungary, EFTA-Poland, EFTA-Romania, EFTA-Slovenia*) Protection of domestic industry (*EFTA-Jordan*)
Technical assistance	1	Exchange of experts, organization of seminars and training activities (*EC-South Africa*)

[i]Treaties that appeared in more than one manifestation within each category of S&D were only counted once.

4. The problem of identifying S&D

It should be noted that most of the RTAs contain a clause covering several types of exemptions that may apply equally to either party. Generally, these RTAs also contain structural adjustment clauses related to possible exemptions that may arise for the protection of infant industries or related reasons. Such exemptions cannot be labelled as S&D treatment because S&D treatment is defined as non-reciprocal. If a clause refers to all parties to the agreement equally, and can equally be accessed by all parties to the agreement, then in theory it should not be labelled as S&D treatment as set out in the introduction to this chapter. In practice, however, such a clear-cut definition needs to be examined carefully. Several of the competition clauses studied in this agreement legally applied to both parties, but were basically designed for the use of the less-developed partner. For example, the European Commission (EC) often includes generous transition periods that relate to both parties that will evidently be used by the less-developed partner, such as extended time periods to formulate and implement a domestic competition law, when it is clear that the EC has its own competition rules in force. Also, the European Free Trade Agreement (EFTA) will regularly grant progressive implementation to all treaty members, including itself, for provisions that EFTA already conforms to.

These provisions include clauses normally associated with S&D such as technical assistance, structural adjustment, extended time periods for the implementation of a competition law, and so on. Is this a type of S&D treatment by stealth, disguised as reciprocity? One explanation may be that the S&D treatment has been extended in a mutual manner because the more-developed partner does not wish to set a precedent for future S&D measures. A second hypothesis may be that these provisions are introduced as somewhat face-saving measures, in theory applying to both countries but in reality to be used by the less-developed partner only.

Table 5.2 contains a list of such reciprocal measures of an S&D nature enacted between signatories at different levels of development. The fact that the signatories are at different levels of development may indicate that the provisions are S&D in the sense that they will mainly favour the less-developed partner, even though the provisions are accorded to each partner equally.

Table 5.2 Table of mutual provisions signed between states at different levels of development

Mutual provision	Name of RTA
Progressive implementation of basic competition law	EC-Morocco, EC-Jordan, EC-Lithuania, EC-Czech Republic, EC-South Africa, EC-Egypt, EC-Tunisia, Israel-Turkey
Exemptions for national market organizations and domestic industry	Czech Republic-Israel, Slovak Republic-Israel
Reform of state monopolies; progressive reform of public procurement	EC-Egypt
Progressive cooperation between competition authorities Progressive reform of state monopolies and enterprises	EC-Lebanon
Mutual technical assistance	EC-Mexico, Canada-Costa-Rica

As shown in Table 5.2, the very basic nature of some of these requirements (that is implementing a competition law) raise the question of which party to the agreement will really benefit from these provisions. None of these reciprocal provisions are likely to be useful to the developed partner, and thus may be tentatively characterized as a type of S&D. If one adds these mutual provisions to the number of non-reciprocal S&D provisions stated in Section 3, the number of effective S&D provisions found in the RTAs increases from 21 to 28, representing 18 per cent or almost one-fifth of all RTAs examined in this chapter.

5. Examples of S&D provisions uncovered in RTAs

This section examines some examples of the non-reciprocated S&D provisions appearing in RTAs. These provisions have been classified under the four broad headings used in Section 3 and again in Table 5.1.

5.1 Safeguarding the interests of less-developed or developing countries

This broad category encompassed specific commitments made in favour of the less-developed partner. The public aid provisions provided by the EC to developing partners (and also in the Romania–Turkey RTA) listed the interests of less-developed partners being safeguarded. Special aid provisions quoted below are taken from the EC-Bulgaria and EC-Czech Republic RTAs, in which special recognition of the less-developed party was accorded by the European Community to the less-developed partner:

Title V, Chapter II, 'Competition and Other Economic Provisions' Article 64

> 4.a) For the purposes of applying the provision of paragraph 1, point (iii), the Parties recognize that during the first five years after the entry into force of the Agreement, any public aid granted by Bulgaria shall be assessed taking into account the fact that Bulgaria shall be regarded as an area identical to those areas of the Community described in Article 92 (3) (a) of the Treaty establishing the European Economic Community.[5]

This special aid takes into account the economic conditions of Bulgaria, Lithuania and the Czech Republic and includes a possibility of the aid being extended for another five years, as shown in the following excerpt (the wording is the same for Bulgaria, Lithuania and the Czech Republic):

Chapter II, 'Competition and Other Economic Provisions' Article 64

> 4.a)The Association Council shall, taking into account the economic situation of the Czech Republic [Bulgaria, Lithuania], decide whether that period should be extended by further periods of five years.[6]

Uniquely, Turkey's agreement with Romania was inspired by the treatment of Turkey in the Treaty Establishing the European Economic Community:

Article 24, 'Rules of Competition Concerning Undertakings'

> 4.a) For the purpose of applying the provisions of paragraph 1, point (c), the Parties recognize that during the first five years after the entry into force of the Agreement, any public aid

> granted by Romania shall be assessed *taking into account the fact that Romania shall be regarded as an area identical to those areas of Turkey described in Article 92(3)(a) of the Treaty establishing the European Economic Community*. The Joint Committee shall taking into account the economic situation of Romania, decide whether that period should be extended by further periods of five years.[italics added]

This latter excerpt is an example of a trade partner borrowing from differential treatment provisions in another agreement when approaching the issue of S&D treatment. These provisions were not always so general. The protection of Jordan's domestic industry is the focus of the unilateral transitional period extended from Europe to Jordan in the EFTA-Jordan RTA:

> *Article 18, 'Rules of Competition Concerning Undertakings'*
> 3. If a Party, within five years after the date of entry into force of this Agreement, considers that a given practice referred to in paragraphs 1 and 2 causes, or threatens to cause, serious prejudice to its interest or material injury to its domestic industry, it may take appropriate measures under the conditions and in accordance with the procedures laid down in Article 25.
> 4. The Joint Committee shall, taking into account the economic situation of Jordan, decide whether the period referred to in paragraph 3 should be extended for further periods of five years.

The interaction between these two paragraphs of the competition clause establishes a clear transition period for Jordan in order that it may adjust its domestic industry to fit within the framework laid out by the new competition agreement.

5.2 Flexibility of commitments

Flexibility of commitments pertains to unilateral exceptions granted by the more-developed partner to the less-developed partner. These provisions manifested themselves specifically as special aid, protection of the service industry, poverty relief and the promotion of economic development. For example, in the agreement signed between the EC and Latvia, special recognition was accorded to Latvia's service industry.

Chapter II, 'Competition and Other Economic Provisions', Article 64

> 6. ...if such practice causes or threatens to cause serious prejudice to the interests of the other Party or material injury to its domestic industry, including its services industry...

In treaties signed between the EC and the less-developed partners, particular provision was made for the perceived poverty of the other party. For example, in the EC-Jordan treaty, the wording is similar to that of previous treaties, in the sense that Jordan is to be treated the same as any Member of the EC in terms of its distribution of state aid, but with the addition that:

Chapter 2, 'Competition and Other Economic Matters', Article 53

> Jordan shall be regarded as an area identical to those areas of the Community where the standard of living is *abnormally low or where there is serious underemployment*, as described in Article 92(3)(a) of the Treaty establishing the European Community. [italics added]
>
> The Association Council shall, taking into account the economic situation of Jordan, decide whether that period should be extended for further periods of five years.[7]

The promotion of economic development figured highly in treaties signed between the EC and less-developed partners. Restructuring of the domestic economy was recognized in at least one of the treaties examined. For example, the EC-Morocco treaty, in which the EC grants special consideration to the needs of Morocco's domestic economy, reads in part:

Chapter II, 'Competition and Other Economic Provisions', Article 36

> During the same period of time, Morocco may exceptionally, as regards ECSC steel products, grant State aid for restructuring purposes provided that:
>
> - it leads to the viability of the recipient firms under normal market conditions at the end of the restructuring period,
> - the amount and intensity of such aid are strictly limited to what is absolutely necessary in order to restore such viability and are progressively reduced,
> - the restructuring programme is linked to a comprehensive plan for rationalising capacity in Morocco.[8]

A similar provision occurs in the agreement between the EC and the Palestinian Authority. The difference was that, in Palestine, the drafters were concerned about developmental problems in general terms. The wording of the text, therefore, does not reach the same level of specificity as that of the EC-Morocco treaty:

Title II, 'Payments, Capital, Competition, Intellectual Property and Public Procurement', Chapter 2, 'Competition, Intellectual Property and Public Procurement', Article 30

> As regards the implementation of paragraph 1 (iii), the Parties recognize that the Palestinian Authority may wish to use, during the period until 31 December 2001, public aid to undertakings as an instrument to tackle its *specific development problems*.'[9]"[italics added]

In the EC-Turkey agreement, this took the form of specific measures to redress social problems such as unemployment, low living standards or more general aid 'of a social character':

Section II, Competition, A. Competition Rules of the Customs Union, Article 32

> 2. The following shall be compatible with the functioning of the Customs Union:
> (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned...
> (d) for a period of five years from the entry into force of this Decision, aid to promote economic development of Turkey's less-developed regions, provided that such aid does not adversely affect trading conditions between the Community and Turkey to an extent contrary to the common interest.
>
> 3. The following may be considered to be compatible with the functioning of the Customs Union:
> (a) in conformity with Article 43(2) of the Additional Protocol, aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;[10]

5.3 Transitional periods

Transitional periods pertain to the progressive implementation of certain provisions over a certain period of time. In several of the treaties examined for this chapter, the less-developed partner was unilaterally accorded a lengthier implementation period than that accorded to the more-developed partner. Transition periods took place in four areas: the setting up of a competition authority, the implementation of a competition law, devolution of public enterprises and, in one instance, the protection of public industry. For example, in the EC-Croatia treaty, Croatia was given one year to set up a competition authority:

Title III 'Payments, Competition and Other Economic Provisions, Article 33 (SAA Article 59)

> Croatia shall establish an operationally independent authority which is entrusted with the powers necessary for the full application of paragraph 1(iii) of this Article within one year from the date of entry into force of this Agreement. This authority shall have, *inter alia*, the powers to authorize state aid schemes and individual aid grants in conformity with paragraph 2 of this Article, as well as the powers to order the recovery of state aid that has been unlawfully granted. [11]

In many cases, the less-developed partner was required to implement a competition law and a certain amount of time was granted to them to do so. There were numerous examples of such provisions occurring between EFTA and less-developed partners. These transitional periods were alluded to in secondary sources but the original text of the agreements was not available at the time of publication. These secondary documents confirmed that unilateral transition periods were extended by the EFTA to less-developed partners in order that they would be able to set up a proper competition law.[12] Mutual provisions according all parties a lengthy implementation period were also common. The popularity of transition periods indicates that it is one of the most effective and easily implemented S&D provisions.

5.4 Technical assistance

Technical assistance within the context of competition law and policy usually takes the form of seminars, exchanges of information and sometimes of staff. The treaty between the EC and South Africa sums up the type of technical assistance that usually takes place between parties to an RTA:

> *SECTION D, 'Competition Policy', Article 39*
> The Community shall provide South Africa with technical assistance in the restructuring of its competition law and policy, which may include among others:
> (a) the exchange of experts;
> (b) organisation of seminars;
> (c) training activities.[13]

Treaty texts examined by authors seldom referred to the unilateral extension of technical assistance. This should not lead to the conclusion that technical assistance is rarely offered by the more-developed to the less-developed partner. Indeed, it is in the interest of the developed partner to ensure that the competition authority of its partner is sufficiently competent to assist in case handling and prosecutions. The results of a survey undertaken by UNCTAD for another chapter of this book (see Chapter 4 by Alvarez *et al.*) showed that competition authorities in developed countries were eager to offer assistance even if it had not been mandated by the RTA. Furthermore, two RTAs examined featured provisions for mutual technical assistance, though the less-developed partner is more likely to benefit from this assistance than the developed partner (see Section 3.)

6 Conclusions

S&D treatment provisions do appear in RTAs. The UN Set recognized the need for S&D treatment in 1980 and UNCTAD has continued to endorse special measures for developing and LDCs at each subsequent Review Conference of the Set. Given the difficulties encountered by S&D at the multilateral level at the WTO, it is somewhat surprising to find a higher than expected number of such clauses in specific competition provisions within RTAs. Nevertheless,

this may be explained, of course, by the fact that not all the developed countries in the WTO talks were signatories of RTAs containing elements of S&D. These RTAs were mainly passed by the EU and EFTA, which had proposed certain elements of flexibility and progressively at the WTO. At the bilateral or regional level, it might be easier for the more-advanced party to accept a certain degree of flexibility, than they would be prepared to accept at the multilateral level. However, it should be highlighted that often the element of non-reciprocity in these clauses is ignored.

The problems addressed by S&D provisions within competition clauses are the same as those that UNCTAD has flagged many times, particularly the need for policy space to ensure that parties at different levels of development benefit from non-reciprocated provisions in their favour. The appearance of S&D provisions within RTAs shows, at minimum, that weaker partners feel that there is a necessity for S&D treatment and that it is beneficial to them. It also supports UNCTAD's position at the WTO, which has been that S&D provisions in favour of developing countries may be necessary for their social and economic development.

There are several reasons why countries may choose to endorse S&D treatment specifically within a competition clause, rather than, say, in the preamble or under a general structural adjustment clause. The first and most basic reason is that some countries do not as yet have a competition law. Transitional periods and exemptions may be necessary for the country to implement a competition law before it can begin to function effectively within the regime envisaged by the RTA. This is more often the case with less-developed partners for whom competition legislation has not been a priority. The motivation to implement a competition law, therefore, is normally driven by the developed partner to the agreement such as the EC, which has shown a strong interest in implementing competition laws within partner states that mirror those that apply within the territory of the EC.

Secondly, competition provisions have direct implications for domestic industries. Competition policy is perceived by many countries, rightly or wrongly, as an infringement upon the growth potential of protected domestic industries and some of the clauses examined in this chapter reflect this fear. Exemptions and exceptions from the rules that apply to the less-developed partner are the usual

outcome of a desire to foster the development of certain industries within the economy of that partner, when it is felt that this would not be possible without minimum protection from external competition. Often, these exceptions are framed as general 'aid' provisions designed to remediate the effects of poverty, but equally they are framed with a particular industry or national champion in mind.

Thirdly, the growth of international cartels alongside the growth of international trade has pinpointed the need for cooperation between competition authorities in different States so that the successful prosecution of cross-border anti-competitive practices may be ensured. Cooperation is a sensitive area for some developing countries because the technical competence of their competition authority may take a while to reach the standards of the developed partners to the agreement. To overcome this perceived imbalance in competence, special measures such as transition periods and technical assistance from the developed partner are included within the competition clauses of RTAs.

The use of S&D provisions within competition provisions of RTAs is a small reflection of a much larger issue, namely that of the conflict between the needs and desires of developing countries. On the one hand, developing countries desire to improve their position within the community of nations by implementing laws that are seen to be further integrating their economies with those of developed nations. On the other hand, developing countries are constrained by their particular economic and social situation which might advocate for industrial policy and national champion policies and therefore are placed in the position of demanding special concessions from competition rules advocated by their more-developed partners. The use of S&D provisions within competition clauses of RTAs is a reflection of this ambiguity and an attempt to equalize the economic and power differentials between developed and developing States. By examining one small aspect of this dilemma, this chapter hopes to act as a reference point by which developed and developing countries may assess their needs for balance in future agreements at either the bilateral, plurilateral, regional or multilateral levels.

ANNEX I

The following table lists all the RTAs including at least one less-developed partner[15] notified to the WTO since 1995. In a few cases, the treaty text was not available at the time of publication. Such cases were marked with a 'U' (unknown) in the second column. The third column indicates the existence of S&D provisions within the competition clause with a 'Y' (yes) if S&D treatment was present, or 'N' (no) if it was not. Those entries for which the treaty text was unavailable at the time of writing ('U'), or in which there was no competition clause ('N') were left blank in the third column. Entries are footnoted if additional information was relevant.

Table 5A.1 Table of RTAs involving at least one less-developed partner, as notified to the World Trade Organization (WTO) since 1995

Name of RTA	Location of competition clause in the RTA ('N' = no competition clause; U = unknown)	S&D provision in competition clause? (Y/N)	Comments
AFTA - Asean Free Trade Area	N		
ASEAN-China	N[1]		
Albania-Bulgaria	Article 25	N	
Albania- Bosnia Herzegovina	Article 21	N	
Albania-Macedonia	Article 27	N	
Albania-Moldova	Article 21	N	
Albania-Romania	U[1]		
Albania-Serbia Montenegro	Article 27	N	
Albania – UNMIK (Kosovo)	Article 25	N	
Armenia-Kazakhstan	Article 8	N	
Armenia-Moldova	Article 8	N	
Armenia-Russian Federation	Article 7	N	
Armenia-Turkmenistan	Article 7	N	
Armenia-Ukraine	Article 5	N	
BAFTA*	Article 15	N	
Bulgaria-Turkey	Article 23	N	
Bulgaria-Israel	Article 27	N	
Bangkok Agreement - Bangladesh, India, Laos, South Korea, Sri Lanka	U[1]		
Bulgaria-Macedonia	Article 27	N	
CACM - Central American Common Market	N		
CAN - Cartagena Agreement	Chapter VIII	N	
CARICOM	Chapter 8	N	

.../...

Table 5.A.1 (continued)

Name of RTA	Location of competition clause in the RTA ('N' = no competition clause; U = unknown)	S&D provision in competition clause? (Y/N)	Comments
Canada-Chile	Chapter J	N	
Canada-Costa Rica	Chapter 11	N	Mutual technical assistance
CEFTA	Article 22	N	
CEMAC	Article 88, WAEMU	N	
Chile-Costa Rica	Chapter 15	N	
Chile-El Salvador	N	N	
Chile-Mexico	Chapter 14	N	
China-Hong Kong	N	N	
China-Macao	N	N	
CIS	Article 17	N	
COMESA	Article 55	N	
Croatia-Albania	Article 27	N	
Croatia-Bosnia Herzegovina	Article 22	N	
Czech Republic-Israel*	Article 19	N	Mutual structural adjustment
Czech Republic-Latvia*	Article 23	N	Mutual structural adjustment
Czech Republic-Lithuania*	Article 22	N	
Czech Republic-Estonia*	Article 24	N	
Czech Republic-Slovak Republic*	U		
Czech Republic – Turkey*	Article 20	N	
EAC	N[1]	N	
EAEC	N	N	
EC-Algeria	N[1]	N	
EC-Bulgaria	Chapter II	Y	Provisions to safeguard Bulgaria's interests
EC-Chile	Title VII	N	
EC-Croatia	Title III	Y	Provisions to safeguard Croatia's interests, transitional periods
EC-Cyprus	Article 5.5	N	
EC-Czech Republic*	Article 64	Y	Provisions to safeguard the Czech Republic's interests
EC-Egypt	Article 34	N	Mutual exemptions, mutual transition periods, technical assistance
EC-Estonia*	Article 63	Y	Provisions to safeguard Estonia's interests
EC-Hungary*	Title V, Chapter II	N	
EC-Latvia*	Article 64	Y	Provisions to safeguard its interests, exceptions and exemptions
EC-Jordan	Article 53	Y	Provisions to safeguard its interests, exceptions and exemptions
EC-Lebanon	Article 27	N	Mutual transition periods
EC-Lithuania*	Article 64	Y	Provisions to safeguard its interests
EC-FYOM[1]	Article 33	Y	Provisions to safeguard its interests
EC-Mexico	Article 39[1]	N	Mutual technical assistance
EC-Malta*	U		
EC-Morocco	Article 36	Y	Provisions to safeguard its interests, exceptions and exemptions
EC-Palestinian Authority	Article 30	Y	Provisions to safeguard its interests, exceptions and exemptions
EC-Romania	Article 64	Y	Provisions to safeguard its interests
EC-South Africa	Article 35	Y	Transitional periods
EC-Syria	U		
EC-Tunisia	Title IV, Chapter 2	Y	Provisions to safeguard its interests, exceptions and exemptions
EC-Turkey	Article 32	Y	Provisions to safeguard its interests, exceptions and exemptions
ECO	N		
EFTA-Bulgaria	Article 18	Y	Transitional periods
EFTA-Chile	Article 72	N	
EFTA-Croatia	Article 19	N	

.../...

Table 5.A.1 (continued)

Name of RTA	Location of competition clause in the RTA ('N' = no competition clause; U = unknown)	S&D provision in competition clause? (Y/N)	Comments
EFTA-Czech Republic*	U		
EFTA-Estonia*	Article 16	N	
EFTA-Hungary*	Article 19	Y	Transitional periods
EFTA-Jordan	Article 18	Y	Transitional periods
EFTA-Latvia*	Article 16	N	
EFTA-Lithuania*	Article 17	N	
EFTA-Macedonia	Article 17	N	
EFTA-Mexico	Chapter IV.I	N	
EFTA-Morocco	Article 17	N	Mutual transition periods for state monopolies
EFTA-Palestinian Authority	Article 16	N	Mutual transition period for state monopolies
EFTA-Poland*	Article 18	Y	Transitional periods
EFTA-Romania	Article 18	Y	Transitional periods
EFTA-Singapore	Article 50	N	
EFTA-Slovak Republic*	U		
EFTA-Slovenia*	Article 17	Y	Transitional periods
EFTA-Turkey	Article 17	N	
Estonia-Faroe Islands*	Article 15	N	
Estonia-Turkey*	Article 24	N	
Estonia-Ukraine*	Article 13	N	
GCC	N		
GSTP	N		
Georgia-Armenia	Article 7	N	
Georgia-Azerbaijan	Article 7	N	
Georgia-Kazakhstan	Article 8	N	
Georgia-Russia	N		
Georgia-Turkmenistan	Article 6	N	
Georgia-Ukraine	Article 7	N	
Hungary-Latvia*	Article 22	N	
Hungary-Estonia*	Article 20	N	
Hungary-Israel*	Article 19	N	
Hungary-Lithuania*	Article 20	N	
Hungary-Turkey*	Article 24	N	
India-Sri Lanka	N		
Israel-Poland*	Article 20	N	
Israel-Turkey	Article 25	N	Mutual transition periods
Japan-Singapore	Chapter 12	N	
Korea-Chile	Chapter 14	N	
Kyrgyz Republic-Armenia	Article 6	N	
Kyrgyz Republic-Kazakhstan	Article 8	N	
Kyrgyz Republic-Moldova	Article 8	N	
Kyrgyz Republic-Russian Federation	Article 7	N	
Kyrgyz Republic-Ukraine	Article 6	N	
Kyrgyz Republic-Uzbekistan	Article 8	N	
LAIA	N		
Laos-Thailand	U		
Latvia-Turkey*	Article 25	N	
Lithuania-Turkey*	Article 25	N	
MSG - Melanesian Spearhead Group	N	N	
Mercosur	N[1]	N	
Mexico-Israel	Chapter 8	N	
NAFTA	Chapter 15	N	
New Zealand-Singapore	Article 3	N	
PATCRA	N	N	

.../...

Table 5.A.1 (continued)

Name of RTA	Location of competition clause in the RTA ('N' = no competition clause; U = unknown)	S&D provision in competition clause? (Y/N)	Comments
PTN	U		
Poland-Faroe Islands*	Article 16	U[1]	
Poland-Latvia*	Article 22	N	Mutual transition period
Poland-Lithuania*	Article 22	N	
Poland-Turkey*	Article 20	N	Mutual transition period
Romania-Moldova	Article 16	N	Mutual transition period
Romania-Turkey	Article 24	Y	Provisions to safeguard its interests, exceptions and exemptions
SADC	Article 25	N	
SAPTA	N	N	
SPARTECA	N[1]	N	
Singapore-Australia	Chapter 12	N	
Slovak Republic-Estonia*	Article 24	N	Mutual transition period, mutual exceptions and exemptions
Slovak Republic-Israel*	Article 19	N	Mutual transition period, mutual exceptions and exemptions
Slovak Republic-Latvia*	Article 23	N	Mutual transition period
Slovak Republic-Lithuania*	Article 22	N	Mutual transition period
Slovenia-Lithuania*	Article 22	N	Mutual transition periods
Slovenia-Bosnia Herzegovina*	Article 17	N	Mutual transition period
Slovenia-Croatia*	Article 22	N	Mutual transition period
Slovenia-Estonia*	Article 24	N	Mutual transition period
Slovenia-Israel*	Article 19	N	
Slovenia-Latvia*	Article 16	N	
Slovenia-FYOM*	Article 22	N	Mutual transition period
Thailand-Australia	Chapter 12	N	
TRIPARTITE	U		
Turkey-Bosnia Herzegovina	Article 17	N	
Turkey-Croatia	Article 25	N	Mutual transition period, mutual exceptions and exemptions
Turkey-Czech Republic*	Article 20	N	Mutual transition period, mutual exceptions and exemptions
Turkey-Macedonia	Article 24	N	
Turkey-Slovak Republic*	Article 20	N	Mutual transition period
Turkey-Slovenia*	Article 27	N	Mutual transition period
US-Chile	Chapter 16	N	
US-Singapore	Chapter 12	N	
US-Jordan	N	N	
WAEMU	Article 88	N	Mutual transition period

[1] As indicated at the outset in this chapter, the authors have examined all agreements involving developing countries and LDCs, but also economies in transition that, while not developing countries, are or were, at the time of the agreement, less developed than their industrialized partners. It was decided to include them in the survey, because the issues dealt with were similar, and could shed light on agreements involving developed and developing countries.

ANNEX II

Methodology and Caveats

Only special and differential (S&D) provisions found within the competition clause itself were included in this analysis. S&D provisions commonly appear in the preamble, structural adjustment clause, state monopolies clause and state-owned enterprise clause of regional trade agreements (RTAs), and even though these measures may have a preferential effect for the less-developed partner, they were not within the scope of this study.

The RTAs used as examples in this chapter were extracted from the database compiled by the World Trade Organization within the ambit of its remit under Section XXIV of the General Agreement on Tariffs and Trade (GATT) and Section V of the General Agreement on Trade in Services (GATS), whereby Member States should notify the Organization of any trade agreement negotiated bilaterally or plurilaterally between itself and another country. The search was carried out using the (World Trade Organization) WTO intranet and the external website offered by the WTO to the general public for research. The list is complete for all the RTAs signalled to the WTO to date.

The list of RTAs contained in this chapter is confined to those notified to the WTO and that involve at least one less-developed country, as indicated in Endnote 2. The purpose of this chapter is to focus on RTAs signed bilaterally or plurilaterally between developing countries or between developed countries and at least one less-developed partner, where the treaty text was available. This excludes agreements between developed countries, such as the Closer Economic Relationship (CER) between Australia and New Zealand, on the grounds that such an agreement did not involve a developing country and could not, by definition, include S&D provisions. These criteria likewise exclude the TRIPARTITE agreement, on the grounds that text was not available at the time of writing.

RTAs signed between countries that have since been overtaken by membership in a larger regional grouping were also included. The most common example of this practice is the accession of new Member States to the European Union in May 2005. The status of the

RTAs signed between those countries prior to their accession to the European Union has been highlighted in Table 5A.1, where the treaties abrogated as a result of the accession of the new Member States of the European Union have been marked with an asterisk. The abrogated treaties are included here because they are operational and because they form an excellent model of the type of S&D provisions likely to be found in agreements signed between developed countries and less-developed partners.

In compiling this list, several RTAs were excluded. In many cases, this was because of difficulty in sourcing the text of the agreement. Detailed searches were undertaken and, in at least one case, consulates were contacted, in an effort to secure an English-language text of the relevant treaty. In several cases, though, it was simply not possible to obtain a copy of the treaty before this book was published (for example, the treaty text of the bilateral free-trade agreement between Laos and Thailand). The omissions are given in Table 5A.2.

The omission of these RTAs does not represent a significant caveat to the conclusions drawn in the final section of this chapter, if one bears in mind that these omissions represent approximately 5 per cent of the entire number of RTAs involving at least one developing or less-developed country notified to the WTO, and that several of the agreements could be analysed from secondary texts even though the original treaty was not available. Nor was it clear that any of the missing texts even contained competition clauses.

Table 5A.2 List of RTAs notified to the WTO, of which treaty text was unavailable at time of writing

Albania-Romania
Bangkok Agreement
Czech Republic-Slovak Republic
EC-Hungary
EC-Malta
Laos-Thailand
PTN
TRIPARTITE

In many cases, the entry into force of the agreement was unclear. The ratification and entry into force of the treaty was assumed to have taken place if the treaty had been notified to the WTO.

It should also be pointed out that in certain cases the primary document containing the text of the treaty could not be located, but the contents of the treaty were available from questions and answers sessions conducted at the WTO, or through summaries of the treaty submitted by parties to it. The following treaties were described from secondary sources: EFTA-Bulgaria, EFTA-Czech Republic, EFTA-Hungary, EFTA-Poland, EFTA-Romania, EFTA-Slovak Republic, EFTA-Slovenia, Georgia-Russia, and SPARTECA.

For example, in one case, the European Free Trade Agreement (EFTA) secretariat lodged a single document outlining the substance of its free trade agreements with a series of central European countries, including Bulgaria, Hungary, Poland, Romania, and Slovenia. This document was examined in lieu of the original agreements. Although it may be considered a secondary source, it was nevertheless rich in detail about each article of the trade agreements signed between EFTA and the individual countries. In making the trade-off between authenticity and inclusivity, the authors believed that the abridged document served just as well as the original trade agreements in providing the data required for this survey.

Treaties that have been superseded have been included, so long as they remained on the WTO list of notifications. If the states were late-joiners to the EC (that is were part of the second tranche of Members acceding in 2005) then the list of RTAs concluded between themselves and the EC prior to their accession was included, even though these RTAs may have since been superseded by the EC rules. Their inclusion was justified by the fact these treaties have been notified to the WTO and because their contents are important for an understanding of the issues of S&D treatment under examination in this chapter.

States that have been scheduled to join the EU at some date in the near future, for example, Romania and Bulgaria, also have bilateral treaties between themselves and the EC. These bilateral treaties were included in the database because the accession of such countries to the EU has not yet been finalized. The bilateral treaties signed between

themselves and the EC thus remain valid for the purposes of this study and any references to S&D treatment within the competition clauses of those agreements could fairly be assumed to have relevance to the overall study.

Lack of information was also a hindrance preventing a universal review of every RTA in existence. The list compiled here and the conclusions drawn from it are reliant upon the goodwill and efficiency of the WTO Members and Secretariat. Member States that have not applied themselves to maintaining an up-to-date list of all RTAs with the WTO will affect the thoroughness of the data compiled here. Nonetheless, the nature of the conclusions that have been drawn from this survey of the relevant documents is valid despite the probable existence of RTAs involving at least one developing partner that may have been missed in the writing of this chapter.

Finally, states that have not yet acceded to the WTO were omitted from the list. In part, this was a practical decision because of the difficulties of finding all the RTAs that exist outside the WTO. Attempting to include all agreements in existence would have placed exigencies upon the researchers that would have been difficult to overcome if the writing was to be concluded within the deadline set

Table 5A.3 List of countries currently seeking accession to WTO

Region	Country
Europe and Central Asia	Russia, Belarus, Ukraine, Uzbekistan, Kazakhstan, Azerbaijan, Bosnia and Herzegovina, Andorra, Tajikistan, Serbia, Montenegro.
Middle East and North Africa	Algeria, Saudi Arabia, Lebanon, Yemen, Libya, Iraq, Iran
East Asia and Pacific	Vietnam, Tonga, Vanuatu, Laos, Samoa
Sub-Saharan Africa	Sudan, Seychelles, Cape Verde, Ethiopia, Sao Tome and Principe
South Asia	Bhutan, Afghanistan
Latin America and the Caribbean	Bahamas

Source: Evenett and Primo-Braga, 2005

for publication. As a result, it is impossible to list the number of RTAs between developing countries that may have been omitted from this study due to non-notification of the signatory parties or other reasons. The number of RTAs in existence that have not been notified to the WTO should be low, especially if one bears in mind two points: firstly, that at least one of the parties to most RTAs is likely to be a WTO Member (the ratio of WTO Member States to non-Member States being high) and would thus have notified its participation in such an agreement to the organization under its Article XXIV or GATS V obligations, and secondly that countries remaining outside the WTO may be economically isolated, and thus (arguably) less likely to sign RTAs with partner states. Table 5A.3 contains a list of countries awaiting accession to the WTO. Note in support of the points made above, that of the 31 countries in the table below, ten of them already appear in the RTAs notified to the WTO by virtue of agreements made with WTO Member States.[25]

This Chapter has not sought to address the question of the status of a developing or transition economy once it has been brought within the aegis of either the EFTA or the EC. Some of the countries examined in the course of compiling this Chapter may have graduated from developing or transition economy status, partly as a result of their accession to the EC, or even EFTA.

NOTES

[1]WTO, Doha Declaration, November 2001. Available online at http://www.wto.org/english/tratop_e/dda_e/dda_e.htm#dohadeclaration

[2]OECD, Joint Group on Trade and Competition "The Role of Special and Differential Treatment in Competition." COM/DAFFE/TD (2004). Published by the Directorate for Financial, Fiscal & Enterprise Affairs, Trade Directorate Organisation of Economic Cooperation and Development (OECD) June 2004

[3]This figure includes treaties that have since been superseded.

[4]Treaties that appeared in more than one manifestation within each category of S&D were only counted once.

[5]WTO, Europe Agreement between the European Communities and Bulgaria, WT/REG1/6, 2002.

[6] WTO, Europe Agreement between the European Communities and the Czech Republic, WT/REG18/6, 10 May 1996.

[7]WTO, European Communities – Jordan Euro-Mediterranean Agreement, WT/REG141/1, 2002.

[8]WTO, Euro-Mediterranean Agreement between the European Communities and Morocco, WT/REG112/1, 2002.

[9]WTO, Euro-Mediterranean Interim Association Agreement on Trade and Cooperation between the European Community and the Palestine Liberation Organization for the Benefit of Palestinian Authority of the West Bank and the Gaza Strip, WT/REG43/1, 1997.

[10]WTO, Customs Union between Turkey and the European Union, WT/REG22/1, 1996.

[11]WTO, European Community – Croatia Interim Agreement, WT/REG142/1, 2003.

[12]For details of all the above treaties, please refer to WTO, EFTA Free Trade Agreements with Bulgaria, Hungary, Israel, Poland, Romania and Slovenia, WT/REG14-16/2, 1996.

[13]WTO, Trade, Development and Co-operation Agreement between the European Community and South Africa, WT/REG113/1, 2000.

[14]As indicated at the outset in this chapter, the authors have examined all agreements involving developing countries and LDCs, but also economies in transition that, while not developing countries, are or were, at the time of the agreement, less developed than their industrialized partners. It was decided to include them in the survey, because the issues dealt with were similar, and could shed light on agreements involving developed and developing countries.

[15]Currently under negotiation.

[16]The text of this agreement was not available at the time of publication.

[17]Tariff concession agreement only.

[18]There is a reference to negotiations on competition in Article 75.

[19]Under negotiation.

[20]Former Yugoslav Republic of Macedonia.

[21]Obligation to set up a competition authority.

[22]Under negotiation.

[23]Treaty text not available at time of publication.

[24]SPARTECA is a preferential trade agreement for South Pacific Island nations wishing to access Australian or New Zealander markets and contains tariff preferences only.

[25]The non-acceded countries that appear on the WTO notification list by virtue of agreements signed with WTO Member States are: Russia, Ukraine,

6

Implementation costs and burden of international competition law and policy agreements

BARBARA ROSENBERG
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1. Introduction

Competition Law and Policy is one of the important tools for fostering development and competitiveness in developing countries (UNCTAD, 2004a) and studies have shown that regional economic integration provides several challenges for developing countries aiming to make the best use of competition policies for economic development, as there is no 'one size fits all' adequate model. For this reason, each country has been discussing appropriate ways of developing and implementing its own competition policy regimes, either by adopting a competition law, or by introducing aspects of competition policy in other areas of its legal and political system.

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International obligations affect the competition framework within a country, as they may impose minimum standards for competition policies. In July 2004, following the conclusions of the Cancun Ministerial Conference, competition was excluded from the World Trade Organization (WTO) agenda, together with other Singapore issues. However, other international commitments dealing with competition law and policy exist and are either in place or being negotiated. Those commitments assume various forms, such as bilateral or plurilateral cooperation treaties among countries with existing competition framework (referred by some as Agency-to-Agency Agreements, or ATAs), a competition chapter on trade agreement (either a regional trade agreement or a customs union agreement) and Mutual Legal Assistance Treaties (MLATs). As a consequence, depending on the scope and ambition of the agreement, as described in this chapter, a country may be required to implement competition law and policy through the creation of a legal framework and an enforcement institution. In other cases, when competition agencies are already established, the main focus will probably be the implementation of cooperation among members based on positive and/or negative comity rules (see Chapter 4 by Alvarez *et al.* in this publication).

Based on this scenario, the scope of this chapter is to evaluate, from a developing country perspective, the benefits and burdens for implementing competition law and policy provisions encompassed in international agreements. These elements should be taken into account by countries when assuming international commitments. For this purpose, the chapter considers existing alternatives of competition agreements and their possible breadth, comparing trade agreements containing competition chapters with other international competition agreements that focus mainly on cooperation.

2. Objectives and features of international law and policy competition provisions

Transactions with a cross-border, or even global, dimension have been increasing mainly since the 1990s as compared to those that are confined within national boundaries. Allied with this, companies have been progressively defining their strategies globally and decisions

or any anti-competitive conduct taken within a jurisdiction may have a direct impact in another country's jurisdiction. As a result, countries are being pushed to adopt antitrust codes, expanding the scope of the existing rules, and increasing resources committed to enforcement (Pitofsky, 1998). Today, approximately 90 countries have some kind of competition law, and 60 of those codes took effect during the past 15 years.

In this scenario, a variety of types of international agreements that include or relate to competition law and policy issues have become more common, serving different purposes, depending on the objectives involved.

In order to facilitate the analysis of the advantages and burdens arising from those agreements, international competition agreements will be divided into two main categories: (i) bilateral or plurilateral cooperation agreements among antitrust authorities, and (ii) competition agreements that are part of a regional trade agreement or custom union agreements. Some particular nuances concerning these types of agreements also occur according to the level of institutional development of the countries involved, as will be detailed below.

Based on this categorization, the similarities and differences of the purposes of each of the international agreements would be used as a tool to evaluate not only the benefits arising from those agreements, but also the costs and burdens that result from their implementation, focusing mainly on the perspective of developing countries, which have limited resources and need to allocate accordingly.

3. Benefits and burdens of bilateral or plurilateral competition cooperation agreements

International cooperation between competition enforcement agencies has become increasingly important, to the extent that they manage to increase the efficiency and effectiveness of enforcement by both authorities, and reduce the risk of two or more jurisdictions reaching conflicting or incompatible decisions in individual cases.

Generally speaking, cooperation agreements on competition issues may achieve two main results: (i) to serve as an instrument to foster capacity building to one of the countries, which happens when the level of development of the parties to the agreement is uneven, and/or (ii) to effectively implement enforcement cooperation activities between two countries where transnational activities are involved. In this latter case, the agreement will increase the chances that the investigation, be it a merger or an anti-competitive conduct case, is successfully concluded, and at the same time, the costs for the parties and for the competition authorities in the countries involved are reduced. To some extent, any agreement will usually aim at both objectives, although in practice, one main feature will stand out, depending on the institutional development of the parties involved.

The increasingly international nature of cross-border transactions, as well as of anti-competitive behaviour that impacts on more than one jurisdiction, have resulted in a growing number of mergers and cooperation projects falling within the jurisdiction of more than one competition authority. This fact has led enforcers to examine ways to expand multilateral cooperation on competition, aiming to achieve means of cooperation to facilitate and coordinate their respective review, investigative and decision-making processes.

A bilateral or plurilateral cooperation agreement on competition is usually referred as a *First Generation Agreement*, and its key elements are (i) information sharing, (ii) coordination of enforcement activities, and (iii) technical cooperation. Information sharing within *First Generation Agreements* is limited to non-confidential data, and may include all documents and records not protected by confidentiality safeguards. Coordination of enforcement activities can be implemented through numerous commitments, such as the possibility that one party will request the other to consider its specific concerns during investigations, based on traditional comity, or even to take or not to take certain enforcement actions depending on the impact that they will have on the requesting jurisdiction, through positive and negative comity provisions.

However, as detailed below, evidence shows that the extent to which parties will effectively be able to coordinate their actions, as well as the nature of the data to be exchanged through such instruments, will basically depend on how similar is the stage of

development of the countries. Therefore, as will be detailed in the following sections, bilateral cooperation agreements among countries with competition law and authority may be divided into two subsets of agreements.

The *first* subset of cooperation agreements would include the agreements between parties with different levels of institutional development. These agreements are usually less ambitious and tend to concentrate on exchange of limited types of information, in most cases achieving important capacity-building results, as the less mature agency will end up profiting from the existing experience of the other country by better understanding its enforcement policies and activities. The *second* subset of bilateral cooperation agreements would refer to those agreements between countries with similar stages of institutional development. Within those agreements, authorities are more likely to effectively coordinate enforcement activities by frequently notifying of their enforcement activities that may affect the other party's market, reduce conflicts with respect to enforcement actions, as well as have and give access to a wider variety of data, making the antitrust enforcement more efficient and effective in certain cross-border cases. Specific countries have even moved a step further and signed *Second Generation Agreements* that, in addition to the mechanisms included in the *First Generation* ones, allow the sharing of confidential information and permit one agency to gather information on behalf of the other (Purcell White, 2004).

It is interesting to observe that provisions included in bilateral or plurilateral cooperation agreements are overall the same, regardless of whether the parties are at similar levels or not. In practice, though, for countries at different institutional stages, these instruments have worked mostly as capacity-building tools, either through specific technical assistance projects, such as seminars and consultancies, or through the exchange of certain kinds of non-confidential information such as case theories and discussions between staff on specific substantive topics.

3.1 Bilateral or plurilateral agreements between parties with different levels of institutional development

Even though there is no doubt that cooperation agreements may increase effectiveness and efficiency on competition law enforcement, by means of technical assistance and exchange of information, any such agreement will also entail costs and burdens for the parties involved, such as those associated with negotiating the agreement and with its implementation, which will be differently perceived by each country, depending on its institutional framework and on the resources available. Similarly, the motivations for entering into those agreements also vary and, therefore, the evaluation of whether or not it is worth bearing those costs will also differ.

When developed and developing countries are party to a *First Generation Agreement,* the latter's role has consisted, to a large extent, of being a recipient of the experience of the other party (see, for example, the case of the ATA between Canada and Costa Rica). In any case, to put into effect the provisions of a cooperation agreement, it will be necessary to allocate staff that could be in charge of other areas. Therefore, regardless of the breadth of the provisions and its main objectives, the costs for a developing country to enter into such an agreement are undeniably high: besides communication, paper exchange and travel expenses, the implementation of any cooperation activity requires human resources and this is possibly the higher cost for a developing country agency, as human resources are normally scarce therein.

The level of human resources needed for the implementation of a cooperation agreement will vary according to the type of cooperation activities, but there is no doubt that qualified people need to be involved. If a country were to report every single investigation that may have an impact in a counterpart's jurisdiction, an agency would possibly need to devote about five people at least to deal with such activity. Notwithstanding, even though costs might be high, if the provisions of the cooperation agreement are duly exploited, the benefits tend to outweigh the costs. For example, if parties effectively exchange information in a specific case, avoiding duplication of efforts and conflicting decisions - and, therefore, an investigation is successfully concluded - the costs of human resources, communication, paper exchange and travel are fully justified.

Technical assistance projects frequently produce satisfactory results, especially if customized to the needs of the recipient, which is likely to happen due to the cooperative relationship between parties to competition agreements. Nonetheless, the possibility to profit from the institutional maturity of a developed country's agency, through consultation channels that allow an enforcer from a developing country to contact its counterpart abroad and learn from the another agency's experiences regarding specific markets and/or conducts, is a very productive way for young competition agencies to upgrade their analytical framework, while solving daily challenges.

From a developed country's perspective, there are also substantial costs involved, whether the agreement is used primarily as capacity-building tools, or to effectively coordinate enforcement activities. For example, for any capacity-building activity, the parties involved will have to prepare documents, train people and bear the expenses associated with the trips. In addition, these tasks usually entail continuing monitoring of its implementation in the country recipient of the program. In the second case, though, it is clear that despite potential coordination difficulties, the possibility to have access to information in the course of an investigation and to streamline its proceedings as much as possible with any agency, even less developed ones, will possibly reduce enforcement costs, and therefore is always desirable. In agreements where its role is typically as a donor of technical assistance, substantial human and material resources are required to organize seminars and workshops and to respond to consultations, which are usually well received by the developing country. And in this case, although the return is not of the same nature as that which the recipient will experience, or in any way similar to those derived from coordination of enforcement activities, it is undeniably greater, since it offers a unique opportunity to promote the convergence of competition policy systems from the donor country's perspective and therefore to influence to some extent other countries' legislation and institutional development.

Some of the US bilateral cooperation agreements could be included in this subset of bilateral cooperation agreements, such as those entered with Mexico, Brazil and Israel.[1] The Brazil-United States Cooperation Agreement on Competition Enforcement, for example, was the first formal cooperation agreement between international competition authorities in which Brazil took part, and was signed in

October 1999 and enacted in March 2003. The agreement specifies certain requirements to be followed by both national antitrust authorities[2] as well as a number of possibilities regarding technical cooperation and enforcement activities, such as:

- Prompt notification to the other party with respect to enforcement activities that: (a) are relevant to enforcement activities of the other party, (b) involve anti-competitive practices, other than mergers or acquisitions, carried out in whole or in substantial part in the territory of the other party, (c) involve mergers or acquisitions in which one or more of the parties to the transaction, or a company controlling one or more of the parties to a transaction, is a company incorporated or organized under the laws of the other party or of one of its states, (d) involve conduct believed to have been required, encouraged, or approved by the other party, (e) involve remedies that expressly require or prohibit conduct in the territory of the other party or are otherwise directed at conduct in the territory of the other party, or (f) involve the seeking of information located in the territory of the other party;
- Consideration of coordination of enforcement activities with regard to related matters;
- The possibility of requesting consultations regarding any matter related to the agreement, the option to require, after prior consultation, the other party's competition authorities to initiate appropriate enforcement activities whenever a party believes that anti-competitive practices carried out in the territory of the other adversely affect important interests; and
- Technical cooperation activities, such as exchange of information to the extent compatible with their respective laws and important interests, exchange of competition agency personnel for training purposes, and participation of competition agency personnel as lecturers or consultants at training courses organized or sponsored by the other authority.

Since the execution of the agreement, most of its provisions have been implemented. Initially, the cooperation consisted mostly of exchange of information and technical assistance projects, mainly aimed at building capacity for the Brazilian authorities, as well as sporadic notifications of cases with multi-jurisdictional implications. In the past three years, though, there has been a significant increase

in the amount of information exchange between the Brazilian agencies and their counterparts in the United States, regarding both anti-competitive conduct investigations and merger cases, not to mention theoretical discussions regarding other competition issues. The exchanges between the Brazilian authorities and the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) staff have taken different features depending on the situation, and have expanded from purely technical assistance initiatives, to the exchange of non-confidential information, including investigation strategies, views on relevant market, theories of anti-competitive harm, potential remedies, and the like. In addition, during the recent elaboration of the draft bill that proposes the reform of the Brazilian antitrust law, numerous consultations were made in order to discuss specific provisions and compare those with the United States experience and also with international recommended practices in the area.

The evolution of the relationship between the US and Brazil in recent years is an indication that, although the provisions regarding positive and negative comity are still to be effectively implemented, the countries may soon be ready to consider effective coordination on enforcement activities, as well as systematic notification of cases that impact both countries. These procedures will necessarily raise the costs, but the positive effects would be undeniably greater.

From the Brazilian perspective, the value of the agreement is already considerable, since through its numerous applications, the agencies have been able to benefit from the expertise of a country with a mature experience in the enforcement of antitrust law and policy.

From the US perspective, the advantages of entering into an agreement with a country such as Brazil are, in the short run, different, but in the long run, quite similar to the advantages the agreement represents for Brazil. In the short run, it seems fair to say that the United States has been able to positively 'influence' the Brazilian institutional and legislative framework and, thus, by means of soft law, promote some convergence with its antitrust law and policy model. As an example, Brazilian authorities have been discussing features of its leniency program with the DOJ so as to make it more effective. In the long run, when the parties effectively coordinate merger and conduct investigation proceedings, the advantages will

derive from the synergies achieved by the coordination that may result in the reduction of investigation and enforcement costs.

Therefore, on the one hand, considering the surge in transnational mergers and anti-competitive conduct that impacts on various markets and, on the other, the absence of a multilateral framework for cooperation among competition agencies, the value for developed and developing countries alike is considerable.

In summary, although agreements between countries at different stages of development are necessarily limited if compared with agreements among equals, at least in the first stages of their implementation, this is not to say that they do not serve valuable purposes despite the costs entailed. And in the case of the Brazil-US cooperation agreement, as was seen above, at least from a developing country's perspective, the net effect has certainly been positive.

3.2 Bilateral or plurilateral cooperation agreements among parties with similar levels of institutional development

Cooperation agreements among parties with similar levels of institutional development and legal frameworks evidently do not result in capacity building. Whether an agreement involves both developed or both developing countries, the costs of negotiating it and of implementing its provisions will be worthwhile when there is a substantive degree of multi-jurisdictional activity between the parties involved.

For countries such as Brazil and Argentina, for example, that are party to MERCOSUR's customs union (thus having the same external common tax for almost all products), and for a number of firms with a plant in one of the two countries and exporting to the other, it is certainly beneficial to have a cooperation agreement. As it is relatively common that a merger in one market will impact on the other; and that anti-competitive behaviour in one country will affect the other market, at least to some degree, exchange of information is likely to make enforcement more effective and efficient.

Indeed, a cooperation agreement between Brazil and Argentina was signed in October 2003. It is also a *First Generation Agreement* and encompasses similar provisions to those included in the Brazil-US agreement that detail technical cooperation, information exchange and comity components. It is worth noting that the exchange of information between Brazilian and Argentinean agencies preceded the adoption of the agreement, but the steps specified in the bilateral document served to institutionalize them and establish routines among the staff. Moreover, the framework provided by the agreement guarantees that documents from one jurisdiction may be legally used by the other.

Although the Brazilian Government has not yet ratified the agreement, a number of its provisions have been already put into practice, including public information relating to notifications regarding conduct and merger cases in both countries, in situations where staff members identified that a certain investigation would concern the other authority. Since the agreement was signed, for example, there have been quite a few notifications regarding conduct merger investigations.

The notification procedure included in the Brazil-Argentina agreement is indeed very important, but for now and during the first stage of its formal implementation, it is in fact quite burdensome for both countries. And precisely for that reason, although both countries have used it many times, it has not so far become a systematic procedure. For developing countries with scarce human and material resources and that have not incorporated this provision into their routine, the obligation to notify the other country in every single case in which an investigation possibly affects the other country's market may entail costs that at least upfront are not necessarily covered by the benefits the agreement will bring when it is fully implemented. Another aspect, however, that would deserve better attention from agencies in both countries at this stage, refers to the possibility of having substantive discussions related to parallel cases being carried out by both jurisdictions. This would enable further harmonization of the countries' antitrust analyses, while providing better knowledge of each other's legal and procedural framework.

Another example of a *First Generation Agreement* between parties at similar levels of development is the cooperation between US agencies (FTC and DOJ) and the EC Competition Directorate.

Formal cooperation between the US and EU antitrust authorities initiated in 1991, when the 'AGREEMENT between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws' was signed (OJ L 132, 15.06.1995). Under the principle of 'traditional' or 'negative' comity, detailed below, the agreement explicitly was aimed to 'promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws'.

That framework was expanded and reinforced by a complementary agreement signed in 1998 (OJ L 173, 18.06.1998), aimed to introduce positive comity principles: 'Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws'. Among other important issues, according to the new understanding, a party will normally defer or suspend its own enforcement activities to let the most suitable authority carry out the investigation according to the specific circumstances of the case.

Mergers were not within the scope of the 1991 and 1998 agreements due to merger legislation on both sides. To deal in a coordinated way with mergers, the US-EU Merger Working Group issued the 'Best Practices on Cooperation in Merger Investigations' in October 2002. These are intended to promote fully-informed decision making on the part of the authorities of both sides, to minimize the risk of divergent outcomes on both sides of the Atlantic, to facilitate coherence and compatibility in remedies, to enhance the efficiency of their respective investigations, to reduce burdens on merging parties and third parties, and to increase the overall transparency of the merger review processes.

As mentioned in the previous section, *First Generation Agreements* concluded between countries at similar development stages and those between countries with different institutional degrees of development encompass mostly the same provisions; existing distinctions refer

mainly to the extent to which any information exchange takes place. As was mentioned above, *First Generation Agreements* allow for the agencies to give and have access to all data and records not protected by specific confidentiality safeguards. It is, therefore, a very broad category, and the flexibility with which the agencies will interpret it basically depends on the assurances that the recipient jurisdiction will protect it as dutifully as the donor would.

As generally mentioned, positive and negative comity obligations also play an important role. The principle of negative (traditional) comity mean that countries would take into account the important and clearly stated trade interests of other countries before action is taken in particular cases. Positive comity allows antitrust enforcers in one country to request that the other country's antitrust agency investigate and take appropriate law enforcement action against anti-competitive conduct that adversely affects the interests of the country requesting the investigation and violates the laws of the country responding to the request, providing for more efficient application of the two countries' enforcement resources. Under this provision, the requesting country will normally agree to defer initiating its own enforcement activity and the enhanced agreement aims to reduce the likelihood of duplicate enforcement actions in cases where positive comity requests are made. However, the effectiveness of this provision may be limited: this approach can be effective only when the anti-competitive effects of the conduct affect not only the requesting jurisdiction, but the requested country as well, which actually may permit and encourage its procedure within its jurisdiction (Matsushita, 2002).

Some countries with mature institutions and sufficient resources to fully explore cooperation activities with their counterparts may consider it appropriate to improve enforcement coordination tools through *Second Generation Agreements*.[3] The possibility to organize joint investigations, as well as to exchange confidential information through these agreements, enables the parties to expand multi-jurisdictional enforcement and consequently to strengthen their domestic enforcement as well.

So far, there are a limited number of such agreements in place, which does not come as a surprise, since aside from some European countries, Australia, the United States, and Canada, cooperation

among competition agencies is a relatively recent phenomenon. In April 1997, for instance, the United States and Australia signed a *Second Generation Agreement* among competition agencies.[4] Under the agreement, the US and the Australian authorities[5] are able to share information obtained in the course of the agencies' investigations, as well as to provide each other with investigative assistance in order to obtain information, evidence, or testimony, which should be used exclusively for law enforcement purposes. Since then, records in Australia that are needed to prove an antitrust case in the US, and *vice versa*, have been made available to antitrust officials in the other country, while ensuring secure treatment of confidential information.

The cooperation agreement with Australia was signed within the realm of the US International Antitrust Enforcement Assistance Act of 1994, which authorizes the FTC and DOJ to negotiate assistance agreements with foreign counterpart agencies. The Act requires that both countries that are party to an agreement have comparable authority to provide assistance, which corroborates the underlining assumption that agreements among parties of the same institutional level have different effects than those entered by heterogeneous parts. An additional requirement consists in the other country also having laws that adequately protect materials provided in confidence from unauthorized public disclosure. The only exception regarding information exchange established in the current US-Australia agreement concerns documents and data that firms provide to the US authorities within the scope of merger review under their pre-merger notification programs. In those cases, however, if it is a multinational transaction it might be also in the firms' best interest to grant waivers, since it would be very likely to expedite the analysis. It is worth noting that, since 1992, the US and the Australian agencies already had in place a *First Generation Agreement* for competition matters which, though it provided an important framework for information exchange, did not allow the parties to share non-public information and give each other investigatory assistance.

Similarly to the US-Australia understanding, the plurilateral Nordic Cooperation Agreement entered between Sweden, Norway, Denmark and Iceland also authorizes the parties to exchange confidential information regarding mergers, cartels and abuse of dominant position cases. The agreement was initially signed between Norway, Denmark and Iceland in 2001, and later, in 2004, Sweden

also joined in. In addition, also in 1997, the European Commission and the national competition agencies in Europe signed an agreement to cooperate in handling cases falling within the scope of Articles 81 and 82 (formerly Articles 85 and 86) of the EC Treaty.[6]

In all the three treaties mentioned above, the parties to *Second Generation Agreements* were all developed countries, with solid institutions and mature antitrust enforcement experience. Therefore, those countries are able to mutually assure one another that confidential information received would be dutifully protected, and that the assistance provided within the scope of an investigation would be reciprocated whenever necessary. These commitments demand significant resources and, at least at this stage, it would be extremely burdensome for most developing country agencies to implement with any partner. Likewise, mutuality is the most important element in those types of agreements, and therefore, regardless of the significant improvement regarding both institutional framework and law enforcement promoted by a number of young competition agencies in the past decade, it is still unlikely that mature jurisdictions would be willing to enter into *Second Generation Agreements* with countries at a different stage.

3.3 Net effects of bilateral and plurilateral cooperation agreements

From a developing country's perspective, formal agreements such as the Brazil-United States and the Brazil-Argentina ones are, in effect, valuable tools, since they foster closer work among agencies, reducing duplication and increasing the amount of data available. More importantly, even these agreements grant officials an adequate framework for exchange information. However, as noted above, none of these agreements allow for the exchange of anything other than non-confidential information; therefore, to all intents and purposes, at least in theory, the same exchanges could happen without an agreement. To some extent, this is not a surprise, as in most cases these agreements are put in place to cement a previously existing relationship and to record procedures that usually had been tested before by the parties. The formal instrument, nonetheless, has proved to be important.

As previously indicated, when the parties to an agreement are developing countries, the costs and burdens involved are of special relevance, due to the limited resources available on both sides. Therefore, in order for any agreement to justify these burdens, the costs should be proportionate to the benefits, and, for that reason, it would be desirable that the provisions are as simple as possible, concentrating on the exchange of information and technical cooperation, before requiring ambitious commitments such as mandatory notification and implementation of comity provisions.

The real importance of mandatory notification requirements and of all other cooperation provisions is that they formally validate what is already acknowledged by the agencies, i.e. that it is in their best interests to cooperate. Therefore, one possibility would be to consider in the initial stages of implementation of any agreement where a developing country is involved, any existing notification provision as mandatory only for the undeniably relevant cases for both jurisdictions, while postponing a broader commitment to a later stage when the parties have been trained to implement this aspect of the agreement and are also ready to effectively begin coordinating enforcement activities.

4. Competition provisions within trade agreements

The basis for competition agreements within trade agreements is necessarily different from the competition cooperation agreements referred to above: the main focus of the first type is to reduce trade barriers and to promote convergence within the region. The trade-off between costs and benefits of the agreements in this case is therefore different. The entire set of benefits and concessions are to be analysed in a wider sense, and concessions, benefits and burdens are not limited to competition issues. The introduction of competition policy in a country has effects on its economy and social welfare, which is in itself burdensome, even though worthwhile.

Within a trade agreement, competition law and policy provisions aim at guaranteeing that liberalization will not be undermined by anti-competitive business practices within the member countries. To accomplish this, it calls for the establishment of juridical and

institutional coverage that proscribe anti-competitive practices and the development of competition policy and regulations among and within the countries. In contrast to cooperation agreements - that have as a basic assumption the existence of competition agencies to coordinate actions - it is possible that members of a trade agreement do not even have competition law and an enforcement agency. This is the case, for instance, in the current impasse in the negotiations of the Free Trade Area of the Americas (FTAA), in which only 16 out of the 34 countries have already established authorities. Due to this, the first cornerstone of a competition agreement within a trade agreement would be to require countries to adopt a sound competition law and policy, as well as to establish an authority to enforce it under a national treatment principle.

In those cases, the burdens and costs of competition law and policy provisions are not limited to issues related to the 'implementation' of a cooperation agreement itself: the main transformation would be the obligation to adopt competition law and policy within its legal, political and economic framework.

As will be seen in the following sections, competition provisions within trade agreements are not directly concerned with the day-to-day enforcement activities and, thus, in most cases, are more generic than cooperation agreements that encompass operational procedures for coordinated enforcement. The situation would be different; however, if the trade agreement aimed at the creation of a customs union or a common market, as the eventual ingredients of coordination may be needed if the markets of the different countries are to be considered as a single one. Eventually, even supranational issues and institutions would arise. Based on this, the analysis of this set of trade agreements will be divided into two main categories: competition provisions in Free Trade Area (FTA) agreements; and competition provisions in customs unions.[7]

4.1 Competition provisions in FTA agreements

These agreements normally include principles aimed at the establishment of a legal and institutional competition framework and general provisions on cooperation among the parties. As the

agreements are quite broad, there are usually no specific burdens for those countries that already have competition law and authority, but for those that do not, the costs are quite significant and depend on the country's evaluation on whether it will effectively want to implement a competition policy system.

As mentioned, the main scope of competition provisions within an FTA agreement is to avoid non-tariff barriers that could arise from the lack of competition law enforcement. Notwithstanding, there are usually no concerns about specific provisions of day-to-day enforcement.

Competition provisions within FTA agreements may vary, as they will depend on the existent competition framework within member countries, but some common features may be identified: all member countries must have a competition agency responsible for enforcement of antitrust laws and each of these agencies must be subject to independent domestic judicial review. In order to further effective competition law and policy development, there are provisions on voluntary cooperation among members, usually accompanied by technical assistance, as in some countries competition agencies are to be created and capacity to deal with such a sophisticated issue needs to be built. Some other provisions that are sometimes considered, such as in the case of the FTAA negotiations, currently at an impasse, include the possibility of creating a competition policy review mechanism, through which effective peer review of a particular country's adherence to the competition chapter can monitor compliance. There is no consensus as to dispute settlement provisions.

The United States has incorporated competition provisions in its FTA agreements with Chile, Singapore and its partners of the North America Free Trade Agreement (NAFTA). Interestingly, there are no such provisions on the US-Central America-Dominican Republic Free Trade Agreement (CAFTA-DR). The ongoing trade negotiation between the European Union and MERCOSUR also has a general chapter on competition.

As mentioned, the burdens of each of these agreements will be different for countries that already have a competition policy and for those that have still to introduce it. Besides, it is worth mentioning

that, when calculating costs and benefits, countries should be also aware of some provisions that are intended to be part of the competition chapters, but that might go beyond the necessary provisions of such chapters. MERCOSUR, for instance, evaluated that provisions regarding public monopolies and enterprises within the negotiation of the FTAA agreement would be outside the scope of the provisions that should be included in a competition section, as well as perhaps being too burdensome, given that such commitment might conflict with other domestic policies. However, as some countries possibly understand that these provisions are acceptable, they accept the inclusion of such provisions in some FTA agreements, particularly in those signed by the US, as is the case of the NAFTA and the Chile-US Agreement.

4.2 Competition provisions within customs union agreements

The provisions included in customs union agreements are, in general, more specific and demand higher commitments from the parties, as they are necessary to implement the regional integration. Competition provisions are quite often seen as a substitute for trade policy instruments, as often happens with predatory pricing mechanisms as opposed to anti-dumping mechanisms. Theoretically, at least, this should be possible, based on the assumption that members of customs unions are at similar levels of development and that their institutional frameworks are analogous. However, it is not necessarily the case that ambitious competition chapters included in agreements within customs unions achieve the desired effects.

An interesting example to assess is the MERCOSUR experience. Since the Asuncion Treaty in 1991, the parties to MERCOSUR had agreed to the harmonization of their competition policies as a necessary step towards the integration process. This ambitious target led Argentina, Brazil, Paraguay and Uruguay to sign, in 1996, the Fortaleza Protocol, through which the countries committed themselves to a common institutional framework to address competition issues.

The Protocol established that each party would have a competition law that would apply to all sectors of the economy and an autonomous competition agency to enforce it. As in a number of other MERCOSUR provisions, the Protocol relies on cooperation among members regarding the application of their respective laws in cases with extraterritorial effects. There was, nonetheless, an expectation that the framework would evolve, and that the Committee for the Defense of Competition (CDC), which would comprise national authorities that would take charge of intra-regional investigations, would be created. However, this institutionalized body is still to be established.

In addition to these features, there are also commitments regarding the convergence of the domestic laws, in order to ensure that the firms would abide by an analogous set of rules and thus compete in similar conditions; as well as a schedule for the parties to review other governmental policies that impair competition and distort trade among member countries. Later in 2002, the members signed the complementary Regulation to the Protocol and specified these goals even more.[8]

However, despite the elaborate structure, and the informal information exchange among authorities, the Protocol has not yet been effectively implemented. The reasons for this are two-fold. First, and most importantly, to date, only Brazil and Argentina have a competition law for both merger and conduct analysis, as well as fully dedicated agencies.[9] Second, the Protocol's main focus is the trade distortion aspect in intra-regional competition cases, instead of the enforcement of competition law and policy (see Chapter 3 of this publication by Holmes *et al.*, which refers to the link between anti-dumping measures and competition provisions). Due to these limitations, MERCOSUR members observed in 2004 that it would be necessary to revise the Fortaleza Protocol so as to reduce its burdens and permit its implementation. A first step to address competition policy within the region at this stage would be by means of a cooperation agreement, through which the parties that already had laws and/or institutions could be required to enforce them, but that would also include a structure for technical assistance projects aimed at the countries that did not have such laws and/or institutions in place.

An interesting aspect related to the possibility of the application of the domestic competition laws and that does not necessarily depend on the implementation of the Fortaleza Protocol, is that based on another Protocol signed in Ouro Preto in 1994, by which disputes arising in any committee may be solved through a dispute settlement mechanism. Until the beginning of 2004, these conflicts were decided by *ad hoc* arbitration chambers that were formed to deal with specific matters. Their decisions could then be appealed to the MERCOSUR Trade Commission. Since last July, however, a permanent tribunal was created, that could also, at least in theory, resolve competition disputes among the parties. In practice, however, these mechanisms, both old and new, could only be used in Argentina or Brazil.

In 2004, the MERCOSUR Trade Commission set a mandate for the members to revise the Fortaleza Protocol, which has been welcomed as a valuable opportunity to streamline its normative scope with the current state of the domestic institutions and laws. The Brazilian proposal encompasses basically four points:

1. To eliminate the focus on the trade distortion requirement for the enforcement of intra-regional competition cases;
2. To redefine the role of the CDC (which due to the above-mentioned reasons was never created) as a consultative body instead of a decisive one;
3. To strengthen cooperation among parties in extra-territorial investigations, both in merger and in anti-competitive cases, whenever possible; and
4. To provide for technical assistance instruments in the Protocol, such as those included in the Cooperation Agreement.

The purpose of the proposed measures is to allow MERCOSUR countries to proceed with the substantive application of the domestic laws in countries where they already exist, as well as to advocate the adoption of such laws and their effective enforcement through technical assistance projects. In this sense, Brazil and Argentina have a very important role to perform, both through cooperation and enforcement of their respective domestic laws, as well by promoting technical assistance projects for Uruguay and Paraguay.

5. Conclusion

In light of these international competition agreement models, countries should consider their needs so as to assess the costs involved in assuming international competition obligations, which should always be proportionate to the benefits. If costs seem too high, it might be that in fact the model in not appropriate in the first place.

As detailed, cooperation is increasingly relevant and its effects should be beneficial as long as the model is adequate so to ensure that the costs do not outweigh the benefits. Considerations on costs and benefits of obligations assumed within trade agreements, however, are indeed very complex. Besides, different levels of institutional competition development within countries will also imply that there will be different issues needing to be assessed.

At this point, one may recall that many countries have historically resisted the inclusion of competition issues within the WTO framework, arguing that they would loose their ability to design their own internal markets and industrial policies if obliged to implement competition law. Some even suggested that national markets were seen to be too small and this raised a desire to discriminate in favour of national producers in order to gain international competitiveness. They have also argued the existence of a capacity problem, due to the legislative and administrative burden of introducing competition law. Among others, they were also concerned that failure to comply with WTO competition laws gives rise to trade sanctions (Drexl, 2004).

Overall, those arguments may eventually be considered by countries when negotiating regional trade agreements, as the results of such an agreement might have similar results to those that would arise from a WTO framework. For this reason, a number of possible forms of special and differential treatment for developing countries may be incorporated into agreements to achieve a proper balance between costs and benefits.

The costs and burdens of the agreements will vary depending on the nature of the agreement and on the objective intended. Therefore, the main challenge for any country assuming international commitments related to competition law and policy is to enter into agreements where the burdens do not exceed their potential advantages.

NOTES

[1]For a list of the United States bilateral cooperation agreements see Department of Justice, International Agreements, available at http://www.usdoj.gov/atr/public/international/int_arrangements.htm

[2]For Brazil, the Administrative Council for Economic Defense (CADE) and the Secretariat of Economic Law Enforcement (SDE) in the Ministry of Justice; the Secretariat for Economic Monitoring (SEAE) in the Ministry of Finance. For the United States of America, the United States Department of Justice and the Federal Trade Commission.

[3]Note that the difference between First and Second Generation Agreements does not refer to the level of development of the parties involved, but to the categories of the information exchanged. It is interesting to observe that not all countries with mature competition institutions necessarily prefer Second Generation Agreements. As previously mentioned, the agreement in place between the US agencies and the CE Directorate is a First Generation Agreement, which does not allow for the exchange of confidential information.

[4]See press release available at http://www.ftc.gov/opa/1997/04/iaeaa.htm.

[5]On the US side, the Federal Trade Commission (FTC) and the Department of Justice (US DOJ), and on the Australian side, the Australian Consumer and Competition Commission (ACCC).

[6]Commission Notice (97/C 313/03); Official Journal C 313 of 15.10.1997.

[7]Common market agreements, such as the European Union model, will not be included in this analysis since the antitrust analysis will be done as if the member countries constitute one single market. Therefore, it would not be adequate to refer to international cooperation as this framework would be closer to a national competition law.

[8]The situation is as follows: the only country that has internalized both the Protocol and its Regulation is Paraguay. Brazil has internalized the Protocol, but not the Regulation or the Cooperation Agreement. Argentina has only internalized the Cooperation Agreement and Uruguay has internalized none.

[9]Uruguay has some provisions to enforce anti-competitive conduct and has a department in charge of conducting the investigations within the Ministry of Commerce. In July 2005, a Competition Law Bill was sent to Congress, concerning anti-competitive conduct provisions, but not merger reviews. Paraguay has its draft Competition Law Bill ready to be sent to Congress, concerning both anti-competitive conduct investigation and merger review.

7

Consumer protection, competition and RTAs: Some lessons for developing countries

KAMALA DAWAR
JAMES MATHIS

1. Introduction

The recognition of the existence of market failures and their importance is a fact. Market imperfections need to be addressed through appropriate regulatory policies and institutions. Particularly, trade and competition policies focus on the supply side of the markets by regulating firms behaviour, and by playing a capital role in protecting consumers and firms from various forms of abuses and barriers to market access and fair competition.

This Chapter examines the case for an effective consumer protection policy within bilateral and regional trade agreements (RTAs). It identifies two main rationales for including consumer protection provisions in cross-border cooperation arrangements.

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Firstly, in the need to complement competition provisions with appropriate mechanisms to ensure that consumers are able to respond appropriately and effectively within global markets. The second is based on the requirements for stronger inter-governmental cooperation agreements in dealing with the greater potential for cross-border deceptive practices that now exists within global markets.

In the first section, the Chapter examines the argument that consumer protection law and policy are necessary tools for addressing market imperfections as they impact on consumers. It discusses how the objective of consumer policy is to ensure that consumers are kept informed about markets for goods and services in such a way that their purchasing decisions contribute to the overall functioning of competitive markets. And, where necessary, to protect the consumer when their position in the market is not strong enough to allow them to play this role.

The subsequent section expands upon the argument that whilst protecting consumers, it is also clear that there are cases where consumer protection regimes can protect and promote competition. In such cases, there is therefore a positive convergence between competition law objectives, consumer protection and economic efficiency. The chapter then examines the argument that, as such, consumer protection should be mainstreamed into competition policy and other trade policies in order to ensure the best overall outcomes for consumers while paying due regard to ensuring that these measures are targeted appropriately, and do not become unnecessary barriers to achieving healthy markets and economic growth.

In the third section, the chapter assesses the need for consumer protection provisions to deal with cross-border market imperfections and deceptive practices. It examines existing expressions of the emergence of these requirements at the inter-governmental level, such as the UN Guidelines on Consumer Protection,[1] the OECD initiatives of the Consumer Protection Committee and the OECD 2003 Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders,[2] and, the International Consumer Protection and Enforcement Network (ICPEN).[3]

The fourth section assesses both the present and potential role of bilateral cooperation agreements and RTAs to serve as appropriate vehicles for enhancing both consumer protection and competition. It identifies relevant provisions of the EU Directive on Injunctions for the Protection of Consumers' Interests; EU Regulation 2006/2004 on Consumer Protection Cooperation, the US-Australia Free Trade Agreement, and the EU-ACP Cotonou Framework Agreement, with the aim of presenting an overview of the extent to which RTAs can offer consumer protection, either discreetly or together with competition policy provisions.

The Chapter goes on to surmise from this examination that bilateral and multilateral arrangements can address issues of information sharing, mutual assistance and judgment recognition and enforcement in cross-border trade. The authors argue that economic development requires both the demand for and supply of competitive markets, and this necessitates the integration of complementary elements of consumer protection law and policy into competition regimes. Further, stronger mechanisms of inter-governmental cooperation are also required to address the increasing volume and impact of cross-border deceptive practices effectively to protect both consumers and markets.

The authors conclude that there is therefore both a strong economic case and an existing legal model for including elements of consumer protection either discreetly or in conjunction with the competition provisions within RTAs. Integrating elements of consumer protection into competition policy and other trade policies at bilateral or regional level can help to ensure the dynamic of empowered consumers while ensuring consumer protection measures do not become barriers to international trade and that they are consistent with international trade obligations. It could further be argued that there is no overriding rationale for excluding consumer protection within bilateral and regional agreements. Even where problems currently exist in implementing effective consumer protection domestically, the inclusion of consumer protection within these agreements can add momentum to its implementation at national level.

2. The case for consumer protection

It is widely accepted that all markets have imperfections and that robust regulation and independent regulators are necessary features of healthy market economies. Imperfections emerge on both the supply (producer) side and the demand (consumer) side of the marketplace. Trade and competition policies focus on the supply side and regulate the behaviour of firms. This will include identifying and removing barriers to entry, cartels and monopolies, and other restrictive business practices, along with investigating mergers and acquisitions.

This form of regulation addresses market failures and can work to protect both consumers and other firms operating in the market to the benefit of economic growth and wealth creation. It cannot however directly address demand-side market imperfections caused by asymmetrical information,[4] misleading advertising or deception, for example. The main policy instruments developed to address these imperfections fall within the remit of consumer protection policies and law.

Consumer protection regimes are made up of both legislation and the core institutions which make the consumer policy framework. While differing in the degree of enforcement and consumer behaviour, all these regimes try to address similar difficulties facing domestic consumers. These include ensuring safety of products and services, adequate information and redress, in addition to preventing unconscionable, deceptive or incompetent business activities.

Consumer protection contributes to sustainable economic development in three main ways. Firstly and most clearly, safe products and standards not only reduce health costs to the nation, but they contribute to the well-being and reliability of the entire workforce and therefore economic productivity. Secondly, once firms have made commitments to adhere to consumer protection policies, product development or innovation will be tailored to beating the competition through satisfying consumer needs, not lowering quality. Thirdly, consumer protection policies can empower consumers. And as discussed in Section 3, analysts such as Porter[5] have stressed the role that discerning consumers can play in provoking competition between firms and innovation by them. Conversely, undemanding

consumers provide little impetus to suppliers to improve their products, services, delivery times, reliability, and so on.

The UK's Department of Trade and Industry (DTI) 2005 consumer strategy includes wide-ranging objectives to deliver social justice, economic and environmental progress; and addresses the linkages between consumer protection policies and economic and sustainable development. It focuses on consumer empowerment as an aspect of functioning markets:

- Consumers are equipped with the skills, knowledge, information and confidence to exercise their rights to get a good deal
- Strong consumer advocacy exists at the general policy-making level and in special cases
- Consumers have access to appropriate and convenient sources of advice and redress, including effective alternative dispute resolution (ADR)
- Consumer rights are proportionate, balanced with responsibilities, and clear and simple enough to be well understood
- Consumers are able to understand the impacts of their own consumption decisions on our shared environmental and social well-being
- Vulnerable consumers are protected without placing undue restraints on markets overall
- Enforcement is fair, consistent, effective and proportionate
- Markets are regarded as fair by both consumers and business[6]

Whatever the scope of the strategy, all consumer protection regimes will have a body of law underpinning transactions and contracts within the marketplace. The variations among legal frameworks covering consumer protection lie in three main areas. One is the extent of their reliance on basic contract law, as in the UK, where the Sale of Goods Acts provides parties to contracts with basic rights when undertaking transactions. Secondly, the extent to which consumer protection is built around broad duties or prohibitions, such as within the US Federal Trade Commission Act (Section 5) where 'unfair or deceptive practices are declared unlawful' or alternatively is a collection of legislation.[7] Thirdly, legal frameworks will differ to the extent of, and manner in which, legislation allows various parties to obtain redress.

By putting consumer protection measures into national legislation, governments are aiming for more than meeting officially defined, legitimate needs of domestic consumers. There is also an understanding that effective consumer protection, accessible information and redress are essential components of a thriving market economy and an important factor in promoting competitiveness.

This understanding became apparent at an inter-governmental level in the 1970s, when the UN Economic and Social Council (ECOSOC) recognized that consumer protection had an important bearing on economic and social development. And further, that an international policy framework was needed to provide general guidance and specific objectives on consumer protection, addressing the particular needs of developing countries. As a result, in 1985 UN Guidelines on Consumer Protection were adopted, and expanded upon in 1999 to include areas of sustainable consumption, by consensus among 150 governments.[8] The Guidelines form an internationally agreed statement of laws necessary for consumer protection, of good practice in their implementation, and of other action needed to promote consumer rights. The legitimate needs, which the Guidelines are intended to meet, are the following:

- The protection of consumers from hazards to their health and safety
- The promotion and protection of the economic interests of consumers
- Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs
- Consumer education, including education on the environmental, social and economic impacts of consumer choice
- Availability of effective consumer redress
- Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them
- The promotion of sustainable consumption patterns

Fully implemented within a domestic legal system, the Guidelines provide a basic framework of protection, advice and support to enable consumers to operate confidently and effectively in a market economy.

In 2005, consumer protection laws and policies are commonplace in developed countries and increasingly apparent in legislation in developing and transitional economies. In Latin America, all countries except Cuba, the Dominican Republic and Bolivia[9] have consumer laws. In central and eastern Europe, a wide range of consumer legislation has been introduced, as in the more developed economies in Asia, although less so Africa. Success in implementing robust consumer protection regimes has been variable. Although two UN ECOSOC monitoring surveys undertaken a decade after the adoption of the Guidelines indicated that the Guidelines had been of some success in influencing national policies about the management of consumption as well as about laws to protect consumers.[10]

However, the monitors also reported that there had been much less emphasis on promoting consumer awareness, through education and information, in order to develop pressure for competitiveness through consumer choice and preference, and on increasing the participation of consumers in decisions which affect their interests. These findings support the growing opinion that while trade and competition laws and policies play an important role in promoting economic efficiency, in order to activate competition between firms consumers must also be able and willing to exercise their market power. Lack of adequate consumer protection presents an obstacle to the achievement of healthy, competitive markets as well as healthy consumers.[11] Therefore, competition provisions *per se* often cannot guarantee all the benefits deriving from fair competition: an integrated approach to competition and consumer policy is the optimal way required for dealing with both the supply (firms) and the demand side (consumers) of markets.

3. The case for complementary consumer and competition regimes

Experience has shown that firms tend to avoid or minimize competition rather than encourage it. Competition authorities are primarily concerned with policies focusing upon rules and procedures to prevent anti-competitive practices, dominance or abuse of dominance, the reduction of barriers to entry and/or facilitating optimal conditions with the aim of improving economic efficiency

and therefore the opportunity for growth and wealth generation. It is taken for granted within nearly all developed market economies that competition law and policy inherently contributes to a greater degree of 'balance' between the rights of producers and the protection provided for consumers and other members of society.

This same balance is also beginning to be recognized in the growing number of bilateral competition cooperation agreements between countries and the many RTAs that now contain facilities for promoting cooperation between agencies seeking to address cross-border restrictive business practices and related antitrust issues.

However, the mainstreaming of complementary consumer policy into competition policy provisions to ensure a healthy demand side to markets has not, with a few notable exceptions, caught up with these policy developments. This can cause markets to behave in a dysfunctional manner, despite removing barriers to entry and other restrictive business practices. As an example, Slovenia's competition law and policy were motivated by the prospects of EU accession. The necessary legal framework and apparatus for the execution of the EU antitrust regulation and regulation of state aid was introduced in the 1990s. This was undertaken, however, without a complementary consumer policy.

The detrimental consequences of this oversight, to both markets and consumers, were highlighted in the Slovenian freight transportation sector.[12] Cut-throat price competition reduced transport prices dramatically but due to an absence of a complementary consumer policy, there was little legislation regulating the providers' behaviour or the quality of service and, consequently, resulted in a deterioration in transport safety. Liberalization without complementary consumer protection ultimately had a negative impact on both the industry and consumer demand in both Slovenia and the surrounding transit countries.[13] This could have been addressed by the incorporation of consumer protection provisions within the same regional agreement that motivated Slovenia to introduce competition policy initially.

Indeed, more recent developments in the EC 2002-2006 Consumer Policy Strategy do indicate a decision to integrate consumer interests more tangibly into the implementation of internal Community

competition rules. The three stated objectives of the strategy are: (i) a high common level of consumer protection, (ii) effective enforcement of consumer protection rules, and (iii) the involvement of consumer organizations in EU policies in order to maximize the benefits of the single market for consumers and to prepare for enlargement.[14] This regional policy focuses directly on the cross-border demand side, seeking information and evidence about practices that may be particularly injurious to EC consumers, but where competitors can avoid being injured due to their capacity to pass the costs of restrictions to the ultimate consumers. As discussed further below, among the others, Australia, the US and the UK have also maintained this more integrated approach.

Indeed, it is increasingly accepted that unless consumers are well informed, able and willing to make choices including switching from established suppliers, and to use redress and other mechanisms to protect them from abuse, markets will not be inherently efficient, competitive or able to serve consumers. Consumers activate competition when they send the correct market signals via informed and rational choices in the marketplace. How consumers search the market, how many firms they survey before making decisions, and how much they will spend (in time or money) to search the market are important factors in triggering competition between firms. Allied to this is the consideration of how they respond to products and prices offered in the market – whether they switch firms, whether they make formal complaints, or seek redress if necessary.

Waterson's work (2003a, 2003b) on the role of consumers in competition and competition policy provided propositions to demonstrate the importance of searching and switching costs for the outcome in a market. For example, if each consumer searches only one firm prior to the purchase decision, the pricing outcome is at the monopoly level regardless of the number of firms in the market. Thus, the higher the proportion of active searchers, all other things being equal, the greater the proportion of low-cost firms, with searchers also imparting information to non-searchers. Waterson also argued that in firms where no discrimination between new and old customers is feasible, firms' prices are generally higher with switching costs than in their absence. This indicates the value of understanding what can facilitate consumers in making rational and informed market

decisions, and in doing so trigger effective competition in the marketplace.[15]

The implications of the behaviour of consumers are wide ranging. Consumers will only engage in additional searches if the expected benefits are greater than the costs. Yet the consequence of this is that if consumers believe it is not worthwhile searching a market, it will not be worthwhile because firms will get signals that they do not have to compete in order to gain customers. Conversely, if consumers believe searching is going to be worthwhile, it will probably be so because informed and active consumers seeking out cheaper provisions of a standard good or service will send firms signals they will respond to by reducing prices and/or improving quality.

The European internal market and the single European currency are expressions of the positive complementarity of policies aimed at enhancing both the supply and the demand for competition at the regional level. European integration is seen as adding to transparency and therefore competitiveness on a regional level. Within competition policy debates, improved price transparency is typically viewed as promoting competition if it affects the consumer side of the market. Anderson and Renaults' analysis of price competition when consumers have to search for prices and product characteristics further indicated that market prices rise with search costs, while Bester and Petrakis concluded that increased market transparency through advertising is also typically shown to lead to increased competition and lower prices.[16]

While it cannot be assumed that consumers will be able to serve competition well, neither can it be taken for granted that competition will necessarily serve consumers well. Sylvan (2004), for example, has noted that there is a mistaken perception that wide choice automatically confers consumer benefits and consequently the conditions for exercising choice are neglected. Markets for financial services, second-hand goods and construction services, for example, may present such severe information problems that consumers are unable to exercise sound choices. Whether or not competition benefits consumers or the economy will therefore depend on factors including the stance and effectiveness of complementary consumer policy.[17]

Research undertaken on the Indonesian competition regime indicated that the laws had been incompletely formulated, with a lack of clarity between the desired ends and differing means available to achieve a specific objective. In this case, the Prohibition of Monopoly and Unfair Business Competition Practices Law (2000) set an arbitrarily maximum market share limit as a benchmark for fair competition. This limit ignored issues such as the fact that large-scale firms do not automatically have market power if the markets in which they operate have no barriers to entry or exit, and that these larger firms might reap the benefits of economies of scale and increased research and development, to the betterment of both markets and consumers. Rather than prohibiting monopolistic enterprises, laws would have been more effective if they both focused on 'harmful' monopolistic conduct and also specified the various types of anti-competitive business practice most detrimental to the goal of fair and open competition that enhances consumer welfare.[18]

Indeed, Sylvan's work indicated that while an intervention to prevent a hard-core cartel has both a clear consumer empowerment and increased competition outcome, such win-win outcomes for competition interventions are not assured. In the case of a complex industry, the information available may simply not be enough to translate into consumers exercising effective choices even in a highly competitive market. Similarly, consumer protection actions may not enhance competition because they may be inappropriately rigid and stifle innovation.[19] An area such as transparency is also inherently complex. While price transparency lowers consumer-searching costs and sends more indicative signals to firms about consumer choice, it is also understood that improving market transparency can produce anti-competitive effects on the producer side of the market, through facilitating tacit collusion. The overall effect of improving market transparency in an undifferentiated manner across all markets would be of uncertain benefit to both consumers and competition.[20]

The crucial point that emerges from this body of work is that without an integrated approach to effecting competitive markets, the good intentions of both competition agencies (to prevent collusion, for example) and the consumer protection agencies (to increase price transparency, for example) could overall prove to be detrimental to both markets and consumers. Within an integrated approach, any trade-offs between consumer protection or empowerment and

competition outcomes will be made within the context of assessing the overall effectiveness of the outcomes of the different possible interventions. That is, any consideration of the health of the market will be based on both competition and consumer outcomes. Thus, in the case of Slovenia, noted above, the strong price competition – up to a 26 per cent drop in the cost of some cross-border freight routes – that followed liberalization in the transport sector was accompanied by an unacceptable deterioration in safety and quality of the market. This could not have been taken up by the competition agency because consumer protection regulation had not been integrated into the competition regime or in this case within government policy.

If competition agencies are to implement a successful regime, they need to monitor developments in both firm and consumer behaviour which will affect the levels of competition in a given market. A study of the performance of competition agencies undertaken by Kovacic on behalf of the OECD (Kovacic, 2005) noted, further, that fuller disclosure and analysis of outcomes of competition policy will likely stimulate public discussion that, in the long run, will improve the quality of competition policy. The social benefit of channelling resources toward activities with the strongest contributions to improving consumer welfare outweighs the immediate costs of reputational discomfort to the competition agency.[21]

Competition can only be ensured through sound regulation and a vigorous regulator of both the supply of and the demand for competition. When governments choose to implement laws which focus on promoting rivalry, or by eliminating excessive divergence from an industry structure, the outcomes can and should be enhanced by increasing the impact of consumer behaviour that sends rational signals to the market and triggers competition between firms. The manner in which competition agencies operate is a significant factor in determining whether competition benefits both consumers and sustainable economic development.

3.1 Institutional settings

While policies to ensure a healthy demand for competition are clearly of direct relevance within the terrain of competition laws and policies, the most direct form of demand-side competition policy is actually that of consumer protection law; and this falls within the remit of national consumer protection agencies. In countries such as Australia, the US, Poland and the UK, the complementarity of competition and consumer policy is well recognized and institutionalized through joint agencies and laws. This establishes consumer policy on a more equal basis with other government trade policies. In the US and Australia, the profile of consumer policy is higher within government and this seems to influence the allocation of resources and the overlapping of institutions and powers responsible for consumer policy, but particularly as it also relates to competition and competition policy.

The US Fair Trade Commission (FTC) serves as an example of a long-standing joint agency approach to consumer protection and competition policy. Organized with a separate bureau for advertising practices, enforcement, financial practices, marketing practices, planning & information, international consumer protection and consumer and business education, the agency is responsible for the enforcement of the respective federal laws for consumer protection and competition, and also for those laws which cover both areas. From the FTC, 'joint' laws include the Federal Trade Commission Act, which empowers the agency to 'prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce.[22] Administration of the FTC is organized by regional offices which operate for both consumer and competition areas.

Australia represents a highly integrated example where the Australian Competition and Consumer Commission (ACCC) is responsible for administering and enforcing the harmonized competition and consumer protection regime established by the Trade Practices Act (1974). This Act deals with almost all aspects of the marketplace involving the relationships between suppliers, wholesalers, retailers, competitors and customers. It therefore includes elements of unfair market practices, industry codes, mergers and acquisitions of companies, product safety, product labelling, price

monitoring, and the regulation of specific industries such as gas, electricity, telecommunications and airports.

Consumer protection agencies, particularly in developing countries, are more often single agencies that tend to be under-resourced. They are also under-represented in other areas of trade and development policy, however complementary these may appear to be. There is much research to indicate that consumer protection has been poorly implemented, particularly in many developing countries.[23] Asymmetric information and an absence of legal redress by consumers are just a few of the problems faced by consumers in the newly liberalized markets, which will directly impact on the development of competitive markets. And differences in the organization of competition and consumer protection agencies within national governments will influence the development and enforcement capacity of complementary policies to ensure that both consumers and firms benefit from trade.

The ongoing challenges faced by many developing and newly liberalizing economies in implementing effective consumer protection policies at national level, either within competition agencies or independently, would appear not to augur well for transposing these frameworks to the regional or cross-border level. However, as the following section will discuss, there is reason to believe that the benefits of integrating consumer protection policies into other trade and competition policies may be too important to sideline within the proliferation of RTAs.

4. The case for regional cooperation in consumer protection

The expansion of cross-border trade presents regulatory challenges for any government. To support free trade, governments prescribe that positive regulatory steps should be taken to ensure minimum regional standards or the recognition of their trade partners' legal enactments. These activities necessarily require resources and governments are advised to ensure that the benefits of new regulations outweigh the costs of implementing them.

When governments commit themselves to regional regulatory initiatives, they are choosing to prioritize from among a larger group of internal considerations, some, but not all, of which will be related to trade and cross-border commerce. RTAs reflect policy priorities when high political expression is used to enact a treaty in order to realize designated common objectives. Whether between developed or developing countries, or a mix of the two, these treaty-based activities seem to raise the profile and credibility of the domestic agencies responsible. And in some cases, they draw capacity-building resources and transfer of technical know-how from one country agency to another. Participation in an agreement can make feasible internal reforms that are beneficial for the country and desired by its government, but might otherwise be successfully resisted by interest groups.[24]

There is no final word on why some regulatory areas are chosen by major trading partners rather than others. It is clear that areas supporting market access receive attention, including customs procedures, product standards and competition law, with the emphasis and the style of regulatory approach depending upon the country partners involved. For competition, the absence of multilateral rules in the trading system may be fostering the inclusion of these provisions in RTAs.[25] Competition cooperation regimes are becoming more the norm than the exception in RTAs, perhaps recognizing the long-understood linkage between restrictive business practices and market access. There is some indication that regional competition cooperation provisions also show evolution, or at least some tailoring to the specific circumstances of the member countries. This is itself the development of state practice, and together with the growing number of agency-to-agency agreements, patterns of cooperation could be discerned that may inform multilateral efforts in the future.

These competition arrangements in RTAs are based on the general principle that the economic welfare gains expected to materialize from the liberalization of trade can be undermined by cross-border anti-competitive practices. Domestic firms can collude to prohibit competitor entry, exporting firms can combine to raise prices following a tariff cut, or divide the regional market amongst themselves. While free trade declarations may eliminate government trade barriers over time, firms can and do respond to any new

competitive pressures by seeking to maintain or re-segment the national market through the use of private barriers to trade – or other anti-competitive practices.

While the complementary nature of trade and competition agreements has progressively developed, there has been far less attention given to the complementary role that consumer policy plays in cross-border agreements. This at a time when domestic agencies increasingly acknowledge their inability to identify the legislative and enforcement gaps in cross-border consumer protection, particularly in e-commerce, but also for other cross-border deceptive practices, scams, and spam. There is an awareness by firms and governments that discrepancies among national consumer protection laws may produce a lack of consumer confidence to participate in cross-border transactions. This would tend to harm smaller and medium-sized businesses from offering their products abroad. The harmonization of consumer protection rules, or perhaps modes of effective cross-border cooperation between agencies and redress by consumers, could therefore increase transnational commerce in consumer goods.

The need to move to the international plane by national consumer protection agencies is expressed by organizations and bodies such as the OECD Committee on Consumer Protection and the ICPEN network of agencies. These bodies are working to prevent and redress consumer problems connected with cross-border transactions in both goods and services.[26] Here there exists the same territorial and jurisdictional issues familiar to anyone who has examined the rationale for cross-border competition policy cooperation. Domestic agencies may have little or no basis to act against domestic entities causing market injury to consumers outside the country, even while successful recourse may be obtainable by the domestic consumer for the same practice. Likewise, agencies may have no clear authority or capacity to take action against entities located or conducting business from outside the domestic territory when practices are targeted or transacted with the domestic consumers.

At a national level, there is a very limited ability to enforce injunctions and/or cease-and-desist orders to provide consumer protection to the public across national borders. There is also limited ability to enforce money judgments for monetary redress for groups

of consumers, where assets are located, or moved, across national borders.

Technology has rapidly dictated a more global approach to consumer protection. Consumer agencies introduced by laws to address domestic 'door-to-door' consumer problems are attempting now to respond to cross-border e-mail spam and spyware invasions. The traditional laws protecting consumers against deceptive practices are often broad enough to respond to this global marketplace, but an agency's own territorial reach is limited.[27] Cooperation agreements can help extend this reach, *de jure* or *de facto*, by providing the frameworks to encourage or require coordination.

Just as multilateral UN and OECD Guidelines set out broader objectives and patterns for competition cooperation, which were then modelled for bilateral and regional approaches, one would expect to see some similar course of development take place for consumer protection. For cooperation, some of the broader building blocks are already in place.

4.1 Inter-governmental sources and references for cross-border cooperation in consumer protection

The first instrument that forms the basis for international cooperation is the aforementioned United Nations Guidelines for Consumer Protection.[28] Besides identifying the legitimate needs of consumers, as outlined above, the Guidelines also encourage international cooperation, especially on a regional and sub-regional context to develop systems for exchange of information, to cooperate in implementation of consumer protection policies, to improve conditions for the offering of essential goods, to develop information links for banned or restricted products, to seek to eliminate detrimental variations of product quality and information, to transmit environmentally sound technologies, to promote capacity building for sustainable consumption, and to promote consumer education.

This sets out a broad field of activities that reflects some trade interests but with the consumer in mind. Given the time of its drafting, there is not such an explicit reference to the modern cross-border

deceptive practices. There is some attention given to consumer education, but not an express linkage between consumer protection and the functioning of competitive markets. Both of these aspects are a more contemporary basis for international cooperation than the Guidelines expressly recognize. However, they serve to identify the core areas of information exchange, cooperation in implementation, and capacity building that would be appropriate and realizable within either a bilateral cooperation agreement or an RTA.

A more recent and specific point of international reference is the OECD 2003 Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders.[29] Resulting from a 1999 Recommendation,[30] Members are encouraged to

> cooperate at the international level, as appropriate, through information exchange, co-ordination, communication and joint action to combat cross-border fraudulent, misleading and unfair commercial conduct.

This should be read to be encouraging agency-to-agency cooperation in particular cases and practices, a form of cooperation also seen in a number of competition agreements. A second concern in the Guidelines differs somewhat from the competition policy pattern of practice, where 'governments, businesses, consumers and their representatives should devote special attention to the development of effective cross-border redress systems'. This reflects consumer protection law in its more 'private international' law domain where single or collective action is taken under domestic law in order to obtain a remedy by either injunctive relief (conduct remedy) and/or by award of money damages.

As introduced above, the Guidelines were generated from the realization that consumer protection systems are inherently domestic and based historically on the common residence of the perpetrator and the victim, and that this is no longer reflective of the situation of consumers in the global marketplace.[31]

The more specific objectives and acts of cooperation identified by the Guidelines include the following:

- Establishing a domestic system for combating cross-border fraudulent and deceptive commercial practices against consumers
- Enhancing notification, information sharing, and investigative assistance
- Improving the ability to protect foreign consumers from domestic businesses engaged in fraudulent and deceptive commercial practices
- Improving the ability to protect domestic consumers from foreign businesses engaged in fraudulent and deceptive commercial practices
- Considering how to ensure effective redress for victimized consumers, and cooperating with relevant private sector entities.

Although both the areas of agency coordination and judicial/ private redress are raised, there is more detail presented on agency aspects with emphasis on notification, information sharing and investigation assistance. The area redress would lead to considerations of accommodating foreign consumers pleading within the territory of the respondent firms, but also after judgment, then the recognition of such judgments in other territories. These activities require treaties of recognition of foreign judgments for which now there is little in the way of a multilateral platform for the consumer protection area.[32]

These questions of cross-border collections arise even as a number of countries have adopted consumer organization rights to bring claims on behalf of larger groupings. These actions can go forward in domestic courts according to certain traditional jurisdictional principles of obtaining power over the non-resident defendant firms. However, enforcement or collection out of country would, if not facilitated, pose a major barrier to the viability of developing private rights of action in cross-border cases.

4.2 Positive integration

What the above indicates is that while the members to an RTA may take integration steps by eliminating the trade and regulatory

barriers for commerce between the markets, the need necessarily arises for some 'positive' regulatory cooperation (integration) as well. This would allow consumers to pursue remedies across the larger defined market, just as firms are able to operate lawfully (and unfortunately unlawfully) across this larger market as well.

Thus, cooperation or RTAs, including reciprocal recognition of domestic court judgments, could be viewed as facilitating the type of cooperation suggested by the OECD Guidelines, albeit at a somewhat advanced level.

Those elements dealing with agency-to-agency relationships are more familiar to the template of cooperation already found in many RTAs for competition law policy provisions. For consumer protection, the OECD Guidelines provide a fairly sharp list of the types of problems that an agency faces in a globalized marketplace, but perhaps even more so in a regional trade environment, where free trade in goods and some services trade is being established by the elimination of governmental barriers.

For agencies, the location of wrongdoers can be extremely difficult to determine. They can operate in concert from more than one territory. They can use 'corporate shells' in various territories, moving their operations or marketing to different territories over time. They can use a wide variety of facilities over many jurisdictions, including product suppliers, Internet services, banks, credit card processors, and call and data processing centres. Increasingly, investigations of cross-border fraudulent and deceptive commercial practices will depend upon evidence that is transient, such as information from computer systems and networks.

The variety of methods to avoid a distinct jurisdictional presence for the purpose of agency control appears to be nearly endless. It would seem that the ability to create false jurisdictional shells would exceed the capacity of even a well-prioritized and resourced single domestic agency. This point alone suggests a stronger cooperative or joint response, which is what the OECD Guidelines also conclude:

> D. Member countries and their consumer protection enforcement agencies should make use of existing international networks and enter into appropriate bilateral

> or multilateral arrangements or other initiatives to implement these Guidelines.

Bilateral and regional agreements are examined below. For now, it can be noted that if these corporate shells can be operated regionally, they can also be operated 'out of region' as well. While a free trade agreement (FTA) may allow for easier cross-border transmission of goods and services, it also may raise the opportunities for cross-border deceptive practices as well. In this environment, the 'region' is also not a closed system. This suggests that even while bilateral or regional approaches move forward, that there is a strong argument for an operative and broader international cooperation.

A primary arena for this is the International Consumer Protection and Enforcement Network (ICPEN), established by consumer protection agencies from 29 countries (now about 40) to facilitate formal and informal communication and cooperation for systemic issues as well as mutual assistance on particular cases. As an aspect of these activities, reference is made to a 2000 study undertaken by the International Marketing Supervision Network (IMSN) regarding cross-border remedies.[33] The territorial jurisdictional problems confronting both agencies and systems of redress are clearly identified:

- Some IMSN members lack authority to take action or enforce decisions taken against domestic entities that market only to consumers outside that member's country, and for some members the existence of that authority is unclear.
- Some IMSN members lack authority to take action or enforce decisions taken against entities located or conducting business from outside that member's country, even if they target or transact with consumers within that member's country.
- These limitations create enforcement gaps in the abilities of IMSN members to collectively protect consumers in IMSN countries.

The potential options also identified to address these issues also outline in greater detail what activities would fall within a comprehensive cooperation scheme:

- review of current limitations on the authority of IMSN members to share information and cooperate with other enforcement agencies;

- bilateral and multilateral arrangements respecting information sharing and mutual assistance;
- bilateral and multilateral arrangements respecting judgment recognition and enforcement;

- measures providing that IMSN members are not prevented from enforcing laws prohibiting unfair or deceptive marketing practices against a domestic business simply because that business has transacted with or targeted only foreign consumers;
- measures providing that IMSN members are not prevented from enforcing laws prohibiting unfair or deceptive marketing practices against a business that has transacted with or targeted domestic consumers simply because it is not a domestic business.

When examining developments in interstate cooperation agreements, the list above is helpful in suggesting some benchmarks to evaluate the facial effectiveness of the provisions examined.

5. Bilateral agency-to-agency cooperation

In spite of the clear identification of the problems generated by cross-border trade for consumer protection agencies and consumer complainants, the cooperation response in both agency-to-agency agreements and RTAs is preliminary and incomplete. Only a handful of countries have begun to develop cooperation and appear to be active in initiating such agreements. These are the beginnings of state-to-state practice that will likely develop over time.

Regarding agency-to-agency cooperation, this chapter has already discussed how competition policy objectives are complemented and the goal of competitive markets made more complete by consumer protection law and policies. This leads to an interesting similarity also in the mechanisms adopted by agencies to establish cooperation. By adapting the common competition cooperation format for consumer protection, the resulting pattern would include:

- definitions of consumer protection, reference to applicable domestic laws and agencies;
- references to existing multilateral (and OECD) instruments;
- clauses permitting or requiring notification to the other agency of investigation and case developments, changes in laws, consumer protection activities, and so on;
- request and response provisions for information leading to the possible investigation or enforcement of one domestic law against the firms of the other member;
- confidentiality provisions; and
- provisions for occasional meetings, technical assistance, and review of the agreement.

This template is so comparable to competition policy agreements, with an additional point of reference to consumer protection, that competition provisions and consumer protection provisions can be drafted in the same or a similar parallel agreement.

This is evident in the few examples dealing with joint agencies responsible for both competition and consumer protection. As noted, Australia has a joint agency and is also active in forming agreements for competition policy and consumer protection. This combined approach in a single document is found in its agreements with Papua New Guinea (PNG) (1999) and with South Korea (2002). The latter is most explicit as it is entitled, 'Regarding the Application of their Competition and Consumer Protection Laws'. The agreement with PNG states that its purpose is to promote cooperation and coordination in the application of the countries' competition and consumer protection laws. In these cases, both countries are working with joint agencies, so the inclusion of competition and consumer protection in the single agreement would seem most advantageous, it not rather obvious. Indeed, it would seem stranger if the joint agencies initiated an agreement that deliberately included one of the fields but not the other.

Although the US also has a combined agency in the Federal Trade Commission, the Australia-US Agreement (2000) is not structured along this pattern of a single agreement. Here, there are separate agency-to-agency agreements for both fields of competition and consumer protection. It may well be that the specialized legal regimes

governing competition cooperation in the United States are a factor in establishing a separate agreement for that subject area.[34]

What is more remarkable about the Australia-US Agreement is that it does contain some decidedly strong language on notification, and apparently without the necessity of requests being made by the other country. Thus, 'the parties intend to assist one another and to cooperate on a reciprocal basis in providing or obtaining evidence that could assist in determining whether a person has violated or is about to violate their respective Consumer Protection Laws' (Article II.C). The parties also agree that their 'staff' shall use their best efforts to inform each other about violations occurring in the territory of the other party or that affect consumers or markets in the other territory. (Article II.D). Although subject (of course) to the strict confidentiality provisions which will necessarily limit the information that can be communicated, these two provisions do demonstrate a style of notification approach that is intended to be proactive (no requesting necessary) and which may also contemplate assistance in those cases where the informing agency's consumers are not so directly affected by the practice or the case at issue.[35]

The Australia agreements with PNG and South Korea have softer notification provisions. They are, however, noteworthy in that they apply identical provisions to both competition and consumer protection. This appears to be more in the manner of a traditional comity provision, although one might stretch the interpretation to find some more active cross-border possibilities as well. As such, each party agrees to notify the other when it becomes aware that an investigation or enforcement activity may affect important interests of the other. This is specified for those cases where one agency makes inquiries of persons located in the other territory. The narrow reading of this clause would be that agencies are only assuming a notification obligation when commencing investigation into firms residing in the other agency's territory. While this avoids certain conflicts, it is also not very ambitious in light of the cross-border problems identified by the OECD 2003 Guidelines and the IMSN study on cross-border remedies.

The PNG and South Korea bilateral cooperation agreements do, however, demonstrate that the close parallel to competition policy can be given effect in a single agreement and at least to the extent

stated above, by the same or similar text. That the examples of joint agency agreements found here happen to have softer notification provisions may not be a function of the fact that competition and consumer policy have been integrated in a single agreement. This may reflect more a pattern adopted by Australia for those agreements (the provisions in both PNG and South Korea are nearly identical), and/or display the level of concern for cross-border practices at the time the text was drafted (the first was in 1999).[36]

The next section considers how cooperation has developed within the domain of RTAs.

6. Regional trade agreements

Unlike the consumer protection situation, the close connection between trade liberalization and competition law has been well exposed in multilateral contexts. As an example, consider the 1948 Havana Charter, the inclusion of competition within the WTO GATS Agreement, and as well within the ill-fated WTO Singapore New Issues. It has also been expressed in the regional integration context, notably the 1957 EEC Rome Treaty. The addition of a competition cooperation section in an RTA has become a matter of common state practice for some territories, the European Union and Canada, for examples. While not so clearly patterned, US trade agreements are also tending to develop competition policy provisions. In all, there is not only the matter of establishing a cooperation framework, which can be accomplished by an agency agreement alone, but RTA provisions may also reflect and communicate a political choice by the negotiating governments to emphasize the need for the development or the continuing viability of their respective agencies.

A newer step to take is to tangibly integrate the concept of a complementary demand side to activate the supply of competition with a regional market, as discussed above. Viewing consumers as instrumental in effecting actual competitive forces is a linkage to be drawn into regional policy and law making, in addition to emphasizing the more diffuse methods of stimulating a competitive market. Furthermore, since the opening of borders for greater trade can generate that same potential for cross-border consumer abuses

as those that occur in the competition policy field, the development of cross-border mechanisms is also still at a rudimentary stage.

One possible explanation for this neglect is that the dominant view of trade policy officials is that consumer protection issues are more 'domestic' or localized in nature, and primarily played out between the final seller and the final consumer. Within this outdated framework, consumer policy areas are necessarily not intensely affected by cross-border transactions. The OECD 2003 Guidelines appear to be an attempt to dispel this notion.

Related to this is an influential opinion that competition law and policy issues are more 'governmental' business, where choices are being made on a case-by-case basis by an agency about which sectors and firms should be subject to investigation and enforcement. A treaty commitment to abide by certain principles in competition law enforcement is well within a government's remit, in order to signal its efforts to function according to some mutual guidelines within the regional trade endeavour. Although it does require a governmental commitment, this body of opinion might suggest that consumer protection is more 'private' - between buyers and sellers - where the emphasis is upon privately initiated court remedies or other dispute resolution activities. In these systems, the aggrieved are not triggering an agency response, but are rather pursuing private claims for redress upon the individual transactions. This is an over-generalization however, for, clearly, there is no reason why parties to an RTA could not also prescribe what they would understand to be the minimal set of protection mechanisms to have in place for judicial as well as administrative action. For that purpose, the UN Guidelines on Consumer Protection are most helpful in identifying the common elements and objectives for consumer protection, which do refer to systems of redress.

A better explanation for the predominance of competition provisions in current RTAs relative to consumer protection may be found in the perception, or perhaps the negotiators' agenda, that there is a more direct connection between anti-competitive practices and market access. While a domestic consumer scam may affect the capacity to trigger competition forces in the domestic market, it may not act so obviously to foreclose foreign competitors from market entry or the importation of their products. Market access is the

objective of an FTA and one can see the close connection with regulatory cooperation that addresses this market access commitment. An illegal or unconscionable act on the part of one or more operators will cause competition problems if undetected. However, detection takes place at national level by consumers and up through to consumer organizations and consumer protection agencies. It is only brought to the attention of trade negotiators later on, if unsuccessfully dealt with, or stronger remedies are required.

Where developed and developing countries in RTAs are exchanging market access commitments and some of the members have functioning authorities, it becomes a priority for them that the other partners also have minimum competition law standards in order to secure the reciprocity of the market access exchange. The parallel to consumer protection can be made in those cases where choices and transparency of information is unavailable, or the ability to redress these problems is present in one market and not in the other partner's market. However, the priority to introduce these elements as complements to competition law cooperation is not so evident in RTAs to date. While the objective of regional integration may well be served by complementary supply and demand-side policies, RTAs appear to reflect more the objective of market access as a singular enterprise. As such, the regulatory policies supporting market access are those that appear to receive priority.

For developing country partners, an emphasis on competition policy may also reflect their relative lack of control over the regional trade agenda with a developed partner. It may well be that a developing country has a different set of regulatory priorities. As RTAs contain more sophisticated and tailored provisions regarding competition, it is important that the option for cooperation to deal with cross-border consumer protection issues surface as a positive provision that complements a developing country's domestic development and market objectives. This applies both for dealing with cross-border fraudulent practices and for improving the demand side of competition.

The question of including consumer protection provisions at regional level can be raised where there are few cases of successful implementation of robust national consumer protection regimes in developing countries. At the same time, if a developing country sees

value in promoting an agency, the inclusion of such provisions in a regional agreement can give impetus to the internal reforms or can provide greater resources for the betterment of both the economy and consumers. This has occurred in several cases for competition cooperation in RTAs where implementation of domestic competition law and a functional agency is also called for as an aspect of the agreement.

Regional groupings can draw on some superior institutional arrangements and establish cooperation at levels that go beyond what might be realizable for multilateral cooperative forums or within the legal authority of an agency-to-agency agreement. Thus, it is interesting to see how a developed internal regional market, the European Union, has sought to address some of the aspects raised by the multilateral and OECD Guidelines. Two enactments are noted here.

First is the EU Directive on Injunctions for the Protection of Consumers' Interests (98/27/EC, The Injunctions Directive). This provides that Member States shall recognize qualified consumer groups as complainant parties within their national legal systems. This bypasses some of the jurisdictional issues raised when consumers seek to hold a foreign actor responsible by establishing a common procedure for injunctions (conduct remedy) and allows qualified consumer groups to access other Member States and commence their actions. If a remedy is ordered, this can then be enforced in the jurisdiction where effectiveness of redress is most likely. Two aspects are therefore introduced in The Injunctions Directive that facilitate redress: permitting groups to represent the more diffuse consumer interest for injuries, and the facilitation of cross-border actions in the respondent's territory.

EU Regulation 2006/2004 on Consumer Protection Cooperation also targets violators who injure consumers in another Member State. This focuses on agency cooperation procedures and emphasizes requirements for consumer authorities to provide information to facilitate cross-border investigations and further, to also require, in certain cases, that a requested agency will undertake investigations on behalf of another. Combined, one can see how the internal market rules are reaching to eliminate territorial issues in the consumer protection field at an advanced level both in agency cooperation as

well as the use of the national courts for private redress at an advanced level.[37]

Aside from the EU body of consumer protection legislation, there are few other examples within the body of RTAs. For the two largest regionally active countries, the authors found only two treaties for completed agreements[38] – the US-Australia FTA, and the EU-ACP Cotonou Framework Agreement. The US agreement with Australia refers consumer protection to the chapter on 'competition related matters' (Article 14(6)), which is helpfully indicative of the complementarity of these policy areas at the outset, and then refers to the existing mechanisms. These include the pre-existing agency-to-agency agreement between the two (2000, discussed above), the 2003 OECD Guidelines (as above) and the ICPEN network.

The treaty text expression is that the parties shall 'further strengthen' cooperation and coordination among their agencies especially for fraudulent and deceptive commercial practices. Areas emphasized for attention include prompt detection of violations in both territories, notification of investigations significantly affecting the other territory's consumers, exchange of information on the administration of the laws, enforcement and investigation assistance in appropriate cases (individual case cooperation) and consulting/coordination on cases with significant cross-border dimensions. Noteworthy is that cross-border notification is squarely set on the possibility of considering injurious practices as these may affect the other country's consumers.

While this listing of activities is not so different from the earlier agency-to-agency agreement between these two parties, its inclusion within the FTA also establishes this regulatory area on an even par with the other regulatory areas receiving attention for cooperation, notably competition policy. It also has added momentum to the process to continue identifying additional measures to facilitate coordination, including the use of court procedures. As a treaty declaration, this serves as a political expression to encourage the respective agencies to continue the agenda, effectively seeking to give effect to the OECD 2003 Guidelines.

It is clear that the US-Australia FTA and its provisions provide a model for incorporating the current international references on consumer protection into an RTA.[39]

The EU external agreement with the most explicit references to consumer protection is the Cotonou Agreement. This is a 'framework' that identifies the areas to be treated, as agreed, in the later negotiations for economic partnership agreements (EPAs) between the EU and regions of the ACP. Whether later negotiated agreements are more or less specific is not obvious. What is authorized by the governments to consider is a listing of cross-border consumer protection issues that seem to draw some stronger reference to the earlier UN Guidelines, but also pursuing some distinct considerations as well, including an emphasis on monitoring product safety, improving information to consumers, encouraging independent consumer associations, notifying enforcement of legislation, cooperation in investigation of harmful practices, and implementing export restrictions for products that are domestically prohibited.

As a complement to competition policy considerations, there is a single expression of the demand side of the competition equation which might well reflect the evolution of the Community's own internal market approach for generating competition within the Member States. As recited,

> Cooperation shall, in particular, aim at ... improving information provided to consumers on prices, characteristics of products and services offered…[40]

This may be the single clear expression of a 'demand-side' consideration in a regional trade or framework agreement to date, even while not explicitly linked to a competition law provision.

For both the US and the EU, consumer protection references in their RTAs are at best sporadic. There are no consumer protection references in other later and contemporary US agreements, including the US-Morocco Agreement and the US-Central America-Dominican Republic Free Trade Agreement (CAFTA-DR). The most recently signed EU-Euro-Med association agreement, (EU-Lebanon Agreement, 2002) does have text dealing with consumer protection, but no particular reference to the cross-border problems identified

in the international sources discussed above, or consideration of the areas taken up in the Cotonou framework. Article 58 of that Agreement[41] provides in total for cooperation in order to avoid trade barriers caused by consumer legislation, the extension of the rapid alert system for dangerous products, for exchanging experts and organizing training schemes.

While these aspects are also important and certainly helpful for agency capacity, the provisions do not come close to addressing the issues identified by the OECD 2003 Guidelines or the subject focus of the IMSN findings on cross-border remedies. Obviously, commencing assistance at this level provides the later opportunity to undertake cooperation between functioning agencies. Considering, however, the longer-term objectives of creating a larger European economic space and the intensity of cross-border cooperation already committed within the EU internal market, it seems nearly disjunctive that consumer protection cooperation has not been expressed at a more contemporary level commensurate with what is being sought by all the parties in the larger Euro-Med arrangements. In fact, the ACP Cotonou framework has an arguably more advanced expression, even while neither of these external arrangements actually reach to give a clearly defined effect to the objects of the OECD Guidelines.

One should also make comparison to the competition provisions of the EU-Lebanon Agreement. Here, the expression common to EU external agreements is found, that cartels and abuses of dominant positions are incompatible with the functioning of the agreement and as they may affect trade between the parties. Moreover, both countries agree to enforce their competition laws and agree to exchange information within the confines of confidentiality. Finally, 'the necessary rules for cooperation … shall be adopted by the Association Committee within five years of entry into force of this Agreement.'[42]

While this is also not an expression of an advanced agency cooperation arrangement, it is a clear nod to the eventuality of cooperation, an element that is missing in the consumer protection section of the agreement.

What can be concluded for RTAs is the following. Few RTAs include consumer protection provisions either to address cross-border practices or to complement the functioning of competitive

markets. An exception is the US-Australia FTA which places a strong emphasis on cooperation regarding cross-border deceptive practices. The EU internal market has moved to advance concepts that both act to support competitive markets as well as deal with deceptive practices by agency cooperation and consumer redress. These examples have not yet found their way into the Community's external arrangements, although the Cotonou Agreement shows some potential for these more contemporary justifications for consumer protection provisions within an RTA.

7. Conclusions

The methods to overcome competitive market deficiencies in both supply and demand have become highly complex within a global marketplace. Obstacles to the supply of such markets, such as monopolies and cartels, predatory pricing and the abuse of dominant position, all work to the detriment of consumers as well as inhibiting economic efficiency and sustainable growth, the very objectives of market liberalization. Problems with the demand for competition found in the inhibited or obstructed ability of consumers to search and switch markets and obtain necessary redress, also work to the detriment of both consumers and economic efficiency and growth. This again detracts from the same objectives of market liberalization, the enhancement of consumer welfare.

RTAs are increasingly identifying ways to use domestic regulatory policies to support the flow of cross-border trade. While these agreements may prioritize the policies and provisions concerned with market access, they also acknowledge the need for competition provisions to underpin the supply of healthy markets. Yet, finding complementary ways of overcoming the limitations imposed on consumers through effective consumer protection and to promote a healthy global marketplace is only beginning to evolve.

Bilateral and multilateral arrangements can address issues of information sharing, mutual assistance and judgment recognition and enforcement. Agencies can develop measures to ensure that they are not prevented from enforcing laws prohibiting unfair or deceptive marketing practices against a domestic business simply because that business has had a transaction with or has targeted only foreign

consumers. It is also possible for agencies to act against a business that has transacted with or targeted domestic consumers simply because it is not a domestic business.

Clearly, the wide variations in the developments, as well as the degree of integration of competition and consumer laws and policies at national level, will be reflected in the nature and scope of the RTAs signed up to by these jurisdictions. More integrated competition and consumer agencies have already included elements of complementary competition and consumer policies within their more recent RTAs, although these examples are rare.

Yet the popularity of RTAs by members of the multilateral trading system is also accompanied by an increasing emphasis on regulatory treatment within these agreements. There is little doubt that competition policy has arrived as a favoured area of regulatory attention, along with others, including intellectual property protection, food and product standards, and depending upon the signatories, environment, human rights, labour rights, and so on. In some cases these regulatory endeavours are intended to generate some firm harmonization and may even be connected by condition to the trade liberalization commitments. This is the new regulatory terrain for RTAs, and particularly for those between developed and developing countries. Some of these new areas also indicate that RTAs are capable of adopting regimes not already covered in the WTO.

There is an inevitable lag in time between the recognition of an area that demands international cooperation and its translation into state-to-state agreements and treaties. The OECD guidelines that established an instrument for competition cooperation were generated in the mid-1980s. The bilateral competition agreements emerged several years later, accelerating a decade later. The point of reference for consumer protection is now placed on cross-border deceptive practices, and this set of guidelines was adopted by the OECD in 2003. E-commerce and communication has clearly raised the stakes for cross-border consumer protection and the particular instruments to address this and other issues are certainly evolving. An agreement, such as the US-Australia FTA, promotes agency cooperation not only regarding specific cases in particular, but also in the development of additional techniques to feed the consumer protection response cycle in the global market.

It is commonplace for the advocates of any particular regulatory policy to attempt to climb on to the RTA bandwagon and assert that their favoured subject area should also be treated at the level of political inter-governmental treaty making. And it is also recognized that where negotiating parties have disparate power in market size and development levels, the agenda for regulatory action is not necessarily an exercise of identifying true common objectives, but rather may reflect the reciprocity in exchanging regulatory action for market access.

Nevertheless, and particularly for developing countries, the task of providing comprehensive consumer protection within a global marketplace is daunting. Given the patchy record in achieving robust consumer protection regimes in developing countries, it is fair to ask whether the inclusion of consumer protection provisions in an RTA represent just one more subject area where resources must be found and other regulatory priorities with possibly more potential foregone.

The counter-argument is that the evidence suggests that the benefits of including complementary consumer protection provisions, within both domestic systems and RTAs, outweigh the costs of introducing and implementing them. This reasoning has been based on two principal elements. The first is that economic development requires competitive markets, which must be encouraged not only from the supply side but from the consumer demand side as well. The other emphasizes the growing phenomena of cross-border deceptive practices, which unequivocally require enhanced international cooperation in order to prevent such injurious behaviour to consumers and for sustainable market development.

For developing countries, these considerations point to several potential courses of action. The first is the case where the country happens to have a joint agency dealing with both consumer protection and competition (integrated approach). In these cases, a bilateral agency-to-agency agreement, or an RTA encompassing competition provisions can also accommodate consumer protection.

To include consumer protection is to grant some equivalent weighting to the activities of the agency itself and the role that consumers can play in the development of the market. It suggests that in a developed-developing country agreement where both of the

parties have consumer protection agencies, but where only competition policy has been included in the RTA, a better complementary balance could be drawn by seeking consumer protection cooperation provisions as well.

A second course arises in cases of RTAs between developing countries. Here the balance of regulatory priorities may be more even at the outset, and countries can determine on their own merits in respect of their own market conditions whether or not consumer protection should be introduced as a common area of cooperation. The argument for its inclusion is evident where all partners have agencies, but is not necessarily diminished when one regional member has a functioning agency and its partner does not.

Overall, such cooperation provisions enacted in an agreement would clearly support a domestic commitment to implement consumer protection laws and policies, even in countries where there is little record of implementing consumer protection laws successfully. Given the documented trends evident in both the areas of consumer protection and competition and in cross-border deceptive practices, the adoption of meaningful cooperation provisions between regional partners is a reasonable priority for any country that has already established consumer protection laws and wishes to make them effective in a contemporary marketplace.

APPENDIX

United Nations Guidelines for Consumer Protection

(As expanded in 1999)
(…)

IV. International cooperation

63. Governments should, especially in a regional or sub-regional context:

(a) Develop, review, maintain or strengthen, as appropriate, mechanisms for the exchange of information on national policies and measures in the field of consumer protection;

(b) Cooperate or encourage cooperation in the implementation of consumer protection policies to achieve greater results within existing resources. Examples of such cooperation could be collaboration in the setting up or joint use of testing facilities, common testing procedures, exchange of consumer information and education programmes, joint training programmes and joint elaboration of regulations;

(c) Cooperate to improve the conditions under which essential goods are offered to consumers, giving due regard to both price and quality. Such cooperation could include joint procurement of essential goods, exchange of information on different procurement possibilities and agreements on regional product specifications.

64. Governments should develop or strengthen information links regarding products which have been banned, withdrawn or severely restricted in order to enable other importing countries to protect themselves adequately against the harmful effects of such products.

65. Governments should work to ensure that the quality of products, and information relating to such products, does not vary from country to country in a way that would have detrimental effects on consumers.

66. To promote sustainable consumption, Governments, international bodies and business should work together to develop, transfer and disseminate environmentally sound technologies,

including through appropriate financial support from developed countries, and to devise new and innovative mechanisms for financing their transfer among all countries, in particular to and among developing countries and countries with economies in transition.

67. Governments and international organisations, as appropriate, should promote and facilitate capacity building in the area of sustainable consumption, particularly in developing countries and countries with economies in transition. In particular, Governments should also facilitate cooperation among consumer groups and other relevant organisations of civil society, with the aim of strengthening capacity in this area.

68. Governments and international bodies, as appropriate, should promote programmes relating to consumer education and information.

69. Governments should work to ensure that policies and measures for consumer protection are implemented with due regard to their not becoming barriers to international trade, and that they are consistent with international trade obligations.

NOTES

[1]United Nations Guidelines For Consumer Protection (As Expanded In 1999.) (A/C.2/54/L.24).

[2]Recommendation of the Council concerning Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders (2003), http://www.oecd.org/dataoecd/24/33/2956464.pdf (no document number).

[3]Except the regulation of financial services and product safety and the procurement of specific redress for individual consumers. See http://www.icpen.org/.

[4]Asymmetry of information is mentioned to indicate one of the phenomena indicated as market failures. In this case, between two negotiating parties, one, notably in this case the consumer, has access to an insufficient amount of information, limiting his/her possibility to make an optimal choice. Different arguments justify the government intervention in the economy in the case of market failure. For more information, please refer to Stiglitz (2002).

[5]Porter (1990).

[6]DTI Consumer Strategy. A Fair Deal For All: Extending Competitive Markets: Empowered Consumers, Successful Business, June 2005.

[7]In some cases, this has been seen as less effective in leaving loopholes or legislative gaps through which practices which would normally be seen as unlawful can slip, until appropriate legislation is identified and introduced in a piecemeal fashion.

[8]United Nations Guidelines For Consumer Protection. *Op cit*. See also, UNCTAD, Competition Policy and Consumer Protection Branch, documents and technical assistance activities, http://r0.unctad.org/en/subsites/cpolicy/

[9]Note that although Bolivia doesn't have consumer protection laws for all the sectors, sectoral regulations have included consumer protections provisions. For more information, please see the COMPAL (UNCTAD) Programme website at http://compal.unctad.org.

[10]UN Documents: E/1995/70 & E/1992/48. http://www.un.org/documents/ecosoc/docs/1995/e1995-70.htm.

[11]See for examples, J. Vickers (2005, 2003), Asher (1998:183), Radner and Sundararajan (2005).

[12]See Consumers International. Global Competition Report. 2003.

[13]*Ibid.* The sector underwent rapid liberalization and de-regulation in 1989, during a period of large losses in transport volume and widespread bankruptcies. Second-hand capital goods from bankrupt industries were sold off to the new small enterprises that now made up 72% of the market in the decade following liberalization. The number of accidents involving freight vehicles increasing more than 30 per cent between 1994 and 2000. The average age of freight vehicles owned by individuals was almost double those owned by companies, at 10 years compared with 5.4 years.

[14]EC Consumer policy strategy 2002-2006. *COM (2002) 208 final)* (2002/C 137/02)

[15]Waterson (2003a, 2003b:129-150).

[16]See Schultz (2004:5).

[17]Sylvan (2004:191-206).

[18]Sylvan (2004)

[19]Sylvan (2004)

[20]Schultz (2004).

[21]Kovacic (2005:23).

[22]15 U.S.C. §§ 41-58, as amended, see generally, http://www.ftc.gov/ogc/stat1.htm

[23]See for programme examples, Consumers International, www.consumersinternational.org; Consumer Unity & Trust Society (CUTS), www.cuts-international.org/; the UNCTAD COMPAL, http://www.unctad.org/en/docs/ditcclp20043_en.pdf.

[24]N. Birdsall and R. Lawrence (1999:136).

[25]For a further discussion on this issue, please refer to Chapter 2 of this publication.

[26]Except areas dealing with the regulation of financial services and product safety and the procurement of specific redress for individual consumers. See http://www.icpen.org/.

[27]FTC, Chairman Majoras speech, "Protecting Consumers in a High-Tech World", Brussels, 04-06-05, at http://www.useu.be/Categories/Telecommunications/Apr0605MajorasSpeech.html.

[28]As expanded in 1999 to address sustainable consumption. Available at http://www.un.org/esa/sustdev/sdissues/consumption/cpp1225.htm

[29]OECD, Recommendation of the Council, cited in full, note 2, above.

[30]OECD, 1999 [C(99)184/FINAL].

[31]As the preamble indicates, …most existing laws and enforcement systems designed to address fraudulent and deceptive commercial practices against consumers were developed at a time when such practices were predominantly domestic…

[32]See for discussion, OECD (2005c:38-40).

[33]"Findings on Cross-Border Remedies", http://www.icpen.org/imsn/activities.htm.

[34]The Australia-EU agreement (2002) is not a joint agency agreement where the EU signatory is the Health and Consumer Protection Directorate.

[35]The US–Australia competition notification provisions are also of a stronger variety than what is observed in other cooperation agreements. Due to amnesty considerations and the confidentiality requirements imposed by Congress, it may well be that a single agreement for both competition and consumer policy would be unfeasible.

[36]The (2002) Australia-EU agreement is also soft on notification, but in this case the EU Directorate is not actually responsible for investigation or enforcement.

[37]Focus on judicial action is also seen in the OAS territories where proposals for cross-border recognition of judgements that would include consumer redress are under consideration. See OECD Workshop presentations, note 29 above.

[38]The US–Australia agreement also has a separate Article on recognition of judgments, which is not discussed here. See Article 14.7

[39]Cotonou Agreement, Article 51.2

[40]Lebanon Euro-Mediterranean Association Agreement, COM (2002) 170 final. Signed 17-06-02.

[41]EU-Lebanon Agreement, Article 35, Paragraph 2.

8

The role of civil society in promoting competition culture at the regional level

PRADEEP S MEHTA
NITYA NANDA

1. Introduction

Since economics and politics are usually intertwined in international economic relations, regionalism has become a popular economic means for political ends - improving interstate relations and/or enhancing security within a region. In international relationships that have a historic record of conflict or where no tradition of partnership exists, cooperation in economic matters can be a core element in a process of confidence building.

> Peace is the natural effect of trade. Two nations who differ with each other become reciprocally dependent; for if one has an interest in buying, the other has an interest in selling; and thus their union is founded on their mutual necessities. (Montesquieu, 1975)

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A competition policy framework at regional level has been one of the most common features of the ongoing regionalization process. Thus, some regions have already adopted a comprehensive regional competition framework, while others are in various stages of such a process. Some of them also have elaborate competition provisions in the regional trade agreement (RTA) itself.

An important development along with the process of globalization and regionalization of national economies is the globalization and regionalization of civil society as well. This has happened in two ways. Some civil society organizations (CSOs) have grown organically and are now working in several countries, while others are networked at global and regional levels, which has of course been facilitated by the information and communication revolution. This has made civil society as a whole much stronger at all levels, enabling it to play a bigger role than ever before. Hence, it is now widely recognized that the capacity and involvement of civil society is crucial for good governance in terms of both policy making and its effective implementation. It has also been observed that the involvement of civil society, particularly consumer organizations in the formulation and implementation has been crucial for competition policy and law, one of the important areas of governance in a market-oriented economy. They also play an important role in promoting the general competition culture through their independent campaign and advocacy activities. A weak consumer movement as well as a low level of awareness of competition issues in civil society, however, has proved to be a dampener in this regard.

When it comes to competition policy and law at regional level, civil society finds itself at a crossroads. As national barriers come down and markets are integrated, the focus of much policy-related activities shifts from national capitals to regional headquarters. This raises the fear that the voice of the people and civil society may not be adequately heard in the course of policy formulation and implementation. On the other hand, in a regionally integrated market, dealing with anti-competitive practices goes beyond the capability of national governments and agencies. Hence, in an era of regional integration, the case for a regional competition framework can hardly be overemphasized. Given this context, it would be interesting to see how civil society has been coping with the situation and if it has

been able to play the appropriate role at regional level as it has been doing at national level in many countries.

Section 2 of this chapter looks at the process of regionalization of competition rules across the world. Section 3 looks at the role of civil society in economic policy making in general and competition policy issues in particular, including at regional levels. The fourth section takes a focused look at three regions, the EU, the Caribbean Community and Common Market (CARICOM) and the Common Market for Eastern and Southern Africa (COMESA) to examine the general context of civil society's involvement in competition policy issues as well as highlighting some experiences. Section 5 gives a general picture of the experience of civil society involvement in competition policy issues, while the sixth and last section concludes the chapter, drawing some lessons from the discussions in the previous sections.

2. The regionalization of competition rules

As with the popularity of regionalism in recent years, the subject of international cooperation in the field of competition law and policy[1] is no longer a new one. Many developed as well as developing countries are party to bilateral cooperation agreements on competition law enforcement.[2] Cooperation arrangements have also featured in many RTAs. A comprehensive, regional approach to competition policy has been adopted within the scope of some RTAs such as, for example, the EU and CARICOM.

Some other regional groupings that have either adopted or are in the process of adopting a regional approach to competition policy are: MERCOSUR (Common Market of the South, also known as Southern Cone); COMESA (Common Market for Eastern and Southern Africa); SADC (Southern African Development Community); EAC (East African Community); CEMAC (Economic and Monetary Community of Central Africa), Andean Community, UEMOA (West African Economic and Monetary Union, WAEMU or UEMOA in French), and so on. While COMESA and UEMOA have already drafted a regional competition policy, the competition provisions in the Andean Community agreement are quite elaborate.

The typical agenda of regional economic cooperation blocks has usually dealt with the issue of the harmonization of national competition laws. In some cases, it even included the creation of a new legal framework in certain countries, as in some Central and Eastern European countries that have recently joined the EU.[3]

The provisions of these agreements can vary and set different levels of integration and cooperation among the economic partners. Some RTAs contain general obligations to take action against anti-competitive conduct, others prescribe specific standards and rules, and a few require common laws and procedures. Some RTAs provide for the applicability, content and/or effective enforcement of competition rules relating only to restrictive business practices (RBPs) affecting trade among the parties, while others contain such prescriptions with respect to all RBPs.[4]

In the EU, the deep nature of integration between member countries[5] allows a rather advanced cooperative mechanism on competition issues – a supranational competition regime, which is linked by the *Treaty Establishing the European Community (1957)* (Treaty of Rome) to the fundamental objective of establishing a common market. The EU also has associated rules, since their adoption in 1989, regarding concentrations, which meet certain sales thresholds that are designed to reach transactions that may affect trade between and among EU Member States. Notably, coordination of these specific rules is ensured by the principle of primacy of EC competition law over national competition law. At the same time, its Member States have separate and distinct national competition laws, though these are not uniform.

Some EU trade agreements have also been made with non-member countries, although, in these, the extent of coordination depends on the level of economic integration involved in the agreement. A prominent example is the Agreement of the European Economic Area (EEA), concluded by the EU with most countries of the European Free Trade Association (EFTA), whereby all practices liable to impinge on trade and competition among the EEA participants are subject to rules that are closely related to the EC competition law. Some of these agreements specifically state that these practices shall be assessed on the basis of criteria arising out of Articles 81 and 82 of the Treaty of Rome.[6]

The North American Free Trade Agreement (NAFTA) agreement provides that each party shall adopt or maintain measures to proscribe 'anti-competitive activities' and take appropriate enforcement action for this purpose. Its Chapter 15, entitled 'Competition Policy, Monopolies and State Enterprises', requires member countries to '*adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto*', without however prescribing specific competition standards or rules. Under this NAFTA obligation, Mexico enacted a comprehensive modern competition law in 1993. A similar provision exists in both the Canada-Chile and Mexico-Chile free trade agreements (FTAs). The Japan-Singapore Economic Partnership Agreement (JSEPA) provides that each party shall take measures that it considers appropriate against anti-competitive activities. Similarly, the EU-Mexico FTA focuses on ensuring the implementation and enforcement of the parties' *respective* competition laws in a manner recalling the side agreements on environment and labour standards embedded in NAFTA. The recently signed Canada-Costa Rica FTA adopts a comparable approach.

Broad-based prohibitions on certain types of anti-competitive practices have been written into subregional agreements in Africa. For example the Treaty establishing COMESA prohibits, in Article 55, '*any agreement between undertakings or concerted practices which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market*'. COMESA is in the process of developing and implementing a regional competition policy. Australia and New Zealand have shown that harmonization is possible in competition laws, especially in the context of predatory behaviour, with their Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). Here, a company with a substantial degree of power in a trans-Tasman market (one with a geographic dimension of either within Australia, or New Zealand, or both) must not take advantage of that power for one of three proscribed anti-competitive purposes in any market in either Australia or New Zealand.

Most RTAs provide for consultation and cooperation mechanisms concerning the application of measures against anti-competitive practices, such as procedures for notification, exchange of information and enforcement of competition rules. In this respect, RTAs should be read in conjunction with other cooperative

competition arrangements that the parties may have in place. It is also an area where lessons learnt from such cooperative arrangements have been incorporated into subsequent RTAs. For example, the concept of 'positive comity' whereby a party may request that another party initiate enforcement action, which is seen as adversely affecting its interests, has been incorporated into a number of RTAs, such as, for example, CARICOM, following its initial introduction in a 1991 bilateral cooperation arrangement between the EU and the US.

3. The role of civil society at regional level

Recently, 'civil society' has become no less a catchphrase than mottos such as 'pluralism', 'citizenship', 'representation' and 'inclusion', and so on. Today, its role and influence over development concerns is expanding. Increasingly, civil society is playing a key role in assessing the contribution of the state and business community to the development arena, rewarding community-friendly behaviour and criticizing its opposite. Experience has shown that governments cannot, by themselves, fulfil all the tasks required for sustainable human development. This goal requires the active participation and partnership of citizens and their organizations. CSOs, therefore, have vital roles to play as participants, legitimizers and endorsers of government policy and action, as watchdogs of the behaviour of regimes and public agencies, and as collaborators in development efforts.[7]

At regional level, strong participation and regular engagement of CSOs are also key factors in achieving the goals of regional cooperation. Successful regional cooperation schemes have all benefited from active participation by a wide range of civil society actors. In fact, the degree of participation by civil society can be seen as an indicator whereby to measure the real effects of intergovernmental regional cooperation. The UN Commission on Global Governance used the term CSOs to describe the 'new actors' who should be consulted in the 'management of global affairs'.[8] For international financial institutions such as the World Bank and the International Monetary Fund (IMF), it became a way in the 1980s and 1990s to identify the broad range of social groups whose inclusion mattered for purposes of development and governance.

Global governance is no longer viewed as primarily an intergovernmental concern but one that involves intergovernmental institutions, CSOs, citizens' movements, transnational corporations, academia and the mass media.

The emergence of a 'transnational' civil society reflects a surge in the will and capacity of people to take control of their lives, a fact that governments and intergovernmental agencies cannot afford to ignore. Except in places where culture or authoritarian governments severely limit civil society, NGOs' roles and influence have exploded in the last half-decade.

Looking back, civil society movements across borders have been traditionally mobilized around issues such as citizenship, rights and democracy. Trade, foreign direct investment (FDI), and competition as well as other economic issues are relatively new concerns. In response to the increasingly widespread disenchantment with the way new democracies work, the struggles of CSOs have been mainly aimed at improving representation, transparency, citizenship, human rights and the accountability of governments and corporations. Furthermore, the international demonstrations in Seattle (1999), Prague and Genoa (2000) certainly marked the rising concerns of the public over the way the global trade regime is being constructed. Their greatest triumphs cannot be discounted. The events leading to the Seattle debacle of the World Trade Organization (WTO) and the subsequent agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and public health at the Doha Ministerial show that a civil society could be considered as a third global force after the governments and business.[9]

The second traditional trace of CSO activities is that most civil society movements are solidly embedded in the national arenas. Despite a scaling-up to international level in the 1980s and 1990s, the state remains the principal target of CSO activities. Many CSOs still see the domestic level as the most effective way to bring about policy change and now frequently seek to press their cases through legal means and domestic pressure. These movements engage with governments and seek to gain influence in concrete policy areas. Moreover, for a range of reasons to do with resources, culture, pragmatism and principles, CSO activities either remain focused at national level or leap to international level, largely skipping the

regional level. However, as regional markets are integrated, the focus of much policy-related activities shifts from the national capital to the regional headquarters.

Nevertheless, region-wide cooperation between civil society movements, or representation and influence of CSOs in the regional policy-making process is still very limited, particularly in the developing world. Attempting to contribute to the regional agenda, or using regionalism as a strategy, has been of comparatively recent origin, even though there is some evidence that civil society movements are gradually developing an independent regional presence. Regionally, overarching networks are gradually and tentatively coming into existence, with a view to representing and channelling networks of civil society actors located in particular states.

Especially in international economic policy making, more prominent than the contributions of regional networks of CSOs have always been those of individual organizations, who either try to extend the outreach of their research and advocacy activities beyond their national base, or have grown out of their initially limited resources to expand regionally. This is a growing trend; with more and more CSOs becoming more active, transnational, regional or global organizations. Their presence at regional level, their inclusion in regionalism, is an undeniable fact.

The CSO regionalization process, however, has not been entirely self-motivated. Governments, the lead takers in regionalism, themselves have several reasons to reserve 'invited space' for civil society participation, reasons that are very much the same as those that have driven the rush towards regionalism. For example, if RTAs are considered an effective way to ensure regional security, then a regional movement of civil society organizations by people bound by common standards, values, and traditions will work in the same way, since peace has always been, and will always be the greatest aspiration of people. Besides, the approval of civil society organizations for regional decisions will help governments to overcome any opposition from domestic constituencies against liberalization and integration. This is being done in most regions through developing a network of CSOs. Such networks are able to

analyse the critical issues from both regional and national perspectives that help the regional bodies with appropriate feedback.

One sterling example of regional CSO cooperation and alliance building is that of the South Asia Watch on Trade, Economics and Environment[10] (SAWTEE) based in Kathmandu. SAWTEE has been promoted by CSOs from India, Nepal, Bangladesh, Sri Lanka and Pakistan in 1994 with the active support of Friedrich Ebert Stiftung, a German political foundation. SAWTEE has been working on regional issues of trade and economics, including competition policy and law. However, in the absence of an effective regional trade treaty, it has not been able to advocate for a regional competition framework. Nevertheless, it is visualized that once the South Asian countries deepen their trade cooperation under the South Asian Association for Regional Cooperation (SAARC) Free Trade Arrangement a demand for a regional competition framework will arise.[11] In any event, SAWTEE has been engaged, in cooperation with CUTS International, in promoting competition regimes at the national level in all SAARC countries.

This regionalization of civil society movements, such as the experience of SAWTEE, helps to create space for information sharing, knowledge diffusion and norms definition in areas of CSO action, which is a space beyond the reach of states, shaped by civil society cooperation and interaction. However, these regional networks of civil society organizations based in different states are characteristically not yet significant, perhaps not even to their members. Belonging is important; but the national level remains the more significant in terms of getting things done. Such networks also face considerable problems of organization and strategy. The members can rarely meet face to face and are unable to build deep bonds based on identity and community. Many members may logically have deeper horizontal bonds with other kinds of NGOs inside their own country.

The proliferation of transnational civil society movements in recent years, as discussed above, can be explained briefly as an expression of the 'voluntary disengagement' of the people from the mainstream political process, and a direct response to the excesses of globalization and corporate hegemony over the world economic instruments and resources. Interestingly, these also serve to explain why CSOs have quite a significant role to play *vis-à-vis* the various

regional frameworks on competition, which are being developed or negotiated and implemented across the world today.

The concerns of civil society over competition issues at regional level have quite the same dimensions as their concerns over the same issues at the respective national levels. And much as governments, national or supranational, want to win over public support, consultation with civil society on any issue is a must, competition policy and law being not the least of these. This process of consultation can happen before any policy or law on competition is formulated, so as to include CSOs as a constituency from the beginning and during the implementation, and thus mitigate discord. It can even be undertaken by inviting representatives of civil society to participate in the policy impact assessment/evaluation process so as to further evolve the policy and law in question". Such a mechanism was absent when the EU adopted its competition framework originally. However, in recent changes of its competition policy, the EU held elaborate consultations with civil society. Such a process has also been followed in the CARICOM and COMESA to some extent.

Anti-competitive practices, or other business undertakings that adversely affect the public interest; and unfair trade practices that harm consumers, therefore, can be quite rampant, nationally, regionally, or internationally. Hence, there exists the need for CSO involvement, which can either be in the form of consultations between CSOs and regulators, or interventions by CSOs in competition cases on behalf of a class of consumers. In this regard, the strength of CSOs should be duly noted. Apparently, the clientele of Trade Negotiations Committees (TNCs) is drawn almost entirely from all the tiny members of these organizations and the companies' public image and their profits depend greatly on whether they manage to get the endorsement of these new representatives of the public. For instance, class actions by consumer organizations against corporates, or against governments, government business enterprises, and private corporations that fail to provide essential services such as gas, electricity, water, and waste disposal at fair prices are no longer a mere possibility.

Civil society generally has an image of being an advocate of the common people and consumers. This will help in building confidence

and trust amongst the people for a regional consensus, for example, on the necessity of a regional competition framework, or the necessity of incorporating certain competition principles into the RTAs that their countries are parties to. CSOs are also traditionally regarded as a useful source of technical expertise; they provide capacity building, deliver services and, most importantly, they provide representation and therefore articulate the voices of the people in the decision-making processes that affect their lives. It is assumed that CSOs often have closer contacts with local communities and can offer valuable insights and perspectives that differ from those of donors and government authorities.

4. Regional experiences

To understand the dynamics of a regional competition framework and the role of civil society in the process, it would be useful to take a closer look at the experiences of some regions. This section, thus, looks at the legal and institutional framework of CSO involvement in matters of competition issues in select regions. Three regions have been selected for this purpose: the EU, CARICOM and COMESA. These have been selected to include regions with significant experience in regional competition policy as well as regions that have adopted it recently or are in the process of adoption. The selection also covers experiences from both developed and developing regions. In fact, these are probably also the regions that are relatively more advanced in terms of adopting or implementing a regional competition policy.

4.1 European Union

It is widely acknowledged that private action in the enforcement of EC and national competition law has been extremely limited to date.[12] This is not an issue with competition policy only. The EU, in general has been perceived by some to be distant and unfriendly to civil society.[13] In Europe, competition law is mostly enforced by competition agencies, subject to review by the civil courts. It is much less common that the national courts directly enforce the law on the initiative of private parties. A study on the condition on claim for damages was undertaken by the law firm, Ashurst, pursuant to a

tender called for by the Commission, to identify and analyse the obstacles to successful action for damages existing in the Member States of the European Union. The study found that levels of private enforcement in Europe are currently very low. The study has also found that not only is there 'total underdevelopment' of actions for damages for breach of EC competition law, but that there is also 'astonishing diversity' in the approaches taken by the Member States.[14]

The Commission is currently looking at the conditions under which private parties can bring actions for damages before the national courts of the Member States for breach of the Community competition rules. The Commission is also working on a Green Paper on Private Enforcement of the EC Competition Rules, which it plans to adopt in 2005. The purpose of the Green Paper, which will set out a number of possible options to facilitate private enforcement, will be to stimulate debate and facilitate feedback from stakeholders.

Nevertheless, some consumer organizations, especially the Bureau Européen des Unions de Consommateurs (BEUC)[15] and the Consumers Association (CA) of the UK, have proactively engaged in competition policy development and enforcement in the EU. As an example, the CA got two cases of violation of EU competition rules harming consumers in the UK resolved to its satisfaction. In one case, the ticketing system of the 2006 Football World Cup in Germany was discriminatory against those who did not have a MasterCard or a German bank account (Box 8.1). This, to a great extent, was discriminatory against non-German customers.

There are other examples. One of them, an important campaign that BEUC and the CA jointly launched in 2001, was to find an alternative to the Block Exemption policy in the European car distribution market which had long been considered to be an outmoded, inefficient and anti-competitive system of distribution. Under this policy, the car manufacturers had been exempted from EU competition rules and they imposed all sorts of restrictions on their dealers, putting them as well as consumers at a disadvantage.

Through this exemption, suppliers could appoint their dealers using a combination of both exclusive and selective distribution systems. In an exclusive distribution system, each dealer is allocated an exclusive sales territory but can sell new cars to all consumers and independent resellers. In a selective distribution system, dealers

Box 8.1 Consumers Association intervention ensures access to World Cup tickets

On 1 February 2005, 812,000 tickets went on sale in the first (of five) sale periods for the 2006 Football World Cup in Germany. MasterCard was appointed as the official and only credit card for payment in the first sale period. Alternatively, fans could pay via a bank transfer or direct debit. This meant that fans could only buy tickets if they:

- had a MasterCard
- had a German bank account
- made an international bank transfer

In March 2005, the UK consumer group, the Consumers Association, complained to the European Commission that the aforementioned arrangements were anti-competitive. They claimed that the arrangements discriminated against fans outside Germany as it forced them to buy tickets initially through a single credit card operator, MasterCard, unless they held a bank account in Germany or were prepared to incur the additional cost involved in a cross-border bank transfer. The Consumers Association calculated that this could amount to £20-£35 sterling depending on the bank. They also pointed out that, in the UK, VISA credit cards are preferred to MasterCard credit cards as there are around 42.7 million VISA credit cards compared to around 24.1 million MasterCard credit cards in the UK.

The Commission had to investigate whether there was reasonable access to tickets for consumers throughout the European Economic Area. On 2 May 2005, the Commission announced that FIFA (the Fédération Internationale de Football Association 'International Football Federation') had agreed to modify its arrangements for ticket payments for the next stages of ticket allocation. More payment methods would be accepted in the second phase (which began on 2 May) and fans based in non-Eurozone countries in the EEA who do not have a MasterCard or a German bank account can pay by making a domestic bank transfer in their local currency. FIFA and the German Football Association will open bank accounts in the 16 non-Eurozone countries within the EEA and will accept payments in the local currency.

The Commission observed that events such as the Olympic Games, the World Cup or the European football championships are very popular and draw crowds from all over the world. Non-residents need to be able to book them in a fair and non-discriminatory manner. Commenting on the 2006 World Cup case, Competition Commissioner Neelie Kroes stated that fans from all over Europe want fair access to these tickets especially as it may be many years before the World Cup will be back in Europe.

Source: EU Anti-trust Legal Update, May 2005 (www.mayerbrownrowe.com/london/broker.asp?id=2128&nid=0&fl=.pdf).

are selected according to a set of criteria but are not allocated a sales territory. It was not possible for dealers to sell more than one car brand, unless he set up a separate company and maintained separate management and separate sales premises for the sale of separate brands. Suppliers were permitted to restrict dealers to operate in specific geographical areas. This so-called 'location clause' allowed suppliers to prohibit dealers from establishing additional sales or delivery outlets at other locations. Dealers were also forced to provide after-sale services whether they wanted to or not.

The campaign for an alternative to Block Exemption to ensure a competitive car market across Europe recommended a set of rules to:

- Allow retailers the freedom to choose the cars that they want to sell and how to sell them
- Allow retailers to decide whether or not they want to offer repair facilities
- Give independent repairers fair access to technical information and spare parts, and give them the freedom to choose the cars that they want to service and the parts that they want to use
- Allow normal market forces into the car market, by giving consumers the power to choose the best retailers, garage services and spare parts.

As a result of a sustained campaign, though the exemption policy was not fully removed, a new Block Exemption Regulation with sweeping changes was forced upon the car industry. It was adopted and became effective from 1 October 2002. The new Regulation accepted most of the recommendations made by BEUC/CA.[16] The new Regulation brought a far better deal and greater choice for consumers. Changes to the 'Block Exemption' rule have allowed dealers to sell more than one make of new car and end the servicing and repairs monopoly of garages. The rules will also make it easier to import cheaper cars into one country from any other European country or to buy them over the Internet.[17]

Another successful case of civil society contribution to competition policy reforms was in the context of the revision of EU merger regulations. On 11 December 2001, the Commission adopted a Green Paper aimed at launching a debate on the functioning of the EU's merger control law, and to identify possible improvements to

the merger control regime, based on experience gathered over the last decade. The Commission announced a proposal for a revision of Merger Regulation during the course of 2002, based on the comments received during the consultation.

In response to this, some consumer organizations including BEUC and the CA made detailed submissions. Generally, they welcomed the proposals for the new regime. They, however, had specific suggestions to make the new regime more effective and consumer friendly. The most noteworthy suggestion by BEUC was related to the due process and views of consumers.[18] They noted that due process incorporates all of the procedural aspects: statements of objections, hearings, and access to the Commission's files. Of particular interest is the willingness of the Commission to encourage inputs from consumer organizations as third parties.

BEUC and the CA suggested that a number of things could be done to ensure the involvement of consumer organizations at EU level. Firstly, they thought, consumer organizations should be automatically (and explicitly) invited to comment on each case and to participate in any national committee that deals with merger control. They highlighted a number of initiatives undertaken in the UK by the Office of Fair Trading (OFT) and the Competition Commission (CC), which enhanced the CA's ability to intervene. For example, the OFT and the CC were regularly contacting the CA with specific requests for information.

However, BEUC also noted that consumer organizations often face difficulty in their efforts to participate in the settlement process due to a combination of lack of expertise in the relevant fields as well as limited resources. It also urged the Commission to consider a training programme for consumer organization representatives. Merger review can sometimes be very technical in nature, and in order to participate fully, consumer organizations will need to develop specialized skills.

These observations and suggestions caught the imagination of the Commission, particularly the then Competition Commissioner Prof. Mario Monti. Thus, the importance of involvement of consumer organizations was recognized not only in merger evaluation but also in all areas of competition policy formulation and implementation.

To ensure that the views of consumer organizations are heard during investigations a Consumer Liaison Officer has been appointed in the DG Competition. Prof. Monti also recognized the problem of resource constraints among the consumer organizations and announced that recognized consumer organizations would be resourced to the extent possible.

4.2 CARICOM

CARICOM[19] has a long tradition of consultation with members of civil society at national and regional levels and has developed a number of regional mechanisms that facilitate ongoing dialogue with civil society on a range of issues, including competition policy and consumer protection issues. CARICOM Heads of Government, in 1997, adopted the CARICOM Charter of Civil Society. The main objectives of the charter are to enhance public confidence in governance, to create a truly participatory political environment within the Caribbean Community, to enter the 21st Century on the basis of the best possible governance and to achieve and sustain that governance by mobilizing action for change.

The Charter institutionalized a strong tradition of consultation between CARICOM governments and stakeholders in civil society at national and regional levels, which dates back to the early days of the West Indian Federation, the late 1950s and early 1960s.

The Charter, one of several recommendations of the 1992 West Indian Commission Report - Time for Action, was itself the result of some 14 months of national consultations in individual CARICOM Member States with a wide range of stakeholders to develop a strategic approach to re-positioning the Caribbean in the Community of sovereign states. In making its recommendations, the Commission noted that 'Integration inevitably involves inter-governmental negotiation and decision making; but it is not the preserve of Governments alone. People need to be drawn into the process'.

The Second Special Consultation on the CARICOM Single Market and Economy (CSME), held in 2000, was very important for ensuring civil society participation at the development of competition policy

at the regional level.[20] There was wide-ranging participation in this Consultation from among the representatives of governments, the private sector, the labour movement, media practitioners, regional non-governmental organizations (NGOs), youth, academia, regional organizations, and other interest groups in civil society.

The consultation identified Core Policy Areas in the CSME as follows:[21]

> **Main Areas** - Free Movement of Goods; Right of Establishment; Free Movement of Services; and Free Movement of Capital;
>
> **Sectoral Areas** - Industry; Agriculture; Transport; Tourism and other services, including Telecommunications;
>
> **Support Areas** - Competition Policy and Consumer Protection; Macro Economic Policies, including Monetary and Fiscal Policies; Investment Environment; and Regime for Disadvantaged Countries, Regions and Sectors;
>
> **Common External Economic Policy** - Common External Tariff (CET) and, Trade and Investment.

Thus, competition policy became one of the core policy areas for CARICOM's sustained consultation with civil society. The consultation also noted that the legislative arrangements in Member States were not seen to be encouraging fair competition and did not provide for ease of business entry and exit or provide for the prevention of abuse of market power, *inter alia*. On the basis of this, it was recommended that appropriate national legislative arrangements be put in place to encourage fair competition and provide for ease of business entry and exit, with a view to preventing the abuse of market power and providing for initiatives, regulation and consumer protection.[22]

The CSME will be effected through nine major amendments to the Treaty of Chaguaramas[23] (called Protocols). Protocol VIII addresses issues relating to competition policy and the promotion of consumer welfare in the CSME. Under this Protocol, a harmonized competition policy will be established and administered. The Protocol seeks to promote and preserve conditions for fair competition to facilitate the participation of Community nationals in all markets and to promote and protect the interest of consumers.

Protocol VIII provides for the establishment of ground rules for the conduct of enterprises to ensure healthy competition and to promote consumer welfare in the Single Market and Economy. More specifically it provides for:

- A ban on agreements and practices which prevent, restrict or distort competition and the prevention of the abuse of dominant positions in particular markets;
- Protection of consumers and an environment in which consumers have the right of choice;
- The prevention and effective remedy of unfair trade practices such as dumping and subsidization;
- The promotion of a business environment in which technology development and transfer can be fostered.

Protocol VIII will apply, with few exceptions, to goods and services and capital markets as it relates to restrictive business practices and consumer protection, and to industrial and agricultural procedures in respect of dumping and subsidies. The Protocol is intended to be principally regulatory, that is containing rules and disciplines that affect cross-border commerce and domestic business practices. The Protocol also establishes the Competition Commission, which will be responsible for the implementation of the Community competition policy.

Heads of Governments of the 15 CARICOM Member States convened in Georgetown, Guyana in July 2002, together with representatives of non-governmental organizations from the region to engage in consultations aimed at strengthening the involvement of Civil Society in the different processes in which the region is involved, in particular the programme of regional integration in the context of the Caribbean Single Market and Economy (CSME). The initiative was termed the Civil Society 'Forward Together Conference'.

Besides agreeing on several broad principles for strengthening the relationships between Caribbean Heads of Government and national governments and Civil Society, the Conference agreed to institutionalize the Forward Together Process in the form of triennial engagements between Civil Society and the Heads of Government, and established a Task Force comprising a small representative group of Civil Society, coordinated by the CARICOM Secretariat, to develop a comprehensive regional strategic framework for carrying forward

the main recommendations of the Forward Together Conference. One important recommendation of the process was to establish a regional consumer protection association in the CARICOM region.

The CARICOM Secretariat has also organized several consultations at national level throughout the Community on the various aspects of the CARICOM Single Market and Economy including competition policy. Business, labour and civil society groups also participate in the regular annual meetings of the Conference of Heads of Government and are provided an opportunity to make statements on their priority areas.

Competition policy in the CARICOM region drew the attention of civil society organizations and other stakeholders as it was on the agenda of the proposed Free Trade Area of the Americas (FTAA) and the post-Cotonou negotiations. In this context, concerns about the capacity of smaller CARICOM countries on the issue of Competition Policy have been expressed. The Caribbean Reference Group (CRG) on External Affairs[24] strongly recommends that the FTAA process should seek to establish a special sub-committee to examine the current stage of development in competition policy regimes, with a mandate to advise on measures needed to build the capacity of those countries unable to participate in the FTAA proposed regime.[25] However, looking at the current pace and status of negotiations, it is unlikely that the FTAA would become a reality in the near future, if at all.

4.3 COMESA

As part of the regional integration effort mandated in its treaty, the COMESA Secretariat has developed a regional competition policy. The aim of the policy is to ensure transparency and fairness between economic actors in the region. It is claimed that the policy is consistent with the provisions and intent of the COMESA Treaty[26] and with internationally accepted practices and principles of competition, especially the principles and rules of competition elaborated by UNCTAD under the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. Existing national competition policies shall be harmonized

and brought in line with the regional policy to ensure consistency, avoid contradictions and provide a predictable economic environment.

The formulation of a Regional Competition Policy for COMESA was launched through a regional conference on competition law and policy.[27] The Kampala Conference was one of a series of activities and events organized by COMESA with the aim of contributing to capacity building and awareness generation on competition issues.[28] Prior to the Kampala Conference, COMESA had organized and participated in a number of meetings, workshops, seminars and fora on competition policy.[29]

These events provided valuable input into COMESA's process of formulating a regional competition policy. In all of them, there was a strong presence of several civil society organizations, both from within the Africa region and elsewhere. In many events organized by COMESA, Consumer Unity & Trust Society (CUTS) International and Consumers International had also been invited. While Consumers International is a global federation of consumer organizations from across the world, CUTS International is an India-based international consumer organization with an international presence including two offices in the COMESA region. CUTS has been doing significant work on competition policy in different parts of the world including in several African countries, and promoting south-south cooperation. The input by CUTS was considered to be valuable by COMESA and hence CUTS was asked to share its experience of working in the region in some of the events. This was in line with the articulation made in the Kampala conference that there was a need for COMESA to utilize the services of capacity building institutions, including the CSOs existing in the region, to develop the necessary capacities both for the private and public sector in developing national and regional policies and laws; and the need to study experiences of other regional groupings in the area of competition policy and law.[30]

Nevertheless, there was scope for broadening the extent of the consultation process undertaken by both COMESA and government with civil society.[31] The draft Regional Competition Law and Regulations were reviewed by the Consumers International (CI) and some of its members. However, there are regional institutions such as the Africa Economic Research Consortium (AERC) who deal with

regional economic issues and have a high potential to develop capacity on competition policy. They could possibly be engaged for deeper involvement of civil society in the process at regional level. There are many other CSOs with some capacity and interest in competition issues that are working mainly at national levels but some of them are regionally networked as well.[32] Their capacity and interest developed as they worked (or are working) on competition issues in partnership with CI and CUTS.[33]

5. Final comments on CSO involvement

In Europe, though the policy environment did not provide civil society with much scope in engaging in regional competition issues, civil society has created a space for itself. Despite the relative weakness of consumer associations, Europe has a network of consumer organizations, BEUC, and at least one consumer organization, the Consumers Association in the UK, that has been successful in raising competition issues at regional level drawing its strength from the Consumers Association. In fact, though consumer organizations have a natural interest in competition issues, it becomes difficult for all of them to develop capacity on competition, as they need to deal with several other issues. In such a situation, a consumer organization having a capacity on competition issues, can share its knowledge and understanding through networking, which can prove to be very useful.

In the other two regions examined above, namely CARICOM and COMESA, a few consumer organizations are reasonably strong. Nevertheless, these CSOs are still mostly working in their national contexts with only occasional engagement in regional issues. There are networks of NGOs (not consumer organizations) in both regions, but they focus more on trade and economic policy issues while giving inadequate attention to competition policy. CI, which is a global association of consumer organizations, has regional offices for African as well as Latin American and Caribbean regions.

There exists a regional consumer organization, namely the Caribbean Consumers Association (CCA) (which existed formerly as the Caribbean Consumers League and is now trying to re-establish itself),[34] but its capacity is extremely limited and it needs to be

significantly enhanced. However, in the COMESA region no such body exists. There are only a few consumer organizations with sufficient strength. It would be useful to build their capacity and provide resources to them for the purpose of promoting an effective competition policy in the region. CI and CUTS are both active in the COMESA region, while CI is also active in the UEMOA region. Hence, they can play a useful role in promoting a network of consumer organizations as well as building up their capacity.

CI and CUTS are also active in the Asian region, particularly in South-east Asia where a regional competition framework may emerge at the Association of South-East Asian Nations (ASEAN). Once again they can play a role in promoting effective regional competition policy. In South Asia, CUTS is quite active in all major countries, the networking is provided by SAWTEE, of which CUTS is one of the founding members. Thus, civil society is already quite geared up for a regional competition framework and waiting for the right time as the process of regionalization itself is very slow here. In the context of SADC and the Southern African Customs Union (SACU), though the regional process has a mandate to evolve regional competition policy, the progress has not been encouraging. However, the Namibian Economic Policy Research Unit (NEPRU), along with its partners, has developed a proposal for regional competition policy.[35]

While CI works through its member consumer organizations, CUTS has been in the forefront of an emerging network, namely, the International Network of Civil Society Organizations on Competition (INCSOC). The added advantage of INCSOC is that it is a multi-stakeholder network interested in competition issues. Its members comprise research institutions, advocacy groups and parliamentarians in over 53 countries, who are encouraged to take up competition issues at national, regional and global levels.[36]

6. Conclusion

As deeper regional integration is taking place in many parts of the world, there is an urgent need for adopting and implementing an effective regional competition framework in all relevant regions. Without a competition framework, the expected gains from deeper trade and investment integration can be frustrated. Worse, with

greater regional integration, the chances of cross-border competition abuses increase substantially and the relatively weaker countries within the region, with smaller but yet efficient firms, might lose in the game due to absence of a level playing field.

Fortunately, this need is now well recognized and the leaders engaged in regional integration accept that a regional competition policy is a concomitant requirement of regional trade integration. However, the process towards promoting regional framework or cooperation on competition policy is quite slow. Weak consumer movement and low appreciation of the need for a competition policy at the regional level among civil society in general could possibly be one of the reasons for this. Obviously, the role played by civil society in this regard so far is far from satisfactory. Even where civil society has been targeted for outreach by the policy makers and the competition bodies, some feel the interaction has not been two-way.

The recent improvement in the EU has been possible due to both an increase in openness on the part of the EC to involve civil society as well as the increased capacity and appreciation by civil society of the importance of competition issues at regional level.

In the CARICOM region, though there has been significant openness on the part of the regional body as well as the national governments, the involvement of civil society has been sub-optimal.

In the COMESA region, involvement of civil society has been affected by both the limited encouragement given by the regional body to civil society as well as by the limited capacity of civil society. Often the regional bodies do not consult many CSOs because they do not have adequate capacity on competition issues; on the other hand, they also do not proactively take up competition issues either at regional or national level because of their capacity constraints, though they have significant capacity on economic and legal policy issues. However, such organizations can develop their capacity on competition issues as well with some external assistance and strategic mobilization.

Improvement in this regard can be achieved if the organizations and the networks engaged in competition policy issues intensify their effort. CI and CUTS can play a major role in this regard. One notable

dimension of the competition policy development in regional framework, especially in the developing world, is the involvement of UNCTAD. However, there is enough scope for further and deeper involvement of UNCTAD, especially at regional level. Moreover, as a part of its mandate, UNCTAD is engaged with CSOs and has significant interaction with them as well. Hence, its deeper involvement in the regional process is likely to boost civil society involvement in it as well.

When the EU started its journey with the regional competition policy, there was still little understanding of the role that civil society can play. However, over time, it became clear that the involvement of civil society is essential.

This role is now well recognized and readily accepted in the inter-governmental regional processes. However, a weak consumer movement, lack of networking and lack of awareness of the importance of competition policy among the CSOs and their networks have been hindering their crucial engagement in furthering the competition agenda.

CSOs have also to maintain their preferential relationship with the people. They can bring people-concerns in the adoption as well as implementation of competition policy and law both at national and regional levels. Consumer organizations have a natural interest in competition policy but their capacity is not always sufficient. Appropriate knowledge and experience sharing through networking would help. In general, CSOs need to strengthen mutual cooperation as a way to develop their own capacity as well as making their case stronger with the policy community both at national and regional levels. The need for developing the capacity of CSOs cannot be overemphasized. Such an approach would go a long way towards realizing the Millennium Development Goals through making markets work for the poor.

NOTES

[1]Competition policy, as mentioned in this chapter, will refer to all measures through which governments seek to promote the efficient and competitive operation of markets; whereas competition law refers to legislation that prohibits and deals with specific anti-competitive practices of firms such as cartels, abuses of a dominant position or monopolization and mergers that create a dominant position or otherwise stifle competition. Competition law, therefore, constitutes a subdivision of competition policy.

[2]For more details, see, for example, Mehta *et al.*, (2005).

[3]One unique type of cooperation on competition issues exists among the Commonwealth of Independent States (former Soviet Union) countries. The thrust of their competition laws is targeted mainly at state monopolies. Thus, they got together to develop a common approach and adopted as guidelines an Intergovernmental Treaty on the Implementation of a Coordinated Competition Policy, signed on 24 December 1993 in Ashkabad, Turkmenistan.

[4]UNCTAD (2004b).

[5]The EU, indeed, is the only regional group that has reached the highest level of economic integration – an *economic union*; which includes a common market plus the adoption of a common currency and/or the harmonization of monetary, fiscal and social policies.

[6]UNCTAD (2004b), *op. cit.*

[7]See the International Council for Social Welfare website at http://www.icsw.org/ for more details.

[8]UN Commission on Global Governance (1995).

[9]See Nicanor Perlas, *Civil Society and the Collapse of the WTO Agenda in Seattle*, at http://www.cadi.ph/Features/Feature_Article_1.htm#_ftn7.

[10]www.sawtee.org

[11]See Mehta (2003).

[12]http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index_en.html

[13]Can EU hear me? How to get the EU's message out (www.gallup-europe.be/canEUhearme/Can_EU_Hear_Me-FINAL-Report.pdf).

[14]http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index_en.html

[15]BEUC, the European Consumers

' Organization, is the representative organization of 37 independent national consumer organizations from countries of the EU, EEA, and elsewhere in Europe. BEUC has a long-standing interest in the area of competition policy.

[16]Press Release: Consumers Association and BEUC gears up to unblock the European car market (PR o15/2001) (http://www.beuc.org/Content/Default.asp?PageID=330).

[17]Commission Regulation (EC) No 1400/2002 of 31 July 2002, Official Journal of the European Communities, 1 August 2002 (http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_203/l_20320020801en00300041.pdf)

[18]BEUC position on the Review of the Merger Regulation (BEUC/X/016/2002) (http://www.beuc.org/Content/Default.asp?PageID=330).

[19]For a description of CARICOM regional experience and of the Treaty of Chaguaramas, please refer to Chapter 10 of this book authored by Taimoon Stewart.

[20]The Conference was held at St Philip, Barbados on 20-21 November 2000 under the Chairmanship of the Rt Hon. Owen Arthur, Prime Minister of Barbados and Head of Government with lead responsibility for the implementation of the CSME.

[21]Report of the Second Special Consultation on the CARICOM Single Market and Economy (CSME), St. Philip, Barbados, 20-21 November 2000 (www.caricom.org/archives/2spcsmereport.htm - 125k).

[22]*Ibid.*

[24]The CRG represent Caribbean NGOs and Labour unions, and is engaged in advocacy on trade policy issues.

[25]www.cpdcngo.org/PDF%20Files/CRG%20Position%20Paper.PDF

[26]For an analysis of the COMESA Treaty, please refer to Chapter 11 co-authored by G. Lipimile and E. Gachuiri.

[27]The Conference was organized by COMESA and International Law Institute.

[28]Report on the COMESA Regional Conference on Competition Law and Policy, 26-30 November, 2001, Kampala, Uganda.

[29]These have included the COMESA/UNCTAD workshop on competition of June 1999; the COMESA/SADC/UNCTAD seminar on competition of July 2000; UNCTAD's Intergovernmental Experts Group (IGE) Meetings on Competition; the July 2000 Competition Roundtable organized by the Department for International Development of the UK; the July 2000 Commonwealth workshop on competition; the October 2001 Global Competition Forum of the OECD Committee on Competition Law and Policy; and various meetings of the WTO Working Group on the Interaction between Trade and Competition Policy.

[30]*Ibid*.

[31]CUTS-ARC (2003).

[32]Institute of Economic Affairs (IEA) of Kenya, Namibian Economic Policy Research Unit (NEPRU) of Namibia, Botswana Institute of Development Policy Analysis (BIDPA) of Botswana, Institute for Global Dialogue (IGD) and Trade Law Centre for Southern Africa (TRALAC) of South Africa and Trades and Development Studies Centre (TRADES CENTRE) of Zimbabwe to name a few.

[33]CI worked on competition issues with some CSOs under its Consumers in the Global Market project while CUTS worked with local CSOs in four countries under its 7Up1 and is currently working in seven countries under the ongoing 7Up3 project in the Southern And Eastern Africa, many of which are members of COMESA.

[34]Experiences and Opportunities for Capacity Sharing through Regional Cooperation and Integration: The Case of the Caribbean Community (CARICOM) (wbln0018.worldbank.org/html/smallstates.nsf/attachmentweb/casecarribean/$FILE/casecarribean.pdf)

[35]Rehabeam Shilimela of NEPRU, Windhoek, Namibia in a personal communication to the authors.

[36]For further details, please see www.incsoc.net

PART TWO

SPECIFIC EXPERIENCES IN REGIONAL COOPERATION AND COMPETITION LAW AND POLICY

9

Modernization of the European system of competition law enforcement: Lessons for other regional groupings

FRÉDÉRIC JENNY
PIERRE M. HORNA

1. Introduction

Over the past decade, the international community has wrestled with the question of how to advance the cause of international cooperation in competition law enforcement around the world so as to avoid cross-border anti-competitive practices being immune from investigation and prosecution. In this regard, even at the heart of the European Union (EU), problems have been encountered with the enforcement of the competition provisions of the EU treaty since the EU Commission decided to focus its resources on the most important cases having implications in several European countries. To facilitate enforcement of EU law by national authorities and courts and to alleviate the burden of the Commission, a unique system based on concurrent jurisdiction of national authorities to enforce European law was established. To facilitate this, procedures

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for the allocation of cases between national authorities, as well as cooperation mechanisms and mechanisms organizing the exchange of information between national authorities were also established. Finally, the relationship between the EU Commission and national authorities was meant to ensure the consistent enforcement of EU law.

Having described the current reforms within EU competition law regarding enforcement of community norms and taking into consideration that the EU treaty is itself a regional trade agreement (RTA), this chapter seeks to verify whether there are specific lessons to be learned from the EU experience in this area and whether it is feasible to apply some features of the EU system to other regional agreements. In this regard, four regional agreements will be examined: the Andean Community (AC), Mercado Común del Sur (MERCOSUR), the Caribbean Community and Common Market (CARICOM) and Union Économique et Monétaire Ouest Africaine (UEMOA).

Given its goals, this chapter is organized as follows. Section 2 deals with the European competition system before the modernization scheme was carried out in May 2004. Section 3 presents several elements of the new European Competition Network and provides available findings about its implementation during its first year of activity (May 2004 – May 2005). Section 4 attempts to assess to what extent some specific elements of this EU system of information could be implemented in four selected regional venues: two in South America (AC & MERCOSUR) one in the Caribbean (CARICOM) and one in Africa (UEMOA). Finally, remarks and conclusions on lessons to be learned are offered in Section 5.

2. The European system of competition law enforcement

The European Community (EC) was founded on the idea that although trade liberalization and market integration are necessary conditions to promote the economic growth and the development of the signatories of the Rome Treaty, these policies had to be complemented by competition law provisions.

The Community competition rules, established in its founding Treaty of 1957, have three goals:

- First, they are designed to prevent economic operators from replacing dismantled public barriers by erecting new barriers to trade; thus the prohibition of exclusionary abuses of dominance through which dominant firms try to prevent the emergence of competitors (or to make life particularly difficult for them) or the strict enforcement of the provision prohibiting inter-firm agreements on vertical distribution contracts through which manufacturers of branded consumer goods establish exclusive distribution networks in each European country, while preventing their distributors from exporting the product outside the area where they had territorial exclusivity, thereby preventing the integration of the unique market, are also prohibited.

- Second they are designed to ensure that operators on the enlarged European market do not abuse their individual or collective market power and that, through competition, the benefits derived from the accrued intensity of competition flows to consumers.

- Third, they are designed to ensure that Member States' governments do not pervert the European market mechanism by providing certain national firms with subsidies that give them an unfair advantage over their competitors. Thus, contrary to what happens in many other jurisdictions, EU Member States are themselves the subject of competition law. The EU Commission has exclusive jurisdiction over state-aid cases and national competition authorities or courts do not enforce this part of European law.

It is important to focus on the EU provisions against anti-competitive practices by firms. Indeed, it is in this area that the experience of the EU with respect to cooperation among national authorities and the 'federal' level is the most interesting because of the complex and evolving relationship between the European Commission and the competition authorities of the Member States.

This section gives a brief description of the main elements of the EU system as it was originally developed, before turning to the 'modernization process' in the next section.

Competition law provisions were deemed necessary at the level of the European Community because it was considered that the governance of the European market could not be obtained simply through the enforcement of national competition laws of Member States for at least three reasons:

- Most countries did not have a national competition law at the time the European Community was founded;

- Even if a country had a competition law its competition authority or its courts would be powerless to prevent or sanction transnational anti-competitive practices originating outside that country but which distorted competition on its domestic market;

- There was concern that national competition authorities, if they existed, would be influenced by the widespread appeal of industrial policy measures and, as a result, would be tempted to exempt some anti-competitive practices by claiming that they had some countervailing benefits for society.

Thus, Article 81 of the Treaty sets out the rules applicable to restrictive agreements, decisions and concerted practices. It prohibits, as being incompatible with the common market, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. According to Paragraph 3 of Article 81, the prohibitions in Article 81(1) can be declared inapplicable if they do not completely eliminate competition for a substantial part of the products concerned, if they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and if they do not include restrictions that are not indispensable for the attainment of these objectives where certain conditions of fairness and efficiency are met. The Treaty, however, is silent as to who should 'declare' inapplicability.

Article 82 (previous Article 86), which prohibits abuses by one or more undertakings of a dominant position within the common market or in a substantial part of it in so far as it may affect trade between Member States, does not allow for exemptions.

In 1962, the Council set out the rules of procedure for the application of Articles 81 and 82 of the Treaty by adopting Regulation 17. Five major aspects of the European system of enforcement of EU competition law are worth mentioning here.

First, the regulation was based on direct applicability of the prohibition rule of Article 81(1) and prior notification of restrictive agreements and practices for exemption under Article 81(3). As a result the Commission, national courts and national competition authorities could all participate in the enforcement of EU competition law.

Second, however, the national legislation of several Member States did not provide national competition authorities with the procedural means of applying Articles 85(1) and 86[1]. Where authorities were not in a position to apply community law to cases which fell within the scope of the European provisions and could only apply their national law, the application of that law could 'not prejudice the uniform application throughout the common market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules'. At the very least, a case falling within the scope of Community law had to be compatible with that law, Member States being forbidden, given the primacy of Community law over national competition law and the obligation to cooperate in good faith laid down in Article 5 of the Treaty, to take measures capable of defeating the practical effectiveness of Articles 85 and 86.

Third, the Council established a system of antitrust enforcement that gave the Commission the monopoly of exemption under Article 81(3) EC. Thus, although national courts were competent under Community law to enforce Article 81(1) and (2) and had an obligation to do so under the duty of solidarity in Article 10 EC(22), they had no power to exempt agreements. If national courts or national competition authorities felt that Article 81(3) EC should have been considered, they had to adjourn the case and apply to the Commission for information and guidance.

Fourth, reinforcing the centralization of the enforcement of EU competition law, Article 9(3) of the regulation allowed the Commission to remove a case from the jurisdiction of national competition authorities by launching its own proceedings, in effect pre-empting national jurisdiction.

Fifth, the Council established a system of voluntary prior notification to the Commission of agreements that could conceivably fall under the prohibition of Article 81(1). The incentive for notification was the possibility to obtain an exemption on the basis of Article 81(3) and the ability for the parties to avoid sanctions if their notified agreement was found to violate Article 81(1). Two ideas underlie this notification procedure. First, the desire to raise the level of legal certainty of operators who did not know whether their vertical distribution agreements violated EU law, given that competition law enforcement was a novelty in Europe. Second, the desire to provide the Commission with as extensive information as possible on potentially restrictive agreements.

Over the years, competition law enforcement has become one of the most important European policies. Some of the most important aspects of the early system of competition enforcement are the following.

The existence of competition law provisions in the EU Treaty undoubtedly contributed to raising the awareness of the Member States that did not have a competition law and encouraged them to adopt a competition law consistent with EU law or to adapt their domestic competition law to align it more closely with that of the EU.[2] This process was helped by the principle of supremacy of European law over national law and over national constitutions, which was affirmed by the European Court of Justice in 1964[3] and in 1970,[4] by the principle of direct effect and by the fact that, in the European Community, EC law depends on national procedural laws. Under these circumstances, the existence of a supranational competition law at regional level has contributed to the dissemination of a competition culture in Member States and to soft harmonization of national laws between Member States. As the importance of European competition law enforcement has become increasingly great, national competition regimes have also become more active.

However, it should also be noted that development of competition law at the level of the Member States has also occurred in the area of merger control. This is interesting because unlike the case of anti-competitive practices for which there is concurrent jurisdiction of national authorities and the Commission, the Commission has exclusive jurisdiction over the control of mergers having a community dimension. Thus, Member States do not directly enforce EU merger control law and are under no obligation to control mergers that fall below the thresholds for European control.[5] Nevertheless, all Member States have adopted merger control. One of the reasons for the widespread adoption of merger control at national level in EU Member States may be the fact that Article 9 of the merger regulation provides that a Member State may inform the Commission that a notified concentration threatens to significantly affect competition in a market within that Member State, which presents all the characteristics of a distinct market, and that in such a case the Commission may decide to refer, in whole or in part, the case of the merger to the competent authority of the Member State. This provision provides a major incentive to Member States to adopt a merger control law and to establish a credible domestic authority to review mergers.

In the original European competition law framework, enforcement of Articles 81 and 82 of the EU Treaty by the authorities of the Member States remained fairly rare. One explanation for the lack of engagement of national authorities and courts is that the monopoly of the Commission on the granting of exemptions acted as a deterrent for national competition authorities or courts to adjudicate cases on the basis of EU law since they could not apply it fully. It also discouraged parties from bringing their case to a national enforcer. An added consideration was the fact that national authorities examining the compatibility of agreements with European law knew that they were at risk of having a stay put on their proceedings if the Commission decided to open an investigation on the same agreement.[6]

At first, the fact that national authorities and courts did not participate very actively in the enforcement of EU law was not considered problematic as it allowed the European Commission to develop the case law (under the control of the European Court of Justice) in a more systematic and consistent manner than would have

been the case had the inexperienced national authorities been more actively involved. However, over time, as the interpretation of European competition law became clearer and more widely known, this benefit became less important.

Because there was little enforcement of EU law by national competition authorities, there were relatively few problems of allocation of cases among competent national competition authorities. The few cases that did arise concerned situations in which the same practice had been referred to the Commission and to a national competition authority. In those cases, there was informal consultation between the European Commission and the national competition authority and if the Commission was confident that the national authority was likely to decide the case in a manner consistent with the thinking of the Commission, it was happy to let the national competition authority go ahead with the case.

Some limited cooperation took place between individual national competition agencies and the European Commission. For example, the German and the Italian competition authorities regularly consulted the Commission when dealing with Article 81 or 82 infringements. However, cooperation between the Commission and national authorities on the enforcement of Articles 81 and 82 of the EU Treaty was limited by the ruling given by the European Court of Justice in the 'Spanish Bank' case.[7] National competition authorities were not entitled to use as evidence, for the purpose of applying either national rules or the EU competition rules, unpublished information contained in replies to requests for information sent to firms by the Commission or obtained through an investigation carried out by the Commission.

There was also very little formal cooperation among national competition agencies and there were very few formal cooperation agreements between Member State competition authorities. France and Germany had a cooperation agreement and, together with the United Kingdom, they entered into an agreement on simplified merger notifications. But neither of these agreements gave rise to significant real cooperation or exchange of information between competition authorities. An exception is the Nordic agreement, which gave the competition authorities in Norway, Denmark, Iceland and Sweden the possibility to cooperate and exchange confidential

information regarding enforcement of national competition rules in these four countries. The four competition authorities met annually. Whether any informal cooperation was taking place between national competition authorities is difficult to assess, among other reasons because there is a question as to what constitutes informal cooperation. Certainly national competition authorities met in various fora, such as the EU consultative committees, the annual meeting of the director generals of competition of the EU, the OECD competition committee and at numerous international conferences on competition issues; but it appears that when it came to cooperating on case specific issues, there was little action.

Given the fact that national laws were relatively similar because they were at least consistent with EU law, and that cases were often similar from one country to another, it is surprising to observe that there was so little cooperation on enforcement among European national competition authorities. This suggests that even in countries that are important trading partners and that are geographically close to one another and have similar levels of economic development, cooperation between national competition authorities on enforcement issues - even informal cooperation - does not necessarily occur spontaneously. However, as shall be seen further on, when there is an organized framework for the cooperation between competition authorities, then both formal and informal cooperation seem to develop more easily.

The possibility offered to parties to notify agreements in order to benefit from an exemption did have a few benefits. First, it allowed the Commission to promote the unification of the European market. The vast majority of notifications concerned distribution agreements and the Commission was in a position to refuse to exempt vertical agreements which unduly restricted trade between Member States, for example when they offered absolute territorial protection to their distributors. Second, it allowed the Commission to elaborate relatively precise rules, embodied, for example, in block exemptions, which offered legal certainty, or at least reduced legal uncertainty, to business firms.

But the voluntary notification procedure also had disadvantages that, over time, became serious obstacles to the efficient enforcement of EU law. The major disadvantage of the system was the fact that

the Commission found itself flooded with tens of thousands of notifications of vertical agreements that it was unable to process individually. In order to deal with this problem, the Commission resorted to the granting of block exemptions for certain types of vertical agreements. It also led to the widespread practice of issuing 'comfort letters' stating, variously, that the Commission believes the agreement to be in accordance with Article 81(1) EC, that it merits exemption, or simply that the Commission is closing its file. Such letters led to the closing of 90 per cent of Regulation 17 notifications informally. However, they are neither a decision granting negative clearance nor an exemption applying Article 81(3) EC.

The irony of this method of treating the problem was that to grant block exemptions to vertical agreements of a certain kind, the Commission had to first declare the concerned agreements anti-competitive. Indeed an exemption could only be granted to an anti-competitive agreement. In this process, many agreements that were not in fact anti-competitive were declared to be violations of Article 81 and the conditions under which they were granted the exemption had little to do with the conditions laid out in Article 81(3).

Because it spent so much time dealing with notified agreements, which in most cases did not raise significant competition issues, the Commission had very few resources available to deal with horizontal concerted practices which were far more likely to be seriously anti-competitive and which were, in most cases, not notified since their authors (or their lawyers) knew that an exemption for such practices was extremely unlikely.

Thus the effectiveness of centralized EU competition law enforcement, which undoubtedly had contributed in the early years to the rapid development of a consistent case law, to providing firms with a substantial level of legal security, and to a soft harmonization of national laws came to be questioned on at least two grounds: first, the notification procedure had backfired and contributed to creating a gap between sound economic analysis and the practice of the Commission, which was wasting much of its precious time and resources barking up the wrong tree; second, the system did not give much incentive to national competition authorities and courts to share in the burden of enforcement weighing on the overworked Commission.

3. The modernization process in the EU

In 1999, the Commission launched its White Paper on the modernization of the enforcement of EC competition rules. Its objective was to launch a discussion with the European academic, legal and business communities and with the other institutions of the European Union on how to improve the effectiveness of the enforcement of EC competition rules in the context of the enlargement of the EU.

The means considered by the Commission were the abolition of the notification system, an elimination of the monopoly of the Commission on the interpretation of Article 81(3), an effort to increase the level of enforcement of EU law by Member State competition authorities and courts, and the development of a cooperation framework between European national competition authorities and the Commission itself.

After a lively debate, the Council adopted Regulation 1/2003, which establishes a new European competition enforcement regime, based on the joint enforcement of the EC competition rules by the Commission and national authorities and which came into effect on 1 May 2004.

The abolition of the notification system should allow the Commission to re-focus its enforcement work on hard-core cartels and abuse of dominance. Article 81 becomes directly applicable in its entirety, including Article 81(3). It is hoped that the direct applicability of Article 81(3) will facilitate the application of EC competition rules by Member State courts and competition authorities. Proceedings by national competition authorities and national courts on Article 81 cases can no longer be blocked or delayed by notifications to the Commission. Henceforth, when a case falls inside the scope of application of Articles 81 and 82, Member State courts and competition authorities will not be able to leave aside EC competition rules and base their decisions solely on national law. Under Article 3 of Council Regulation 1/2003, they have an obligation to apply EC competition rules, at least alongside national law. Finally, Council Regulation 1/2003 provides for mechanisms of coordination and cooperation between the Commission and national authorities to achieve a coherent enforcement of Articles 81 and 82 EC.

With the adoption of Council Regulation 1/2003, the Commission published the Modernization Package, which is a set of six notices on various aspects of the new system of enforcement of EU competition law.[8]

Through the decentralization of EC competition law enforcement, the Commission sought to entrust decision making to national courts and authorities, while maintaining its overall control over EC competition law and policy. To achieve this aim, the Modernization Package seeks to solve the problem of allocating cases among European competition authorities, to facilitate the exchange of information between competition authorities, and to define the links between national authorities and courts and the Commission itself.

Together, the national competition authorities and the Commission form a network of public authorities, which is a forum for discussion and cooperation for the application and enforcement of EC competition policy. The network called the 'European Competition Network' (ECN) provides a framework for the cooperation of European competition authorities.

Five main elements of the Council regulation regarding the relationship between the European Commission and the national authorities and national courts are worth describing:

1) Allocation of cases

According to Article 11(3) of Council Regulation 1/2003, the competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before, or without delay, after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States via the competition network. This allows the network to detect multiple proceedings and address possible case re-allocation issues as soon as an authority starts investigating a case.

Where case re-allocation issues arise, they should be resolved swiftly, normally within a period of two months. In most instances, the authority that receives a complaint or begins an ex-officio proceeding will remain in charge of the case. Where re-allocation is

found to be necessary, network members will endeavour to re-allocate cases to a single well-placed competition authority. An authority can be considered to be well placed to deal with a case when three cumulative conditions are met: 1) the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory and is implemented within or originates from its territory; 2) the authority is able to effectively bring to an end the entire infringement; 3) it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement. If parallel action by two or three national competition authorities (NCAs) is appropriate because an agreement or practice has substantial effects on competition, mainly in their respective territories and the action of only one national competition authority would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately, the authorities dealing with a case in parallel action will endeavour to coordinate their action to the extent possible. They will seek to designate one of them as a lead authority and to delegate tasks to the lead authority such as, for example, the coordination of investigative measures and the information of the parties involved.

The Commission will deal with agreement(s) or practice(s) 1) that have effects on competition in more than three Member States, 2) with cases closely linked to other Community provisions that may be exclusively or are more effectively applied by the Commission, and 3) with cases raising new competition issues. It will also deal with cases whenever it is necessary to ensure effective enforcement**.**

2) Exchange of information among national competition authorities

Article 12 of Council Regulation 1/2003 provides that 'for the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to

a different outcome, information exchanged under this Article may also be used for the application of national competition law (…)'. This article of the Council Regulation takes precedence over any contrary law of a Member State.

3) Assistance on investigations by competition authorities of Member States

According to Article 22 of Council Regulation 1/2003: 'The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the Competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. (…) At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). (…)'.

4) Control of the Commission over enforcement of EU law by national competition authorities

Article 16 of Council Regulation 1/2003 provides that: ' When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission'.

Article 11 of the same regulation provides that: 'No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the Competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the Competition authorities of the other Member States (…)'.

Furthermore, Article 11-6 allows the Commission to supersede national competition authorities by providing that 'The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority'. This article could be applied if one of the following situations arises: 1) Network members envisage conflicting decisions in the same case; 2) Network members envisage a decision that is obviously in conflict with established case law; 3) Network member(s) is (are) unduly drawing out proceedings in the case; 4) There is a need to adopt a Commission decision to develop Community competition policy, in particular when a similar competition issue arises in several Member States or to ensure effective enforcement; 5)The NCA(s) concerned do not object**.**

5) Relationship between the Commission and national courts

Article 11 of Council Regulation 1/2003 provides that when applying EC competition rules, national courts are bound by the case law of the Community courts as well as by Commission regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices. Furthermore, the application of Articles 81 and 82 EC by the Commission in a specific case binds the national courts when they apply EC competition rules in the same case in parallel with or subsequent to the Commission.

Furthermore, national courts must also avoid giving decisions that would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings.

If a national court wants to take a decision that runs counter to that of the Commission, it must refer the question to the Court of Justice for a preliminary ruling (Article 234 EC). The latter will then decide on the compatibility of the Commission's decision with Community law.

Article 15(3) of Council Regulation 1/2003 allows national competition authorities and the Commission, acting on their own initiative, to submit written observations to national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State

3.1 Provisional assessment of the system of decentralized enforcement of EU competition law

This new system of decentralized enforcement of the EU law has been in effect for just over a year at the time of writing and it is therefore quite early to draw definitive conclusions as to whether it has increased the effectiveness of the enforcement of EU law. However, several preliminary conclusions can be offered, based on interviews with and speeches by competition officials in Europe.

First, it is clear that the Modernization Package, and, in particular, the abandoning of the notification system, has allowed a general refocusing of European law enforcement on the most egregious anti-competitive practices. As Philip Lowe, the EU Director General of Competition stated in March 2005:[9] 'There is a clear focus on the most serious infringements: almost half of the ECN enforcement decisions concerned cartels and one third concerned abuses of a dominant position on the European market, in particular by national incumbent operators in the newly liberalised sectors'.

Second, the compulsory reporting of cases of practices that could violate EU law to the network has permitted each national authority to gain access to information as to the kind of EU cases with which other national competition agencies were dealing. This has contributed to encourage each national authority to more carefully assess whether the cases it dealt with under its national laws could also be violations of EU law. As a result, national competition authorities have reported several hundred cases to the ECN during its first year of operations; many of these were cases of alleged horizontal anti-competitive practices or of abuses of dominance, a striking fact given the very limited number of non-vertical EU cases dealt with each year prior to the reform.

Third, the process of allocating cases among competition authorities seems to have worked smoothly. In the vast majority of cases, the first competition authority to which a case was referred was also the best placed. In a few instances, discussions between the EU Commission and a national authority revealed that the Commission was the best placed to deal with the cases considered. For example, following discussions between the European Commission and the French Conseil de la concurrence, which had received a referral concerning Wanadoo, whereby a telecommunication operator alleged that Wanadoo had violated Article 82 by practising predatory pricing for internet access through ADSL, it was decided that the European Commission, which had previously dealt with a similar case concerning Wanadoo, was the best placed competition authority to deal with the case. In a speech in March 2005,[10] Ms Kroes, the EU Commissioner, made this comment: 'Identifying which authority is well placed to handle a case is only one part of the picture. Proactive work sharing also offers new opportunities in terms of efficiency and effectiveness. The action of the Commission and that of a Member State competition authority can often complement each other. One concrete example is the handling of the simultaneous complaints against Deutsche Post received by both the Commission and the German Bundeskartellamt. Deutsche Post's actions were based on a provision of the German postal legislation, which was already the subject of a Commission procedure under Article 86 EC. In this case, it was agreed that the most effective and efficient way forward would be for the Commission to continue its Article 86 procedure and for the Bundeskartellamt to continue the antitrust complaint. The combined efforts enabled both the Commission and the Bundeskartellamt to take their respective decisions within a very short timeframe'.

Fourth, the creation of the network has led to heretofore unknown, sometimes informal, levels of exchange of information among national competition authorities and the European Commission, leading to a higher level of enforcement of EU law. Ms Kroes gave a vivid illustration in the above-mentioned speech: 'Recently several Member States' competition authorities received complaints from customers suggesting that a cartel was operating in the flat glass sector. The authorities sat down and put the individual pieces of the jigsaw puzzle together. On seeing the full picture emerge, they concluded that the scope of the case might call for Commission

action. As a result, the Commission carried out inspections last month'. In a survey on the effect of the Modernization Package published in 2005,[11] it was reported that there have been several cases where the French authorities have launched investigations on the basis of information received from the Commission. Similarly, in Germany it was reported that as a result of the traditionally high level of communication with the Commission, and now with other national authorities, there have been several cases in which proceedings were initiated by the Federal Competition Office on the basis of information received from other authorities. The Portuguese Competition authority also confirmed to the authors of the survey that it had already started investigation proceedings as a result of information transmitted by another national competition authority.

Fifth, a number of competition authorities have been able to request the cooperation of other national authorities either to investigate on their behalf or to undertake a joint investigation. In the above-mentioned survey, it was, for example, reported that in a recent case the Danish Competition Authority carried out a dawn raid following a request from the Swedish Competition Authority regarding an alleged anti-competitive agreement between a Danish company and a Swedish company. It was also reported that, in Germany, inspections (dawn raids) are now frequently carried out in close cooperation with simultaneous inspections being conducted by other national authorities. It was also reported that the Italian Antitrust Authority has recently opened an Article 81 investigation into alleged restrictive practices adopted by certain baby milk suppliers active in Italy, in the course of which it has successfully coordinated dawn raids in France, Germany and Spain. The Swedish Competition Authority has, in cooperation with the Danish Competition Authority, carried out cross-border, on-the-spot investigations at the premises of undertakings active within the natural gas market in Sweden and Denmark in an investigation regarding possible market sharing and abuse of dominant position. In a recent speech, the Chairman of the French Conseil de la concurrence has alluded to the fact that it had requested that British authorities conduct an investigation in the United Kingdom to complement the elements in possession of the Conseil and to allow it to establish the proof of a violation of EU law.

Sixth, besides formal or informal cooperation on specific cases, national competition authorities are now getting together in both formal working groups and informal meetings where they discuss antitrust law and economics, as well as problems encountered in specific sectors. In the first half of 2005, there were 14 sectoral working groups dealing with energy, railway transportation, automobile, and so on,…and four horizontal working groups.

Overall, it seems that the reform has indeed been quite successful and that it has raised both the awareness and the level of enforcement of EU competition law.

It is particularly worth noting that the establishment of a formal network of competition authorities and the organization of a systematic exchange of information on transnational cases among national competition authorities has acted as a catalyst to promote the development of deeper formal cooperation among them. The development of formal cooperation between national competition authorities has also led to the development of informal cooperation and exchange of views on general topics, sectoral study groups, and so on. This phenomenon of generalized cooperation is all the more interesting because cooperation and exchange of information between national competition authorities before the adoption of Council Regulation 1/2003 were very limited. The increase in formal and informal cooperation between national competition agencies seems to have increased, to a considerable degree, the enforcement of EU law at national level. According to Philip Lowe, this, in turn, has also changed the way the Commission enforces EC competition rules, by transforming it from a mode of reactive enforcement to a pro-active one. Sectoral inquiries into energy and financial services, which the European Commission has undertaken since the adoption of the Council Regulation, may provide the clearest example of this.

Four general lessons can be learned from the European experience described above:

1) Regional trade agreements are powerful, natural instruments for promoting competition law enforcement because the benefits of trade liberalization are realized only to the extent that firms do not engage in anti-competitive measures which will restrain

trade between the countries that are parties to the regional agreement, thereby defeating its purpose.

2) The existence of a supranational competition law in a regional grouping, which is not exclusive of the fact that Members States can have their own national law to resolve competition issues that do not involve transnational anti-competitive practices having an effect on trade, can be a useful tool, both to promote a level playing field and to promote the soft harmonization of national laws over time.

3) When there is a body in charge of enforcing the supranational law, the relationship this body and the national competition authorities of the members of the regional grouping share is bound to evolve over time. Strong input and control by the 'federal' body at the beginning of the process (for example via a notification process) is useful to the extent that members of the grouping may not initially have the required resources or understanding of competition law enforcement. However, there is a need to involve the national competition authorities of the members of the regional grouping more closely over time and to shift from an *a priori* to an *ex post* system of enforcement as the case law develops, in order to limit the cost of enforcement and make it more effective.

4) Cooperation between competition authorities on transnational issues does not come spontaneously but requires a framework, including procedures to share information on cases of mutual interest, on the kind of information that national competition authorities need and a mechanism of case allocation. The development of such a framework does not require the existence of a supranational competition law. Once this framework exists both formal and informal cooperation between competition authorities can develop.

4. Examining four regional competition agreements in the light of EU experience

This section evaluates the experience of four regional groupings in dealing with cross-border anti-competitive practices. This assessment has been organized around the main elements of the EU Modernization scheme presented in Section 3: (i) the decentralization of enforcement; (ii) the avoidance of multi-jurisdictional conflicts and excessive costs; (iii) more effective regional law enforcement; and (iv) fostering cooperation amongst regional and national authorities.

Prior to presenting this assessment, it appears useful to indicate context in which the four regional groupings have developed their competition policy enforcement regimes.

4.1. Brief description of the four selected regional groupings

The Andean Community (AC)[12]

In the Andean Group Free Trade Community, regional tariff and non-tariff barriers were progressively reduced. Policy harmonization on rules of origin, transportation, export subsidies, anti-dumping and countervailing duties, intellectual property rights, and standards and investment, among others, supplemented the trade liberalization efforts of each country.

The Cartagena Agreement of 1969 does not contain any competition rules similar to Articles 81 and 82 of the Treaty of Rome. It does, however, include a mandate to adopt regulations for dealing with restrictive business practices. Decision 285, enacted in 1991 by the Commission of the Cartagena Agreement, established common rules 'to prevent or correct distortions in competition resulting from practices aimed at restricting free competition'. Its substantive provisions and enforcement mechanisms are modelled after European Union competition rules. The system is therefore based on supranational rules enforced by community bodies.

Decision 285 prohibits restrictive practices resulting either from collusive agreements (such as price fixing, restraints on output, distribution, technical development and investment, market allocation, discrimination, and tying arrangements) or from abuses of dominant position (such as refusals to deal, withholding of input to competing firms and discrimination) as long as they affect competition in more than one country of the subregion. If the practice does not have extraterritorial implications, then national law applies.

The enforcement of Decision 285 was the responsibility of the Board of the Commission of the Cartagena Agreement (hereafter referred to as the Board), a supranational institution, which conducted investigations and proceedings at the request of countries or affected firms. The General Secretariat prepared and carried out the investigation jointly with the relevant national competition authority

If the Board determines that the practice is restrictive to competition, it may issue an order for it to be ceased. It may also authorize the affected country to impose corrective measures, that is, to lower tariffs on the products exported by means of restrictive practices.

A number of institutional limitations have contributed to the failure of Decision 285. A first limitation was that the Board could not initiate investigations on its own. Its actions had to be requested either by the countries or by firms having a legitimate interest. This left the Board with little power to oversee the Andean market.

A second limitation was that the Board had neither punitive nor coercive powers to force firms to implement its decisions. It simply issued a finding with an explanation setting forth its conclusions and a recommendation to cease the practice.

A third limitation was that political will to enforce competition policy was at best inconsistent (there was virtually no regard for competition in Bolivia and Ecuador and the interest for competition in Colombia, Peru, and Venezuela was inconsistent).

> According to Ana Julia Atar and Luis Tineo, at the end of the 1990s[13]

'Four important points can be concluded from the Andean countries' experience. First, competition policy still depends heavily on individuals rather than on institutions. The president plays a determining role in policy shaping, which cannot easily be set apart by the supposedly independent agencies. The heads of the agencies are to some extent subject to signals hinging upon the government's will. The green light has been fully given in Peru where INDECOPI still enjoys the government's confidence. The green light has selectively been given in Colombia and Venezuela, but a red light has been given where frequent shifts in government policies have forced the competition agencies to change priorities in their agendas.

Second, a lack of government conviction in competition policy has increased rent-seeking activities by the traditional business groups. Governments have given in to competition pressures. Accordingly, sectoral exemptions have been bestowed, new restrictions to trade and investment have begun to appear, sanitary and phytosanitary measures have halted imports, and threats of antidumping and countervailing duty actions have intensified, as have domestic industry lobbying for tariff protection. The economic turmoil of Colombia and Venezuela are clear examples of the protectionist answers that governments can provide against increases in competition coming from abroad.

Third, the laws have been applied very differently to similar situations. Although there are common grounds regarding collusive agreements, such agreements have been more effectively prosecuted in Peru and Venezuela than in Colombia, and they are freely employed in Bolivia and Ecuador. None of the countries has developed sound criteria toward vertical restraints. Finally, each country has tailored its own merger policy, which ranges from full freedom to merge in Peru, to an outdated system in Colombia where mergers are overlooked, to a forceful system in Venezuela where mergers matter. As a result, each country, with different priorities, has yielded different outcomes and therefore, provided firms with different signals.

Fourth, the Andean countries and existing agencies have missed the regional role that competition policy may play in the integration project. The Andean institutions have lost their leadership in this area to the extent that competition policy is left to each country. Extraterritorial problems originated by

> cartels and restraints at the distribution channels are increasing in the region(…). Despite the fact that the increase of competition in the region is largely due to the Andean trade liberalization framework, the absence of a regional competition policy not only has not promoted the expected regional integration of firms, but, for the most part, its inhibition.'

In spite of these weaknesses, a few cases have been dealt with, and in the first semester of 2005, one investigation was launched.[14]

On 29 March 2005, Decision 608 on 'Regulations for the Protection and Promotion of Competition in the AC'[15] was adopted. This Decision, amending Decision 285, meets some of the concerns raised by Ms Atar and L. Tineo. In addition, this Decision was partly conceived as a result of the Cooperation Agreement between the EU and the Andean Community, which had the following three main objectives: (i) to amend the former community competition law; (ii) to adopt national competition laws for Bolivia and Ecuador; and (iii) to adapt the domestic laws of Colombia, Peru and Venezuela to the new community competition law.[16].

One of the most important aspects of the Decision 608 - a major difference with the former Decision 285 - is that it empowers the AC General Secretariat to tackle cross-border anti-competitive practices more effectively by imposing sanctions.[17]. According to Article 18 of Decision 608, the General Secretariat can run its own investigations and gather all the evidence that it deems necessary. In addition, the national authority in charge of the investigation and the General Secretariat will coordinate during the investigation period.

Decision 608 creates an advisory Committee (the *Andean Committee for the Protection of Competition*), composed of representatives of national competition authorities and designed to facilitate better handling of competition cases and guarantee the flow of information between the regional body and national competition authorities.[18]

Article 37 of Decision 608 also provides for the development of exchanges of information and experience as well as technical training and the compilation of jurisprudence on competition law and policy.

CARICOM[19]

The Member States of The Caribbean Community (CARICOM) are Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname and Trinidad and Tobago.

Chapter VIII of the Treaty of *Chaguaramas* (hereafter referred to as the Revised Treaty)[20] provides for the development of a Community Competition Policy.

The basic objective of the CARICOM competition policy regime is to ensure that anti-competitive conduct does not prevent the benefits expected to accrue from the establishment of the CARICOM Single Market and Economy (CSME).

The Protocol prohibits agreements, decisions and concerted practices by firms that have as their object or effect the prevention, restriction or distortion of competition and abuses of a dominant position in the market.

The Protocol provides for various legal and economic exemptions.

Activities undertaken by employees for self-protection or collective bargaining by employees or employers do not fall within the scope of competition rules and the activities of professional associations whose standards are approved by the Competition Commission would not be subject to competition rules.

The competition rules do not apply to anti-competitive business conduct of a firm having minimal effect on trade in the CSME or to agreements, decisions and concerted practices by firms that have the effect of improving production or the distribution of goods and services or promoting technical or economic progress if the competition restrictions are indispensable to the firm's attainment of the aforementioned objectives and competition is not eliminated in a substantial part of the relevant market for the good or service.

The Council for Trade and Economic Development (COTED) has the power to exempt sectors or enterprises or groups of enterprises in the public interest and to develop special rules for special sectors.

The CARICOM Model Law is intended to guide the Members in developing their legislation.

Member States are required to enact rules of competition as outlined in Chapter VIII of the Treaty, and to establish national competition authorities to implement and enforce these rules. Member States are also required to take effective measures to ensure access by nationals of other Member State to enforcement authorities, including courts, on an equitable, transparent and non-discriminatory basis.

Jamaica and Barbados are the only countries that have competition regimes in place. Jamaica has had a competition law (the Fair Trading Act) and an authority (The Fair Trading Commission) since 1993. Currently that law is being amended to take into consideration, among other factors, the provisions of Chapter VIII of the Revised Treaty. Barbados enacted its law in January 2003, and has set up a Fair Trading Commission that brings under one umbrella the supervision of regulated industries, competition and consumer affairs. While St Vincent and the Grenadines (SVG) passed a competition law in 1998, no authority has been set up to enforce the law. The Organization of Eastern Caribbean States (OECS), a subregional grouping of smaller states within CARICOM, and Trinidad and Tobago both have draft laws and other Member States are in the process of drafting their laws.

The Protocol provides that all legislation, agreements and administrative practices inconsistent with the rules of competition must be notified to the COTED within 24 months. The Member States were required, within 36 months of the Protocol's coming into effect, to establish a programme providing for the termination of proscribed legislation, agreements and administrative practices.

The Protocol calls for the creation of a regional competition commission composed of seven members with skills in commerce, finance, economic law, competition policy and international trade and to be appointed by the Regional Judicial Legal Service Commission (RJLSC).

The CARICOM Competition Commission (CCC) is responsible for enforcing the rules of competition, coordinating the implementation of CARICOM Competition Policy, promoting competition in the CSME, and performing any other function designated by any competent body of the Community.

The CARICOM Competition Commission is severely hampered by restrictions that are due to the reluctance on the part of Member States to relinquish sovereignty. The lack of supranational legal authority for the CARICOM Competition Commission is a major shortcoming of the Revised Treaty. For example, in CARICOM, the initiation of an investigation is complex. Upon formal request of the Commission, the relevant national competition authority must first undertake a preliminary examination. If the results of this preliminary investigation suggest that further investigation of the matter is justified, then the CARICOM Competition Commission and the relevant national authority shall hold consultations to determine and agree on who should have jurisdiction to investigate. If there is a difference of opinion regarding who should conduct the investigation, the CARICOM Competition Commission is required to cease any further examination of the matter and refer it to the CARICOM Council for Trade and Economic Development (COTED) for decision. As Taimoon Stewart has argued, this '*arrangement is very worrisome, since it virtually "ties the hands" of the Community Commission, and vests power in COTED, a political body'*.

Finally, at national level, each Member State is responsible for the enforcement of its domestic competition law rules and for enacting legislation that:

- Ensures consistency and compliance with the rules of competition for CARICOM;
- Ensures that the determinations of the CARICOM Competition Commission are enforceable in its jurisdiction;
- Establishes a national competition authority and facilitates the development of administrative procedures to enforce the rules of competition; and
- Provides penalties for anti-competitive business conduct.

MERCOSUR[22]

Although the creation of the Common Market took place in 1991 with the signing of the Asunción Treaty by Argentina, Brazil, Paraguay and Uruguay, it was not until December 1996 that an ambitious set of guidelines towards a common competition policy in the region was adopted. One important goal of the protocol was to pave the way for abolishing anti-dumping measures among MERCOSUR countries. Indeed, anti-dumping measures have been widely used in the region and they impair trade. For example, between 1991 and 2001, Argentina had initiated 38 anti-dumping actions against Brazil, two against Paraguay and one against Uruguay, while Brazil has opened two investigations against Argentina and two against Uruguay.

According to Article 4 of the Protocol, 'individual or concerted acts, of whatever kind, the purpose or final effect of which is to restrict, limit, falsify or distort competition or access to the market or which constitute an abuse of a dominant position in the relevant goods or services market in the framework of the MERCOSUR, and which affect trade between the States Parties' constitute an infringement of the Protocol.

The Member States commit themselves to adopt, within two years, common rules for the control of acts and contracts, of any kind, which may limit or in any way cause prejudice to free trade, or result in the domination of the relevant regional market of goods and services, including those which result in economic concentration, with a view to preventing their possible anti-competitive effects in the framework of the MERCOSUR.

The protocol is to be enforced by the MERCOSUR Trade Commission (TC) and the Committee for the Defence of Competition (CDC). Both bodies are composed of representatives from each member country. However, in the case of the CDC, each country's representatives must come from its respective competition agency.

The TC performs adjudicative functions, whereas the CDC is responsible for the investigation and evaluation of cases, which are handled in three stages. Proceedings are initiated before the competition authority of each country at the request of an interested party. After a preliminary determination of whether the practice has MERCOSUR implications, the competition agency may submit the

case to the CDC for a second determination. Both evaluations must follow a rule of reason analysis in which a definition of the relevant market is made and evidence of the conduct and the economic effects must be provided. Then, the CDC must decide whether the practice violates the Protocol and recommend that sanctions and/or other measures be imposed. The CDC ruling is submitted to the TC for final adjudication by means of a directive.

As part of these procedures, the protocol establishes provisions for preventive measures and undertakings of cessation. This mechanism allows the defendant to cease the investigated practice under certain obligations agreed upon with the CDC.

The monitoring of these measures and the enforcement of the sanctions are the responsibility of the national competition authorities.

Article 32 of the Fortaleza Protocol mandated: 'The States Parties undertake, within a two year period following entry into force of the present Protocol, and for purpose of their incorporation in this instrument, to draft joint standards and mechanisms which shall govern State aid which is susceptible to limit, restrict, falsify or distort competition and to affect trade between the State Parties.'

Like any other international treaty in compliance with Public International Law rules, the Protocol must be ratified by all national parliaments of the Member countries to enter into effect. However, the ratification process was not completed and currently the Protocol is being reviewed in order to introduce amendments.

Two main reasons seem to explain why the Protocol was not ratified.

1. The first reason was strong resistance to the provisions of the Protocol providing for the elimination of anti-dumping duties and for the regulation of state aids, as was stipulated by the Protocol. This resistance is partly due to trade asymmetries among the MERCOSUR Member States and the domination of the Brazilian economy.

2. The second reason is the lack of experience in antitrust law enforcement, particularly in the case of Paraguay and Uruguay.

A cooperation agreement among the antitrust agencies of MERCOSUR was recently adopted (July 2004) and has been put into effect, after being incorporated into the national laws of each member state. A special provision was made to allow Paraguay to join the Agreement once it adopts a competition law and establishes a competition authority. The aim of this agreement called 'Understanding on Cooperation between Competition Defence Authorities of Member States of MERCOSUR for the Enforcement of National Competition Laws' (the 'Understanding') is to promote cooperation in the execution of national competition laws and technical cooperation between national competition authorities.

West African Economic and Monetary Union (WAEMU)[22]

The West African Economic and Monetary Union - (hereafter referred as its French original acronym UEMOA - Union Économique et Monétaire Ouest Africaine) includes eight countries (Benin, Burkina Faso, Côte d'Ivoire, Guinea- Bissau, Mali, Niger, Senegal and Togo). UEMOA Member States have embarked on a series of reforms since May 1996. As a result of these efforts, by 1999, all tariff barriers were eliminated on intra-community trade. This has led to a certain level of market integration, strengthened by a customs union and common trade policy.

In May 2002, the UEMOA Council of Ministers adopted the Community Competition Law, which is comprised of five elements:

1. Control of anti-competitive behaviour within the UEMOA;
2. Rules and procedure related to the control of cartels and abuse of dominant position within the UEMOA;
3. The control of State aids within the UEMOA;
4. Transparency of the financial relationship between Members States and public enterprises on the one hand, and between public enterprises and international or foreign organizations on the other; and
5. Cooperation between UEMOA's Commission and national authorities in the enforcement of the law.

To promote clarity and legal predictability with regard to competition, it was deemed necessary that the competition law should include a non-exhaustive list of banned practices. The content of the

list was based partly on the practices most frequently encountered in any market economy, and partly on the distinctive features of UEMOA, particularly as regards vertical agreements.

The law also applies to practices 'comparable' to an abuse of dominance and to mergers. Individual or sectoral exemptions can be granted.

As in the case of the AC, the UEMOA Competition Law applies to practices that have an intra-regional effect. Similarly, countries that do not have national competition laws may apply regional competition law within their national boundaries. This is the case, for instance, of Benin, Guinea-Bissau, Niger and Togo. These countries have been asked to adopt a competition law in conformity with Community Competition Regulations. Meanwhile, these countries take part in the implementation of the Community Competition Regulations through their involvement in the deliberations of the Regional Advisory Committee on competition (the supranational administrative body in charge of the enforcement of this regulation.), which is composed of two representatives from each member state. Its role is to provide advice on the Commission's draft decisions.

Following a ruling by the UEMOA Court of Justice (opinion 003/2000/CJ/UEMOA) the UEMOA Commission has exclusive authority to implement Treaty provisions concerning competition. National competition authorities enforce national competition laws when they exist, but national laws are inoperative in areas covered by community rules. However, formal and informal cooperation between the Commission and the competition authority of each country occur whenever there is an investigation. This cooperation is simplified by the fact that the Commission is composed of two representative of each member state.[23] A network linking the Commission and national competition authorities is in the process of being set up to promote this cooperation.

Recently two decisions were taken concerning the construction of a gas pipeline across Benin and Togo. In the first decision, in application of UEMOA 's Community Competition Regulations on state aids, the Commission granted Benin and Togo a special fiscal and legal regime so these countries would to be able to provide fiscal incentives to enterprises involved in the construction of the gas

pipeline. The second decision was an exemption granted by the Commission to a joint venture between the enterprises, which will have the responsibility to run the pipeline after its construction.[24,25]

4.2 The EU experience and the four regional agreements: similarities and differences

The various provisions of the four groupings described above will be examined below, in light of EU experience in competition law and policy. Clearly, not all of the EU characteristics are adaptable to the other regional realities. Some features are directly related to the concurrent jurisdiction of the European Commission and the national competition authorities to enforce EU law- Therefore, they are not relevant to the four regional agreements since none of them enforces the regional law concurrently with the national authority. Other elements discussed in the review of the EU modernization system concerning the way the regional authority promotes the development of national competition law, the cooperation between national authorities and the regional authorities in the enforcement of the regional laws and the cooperation between national authorities, are relevant to the case of the regional agreements.

4.2.1 Relationship between trade and competition

It is clear that in the case of the EU the establishment of competition rules was deemed to be a necessary complement to trade liberalization. As in the case of the EU, in the four regional agreements under review, competition law provisions are considered to be a necessary addition to or an integral part of regional trade liberalization measures. The provisions of regional competition laws, when they exist, apply to practices that have an effect on trade. The complementary nature of international trade policy and competition policy, which has been much discussed at multilateral level in the context of the negotiations of the Doha Round at the WTO, is clearly illustrated in those agreements.

4.2.2 Centralization of regional law enforcement

Much of the rationale for the decentralization of EU competition law enforcement comes from the fact that the European market is deeply integrated; therefore, a considerable number of anti-competitive practices may have an effect on intra-community trade. As a consequence, national competition authorities need to assist the European Commission in dealing with routine cases so as to avoid an excessive burden to the Commission. The authors have shown that to achieve this result, in Europe, national competition authorities are competent, together with the European Commission, to enforce EU law, at least as far anti-competitive practices are concerned. They also enforce their own domestic competition laws. It was also seen that the enforcement of EU law by national competition authorities had necessitated the creation of a network of European competition authorities and measures designed to bring better comprehension of competition issues at national level and a more efficient decentralized enforcement of EU law. Overall, to ensure consistent enforcement, the decentralization of the enforcement of the regional law has required building a rather complex system of relationships between the Commission and the national authorities.

In the four regional groupings chosen, although market integration is a goal, the level of market integration actually achieved is not yet as significant as in Europe. As a result many public restraints to international trade remain and private anti-competitive practices may be perceived to be a less important obstacle (in relative terms) to market integration than in Europe. Additionally, Member States belonging to the regional groupings are, in some cases (particularly in the case of CARICOM and UEMOA) small developing countries with limited resources to devote to fighting anti-competitive practices and little experience of antitrust enforcement. Therefore, the pressure to decentralize the enforcement of regional competition law may be less than in Europe.

In three out of four cases, the model used is that of a grouping with a supranational law enforced by a supranational body, although, as shall be seen later, there can be significant differences in the enforcement powers of supranational bodies.

This is, for example, the case of the AC, where Decision 285 establishes common rules: 'to prevent or correct distortions in competition resulting from practices aimed at restricting free competition' and creates a supranational institution, which conducts investigations and proceedings at the request of countries or affected firms. It is also true of the CARICOM Model Law, which is intended to guide its Members in developing their own national legislation.[26] The CARICOM Competition Commission (CCC) shares the responsibility for enforcement of the regional law with the national competition authorities Finally, it is the also the model followed by UEMOA, which has a model regional law and where the Commission has exclusive authority to implement Treaty provisions concerning competition.

In two of the three agreements, UEMOA and the AC, the regional bodies in charge of enforcing the supranational law have acquired significant powers.

The case of the AC is particularly interesting because, as already indicated, significant institutional changes in 2005 have given teeth to the regional institution, provided for more cooperation between the regional and national authorities and increased pressure to adopt national competition law consistent with the regional law. For example, as mentioned earlier, Decision 608 of the Andean Community now the General Secretariat of the Community of Andean countries to impose sanctions in case of transnational anti-competitive practices. These changes remedied two previously identified weaknesses of the grouping: the lack of an appropriate competition culture and the lack of sanctioning power for the regional competition authority. The grouping had not been successful in developing a culture of competition at the national levels of its Member States and in some there was little or no interest in competition. In the discussion concerning the European Union, an increased level of awareness of competition issues at national level in most Member States has, to a large extent, been due to the increase in cooperation with the Commission and with other national competition authorities; the regional competition authority was very weak because it did not have sanctioning powers and had only limited means of investigation.

In the case of UEMOA, inspiration for its institutional design clearly came from the EU model. The RTA has a strong central body

in charge of enforcing a regional law that applies to practices that have an effect on trade between Member States. Member States are required to adopt national laws consistent with the regional law and, in case of conflict, the principle of primacy of the regional law applies.

The centralized enforcement by a supranational body of a regional law necessarily entails some relinquishment of national sovereignty; this has already happened, as in the case of the EU, in the UEMOA agreement and also in the AC agreement since its recent changes. Attempts to promote a centralized system of enforcement without relinquishment of national sovereignty to the regional body in terms of powers of investigation or sanctioning of illegal practices results in paralysis. This is partly what is happening in CARICOM, which is the least successful of the three regional agreements providing for the centralization of a regional law. Indeed, the CARICOM Competition Commission is severely hampered by restrictions that directly result from the reluctance on the part of Member States to relinquish sovereignty. It is possible that one of the reasons for the failure of CARICOM members to provide the CARICOM Competition Commission with sufficient investigatory power to effectively enforce the regional law is the disproportion of economic power among the countries that compose the grouping. The economies and trade capacity of Jamaica and, in particular, of Trinidad and Tobago are considerably more developed than that of the smaller islands (such as, for example, St Vincent and the Grenadines) or that of the least developed members states (such as Haiti). At the same time, a number of these small island economies are in direct competition when it comes to tourism, for example. It is thus possible that the fear exists that, if they are not strictly controlled by the Member States, the regional institutions might represent the interests of the more powerful countries to the detriment of the other Member States.

4.2.3 The harmonization of national competition laws with the regional law

In the case of the European Union, as has already been mentioned, Member States have, over time, adopted national competition laws with provisions similar to the provisions of Articles 81 and 82 of the EU Treaty. This soft harmonization is a consequence

of the EU institutional architecture and the principle of primacy of Community law. This system ensures a level playing field in Europe; similar practices are treated in the same way from the standpoint of competition whether or not they affect intra-European trade. In addition, cooperation between the Commission and national authorities is facilitated by the fact that national competition authorities enforce, at domestic level, prohibitions similar to those of the EU Treaty.

In the three regional agreements examined that establish a regional law (that is all of the agreements reviewed except for MERCOSUR), national competition authorities do not enforce the regional law. However, it is still important for the consistency of the system that, to the fullest possible extent, the Member States have a national competition law and that those national competition laws be consistent with the regional law. Furthermore, national competition authorities may be called in to assist the regional competition authority in the enforcement of the regional law and it is thus useful, for the cooperation to be effective, that national authorities have some experience enforcing a law similar to the regional law.

In all three of these groupings, Member States are required to adopt national competition laws in line with the regional law. For example, in the case of CARICOM, Member States must create a national competition authority and enact competition legislation consistent with CARICOM competition rules. Decision 608 on 'Regulations for the Protection and Promotion of Competition in the Andean Community'[27] requires Bolivia and Ecuador to adopt national competition laws and the other Member States to adapt their national laws to make them consistent with the new community competition law. In UEMOA, Benin, Guinea-Bissau, Niger and Togo have been asked to adopt a competition law in conformity with the Community Competition Regulations.

Those Member States of UEMOA that have not so far been able to adopt a domestic competition law may, within their boundaries, apply regional competition law to practices that do not have a trade effect. Similarly, the Andean Community Law is applicable in Bolivia and Ecuador and could be used to challenge domestic anti-competitive practices.

4.2.4 Cooperation among national competition authorities without supranational law enforcement system: the case of MERCOSUR

The MERCOSUR agreement is quite different from the other three agreements reviewed, in the sense that it does not include a supranational law or a supranational enforcement agency. Enforcement powers in the area of competition rest with the national competition authorities; the agreement merely provides for a mechanism of cooperation and exchange of information between national competition authorities on transnational issues. As already mentioned, the agreement has not yet been ratified, and all MERCOSUR countries do not yet have a national competition law. Overall, it seems that the MERCOSUR cooperation agreement has been largely ineffective.

Several considerations can be put forward to explain this relative failure.

First, it is not easy to promote cooperation or exchange of information among national competition authorities in the absence of compulsory mechanisms. Before the EU modernization process there was little cooperation among Member State authorities. However, once the network was established and once national competition authorities were required to provide information to the network on transnational cases they were dealing with, cooperation between them went far further and extended to the establishment of working groups and much informal cooperation.

Furthermore, EU Member States, which are not only geographically close but are also major trading partners, have relatively similar levels of development. As a result, cooperation on competition issues or exchange of information among national competition authorities can be relatively balanced, in the sense that the potential violators and the potential victims of transnational anti-competitive practices are fairly evenly distributed among countries. This is not the case in MERCOSUR, where the economic might of Brazil very much dominates the region and the other members. This imbalance is likely to make voluntary cooperation among national authorities more difficult by exacerbating trade friction.

4.2.5 Fostering formal and informal cooperation between national competition authorities and regional bodies enforcing 'regional law'

An interesting aspect of the Andean Community, and of the UEMOA system, is the relationship between national and regional authorities.

As previously explained, the adoption of an EU style relationship between the regional and national competition authorities would probably have been too complex to implement in the Andean Community and in UEMOA. This is evident from the relatively limited number of transnational cases and the limited resources of national competition authorities within these two regional groupings, and the fact that, in both groupings, there are countries that have very little experience with competition law.

As a result, in both groupings the regional law is enforced by the regional competition authority, yet both groupings have, in relatively similar ways, ensured that national competition authorities would nonetheless be involved in the enforcement of the regional competition law. In the Andean Community, the *Andean Committee for the Protection of Competition*, an advisory committee composed of representatives of national competition authorities, was created by Decision 608 in March 2005. Article 37 of the same decision provides for exchange of information and experiences between competition authorities as well as for technical training and the diffusion of jurisprudence on competition law and policy.

Similarly, in UEMOA, the Regional Advisory Committee on competition is composed of two representatives from each Member State.

Finally, an 'Understanding on Cooperation between Competition Defence Authorities of Member States of MERCOSUR for the Enforcement of National Competition Laws' has recently been adopted by MERCOSUR and is designed to promote cooperation between the national competition authorities of Member States.

In order to develop cooperative links between the countries, the competition authorities of the four groupings should act to disseminate a culture of competition, to facilitate benchmarking and

the establishment of best practices and ultimately to increase the level of enforcement at national level, both in terms of quality and quantity.

The EU experience shows that the establishment of a more formal network enabling competition authorities to engage in regular contact, particularly when there is an obligation to provide information on possible cases of violation of the regional law, leads to an improvement in the awareness of regional laws, promotes a more consistent enforcement of national and regional laws and helps the spread of a competition culture in the Member States via the development of informal cooperation between national authorities.

From the available information analysed, it seems that there is still room to create more systematic links and interaction among the national competition authorities in the four regional groupings.

5. Conclusions

Each of the regional agreements in Latin America and Africa examined in this chapter faces difficult challenges and it is fair to say that so far they have achieved modest results.

As already noted, in each of the regional agreement groupings some Member States do not have a domestic competition law and a domestic competition authority and, even in Member States that have a competition law, awareness of the possible benefits of competition is often lower than at regional level. As a result, there has been little enthusiasm on the part of Member States to allow the regional competition authorities sufficient powers and means to fulfil their tasks (CARICOM, notably).

The situation is slowly changing. As an example, in the four groupings examined, Member States that do not have a competition law are required to adopt one. Nevertheless, adopting a national competition law in these cases, particularly when this is principally done to meet an obligation, is not sufficient to make Member States appreciate the benefits of competition either at national level or at the level of the regional grouping.

Furthermore, many Member States involved in these regional agreements are small economies with insufficient resources to fund a national competition agency (this is particularly relevant for some members of CARICOM and UEMOA). As a result, in Member States having a national competition law, the law is not always enforced vigorously nor is it even well understood.

Finally, when it comes to specific cases, regional competition is not always welcomed by governments that may be more sensitive to its short-term costs than to its long-term benefits (hence, for example, the large number of anti-dumping measures in the MERCOSUR area).

This situation is very different from that which prevails in the European Union. The level of awareness of competition is much more widespread in Europe. This fact should not be surprising, in view of the fact that the European Commission has pushed the agenda of trade liberalization and competition for more than 50 years.

Furthermore, the economies of European Union Member States are sufficiently prosperous that adequately financing their national competition authorities does not constitute a major effort.

But, even though the conditions for the development of competition law at regional level are very favourable in the EU context, the recently adopted competition Modernization Package represent an additional effort made to raise the level of awareness of competition law in Member States and to decrease the costs of enforcement

One of the lessons of the EU experience in this area is that, even in the context of well-established trade and competition agreements, further efforts to promote a competition culture in Member States and to rationalize the enforcement of regional competition law are always necessary.

Moreover, as previously mentioned, the four regional authorities should focus more on the development of a competition culture. This advocacy function is crucial. Indeed, it would be a mistake to believe that the existence of a regional competition agreement and/or authority is in itself proof that the case for international competition has been made. In fact, it is, at best, an opportunity to make this case.

One of the relatively inexpensive ways for a regional authority to push forward the case for competition in Member States is through a coordinated effort involving the various national competition agencies.

As already indicated, the EU Modernization Package provides for the establishment of a network of competition authorities meeting regularly, informing one other of their respective activities, creating working groups, developing personal relationships and cooperating formally and informally on specific cases. The level of interaction between the regional and national competition agencies seems to be much more advanced in the EU than in the four groupings examined, even though in some cases (MERCOSUR in particular), there have been attempts to develop a network of competition authorities and to promote cooperation.

Beyond what has already been said, the ability of a regional competition authority to push the competition agenda is also dependent on its enforcement capacity. The EU Commission has actively used this power to investigate blatant anti-competitive practices by firms or by governments (in the area of state aids). Such cases have often been the subject of intense controversies in Member States (particularly in the area of merger control).

In several of the agreements reviewed, the regional competition authority has only limited means to initiate cases and is dependent either on complaints from victims or from Member States. While limitation of the powers of the regional body may be considered legitimate to protect the national interests of the Member States, it comes at a cost: the weakening of regional competition law enforcement.

Another lesson that can be drawn from EU experience is that it is always worthwhile to seek ways to make competition law enforcement less costly, particularly at regional level. This lesson would seem to be particularly relevant for regional agreements among developing countries whose Member States have limited resources. But it is not only relevant for such agreements, as it was already noted that a major motivation of the EU Commission in pushing the Modernization Package was precisely the desire to reduce the cost of enforcing EU competition law.

From this standpoint, it would seem that for some of the four agreements examined in this chapter there is room for improvement. Indeed, the cooperation between national competition authorities and the regional body in charge of competition (when such a body exists) appears in some cases designed not so much to minimize the cost of enforcement for the signatories of the agreement as to protect the national sovereignty of each Member State. The most striking case is that of CARICOM. Some of the CARICOM Members States are micro-states where the creation and the funding of a domestic competition authority are not economically justified. In these circumstances, concentrating the investigatory powers at regional level could have contributed to minimizing the cost of enforcement for Member States. Yet, on the one hand, Member States, when requested by the CARICOM Commission, are expected to conduct preliminary investigations on its behalf and, on the other, they have the power to prevent the CARICOM Commission from further investigating a case in which the Commission had reasons to believe that a violation of CARICOM law had taken place. It may be that the issue of the proper balance between the protection of national sovereignty of Member States and the effectiveness of the regional competition policy will have to be reconsidered.

A final remark is in order.

Before judging that the small number of cases examined under these agreements is evidence of their ineffectiveness, one should remember that in the EU there was practically no enforcement of the regional competition law during the first decade after the Treaty was signed (it was only very gradually that competition law enforcement took centre stage) and that the four regional competition agreements in Latin America and Africa considered here were all signed less than ten years ago. As is evident from the case of the EU, a regional competition agreement can evolve (and usually become more effective) over time. It has been shown that this process has already taken place for some of the agreements examined. In particular, it was noted that the MERCOSUR Agreement is being reconsidered and that Decision 608 on 'Regulations for the Protection and Promotion of Competition in the Andean Community' was adopted and modified Decision 285, thereby solving some problems. There is thus every reason to believe that over time all four regional agreements will be modified and that they will become more effective.

The previous remarks on the lessons to be drawn from the EU experience should not be understood to imply that the solutions adopted in the EU Modernization Package are necessarily adequate for other regional groupings. What they do seek to suggest is that some of the issues that are relevant in the case of the EU might also be worth considering in the context of other regional agreements.

NOTES

[1]The following are some examples of laws allowing national competition authorities to apply Articles 85(81) and 86(82) of the EU Treaty: in Austria the Cartel Act of 1998 and the Austrian Competition Act of 2002, the Danish competition act of 28 June 2002, the Finnish Act on Restrictions on Competition (480/1992), the Competition Act of 2002 provides mechanisms for the enforcement of Articles 81 and 82; Article 54 of Law no. 52 of 6 February 1996 expressly empowers the Autorità Garante della Concorrenza e del Mercato to enforce Articles 81 and 82 of the Treaty; it enables the IAA, when applying the EU rules to exercise the powers applicable in the context of national competition law; in the Netherlands, the Competition Act of 1997 designates the Director General of the Dutch Competition Authority as the authority that enforces Articles 81 and 82 of the EC treaty; in Portugal the Decree Law no. 10/2003 gives competence to the National Competition Authority to enforce Articles 81 and 82; in the UK, the enforcement of Articles 81 and 82 of the EC Treaty by the Office of Fair Trading is provided for by the Competition Act of 1998 and the Enterprise Act of 2002.

[2]For example, in Belgium, the law of 5 August 1991 on the protection of economic competition contains provisions which essentially mirror Articles 85(81) and 86(82); the provisions of Articles 4 and 6 of the Finnish Competition Act adopted in 1992 are aligned on Articles 81 and 82, the French 1986 ordinance on competition, now part of the Commercial Code, contains two provisions which mirror Articles 81 and 82; Articles 1 and 2 of the Greek law 703/77 are equivalent respectively to Article 85(81) and 86(82) of the EC Treaty; in Italy national rules on anti-competitive agreements and abuses of dominant position in the National Competition Law of 1990 are substantially identical to Articles 85(81) and 86(82); in Luxembourg the provisions of the law of 17 May 2004 on abuse of dominance are a literal copy of Article 86(82); in Spain Law 16/1989 on the Defence of Competition which came into force in August 1989 contains the national equivalents of Articles 81 and 82 of the EC Treaty; in the UK the 1998 Competition Act contains the national equivalent of Articles 81 and 82; the Swedish competition act enacted in July 1993 contains prohibitions that are modelled on Articles 81 and 82.

[3]Costa v Ente Nazionale per l'Energia Elettrica (ENEL) ECJ Case 6/64, 1964 ECR 585, 1964 CMLR 425.

[4]Internationale Handelsgesellschaft mbH v Einfuhr-undVorrattsstelle für Gtreide und Futtermittel, ECJ case 11/70, 1970 ECR 1125

[5]However competition authorities of all Member States can participate in the Merger Advisory Committee which delivers non-binding opinions on the Commission's Merger draft decisions.

[6]See, for example, 'Commission Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty", OJC 313 15/10/97, p. 3: 'The Commission is convinced that close cooperation with national authorities will forestall any contradictory decisions. But if, "during national proceedings", it appears possible that the decision to be taken by the Commission at the culmination of a procedure still in progress concerning the same agreement may conflict with the effects of the decision of the national authorities, it is for the latter to take the appropriate measures' (Walt Wilhelm) to ensure that measures implementing Community competition law are fully effective (ibid.). The Commission takes the view that these measures should generally consist of national authorities staying their proceedings pending the outcome of the proceedings being conducted by the Commission. Where a national authority applies its national law, such a stay of proceedings would be based on the principles of the primacy of Community law (Walt Wilhelm) and legal certainty, and where it applies Community law, on the principle of legal certainty alone. For its part, the Commission will endeavour to deal as a matter of priority with cases subject to national proceedings thus stayed. A second possibility may, however, be envisaged, whereby the Commission is consulted before adopting the national decision.

[7]Case C-67:91 Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada (AEB) and others [1992] ECR I-4785.

[8]The set of Notices are as follows: (i) Notice on cooperation within the Network of Competition Authorities, (Official Journal C 101, 27-04-2004, pp 43-53); (ii) Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (Official Journal C101, 27-04-2004, pp. 54-64); (iii) Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (Official Journal C101, 27-04-2004, pp 65-77); (iv) Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (Official Journal C101, 27-04-2004, pp 78-80); (v) Notice on the effect on trade concept contained in Articles 81 and 82 of the Treaty, (Official Journal C101, 27-04-2004, pp 81-96); (vi) Notice on the application of the Treaty (Official Journal C101, 27-04-2004, pp. 97-118).

[9]Philip Lowe: "Chairman's closing remarks" International Bar Association / European Commission Conference on Antitrust Reform in Europe: A year in Practice, Brussels, Friday 11 March 2005.

[10]Neelie Kroes "Taking Competition Seriously – Anti-Trust Reform in Europe", International Bar Association/European Commission Conference 'Antitrust reform in Europe: a year in practice' Brussels, 10 March 2005.

[11]Modernization in Europe 2005, Global Competition Review, February 2005.

[12]This development is based on the article "Competition policy in the Andean Countries: A policy in search of its place" by Ana Julia Jatar and Luis Tineo, Foreign Trade Information Service, Trade Unit of the Organization of American States www.sice.oas.org and information provided by Ms. Tania Mendieta, international expert on the Andean Community Legislation (Bolivia).

[13]"Competition policy in the Andean Countries: A policy in search of its place" by Ana Julia Jatar and Luis Tineo, Foreign Trade Information Service, Trade Unit of the Organization of American States www.sice.oas.org

[14]These cases referred to Decision 285 and were initiated by the former Board of the Commission of the Cartagena Agreement. These cases were launched by virtue of the following resolutions: Resolution 391, application by IMEZUCAR SA (Venezuela) dated 15 January 1996 (web source visited on 15 August 2005, available at http://www.comunidadandina.org/normativa/res/r391.htm); Resolution 484, application by Polipropileno Biorientado (BOPP) - Ecuador dated 9 June 1997 (web source visited on 15 August 2005, available at http://www.comunidadandina.org/normativa/res/r484.htm); and Resolution No. 892, application by National Confederation Alpamayo (Peru) (web source visited on 15 August 2005, available at http://www.comunidadandina.org/normativa/res/r892sq.htm).

[15]Official Gazette of the Cartagena Agreement No. 1180 as of 4 April 2005.

[16]See: Murillo, Paulina Ab. Coordinator of the Ad-Hoc Secretariar / REICO. "La reforma de la norma de competencia en la comunidad andina." Briefing based on an article published in the Latin American Journal on Competition. García-Gallardo, Ramón and María Dolores Domínguez Pérez. "La reforma de la norma de competencia en la Comunidad Andina". Web source visited on 06 August 2005, available at http://www.care.org.ec/reico/brief3.htm#_ftn1.

[17]With regard to the implementation of measures, Article 35 indicates that the implementation of provisional or definite measures envisaged under the present Decision, will be the responsibility of the governments of the Member countries where the companies subject to the measures originate from, or where they have their headquarters in the subregion or the place where the denounced practices have been found, and they will proceed in accordance with the national regulations. The executing Member country

will communicate the implementation of measures imposed within the framework of the present Decision to the General Secretariat, and through this body, to the rest of the Member countries and to other parties that are part of the procedure.

[18]Chapter VI of Decision 608 refers to the creation of the Andean Committee for the Protection of Competition, (hereafter referred as the Committee) which will be composed of one representative from each national competition authority of the Member countries. The functions of this Committee are those referred in Articles 6, 13, 21, 26, 27 and 36 of Decision 608. and basically are in close connection to consulting activities so as to issue recommendations as requested. The Committee members account for certain rights and obligations stated in Article 40 therein.

[19]Stewart, Taimoon. "The role of competition policy in regional integration: the case of the Caribbean community". presented at the SALISES, UWI Conference on the CSME, March 2004 and Chapter 10 of the present publication.

[20]This Treaty provides for, among others, the removal of restrictions by Member States (MS) on Trade in Goods, the Right of Establishment, Provision of Services, including Banking and Financial Services, Movement of Capital and Current Transactions and Skilled Community Nationals.

[21]This section has been significant inspired by two regional competition experts: Gesner Oliveira (Former Chief of Competition Agency – CADE - Brazil) and Marina Bidart (competition expert and former official of the Argentinean Competition Commission). It is also based on the article "Toward a Common Competition Policy in Mercosur" by José Tavares de Araujo.

[22]This section is based on a survey on UEMOA completed by Mr. Yves Kenfack, Economic Affairs Officer at the Competition and Consumer Policies Branch (UNCTAD). This section is also based on three basic elements: i) the contribution submitted by UEMOA's representative at the Global Forum on Competition in February 2002; ii) annexes related to UEMOA's competition rules contained in UNCTAD's competition training manual on the implementation of a competition law in French. In addition the authors have also consulted a leaflet published by the UEMOA Secretariat describing its community competition law; iii) informal discussions with various UEMOA competition experts.

[23]Interview conducted by Yves Kenfack on 16 August 2005 with Mr Moudjaïdou Soumanou, Director of Competition and Domestic Trade at the Minister of Industry, Commerce and the promotion of employment of Benin.

[24]See Decision No. 06/2004/COM/UEMOA dated 23 December 2004 as well as Decision No. 2/2005/COM/UEMOA. *Op. Cit*.

[25]See Decision No. 002 /2005/COM/UEMOA available at the Bulletin Officiel de l'Union, whereby, two member countries of UEMOA (Benin and Togo) and two countries belonging to the Economic Community of West Africa (ECOWAS) (Ghana and Nigeria) were involved. Overall, a Ghana Gas Company seeks clearance before the UEMOA commission according to Article 3 of the Regulation No. 03/2002/CM/UEMOA (23 May 2002). The exception was finally granted by the Commission.

[26]In this regard, Member States are required to enact the rules of competition as outlined in Chapter VIII of the Treaty, and to establish national competition authorities to implement and enforce the rules. Member States are also required to take effective measures to ensure access by nationals of other Member States to enforcement authorities, including courts, on an equitable, transparent and non-discriminatory basis.

[27]Official Gazette of the Cartagena Agreement No. 1180 as of 4 April 2005.

10

Special cooperation provisions on competition law and policy: The case of small economies

TAIMOON STEWART

1. Introduction

This Chapter looks at the experiences of small economies in the specific area of cooperation in the enforcement of competition law and policy. It examines cooperation to deal with the cross-border effects of anti-competitive conduct and the technical assistance required for building capacity to implement and enforce the law. The economies chosen for examination are the small economies of the Caribbean Community (CARICOM).[1] These economies are deemed to be small because of several characteristics which, when combined together, create conditions of small size not seen in larger economies that claim the status of small economies in the literature[2] and the international fora (such as, Singapore, Hong Kong, Australia, Canada,

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Israel). It is argued here that the claim of these larger economies to the status of small size is not only erroneous, but is damaging to the needs of 'real' small economies, in that it erodes the very real claims of such economies for consideration for special and differential treatment. CARICOM countries are put forward as representatives of the type of economies that qualify for designation as being of small size.

CARICOM consists largely of the former British West Indian colonies, which were granted independence over a period covering a decade and a half from 1963 onwards. The first effort at integrating all these economies under one governing body was in 1959 when Britain attempted to bring them together in a West Indian Federation with dominion status within the British Commonwealth. The reasoning was that the island colonies were too small to be viable as independent states. Indeed, the idea of independence was not even entertained, given the small size of these economies. However, Jamaica withdrew from the proposed West Indian Federation and the whole idea collapsed. Thereafter, Britain granted independence to the colonies, starting with Jamaica and Trinidad and Tobago in 1963 and then the other islands during the rest of the 1960s and into the mid-1970s. However, several islands in the Caribbean are still colonies of Britain, such as the British Virgin Islands, the Cayman Islands and Montserrat.

The governments of the newly independent countries soon recognized that the small size and limited resources and capabilities of these economies limited their developmental potential. As a result, the Caribbean Free Trade Area (CARIFTA) was formed in 1968 by which a process of integration was initiated. Inspired by the formation of the European Community, the level of integration was deepened in 1973 with the signing of the Treaty of Chaguaramas establishing a Common Market in CARICOM. In recognition of the even greater challenges faced by the smaller island states of the region, a subregional grouping, the Organization of Eastern Caribbean States (OECS),[3] was formed in 1981 and has progressed to a much deeper level of integration than the larger grouping, CARICOM. Suriname (formerly a Dutch colony) and Haiti (formerly a French colony) joined CARICOM in 1995 and 2002, respectively. A loose arrangement between CARICOM and the Dominican Republic, the Caribbean Forum (CARIFORUM), exists for the specific purpose of coordinating

their relations and particularly negotiations with Europe. Finally, in the last decade of the 20th century, CARICOM began negotiations to create the deepest level of integration, the CARICOM Single Market and Economy (CSME). The Revised Treaty of Chaguaramas was signed in 2001, and all signatories are in the process of putting the legal and institutional arrangements in place to meet the obligations undertaken and thereby establish the CSME.

The Treaty of Chaguaramas has a special designation of Less-(not least)Developed Countries (LDCs) within CARICOM to differentiate between the smaller economies within the Community and those that are more complex and viable, the More-Developed Countries (MDCs). The countries included in this designation are the OECS countries and Belize, and special and differential (S&D) treatment is accorded to them. This designation is totally separate from the UN list of Least-Developed Countries (LDCs) in the global community or any other designation of LDCs at the global level. It refers only to smaller economies within CARICOM and under the specific terms of The Treaty of Chaguaramas.

The issue of small size and viability in the international economy and system has become more pressing now with the changes in the global economy, the stringent rules of international trade and the absence of socio-economic considerations in the rulings of the World Trade Organization. In the last decade and a half, these countries have been on a roller coaster of economic ups and downs, but primarily downs. It is precisely because of the small size and vulnerability of these economies and their limited human and financial resources that it is very difficult for them to break out of this dire economic circumstance. These characteristics are explored in the following section.

1.1 Characteristics of small size: the specific case of CARICOM

Designation of small size status to a country has become a contentious issue in international relations. There is ambiguity in terms of its definition, primarily because the meaning has been diffused by claims to the status of small size by countries such as

Canada, Israel, Singapore, Australia and others. Those economies are fairly complex with a reasonable level of integrated production systems, innovation capability and control over cutting-edge technologies that give them the capability to compete in the global economy, even if in a limited specialized area, as is the case of Singapore. Moreover, we note here the geo-politics of the post-World War Two era, which resulted in massive aid such as the technical assistance granted to East Asian countries to stimulate the metamorphosis into the Asian Newly Industrialized Countries. We argue here that it is contradictory to designate complex economies as 'small'. The term 'Small Economies' was introduced by CARICOM economies into the language of international negotiations in the World Trade Organization (WTO), the Free Trade Area of the Americas (FTAA) and other negotiating fora, and studies on small size (Commonwealth Secretariat studies, for instance) have focused on the Caribbean and Pacific small economies. Our central argument here is that the meaning of the term 'small size' extends beyond static indicators of size of land mass, population and gross domestic product (GDP) to a dynamic notion of the interaction of a configuration of characteristics linked to size and historical experience that serve to limit development potential and options and, thus, economic growth and societal development. The idea of 'small size' is organically linked to underdevelopment and to both economic and socio-political constraints to achieving development, not just to static characteristics.

While most CARICOM countries are island states with a small land mass, particularly the seven OECS countries, which are less than 800 sq. km, there are three that are continental states with a relatively large land mass, such as Belize with 22,995 sq. km. Yet, the annual GDP of Belize is under US$1 billion, similar to the small island states in the OECS. Singapore, with a land mass of 682.7 sq. km has an annual GDP of US$106 billion approximately.[4]

Population size is significant because it impacts on market size and therefore on opportunities for scale economies. The OECS and Belize have populations of fewer than 300,000. Jamaica's population is 2.6 million (the largest next to Haiti) and Trinidad and Tobago's is 1.3 million.[5] Yet, Haiti's population is 7 million and Singapore's is 4.4 million, but there is a wide difference in the performance of those two populations and their impact on economic performance.

Different factors limit the capacity of these small countries to position themselves in the global economy in a way that would result in inward flows and retention of capital. Some factors are influenced by history and culture. The Caribbean was the first non-European area to be colonized. Some of the history of slave trading may explain the human resource constraints faced by these countries. There is a shortage of technical human resources.

Also, the island status of most of these economies increases the transportation cost of goods that negatively affect the economies. Shipping routes and trading partners have been shaped by its colonial heritage to look to other English-speaking territories. Belize and Guyana have limited channels of communication/transportation with their continental neighbours, though that is now changing, particularly for Belize, with increasing economic linkages with Mexico and Guatemala.

Few people and limited resources obviously also have led to a limited demand for goods and services and, therefore, limited economic activities service the domestic sector. Local firms are generally small family firms that are technologically backward and operating in the import and retail sectors or offering domestic services. The local business sector is risk adverse and invests little or nothing in Research and Development (R&D). Further, the descendants of the colonial elite class dominate large sectors of the domestic economy, such as the import and retail sectors. This concentration in the hands of a few has resulted in limiting entrepreneurial activities in the traditional domestic sectors.

The low savings rate in these economies partly stems from a lack of confidence in the financial system. There is some evidence of financial and human capital flight.

For OECS countries, the shortage of technical human resources is so critical that the number of staff allocated to deal with external trade negotiations (WTO, FTAA, ACP-EU and bilateral negotiations) in most countries ranges from three to five officers. The workload is so great that it is impossible to do research or to specialize in any particular subject area. These countries are currently searching for ways to minimize the effects of this deficit.

The CARICOM Regional Negotiating Machinery (CRNM[6]) was created in 1998 to address the problems of the Caribbean countries at regional level, by facilitating trade negotiations through adequate personnel conducting specialized research in areas of interests for the region (to the extent possible given very limited staff). Consultants have also studied the region to assist in policy formulation. However, interests differ in the region between the MDCs and the LDCs, and the OECS countries are not confident that they could abdicate policy formulation and development of negotiating positions to the CRNM. Therefore, the OECS Trade Negotiation Group (TNG) was formed in 2003 to coordinate policy and negotiating positions within the OECS for submission to the CRNM. The TNG shows promise, in that discussions within this group have been fruitful and more coherent positions are being developed. However, much more needs to be done to develop institutional structures and portfolio allocation to maximize the potential of this group.[7]

Besides these problems, there are other serious structural rigidities. All the economies are characterized by single commodity export that is the major springboard for other economic activities, thus rendering the economies very vulnerable to changes in the global marketplace. Natural resource exploitation is dominated by foreign direct investment (FDI): for example, tourism, oil, bauxite, and agro-processing. Moreover, the leading sector generally remains at the primary processing level, with the lucrative components of the product chain remaining in the hands of firms in the industrialized countries. While this is clearly evident in the commodity production industries, it is also true of the tourism industry, which is increasingly dominated by the International Tour Operators who, through vertical linkages, dictate the terms of trade and cream off the profits from the industry. Because of the colonial inheritance of producing commodities for export and importing consumption needs, these economies still retain structural rigidities that are difficult to transform. Thus, there are few linkages between the leading sectors and the rest of the economy. Most inputs to cater for the tourism industry are imported, for instance.

The dependence on imports rather than on local production and the dominance of a limited export sector at primary levels of production have led to dependence by the government on a narrow tax base, particularly tariffs on imports. There is a conflict, therefore,

between the thrust towards lowering tariffs and the need to defend government revenue. The narrow base of export markets makes these economies vulnerable to sudden changes because of lack of flexibility to switch. Such is the case of tourism where heavy dependence on the US market, for instance, can lead to sudden stemming of tourist inflows if there is an economic downturn or security problems or if advice is given to citizens against travelling to a particular destination either because of security risks in the host country or for geo-political reasons.

Economic fragility is compounded by vulnerability to natural disaster, with Montserrat destroyed by volcanic eruptions, and repeated destruction across the region caused by hurricanes. This leads to uncertainty as to the sustainability of several sectors in the economy as, for example, agriculture and tourism, which could sustain product and infrastructural damage resulting in disruption in economic activities, increases in insurance rates and interest rates on bank loans, or even inaccessibility to loans, and general disruption in the whole economy. It is the immediate and pervasive impact on the whole society and economy of a single blow – a decline in commodity price or loss of market, a hurricane, excessive competition from imports and the inability to recoup, leading to serious socio-economic problems – that is a defining feature of small, vulnerable economies.

1.2 Competition law in small economies of CARICOM

The findings of a recent study on competition issues undertaken in CARICOM countries[8] confirm that, even in micro-economies that are open to imports and foreign direct investment, anti-competitive conduct can be found in the non-tradable sector.

Moreover, the study shows that the persistent concentration of wealth in the hands of the descendants of the plantocracy, leads in many cases to dominance in product markets and to related abuses of dominant position. It was also found that in the non-tradable sectors, mergers leading to excessive concentration or monopolies could be harmful.

Also, price-fixing by Trade Associations persists openly, mainly because of unawareness of the illegality of the act. Such trade associations (e.g. Bakers' Associations, Shipping Agents) should be alerted to the potential illegality of their conduct, and monitored for continued collusion. Disciplining other associations, such as taxi associations in tourist economies, could be problematic in many of the territories because of the political and socio-economic fall-out that could result.

Cooperation amongst small firms exists and it is meant to achieve economies of scale in importation and the retail of products. In the study, this business conduct was found amongst newly migrant ethnic groups (Chinese, Taiwanese and Indians). These groups are challenging the incumbents, usually from the plantocracy class, providing more competition and, thus, benefits are flowing to consumers. They are likely to be exempt from the law under the *de minimus* clause.

Very high concentrations in product markets were found in these economies, both as a result of efforts to achieve minimum efficient scale and because of the unequal distribution of wealth derived from historical circumstances. Moreover, the lines of division amongst importers, distributors and retailers are much diffused. Abuse of a dominant market position is more likely to occur, particularly in the import/distribution/retail trades and downstream tourism services, in which Destination Management Companies could squeeze smaller players out of the market through exercise of market power. Interlocking directorates are prevalent in these economies and seemingly are used to ensure the continued control of the economy by the dominant elite.

Collusion was found to be unlikely in the micro-economies, given an aversion to cooperation and a reluctance to disclose information found amongst family firms. This may not be as pronounced in Trinidad and Tobago and Jamaica, where the economies are larger and more complex. Moreover, it could be extremely difficult to prove collusion, barring written evidence, given the culture of small societies, with close personal relations amongst business rivals.

The research showed that, despite the validity of smallness and economies of scale arguments against Merger Control Regulation

(MCR), evidence of the need for MCR in the non-tradable sector was found. For instance, in Belize, one bus company, through allegedly predatory behaviour, succeeded in effecting a hostile takeover of the other five companies on the country-wide route and once the monopoly was achieved, raised fares, leading to riots.

Box 10.1 Recommendations and observations on domestic competition laws in small economies

Competition law in small economies should:

- Include provisions proscribing anti-competitive agreements, abuse of a dominant market position, and merger control regulation
- Introduce competition law initially focusing on advocacy in order to develop a culture of competition and understanding of the law by the business sector
- Have a soft merger control regulation that would not impose heavy burdens on the Commission, but would allow the authorities to deal with mergers in the non-tradable sector in particular that would be harmful to consumers
- Introduce merger control regulation some years after the introduction of the competition regime, so that skills could be developed to apply the regime
- Have a threshold for MCR low enough to catch the dominant local firms but introducing in the evaluation sensitive criteria tailored to the need to achieve minimum efficient scale
- With excessive concentrations caused by inherited wealth, there may need to be targeting for abuse of a dominant position as the most important aspect of competition law enforcement and in the corporate public interest
- Have a lower threshold for determining dominance than what exists in developed markets
- Allow for exemption of small- and medium-sized enterprises
- Recognize the difficulty of proving collusion in small societies where personal relationships amongst business persons are deep and intimate
- Recognize that the leniency programme may not work and may even be dangerous to whistle-blowers in these small economies, saddled as they are with businesses that are conduits for drug money laundering
- Target trade associations but also be sensitive to the socio-economic fall-outs, such as dealing with taxi associations in tourist economies

Source: Stewart, 2004

Having a strong competition regime in each CARICOM country could lead to changes in the structure of ownership in the economies. At present, bank rates are so high, with margins between the lending and borrowing rates so wide that the cost of money to the business sector is extremely high. Banks operate in a cartel-like fashion, though they claim to be engaging in a 'follow the leader tactic'. Moreover, banks discriminate in their lending policies against the small entrepreneurs by having stringent collateral rules. Access to capital is therefore a barrier to entry into the market for small entrepreneurs. A strong competition regime may serve as a disincentive to this cooperation amongst banks and stimulate competition, leading to consumer benefits and providing opportunities to new entrepreneurs

In the next section, the underlying reasons for cooperation and forms of cooperation are examined as a basis from which to evaluate the needs of the small economies of CARICOM.

1.3 Cooperation on cross-border effects of anti-competitive practices

Competition law is designed to deal with anti-competitive practices that take place within a national jurisdiction, and which adversely affect domestic consumers. Most competition laws explicitly exclude from their scope those anti-competitive practices that have no effect on the domestic market. For example, export cartels are excluded from coverage by the law in most competition regimes (an exception, among others, being Brazil) because domestic consumers are not affected; rather, foreign consumers are the ones who are adversely affected. Competition authorities would take no action in cases where domestic consumers are not affected. Some laws include provisions that allow authorities to investigate cases in which perpetrators of anti-competitive practices are outside the national jurisdiction, but their practices affect national consumers. However, enforcing this provision is tantamount to extraterritoriality, which is not sanctioned under international law, and which can only be engaged in by the powerful countries.

The problem with investigating and applying sanctions to firms outside one's jurisdiction which are engaging in misconduct affecting

one's consumers is that there is no legal access to the firms involved, and no legal basis upon which to conduct investigations in another country's jurisdiction, without the explicit consent and, preferably, cooperation of that country. It is in this context that bilateral cooperation agreements were developed. For instance, the practice of notification began initially because the United States was exercising extraterritoriality in OECD countries in order to get information related to anti-competitive conduct affecting its domestic market. As such, the first agreements signed in the 1980s were defensive in nature.[9] Over the last decade and a half, cooperation agreements have deepened considerably, but only amongst OECD countries, with the deep levels of cooperation still limited to a few of them. These include: consultations, exchange of non-confidential and/or confidential information allowed by the domestic laws, notifications of enforcement activities affecting the other party's interests, commitments to take into account the other party's significant interests when investigating or applying remedies, requests for assistance in investigations into anti-competitive conduct, requests for enforcement of an order by one party in the territory of another party, joint investigations, mutual legal assistance, and positive comities.[10]

Such deeper levels of cooperation are relatively recent phenomena, though, in that as late as the early 1990s, there was some reluctance on the part of OECD countries to cooperate with one another. The work being done in the OECD Secretariat on hard-core cartels was a major trigger to deepening cooperation modalities amongst these countries. Even now, sharing of confidential information is done very sparingly, and most countries have laws that prohibit the sharing of information that is not in the public domain, or that was acquired in the process of an investigation. The experience of OECD countries has been one of gradual deepening of cooperation as they gain credibility with one another's competition authorities, and a level of personal relationships and trust developed amongst staff. Such cooperation has been voluntary, and has occurred amongst countries where there is convergence of the law and enforcement procedures and mutual confidence. It is not surprising, therefore, that deep cooperation is largely limited to those developed countries that are culturally compatible, that is, Europe and its diaspora.

It should be pointed out here that most anti-competitive conduct with serious cross-border effects comprises hard-core cartel agreements between multinational corporations (MNCs) from the US, Europe and Japan. Since the early 1990s, the US, followed by other OECD countries, has increased its vigilance on international cartel activity, and some 40 cartels have been investigated and sanctioned in that time. It is estimated that US$80.1 billion of exports to developing countries have been affected by cartel pricing, resulting in tremendous welfare losses for consumers in those countries and inhibiting development efforts (Evenett *et al*., 2001). Further, these cartels are increasingly targeting developing countries because of the increased stringent enforcement activities in OECD countries on the one hand, and the lack of competition laws and institutions or weak enforcement in developing countries on the other. For instance, the published records of the International Electrical Association revealed that the International Heavy Electrical Equipment Cartel agreement covered mainly developing countries, and Jamaica was named as one of the countries affected. The territories excluded or exempted from the agreements are usually the home territories of the member companies (the EU and Japan,[11] where there is antitrust legislation prohibiting such activities), plus those regions in their traditional sphere of influence (Jenny, 2003:10).

The activities of international cartels have had serious dampening effects on development in these countries, given the high dependence on imports, not only of consumer goods, but also of producer goods. For instance, the Trinidad and Tobago economy is heavily dependent on the oil and natural gas revenues, and heavy industries that rely on a competitive price for energy through the piping of natural gas directly to the industrial site. The major economic activities centre around the petroleum and petro-chemical industries, involving drilling and piping oil and natural gas, and a mini steel mill is one of the successful heavy industries, together with production of methanol, urea and ammonia. The Seamless Steel Tubes Cartel[12], which operated from 1990 to 1995, would have impacted on profit margins in the oil and natural gas sector. The Graphite Electrodes Cartel increased prices paid by the mini steel mill for graphite electrodes[13] by 50 per cent more than the market price. The activities of the Vitamin Cartel were worldwide, according to the US Federal Trade Commission (FTC), and therefore all vitamin imports into the CARICOM region that were included under the cartel arrangement

would have been overpriced. It is clear, then, that for developing countries, there is urgent need for deeper levels of cooperation not just amongst themselves, but, more importantly, between themselves and industrialized countries.

1.4 Special provisions needed for small economies

Given both the high level of maturity required for participating in deeper cooperation levels and the obligations involved in such agreements, what special cooperation provisions would enhance the ability of CARICOM small economies to comply with obligations on competition policy included in trade agreements?

The level of special provisions that are required is related to the following factors:

- The relative level of maturity of the competition authorities as between the contracting parties
- The capacity of the competition authority in terms of technical resources
- The extent of the obligations undertaken in the trade/cooperation agreement
- The level of openness of the economy and hence, exposure to anti-competitive conduct originating outside of the domestic market
- The dependence on imports and FDI increases the vulnerability of these small economies to the pernicious activities of international cartels.
- The ability of the government/competition authority to successfully investigate and enforce laws in the case of multinational firms located in the domestic market and international cartels.
- Factors that would impact on the ability of the country to negotiate cooperation provisions are the maturity of its institutions, the extent of the convergence of the laws of the parties and the track record of enforcement of the law.

The small open economies of CARICOM need a high level of cooperation with their major trading partners, such as the United States, Canada and Europe, because they are very vulnerable to the actions of international cartels involving firms from these countries.

However, the legislative and institutional framework is still too new to deal with anti-competitive conduct or has still to be put in place in most CARICOM countries and technical officers need to be trained to conduct investigations. Further, OECD countries may have little to gain from such cooperation, and may be uncomfortable sharing sensitive or confidential information with authorities that do not have a proven track record of enforcement and demonstrated respect for confidentiality of information. While the Barbadian and Jamaican FTCs are gradually developing such a track record and maintain a high standard of enforcement, they are as yet very young. This is not to detract from the high level of cooperation in technical assistance provided by OECD countries, including training workshops and seminars/conferences, such as the Latin American Forum held in Madrid in July 2005.

1.5 Cooperation with developed countries varies substantially

The Canada-Costa Rica Free Trade Agreement (FTA) includes fairly substantial cooperation provisions, and this is a welcomed development. This may have resulted from Costa Rica's demonstrated commitment to enforcement of competition law and the progress made in developing its competition regime. Nevertheless, the provisions of the agreement have not as yet been incorporated into domestic law through legislation, and are therefore not fully implemented or enforced. This demonstrates that even when more substantial provisions are agreed upon, it is the implementation that proves the usefulness of the agreement. Bilateral negotiations of an FTA between Canada and CARICOM is scheduled to begin in late 2005, and no doubt, there will be a competition provision in the agreement because Canada has in the past been a major proponent of a strong competition chapter in the FTAA. However, one does not expect a replication of the Canada-Costa Rica provisions in the forthcoming Canada-CARICOM FTA because of the undeveloped state of competition policy in CARICOM countries.

There are many constraints to strong cooperation even amongst homogenous competition regimes in the OECD countries (to the extent that there is compatibility in terms of core competition

principles, prohibitions, and enforcement of the law). Stronger cooperation provisions may be found in bilateral cooperation agreements between competition authorities that are at equivalent levels of maturity and with homogenous laws. However, there is some evidence that mature competition authorities are reluctant to enter cooperation agreements with weak, new authorities, and particularly deep commitments in cooperation agreements on enforcement. This was evident in discussions in the WTO Working Group on Trade and Competition Policy (WGTCP) in which OECD countries were insisting on limiting cooperation to sharing of public information. It may be that a consideration would be the level of trade with the country and the extent to which its domestic firms are capable of engaging in anti-competitive conduct that could block market access or affect the domestic market of the industrialized country. In the case of CARICOM countries, no domestic firm is capable of affecting markets in the industrialized countries in any significant way.

Hence, while the theory would suggest that small open economies may have trouble securing cooperation provisions in enforcement of the law amongst OECD competition authorities, they should nevertheless argue for deeper cooperation/ assistance in investigating MNCs. There is a power asymmetry that renders governments in small economies powerless to discipline these corporations that may be influential in such economies. Despite the unlikelihood of success, trade-offs in negotiations may arise that may allow some leeway directed specifically at small economies, or CARICOM economies.

For instance, small economies may ask for assistance in investigating and prosecuting firms that participate in international cartels whose activities harm their economies, and which have been investigated and punished by the industrialized countries, for instance, the Vitamin Cartel. In many instances, the US Federal Trade Commission (FTC)/Department of Justice (DOJ) or the European Commission Directorate General (DG) Competition have information and evidence of cartel activity affecting developing economies, but cannot share them because of domestic laws restricting the disclosure of information. Such is the case with the Vitamin Cartel and the Shipping Cartel investigated by the EC DG Competition. Indeed, Brazil tried for years to sanction members of the Vitamin Cartel for operating within their borders, but was unable to get any information from the US FTC because of confidentiality rules.

Even so, sharing the information and evidence may not be sufficient for small economies to proceed with enforcement of the law against MNCs because of power asymmetry. The clout of the US FTC/DOJ or DG Competition is needed and if they act as a protector of these economies against international cartels, which are already under investigation, by incorporating them under the umbrella of prohibitions for the cartels, they would be contributing considerably to the development of these small economies, given the extent to which cartel activities adversely affect developing economies.[14] Moreover, a special provision may be that reciprocity may not be a requirement, since small economies hardly have the human resource capacity to respond to even simple information exchange. Small economies need deeper cooperation with the more mature competition authorities to pursue investigation and sanctioning of international cartels, but at times this may be unlikely if the interests of the developed countries and the rules of competition enforcement in those countries diverge from the small economy's interests.

What small economies can receive in cooperation agreements and which they also need very much is technical assistance in various forms. Examples can be activities such as internships or posting of staff from more mature agencies in new agencies in small economies to provide guidance and assistance in investigations. At present, there are no trained personnel to staff competition agencies or even the Community Competition Commission, which is due to be constituted by June 2006. Training of the human resources to implement and enforce the competition regime is absolutely essential at this point. The expertise of the experienced staff could make a substantial contribution to the maturing of the competition commissions in these countries.

Education of consumers, the business sector, the regulators, judges, lawyers, the press, non-governmental organizations and other stakeholders is sorely needed. At present, there is a total lack of a competition culture in CARICOM countries, with the exception of Jamaica where they have had 12 years to build a sense of competition discipline in the private sector. Interviews carried out by the author in 2003 in six CARICOM countries[15] showed that, apart from Jamaica, there was a lack of understanding on the part of the private sector of even the basics of competition law and what is anti-competitive conduct. Indeed, trade associations fix prices with impunity, because

there is no sense of wrongdoing. And, since there is no legislation, then there is no illegality; so fixed prices are published in the newspapers (for example, the price fixing of the Baker's Association in 2003). Therefore, the most critical task needed in CARICOM countries is education in the benefits to be derived by consumers and producers of abiding by the rules of competition.

The University of the West Indies does not at this point offer a course in Competition Law and Policy. This is one area of urgent need so that long-term training and training of trainers can be offered within the region on a sustainable basis.

In the next section, cooperation provisions found in FTAs entered into by CARICOM are examined for special treatment based on the constraints faced by small economies.

2. Competition cooperation provisions in CARICOM signed agreements

In the case of the *Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy*, the level of cooperation on competition is deep. This is not the case with the other trade agreements signed by CARICOM, however. The CARICOM-Venezuela and CARICOM-Colombia Trade Agreements[16] were the first ones to be signed in July 1991 and July 1994, respectively. At that time, competition policy was not on the international trade agenda. It became part of the WTO agenda in 1996 at the Singapore Ministerial. Neither was the CARICOM's competition regime developed until later in the decade. It is therefore understandable that there is no mention of anti-competitive business conduct in these two FTAs.

The CARICOM-Dominican Republic FTA[17] was signed in August 1998, and by then CARICOM countries were negotiating the Revised Treaty of Chaguaramas by which the CARICOM Single Market and Economy was to be created. Protocol Eight of the Draft Revised Treaty provided for the Community Competition Regime, its object being to ensure that the benefits to be derived from governmental removal of barriers to market entry are not compromised because of anti-competitive conduct by the private sector. This Treaty was signed by

Heads of Governments in 2001, and Protocol Eight became Chapter 8 of the Revised Treaty. Another development which sensitized CARICOM governments and other governments in Latin America to the need to proscribe anti-competitive conduct as part of FTAs was the fact that the hemispheric Working Group on Competition Policy had been meeting for several years, and had done considerable work in preparation for the start of negotiations of the FTAA Agreement. Negotiation of this agreement started in September 1998. Therefore, the Free Trade Agreements (FTAs) signed from 1998 onwards all contain provisions on competition policy. These are CARICOM-Dominican Republic, CARICOM-Cuba[18] and CARICOM-Costa Rica.[19]

Provisions in these agreements related to competition are very brief and little is said about cooperation. The Draft Chapter on Competition Policy in the FTAA offers far greater depth than any other trade agreement. However, negotiations are at an impasse and there are no positive indications that they will resume soon, or even at all. At the time that negotiations halted, most of the text was still bracketed. Given the current impasse and the change of heart of many countries in terms of the level of commitment they are willing to adopt, it is doubtful whether the more advanced and challenging provisions will be adopted, at least generally. If there is a plurilateral agreement alongside a multilateral one, then there are possibilities that there would be deeper obligations undertaken by a few countries.

Yet, it is important to examine the draft text if only because it reflects the ambitions of the various parties to the negotiations. It represents five years of negotiations, and is reflective of the views held by countries in this hemisphere. It provides insights into the kinds of provisions that the smaller and weaker economies wanted in the cooperation section of the chapter.

2.1 Cooperation provisions in the Revised Treaty of Chaguaramas (2001)

Chapter 8 of the Revised Treaty of Chaguaramas establishes a competition regime for CARICOM, providing detailed guidance on the provisions to be adopted, the institutional framework that must be set up and the modalities for implementation. The regime is designed to deal with domestic and cross-border anti-competitive

conduct within the CARICOM Single Market and Economy (CSME).[20] It provides for the establishment of a Community Competition Commission to oversee the enforcement of the competition regime at Community level (similar to the EC DG Competition's role in the European Union), and requires each Member State of the CSME to legislate and implement competition law at domestic level, to set up a national competition authority, and to cooperate with each other and with the Community Competition Commission in implementing the Community Competition Policy. The Caribbean Court of Justice is the Court of Appeal against decisions made by the Community Competition Commission.

Provisions on cooperation in Chapter 8 of the Revised Treaty include the following. Article 170(3) outlines the obligations of Member States:

> Every Member State shall require its national competition authority to:
> (a) cooperate with the Commission in achieving compliance with the rules of competition;
> (b) investigate any allegations of anticompetitive business conduct referred to the authority by the Commission or another Member State;
> (c) cooperate with other national competition authorities in the detection and prevention of anticompetitive business conduct, and the exchange of information relating to such conduct.

Article 173(2) outlines the functions of the Community Competition Commission, which include:

> (e) co-operation with competent authorities in the Member States;
> (f) providing support to the Member States in promoting and protecting consumer welfare;
> (g) facilitating the exchange of relevant information and expertise;
> (h) developing and disseminating information about competition policy, and consumer protection policy.

Obligations on the level of cooperation within CARICOM, mandated by the Revised Treaty, are very high. A National Authority must assume responsibility for investigating anti-competitive behaviour in its territory which affects another Member's territory within the CSME, this being the highest possible level of cooperation

on cross-border effects of anti-competitive behaviour. The National Competition Authorities must also cooperate with the Community Competition Commission in its investigation of cross-border anti-competitive conducts. At this point (August 2005), there are only two countries in the Community that have competition legislation, have established Fair Trading Commissions, and are enforcing the law. These are Jamaica (1993) and Barbados (2002). All other countries in CARICOM are in the process of establishing the required regime.

While there are no special provisions in Chapter 8 directly linking cooperation mechanisms to small size, there are provisions in the Revised Treaty which grant special and differential treatment for disadvantaged economies, sectors and industries and for the LDCs within CARICOM (note once again, LDCs refer to the Less-Developed Countries within the regional grouping, not Least-Developed Countries as designated by the UN).

Article 157(1) provides for disadvantaged countries, regions and sectors to be provided with technical and financial assistance as may be required to allow them to participate effectively in the CSME and to administer international trade agreements. The Council on Trade and Economic Development (COTED) of CARICOM is mandated to evaluate the need for technical and financial assistance to disadvantaged countries, regions and sectors (Paragraph 2).

According to Paragraph 3 of Article 51, such technical and financial assistance may include

> (c) professional assistance in meeting obligations under trade-related agreements
> (d) assistance to establish institutions or centres for the training or retraining of employees as the case may require;
> (e) provision of relevant expertise to formulate a legal policy framework conducive to fair trading and fair competition

One can therefore surmise from this that there would be special consideration in the form of technical assistance given to CARICOM's LDCs as they proceed with establishing and enforcing their competition regime. Such considerations could include assistance in developing the law and setting up the institutional framework for implementation and enforcement of competition law. Such technical assistance would more likely come from the Jamaican Fair Trading

Commission and, to a lesser extent, the Barbados Fair Trading Commission since, apart from those Commissions, there is no other source of knowledge in the region. Given the depth of cooperation envisaged within the CSME, the existing framework may be sufficient.

However, there is little capacity within the OECS countries to enforce competition law. There has been some discussion on the possibility of establishing a subregional competition commission to service the OECS countries, with links to each country through a competition desk in the ministry responsible for trade. Even so, the problem of jurisdiction will need to be addressed by giving the Subregional Commission legal authority to investigate the markets of the OECS.

Another question that has not been dealt with by the Treaty is the response to requests for information from another competition authority in a Member State. Given the short supply of technical persons in the relevant ministries, the lack of skills in the area of competition policy and the sense of overwhelm experienced by most technical officers while they try to cope with portfolios that should be handled by a team of people rather than by one individual, one can anticipate that there could be long delays in responses to requests for information. This could prove to be not only frustrating, but could reduce the credibility of the system when issues and cases are not dealt with expeditiously. Cooperation between competition authorities could therefore be hindered by limitations in the LDCs to respond to requests, and measures need to be adopted to address the problems that could be encountered.

2.2 Competition provisions in FTAs

Competition provisions in the FTAs in which CARICOM participates are limited to commitments to develop and enforce competition law. Little is said about cooperation.

2.2.1 CARICOM-Dominican Republic FTA (August 1998)

Article XI deals with anti-competitive business practices.

> The Parties will seek to discourage anticompetitive business practices in the Free Trade Area and work towards the adoption of common provisions to prevent such practices.

> (2)The Parties will undertake to establish mechanisms aimed at facilitating and promoting competition policy provisions and ensuring their application among and within the Parties.

There is provision in Article XIV for Standing Committees to be set up, operating under the guidance of the Council. Art. XIV (viii) provides for a Committee on Anti-competitive Business Practices. The Committee's functions include

> Art. XIV (2)
> (iii) consult on issues of mutual concern relating to its subject area which arise in international fora;
> (iv) facilitate information exchange among the Parties;
> (v) create working groups or convene expert panels on topics of mutual interest relating to its subject area;

These provisions apply to all the committees, not just competition.

Further, Article VI says that

> Nothing in this Agreement shall require any Party to provide confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

Interestingly, at the time this Agreement was signed, the Dominican Republic did not have competition legislation and only Jamaica in CARICOM had a law and an authority. Seven years later, the same situation exists, except that Barbados passed its law in January 2003, having established its authority earlier.

No significant progress has been achieved in moving forward the implementation of the agreement during the last four years and, with the exception of the Joint Council, the only committee that has been established to date has been the Committee on Rules of Origin. No other Standing Committees have been constituted. However, at the recently concluded (August 2005) 3rd meeting of the Joint Council, it was agreed that the other Standing Committees will be constituted and a meeting is scheduled for late October. The parties re-affirmed that they are committed to the process.

2.2.2 CARICOM-Cuba FTA (2000)

The FTA aims to strengthen commercial and economic relations between the parties through free market access for goods, services and investment, and elimination of non-tariff barriers to trade. The scope of the coverage of the FTA Agreement is substantial, including, among others, provisions on rules of origin, technical standards, business facilitation, trade financing, tourism, investment, intellectual property rights, transportation and unfair trade practices (subsidies and dumping. It contains, as part of its objective

> (ix) the discouragement of anticompetitive business practices between the parties
> Article 23 states that
> a. The Parties will discourage anticompetitive business practices and work towards the adoption of common provisions to prevent such practices.
> b. The Parties will undertake to establish measures and mechanisms to facilitate and promote competition policy and ensure their application between the Parties.

It contains no specific provisions on cooperation modalities. Cuba is at the early stages of liberalizing its economy, and much of its trade was controlled by the State at the time this Agreement was negotiated. Progress in implementation of the Agreement has been very slow, and CARICOM manufacturers, particularly those in Trinidad and Tobago, have had problems accessing the Cuban market. A decision has been made to establish a Trade Facilitation Company in Cuba to iron out the problems faced by those trying to access the market.

2.2.3 CARICOM-Costa Rica FTA (2004)

The CARICOM-Costa Rica FTA includes soft provisions on competition policy. Interestingly, despite the fact that the Canada-Costa Rica cooperation provisions in their FTA are touted as a model for future agreements, this was not replicated in the FTA with CARICOM, which was negotiated after the Canada-Costa Rica FTA was signed.

Article XIV.01 requires that

> 1. The Parties shall seek to make progress towards the adoption of common provisions to prevent the benefits under this Agreement from being undermined by anticompetitive activities.

> 2. Likewise, the Parties shall make an effort to establish mechanisms to facilitate and promote the development of competition policy and to guarantee the application of regulations on free competition in and between the parties in the free trade area.

There are no specific provisions regarding cooperation.

Article XIV states that within a period of two (2) years of the date of entry into force of this Agreement, the Parties shall analyse the developments regarding paragraphs 1 and 2 of Article XIV.01 and shall consider adopting disciplines in this Chapter.

As stated earlier, the competition regime in CARICOM is too undeveloped to expect more than provisions encouraging its implementation.

The CARICOM-Costa Rica agreement is still not implemented. The Agreement requires simultaneous passage of legislation so when the two countries exchange instruments, the Agreement will be fully implemented. Trinidad and Tobago's bill has been processed to the stage of requiring only the signature of the President. However, Costa Rica has been slower, and the bill is still to be presented to Parliament, though it is supposed to be the first item on the agenda when Parliament resumes work (August 2005).

2.3 FTAA cooperation provisions

Although there has been an impasse in the negotiation of the FTAA Agreement, partially linked to WTO negotiations, there is still merit to examining the provisions on cooperation in the draft chapter on Competition Policy (FTAA.TNC/w/133/Rev 3 Nov. 21, 2003). Even if negotiations never resume, they represent the interests, positions and aspirations of the countries in the hemisphere with respect to the cooperation on competition law enforcement. While most of the text was still bracketed at the time of the cessation of negotiations, the debate and reflection that took place in that group to forge the chapter to this point reflect a remarkable level of cooperation amongst technical staff of competition authorities and trade ministries in the hemisphere.

It should be noted that at the Miami Ministerial in November 2003, there was agreement that different levels of ambitions would be accommodated by having two-tiered negotiations, one for those countries willing to undertake deeper obligations, and another for those that want a minimum of obligations. Therefore, should negotiations resume, one could expect two different Agreements resulting from the negotiations.

The draft chapter provides for technical assistance and this article is not bracketed, thus reflecting consensus in the group that such assistance should be provided:

> Article 16. Technical Assistance
>
> 16.1. The Parties agree that it is in their interest to work together on technical assistance activities related to the development, adoption, implementation, and enforcement of competition laws and policies, including by sharing expertise and information, training officials, sending experts to participate in events related to competition issues, and exchanging personnel, when appropriate.

Consensus was arrived at that there should be cooperation in investigating and taking appropriate action where there is evidence to indicate that anti-competitive business conduct is occurring. Bracketed text contains provisions on notification, exchange of information, consultation, positive and negative comity, and joint investigations.

> Article 8. Mechanisms for [Cooperation] [Collaboration] and for Exchange of Information among [Competition] Authorities
>
> 8.1. Parties recognize the importance of cooperation and coordination among their authorities to further effective competition law enforcement and development of competition policies in the FTAA.
>
> 8.2. If there is evidence to indicate that anticompetitive [business] conduct [of economic agents] with cross-border impact is being carried out, the Parties will [endeavour to cooperate] [cooperate] [and promote the exchange of information,] in investigating and taking appropriate action.

> [8.3. The Parties may conduct joint investigations.]
>
> [8.4. For effective implementation of cooperative relationships, the Parties recognize the value of entering into cooperation agreements or arrangements. When developing their cooperation agreements or arrangements, the Parties agree to consider providing for notification, exchange of information, consultation, positive and negative comity and coordination in related matters.]
>
> [8.5. Each Party shall notify the affected Parties when a competition law enforcement action may affect another Party's interests.]
>
> [8.6. When a Party notifies another Party about a competition law enforcement action that may affect its interests, the notified Party shall provide detailed information about the action in question.]
>
> [8.7. A Party may request another Party to take appropriate action when there are indications that anticompetitive [business] conduct [of economic agents] is being carried out contrary to the competition law in the territory of the requested Party and that such conduct negatively affects the interests of the requesting Party. Nothing in this article limits the discretion of the requested Party's competition authority under its competition laws and enforcement policies as to whether to undertake enforcement activities with respect to the anticompetitive activities identified in a request.]

There are very deep levels of cooperation proposed, but most are bracketed. Given that there may be two-tiered negotiations if there is a resumption of negotiations, then it is possible that those countries that would opt for the higher level of commitment in a plurilateral agreement would also arrive at consensus on those provisions that offer deeper levels of cooperation.

The draft text also includes provisions for the establishment of a Committee on Competition with powers to, amongst other functions outlined in Article 12.1.1,

- Promote cooperation among the Parties and subregional entities on [competition] issues arising under this chapter. (Article 12.1.1(b))

- Assist in coordinating technical assistance (Article 12.1.1(c)
- [Establish procedures for making and distributing to the Parties any notifications made in accordance with this Chapter.] (Article 12.1.1(d).

Therefore, not only is there consensus to provide technical assistance, but also for developing institutional mechanisms for ensuring that such technical assistance is coordinated and therefore delivered.

It should be noted that the very process of negotiation of the chapter led to the technical staff of competition authorities getting to know each other and a phenomenal increase in informal cooperation amongst competition authorities within the hemisphere. That is a very positive development in cooperation on competition that has been achieved, irrespective of the impasse in the negotiations.

2.4 Informal cooperation: the Barbados and Jamaica experience

2.4.1 The Barbados Fair Trading Commission

Barbados has no formal cooperation agreements with other competition agencies. All assistance has been given on the basis of informal arrangements. Barbados received technical assistance from the Australian Competition and Consumer Commission (ACCC) in the form of an attachment of one of their officer's to the Fair Competition (FC) Division for a period of 3 months. The ACCC officer assisted in the development of systems and procedures to be used by the FC Division. This attachment was found to be very useful and instructive as it formed an important component of the training and development of the necessary competencies of officers in the FC Division.

There was a view that informal cooperation agreements are most useful when there might be a matter of urgency regarding which advice may be sought to assist in the execution of an investigation or just a quick query on how to obtain information to assist in an investigation. An informal contact can provide unofficial advice

quickly, which may not be the case when the request has to go through formal channels. Getting a formal response may sometimes be time consuming.

However, it was felt that there is an advantage to formalizing these arrangements because the informal link to a contact person used most frequently may not always be available and one would wish urgent matters to be given some priority. In an informal setting, priority requests may not always be treated with the urgency that is necessary.

It was suggested that formal agreements should enshrine some given time frame to respond to an information request from new competition agencies based on a request's assigned level of priority which had been previously mutually agreed. For example, a Priority 1 request could be answered in 1-3 working days, Priority 2 in 4-7 working days, and Priority 3 in 7-14 working days.[21]

2.4.2 The Jamaican Fair Trade Commission

The Jamaican FTC has no formal cooperation agreement with any other competition agency. However, there is 'networking' with individuals in more mature authorities, such as the US FTC, some of whom are extremely helpful and accommodating of their queries. The FTC staff has had help with case law on a number of issues - largely consumer related.

The FTC received a request from the US DOJ in late 2004 to assist with information in respect of the remittance sector, and they made a considerable effort to comply with the request. The DOJ was investigating Western Union. They forwarded a substantial amount of information about the local remittance sector. By all indications it was considered to be very useful.

It was felt by staff of the Jamaican FTC that the most important form of cooperation that they need from more mature authorities at this stage of their development is the sharing of expertise with staff, such as establishing some internship or exchange programme whereby experts from mature agencies could spend some time with them, dealing with specific cases and issues. This kind of sharing

will necessarily import sharing of information, generally - about approaches to dealing with similar cases, on how firms operate in different regulatory environments. Of course confidentiality issues would have to be critically evaluated and appropriate provisions put in place to address the relevant issues. There was also the view that an agency such as theirs could also benefit greatly from assistance with drafting procedural rules and regulations.

Cooperation between Barbados and Jamaica is developing, and the Barbadian FTC said that the most informal cooperation and assistance they have received have been from the Jamaican FTC. There is potential for future cooperation on, for instance, how to proceed with investigating anti-competitive conduct, where the perpetrator operates in both jurisdictions. The Jamaican competition law does not address mergers and acquisitions and so the Jamaican FTC is observing with keen interest what is happening with mergers regulation in Barbados so that they could be made aware of market concentration in the various sectors.[22]

3. Conclusions

This Chapter argues that while CARICOM countries may need high levels of cooperation, particularly with competition authorities in the United States and Europe, from whence most of their imports come, the reality is that it is unlikely that such cooperation would be available, given that their competition regimes are not sufficiently developed to meet the prerequisites for deeper levels of cooperation. However, this does not preclude the possibility of developing new modalities of cooperation designed specifically for small economies to address the problem of their ability to investigate and discipline international cartels, which adversely affect their domestic markets and further limit their development potential.

The findings of the research showed that CARICOM has no cooperation agreement of substance with third parties, and this is because, until CARICOM countries legislate prohibiting anti-competitive practices and develop institutions to enforce the law, there is no basis for cooperation on competition issues. While Barbados and Jamaica have laws that are enforced, these agencies

are as yet too young to qualify for deeper levels of cooperation. However, they have been beneficiaries of very useful informal cooperation with mature agencies. The process of negotiating the draft chapter on competition policy in the FTAA in itself generated high levels of informal cooperation amongst competition authorities within the Western Hemisphere, and shows that a regional or international committee on competition policy, as proposed in the WTO WGTCP, has great potential for generating informal cooperation and providing technical assistance in the form of substantive discussions on competition enforcement issues that would benefit young competition authorities.

For CARICOM countries, the most important type of cooperation at this stage, being realistic as to what is possible, is for very deep levels of technical assistance to train staff in investigating cases through internships and placing staff from more mature authorities for several months with a young authority to guide the staff in investigation and institution building.

More specifically, the following are needed:

1. Training of lawyers in drafting skills.
2. Scrutiny of draft competition law by competent experts with experience in implementation of competition law in mature regimes, to identify loopholes in the law and possible implementation problems.
3. Short-term and long-term training of technical/professional staff to serve in Competition Commissions and to service the private sector:
    a. Seminars and workshops of varying levels of complexity targeting government technocrats, the business sector, the policy, journalists and consumers
    b. More detailed and intensive training sessions for potential staff of competition authorities, judges, and lawyers
    c. Scholarships for legal training in competition law from recognized universities
    d. Developed internal capacity to offer training on a sustainable basis by enhancing the capacity of the University of the West Indies to offer training programs in competition law and policy. This would require assistance from international experts since the expertise just is not present in the region. Apart from the lack of faculty involved in research

on competition policy, there is no faculty with experience in enforcement of competition law, and few in the region (Jamaica and Barbados) with such experience. Most of the cases dealt with by the Jamaican and Barbadian FTCs are consumer protection cases, rather than antitrust.

4. Technical and financial assistance in institution building.

Urgent attention to technical assistance in CARICOM is needed, since these countries are attempting to set up competition regimes now, but are doing so with a dearth of human and financial resources.

NOTES

[1]CARICOM consists of Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat (still a colony of the UK), St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago. (While Haiti is part of CARICOM, it is not active within the regional grouping because of its chronic instability and problems. After Aristide was deposed in 2004, CARICOM Heads of States refused to recognize the new government and diplomatic relations were severed.)

[2]For example, Gal (2003).

[3]The Organization of Eastern Caribbean States (OECS) consists of seven states: Antigua and Barbuda, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines.

[4]Central Intelligence Agency (2000).

[5]While Haiti's population is much larger than the rest of CARICOM, it is not considered significant here because there is little purchasing power in the country and limited economic activity.

[6]The Caribbean Regional Negotiating Machinery (RNM) was created by the Caribbean Community (CARICOM) Governments to develop, coordinate and execute an overall negotiating strategy for various external trade negotiations in which the Region is involved. The RNM is responsible for developing and maintaining a cohesive and effective framework for the coordination and management of the Caribbean Region's negotiating resources and expertise.

[7]Interviews conducted by the author in June 2005 with trade technocrats in OECS countries.

[8]Stewart (2004).

[9]Discussion in the FTAA Negotiating Group on Competition Policies (NGCP) August 2003.

[10]For an exhaustive analysis of these forms of cooperation, please refer to Chapter 6 of this publication co-authored by Rosenberg and Tavares de Araujo. Also see UNCTAD (2002b).

[11]The US FTC charged the US participants early in the cartel's life and forced their withdrawal from the cartel.

[12]Tubes, pipes and casings (Oil Country Tubular Goods (OCTG) used in the transmission of oil and gas from wells.

[13]Used in mini steel mills to generate the enormous heat necessary to melt scrap metal and convert it back to marketable steel product. There is no substitute input.

[14]See the work of Evenett et al. (2001).

[15]Belize, The Bahamas, Jamaica, St. Lucia, St. Vincent and the Grenadines and Trinidad and Tobago. The findings of this empirical study are published in Stewart (2004).

[16]Agreement between the Caribbean Community (CARICOM) and the Government of the Republic of Venezuela on Trade and Investment, July 1991. Agreement on Trade, Economic and Technical Cooperation between the Caribbean Community (CARICOM) and the Government of the Republic of Colombia, July 1994.

[17]Agreement Establishing the Free Trade Area between the Caribbean Community and the Dominican Republic, August 1998.

[18]Trade and Economic Cooperation Agreement between the Caribbean Community (CARICOM) and the Government of the Republic of Cuba, July 2000.

[19]Agreement between the Caribbean Community (CARICOM) acting on behalf of the Governments of Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago and the Government of the Republic of Costa Rica (Establishment of a Free Trade Area), April 2004. The Bahamas, Haiti and Montserrat are not signatories because they are not part of the CSME.

[20]The CSME represents a deepening of the CARICOM integration process into a single market and eventually, a single economy. All members of CARICOM except the Bahamas and Haiti are members of the CSME

[21]Interview with Mr Barry Headley, Chief Economist in the Barbados Fair Trading Commission.

[22]Interview with Ms Barbara Lee, CEO of the Jamaican Fair Trading Commission.

11

Allocation of competences between national and regional competition authorities: the case of COMESA

GEORGE K LIPIMILE
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1. Introduction

Framing the Issue

As the regional economy integrates more deeply, the necessity for appropriate policy instruments and tools is becoming increasingly urgent and, in this regard, a competition policy is important to ensure observance of good corporate governance and promoting equitable and harmonious economic development.

Erastus Mwencha, Secretary General, COMESA:
Ministerial Roundtable, Cairo Egypt, 2004

The Common Market for Eastern and Southern Africa (COMESA) launched a Free Trade Area (FTA) on 31 October 2000 and plans to become a customs union in the near future. The absence of tariff and non-tariff barriers in the FTA has enhanced and made competition stiffer. However, in order to ensure fair competition

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and transparency among economic operators in the region, COMESA has formulated regional competition regulations. The regulations are consistent with internationally accepted practices and principles of competition, especially the United Nations Set of Principles and Rules on Competition developed by UNCTAD in 1980. Alongside these regional regulations, national competition laws continue to be developed or improved and brought in line with the global trends and developments as COMESA deepens its regional integration. They are also being improved to ensure consistency in regional policies, to avoid contradictions and to provide a regionally predictable environment.

While enhancing fair business practices, the regional competition regulations, are aimed at achieving the following:

> i) to promote fair competition aimed at boosting regional trade and investment; and
> ii) to ensure the maximization of consumer welfare in the COMESA region through an effective regional competition framework.

The competition regulations are intended to enhance COMESA's rules-based trading system by promoting economic efficiency, predictability of the trading regime, good corporate governance and fairness among economic operators and consumers.

National economic developments arising partly from privatization, dismantling of public sector monopolies and liberalization of foreign investment and trade economic liberalization programmes in general, have led to a concentration of economic power among a few business operators. This continues to cause concern both at national and regional levels, and the need for a regional framework to address possible anti-competitive trends, including abuse of dominance and cartel behaviour, is becoming increasingly urgent. And so, the regional competition regulations should contribute to adoption, improvement and effective implementation of competition policies by Member States as an integral part of their economic reforms at national and regional levels.

For COMESA to achieve the aforementioned benefits of competition, there should not only be a law with attendant regulations, but there should be established (pursuant to specified

provisions of that law) a commensurate adjudicative entity to enforce it. For reasons, which this chapter hopes to make clear, the law and regulations should be drafted with some degree of specificity in order to give guidance to those who would be its ultimate arbiters.

This approach departs from the historical norm, namely, the use of broad, sweeping language within a text of short duration. The recommended deviation in this area is promoted by an inarguable reality; competition/antitrust philosophy is a relatively new phenomenon in this and other development regions. Therefore, in setting up a competition regime, COMESA should not only draw on a home-grown pool of expertise but also on comparative experience.

The regulations will also specifically address consumer protection. This marks a departure from regional competition arrangements including the European Union. Consumer protection should not be thought of as simply providing safeguards to consumers. Good consumer protection also provides benefits to all traders through encouraging consumer transactions and more particularly to ethical traders who, in the absence of effective regulation, unfairly lose business to unscrupulous traders in situations where consumers cannot distinguish between the two until after the transaction.

It is submitted that the proposed legislation will certainly keep faith with established precepts of competition jurisprudence. However, the particular needs and history of the economics of the Member States have been taken into account to ensure that this new law is appropriately relevant to the present and future demands of the Region.

1.1 Allocation of competences

In regional trade agreements all over the world, whether the European Union (EU), the North American Free Trade Agreement (NAFTA), the Southern Africa Development Community (SADC), the Union Economique et Monétaire Ouest Africaine (UEMOA/WEMU), the Caribbean Community and Common Market (CARICOM) or the Common Market for Eastern and Southern Africa (COMESA), the

issue of the division of competences between the members and the umbrella body is always central. As Ulrike Guèrot[1] points out, the loss of power of the governments of the European Union Member States to the European body is an issue that the Member States would have to deal with. He further argues that due to the extended membership of the European Union, the sovereignty of states and the competences being exercised from various levels of the Union will become even more controversial. COMESA would have to deal with such complexities not only in the area of competition, but in other areas of trade too. Some members may feel that their needs are not being fully taken care of by the regional body. Others may want to argue for exemptions from the application of competition regulations, especially where such exemptions are granted under national laws. Vilenas Vadapalas[2] further puts forward the point that accession to the EU for Lithuania would 'inevitably mean a transfer of sovereign powers (competences) of the state to the communities and the Union'. COMESA will also have to deal with the need to protect Member States autonomy and their identity while at the same time upholding the common goals and aspirations under the common market treaty in general and competition regulations in particular. Since COMESA is now a customs union and is preparing to become a common market by 2008, at the latest, with the advent of competition regulations, Member States without a competition law in the region would have to enact one in the context of the regional law and in a situation where free movement of goods, services and persons may have made it vulnerable to anti-competitive practices. Undoubtedly, the transfer of sovereignty to COMESA also implies that Member States do exercise sovereign powers together in common market matters. This will largely depend on the industrial structures of each Member State and the current economic status.

COMESA is dealing with a situation where Member States have undergone structural adjustment programs of liberalization and privatization without having competition laws. This is a big challenge for COMESA as a common market and for Member States at national level. One of the challenges for example being faced by the newly established Malawi Competition Commission is how it will relate to specific sector regulators, which have been in existence for some time now. Uganda had to delay its competition bill finalization to study the East African Community (EAC) and COMESA regulations for coherence.

On the allocation of competences, COMESA Member States would have to deal with more than one set of regional grouping competition rules in the future. The EAC, the SADC and the Southern Africa Customs Union (SACU) have articles on restrictive business practices, and efforts to operationalize these articles are under way. The EAC has a draft competition law, which is at an advanced stage of discussion. This will pose a challenge to Member States that belong to two of these regional bodies as far as the allocation of competences is concerned. Examples of such states are Kenya and Uganda, EAC and COMESA, Angola, Democratic Republic of Congo, Malawi, Seychelles, Tanzania, Zimbabwe, Zambia, COMESA and SADC. This overlap would have to be addressed by COMESA as well as the other regional bodies with cross-cutting members.

Though COMESA regulations are largely based on the EU Competition Law; it is important to note that for a period of 40 years, the EU has developed a body of law through case law. This EU law has been implemented by Member States' courts and has been progressively adopted by national governments in their national law. It can be argued that the EC has succeeded in bringing about convergence in national antitrust policies while at the same time European competition policies still provide for the co-existence of national and European Competition Law subject to European law supremacy.[3]

The COMESA and UEMOA (WAEMU)[4] West African Economic and Monetary Union, which also adopted competition rules in May 2002, have provided the supremacy of competition rules over national laws. However, the exercise of the supremacy can only be meaningful through a process of enforcement and coordination of the rules, and creation of trust by the national government of the regional body.

1.2 General policies underlying the COMESA competition regulations

On 17 December 2004, the COMESA Council of Ministers approved and gave effect to the COMESA Competition Regulations[5] and Rules in their Member States. This has resulted in an unprecedented process of discussions, research, consultations and

negotiations that will put into place the implementation of the competition regulations. The approval of the Regulations is seen to be consistent with the provisions of Article 55 of the COMESA Treaty, which provides for the establishment of regional competition regulations. The Competition Regulations and Rules shall seek to promote fair competition in order to boost regional trade and investment; and to ensure the maximization of consumer welfare in the COMESA region through an effective regional competition framework. It is further envisaged that the regional competition regulations shall contribute to the adoption, improvement and effective implementation of competition policies as an integral part of Member States' economic reforms at national and regional levels.

Above all, the Competition Regulations and Rules are intended to enhance COMESA's rule-based trading system by promoting economic efficiency, the predictability of the trading regime, and good corporate governance and fairness among economic operators and consumers. The competition regulations, when in force, shall represent the most effective means available to businesses, both large and small, of ensuring that the common market operates effectively and fairly. Further, it is envisaged that as COMESA moves to complete the customs union, it shall be necessary to ensure that anti-competitive practices do not engender new forms of protectionism at national level, which would only lead to diminishing the potential value of the common market. The legal framework for regional competition policy is also intended to provide a mechanism for technical cooperation among national competition authorities of Member States. This would include strengthening the exchange of information, undertaking consultations and joint operations in the enforcement of competitive laws and thwarting anti-competitive practices at bilateral, regional and multilateral levels.

1.3 Regional institutions for competition policy and law

1.3.1 COMESA

The Common Market for Eastern and Southern Africa (COMESA) is a regional integration grouping currently with nineteen African sovereign states.[6] By virtue of the COMESA Treaty, these countries have agreed to promote regional integration through trade

development and to develop their human and natural resources for the mutual benefit of the all their peoples.

1.3.2 SADC

The other regional body that contains provisions in its Treaty that favour and promote competition is the Southern African Development Community (SADC), an economic grouping of fourteen countries.[7] The primary objective of the SADC alliance is to promote economic growth and development, to alleviate poverty, to enhance the standard and quality of life of the peoples of Southern Africa, and to support the socially disadvantaged through regional integration. The competition provision under the SADC Treaty reads: 'Member States shall implement measures within the community that prohibit unfair business practices and promote competition'.

1.3.3 SACU

The third regional body of great economic importance is the Southern Africa Customs Union (SACU).[8] Its treaty contains two very important provisions that address competition in the customs union. Article 40 states: '1. Member States agree that there shall be competition policies in each Member State. 2. Member States shall cooperate with each other with respect to the enforcement of competition laws and regulations'. The treaty goes further to provide for remedies relating to unfair trading practices. Article 41 provides for unfair trading practices:

The council shall, on the advise of the commission, develop policies and instruments to address unfair trade practices between Member States.

1.3.4 CARICOM

It is also useful to mention that the ideal of having a regional competition regime has been mooted in the Caribbean Community (CARICOM).[9] The members of the Caribbean Community, with the exception of the Bahamas, have agreed to move to a deeper level of integration by forming a CARICOM Single Market and Economy (CSME) that it is hoped will be like the European Community. Protocol VIII of the CARICOM Treaty identifies the types of anti-competitive business conduct that are prohibited as follows: (i) agreements, decisions and concerted practices by firms that have as their object or effect the prevention, restriction or distortion of

competition, and (ii) abuse of a dominant position in the market. The Merger Control Regulation is not provided for in protocol VIII because it was felt that it would be inappropriate given the small size of CARICOM firms, and the intension of the integration of production processes of goods and services.

The CARICOM countries have yet to develop the legal and institutional framework for complying with the protocol and enforcement of the law.

1.3.5 EAC

Another regional body that has a direct impact on COMESA competition regulations, is the East African Community (EAC).[10] Article 75 of the EAC on the establishment of a customs union Section 1(i) specifies competition as one of the areas in which Member States needs to develop a joint protocol. The EAC has developed a draft competition law to operationalize Article 75 1(i) on competition. The draft regional competition law for the EAC Member States is at an advanced stage of enactment and has been discussed by the Council of Ministers. Two Member States of EAC are members of COMESA and the other member belongs to SADC.

2. Formation of COMESA

The history of COMESA goes back as far as 1965 when the United Nations Economic Commission for Africa (ECA) convened a ministerial meeting of the then politically independent states of Eastern and Southern Africa to consider proposals for the establishment of a mechanism for the promotion of subregional economic integration. The meeting, which was held in Lusaka, Zambia, recommended the creation of an Economic Community for Eastern and Southern African states.

Consequently, an Interim Council of Ministers, assisted by an Interim Economic Committee of officials, was subsequently set up to negotiate the treaty and initiate programmes on economic cooperation, pending the completion of negotiations on the treaty.

In 1978, at a meeting of Ministers of Trade, Finance and Planning held in Lusaka, the creation of a subregional economic community was recommended, beginning with a subregional trade area that would be gradually upgraded over a ten-year period to a common market until the community had been established. To this end, the meeting adopted the 'Lusaka Declaration of Intent and Commitment to the Establishment of a Preferential Trade Area for Eastern and Southern Africa' and created an Inter-governmental Negotiating Team on the Treaty for the establishment of the Preferential Trade Area (PTA). It was agreed at this meeting to put in place a schedule for the work of the Intergovernmental Negotiating Team.

After the preparatory work was completed, a meeting of Heads of State and Government was convened in Lusaka on 21 December 1981 at which the Treaty establishing the PTA was signed. The Treaty came into force on 30 September 1982, after it had been ratified by more than seven signatory states as provided for in Article 50 of the Treaty.

The PTA Treaty envisaged its transformation into a common market and, in conformity with this, the Treaty establishing COMESA was signed on 5 November 1993 in Kampala, Uganda, and was ratified a year later in Lilongwe, Malawi, on 8 December 1994. Hence, COMESA was established in 1994 to replace the PTA, which was established in Lusaka, Zambia in 1981, within the framework of the OAU's Lagos Plan of Action and the final Act of Lagos. The PTA at the time was established to take advantage of a larger market size, to share the region's common heritage and destiny and to allow greater social and economic cooperation, with the ultimate objective being to create an economic community. To date, COMESA remains one of the most successful regional economic cooperation and integration groups in Africa.

It is envisaged that closer economic integration of COMESA Member States shall further enlarge the market of the member countries. This enlarged market, governed by a stable, transparent and predictable framework for trade, will allow for economies of scale, will improve the level of specialization, will reduce production and transaction costs, and will, altogether, help to increase the competitiveness of the common market. This, in turn, will lead to an increase in trade flows and investment in the region, and between

the region and the rest of the world, thereby promoting their sustainable development and contributing to poverty eradication in the COMESA Member States.

2.1 The need for a regional competition policy[11]

Even before the current regional process began, it was clear that national competition authorities need to cooperate on their competition law enforcement work in order to deal effectively with restrictions on competition that have cross-border effects. Increased globalization has meant that a higher percentage of competition cases now have significant regional and international components. As trade and investment liberalization reduces entry barriers, firms may have greater incentives to engage in anti-competitive practices and mergers, which would limit market access by firms. Therefore, the need for increased regional cooperation can be achieved at different levels and under different forms. The regional competition law and policy is one such initiative.

It has become imperative for business, politicians and economic policy makers to focus on the necessary adjustments to accommodate the changing economic environments in the region. These are considerable but by no means insurmountable. The task of COMESA Member States is to provide the right environment for economic integration. This requires a range of activities from the creation of a common legislative framework to the mutual recognition of standards and qualifications. The common market competition regulations shall firmly establish one of the foundation stones of the economic integration of the region.

National economic developments arising partly from privatization, dismantling of public sector monopolies and the liberalization of foreign investment and trade, and economic liberalization programmes, in general, have, at national and regional levels, led to a concentration of economic power among a few business operators. Most COMESA Member States have continued to witness the transformation of what used to be the public sector into a hard-core private sector. This has raised concern both at national and regional levels, and the need for a regional framework to address

possible anti-competitive trends including abuse of dominance and cartel behaviour, has become increasingly urgent. The region, for example, has witnessed single dominance of foreign firms in two or more Member States. The Ilovo Sugar Company, an international conglomerate, has a single dominance presence in Swaziland, Zimbabwe, Zambia and Uganda. The likelihood of abuse by such a company is very high. It is able, through its holding company, to engage in various anti-competitive practices if not effectively monitored. And such monitoring can only be effective at regional level.

The COMESA Member States fully recognize that the benefits of market integration would be achieved only in a dynamic competitive economic environment where new market barriers are not erected in place of those that have been dismantled. Concentrations of economic power, which lead to market dominance and reduce or eliminate competition, must be dealt with at regional level. At the same time, and more importantly, legal certainty must be provided if enterprises are to be alive to the possibilities and to respond to the challenges of regional economic integration. The regulations establish conditions for free and effective competition in the common market to ensure that anti-competitive practices do not create new barriers to trade or other forms of protectionism. The competition regulations set down minimum standards and allow enterprises to penetrate the common market and to establish themselves without barriers or restrictions, thereby facilitating intra-COMESA trade and cooperation.

Creating legislation for the regional competition regulations was inevitable. The few Member States with national competition laws were quick to realize that such laws were not effective enough to deal with the anti-competitive practices, which were manifested most at regional level. This dilemma in enforcement has been fully acknowledged by all the national competition authorities in the region, namely, Kenya, Zambia and Zimbabwe.

It is incontestable that globalization of business activities has led to a large increase in competition cases with a regional or international dimension. The national competition authorities have already had to deal with cases involving regional anti-competitive activity, with the participating firms being located in two or three countries in the common market. This has been very common in the enforcement of

Box 11.1 Extract from the Zambia Competition Commission

The Commission has handled a number of cross-border cases involving players in the subregion of Southern Africa and Zimbabwe. The mergers and takeovers were in the Agro-Processing sub-sector, poultry industry, sugar refining, agrochemicals, beverages and construction and building products industries, among other sectors. International mergers and takeovers have continued to be the greatest challenge of the Zambia Competition Commission due to a lack of information on the competitive behaviour of these regional firms and the absence of cooperative arrangement within the region. Positive comity as an instrument of cooperation among competition officials is at a very informal level. The current practice of informal positive comity is not sufficient to effectively regulate the behaviour of transnational corporations in the region. There is a need for a regional framework for the regulation of the behaviour of regional firms. This framework may take the form of a Regional Cooperation protocol or a forum where matters of anti-competitive conduct and/or cross-border mergers and takeovers that are likely to be anti-competitive would be resolved. The absence of such a mechanism has made it possible for transnational corporations to enter weaker economies of regional states and wipe out competition and abuse their dominance without any action from the competition authorities. The weakness currently is that the jurisdictions of the competition authorities are domestic without any extra-territorial applications.

Source: An extract from the speech presented by Mr Ngenda Sipalo, Vice Chairman of the Zambia Competition Commission at the SADC Cooperation Forum, 21-22 November 2001, South Africa

cases involving mergers and takeovers. A large proportion of merger/ takeover investigations involve a foreign party or assets or information located abroad. Regional competition cases raise difficult challenges for competition law enforcement, which can only be effectively solved through enhanced regional cooperation. Cooperation and transparency in procedures is also essential for business, which otherwise would be subject to excessive costs arising from parallel and poorly coordinated investigations. To address the problems being encountered by the national competition authorities, the solution lies in the regional approach to the competition cases with regional coverage.

2.2 Case examples

The need for a regional competition regulation can be exemplified by the case examples presented in this chapter. These cases have one thing in common: they are of a cross-border nature and they affect at least two COMESA Member States. It can be argued that well-enforced regional competition regulations could resolve such cases in future to the benefit of all affected parties and that they would be more comprehensively tackled and resolved.

Merger control regulations for COMESA form part of Articles 16 and 18, which impose a cross-border condition. The rule applies only when the merger affects trade between Members States. The case examples presented in this chapter from the carbonated soft drinks, tobacco and cement sectors were of a cross-border nature and therefore affected one or more Member States of COMESA. This shows that the COMESA competition regulations are timely and, if effectively enforced, will be of great economic significance for the common market.

In the COMESA regional context, the problem, and its consequences, of multiple merger notification would make it imperative that merger control provisions should be incorporated into the regional competition law. The region has a number of practical examples supporting this view. For instance, the global *Coca Cola/Cadbury Schweppes* merger was reviewed in the COMESA region by the competition authorities of Zambia and Zimbabwe. The merger was notified to, and reviewed by, the two competition authorities separately, even though its effect was regional in view of the almost free trade between COMESA Member States. In the case of Zimbabwe, the merger was approved with certain conditions, which included partial divestiture and undertakings on the part of the merging parties to develop local beverage brands. In Zambia, as reported in the Annual Report 1999 of the Zambia Competition Commission, the merger was also conditionally approved but with different undertakings 'aimed at enhancing competition, including the obligation on TCCC (The Coca Cola Company) to notify its exclusive dealing arrangements, restrictive territorial allocation agreements and stop price fixing arrangements' (Box 11.2).

Box 11.2 Takeover of Cadbury Schweppes by Zambia Bottles Ltd.

Introduction and relevant background

The Coca-Cola Company (TCCC) and Cadbury Schweppes (CS) Plc signed an agreement for the purchase by TCCC of the CS commercial beverages brands and trademarks outside the United States, continental Western Europe and a few other countries. In Zambia, TCCC lodged a notification under Section 8 of the Act to acquire Cadbury Schweppes Zambia (CSZ) Limited. TCCC produces carbonated soft drinks in Zambia, while Cadbury Schweppes produced both carbonated and non-carbonated drinks, as well as clear beer (whisky black)

Major findings

TCCC had a 92 per cent market share in carbonated soft drinks in Zambia, while CSZ had 8 per cent. Their products are almost perfect substitutes. Imports of competing products are negligible and are mainly done by Kazuma Enterprises on a niche market basis, including Pesis products from Namibia. The takeover of Cadbury Schweppes brands in Zambia by TCCC was effectively eliminating competition and any possible entry into the carbonated soft drinks market in Zambia, especially since ownership and or authorized use of patents and know-how are key to substantial investments in Zambia and the Zambian operation had only been awarded a franchise to use the TCCC trademark and beverage brands.

The Zambia operation needed re-capitalization. The parties submitted that TCCC would infuse its expertises in the beverage sector and assist CSZ achieve efficiencies. Third-party concerns were raised regarding the concentration of economic power in TCCC in Zambia as well as the future of Goldsport in Ndola, which is an SME with TCCC franchise for secondary brands.

Commission decision

There existed entry barriers in the carbonated soft drinks market in Zambia, even before the notification of this transaction. In Zambia, the transaction entailed elimination of a vigorous competitor by TCCC and consolidation of TCCC market and power and likely abuse of the same in relation to distributors and retailers. However, CSZ required re-capitalization . CSZ had already sold the brands to TCCC, and CSZ did not have the franchise to produce the brands. Closure of CSZ would have had worse effects on both the social and economic spheres in the country.

The transaction was authorized with conditions, which included the following:

- TCCC was to cease operation of any exclusive dealings and territorial restraint arrangements in Zambia.
- TCCC shall not fix prices or excessively advertise the recommended price;
- TCCC and cooperating bottlers in Zambia would continue to comply with the provisions of the Competition and Fair Trading Act.

Source: Zambia Competition Commission

It should however also be noted that while the merger affected other COMESA countries, such as Uganda, the absence of merger control provisions in those countries prevented it from being notified and reviewed by the affected countries. As such, the countries could not obtain countervailing concessions on the merger's consummation as Zambia and Zimbabwe did.

It should however also be noted that while the merger affected other COMESA countries, such as Uganda, the absence of merger control provisions in those countries prevented it from being notified and reviewed by the affected countries. As such, the countries could not obtain countervailing concessions on the merger's consummation as Zambia and Zimbabwe did (Box 11.3).

The competition authorities of Zambia and Zimbabwe also separately reviewed the global Rothmans of Pall Mall/British American Tobacco merger. The Zimbabwean authority approved the transaction with conditions of both a structural (partial divestiture aimed at promoting new entry into the cigarette-making industry) and a behavioural nature (undertakings not to increase cigarette prices for a specific period of time). The Zambian authority unconditionally approved the merger since it was found that 'the concentration was likely to enhance competition as market offerings were likely to be enlarged in terms of brands' (Box 11.4).

Other notable examples include the acquisitions by Pretoria Portland Cement of South Africa and Lafarge of France of major cement companies in various COMESA Member States in Southern Africa. Even though the acquisitions had the effect of drastically changing the structure of the whole regional cement market, individual countries reviewed them separately on national rather than on regional considerations (Box 11.5).

A regional approach to the above transnational mergers could not only have avoided dissimilar outcomes on the same transactions but could have eliminated the threats and likelihood of plant relocations from one COMESA Member State to another by the merging parties. A regional competition law with merger control provisions would also ensure that the beneficial effects of merger control provisions will accrue to all COMESA countries, and not only to those few countries with such legislation. It would further assist

Box 11.3 Coca-Cola Company/Cadbury-Schweppes merger

The Coca-Cola Company (TCCC) and Cadbury Schweppes (CS) Plc signed an In December 1998 Cadbury Schweppes Plc of the United Kingdom sold to the Coca Cola Company (TCCC) of the United States of America its commercial beverage brands outside the United States, Continental Western Europe and certain other territories worldwide. In December 2000, TCCC submitted to the CC in terms of Section 35 of the Competition Act a merger application for authorization of its proposed acquisition in Zimbabwe of beverage brands owned by Cadbury Schweppes Plc.

The brands acquisition transaction was evaluated as a horizontal merger as defined in Section 2 of the Competition Act. Consultations were made with the parties and other competition authorities that had also considered the transaction in terms of their countries' competition legislation, i.e. the Australian Competition & Consumer Commission, the Zambia Competition Commission and the Competition Commission of South Africa.

The Commission identified from a consumer survey undertaken that the relevant product market was 'ready to drink' soft drinks of a carbonated and non-carbonated nature (TCCC had submitted that the relevant product was all beverages, including tea and coffee, and even bottled water). In that market, the merging parties' pre-merger market shares were 76.9 per cent (Coca Cola brands) and 12.5 per cent (Cadbury Schweppes brands) resulting in a combined post-merger market share of 89.4 per cent. It was, however, found that the proposed merger will not create a monopoly situation in the relevant markets, which is highly contestable, nor will it lessen actual competition in the soft drinks bottling and distribution industry. It was also found that the proposed merger had considerable public interest benefits in the form of generation of foreign currency from the continued export of local beverage brands such as the Mazoe brands, the creation of employment, the more efficient use of resources and the continued availability of Schweppes brands on the market.

The Commission therefore authorized the transaction subject to conditions, which included that TCCC undertake to purchase Schweppes Zimbabwe Limited as a going concern and to establish an appropriate shareholding structure (to include indigenous shareholders) to oversee the operations of the new company to be formed; that TCCC undertake to maintain the local Mazoe and Calypso brands on the Zimbabwean market and to develop them into regional brands with wider circulation; and that TCCC undertake to promote and develop Zimbabwean suppliers and supplies with respect to the raw materials necessary to produce the finished product brands.

An undertaking to the above effect was signed between the Competition Commission and TCCC on 30 May 2001.

Source: Zambia Competition Commission

Box 11.4 Rothmans of Pall Mall/British American Tobacco merger

In January 1999, British American Tobacco (BAT) Plc of the United Kingdom announced that it had reached an agreement with the shareholders of Rothmans International, Compagnie Financiere Richemont AG of Switzerland and the Rembrandt Group Limited of South Africa to merge their international tobacco businesses. Subsequent to the completion of the international merger between BAT and Rothmans International, Rothmans of Pall Mall (Zimbabwe) Limited in September 1999 applied to the Competition Commission under Section 35 of the Competition Act, 1996 for authorization to acquire the entire issued share capital of BAT Zimbabwe Limited.

The merging parties gave as one of the reasons to merge the declining market for cigarettes in Zimbabwe. It was presented that the Zimbabwean manufactured cigarette market had declined to such an extent that it was no longer big enough for the continued viability of two manufacturers as evidenced by the poor performance of BAT Zimbabwe Limited in its financial year ended 31 December 1998.

The case was evaluated as a horizontal merger as defined in Section 2 of the Competition Act. Through its investigations, the Commission noted that although the merger would result in the creation of a monopoly situation in the relevant market (i.e. the manufactured cigarette market), it had other public interest benefits. Section 32(5) of the Competition Act includes as such benefits the creation of greater economies of scale resulting in more efficient use of resources, the generation of foreign currency through exports, and the stabilization of product prices on the local market. The failing firm defence put forward by the merging parties was also considered a strong point in this connection.

The Commission therefore authorized the merger with certain conditions aimed at alleviating the adverse effects of the monopoly situation created. The conditions related to the disposal of surplus cigarette-making equipment to third parties interested in entering the Zimbabwean cigarette-making industry and constant surveillance by the Competition Commission of future cigarette price increases, with price rises needing the Commission's authorization, while the monopoly situation created remains in existence.

Source: Zambia Competition Commission

Box 11.5 The takeover of cement plants in Malawi, Tanzania and Zambia by Lafarge of France

This is the matter in which the Commonwealth Development Corporation (CDC) subsidiary, Pan African Cement Group (PAC) notified of its intention to takeover the CDC interests in Chilanga Cement PLC (Zambia), Portland Cement Company (Malawi), and Mbeya Cement Company (Tanzania). Further, an agreement was already signed by PAC/CDC to allow Lafarge of France takeover the three PAC cement companies as the majority shareholder.

Lafarge was a relatively new comer to the sub-Saharan region i.e. Eastern and Southern Africa. As of 1997, the firm had five plants in Africa located in Kenya and Cameroon. In 1998, Lafarge bought a plant in South Africa from Murray Roberts and the recent acquisition of Blue Circle Industries (BCI) in 2001 entrenched its market position. The takeover when concluded shall enhance Lafarge's position in the region as follows:

The acquired BCI regional cement plants include:

		Capacity (MT)	Market share
1.	South Africa	2.3 million	30 per cent
2.	Kenya	250,000	
3.	Uganda	120,000	
4.	Zimbabwe	350,000	

Additional to the proposed acquisition of PAC/CDC's cement plants in the region:

		Capacity (MT)	Market share
1.	Zambia	400,000	80 per cent
2.	Malawi	150,000	70 per cent
3.	Tanzania	250,000	22 per cent

Lafarge has a cement plant in the Republic of South Africa (RSA) with a capacity of 2.3 million tons and it has an excess capacity of about 600,000 tons. Lafarge has had joint venture cement operations in Kenya, Nairobi and Mombasa. Lafarge does not export any cement to the Chilanga Cement markets. This scenario changes the market position of Lafarge when one takes into account the announcement that Lafarge has taken over the British BCI. This effectively means that Lafarge is present in Zimbabwe, Kenya and Uganda. Despite this, Lafarge's facility in Zimbabwe cannot export into Zambia because its current production is all taken up by local demand. Its Uganda and Kenya plants are logistically unable to export into Zambia due to the prohibitive land-based transport costs. Its Indian ocean trading company, Cementia could sell into Zambia through a Tanzanian port. This trading wing has eight ships and eight terminals to facilitate its operations. Lafarge is well positioned to take on Zambia from the north, south and east. This is fine it if goes to enhance competition and not to eliminate it by buying off the potential competitor, Chilanga Cement.

Source: Submissions by third party to the Zambia Competition Commission during the assessment of the Lafarge takeover

those countries with limited resources to embark on full and effective merger control at regional level.

The COMESA region is ripe for active involvement in merger control given the advanced stage it has reached in integrating the economic activities of its Member States, particularly in the area of trade cooperation. Cross-border business transactions, including investment and business concentrations and alliances, are now becoming the norm in the region, thereby justifying merger control at regional level. There is therefore a great need for merger control provisions in any competition law that COMESA will adopt. The EU's 'one-stop shop' merger notification approach has a lot of merit and justifiably suitable if adapted correctly to the COMESA region's particular needs and requirements.

Mergers that raise possible competitive issues in more than one country have become commonplace in the region, as is review of a single transaction by multiple competition authorities. These transactions move independently through the various procedural stages at the national competition authorities, and the timing and processes often vary among different national competition authorities. This has raised the cost of doing business in the common market and, therefore, requires firms to understand the procedures and analysis that each competition authority will employ in its review of any anti-competitive matter. Coordination of procedures is not, however, sufficient if national laws are not designed to address market access issues that foreign firms may face. These problems can only be resolved if COMESA Member States in the region enact sound competition principles and enforce them effectively.

'Although multilateral trade liberalization and regional integration may provide significant welfare gains, there is still need for complementary regulatory and competition policies to ensure that the predicted benefits are not impaired by private anti-competitive practices'[12]. As national governments' restrictions to trade are progressively reduced, there is increased concern that the benefits of trade liberalization could be denied through anti-competitive business practices with market foreclosure effects. Anti-competitive practices are not only detrimental to the welfare of the country where they take place, but are a matter of legitimate concern to other trading partners too. For example, national players can organize themselves

into import or market-sharing cartels in order to keep new competitors from abroad out of their market. Further, exclusive distribution practices can sometimes be formidable obstacle to companies trying to gain a foothold in foreign markets. In such circumstances, the only appropriate and effective remedy lies in a policy of active competition law enforcement at regional level. Attempts to address such 'market access' cases through extraterritorial competition law enforcement can antagonize other countries. They can also prove ineffective because vital evidence is often located abroad. The regional competition regime offers the option to deal with cases of an extraterritorial nature.

The Member States of COMESA have in recent years witnessed a change of attitude towards the role of governments in a globalized economy. In line with the liberalization of trade and investment restrictions and regulatory reforms, competition laws have been introduced or reinforced in countries at different levels of development. More than five countries in COMESA have already enacted a competition law and at least 15 others are in the process of preparing competition legislation. Most of these competition laws came into effect in the last ten years. These figures suggest growing regional consensus on the need for competition law as an integral part of the domestic reforms necessary for integration in the regional economy. Most developing countries have stressed this point in the UNCTAD working group. These figures also show that competition law and policy is an issue of genuine interest by countries at all levels of development. Cooperation in the competition field should not therefore be limited to COMESA members. Indeed, competition authorities in the subregion have stressed the importance of enhancing regional coordination, including technical assistance, exchange of information and co-operation in enforcement. The regional competition framework offers an institutional framework for such cooperation.

The majority of developing countries in the absence of an effective regional competition policy will find it difficult, especially where there are no national competition laws, to stop anti-competitive behaviour by the local subsidiaries of merging multinationals in developed countries. These multinational corporations may behave competitively in Europe because of the effective competition rules but may indulge in anti-competitive practices in developing countries.

It is evident that firms can engage, and tend to engage, in cross-border anti-competitive behaviour with impunity, especially in countries that do not have domestic competition laws, and most of the Member States in the common market are particularly vulnerable to the practices. The COMESA Regional Competition Regulations offer Member States without national competition laws an opportunity to assess any anti-competitive conduct through the COMESA route.

3. The COMESA competition regulations

As stated earlier, COMESA launched a Free Trade Area (FTA) on 31 October 2000 and plans to become a customs union by 2008. The absence of tariff and non-tariff barriers in the FTA has enhanced competition in the common market. In response to these market changes, and in order to ensure fair competition and transparency among economic operators in the region, COMESA formulated regional competition regulations. These regulations are expected to be consistent with internationally accepted practices and principles of competition especially the United Nations Set of Principles and Rules on Competition developed by UNCTAD in 1980.

The COMESA Competition Regulations and Rules are directly derived from Article 55 of the Treaty. This provision bestows upon Member States the responsibility of embracing the market economy principles and the requirement for Member States to prohibit any agreement between undertakings or concerted practice, which has as its objective or effect the prevention, restriction or distortion of competition in the common market. The other provisions in the Treaty which promote and preserve the state of competition in the common market include Article 52 which contains a prohibition of any subsidy granted by a Member State or through state resources in any form, which distorts or threaten to distort competition, insofar as it affects trade between Member States; Article 51 contains provisions on dumping; and Article 49 provides for the elimination of quantitative and other restrictions between Member States.

Article 55: Competition

1. The Members States agree that any practice, which negates the objective of free and liberalized trade, shall be prohibited. To this end, the Member States agree to prohibit any agreement

between undertakings or concerted practice, which has as its objective, or effect the prevention, restriction or distortion of competition within the Common Market.
2. The Council may declare the provisions of paragraph 1 of this Article inapplicable in the case of:
a) any agreement or category thereof between undertakings;
b) any decision by association of undertakings;
c) any concerted practice or category thereof;
which improves production or distribution of goods or promotes technical or economic progress and has the effect of enabling consumers a fair share of the benefits: provided that the agreement, decision or practice does not impose on the undertaking restrictions inconsistent with the attainment of the objectives of this Treaty or has the effect of eliminating competition.
3. The Council shall make regulations to regulate competition within the Member States.

It is paramount to appreciate that the COMESA Competition Regulations and Rules are intended to operationalize Article 55 of the Treaty. This is in accordance with Article 55(3) of the Treaty, which empowers the Council to make regulations to regulate competition within the Member States. Consequently, the COMESA Competition Regulations and Rules are an independent set of legal rules, which form part of the web of laws and policies designed to achieve the objectives of the common market. The competition regulations, after being approved by the Council, have become an independent mechanism designed to meet the aims and objectives of the common market and not merely an instrument for the achievement of a unified common market. All businesses, whether trading as companies, partnerships, state corporations, trade associations or sole traders and whether for profit or not, must have regard to the competition regulations.

The main competition regulations governing undertakings in the public and private sectors are set out in parts three and four of the regulations. Article 16 prohibits arrangements between two or more undertakings, which may affect interstate trade and which have an anti-competitive object or effect. Specifically prohibited are all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

The consequence of infringing Article 16(1) is set out in Article 16(3), which makes such an agreement or decision automatically void.

> *Article 16: Restrictive Business Practices*
> 1. The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which:
> a) may affect trade between Member States; and
> b) have as their object or effect the prevention, restriction or distortion of competition with the Common Market.
> 2. Paragraph 1 applies only if the agreement, decision or concerted practice is, or is intended to be, implemented within the Common Market.
> 3. Any agreement or decision, which is prohibited by paragraph 1, is void.

Article 16(4) provides that the rigour of the prohibition in Article 16(1) may be lifted in specified circumstances: Article 16(1) may be declared inapplicable in respect of cartel-type arrangements which meet four tests, two positive and two negative. The two positive requirements are that the agreement, decision or concerted practice must contribute to improving production or distribution of goods or promoting technical or economic progress and; that it must also allow consumers a fair share of the resulting benefit. The two negative requirements are that the agreement does not impose restrictions unnecessary to the attainment of the positive objectives stated and that it must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the market in question. It is important to stress that all four of these requirements must be satisfied if an agreement is to satisfy Article 16(4). This exemption is also qualified by Article 55 (2) of the Treaty.

The second important provision is found in Article 18 of the regulations. Article 18 is concerned with abuses of a dominant position, whether by one or more undertakings. The abuse must occur within the common market and it is prohibited insofar as it may affect trade between Member States. Under Article 18 of the Regulations, certain conduct is expressly deemed as abuse of a dominant position and therefore prohibited. Such conduct shall include restrictions of entry into a market, prevention of competition in a market,

elimination of any undertaking into the market, limitation of production of goods or services, and so on.

Article 18: Abuse of a Dominant Position

1. Any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it affect trade between Member States, if it:
   a) restricts, or is likely to restrict, the entry of any undertaking into a market;
   b) prevents or deters, or is likely to prevent or deter, any undertaking from engaging in competition in a market;
   c) eliminates or removes, or is likely to eliminate or remove, any undertaking from a market;
   d) directly or indirectly imposes unfair purchase or selling prices or other restrictive practices;
   e) limits the production of goods or services for a market to the prejudice of consumers;
   f) as a party to any agreement makes the conclusion of such agreement subject to acceptance by another party of supplementary obligations which, by their nature or according to commercial usage, have no connection with subject of the agreement; or
   g) engages in any business activity that results in the exploitation of its customers or suppliers, so as to frustrate the benefits expected from the establishment of the Common Market.
2. In determining whether an undertaking is in a dominant position, consideration shall be given to the:
   a) Relevant market defined in terms of the product and the geographic context;
   b) Level of actual or potential competition in terms of number of competitors, production capacity and product demand;
   c) Barriers to entry of competitors; and
   d) History of competition and rivalry between competitors in the sector of activity.

The provision for abuse of dominant position in turn requires the Commission to assess vertical restraints. The assessment of vertical restraints is controversial because most of the examples of vertical restraints entail claims of efficiency gains. The Commission shall have to analyse vertical restraints from a 'rule of reason'

perspective. Consequently, the Commission may in certain circumstances grant exemptions. It is now stated law that: 'finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market'.[13] The Commission as seen from the wording of Article 18 shall adopt this approach.

Article 19 of the regulations specifically addresses the prohibition of cartel arrangements. The horizontal agreements, especially those which fix prices, collusive tendering, quota allocation, collective refusal to supply are expressly prohibited. These arrangements are widely condemned by most competition laws of Member States as they serve no purpose other than to shift benefits from consumers to producers, the upshot being organizational inefficiencies and the making of excess profits. Article 19 expressly incorporates the notion that horizontal agreements are illegal *per se*.

Article 19: Prohibited Practices

1. It shall be an office for undertakings engaged in the market in rival or potentially rival activities to engage in the practices appearing in paragraph 3:

   Provided that this paragraph shall not apply where undertakings are dealing with each other in the context of a common entity wherein they are under common control or where they are otherwise not able to act independently of each other.

2.This Article applies to formal, informal, written and unwritten agreements, arrangements and understandings.

3. For the purpose of paragraph 1, the following are prohibited:

a) agreements fixing prices, which agreements hinder or prevent the sale or supply or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services;

b) collusive tendering and bid-rigging;

c) market or customer allocation agreements;

d) allocation by quota as to sales and production;

e) collective action to enforce arrangements;
f) concerted refusals to supply goods or services to a potential purchaser, or to purchase goods or services from a potential supplier; or
g) collective denials of access to an arrangement or association, which is crucial to competition.

Article 24 of the regulations provides for a pre-merger notification system which requires participants to a merger to inform the Commission of any merger likely to substantially prevent or lessen competition, or likely to be contrary to the public interest. A notifiable merger requires a regional dimension. For the purpose of the regulations, a merger has a regional dimension where both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more Member States and the threshold of combined annual turnover or assets in the region, either in general or in relation to specific industries.[14] Consequently, the Commission shall handle larger mergers above certain turnover thresholds. National competition authorities shall apply national merger laws below the thresholds. Where the companies are required to notify a merger in two or more national jurisdictions, it shall be possible for them to ask the Commission to take over the case if the Member States concerned agree.[15]

Article 24: Notification of a Proposed Merger

1. A party to a notifiable merger shall notify the Commission in writing of the proposed merger as soon as it is practicable but in no event later than 30 days of the parties' decision to merge:

Any notifiable merger carried out in contravention of this part shall have no legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger shall be legally enforceable in the Common Market.

Part 5 of the regulations, comprising Articles 27 to 38, deals with consumer protection and welfare. These are not discussed in this chapter due to space limitations.[16]

3.1 Need for cross-border impact

As stated above, Article 55(1) of the Treaty is identical to Article 81(1) of the European Community's Treaty of Rome. It should be pointed out, however, that Article 55(1) which prohibits 'any agreement between undertaking or concerted practice which has, as its objective or effect the prevention, restriction or distortion of competition within the Common Market', does not specifically state that the offensive agreement must 'affect trade between Member States', as is the case with Article 81(1).

Notwithstanding that omission, it is submitted that the impact of cross-border trade is an implicit prerequisite in light of the wording of Article 16(1) of the Regulations. Consequently, the Commission essentially can only intervene when there is an effect on trade between Member States. The Regulations, more especially Articles 16 and 18, and to some extent the Merger Control Regulation, do not apply unless the agreement or conduct 'may affect trade between Member States' and has as its object or effect the restriction or distortion of 'competition within the Common Market'. The concept of an agreement, which may affect trade between Member States, provides a jurisdictional limit to the prohibition laid down in Articles 16 and 18. The criterion confines the scope of the application of Articles 16 and 18 to agreements having a minimum level of cross-border effect within the common market; hence the practices must appreciably affect trade between Member States.

COMESA comprises 20 Member States. Obviously, via a treaty, these states have voluntarily decided to take on certain obligations *vis-à-vis* each other. They have not given up their rights as sovereign nations. In order for COMESA to assert jurisdiction, therefore, the conduct in question must cross borders.

The above contention is buttressed by the Preamble to the Treaty itself which, after listing the 20 Member States that are party to it, states:

> **Conscious** of the overriding need to establish a Common Market for Eastern and Southern Africa...
>
> **Having regard** to the principles of international law governing relations between sovereign states, and the principles of liberty, fundamental freedoms and the rule of law, ... (emphasis added)

Additionally, Article 55(1) prohibits anti-competitive practices ''within the Common Market'. The 'Common Market' is defined in Article 1 of the Treaty, and Article 1(2) states that the common market is only open to the 20 listed Member States. In other words, the Treaty is concerned with activity between these Member States, not with conduct solely within the borders of any one state.

That having been said, it must nonetheless be made clear that a broad interpretation be given to the concept of 'conduct which affects trade between Member States'. It is an expression that is given a broad meaning and any conduct that will trigger the intervention of the European Commission is that which 'may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the aim of a single market in all the Member States'. The European Commission has always tended to apply the provision in a liberal manner.

The fact that the Court's definition encompasses 'potential' impact as well as 'actual' and also considers what 'might' prejudice the aim of a single market shows the breadth of the Court's reach.

For COMESA to adopt a comparable approach, support may be found in Article 4 of its Treaty, specifically, Section 6(d) where it is stated that:

> in the field of economic and social development: ...
> (d) adopt a regional policy that will look into all possible economic problems that Member States may face during the implementation of this Treaty and propose ways and means of redressing such problems in a manner that will satisfy the conditions of equitable and balanced development within the Common Market;...

Additionally Article 6(c), which lists the 'Fundamental Principles', states that:

> The Member States, in pursuit of the aims and objectives stated in Article 3 of this Treaty, and in conformity with the Treaty for the Establishment of the African Economic Community signed at Abuja, Nigeria on 3rd June 1991, agree to adhere to the following principles:...

> (c) inter-State cooperation, harmonization of policies and integration of programs among the Member States;...

The creation of a cohesive Single Market is obviously an important objective of the Member States. Regional integration is not only a 'specific undertaking' but also a 'fundamental principle'. Conduct that affects trade between Member States, is therefore a concept to be broadly defined in order to ensure the attainment of a true common market.

3.2 Relevant European Community experience

It is readily acknowledged that to infringe Article 81(1), three conditions must be satisfied. There must be:

1) some form of collusion between undertakings
2) which may affect trade between Member States, and
3) which has the object or effect of restricting competition within the common market.

The European Court of Justice has articulated, in several cases,[17] the test as to whether it will be found that there has been an impact on trade between Member States. One notable case held:

> ..... it must be possible to foresee with a sufficient degree of probability in the basis of a set of objective factors of law or fact that it may have an influence direct or indirect, actual or potential on the pattern of trade between Member States, such as might prejudice the aim of a single market in all the Member States.

The Court's view can be summed up thus: if one can reasonably say that trade between Member States is being, or will probably be, affected such that the notion of a common market may be (or has been) impacted, there is an effect across state lines.

3.2.1 'Appreciable' effect

However the fact that there is an impact on trade between Member States is not enough. That impact must be 'appreciable'.

Indeed, courts have come up with an actual number, 5 per cent, but that does not mean that analysis is foregone. The facts of each case have to be carefully considered. As early as 1969, the European Court determined that '... an agreement falls outside the prohibition in Article 85 when it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question'.

In essence, therefore, courts and others who are called upon to adjudicate look to the market share of the companies involved in relation to the product(s) in question.

3.2.2 'Trade' defined

As to what constitutes 'trade', the term is also given a wide scope. The courts have found that the word 'trade' 'covers all economic activity, including not only the supply of goods but also the supply of services... It seems that the flow of profits from one Member State to another in itself constitutes "trade" between Member States.'[18]

In summary, to trigger the jurisdiction of a regional competition authority, the conduct in question must have, or be likely to have, an appreciable negative competitive impact on trade between Member States. 'Trade' encompasses all activity that results in a profit, and also covers goods as well as services.

As to whether or not the conduct at issue requires regulation is a question to be determined on a case-by-case basis. However, there is certain economic activity so inherently inimical to the interests of the common market that it may be deemed to be *per se* illegal and, as such, warrants a truncated analysis.

3.3 Supremacy of the COMESA competition regulations

There are provisions for cooperation between the Commission and Member States in the application and enforcement of the Regulations and Rules. These relate to both the application of the law and practical cooperation. The concurrent jurisdiction of the Commission and national courts to apply the Regulations means that consistent application is required. Any inconsistency would offend

against the principle of legal certainty, which is one of the fundamental principles of the Treaty.

Within the common market there are at least two legal orders: national legal orders comprising the respective bodies of legal rules within each of the COMESA Member States and the regional legal order comprising the body of legal rules created at COMESA level. The latter includes the COMESA Treaty and the secondary legislation of the common market, principally Regulations and Directives, all of which are of equal application within all Member States. Under Article 5 of the Treaty, Members States have made an undertaking that they shall make every effort to plan and direct their development policies with a view to creating conditions favourable for the achievement of the aims of the common market and the implementation of the provisions of this treaty and shall abstain from any measures likely to jeopardize the achievement of the aims of the common market or the implementation of the provisions of this Treaty.

Article 5: General Undertakings

> 1. The Member States shall make every effort to plan and direct their development policies with a view to creating conditions favourable for the achievement of the aims of the Common Market and the implementation of the provisions of this Treaty and shall abstain from any measures likely to jeopardize the achievement of the aims of the Common Market or the implementation of the provisions of this Treaty.

Member States found to be in breach of the Regulations in combination with their duties under Article 5 of the Treaty are required to cooperate with the COMESA institutions in achieving the objectives of the Treaty, which include the institution of a system ensuring that competition is not distorted. Member States could be in breach of these duties where they enact legislation requiring or encouraging undertakings to act contrary to the COMESA competition regulations or reinforcing the effects of such conduct. The conclusion to be drawn from this is that the COMESA competition regulations constitute a new legal order of international law, under which the Member States have limited their sovereign rights, albeit within limited fields, with the subject of the new order comprising not only Member States but also their nationals.

Independent of the legislation of Member States, the competition regulations shall not only impose obligations on individuals but shall also be intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of the obligation which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of COMESA.

The common market legal order may be characterized as being autonomous and inherently supreme by virtue of the undertaking under Article 5 of the Treaty. The common market law is said to enjoy primacy over national law. This is stated under Article 5(2) of the Treaty which requires Member States to take steps to make the provisions of the Treaty an integral part of their legal systems and which their courts shall be bound to apply.

The common market legal system shall have precedence over national law and a Member State may not unilaterally nullify a provision of the Regulation by its own subsequent domestic legislative measure. The decisions of the COMESA Court of Justice on the interpretation of the provisions of the Treaty shall have precedence over decisions of national courts. For example, it may be that a particular agreement is permitted under domestic competition law but is forbidden under Parts 3 and 4 of the Regulations; in that case, the principle that the Treaty and COMESA Regulations have supremacy over domestic law means that Parts 3 and 4 will prevail over the domestic law and that the agreement will be forbidden. Conversely, an agreement that is permitted under Parts 3 and 4 of the Regulations cannot be prohibited under domestic competition laws.

Moreover, the regulations upon publication in the official gazette of the common market shall be directly effective within national legal orders, independent of any measure of reception or enactment into national law. This direct effect is full and uniform in all Member States from the date of entry into force of the regulations and for so long as they continue in force. In accordance with Article 10(2) of the Treaty, the regulations shall be binding on all the Member States in their entirety. Consequently, national courts are expected to apply the regulations in their entirety and protect those rights that the Treaty

confers as well as to enforce obligations on the part of individuals and firms.

The question as to whether the Regulations form part of national legal orders is established under Article 5(2)(b) of the Treaty, which confers upon the regulations of the Council, the force of law and the necessary legal effect within all Member States.

3.4 Enforcement institutions and their respective jurisdiction

The COMESA Treaty establishes various organs of the common market. This chapter examines the role of each of those institutions in relation to the creation, application and enforcement of competition law and policy.

3.4.1 Council of Ministers

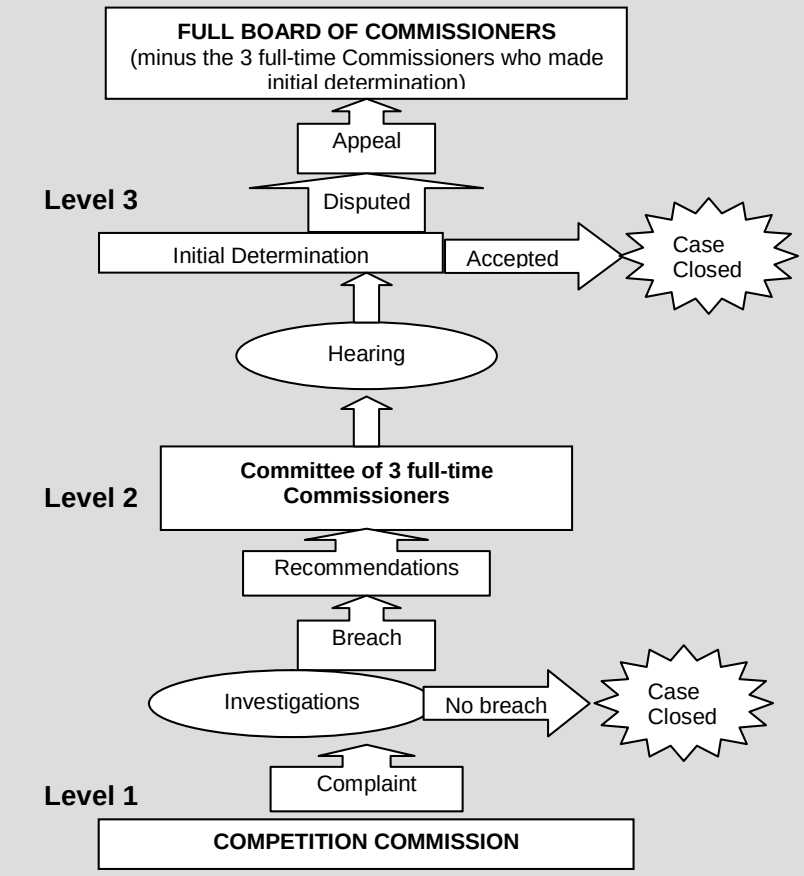
The Council of Ministers of the common market established by Article 7 of the Treaty (Council) is the supreme legislative body of COMESA and takes the major economic and political decisions pertaining to the common market. It consists of such ministers as may be designated by each Member State. The Treaty under Article 11 places a duty on the Council to adopt appropriate regulations and directives to give effect to the principles set out in the Competition Regulations.

3.5 COMESA Competition Commission

The COMESA Competition Commission (Commission) is the executive arm established under Article 6 of the Regulations. It has broad responsibilities which include the implementing of the decisions of the Council and the putting forward of opinions or recommendations on matters dealt with under the Regulations. The Commission has a central role in relation to competition; it is responsible for both the development of policy in relation to competition law and for the application and enforcement of the Regulations. It also has powers and duties to enforce the consumer

protection provisions of the Regulations. Decisions and other public statements made by the Commission shall be important in setting out general principles about the way in which it proposes to act.

Box 11.6 "Three-tier" decision making process: COMESA competition policy institutional arrangements



The Commission as established under Article 6 shall enjoy an international legal personality. It shall have, in the territory of each Member State, the legal capacity required for the performance of its functions under the Treaty and the power to acquire or dispose of movable and immovable property in accordance with the laws of each Member State.

The Commission under Article 7 has been bestowed with the functions of applying the provisions of the Regulations with regard to trade between Member States and is responsible for promoting competition within the common market. In carrying out its functions, the Commission may:

- monitor and investigate anti-competitive practices of undertakings within the common market;
- mediate disputes between Member States concerning anti-competitive conduct;
- help Member States promote national competition law and institution;
- harmonize national laws with the regional Regulations;
- cooperate with national competition authorities in Member States;
- cooperate with and assist Member States in the implementation of its decisions;
- provide support to Member States in promoting and protecting consumer welfare.

Irrespective of whether an agreement or arrangement has been notified to the Commission or a complaint made, it is open to the Commission to launch its own investigation in relation to any agreement, practice or other activity that it may suspect infringes the competition rules. This general supervisory function of the Commission in competition matters, demonstrates further why the competition rules are all-embracing and cannot be circumvented or ignored by Member States.

Consequently, the Commission's powers of investigation, have, due to its international character, taken into account the need for observing the principles of natural justice. The provisions of the Regulations must be applied in accordance with the general principles common to the Member States. These shall include principles of

proportionality, equality and non-discrimination, legitimate expectation, legal certainty and the right to a fair hearing. Fundamental human rights as derived from the constitutional traditions of the Member States, and as set out in the African Union Charter for the Protection of Human Rights and Peoples Rights, shall be taken into account when implementing the Regulations. The Regulations further provide for remedies and penalties for persons who contravene or fail to comply with any provisions of the Competition Regulations and Rules.

The third important enforcement institution is the Board of Commissioners (the Board) established under Article 12 of the Regulations. The composition and appointment of the Board reflects the regional character of COMESA. The members of the Board are drawn from the Member States of COMESA. The Council on the recommendation of the Secretary General appoints them. The functions of the Board include the determination on any conduct, and adjudicating on any matter provided under the Regulations. The Board shall also hear appeals, or review any decision of the Commission that may, in terms of the Regulations, be referred to it. It may also delegate any of its functions to another COMESA Agency established to coordinate and regulate a specific sector.

3.6 The COMESA Court of Justice

The COMESA Court of Justice (Court) is created under Article 19 of the Treaty. Its major function is to ensure the adherence to law in the interpretation and application of the provisions of the Treaty. This includes the conduct of judicial review of acts of COMESA institutions, which shall include any disputes arising out of the application of the Regulations by the Commission. Member States, legal persons and natural persons shall have *locus standi* before the court. Referrals to the court may be made by the Secretary General of COMESA, any person who is resident in a Member State, and the Member States themselves, to the effect that the act, regulation, directive or decision is *ultra vires* or unlawful or an infringement of the provisions of the Treaty.

The COMESA Court of Justice shall receive appeals against the decisions of the Board. The judgement of the Court is binding in matters of law in all Member States. The Court has seven judges and jurisdiction to hear all cases brought by individuals and undertakings against measures of the Commission. Actions against the Commission in competition cases shall generally be taken to the Court. It has unlimited jurisdiction to review the decisions of the Commission imposing penalties for infringements.

The Court hears appeals from the Board on points of law in relation to competition cases. It shall also hear positions on points of law from the national courts of the Member States, actions brought by Member States or undertakings against the Commission and actions brought by the Commission against states (infraction proceedings).

3.7 Remedies before Member States' domestic courts

Since the regulations apply directly in Member States, private parties may file complaints to initiate infringement procedures under the regulations. This is more so, given the fact that the regulations create rights and obligations between individuals as well as between individuals and Member State governments.

Private persons and firms can invoke Articles 18 and 19 of the regulations in two procedural situations before national courts:

- As a defence in a civil action involving a prohibited agreement or as part of an action for an injunction; or
- Damages incurred as a result of an infringement of the competition regulations.

In private actions, national courts have jurisdiction to determine whether the regulations have been violated. They are able to assess a case involving the regulations, although they must consider legally binding acts by the Commission, for example exemptions under Article 16(4) of the regulations. In this context, the consistency of the COMESA competition regulations throughout the common market is guaranteed by Article 30 of the Treaty, which empowers and, in certain circumstances, requires national courts to refer a case to the

COMESA Court of Justice for a preliminary ruling on questions of interpretation on the legality of the act or a decision made under the regulations.

It is important to note that the system allows national courts to concurrently apply the regulations and the national law. Article 29 of the Treaty provides that, except where the jurisdiction is conferred on the Court by or under this Treaty, disputes to which the common market is a party shall not on that ground alone, be excluded from the jurisdiction of national courts. For example, although it is only the Commission that can grant an exemption pursuant to Article 16(4), the national courts may be empowered to enjoin any party from infringing Article 16. It shall be therefore necessary for the national courts to decide whether, in any particular case, the agreement does so clearly infringe Article 16 that an exemption is very unlikely to be granted by the Commission, even if it has been notified to the Commission, or whether there is no infringement of Article 16 and therefore the question of an exemption under Article 16(4) does not come into play.

Invariably an agreement that is the subject of legal proceedings under the regulations before the national court, will also be the subject of consideration before the Commission. In this situation, national courts have the option either to adjudicate upon the dispute or suspend the proceedings pending determination by the Commission. Similarly, where it is clear that the regulations apply, and there is no possibility that the Commission will grant an exemption under Article 16(4), the national court may proceed to rule on the matter. However, where the situation is unclear, the national court would most probably not take a final decision, but would stay proceedings or adopt interim measures and seek assistance from the Commission or the COMESA Court of Justice.

Member States are further employed in the execution of a judgement which imposes a pecuniary obligation. In such a case, the rules of civil procedure in force in the Member State in which execution is to take place shall govern the process.

It is envisaged that the Commission shall actively encourage private parties to seek remedies before national courts and the Commission shall have a duty to give advisory opinions regarding

questions of law arising from the provisions of this treaty affecting the common market.

3.8 Mechanism for cooperation in the application and enforcement of competition regulations

The Regulations provide a mechanism for cooperation for the operation of regional and national competition laws. It is important to note that the COMESA Competition Authority is not yet operational and there are still very few Member States with operational national competition authorities. Consequently, we shall base our analysis on the existing provisions of the regulations and the rules, knowing very well that once the Commission becomes operational, it will develop further rules or directives necessary for the efficient performance and implementation of the Regulations.

As stated earlier under Article 16 of the Treaty, there is a general undertaking by the Member States to make every effort to implement the provisions of the Treaty and to abstain from taking any measure likely to jeopardize the implementation of the provisions of the Treaty. One such provision is Article 55 of the Treaty, which calls for the implementation of competition law and policy. The Treaty requirement is enhanced in the Competition Regulations by Article 5, which confers upon the Member States an obligation to take all appropriate measures to ensure fulfilment of the obligations arising out of the Regulations, and requires Member States to abstain from taking any measure that could jeopardize the attainment of the objectives of the Regulations.

Further, the Member States have made specific undertakings under Article 4 of the Treaty in the fields of industry and energy to eliminate rigidities in the structures of production and manufacturing so as to provide goods and services that are of high quality and are competitive in the common market.

The mechanism for cooperation deals with the application and enforcement of the competition regulations under Parts 3, 4 and 5 of the Regulations. As stated above, these operate against the legal background of the supremacy of the Treaty or the Regulations over

national competition laws, the direct application of the Treaty and the duty of sincere cooperation contained in Article 5 of the Treaty.

The Commission, pursuant to Article 7, has the power to issue notices and guidelines to provide guidance for business and indicate the Commission's view on certain matters relating to the application of the regulations. For example, the Commission can exempt certain categories of agreements under Article 16(4) of the regulations. It will be necessary for the Commission to issue guidelines for the application of Article 16(4), setting out the way in which the Regulations will apply to such agreements, and also a more general guide for businesses and for the national authorities on the application of the exemption provision.

In a regional competition regime, it is important that there are practical mechanisms to ensure the appropriate enforcement of the Regulations at national level and that the operation of national law does not conflict with the operation of the Regulations in cases where jurisdiction may be overlapping.

The Regulations and the Rules contain various provisions to ensure cooperation at national level with the Commission's investigation and enforcement powers. Under Rules 43 and 44, before the Commission undertakes an on-site investigation, it must inform the competent authority of the Member State in whose territory the investigation is to be carried out. Officials from the competent authority may assist the Commission with investigations, and, where the investigation is opposed by the parties concerned, the Member State must give the necessary assistance to the Commission officials to enable them to carry out their investigations. The officials from the competent national competition authority shall be expected to accompany the Commission officials to an on-site investigation.

Further, decisions of the Commission that impose penalties for infringement of the Competition Regulations are enforceable in accordance with the COMESA Treaty. Enforcement shall be governed by the rules of civil procedure in the Member State where the enforcement is carried out. In the case of Member States with common law systems, this may require the Commission to cause a decision to be registered with the High Court as a result of which it will have the

same effect as if it were a judgement or order given or made by that Court on the date of registration.

To this end, national competition laws may be required to revise, amend or enact appropriate provisions with the aim of realigning their law with the requirement of the Regulations.

For the implementation of certain provisions of the Regulations, the Commission may require the cooperation of the national competition authority. For instance, under the merger control regulation, a Member State, having attained knowledge of a merger notification submitted to the Commission, may request the Commission to refer the merger for consideration under the Member State's national competition law if the Member State is satisfied that the merger, if carried out, is likely to disproportionately reduce competition to a material extent in the Member State or any part of the Member State.

Further, for all merger enquiries, all relevant Member States are required to be notified and to submit written representations to the Commission. Member States may not apply their own national competition laws to concentrations with a regional dimension, except in certain limited circumstances. Conversely, the Commission may not use the Merger Regulations to investigate concentrations without a regional dimension except in certain limited circumstances.

The Commission may refer mergers with a regional dimension back to a Member State to take action under national legislation where there is a competition problem in a distinct market within the Member State. Member States may take action in relation to a merger that falls to the exclusive competence of the Commission in order to protect 'legitimate interests'. The merger Regulation may recognize the exclusions under Article 4 of the Regulations as such legitimate interests. The Commission may further use the Merger Regulation to investigate concentrations without a regional dimension at the request of a Member State. However, the general rule is that if a merger meets the tests for assessment by the Commission, the national competition authority will not investigate. As noted above, in such cases the Commission has exclusive competence, subject to certain limited exceptions.

It is important to note that the approval of the Competition Regulations by the Council makes them, in accordance with Article 10 of the Treaty, binding upon each Member State to which it is addressed as to the result to be achieved but not as to the means of achieving it. The entry into force of Regulations is provided for under Article 12 of the Treaty, which stipulates that Regulations shall be published in the official Gazette of the common market and shall enter into force on the date of their publication or on such later date as may be specified in the Regulations.

4. Towards the implementation

The entry into force of the regional competition regime shall bring about several challenges to the COMESA Member States, the most important of which is to ensure a correct system of allocation of cases (between the Commission and national competition authorities) and a constant application of the regulations and rules by all players. The implementation of the regulations shall require a phased approach in which the focus should first be on advocacy in order to 'build a competition culture' at both national and regional levels, secondly on enforcement and particularly on anti-competitive (or cartel) enforcement, and thirdly on merger regulation.

The Commission shall require modern and efficient tools that shall be acceptable as a business regulator. It must be a Commission that allows more freedom for business to take the commercial decisions they want, while safeguarding competition. It is important to mention that alongside these regional regulations, national competition laws shall continue to be developed, reviewed and realigned with the global trends and developments as COMESA deepens its regional integration. This shall also ensure consistency in regional policies, avoid contradictions and provide, as mentioned earlier, a regionally predictable economic environment.

The challenges for the new commission and for the national competition authorities shall be enormous, especially in the early stages of implementation. The first such challenge shall be the prospect of harmonizing national competition laws and regional competition. Efforts at harmonization shall be seriously constrained

by the different capacities of the individual national competition authorities. Already, one can witness a marked difference in experience and resource endowment among the national competition authorities. This shall indeed be a significant limiting factor because no matter how useful the regional law is intended to be, if the national competition authorities command neither national political support nor technical competence, then the intervention of the COMESA Competition Commission shall be met with constraints, thereby inhibiting the progress of regional trade and investment.

In order to effectively implement the regulations, it is essential for Member States to mobilize a strong technical capacity to support the conceptualization of the system. Where these skills are not available at national level, they will need to be imported. When they are imported, it is important to ensure that local capacity is built at the same time. There shall be considerable need to ensure that opportunities to develop local, more permanent skills are attended to, especially by the competition authorities. This is so, because for the regional regime to work effectively, it shall require effective competition authorities at national level.

In the context of the critical manpower and technical resource shortages in Member States, the successful implementation of the regulations shall be reliant on the participation of a strong and willing domestic and regional private business sector.

The implementation of the block exemption rules and guidelines will be another challenge to be faced by the Commission. There is need for a complete departure from the old legalistic block with exemption regulations as is happening in the EU competition system, by adopting a more economics-based approach. Instead of imposing on companies a limited list of what they can and ought to do, the new approach shall define a limited list of what is specifically prohibited, that is those matters related to practices prohibited under Regulation 19.

The other challenge shall deal with the Commission's intervention against anti-competitive mergers. There shall be a need to continue reviewing the procedure for merger assessment to create a more level playing field in the common market. The Commission shall be required to enact more streamlined rules or systems for merger

Box 11.7 Main competition reforms in EU Competition Law

• **New antitrust regulation** (Reg (EC) No 1/2003): eliminates notifications; empowers national competition authorities and courts to apply Article 81 in full; increases the Commission's inspection powers

• **New merger control regulation** (Reg (EC) No 139/2004): enables the Commission to intervene against all anti-competitive mergers; reinforces the 'one-stop shop' principle; introduces some flexibility into the review timetable

• **Block exemption regulation on technology transfers between firms**: creates a safe harbour for agreements licensing new technological breakthroughs between competing companies with a market share below 20 per cent (30 per cent for agreements between non-competing firms); no presumption of illegality for agreements between companies with higher market shares

• **Regulation on air transport between EU and non-EU airports**: gives the Commission clear and effective powers to review the impact on European consumers of alliances between EU and non-EU airlines

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referrals, which shall smooth the process of referrals to and from the Commission. There may be a need to also consider at this early stage the introduction, with greater caution, of the EU concept of the 'one-stop shop' principle and of introducing more flexibility into the review timetable.

As COMESA establishes the Commission to implement the Regulations, it will be found that there are gaps in the Regulations and Rules that need to be filled. There is a need to give the Regulations the 'teeth to bite'. The Commission, once operational, may require the enaction of more rules to create the conditions for a greater involvement of national competition authorities and courts by empowering them to apply Regulations 16 and 18 in their entirely and for national courts to apply the regional law whenever applicable, that is whenever the agreement or practice at stake may affect trade

between Member States. This will allow not only the Commission but also the national competition authorities to be responsible for enforcing regional competition rules. There may be a need to draw clear rules on the power of the Commission and national competition authorities to intervene as *amicus curiae* before courts applying Regulations 16 and 18 of the Competition Regulations.

Given the similarities between the Regulations and the EC Treaty on competition, it will be helpful to borrow with greater caution from the 'modernization' principles of the EC Competition Law. Among the modernization principles to be considered by the Commission shall include:

- Accommodating the principle of subsidiarity by allowing the most appropriate competition authority to act in any particular case.
- Introducing a level playing field for competition scrutiny of commercial agreements across the common market.
- Putting in place a mechanism to ensure cooperation and consistency in the operation of the new regime.
- Issuing a Notice on cooperation between the Commission and national competition authorities and national courts.

The Commission, upon entry into force of the Competition Regulations, shall find itself, at its establishment, with the formidable task of creating a 'competition culture' within the COMESA Member States. Competition enforcement at common market level will be more effective if there are Member States that understand and support the concept of competition policy.

It is expected that the introduction of a regional competition regime will be met with some resistance, especially in those Member States that are still pursuing economic policies of protectionism. In such Member States, it may be difficult to demonstrate the benefits of competition and how greater competition in the economy will in fact bring about economic efficiency. The Commission shall be required to put in place a vigorous competition awareness campaign.

The general attitude of the people towards the liberalization process that was embarked on by most COMESA Member States has also created a barrier to competition advocacy. The privatization programme by most Member States witnessed the entry of

multinational companies and the exit of local firms from the domestic market. The demise of local firms has always been attributed to the stiff competition brought about by multinational companies. In the eyes of many, rightly or wrongly, competition in domestic markets is seen as a destroyer of local firms.

The fostering of the development of competition expertise outside the government institutions has been minimal in COMESA Member States. The concept of competition is not only new to the business stakeholders but also within the government institutions. The national competition authorities in the few countries with national competition laws are still weak and their capacities are not fully developed. This has made most national competition authorities unable to carry out meaningful advocacy work on competition. The legal system or the judiciary, lawyers, public servants, businesses have yet to embrace and understand the concept of competition. There will be a need for the Commission's involvement in the training programmes of the said stakeholders, and for these stakeholders to give proper guidance to governments in the allocation of competences at national and regional levels.

As for most governments of these countries, competing needs and priorities have always tilted their efforts towards areas other than the promotion of competition. The political aspirations and policy pronouncements had a tendency to overshadow competition. Limitations of the available financial and human resources have continued to undermine the role of competition in national economic development.

The COMESA Competition Commission would also have to deal with other challenges facing developing countries in Africa. The issue of developing local entrepreneurship and protection of small and medium enterprises as a tool of poverty alleviation is important to policy makers in the developing world in general and to COMESA Member States. This may affect the process of implementation of the competition regulations and a common ground on the core policy options, which could go contrary to competition principles, should be addressed at an early stage.

It should be appreciated that competition law and policy is only one among many instruments available to government required to

bring about economic growth. The introduction of competition laws in most of these countries has not been matched by the review of other legislation, which inhibits the proper functioning of competitive markets. Whereas most of these countries have liberalized the economic process, the enactment of accompanying new laws to regulate the market economy process and the repeal or amendment of the existing laws, which operate against the competition process, has been demonstrably slow. There still exist many laws or regulations in these countries that make it impossible for the competitive process. For example, there are still laws in some COMESA Member States that control prices and some that discriminate against foreign firms.

5. Conclusion

In reality, the Regulations and Rules are still very new, and it is too early to gauge the long-term impacts on socio-economic development. However, the indications from the three Member States with operational national competitions laws demonstrate some very positive development impacts. However, there are potential areas of weakness associated with implementation and enforcement. These areas of weakness are expected to be remedied through deliberate focused interventions.

The effective regional competition enforcement is by and large going to rest on the orientation and capacity of national competition authorities. It shall require the raising of enforcement standards in the national competition institutions, establishing competition authorities in all Member States, harmonization of national laws in line with COMESA competition law and, above all, learning from the best practices and experiences of the developed countries.

As for the application of COMESA competition regulations, in a situation where many members do not have competition laws, it would be interesting to follow the development of the implementation process in this regard. One important consideration would be to stipulate as part of the implementation guidelines the provision that Member States with no competition law may take anti-competitive cases to the regional body. The regional body may take the liberty of handling cases regardless of the cross-border impact, which would

otherwise be handled at national level and use this as an interim measure while Member States prepare to enact competition laws. This would form a good base for COMESA to start off the implementation of the regulations. The Andean Community Law (Decision 608) also allows Member States to apply the regional law in place of national laws. Ecuador is one country, within the Andean Community, which is preparing to utilize this option. However, countries choosing this method should be aware of the fact that anti-competitive practices are most likely to thrive where there is no national law; and, hence, information about their rights and obligations under the regional law is limited. To overcome such a challenge, the affected Member State should set aside resources to create national institutions to support the implementation of the regulations.

On merger control, the examples given in this chapter shows that there is a great potential for COMESA regional regulations to deal with cross-border mergers and acquisitions. As mentioned elsewhere in this chapter, the COMESA Competition Commission may wish to consider as one of the deliverables, the establishment of the Commission as a 'one stop shop' for merger analysis. At a time when all COMESA countries will have competition laws, it would be more cost effective to handle the mergers at regional level rather than having different countries dealing with the same merger.

Further, in order for the COMESA Competition Commission and national courts to apply the regulations effectively and to enhance the allocation of competences, there is a need to develop capacity-building programs at national level. This includes human resource and institutional capacity building for both enforcement officers and the judiciary. The UNCTAD training programme in this area has been effective in sensitizing the judiciary and enforcement officers on the legal and economics aspects of competition cases and would be a good model to consider.

It is also important to note that it is one thing to have rules and regulations, but another for the regulations to have the desired effect of spurring regional trade and curtailing cross-border anti-competitive practices. An effective way to assess the effectiveness of the applications of the COMESA rules and regulations would be by examining the number and the nature of the cases brought before the Commission. There is therefore a need for COMESA to develop

within its enforcement activities an advocacy programme for sensitive Member States on the rules and regulations at two levels:

(a) For countries with competition laws, their responsibilities under the new regulations and their role in the enforcement process.
(b) For members with no competition laws, what they need to do to benefit from the rules - enact national legislation.

Member States with competition laws should be made aware that the common market legal systems shall have precedence over national law and therefore should enact competition laws that are in line with COMESA regulations and those with existing laws may be required to amend them to conform with regional law.

NOTES

[1]Dr Urrike Guèerot is head of the EU Unit at the DGAP in Berlin. In his commentary on the debate on the European Constitution Treaty Convention for the Centre for European Reform entitled 'A "competence catalogue" is code for protection' in June 2002. Also see http://ww.euractive.com/articles

[2]See Delimitation of Competences between the European Union and the Member States: a look from a candidate country by Prof. Dr Vilenas Vadapalas, Director General of the European Law Department under the Government of Lithuania; Chair of International and EU Law of the Faculty of Law, Vilnius University. See also http//www.ecln.net|elements|constitution_debate/perspective2004/part1/1_02.html

[3]See http://www.lse.ac.uk/collections/globalDimensions/tradepolicy/papers/woolcock.htm

[4]OECD Global Forum on Competition: Contribution by WAEMU/UEMOA; 14-15 Feb. 2002. The Member States of WAEMU are Benin, Burkina Faso, Cote d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo.

[5]The term 'Regulations' is equivalent to a competition law, and is used to reflect the Treaty terminology.

[6]The Member States of COMESA are Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

[7]The Member States of SADC are Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

[8]SACU comprises South Africa, Botswana, Swaziland, Lesotho and Namibia

[9]CARICOM comprises , Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname, Trinidad and Tobago.

[10]Member States of the EAC are Kenya, Uganda and Tanzania. Rwanda and Burundi have also requested to join the EAC

[11]The author who was one of the consultants in the formulation of the COMESA Regional Competition Law has drawn some conclusions from the various working documents that the consultants prepared.

[12]Cernat Lucian: "Competition Audit of the Economic Policy-Making Process" paper presented at the Project Interim Meeting, 16-17 August 2005, Hanoi, Vietnam.

[13]Michelin vs Commission, Case 322/81, 1983, ECR 3401.

[14]Regulation 23.

[15]Regulation 24(7).

[16]It is worth noting that the treaty establishing the Caribbean Community (CARICOM) includes a section on Consumer Protection (Part VI). However, this regional arrangement is yet to be implemented.

[17]In Common Market Law of Competition (citation, supra) it was stated on pg. 110 that the test was first stated in Case 56/65 Societé Technique Minière [1966] ECR 235, 249, 251 and is repeated in Consten and Grundig [1966] ECR 299, 341 [1966] CMLR 418, and later in Case 27/87 Erauw-Jacquery [1988] ECR 1919 [1988] 4 CMLR 576.

[18]Common Market, citation, supra on pages 108-109.

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Suggestions for enhancing the effectiveness of cooperation on competition law and policy at the regional level from the experience of the Republic of Korea

DEUK-SOO CHANG

1. Introduction

With trade liberalization, deregulation and privatization, economies around the world are being dramatically integrated into a single market. To further develop the world economy along this trend of globalization, cooperation in competition law and policy is needed among developed countries (North-North), developing countries (South-South), between developed and developing countries (North-South) and between developed and transition economies. This is elucidated by the fact that competition issues are included in various forms of bilateral, multilateral, regional and subregional agreements.

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Although developing and the least developed countries take an interest in adopting or implementing competition laws, they face obstacles in the process of adopting the laws and encounter difficulties in implementing them due to a lack of experience or public awareness. Mostly, developed countries provided technical assistance in this area. But, complementing developed country assistance, in recent years there is also a growing recognition that cooperation among neighbouring countries with a similar political, economic, and institutional structure can be effective for formulating and implementing competition laws. In this regard, the Republic of Korea has been strengthening cooperation with its neighbouring countries in East Asia and members of the Asia-Pacific Economic Cooperation (APEC) and the Commonwealth of Independent States (CIS).

This Chapter will first take a look at the regional cooperation experiences of the Republic of Korea regarding competition law and policy as regards creating and participating in FTAs, the sharing of information on international cartel cases and the provision of technical assistance to developing countries and transition economies. This Chapter will then suggest ideas for enhancing the effectiveness of regional cooperation through assessing the merits of the cooperative activities.

2. Regional economic cooperation in East Asia

2.1 Current economic situation in the East Asian region

With the rapid development of information and communication technologies and transportation, international transaction costs have been significantly lowered and government regulations and trade barriers are steadily being abolished and reduced. As a result, the world economy is being integrated into a single global market. At the same time, economic interests at regional level are encouraging countries to integrate into regional blocks at a rapid pace. Countries in Asia have established regional economic blocs such as the Asia Pacific Economic Cooperation (APEC), which includes countries bordering the Pacific Ocean though not in Asia, and the Association of South East Asian Nations (ASEAN).

The East Asian economy encompassing the Republic of Korea, Japan and China had achieved annual economic growth rates averaging around 7 per cent throughout the 1990s. Today it plays an important role as a major engine of the global economy after overcoming the financial crisis that hit the region in 1997-98. Among the countries in East Asia, China shows the most remarkable economic growth. One of the critical forces behind the fast growth in this region is market competition promoted by the efforts for trade liberalization such as elimination of barriers to trade and investment. With lowering investment barriers, direct investment in the region is increasing to a level that exceeds the average of world direct investment. Cross-border mergers and acquisitions (M&As) are also increasing in the region.

As one of the efforts to strengthen a market economy, China and other Asian countries have been striving to adopt or improve competition law and policy.

2.2 Growing economic alliance between the Republic of Korea and East Asian countries

Amid the accelerating intra-regional economic alliance in East Asia, there is a need for the Republic of Korea to strengthen its economic partnership with countries in the region, as its revitalization is highly dependent on the region's economic growth. To that end, the Republic of Korea mostly relies on the World Trade Organization (WTO) multilateral framework while pursuing various complementary agreements including FTAs and economic cooperation agreements.

Although not concluded with an East Asian country, the Republic of Korea-Chile FTA signed in April 2004 is an outcome of such efforts. This FTA will not only achieve trade and investment liberalization, but also consolidate economic alliances in many sectors such as finance, information and communication technology and science. It will also become the template for strengthening economic alliance with East Asia. Currently, the Republic of Korea is also pursuing FTAs with Singapore and Mexico. Meanwhile, with regard to the Republic of Korea-Japan FTA, a Joint Study Group of economic and political

leaders from both countries was launched in July 2002 to assess possible effects of the agreement. Reviews are also in progress to find various means of cooperation in the region, including the possibility of the East Asian Free Trade Area covering ASEAN plus the Republic of Korea, Japan and China.

2.3 The characteristics of competition provisions in East Asia

Japan was the first Asian country to adopt and implement competition law, followed by the Republic of Korea and Taiwan Province of China. Thailand, Indonesia and Singapore also joined the ranks recently. China undertook to legislate antitrust law after its WTO accession.

Since Asia has not had sufficient experience in the field of competition law implementation, related studies have been mostly focused on importing and adapting to the specific needs of the Asian countries the provisions of some experienced countries such as the US and the EU member states. Also, countries in the region are becoming increasingly interested in competition laws of their neighbours, such as the Republic of Korea and Japan, in order to legislate or enforce competition laws successfully while adapting to their unique needs and situation. Even the Republic of Korea and Japan, countries with considerable experience in competition law enforcement, are also examining how to enhance the effectiveness of their competition laws.

Compared with the US and Europe, where market economies evolved gradually, Asian countries depended heavily on government intervention or assistance in developing their economies. Therefore, competition laws in these countries are designed to cure negative effects rather than to prevent the causes, and they focus on administrative regulation rather than judicial regulation. Because the government directly allocates resources, it cannot help but establish various institutional barriers, such as authorization/permission systems and high tariffs, to manage limited resources. These barriers promoted monopolistic structures. In addition, regulations were initiated mostly *ex officio* of regulatory agencies rather than by filed complaints.

As economic power in these countries is normally concentrated in a few families or business groups, competition laws include measures to curb concentration of economic power in addition to regulations for protecting free and fair competition. For example, in order to respond to this specific need, the Korea Fair Trade Commission (KFTC) established measures such as prohibition on cross-shareholding, restriction on the total amount of shareholding of other companies and restriction in the exercise of voting rights in finance and insurance companies.

3. The Republic of Korea's experience of regional cooperation in competition law and policy

3.1 Cooperation through FTAs

Heavily dependent on external trade for its economic growth and development, the Republic of Korea has been one of the biggest beneficiaries of trade liberalization within the multilateral frameworks of the GATT and the WTO. Recently, regionalism led by FTAs has been rapidly expanding. The Republic of Korea also began to actively pursue FTAs with other countries.[1]

3.1.1 Republic of Korea-Chile FTA

The Republic of Korea-Chile FTA, which came into effect on 1 April 2004, consists of 21 chapters divided into seven parts.[2] Competition-related issues are included in nine Articles of Chapter 14. In that chapter, competition authorities of both countries agreed to apply their respective competition laws in order to ensure that the benefits of liberalization in goods and services would not be diminished or cancelled by anti-competitive business conduct. To this end, both parties agreed to cooperate and coordinate between their competition authorities. In addition, with a view to preventing distortions or restrictions on competition which may affect trade in goods or services between them, the parties agreed to give particular attention to anti-competitive agreements, concerted practices and abusive behaviour resulting from dominant positions. The parties also agreed to cooperate and coordinate for the implementation of

competition laws. The main provisions included notifications, consultations, exchange of information and technical assistance as follows.

Notifications
Each competition authority shall notify the competition authority of the other Party of an enforcement activity if it:
- is likely to substantially affect the other Party's important interests;
- is related to restrictions on competition which are liable to have a direct and substantial effect in the territory of the other Party; or
- concerns anti-competitive acts taking place principally in the territory of the other Party.

Coordination of Enforcement Activities
The competition authority of a Party may notify the other competition authority its intention to coordinate enforcement activities with respect to a specific case. This coordination shall not prevent the Parties from taking autonomous decisions.

Consultations when the Important Interests of a Party are Adversely Affected in the Territory of the Other Party
The competition authority of a Party may transmit its views on the matter to, or request consultation with, the other competition authority
- if it considers that an investigation or proceeding being conducted by the competition authority of the other Party may adversely affect such a Party's important interests,
- if it considers that its interests are being substantially and adversely affected by any sort of anti-competitive practice conducted by one or more enterprises located in the other Party.

Exchange of Information and Technical Assistance
With a view to facilitating the effective application of their respective competition laws, the competition authorities may exchange non-confidential information. The Parties may also provide each other technical assistance in order to take advantage of their respective experiences and to strengthen the implementation of their competition law and policies.

3.1.2 Republic of Korea-Singapore FTA currently being pursued

Competition-related provisions are also included the Republic of Korea-Singapore FTA, which was recently signed and is expected to be effective soon. Its purpose is to promote free competition and curtail anti-competitive practices, such as anti-competitive horizontal arrangements between competitors, abuse of market dominance, anti-competitive vertical arrangements between businesses and anti-competitive mergers and acquisitions. Matters related to cooperation in competition law and policy under the FTA can be summarized as follows:

> *Promotion of Competition*
> Each Party shall promote competition by addressing anti-competitive practices in its territory, adopting and enforcing such means or measures as it deems appropriate and effective to counter such practices.
>
> *Competitive Neutrality*
> Each Party shall take reasonable measures to ensure that its government does not provide any competitive advantage to any government-owned businesses.
>
> *Consultations*
> - At the request of a Party, the Parties shall enter into consultations regarding matters that may arise under this Chapter, including the elimination of particular anti-competitive practices that affect trade or investment between the Parties.
> - During the consultations, each Party shall endeavour to provide relevant information to the other Party.
> - Any information or documents exchanged between the Parties in relation to any mutual consultations shall be kept confidential.
>
> *Cooperation*
> The Parties recognize the importance of cooperation and coordination between their competition authorities for effective competition law enforcement.

3.2 Cooperation through bilateral arrangements and consultation meetings

3.2.1 Republic of Korea-Australia Cooperation Arrangement

After working-level consultations for about two years, the KFTC signed the Cooperation Arrangement with the Australian Competition and Consumer Commission (ACCC)[3] in September 2002. The arrangement is the first of its kind that the KFTC concluded. Its purpose is to promote the effective enforcement of the competition and consumer protection laws in both countries through the development of cooperative relationships between the two national agencies. In accordance with the provisions of the arrangement, the agencies will share information, cooperate with and provide assistance to each other to the extent compatible with their essential interests. The main content of the arrangement will be examined as follows:

> *Exchange of information*
> Both Agencies recognize that it is in the common interests to share information that will:
> - facilitate effective application of the competition and consumer protection laws administered by the respective Agency;
> - facilitate coordinated investigations, research and education;
> - promote a better understanding by each of the Agencies of the economic and legal conditions and theories relevant to their respective competition and consumer protection law enforcement and related activities.
>
> Based on the recognition, the Agencies will, on a regular basis, exchange and provide information in relation to:
> - investigations and research conducted;
> - speeches, research papers, journal articles, and other materials;
> - compliance education programs;
> - amendments to relevant legislation; and
> - human resources development and management.
>
> *Notification of enforcement and related activities*
> In respect of investigations by the Agencies, each Agency will notify the other whenever an investigation, enforcement or a related activity may affect the essential interests of the other.

> Each Agency will, in particular, notify the other when it makes inquiries of persons located in the other's jurisdiction.
>
> *Assistance in enforcement and related activities*
> The assistance available under this Arrangement includes coordination of enforcement activities when the Agencies agree that it would be beneficial in a particular case, and providing access to information of the Requested Agency. However, the Requested Agency is not required to provide information to the Requesting Agency if disclosure of that information to the Requesting Party is prohibited by relevant laws, or is incompatible with the essential interests of the Requested Agency.
>
> In addition, the Agencies will arrange visits and/or the exchange of staff as appropriate and develop cooperative arrangements in relation to staff development and training, mutual assistance in legislation and so on.

Since the signing of the Arrangement, the KFTC has sent its staff to the ACCC almost every year to exchange information on the Compliance Programme, consumer protection policies and case proceedings. It is also noted that bilateral cooperation in other enforcement-related activities has been going smoothly.

3.2.2 Republic of Korea-Mexico Cooperation Arrangement

Following the Cooperation Arrangement with Australia, the Republic of Korea signed a cooperation arrangement regarding the application of competition laws with the Federal Competition Commission of Mexico in April 2004. In accordance with the provisions of the arrangement, each Agency will notify the other Agency with respect to its enforcement activities that may affect important interests of the other Agency and cooperate in the detection of anti-competitive practices and the enforcement of their competition laws. There are provisions relating to confidentiality of information and coordination of enforcement activities. In addition, it is stipulated that for technical cooperation in competition law enforcement and policy, both Agencies will carry out activities such as exchanges of information, exchanges of personnel for training purposes and participation of personnel as lecturers or consultants at training courses on competition law and policy organized or sponsored by

each Agency. The Arrangement includes provisions for law enforcement cooperation one level higher than that prescribed in the Republic of Korea-Australia arrangement. In accordance with Paragraph V 'Cooperation regarding anticompetitive practices in the territory of one country that adversely affect the interests of the other Agency', if an Agency believes that anti-competitive practices carried out in the territory of the other country adversely affect its important interests, the first Agency may request the other to initiate appropriate enforcement activities, and the requested Agency will carefully

Table 12.1 Bilateral consultation meetings

Meeting	Date	Topics discussed
9th Republic of Korea-Russia consultation meeting	June 2005	• Discussed recent trends in agency activities in the field of competition policy and regulatory reform • Noted the progress in bilateral cooperation between their competition authorities
7th Republic of Korea-US consultation meeting	November 2003	• Discussed issues of common interest, including cooperation in international cartel investigations, harmonization of intellectual property rights and competition policies, and protection of consumers • Officially agreed to sign a bilateral agreement between the competition authorities
13th Republic of Korea–Japan bilateral consultation meeting	March 2004	• Exchanged their opinions on the content of the revision of competition laws and on ways to coordinate technical assistance in competition policy for countries in East Asia • Consulted on the establishment of a Joint Study Group consisting of leaders from the government, academia and industry in order to eliminate anti-competitive practices existing in the markets of the two countries
9th Republic of Korea–France consultation meeting	April 2004	• Exchanged their views on important cases handled by the two authorities as well as recent trends in competition policies in the Republic Korea and France • The French delegation expressed a deep interest in the Three-Year Market Reform Roadmap and the revision of the Monopoly Regulation and Fair Trade Act (the competition law in the Republic of Korea) • At the suggestion of the French delegation, both countries basically agreed on signing a bilateral cooperation agreement
4th Republic of Korea-EU consultation meeting	June 2005	• Discussed recent revisions of the competition laws of each party • Exchanged opinions on investigations into the Microsoft Corporation, which had been charged with abuse of market dominance (bundling) • Agreed to strengthen the cooperative relationship by sharing related information

consider enforcement activities with respect to the practices identified in the request.

3.2.3 Holding bilateral consultation meetings

Currently, the KFTC maintains cooperation channels with 11 countries for consultation meetings on competition policy.[4] Recent consultation meetings have been held with Russia, the US, Japan, France and the EU. See table 12.1.

3.3 Cooperation through Memorandums of Understanding (MOUs) with CIS members and transition countries in Eastern Europe

Transition countries, which are undergoing transition from government-controlled economies to market economies, have not yet adopted competition law or, if they have, are at the early stage of competition law enforcement. Worse still, they are experiencing a lack of social and political awareness of and support for competition laws. Therefore, it is necessary to provide assistance in institution building so that competition policies can be established firmly in transition economies. Strengthening technical assistance is also needed as a way to help them improve their law-enforcement capabilities. In this regard, the KFTC has been reinforcing cooperative relationships with CIS members and transition countries in Eastern Europe by holding consultation meetings with Russia since 1997 and with Romania since 2001. The KFTC signed a Memorandum Regarding Cooperation in Competition Policy with a total of 13 competition authorities (11 competition authorities of CIS countries, including the Ministry of Anti-Monopoly Policy and Support to Entrepreneurship[5] of Russia, the Competition Council of Latvia and the Competition Council of Romania) in September 2003. Comprising a preamble and 13 provisions, the Memorandum prescribes exchange of information and the provision of technical assistance with regard to anti-monopoly or fair trade policy enforcement in order to create favourable conditions for market competition between the parties. Provisions 2 and 3 are related to cooperation.

Basic directions of cooperation

- exchanging legal acts and other binding instruments, on the basis of which the activities of the Parties in the field of competition law and policy are carried out;
- improving legal framework on restrictive business practices, unfair competition and merger control, in consideration of the experience of the Parties;
- exchanging experience in the field of investigation, concerning the infringement of competition laws;
- working on development of scientific and methodological basis for research in the field of competition law and policy.

Main forms of interaction

- promoting and strengthening cooperation in exchanging non-confidential information, such as the developments of competition law and policy and cases;
- organizing training for the staff of the other parties in the KFTC;
- sending the experts of the KFTC for providing personnel training and consultation on law enforcement and policy making;
- participating in the conferences, symposiums, seminars and other events held in the territories of the Parties;
- organizing visits of the high-level officials of the Parties for discussing questions of further multilateral and/or bilateral cooperation.

In collaboration with the Korean International Cooperation Agency (KOICA),[6] the KFTC undertook a technical assistance programme for public officials from competition authorities in eight transition countries[7] in April 2005 to strengthen market function in the countries. The programme included presentations and discussions by participants and lectures on nine themes that are substantially helpful to transition economies, such as the relationship between competition policy and economic development, national monopoly and competition policy, cartel regulations and merger reviews.

3.4 Cooperation on international cartel cases

Developed countries including the US and EU Member States are strengthening the extra-territorial application of competition law

to the conduct of foreign companies which results in restriction of competition in their markets. Such business conduct includes international cartels and mergers. International cartels, in particular, are being dealt with as top priority in the US and the EU. With this trend, the Republic of Korea began to apply its competition law in the 2000s to competition-restrictive practices of foreign companies that damage domestic companies and consumers.

In March 2002, the KFTC imposed administrative fines of 11.2 billion won (approximately US$ 8.5 million) in total, along with corrective orders, against six graphite electrode manufacturers from the US, Germany and Japan for having participated in the international cartel of graphite electrodes. This is the first case of the Monopoly Regulation and Fair Trade Act (MRFTA) being applied to anti-competitive conduct committed by foreign companies located outside the Republic of Korea. And in April 2003, the KFTC issued corrective orders and imposed administrative fines of 3.9 billion won (approximately US$ 3 million) in total against six vitamin producers from Switzerland, Germany, France, Japan and the Netherlands, which had participated in an international cartel. Below are examples of the Republic of Korea's experience in handling international cartel cases, which reveal the importance of international cooperation in combating international cartels.

3.4.1 Effects of international graphite electrodes cartel on the Korean market

Estimated as dominating over 80 per cent of the world's market share, six graphite electrode[8] producers, Showa Denko K.K. (Japan), Nippon Carbon Co., Ltd (Japan), Tokai Carbon Co., Ltd (Japan), SEC Corporation (Japan), SGL Carbon Aktiengesellschaft (Germany) and UCAR International Inc. (United States), had meetings from 1992 until 1998, and collaborated on and implemented price fixing. They agreed that, if a producer in a 'home market' raised its price, the other producers in the market would also raise their prices (so-called respect for the 'home market'). In 'non-home markets', which consist mainly of the Asian region excluding Japan, the cartel participants agreed on a specific market price. The cartel conspirators also agreed on a 'No Rebate, No Discount' rule, regional allocation of sales volume concentrating on the Asian region, limits on the volume of graphite electrode exports, and an agreement not to export electrodes to

countries where cartel members were located. What is more, with an aim to impede the entry of new firms into the market, they agreed that there was to be no transfer of production technology outside the circle of producers participating in the cartel.

The Republic of Korea does not have any graphite electrode producers, so it had to rely entirely on imports of graphite electrodes. Moreover, since over 90 per cent of the Republic of Korea's graphite electrode demand depends on imports from those cartel participants, the Republic of Korea was found to have undergone substantial damage. Korean companies imported graphite electrodes worth US$ 553 million from these cartel participants during the cartel period. The import price rose from US$ 2,255 per ton in 1992 to US$ 3,356 per ton in 1997.

3.4.2 Effects of an international vitamin cartel on the Korean market

The world's bulk vitamin market is dominated by F. Hoffmann La-Roche Ltd (Switzerland), BASF A.G. (Germany) and Aventis S.A. (France, formerly Rhone-Poulenc S.A.). Led by these three companies, six vitamin producers including Eisai Co., Ltd (Japan), Daiichi Pharmaceutical Co., Ltd (Japan) and Solvay Pharmaceuticals B.V. (the Netherlands) agreed to allocate sales volumes and coordinate the price of bulk vitamins in the global market. Take vitamin A and E as an example. After the first meeting in Zurich in 1989, four vitamin companies, including La-Roche, BASF and Aventis, met every year to agree on fixing the market share of each company in regional and global markets to the 1998 level. They also included in their agreement that the market share quotas would increase in proportion to the expanded market size. To check the implementation, these cartel participants exchanged related information and coordinated, on a regular basis, allocated sales volume and real sales volume in each national and regional market. As to sales prices, the cartel members accepted the 'price-before-volume' principle as being the underlying principle of the cartel. Once one cartel member announced a price increase, the others would follow suit. In this way, they raised prices each quarter or each year. Similar international cartels were also formed in the vitamin B5, D3 and beta carotene markets.

Among the many types of bulk vitamins, only vitamin H is produced in the Republic of Korea. For other vitamins, such as vitamins A, E, B5, D3 and beta carotene, the Republic of Korea relies entirely on imports. During the cartel period, the Republic of Korea imported bulk vitamins worth US$ 185 million from the six companies. The import price increased during the period, but plunged after the termination of the cartel. This led to enormous harm being done to the Korean companies that had imported bulk vitamins from the cartel members and, ultimately, to consumers.

3.4.3 Examples of cooperation on investigation of international cartel cases

Upon launching investigations into the graphite electrode cartel, the KFTC notified competition authorities in related countries (the US, Germany and Japan) of its investigations in accordance with the '1995 OECD Recommendation Concerning Cooperation between Countries on Anti-competitive Practices Affecting International Trade'. The KFTC requested these authorities to provide necessary information on where the cartel conspirators met, what they discussed, and internal reports of the relevant authorities from which they might gather the information requested. As shown in Table 12.2, the requested parties provided only publicly available data.

Table 12.2 Information provided by foreign competition authorities

	Information provided
US Department of Justice	• sent a letter stating that it was difficult to disclose cartel-related information and evidence since these are considered confidential information, but that the Department could provide the information presented at the court after the conclusion of the US v Mitsubishi Corp case. • provided information on financial status of UCAR International, a US company, before the KFTC made a ruling.
Fair Trade Commission of Japan	• stated that the provision of information related to a case under investigation was prohibited by law, but that its officials who investigated the cartel case were willing to provide explanations for the KFTC investigators.
EU DG Competition	• provided a non-confidential version of its decision.

Meanwhile, the Chairman of the KFTC had individual meetings with the US, German and Japanese Ambassadors to the Republic of Korea and explained the cartel case before the KFTC ruling was laid down. Also, before a press release on its ruling, the KFTC notified competition authorities and embassies of the related countries of its decision.

In the international vitamin case also, the KFTC notified the competition authorities in Switzerland, Germany, France, Japan and the Netherlands of its initiation of investigations and the results.

3.5 Cooperation through technical assistance

In the early days of competition law enforcement, the Republic of Korea received technical assistance from advanced countries or international organizations in order to overcome problems arising from its lack of experience and to improve its know-how. Many KFTC officials received training at competition agencies in developed countries through field trips and visits, and participated in competition policy seminars and workshops hosted by international organizations such as the OECD and the IBRD. All of these fora of technical assistance were very helpful for reviewing and formulating Korean competition law, as well as for introducing new competition policies and improving case proceedings.

Because of sustained economic growth, the Republic of Korea became the 29th member of the OECD on 29 December 1996. With its success in economic development and competition law enforcement at the same time, the Republic of Korea has begun to act as a bridge between developed and developing countries in competition law and policy. Developed countries want the Republic of Korea to play a more active role in spreading competition culture throughout the world, while developing countries desire to learn from its experiences, a country with similar historical and economic conditions. Since it initiated technical assistance activities in the late 1990s, the KFTC has been undertaking a variety of technical assistance programmes for developing countries based on experiences as a recipient and donor country with regard to competition law enforcement. These programmes include the International Workshop on Competition

Policy, KOICA's training programme on competition policy, and educational programmes through the OECD-KOREA Regional Centre for Competition.

International Workshop on Competition Policy

The International Workshop on Competition Policy, which has been held every year since 1996, has become a useful channel for sharing and understanding experiences of both developed and developing countries in competition law enforcement. Having been co-hosted by international organizations such as the OECD, the Workshop has dealt with not only traditional issues of competition law such as cartels and mergers, but also with topics specifically focused on the development dimension, including 'the role of competition policy in developing countries' and 'competition law appropriate to developing countries'. The Workshop is usually held for three to four days, and lecturers are mostly high-ranking officials of the KFTC and instructors from the OECD Secretariat or Member States. At the 9th International Workshop on Competition Policy last year, law enforcement experiences relating to cartels were shared with Asian countries including China and Indonesia, and transition economies such as Ukraine.

KOICA's training programme on competition policy

In cooperation with KOICA, the KFTC has undertaken programmes for sharing the Republic of Korea's experience in competition law enforcement with developing countries since 2002. Senior-level KFTC officials or professors provide lectures on the 'relationship between competition policy and economic development', 'M&A review system', 'proceedings of investigation and sanctions against concerted behaviour', and 'cases of regulatory reform' for working-level officials from participating countries. The KFTC operated two programmes in 2002, three in 2003 and one in 2004 for China, developing countries in Asia and transition countries. This year, the KFTC also held a course entitled 'Strengthening Market Function for Transition Countries' for public officials from competition authorities in CIS countries in April, and plans to start a course on developing competition law and policy for 20 countries in Asia, Africa, South America and the Middle East in November.

Table 12.3 Comparison of technical assistance programmes

	International Workshop on Competition Policy	KOICA programmes	RCC programmes
Period	3~4 days	14 days	5 days
Participants	Countries from around the world	Developing and transition countries	Non-OECD member countries in Asia
Selection of trainees	KFTC	KOICA	Consultation between OECD and KFTC
Lecturers	KFTC and OECD officials	KFTC officials and professors	OECD experts
Financing	KFTC	KOICA	KFTC, OECD

Educational programmes of the OECD-KOREA Regional Centre for Competition

In April last year, the Republic of Korea established the OECD-KOREA Regional Centre for Competition, which provides programmes for strengthening capabilities of Asia's developing countries in competition law.[9] As one of the first competition-related regional offices in the world, the centre engages in educational activities on competition policy management for relevant public officials and experts in Asia as well as counselling and research activities on competition policy and legal institutions. The centre organized two educational programmes for Indonesia and four Central Asian countries last year, and plans to run a total of seven programmes this year, including the educational programme on mergers for 21 competition officials from Indonesia, Singapore and Taiwan Province of China, which was held in April this year. In particular, the centre was designated as the provider of education in accordance with the MOU signed between the OECD and the ADB to provide about US$ 600,000 for a technical assistance programme for China. Table 12.3 clarifies the different types of technical assistance provided.

Top Level Official Meeting on Competition Policy

During the First Top Level Official Meeting on Competition Policy held in Bogor, Indonesia, in May this year, participating countries had in-depth discussions on the challenges they are facing in enforcing competition law and policy, and their efforts to overcome these challenges and difficulties. The session titled 'Towards Effective Technical Assistance and Capacity Building Activities', in particular, discussed the current situation regarding technical assistance and ways of effective technical assistance for countries that have recently adopted, or have yet to adopt, competition law and policy. Various opinions on the current situation and problems of technical assistance were exchanged between donor (Republic of Korea, Japan and Taiwan Province of China) and recipient countries (Indonesia, the Philippines, Malaysia, Thailand, Viet Nam and Singapore). Competition authorities in both donor and recipient countries may need to pay more attention to, and make more efforts for, providing effective technical assistance. Also, more active discussions on technical assistance were needed at the regional APEC level where competition issues are sometimes thought to be overlooked.

4. Evaluation of cooperative activities

4.1 FTAs, bilateral arrangements and MOUs

Multi-level approaches are required for cooperation in international cases between competition authorities, technical assistance and capacity-building activities. To make these cooperative activities more effective, binding agreements should be adopted between countries. Most such cooperation agreements on competition law and policy have a common content: notification, negative comity, positive comity, coordination, and joint investigation.

Table 12.4 summarizes the different kind of provisions included in the various agreements concluded between the Republic of Korea and other countries.

Table 12.4 Comparison of Republic of Korea-Australia Arrangement, Republic of Korea-Chile FTA (Chapter 14) and Republic of Korea-Mexico Arrangement

	Republic of Korea-Australia Arrangement (September 2002)	**Republic of Korea-Chile FTA (came into effect in March 2004)**	**Republic of Korea-Mexico Arrangement (March 2004)**
Type	agency-to-agency arrangement	government-to-government agreement	agency-to-agency arrangement
Structure	Preamble, 11 Paragraphs (29 provisions)	9 Articles (21 provisions)	Preamble, 13 Paragraphs (42 provisions)
	by type of cooperation		
Positive comity	×	○ consultation request	○ law enforcement request
Negative comity	○	○	○
Enforcement cooperation	○ includes investigation assistance	only prescribes exchange of information	○ includes investigation assistance
Enforcement coordination	○	○	○
Notification	○	○	○
Technical assistance	○	○	○

Legend: ○: has provisions, ×: has no provisions, : has limited provisions

As shown in Table 12.4, the three RTAs include most of the general forms of cooperation. However, due to the vagueness of these provisions, it is often difficult to implement these forms of cooperation. In terms of positive comity, there are differences among the three agreements: while the Republic of Korea-Australia Arrangement has no such provisions, and the Republic of Korea-Chile FTA prescribes only consultation requests, the Republic of Korea-Mexico Arrangement has full provisions on positive comity.

In the area of enforcement coordination, the three agreements do not include explicit provisions on a deep level of coordination, such as a joint investigation into international cases. Moreover, as these agreements were signed only recently, there have not been many specific cases of bilateral cooperation, other than the cooperation with the Australian competition agency in personnel training.

The MOU with 13 transition countries mainly covers the exchange of information and the provision of technical assistance with regard to anti-monopoly and competition policy implementation, and does not include various forms of cooperation that most cooperation arrangements have. Therefore, the MOU needs to be rearranged in order to guarantee a deeper level of cooperation. A bilateral consultation meeting on competition policy could serve as a channel for enhancing mutual understanding and seeking specific ways of cooperation through discussions on pending issues. More efforts should be made to establish cooperation channels with more countries and to develop existing consultation meetings into bilateral agreements.

4.2 International cartel cases

Cross-border anti-competitive cases require cooperation and coordination between different jurisdictions. During the course of enforcement activities, disputes with foreign companies and, furthermore, diplomatic rows between countries could occur. It takes considerable time, effort and personnel to handle an international case related to different foreign firms or countries. Worse still, some companies that participated in anti-competitive practices do not have local branches or offices in developing and least developed countries, and thus many difficulties may arise during the investigations.

During the investigations of the aforementioned international cartel cases, the Republic of Korea was hoping for more forthcoming responses from the requested parties. For a more effective cooperation in law enforcement, information needs to be exchanged between competition authorities. However, in many countries important information is often classified as confidential, which limits substantial cooperation in law enforcement.

4.3 Technical assistance

Technical assistance has contributed greatly to advancing the competition laws of the recipients to the global level and establishing cooperative relationships between donor and recipient countries. From the perspective of the Republic of Korea's experience, technical assistance programmes have not only been a useful means whereby to understand and share experiences in competition law and enforcement in each country, but have also helped developing countries to adopt competition law and policy and establish a tailored enforcement system.

Despite some positive experiences, such as, for example, the International Workshop on Competition Policy and the OECD-Korea regional centre for competition technical assistance programmes, the current scale of technical assistance in competition lags behind the official development assistance provided in the economic and social sectors. Sometimes, technical assistance initiatives only provide general ideas regarding competition laws and policies and are not meeting the needs of recipient countries. It is also noted that when the programmes are carried out alone by individual countries without coordination and cooperation, they may risk running in an overlapping and unsystematic way.

5. Conclusions: suggestions for enhancing effectiveness of cooperation at regional level

5.1 Including competition issues in the economic alliance agreements

Agreements for economic partnership such as an FTA will bring about promotion of competition through trade and investment liberalization. To achieve this expected outcome, participating countries should respond appropriately to anti-competitive practices. Therefore, competition policies focusing on regulating anti-competitive practices need to be given careful consideration as an important element of the framework for economic alliance.

Many ASEAN countries are actively moving toward trade and investment liberalization with their initiatives for the ASEAN Free Trade Agreement (AFTA) and the ASEAN Investment Area (AIA). With the Bogor Declaration of 1994, APEC member countries announced their commitment to complete the achievement of their goal of free and open trade and investment by 2020 (for developed economies, by 2010). With the 'APEC Principles to Enhance Competition and Regulatory Reform', APEC members also committed themselves to addressing anti-competitive behaviour by implementing competition policy. To put these commitments into action, economic agreements should be signed and competition-related issues need to be included.

In order to be effective, an appropriate competition cooperative system should have some characteristics reflecting the diversity in development stages and in approaches to competition regimes in East Asian countries. This competition framework should be 'comprehensive', 'flexible' and 'gradual'. The cooperative structure needs to be a comprehensive framework encompassing not only prevention of disputes over competition law enforcement and cooperation among countries concerned, but also technical assistance. Furthermore, it would be desirable to set the scope of cooperation flexibly, in order to respond to the different approaches of competition laws in other countries. Finally, when the competition regime in a country differs from that in others, gradual strengthening of cooperation should be considered. For example, the initial scope of cooperation is limited to notification, exchange of information, technical assistance and consultation. Then, the scope of cooperation can be broadened into cooperation at the enforcement level, such as enforcement coordination, in the long term.

Provisions to be included in the economic alliance agreement are correlated to the commitment to regulate anti-competitive behaviour. In order to face anti-competitive practices, such as cartels in the East Asian market, it is essential to maximize the benefits of free and open trade and investment. Therefore, the individual commitment of each country to regulate anti-competitive activities in its domestic market is important for establishing a single economic community in East Asia. That's why an effort should be put into creating an environment for preventing and punishing anti-competitive practices.

5.2 Strengthening technical assistance for institution and capacity building

Substantial cooperation in competition law and policy between countries in the region would be possible when each country has in place provisions and authorities effectively preventing anti-competitive behaviour in its market. Still, many developing, transition and least developed countries have not introduced competition law or, if they have, do not have a comprehensive and systematic competition law adapting to the international standards. They do not have independent competition authorities in charge of competition law implementation either. Under these circumstances, it is too soon to hope for substantial cooperation in competition law and policy immediately. To begin with, technical assistance should be provided for institution building, as a way to ensure that competition policies become well established in these countries and for capacity building in law enforcement. A set of actions should then be undertaken by these countries.

First, good practices need to be found so that technical assistance activities can be carried out effectively. Given that the increase in technical assistance has not always guaranteed effective solutions, efforts should be made to provide assistance more tailored to the specific needs of developing countries within the budget.

Second, technical assistance programmes should reflect the economic structure and development stage of recipient countries. Countries preparing to introduce or in the early stage of implementing competition law may often face difficulties from a lack of experience. What they need is the capacity to implement competition policies. In addition, donor countries together with the recipient countries should try to understand and find solutions to challenges facing the recipient countries, such as concentration of economic power by large companies and monopolies, privatization of public corporations and integration of geographically segmented markets.

Third, technical assistance activities being carried out alone by individual countries should be managed and coordinated systematically. Of course, it is not easy to integrate a variety of technical assistance activities. However, countries can coordinate

them voluntarily by sharing information on the current activities concerning technical assistance in each country.

Fourth, competition authorities in donor countries should try to broaden the support base for technical assistance. Technical assistance programmes are usually financed not by economic agencies, but by other agencies. In this regard, efforts are needed to enhance understanding of competition policies among these financing agencies.

To expand technical assistance at the global level, consideration should be given to more active discussions in international organizations such as UNCTAD, WTO, OECD, APEC and ICN. Also important is the greater interest and commitment of competition authorities in both donor and recipient countries. At the same time, recipient countries must know what they need to formulate and enforce the laws, and what's to be done. For their part, donor countries have to develop and operate various programmes tailored to the unique needs of recipient countries. To transform donor-oriented and introductory programmes into recipient-oriented and problem-solving programmes, in particular, the current one-year programmes need to be changed into multiple-year programmes. Various kinds of content by sector such as law, policy, cases and so on or by level such as rudimentary, intermediate and advanced need to be developed. In addition, international cooperation between competition authorities is important. It would be desirable to develop programmes connecting diverse technical assistance activities of countries, exchange programme content or lecturers, establish communication channels to evaluate and discuss the effectiveness of the programmes, and systematically coordinate bilateral, multilateral and regional technical assistance activities.

5.3 Expanding comparative studies for harmonization of competition law

Although an increasing number of Asian countries legislate and enforce competition law with the enlargement of the market economy in the region, few countries, other than the Republic of Korea and Japan, have accumulated sufficient experience to evaluate the consequences.

In order to further develop competition laws in Asia, there should be studies that compare provisions adapted by the Republic of Korea and Japan with those in the US and Europe in order to develop the laws to meet global standards. By sharing their know-how and experiences with other countries, the Republic of Korea and Japan can help these countries develop tailored competition law. The results of these comparative studies can also be used as valuable information by countries trying to develop a competition framework, such as China, let alone countries lacking competition law enforcement experience such as Thailand, Singapore and Indonesia.

In the short term, the studies on competition laws in Asia will contribute to developing the competition laws of each country and establishing competition order in the region. In the long term, the countries are expected to converge or harmonize the laws and, thus, to lay the legal foundation for incorporating Asian economies into an economic community.

Despite the competition regime being established in each country, substantial cooperation in enforcement would be difficult to expect if there are differences in competition laws and regulations. Harmonization of different laws of different countries is a prerequisite for substantial cooperation in this field. To that end, there should be many international academic events where specialized scholars, legal experts and public officials gather and exchange their opinions. Such events will present participating countries with opportunities to reach a consensus on the goals and the content of competition laws and policies and, ultimately, to harmonize their competition laws and policies.

Endeavours to transfer specialized knowledge and technologies to competition law enforcers of other countries are equally important. For example, sponsored by the KOICA, the KFTC held a two-week programme for sharing the Republic of Korea's experience in competition law implementation with 15 officials from the State Administration for Industry and Commerce (SAIC) of the People's Republic of China[10] in 2002. The KFTC also hosted an international seminar where the US, EU and Japanese experts, dispatched as lecturers for the program, as well as public officials from the Korean and Chinese competition authorities, had in-depth discussions on the competition laws of each country.

5.4 Establishing consultation channels

In order to guarantee regular consultations between competition authorities, countries in the region should strive to develop a regional consultation body while maintaining bilateral consultation channels. The launch of a formal regional conference could represent an effective option. East Asian countries including the Republic of Korea hold the East Asia Conference on Competition Law and Policy and the Top-Level Officials' Meeting on Competition Policy. These meetings will definitely serve as a channel for cooperation in competition law and policy in the East Asian region.

Moreover, in order to spread competition law throughout the region, equally important is to build a working-level channel for the discussion of technical issues. In this regard, the Republic of Korea, Japan and Taiwan Province of China have recently had close consultations, and tangible results of this effort are expected soon. Consistent support and interest of not only East Asian countries but also related countries are required to bring such efforts in line with those of international organizations.

NOTES

[1]The Republic of Korea-Chile FTA is the first FTA Korea signed. The Republic of Korea temporarily signed the Republic of Korea-Singapore FTA after reviewing the final draft, and is pursuing FTAs with Japan, Mexico and ASEAN countries.

[2] The objectives of the Republic of Korea-Chile FTA are to encourage expansion of bilateral trade, eliminate barriers to trade, facilitate cross-border movement of goods and services, promote conditions of fair competition, increase investment opportunities, protect intellectual property rights and create effective procedures for the resolution of disputes.

[3] The ACCC is a national agency in charge of both competition and consumer protection policies and is evaluated as an exemplary competition authority whose purpose is to increase consumer welfare.

[4] As of June 2005, the 11 countries are Japan, the United States, France, Russia, the European Union, Romania, Mexico, China, Germany, Australia and Italy.

[5] Through the government reorganization in March 2004, the Federal Anti-Monopoly Service (FAS) was newly created under the office of the Prime Minister after its predecessor, the Ministry of Anti-Monopoly Policy and Support to Entrepreneurship, was abolished. The FAS is in charge of anti-monopoly and competition policies. Policies relating to entrepreneurship support came under the charge of the Ministry of Economic Development and Trade.

[6] KOICA was established in 1991 to strengthen cooperative relationships and mutual exchange with developing countries and promote socio-economic advancement of these countries. It implements and administrates the grant aid and technical programmes of the Korean government.

[7] The eight transition countries include Latvia, Tajikistan, Russia, Moldova, Uzbekistan, Ukraine, Kyrgyzstan and Kazakhstan.

[8] Graphite electrodes are large columns used in electric arc furnaces in steel-making mills to generate the intense heat (about 3000°) necessary to melt and further refine steel. There are no substitute goods.

[9] In May 2003, the OECD proposed to establish a regional competition centre which will provide training and education on competition law and policy for non-member countries in Asia, and signed the MOU with the KFTC for the establishment of the OECD-KOREA Regional Centre for Competition in December 2003.

[10] China's competition law is composed the Countering Unfair Competition Law and other individual laws such as the Law on the Protection of Consumer Rights and Interests and the Price Law. The Countering Unfair Competition Law provides for 11 types of unfair competition practices. However, the Law has no provisions on monopoly, cartel and M&A. Currently, China is working at legislating the Anti-Monopoly Law, a universal and comprehensive competition law.

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Exemptions from competition law in regional trade agreements: A study based on experiences in the agriculture and energy sectors

MELAKU GEBOYE DESTA

1. Introduction

This chapter discusses the issue of exemptions from competition law in Regional Trade Agreements (RTAs) with a view to answering the question of whether there are any sectoral differences in the scope of application of competition policy. The term 'exemption' is used here in a broad sense to mean not only the total exclusion of competition law provisions from a particular sector but also to cover cases where the general rules of competition law are subjected to modifications and adaptations with a view to making them more lenient and accommodative in favour of private actors engaged in a particular sector or activity or meeting certain general conditions in common. Based on a closer examination of national and regional experiences in the application of competition law in two key sectors, agriculture and energy, which have been chosen only

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for explanatory purposes, the chapter attempts to draw the lessons that could be helpful particularly to developing countries in their effort to introduce competition law and institutions at both national and regional levels. Two main lessons are particularly apparent. Firstly, knowledge of the experiences of other countries and regions in the development of their competition law systems, including any sectoral differences and exemptions, provides useful lessons for those that are in the process of making one so that they would avoid or minimize mistakes made by others while strengthening their achievements. And, secondly, the extent to which a sector is subject to standard competition rules in a market of export interest to a developing country is an important factor in designing the latter's export policy and strategy.

With these objectives in view, the chapter is structured as follows: Section 2 provides a general background about the nature of competition law and policy and its major features in terms of both substantive rules and principles and the exceptions with the help of examples from different national systems. Section 3 provides an overview of competition law in RTAs based on examples of RTAs from the north, the south and those with north-south membership. Section 4 then looks at exemptions from regional competition law based on experiences from national and regional competition law systems using the agriculture and energy industries as explanatory case studies. Finally, Section 5 concludes by drawing the lessons that could be learnt for the future of competition law/policy in international/multilateral economic cooperation.

2. Competition law: general remarks

Competition law[1] is a key element of virtually all advanced national legal systems based on free market principles. Competition law is concerned with the structure and behaviour of enterprises on the market. It aims to create a market in which producers and traders would compete freely on the quality of products and services they offer and the prices they charge rather than through the improper exercise of market power, whether acquired unilaterally or in concert with others. More broadly, competition policy is designed to address 'industry structures and practices that give excessive market power to sellers – power to raise prices above, or reduce quantities below, the levels that would prevail in competitive markets.'[2]

The competition laws of almost all countries target two forms of practices by private-sector operators – concerted practices, such as price fixing and market-segmentation cartels (hereafter anti-competitive agreements), and abuse of dominant positions such as monopolies (hereafter disciplines on dominant market positions).[3] A chief feature of all these laws is that they discourage the formation of anti-competitive agreements as well as the abuse of dominant market positions. To take an example, Section 1 of the Sherman Antitrust Act of 1890 in the US provides, in part: 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.'[4] Likewise, Section 2 of the same Act on monopolies provides as follows: 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony….'[5] Sanctions for violation of competition law range from administrative behavioural or structural orders to, in some cases such as in the US and, since 2002, in the UK,[6] criminal penalties against officers acting on behalf of those operators.

Competition law applies only to the conduct of private enterprises acting out of their own free will. It does not apply to cases where companies take anti-competitive measures pursuant to requirements set by the state. Under such circumstances, private enterprises often have the defence of 'foreign government compulsion', which is normally available in cases where anti-competitive private conduct is compelled by a government. In a US case, a group of crude oil suppliers participated in a concerted boycott designed to deny an oil refining company (Interamerican Refining Corporation) crude oil from Venezuela. In the antitrust proceedings, the defendants argued that they could not supply the required grade and type of oil to the refiner because the Venezuelan government had forbidden sales which, directly or indirectly, reached Interamerican. The US District Court for the District of Delaware held that 'the undisputed facts demonstrate that defendants were compelled by regulatory authorities in Venezuela to boycott plaintiff. It also holds that such compulsion is a complete defense to an action under the antitrust laws based on that boycott.'[7]

Moreover, competition law does not apply to inter-governmental anti-competitive practices such as the various international commodity agreements made by producing and consuming countries aimed at regulating prices and supplies through production quotas,[8] or those established only by producing countries such as the Organization of Petroleum Exporting Countries (OPEC).[9] Such practices could however be covered by the rules of the WTO system, due to the direct governmental act involved, unless justified by any of its exceptions.[10]

3. Competition law and regional trade agreements

3.1 The backdrop of trade liberalization

Although national competition law had its historical origins independently of international trade, the current discussions about regional and international competition law and policy are taking place against the backdrop of broader international trade liberalization through bilateral, regional, plurilateral and multilateral means. With the proliferation of RTAs aimed at closer economic integration through the dismantling of barriers against the free movement of goods and services, and in many cases also of capital and persons, the need for competition law at regional level has become ever more apparent, and regional competition laws and policies are increasingly commonplace.

The reasons behind this development are fairly well known. Firstly, although multilateral and regional trade liberalization have succeeded in the reduction/elimination of most governmental barriers to trade, the lack of similar arrangements to deal with 'private trade barriers'[11] to international trade has created doubts about the effectiveness of the multilateral trading system. Competition law is thus perceived as a necessary anti-circumvention supplement to RTAs designed to protect the fruits of trade liberalization from being undermined by private sector barriers.[12]

Secondly and related to the first, closer integration between markets means that the likelihood of private measures in one country

adversely affecting another country's interests is much higher. More specifically, the creation of RTAs, if not supplemented by appropriate arrangements about enforcement of competition law, has the potential to exacerbate this problem since RTAs by definition make it easier for companies to cause damage in partner countries. In the absence of inter-state cooperation on competition issues, the standard reaction in such circumstances by any government would be to apply its competition law to practices that took place outside its territorial jurisdiction, as is often the case with US antitrust law, thereby causing serious international frictions.[13] Regional competition law is thus as much an instrument of minimizing trade distortions as of building confidence and amicable international relations at regional level. Indeed, the recent growth in the number of countries with competition law in many parts of the developing world is directly linked to the unprecedented growth in the number of regional trade agreements with competition provisions over the past decade or so.[14]

At the global level as well, the WTO system already contains some competition provisions, such as the 1996 Reference Paper on Telecommunication services.[15] Moreover, intense effort has been taking place on this topic, particularly since the 1996 Singapore Ministerial Conference, with the object of introducing a generic competition agreement that would apply to every sector in the same way as the agreements on subsidies and countervailing measures or on anti-dumping measures. This effort has not been successful yet[16] and the competition policy instruments in existence today at international level are limited to the soft-law provisions of the 1976 OECD Guidelines for Multinational Enterprises (revised in 2000)[17] and the 1980 United Nations Set of Principles and Rules on Restrictive Business Practices.[18]

3.2. A brief survey of competition law in RTAs

Almost every modern RTA devotes a chapter or so to competition law issues.[19] While the ideal goal in every case might be harmonization of competition law standards across the membership of RTAs, in reality significant divergence exists in the form and substantive content of the competition law obligations created by different RTAs. On the least advanced end of the spectrum fall such agreements as

the New Zealand-Singapore bilateral agreement, which limit themselves to broad and non-binding language without any realistic intent to discipline anti-competitive behaviour.[20] On the most advanced end, fall such region-wide common competition regimes as that of the EC, which not only imposes common substantive obligations directly on the private operators in member countries but also creates a supranational authority with power to enforce the law throughout the Community. It is difficult to find any other RTAs with this level of harmonization and the closest the author has been able to find thus far is the Caribbean Community. Most RTAs fall somewhere between these two extreme cases. A good example of this middle tier would be Chapter 15 of the North American Free Trade Agreement (NAFTA),[21] which requires each signatory government to 'adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto….'[22] While Canada and the US already had long-established competition law systems, Mexico adopted a competition law and created the Federal Competition Commission to enforce it in 1993.[23]

The following section will look more closely at the competition laws of three RTAs – the EC, CARICOM, and a category of RTAs concluded between the EC and different developing countries. The purpose of this discussion is to illustrate the different levels of ambition in competition law reflected in such arrangements and to lay the contextual background for the subsequent discussion on the exemptions from these systems.

3.2.1 The European Community (EC)

Given the depth and complexity of EC competition law, it is impossible to provide any detailed description of the system here. The following brief introduction is intended mainly to outline the general principles contained in the Treaty of Rome and a few of the key secondary legislations so as to lay the background for the subsequent discussion of the exemptions from regional competition law, for which EC law is almost the only source.

The EC boasts the most advanced and near-uniform system of regional competition law with a powerful Competition Directorate General that has the competence to enforce its rules directly on private enterprises throughout the Community. Indeed, 'the competition

sector is the only one in which the commission is entrusted with the application of community rules to individual undertakings'.[24]

The basic substantive rules of EC competition law are contained in Articles 81 and 82 EC on anti-competitive agreements and abuse of dominant market position, respectively. Article 81(1) prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.' This general principle is supplemented by a list of specific practices such as price fixing, supply restriction, and market sharing agreements which 'shall be automatically void'. Article 81(3) provides a list of conditions under which anti-competitive agreements, otherwise falling under Paragraph 1, would be exempted, which will be discussed in the next section.

Article 82 EC also provides that 'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States'. Once again, this general principle is also supplemented by a list of specific practices that may qualify as such an abuse of a dominant position. These practices include the imposition of unfair purchase or selling prices or other unfair trading conditions, and limitation of production, markets or technical development to the prejudice of consumers.

Article 86 EC then singles out public undertakings and undertakings to which Member States grant special or exclusive rights and declares that they, too, are subject in principle to the rules of competition law contained in the Treaty. However, Paragraph 2 goes further and provides:

> 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly *shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them*. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community' (emphasis added).

The relevance of this provision particularly to the energy industry will be discussed in the next section.

The power to issue regulations and directives necessary for the enforcement of EC competition law was initially given to the European Council. Interestingly for the purpose of this discussion, the Council also had the power 'to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 81 and 82'.[25] It will be seen later on, with the help of examples from the agriculture and energy sectors, how the Council exercised its power under this provision in adapting the scope of competition law to the various branches of the economy.

3.2.2 The Caribbean Community (CARICOM)

As early as 1973, the Chaguaramas Treaty establishing CARICOM[26] provided a set of principles governing restrictive business practices. In a language that clearly bears the influence of the EC system described above, Article 30 of the Annex to the Chaguaramas Treaty considered incompatible a category of private sector practices that would nullify the benefits expected from the agreement to liberalize intra-regional trade. These practices include the following: (a) agreements between enterprises, decisions by associations of enterprises and concerted practices between enterprises which have as their object or result the prevention, restriction or distortion of competition within the Common Market, and (b) actions by which one or more enterprises takes unfair advantage of a dominant position, within the Common Market or a substantial part of it. Furthermore, Article 30(4) also committed Member States to introduce 'as soon as practicable' uniform legislation for the control of restrictive business practices.

The sketchy provisions of Article 30 were later amended and replaced by a new and more detailed protocol in 2000.[27] The protocol establishes a regional competition commission invested with powers necessary for the enforcement of the rules, including powers to secure the attendance of any person before it to give evidence, order termination of anti-competitive conduct and impose fines and/or order payment of compensation to affected parties.[28] The protocol also imposes on Member States the obligation to take all necessary

legislative measures to ensure compliance with the rules of competition and provide penalties for anti-competitive business conduct and establish national competition authorities to that end.[29] The national competition authorities are required to cooperate with the Community Competition Commission (Article 30(b)(3)).

At the substantive level, the protocol prohibits anti-competitive business conduct, which is defined to mean the following:

> '(a) agreements between enterprises, decisions by associations of enterprises, and concerted practices by enterprises which have as their object or effect the prevention, restriction or distortion of competition within the Community; (b) actions by which an enterprise abuses its dominant position within the Community; or (c) any other like conduct by enterprises whose object or effect is to frustrate the benefits expected from the establishment of the CSME '.[30]

This broad definition is further supplemented by a long illustrative list of specific practices, such as price fixing, supply restriction and unauthorized denial of access to networks or essential infrastructure.

3.2.3 Agreements between the EC and developing countries

The EC generally follows the standard practice of including competition provisions in agreements it signs with developing countries. A look at the EC-South Africa Trade and Development Cooperation Agreement (TDCA)[31] and the Euro-Mediterranean Association Agreement between the EC and Algeria[32] shows that the EC has effectively made competition policy an essential aspect of any preferential trade agreement that it concludes with developing countries and follows a standard format and near-identical wording. For example, Article 35 of the TDCA and Article 41 of the EU-Algeria Association Agreement declare as incompatible with the proper functioning of the respective instruments anti-competitive agreements between private enterprises and abuse of dominant market positions insofar as they may affect trade between the Community and the partner countries. These provisions require that the parties to the agreements take all necessary legislative measures to implement the commitments contained in them. In this respect, the TDCA specifically provides that 'if, at the entry into force of this

Agreement, either Party has not yet adopted the necessary laws and regulations for the implementation of Article 35, in their jurisdictions it shall do so within a period of three years.'[33]

In both cases, the enforcement of the competition commitments is left to the respective competition authorities of the EC and the two partner countries subject to an administrative-cooperation commitment. Each side of the two agreements reserves the right to take appropriate measures against any such anti-competitive practices subject to a consultation requirement or, failing any such consultations, after 30 working days following referral for such consultation. Unlike the EU-Algeria Agreement, however, the TDCA provides for a positive comity obligation under which the Parties agree that

> 'whenever the Commission or the South African Competition Authority has reason to believe that anti-competitive practices, defined under Article 35, are taking place within the territory of the other authority and are substantially affecting important interests of the Parties, it may request the other Party's competition authority to take appropriate remedial action in terms of that authority's rules governing competition'.[34]

By contrast, in apparent recognition of the weaker position of the African, Caribbean and Pacific Group of countries (the ACP), the Cotonou Agreement[35] is largely limited to a restatement of general principles and future aspirations. Article 45 of the Cotonou Agreement simply declares the crucial importance of a sound and effective competition policy and commits the ACP countries

> 'to implement national or regional rules and policies including the control and *under certain conditions* the prohibition of agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition. The Parties further agree to prohibit the abuse by one or more undertakings of a dominant position in the common market of the Community or in the territory of ACP States' (emphasis added).

This is then followed by a statement of cooperation including technical assistance in the drafting of an appropriate legal framework and its administrative enforcement. It is notable at this juncture that this softly-softly approach is likely to change as competition policy

is being pursued more vigorously by the EC in the context of the ongoing negotiations for the establishment of Economic Partnership Agreements with ACP subregions.[36]

4. Exemptions from competition law

It is noteworthy that not every cartel-like activity or every monopoly situation is prohibited, whether at national or regional levels. Although the economic principles of productive and allocative efficiency underlying competition law would be undermined by most anti-competitive activities, the laws of many countries and regions provide for a host of grounds for exemptions from the application of their respective competition rules. As indicated in the introduction, the term 'exemption', this does not necessarily mean the total exclusion of competition law provisions from a particular sector but broadly to cover modifications or adaptations of general competition law with a view to making it more lenient and accommodative of private behaviour in a particular sector or activity. Some of these exemptions are motivated by considerations of the strategic significance of particular industries in an economy (for example agriculture and the energy sector, in general); some others are dictated by the nature of the industry – such as the so-called natural monopolies in the network-bound industries (for example electricity and natural gas); and still others by the mercantilistic urge to promote exports (for example the exemption of export cartels in the US, the EC and many other developed legal systems).[37]

This discussion will take the agriculture and energy industries as case studies. The reasons for the choice of these sectors are three-fold. Firstly, despite the obvious differences between these two sectors, they share at least one important thing in common – both often benefit from exemptions from the full application of general competition law in many countries. At the same time, reflecting the decisive role of industrial structure on competition law, the exemptions applying to these two sectors are also different. Accordingly, because the farming industry is largely made up of many small and individually powerless players,[38] the exemption for agriculture naturally relates more to the collusion aspect than the market power abuse aspect of competition law. On the other hand, because the energy sector, and particularly its network-bound segments, is dominated by just a few

integrated and powerful utilities,[39] the exemption relates more to the market power abuse aspect of competition law than the collusion aspect of it. In practice, this has often been manifested in the form of utilities enjoying special status either as governmental or quasi-governmental monopolies or as private enterprises exempt from the full force of general competition law. The two sectors are thus chosen as explanatory tools for the discussion on exemptions from the two forms of anti-competitive practices.

Secondly, at the level of general international economic relations, too, these are two sectors have been resistant to the full application of the market-oriented rules of the multilateral trading system. Both are considered vital and strategic industries with implications for national security – industries on which the economic well-being and possibly the very survival of nations could depend. Partly because of these common features, both have been characterized by a distrust of market forces, thereby often subjecting them to special exemptions from key trade rules. The special subsidies regime within the WTO applying to agricultural products, the equally generous forms of state aid available to some forms of renewable energy sources in many WTO member countries, and the widespread practice of government intervention at both the producer and consumer ends of the oil industry in the form of OPEC and the International Energy Agency, respectively, are all proof of the strong aversion of these sectors to the rules of the market.

Finally, these two sectors, particularly in their primary forms, are of particular importance to the developing countries, and at a time when many north-south RTAs are taking competition provisions as a necessary component, it is worth analysing the lessons of other RTAs in the treatment of these sectors.

In line with the discussion in the preceding section, the exemptions from competition law will also be discussed according to the two major forms of practices that fall under general competition law – anti-competitive agreements and abuse of dominant market positions. It is worth stressing at this point, however, that the search for exemptions from competition provisions presupposes the existence of certain RTA-wide common rules and principles of binding competition law whose applicability could otherwise be excluded or qualified in specific sectors. And this is far from common.

The discussion in this section is thus largely focused on the EC as it is difficult to find RTAs that have achieved a sufficiently high degree of harmonization of competition law warranting the explicit inclusion of an exemption. The absence of a truly common competition policy in RTAs, such as those concluded between the EC and developing countries, means that there is often nothing like a common exemption from competition law for any specified list of sectors such as agriculture or energy. Rather, each party retains its own policy choices in this respect, subject to the commitment to enforce the minimum standards contained in the text of those agreements, and often a duty to cooperate with the other partner in the enforcement of these laws. Some RTAs and also national systems will still be referred to in this section as appropriate in order to show how exemptions work in practice.

4.1 Exemptions from the ban on anti-competitive agreements

As noted earlier, exemptions from competition law are common, and may be general or specific, express or implied. Reflecting the structural considerations at the core of competition law, exemptions from the ban on anti-competitive agreements are mostly available only to small players in the market. Special competition law regimes are thus often created to apply to farmers, fisheries and the like, owing to the small and fragmented nature of the individual actors in those industries;[40] the strategic significance of food production also plays an important role. This section will look at exemptions that are generally available in many legal systems to what are called small- and medium-sized enterprises (SMEs) in all sectors and proceed to the agricultural sector focusing on farming.

4.1.1 SMEs and de minimis

SMEs often benefit from exemptions from competition law rules prohibiting concerted practices either expressly[41] or through the minimum anti-competitive threshold requirements set by the competition laws of many countries.[42] According to the OECD, the reasons for this include the structural concern that SMEs 'have no chance of survival in competition with large firms if the latter use

economies of scale'.[43] Several governments attempt to offset those structural disadvantages of the SMEs by, *inter alia*, allowing them to enter into co-operative agreements amongst themselves.[44]

The special treatment of SMEs may also take the form of a *de minimis* requirement, although the latter is not necessarily limited to SMEs. Under EC competition law, for example, the European Court of Justice (ECJ) interpreted the ban on concerted practices under Article 81(1) EC as inapplicable 'where the impact of the agreement on intra-Community trade or on competition is not appreciable'.[45] This requirement of appreciable impact thus constitutes a *de minimis* requirement for the application of Article 81 EC. Based on this judicial interpretation, the Commission later issued a Notice in which it stated that agreements between small and medium-sized undertakings 'are rarely capable of appreciably affecting trade between Member States'.[46] The Commission then defined the *de minimis* threshold to mean an aggregate market share held by the parties to the agreement not exceeding 10 per cent in any of the relevant markets affected by the agreement for agreements between competitors, and 15 per cent for agreements between non-competitors.[47]

However, not all forms of agreements among SMEs and/or within this *de minimis* limit benefit from exemption. The Notice excludes from exemption a category of agreements containing 'hard-core restrictions', including price fixing, output restrictions and allocation of markets or customers.[48] Perhaps because of this, EC Commission officials often argue that

> 'EC exemptions are not exceptions to the applicability of EC competition rules; rather, they are one of the ways of applying competition rules, by means of Article 81(3) of the Treaty. Agreements which do not fall within the scope of Article 81(1) - e.g. because there is no appreciable restriction of competition or effect on trade between Member States – are neither exempted nor excepted: they are simply not prohibited. This will be more often the case for SMEs'.[49]

In addition to this general practice of setting *de minimis* requirements and the special treatment of SMEs, the laws of many countries also allow exemptions in those special cases where anti-competitive agreements might also have pro-competitive effects. For example, under the EC Treaty, the Council has the power to declare inapplicable the anti-cartel provisions of Article 81(1) EC to specific

concerted practices and decisions or categories of them which are deemed to contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.[50] This power of exemption, which was later put under the exclusive competence of the Commission by EEC Regulation 17 of 1962,[51] came to an end with the enactment of EC Council Regulation No 1/2003[52] which introduced 'a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty'.[53] This Regulation also abolished the prior administrative-decision requirement in order to exempt concerted practices that satisfy the exceptional circumstances outlined in Article 81(3) EC, simply declaring such agreements 'shall not be prohibited, no prior decision to that effect being required'.[54] In practice until then, the exemptions were often granted on individual and case-by-case bases, particularly in the early days of EC competition law enforcement in the 1960s, while in the later days it took the form of what in EC law are called 'block exemptions', often applying to vertical agreements such as exclusive distributorship agreements. For example, Commission Regulation (EEC) No. 123/85 of 12 December 1984 on the application of the now Article 81(3) EC Treaty to certain categories of motor vehicle distribution and servicing agreements, provided a block exemption for

> 'agreements, for a definite or an indefinite period, by which the supplying party entrusts to the reselling party the task of promoting the distribution and servicing of certain products of the motor vehicle industry in a defined area and by which the supplier undertakes to supply contract goods for resale only to the dealer, or only to a limited number of undertakings within the distribution network besides the dealer, within the contract territory'.[55]

Once again, however, there are limits to such exemptions. A good example here is the ECJ finding in *Volkswagen v Commission*.[56] In that case, the Commission imposed a fine of EUR 102 million on Volkswagen for forcing Italian dealers for Volkswagen and Audi makes to sell vehicles solely to Italian customers, thereby prohibiting re-exportation of vehicles into other members of the Community. This, according to the Commission, hampered the objective of creating

the common market, which is one of the fundamental principles of the European Community. Volkswagen then brought an action against the Commission, which was rejected by the Court of First Instance and later confirmed by the ECJ as follows: 'a measure which is liable to partition the market between Member States cannot come under those provisions of Regulation No 123/85 that deal with the obligations which a distributor may lawfully assume under a dealership contract'.[57] This therefore shows that there are always certain types of conduct that cannot benefit from exemptions from anti-competitive agreements, such as agreements leading to price fixing and the partition of markets.

4.1.2 Agriculture

The agriculture sector could be defined broadly to include the whole supply chain from the farmer who produces the crop down to the processing plants and the retail outlets. The discussion in this chapter focuses almost exclusively on the upstream segment – that is on the farming industry more narrowly defined.

There are several reasons why agriculture in this narrow sense is often treated separately from other sectors in respect of competition law and policy. Firstly, agriculture is the source of our food and is often considered as too strategic an industry to be left entirely to the workings of the market. Secondly, because the sector is largely made up of small and often family-based producers, the need to organize them in associations, such as cooperative societies, is apparent. Such an organization has the object of protecting the interests of these small and potentially vulnerable operators from the adverse effect of market forces. One way of protecting their interests is to use their cooperatives so as to enhance their bargaining power in negotiations for prices and other commercial terms with the often more powerful processors and retailers.[58] Such an association of producers would of course be illegal under the competition law regime of many developed countries. The exemptions for agriculture are often designed to make this legally permissible.

The EC competition law regime is a good case in point here. The EC Treaty created common policies in both agriculture and competition. Through the agriculture section, the Treaty tried to create a system which aims, *inter alia*,

> '(b)… to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; (c) to stabilize markets; (d) to assure the availability of supplies; (e) to ensure that supplies reach consumers at reasonable prices'. [59]

Some of these objectives of the common agricultural policy, such as those on increasing farmers' earnings and securing reasonable prices for consumers, conflict with each other,[60] and they also require a certain degree of direct public intervention in the agricultural market contrary to the spirit and letter of the competition chapter of the same Treaty.[61] The Treaty resolves this apparent conflict between the objectives of the agricultural and competition policies by making the latter subordinate to the former. Article 36 EC provides that 'The provisions of the chapter relating to rules on competition shall apply to production of and trade in agricultural products *only to the extent determined by the Council within the framework of Article 37(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 33*' (emphasis added). Agricultural policy is thus given precedence over the aims of the Treaty in relation to competition.[62] The Council exercised the wide discretion given to it by this provision through EEC Council Regulation No. 26 applying certain rules of competition to production of and trade in agricultural products[63], which is sometimes taken as the first block exemption adopted by the Council.[64]

Regulation 26 reaffirms that the rules on competition apply to production of and trade in agricultural products 'in so far as their application does not impede the functioning of national organisations of agricultural markets or jeopardize attainment of the objectives of the common agricultural policy'.[65] More to the point, Article 2 of the Regulation declares that Article 81(1) of the Treaty (on anti-competitive agreements)

> 'shall not apply to such of the agreements, decisions and practices referred to in the preceding Article as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article [33] of the Treaty. In particular, it shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the

> storage, treatment or processing of agricultural products, and under which there is *no obligation to charge identical prices*, unless the Commission finds that competition is thereby excluded or that the objectives of Article [33] of the Treaty are jeopardised' (emphasis added).

The requirement not to include an obligation to charge identical prices once more underlines that even in agriculture the exemption from competition is far from complete.

The approach of CARICOM to the issue of exemptions is also similar to that of the EU. Article 30(i)(3) of the 2000 Protocol amending the CARICOM Treaty requires members to ensure that any agreements and decisions falling within this broad definition of anti-competitive business practices will be null and void unless such practices fall in any of the exceptions provided in Article 30(i)(4) of the protocol.[66] The exceptions are couched in terms similar to Article 81(3) of the EC Treaty and none of them specifically excludes either agriculture or energy from the coverage of competition law.[67] It is possible, however, to argue that since many of the competition rules would conflict with the agricultural objectives of the Community outlined under Article 49 of the Annex to the Chaguaramas Treaty, including the objective to raise the income and standard of living of the rural population, the scope of application of the competition provisions is necessarily limited by those agricultural objectives. Moreover, the protocol also provides for a *de minimis* rule under which the Commission is given the power to exempt anti-competitive business practices whose impact on trade in the CSME is found to be minimal.[68] It does not however provide any threshold figures for the determination of this *de minimis* level. Finally, the Committee on Trade and Development (COTED) has power to grant individual or block exemptions in the public interest.[69] It is not clear whether COTED has exercised its power to exempt agriculture from the competition rules.

In sum, a tempting conclusion from the discussion in this section is the following: if European farmers and other SMEs are exempted from the anti-cartel provisions of the common competition policy due to their small size, those in the developing world are far smaller even by their own standards and more deserving of such a special treatment from the rules of competition law whether at the national,

regional or multilateral levels. However, developing countries would serve their interests best by pushing for a fuller application of competition law in the agricultural and other similar sectors of developed countries rather than by merely trying to copy the catalogue of exemptions from those countries. By allowing market forces to play a larger role in determining the distribution of market share among the different players on the domestic market, such pro-competition developments within countries could arguably even help the liberalization of agricultural trade at the WTO level – an issue that has eluded developing countries for decades.

4.2 Exemptions from the discipline on dominant market positions

The discussion in this sub-section is even more complex than the preceding one. While almost every competition law system generally prohibits anti-competitive agreements among private-sector operators, the approach to dominant market position is much more diversified. In some countries, such as the US and Mexico, monopolies are simply prohibited, while in others, such as the EU, monopolies are in principle permitted and it is only their behaviour that is subject to regulation. It is this divergence in the principles that makes any discussion on exemptions from principles slightly more difficult.

In general, the exemptions from this aspect of competition law are often indirect and limited to the big national utilities and natural monopolies. Furthermore, recent developments in many countries show that the scope and significance of those exemptions is getting more and more limited. This section discusses such exemptions with the help of experiences in the energy sector.[70]

4.2.1 Energy

The energy industry is a big and diverse industry in itself, covering everything from coal, oil and gas to nuclear and renewable sources of energy. This chapter focuses largely on the network-bound energy sectors particularly electricity and pipeline gas. The discussion is limited to the EC experience in the sector for two reasons: (1) as noted earlier, it is already difficult to find a well-developed RTA-

wide competition policy that applies directly to private operators throughout an RTA; and (2) in the case of network-bound energy, the issue of RTA-wide competition law does not arise unless the necessary physical infrastructure exists connecting the different members of a particular RTA, which is missing in many cases. The EU, albeit not the only one, satisfies both requirements and provides a useful case study for the development of regional competition law in such areas.

The application of EC competition rules to the network-bound segments of the energy industry has been traditionally limited. Although undergoing change over the past decade or so,[71] such networks are what are often called natural monopolies generally immune from competition law requirements. The EC experience on the relationship between its network-bound energy industry and its common competition policy is thus a useful one.

The 1957 Treaty of Rome establishing the European Economic Community (EEC) did not expressly mention energy. The meaning of this omission has been debated – some saying that that amounted to giving energy a special status while others suggested that energy is a type of good and remained subject to the general rules of the Treaty just like any other goods.[72]

Unlike in some national legal systems,[73] there is no explicit exemption for energy from EC competition law; the claim is arrived at only indirectly. Firstly, the EC Treaty provides for an exemption for 'undertakings entrusted with the operation of services of general economic interest'. According to Article 86(2) of the EC Treaty:

> 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.

The energy industry squarely fits into this description due to the general economic interest of the energy industry and its tendency toward monopoly. Although the EC Commission later introduced several pro-competition initiatives for the energy sector, both in the form of legislative proposals and judicial actions, several competing interests conspired to keep the network-bound energy sector largely

shielded from the EC rules of competition law for a long time.[74] A lack of political will from Member States and the cautious approach of the ECJ in the interpretation of the EC Treaty, and particularly Article 86(2) played a major part in this. At national level, many EC member countries reconciled the competing demands of competition law on the one hand and the natural monopoly status of the network-bound sectors with their public service requirements on the other through establishment of independent regulators as 'a surrogate for competition'.[75] This anti-competitive role of networks is gradually being addressed especially in the EC gas and electricity sectors, through network unbundling and particularly regulated and non-discriminatory third-party access to networks.[76] However, it remains that energy is still one of the least-developed common policies at the EC level.[77]

5. Lessons to be learnt

This chapter has shown that competition law, whether regional or national, does not apply equally to every economic sector or operator; rather, it is carefully adapted to suit the realities of different sectors of the economy in the form of exemptions or modifications. It has been shown that the competition law provisions that are found in almost all recent RTAs, to the extent they create any common competition policies, do not envisage the same standards to such traditionally exempted sectors as agriculture and energy. In this respect, the chapter has argued that the type of competition law applying to different sectors and operators is largely determined by the structure of particular industries and their role in the overall economy. The analyses on the extent of application of competition law in the agriculture and energy sectors has demonstrated how the obvious structural differences that exist between the two industries contribute to some form of special treatment for these two sectors in terms of both national and regional competition law. Furthermore, it has been shown that, because the two are structurally different industries, the nature and scope of exemptions are also substantively different. In the case of agriculture, the issue is not (yet) about dominance, as the structure of farming in many countries does not have that many dominant players yet; it is rather about anti-competitive agreements among the otherwise small players. Hence the partial exemption of agriculture from the anti-cartel provisions

of competition law, such as Article 81 of the EC Treaty. The reverse is, however, true in the case of energy, and particularly network-bound energy. Because the players are often large and few and possess significant market power, the relevant rules are those on abuse of dominant market positions and the exemptions were designed to partially shield them from rules such as Article 82 of the EC Treaty.

At a broader level, these exemptions are also an embodiment of a general aversion to reliance on market forces for these sectors. Indeed, it is obvious, at least in the two sectors analysed here, that important parallels exist in the approaches of the multilateral trading system of the WTO and most RTAs in respect of the application of trade law on the one hand and the application of national and regional competition law on the other. It shows that sectors that are still subject to a high level of governmental intervention in the form of subsidies or high market access barriers at the border, often in derogation from key WTO disciplines, also often benefit from special treatment in the application of competition law to private business at the national and regional levels.

Although the implication of these parallels for regional and multilateral trade and competition negotiations, in general, and for developing countries, in particular, is difficult to determine, a few tentative conclusions may be suggested:

(1) The sectors that have proven to be resistant to multilateral trade liberalization at the WTO are an extension of the resistance of those sectors to the rules of the market at the domestic level. The apparent parallels in this respect may indicate that the causes are also somehow related and the solutions might require an integrated approach.

(2) It cannot be ruled out that even the most far-reaching regional or multilateral agreement on competition will not bring such traditionally market-resistant sectors as agriculture and energy to the same level as just any other commodity, largely due to their strategic importance and their inherent structural features as either natural monopolies or small and family-based holdings. Whether this sets the outer limits of regional and multilateral competition law in the future is yet to be seen.

(3) From the perspective of developing countries that are in the process of introducing competition law or have just completed one, the choice is not between perfect competition and perfect monopoly; it is about the introduction of degrees of competition appropriate to different sectors of the economy, and there can be no fixed criteria by which to determine that appropriate degree. A thorough study of the experiences of countries and regions with established competition law traditions is thus vital not only for what should be covered by any such law, but also for what should not be so covered or covered only to a limited degree.

(4) This may also mean that the benefits of any progress at the WTO level in terms of trade liberalization in sectors like agriculture could be undermined unless they are accompanied by similar pro-competition moves in terms of the private-sector barriers at the national and regional levels. In a sector as sensitive and vital as agriculture, the possibility of private trade barriers, such as boycotts and refusals to purchase by retailers at the behest of national farmers unions, taking the place of dwindling governmental tariffs and non-tariff restrictions is a genuine concern particularly for developing countries that have paid so much in multilateral trade negotiations for the reintegration of agriculture into the mainstream rules of the trading system. This also appears to support the argument that developing countries could benefit from proactive engagement in negotiations for a multilateral competition agreement. The fact that virtually all countries with a developed competition tradition not only tolerate but also actively promote purely export cartels makes such a multilateral instrument potentially useful, particularly for developing countries.

(5) Also, while exemptions of particular sectors from competition law in developing countries may well serve some specific purpose at any given point in time, the long-term interest of these countries would be best served by less rather than more frequent resort to exemptions. As such, it is suggested that further research in this area should consider whether developing countries should campaign against exemptions and for a more even application of competition law across sectors by their developed country partners.

(6) If special and differential treatment were to be really meaningful, it should involve undertakings by more advanced countries to eliminate exemptions and deregulate sectors before their developing country counterparts. Developed countries should set an example in liberalizing sectors before developing countries and without expecting immediate reciprocity.

NOTES

[1]Note that the term competition law is used here in the narrow sense and does not include such governmental or governmentally backed practices as subsidies covered by the WTO rule book.

[2]See Tarullo (2000:483).

[3]See, for example, EC Treaty Articles 81 and 82, respectively, together with the 1989 Merger Regulation (Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O. J. 1989, L 395, pp. 1-12).

[4]The full text of this Act is available at http://www.usdoj.gov/atr/foia/divisionmanual/ch2.htm#a. For detailed guidelines on the application of US antitrust law, see Antitrust Enforcement Guidelines for International Operations, issued by the US Department of Justice and the Federal Trade Commission April 1995, available at http://www.usdoj.gov/atr/public/guidelines/internat.htm

[5]See Id. See also Section 7 of the Clayton Act of 1914 on mergers and acquisitions.

[6]See Article 188 of the UK Enterprise Act of 2002, available at http://www.opsi.gov.uk/acts/acts2002/20020040.htm

[7]*Interamerican Ref. Corp. v Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970). It is notable, however, that national law requirements would not serve as a defence in a WTO-type situation where members undertake to eliminate anti-competitive conduct. In Mexico – Telecommunications, Mexico argued that acts by its telecommunications enterprise, Telmex, could not be anti-competitive practices since they were required by national law. The panel rejected this Mexican argument and rightly observed: 'International commitments made under the GATS "for the purpose of preventing suppliers ... from engaging in or continuing anti-competitive practices" are … designed to limit the regulatory powers of WTO Members. … In accordance with the principle established in Article 27 of the Vienna Convention, a requirement imposed by a Member under its internal law on

a major supplier cannot unilaterally erode its international commitments made in its schedule to other WTO Members to prevent major suppliers from "continuing anti-competitive practices". The pro-competitive obligations in Section 1 of the Reference Paper do not reserve any such unilateral right of WTO Members to maintain anti-competitive measures.' See Mexico – Measures Affecting Telecommunications Services Report of the Panel, WT/DS204/R, adopted on 1 June 2004, Paragraph 7.244 (footnotes omitted).

[8]See, for example, the International Coffee Agreements, particularly the earlier ones, which 'allowed for the suspension of quotas if prices were high and their reintroduction if prices became too low.' See http://dev.ico.org/history.asp#ica2.

[9]Although this view is widely shared among international lawyers and competition specialists, two judicial actions were brought against OPEC based on US antitrust law. In both cases, however, the Courts dismissed the cases on grounds of the 'act of state' doctrine and service of process. For more on this, see Desta (2003:523-551). See also Rezzouk (2004:2) who observed that the behaviour of governments is outside 'the conventional range of national competition law'. Tarullo (2000:483) also notes that 'competition law generally applies only to private conduct'.

[10]See Desta *Id*.

[11]Private trade barriers here refer to 'arrangements by domestic producers such as boycotts or refusals-to-deal that exclude imported products from their market'. See Hudec (1999:77).

[12]It is in fact difficult to find any RTA competition provision that does not mention as its primary objective the protection of the achievements of the RTA from being undermined by private anti-competitive behaviour.

[13]On the extraterritoriality aspects of competition law, see Guzman (1998).

[14]For relevant information, see Silva (2004:7). Silva reported that '… in 1990, only five nations in this region had competition laws. At present, 12 of the 33 countries of the region possess such laws, while eight — not including Caribbean nations — are at the drafting stage and a greater number have sectoral and constitutional laws or other relevant provisions'. This is not accidental; it reflected the rapid growth in the number of RTAs worldwide since the 1990s. According to a recent WTO paper, 196 RTAs were notified to the WTO between 1 January 1995 and February 2005, while the total number of RTAs over the 47 years lifetime of the GATT stood at just 124. See Crawford and Fiorentino (2005:3).

[15]For practical experience in the application of these competition rules under the WTO, see the panel report in Mexico Telecommunications, supra n. 7.

[16]Following the Cancun WTO Ministerial setback in September 2003, which was largely attributed to agriculture and the Singapore issues (one of which is

competition), the effort to create a WTO competition agreement has been suspended.

[17]See OECD, The OECD Guidelines for Multinational Enterprises Revision 2000, at http://www.oecd.org/dataoecd/56/36/1922428.pdf.

[18]See UNCTAD, "The United Nations Set of Principles and Rules on Competition" (Geneva 2000 TD/RBP/CONF/10/Rev.2) at http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf.

[19]For a useful and recent survey on this, see OECD (2005). Surprisingly, the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA) does not contain a generalized competition provision and only specifically addresses the issue in relation to the privatization and liberalization of Costa Rica's telecommunications industry. See Central American-Dominican Republic-United States Free Trade Agreement, 5 August 2004, not yet entered into force, at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html

[20]See OECD (2005:9).

[21]The North American Free Trade Agreement, Chapter 15, 17 December 1992, 32 I.L.M. 289 (entered into force 1 January 1994).

[22]*Id.* at Article 1501.

[23]OECD, Competition Law and Policy in Mexico: an OECD Peer Review, (Paris 2004), at http://www.oecd.org/dataoecd/57/9/31430869.pdf (hereinafter Mexico Peer Review).

[24]See Ehlermann (2000:537,540).

[25]See Article 83(2)(c) EC.

[26]Treaty signed at Chaguaramas, Trinidad & Tobago, on 4 July 1973; text available at http://www.caricom.org/archives/treaty-caricom.htm.

[27]See Protocol VIII: Competition Policy, Consumer Protection, Dumping and Subsidies: (Protocol Amending the Treaty Establishing the Caribbean Community), signed on 14 March 2000 at Basseterre, St. Kitts and Nevis, text available at http://www.caricom.org.

[28]See Article 30(f) of Protocol VIII, Id.

[29]See Article 30(b) of Protocol VIII, Id.

[30]See Article 30(i)(1) of Protocol VIII, Id.

[31]*Agreement on Trade, Development and Cooperation between the European Community and the Republic of South Africa*, published in O.J. L 311/296, 4.12.1999, (hereafter TDCA) Article 35.

[32]See Article 41 of the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, signed in Valencia 22/04/02, text available at http://europa.eu.int/comm/external_relations/algeria/docs/index.htm

[33]See TDCA Article 36, supra n. 31.

[34]See Article 38 TDCA, supra n. 31.

[35]See Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States and the European Community and Its Member States, signed in Cotonou, Benin on 23 June 2000, text available at http://www.acpsec.org/en/conventions/cotonou/accord1.htm

[36]See, for example, Falkenberg (2004:3), who argues that trade alone is not sufficient for development and that the Economic Partnership Agreements should cover competition since 'enterprises in developing countries can stitch up markets at least as successfully as in developed countries' which 'plays against new entrants into the markets and hence against economic growth and employment'.

[37]See Victor (1992:571,577) states that all major trading partners of the US have some form of antitrust immunity for export cartels, an approach which is like 'each country trying to benefit at everyone's expense'.

[38]In terms of industrial structure, agriculture, although undergoing significant changes in recent years, is still largely characterized by small-scale, often family-based holdings. Small family farms still account for an overwhelming majority of farms even in the developed world – about 90 per cent of all farms in the US in 2001. See Banker and MacDonald (2005), available at http://www.ers.usda.gov/publications/aib797/aib797.pdf.

[39]The energy industry has traditionally been a classic example of monopolistic or oligopolistic structures controlled by a few large and often integrated utilities usually enjoying special status under the law.

[40]Altman and Callmann (2005) (recognizing that under US antitrust law, some exemptions from competition are based on 'concern for the economic weakness of isolated groups, such as farmers').

[41]Examples include the EU, the US and Japan. For more on this, see OECD (1997).

[42]Examples include Canada and Norway. See Id.

[43]See Id. p. 8.

[44]For example, German competition law allows inter-company cooperation agreements that are primarily directed to the promotion of efficiency including 'production, research and development, financing, administration, advertising, purchasing and distribution', but not agreements designed to eliminate competition such as price fixing or market sharing. (Id. p. 11). In

the effort to minimize the structural disadvantage of SMEs, in 1990 Germany extended the exemption from the ban on concerted practices to joint purchasing by SMEs on certain conditions: 'if the participating companies are not compelled to purchase, if competition on the relevant market is not substantially impaired and if the agreement serves to promote the competitiveness of SME' (Id. p. 12).

[45]See Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) O. J. C 368/07 of 22.12.2001, recital Paragraph 1.

[46]See Id. Paragraph 4. SMEs under EC law are defined to mean 'undertakings which have fewer than 250 employees and have either an annual turnover not exceeding EUR 40 million or an annual balance-sheet total not exceeding EUR 27 million' Id.

[47]See Commission Notice, Id. Paragraph 7.

[48]See Commission Notice, Id. Paragraph 11.

[49]See OECD (1997:42).

[50]See Art. 81(3) together with Article 83 of the EC Treaty.

[51]See Regulation No. 17 implementing the [then] Articles 85 and 86 of the EEC Treaty (Articles 81 and 82 EC), O.J. 13 of 21.02.1962. Art. 9 of this Regulation stipulated that 'the Commission shall have sole power to declare Article 81 (1) inapplicable pursuant to Article 81 (3) of the Treaty'.

[52]See Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L. 01 of 04.01.2003.

[53]Recital to Id. Paragraph 4.

[54]See Id. Art. 1:2. The Commission later issued detailed Guidelines on the application of Article 81(3) of the Treaty in Commission Notice 101/08, O.J. C 101/97 of 27.04.2004. A former Director General of the EC Competition department had already described the 1999 Commission White paper which first introduced the proposal as 'the most important policy paper the Commission has ever published in more than 40 years of EC competition policy'. See Ehlermann (2000:537).

[55]See Commission Regulation (EEC) No. 123/85 of 12.12.1984 on the application of Article 85(3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements, O.J. 1985 L 15, p. 16), recital Paragraph 1. See also Commission Regulation (EC) No. 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, O. J. L 203/30 of 1.8.2002. For more on block exemptions, see Goyder (2004).

[56]See Volkswagen AG v Commission of the European Communities, Judgment of the Court (Sixth Chamber) of 18 September 2003, Case C-338/00.

[57]See Id. Paragraph 49.

[58]In a private correspondence with this author (27 July 2005), Professor Alan Swinbank observed that farms produce raw materials, and the first-stage processors are often highly concentrated. He noted as an example that there is only one sugar-beet refiner in the UK, and so British sugar users face a duopoly: British Sugar (the beet refiner) and Tate & Lyle (the refiner of imported raw cane sugar).

[59]See Article 33(1) of the EC Treaty.

[60]The ECJ has recognized that these aims could be in conflict and ruled that 'according to the settled case-law of the court … in pursuing the various aims laid down in article 39 of the treaty, the community institutions have a permanent duty to reconcile the individual aims. Although that duty to reconcile means that no single aim may be pursued in isolation in such a way as to make the achievement of the others impossible, the community institutions may allow one of them temporary priority in order to satisfy the demands of the economic or other conditions in view of which their decisions are made'. See Case 27/85 Vandemoortele v Commission [1987] ECR 1129, Paragraph 20.

[61]See Title VI, Chapter 1, Articles 81-89 of the EC Treaty. The common agricultural policy takes the form of common market organizations for particular agricultural products. The structure of these market organizations varies from product to product but generally it works as follows: the European Council annually sets common prices which indicate the politically desired price level that should prevail on the market. To ensure that this desired price target is achieved, the system envisages intervention purchase by the authorities, thus allowing the producers minimum guaranteed return for their produce.

[62]See, inter alia, Case 139/79, Maizena v. Council [1980] ECR 3393, Paragraph 23.

[63]*Official Journal 030, 20/04/1962 P. 0993* – 0994.

[64]See Goyder, supra n. 55, pp. 114-5.

[65]See Regulation 26, recital Paragraph 6.

[66]See Protocol VIII, supra n. 27.

[67]The only place where the protocol explicitly excludes agriculture is in the case of prohibited subsidies under Article 30(p)(quater) of the protocol, which is effectively copied from Article 3 of the WTO Agreement on Subsidies and Countervailing Measures. Such publicly sanctioned anti-competitive practices are however outside the remit of this chapter. For an extensive analysis of agricultural subsidies with the WTO system, see Desta (2002), Parts II and III.

[68]See Article 30(m) of Protocol VIII, supra n. 27.

[69]See Article 30(o) of Protocol VIII, supra n. 27.

[70]Note however that exemptions from disciplines on dominant market positions are not necessarily limited to the big players. Section 24 of Japan's Anti-Monopoly Act, for example, provides an exemption for SMEs from the anti-monopoly law by allowing them to form cooperative unions so that 'small-scale enterprises that find it difficult to effectively compete with large-scale enterprises become part of an effective unit of competition in the market, and thereby actively contribute to the maintenance and promotion of the fair and free competition order as set out in the Anti-Monopoly Act'. See OECD (1997:35), supra n. 41.

[71]See Cameron (2002:7–9).

[72]According to Cameron (2002:11), the competition provisions of the EC Treaty 'were not applied to the energy sector'.

[73]For example, although Mexico's constitution prohibits monopolies and monopolistic practices, it exempts from this prohibition specific sectors in what it calls 'strategic areas' including petroleum, hydrocarbons, petrochemicals, radioactive mining and electricity. See Mexico Peer Review, supra n. 23 at 15.

[74]For more on how this provision was used to exempt the network-bound energy industry, see Cameron (2002: Chapter 5).

[75]See Cameron (2002:23).

[76]Non-discriminatory access to upstream production (generation in the case of electricity; imports or national production in the case of gas), non-discriminatory access to transmission and distribution networks, and non-discriminatory access to consumers are essential conditions for competitive entry to occur in the energy industry. For more on this, see OXERA (2003:8-9). See also Cameron (2002:4,23–28) and Waelde and Gunst (2004:179-212).

[77]By contrast, the Treaty of Rome devoted a whole section to agriculture (Title II of the EC Treaty, Articles 32-39) and the common agricultural policy (CAP) is perhaps "the most highly developed" of all the common policies of the EC. See Steiner and Woods (2000:208).

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