



**United Nations  
Conference  
on Trade and  
Development**

Distr.  
GENERAL

TD/B/COM.2/CLP/21/Rev.5  
26 April 2007

Original: ENGLISH

---

TRADE AND DEVELOPMENT BOARD  
Commission on Investment, Technology and  
Related Financial Issues  
Intergovernmental Group of Experts on Competition Law and Policy  
17–19 July 2007  
Item 3(i) of the provisional agenda

**EXPERIENCES GAINED SO FAR ON INTERNATIONAL COOPERATION  
ON COMPETITION POLICY ISSUES AND THE MECHANISMS USED**

Revised report by the UNCTAD secretariat\*

**Executive Summary**

This report focuses mainly upon three of the more formal types of international instruments dealing with competition law and policy cooperation, namely: competition law enforcement cooperation agreements; free trade, customs union or common market agreements; and multilateral instruments. The concentration of such agreements among OECD countries has lessened somewhat. There are many common elements among the relevant provisions of these agreements, even though no single agreement is exactly like another. The implementation of such agreements has helped to minimize conflicts among Governments and to facilitate enforcement in this area. Countries that are close trading partners with significant economic relations, and that have comparable competition policy experiences or views, are the most likely to employ such arrangements. To date, developing countries have played a less significant role than their OECD counterparts in developing or implementing these more formal cooperation arrangements, especially in dealing with specific cases. To promote the active participation of developing countries in such arrangements, it would be advisable to build up mutual confidence gradually, by evolving from simple and informal arrangements to more complex cooperation agreements. Balanced cooperation among developing countries would provide a learning experience and help ensure that cooperation with more advanced partners was fruitful. Free trade or common market agreements might provide a framework conducive to this purpose, but

regional rules, institutions and mechanisms would need to be adapted accordingly. Within the framework established by the Fifth Review Conference and taking into account views expressed during or after the seventh session of the Group of Experts, future sessions of the Intergovernmental Group of Experts on Competition Law and Policy might accordingly deliberate upon the status of international cooperation in this area and identify how UNCTAD could further strengthen such cooperation. Specific issues for discussion include the following: (a) how to ensure compatibility, coexistence, coordination and mutual reinforcement among national, subregional, interregional and possible multilateral competition regimes; (b) how much convergence among substantive, procedural and enforcement policy aspects of competition laws and policies is necessary to further enforcement cooperation; (c) the appropriate balance between promoting such convergence and allowing room for diversity and experimentation by each country or subregional grouping; (d) whether and how the principle of preferential or differential treatment for developing countries might be better reflected in competition cooperation agreements; (e) what types of dispute avoidance or resolution mechanisms (if any) might be appropriate in different contexts, and how such mechanisms as applicable might be tailored and developed for cooperation on competition law and policy; (f) how diversity or compatibility/convergence among national, bilateral, regional and multilateral regimes might be catered for or reconciled through such mechanisms as applicable; (g) how best to promote exchange of experiences in this area so as to further develop bilateral and regional cooperation mechanisms, including the organization, functions and powers of the competent institutions; (h) confidentiality restrictions and leniency agreements; (i) possible roles of competition authorities and of UNCTAD with respect to negotiations or implementation of competition-related provisions in regional trading agreements; and (j) minimum standards for substantive and procedural antitrust rules.

**CONTENTS**

	<b>Page</b>
Executive Summary .....	1
INTRODUCTION .....	4
<b>I. INSTRUMENTS OF INTERNATIONAL COOPERATION ON COMPETITION LAW AND POLICY .....</b>	<b>6</b>
A. Overview.....	6
B. Agreements on competition law enforcement .....	6
C. Mutual legal assistance treaties.....	8
D. Friendship, commerce and navigation treaties .....	8
E. Technical cooperation agreements.....	9
F. Free trade, customs union, economic partnership or common market agreements .....	9
G. Multilateral and plurilateral instruments.....	15
<b>II. ENFORCEMENT COOPERATION .....</b>	<b>18</b>
A. Overview.....	18
B. Cooperation between the European Union and the United States .....	18
C. Impediments and factors conducive to cooperation .....	19
D. Developing countries, regional groupings and the Set of Principles and Rules..	21
 <b>Annexes</b>	
<b>I. BILATERAL AGREEMENTS ON COMPETITION LAW ENFORCEMENT .....</b>	<b>27</b>
<b>II. SELECTED FREE TRADE, CUSTOMS UNION, ECONOMIC PARTNERSHIP OR COMMON MARKET AGREEMENTS WITH COMPETITION LAW AND POLICY PROVISIONS .....</b>	<b>31</b>
<b>III. MULTILATERAL AND PLURILATERAL INSTRUMENTS DEALING WITH COMPETITION LAW AND POLICY .....</b>	<b>36</b>

## INTRODUCTION

A first UNCTAD secretariat report with the same title as the present report (TD/B/COM.2/CLP/11) was presented to the Intergovernmental Group of Experts on Competition Law and Policy at its second session, held from 7 to 9 June 1999.<sup>1</sup> At the request of the Group of Experts, a revised report on this subject (TD/RBP/CONF.5/4) was presented to the Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (25 to 29 September 2000). In line with the resolution adopted by the Review Conference, a further revised report (TD/B/COM.2/CLP/21) was submitted to the third session of the Group of Experts, which requested its further revision; further revised versions were respectively submitted to the fourth and fifth sessions of the Group, which again requested revised versions.<sup>2</sup> A further version of the report was prepared at the request of the sixth session of the Group which, in its agreed conclusions, requested the secretariat to revise/update document TD/B/COM.2/CLP/21/Rev.2 in the light of comments made by member States at that session or to be sent in writing by 31 January 2005, for submission to the 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 Conference.<sup>3</sup> The Review Conference took note with appreciation of the documentation prepared by the UNCTAD secretariat for the Conference, and requested the secretariat to revise documents in the light of comments by member States made at the Conference or to be sent in writing by 31 January 2006 for submission to the following session of the Group of Experts.<sup>4</sup> A revised version of the report was accordingly prepared for the seventh session of the Group of Experts (31 October-2 November 2006), which requested the UNCTAD secretariat to revise/update documents in the light of the comments made by member States at the seventh session or to be sent in writing by 31 January 2007 for submission at the eighth session of the Group of Experts.<sup>5</sup> The present revised report should be read in conjunction with three other reports, the second of which has now been revised for the eighth session of the Group of Experts: “Roles of Possible Dispute Mediation Mechanisms and Alternative Arrangements, including Voluntary Peer Reviews, in Competition Law And Policy” (TD/B/COM.2/CLP/37/Rev.3); “Ways in which Possible International Agreements on Competition Might Apply to Developing Countries, including through Preferential or Differential Treatment, with a view to Enabling These Countries to Introduce and Enforce Competition Law and Policy Consistent with their Level of Economic Development” (TD/B/COM.2/CLP/46/Rev.3); and “A Presentation of Types of Common Provisions to be Found in International Agreements, Particularly Bilateral and Regional, Cooperation Agreements on Competition Policy and their Application” (TD/RBP/CONF.6/3). Also of high relevance to the present report is the UNCTAD book entitled *Trade and Competition Issues: Experiences at Regional Level*, particularly the article it contains on special and differential treatment in this area,<sup>6</sup> as well as the UNCTAD book *Implementing Competition-Related Provisions in Regional Trading Agreements: Is it possible to obtain development gains?*, UNCTAD/DITC/CLP/2006/4.

1. For the purposes of this study, international cooperation in the area of competition law and policy is interpreted in a broad sense, covering cooperation aimed at: (a) avoiding conflicts between Governments; (b) facilitating enforcement against restrictive business practices (RBPs) (which is reciprocal in principle); (c) provision of technical assistance for adopting, reforming or enforcing competition law and policy by countries which are more experienced in this domain to those less experienced; (d) the promotion of convergence or harmonization of competition laws or policies; (e) enhancing trade liberalization or its

benefits; (f) promoting efficiency, welfare and development; (g) reducing transaction costs for firms; and (h) supporting economic integration. It should be noted that, in practice, any cooperation agreement or cooperative activity may have more than one of these objectives, which are indeed often interlinked.

2. International cooperation in this area can take place either on an informal basis, or in pursuit of the application of an international instrument (the term “instrument” is used here to cover both legally binding treaties or agreements and non-binding recommendations or undertakings). This report focuses on the latter. Chapter I describes different types of bilateral, regional, plurilateral and multilateral cooperation instruments with a bearing on competition law and policy. Chapter II describes experiences in cooperation on competition law and policy based on these instruments. Factors which have either facilitated cooperation or that have made it more difficult are analysed and suggestions are made as to how this cooperation might be developed. The first three annexes to this study list a selection of three types of instruments dealing with competition law and policy, namely: bilateral agreements on competition law enforcement; free trade, customs union or common market agreements; and multilateral and plurilateral instruments. Only instruments currently in force are referred to, in an approximate chronological order, except where there is doubt about the date of an instrument.

## Chapter I

### INSTRUMENTS OF INTERNATIONAL COOPERATION ON COMPETITION LAW AND POLICY

#### A. Overview

3. This chapter distinguishes among the following six types of international instruments dealing with competition law and policy (the first four types are primarily of a bilateral nature): (a) agreements focusing on cooperation in competition law enforcement; (b) mutual legal assistance treaties, which would apply to criminal antitrust cases as well as other criminal cases; (c) friendship, commerce and navigation treaties concluded between the United States and several other countries, which include clauses referring to cooperation on antitrust matters; (d) technical cooperation agreements ; (e) free trade, customs union, economic partnership or common market agreements, including regional or subregional agreements or bilateral agreements concluded within a regional framework, covering competition law and policy as one element in a broader relationship; and (f) multilateral instruments, whether or not they are of a legally binding nature, which are universally applicable or are of a plurilateral nature and cover a range of issues or focus specifically on competition law and policy. In practice, the borderlines between these different categories of instruments are often blurred, while other instruments not mentioned here may also have some bearing on competition law and policy – for example, some international treaties relating to judicial assistance provide for the sharing of confidential information; pursuant to such treaties, letters rogatory have been used to obtain confidential information.<sup>7</sup> Some typical provisions of such agreements and notable features of specific agreements are described below. While enforcement agreements and some multilateral instruments usually deal solely with competition law and policy, other types of agreements deal with cooperation on competition law and policy as one element in a wider agreement. Each type of instrument is dealt with in a separate section of this chapter. It is noteworthy that the concentration of co-operation agreements among OECD countries is not quite as heavy as before; virtually all observer and invitee jurisdictions at the Global Forum which were active in competition policy had entered into co-operation agreements with one or more jurisdictions (often with those which were geographically close and/or close trading partners), with numbers of agreements comparable to those existing among OECD Member countries.<sup>8</sup>

#### B. Agreements on competition law enforcement

4. As is evident from annex 1, the United States is party to a large number of these agreements; it has such agreements with Australia, Brazil, Canada, the European Union, Germany, Israel, Japan and Mexico. The European Union has concluded such agreements with Canada, Japan, the Republic of Korea and the United States but, as discussed below, has also agreed to undertake enforcement cooperation with some other countries within the context of free trade, customs union or common market agreements. Canada has also signed agreements with Chile, Japan, Mexico and the United Kingdom, as well as a tripartite agreement with Australia and New Zealand (these latter two countries have separately signed a tripartite agreement with the United Kingdom). Whereas these tripartite agreements do not make any changes in respect of the exchange of confidential information, a similar tripartite agreement recently signed by Denmark, Iceland and Norway does provide for the possibility of the exchange of confidential information (for which each of their competition authorities

obtained prior legislative authority). In recent years, the Republic of Korea has signed memoranda of cooperation in this area with Australia, Canada, the EU, Mexico, Russia and Turkey as well as a joint agreement with Latvia, Romania and the CIS Interstate Council for Antimonopoly Policy (ICAP), which is comprised of the heads of the antimonopoly authorities of CIS countries. Russia also has cooperation agreements with Brazil and Mexico. Lithuania has cooperation agreements with Estonia, Latvia, Poland and Ukraine, including a tripartite agreement among the three Baltic states. China has signed cooperation agreements (which cover both fields of unfair competition and antimonopoly) with Kazakhstan and with Russia; in accordance with the terms of the latter, the China State Administration for Industry and Commerce and the Russian Ministry of Antimonopoly Policy and the Support of Entrepreneurship have exchanged experiences relating to competition law and policy and cooperated on law enforcement. A Memorandum of Understanding has now been signed between China and Russia providing for regular high-level meetings, information exchange and the possibility of a future cooperation agreement. Australia has agreements with Fiji and Papua New Guinea, covering both competition and consumer questions. Typical provisions of many of these agreements include: notification of enforcement activities affecting the other party's important interests; commitments to take into account the other party's significant interests when investigating or applying remedies against RBPs (traditional comity); consultations to resolve conflicts between the parties' respective laws, policies and national interests; coordinated action in respect of related RBPs occurring in both countries; requests for assistance in investigations when RBPs on the territory of the party requested are adversely affecting the significant interests of the requesting party; requests for enforcement of an order by one party in the territory of another party; and commitments (subject to compatibility with national laws and important interests and to the availability of resources) to give serious consideration to such requests for investigatory assistance or enforcement, including by providing non-confidential information and in some cases, confidential information (subject to safeguards). The agreements which the United States has concluded with Brazil and Mexico provide for technical cooperation.

5. Some recent agreements provide for "positive comity", under which requests by one country's competition authority to another country's authority to initiate or expand proceedings against RBPs originating in the latter's territory which adversely affect the first country's important interests should be seriously considered by the authority so requested. The response to such requests remains voluntary; conversely, the requesting country retains the right to initiate or re-institute its own enforcement. It is also expressly recognized in such agreements that parallel investigations may be appropriate where both markets are harmed. The first bilateral competition agreement to include positive comity provisions was the 1991 agreement between the United States and the Commission of the European Communities, which was complemented by the 1998 agreement between them (not applying to mergers), which introduces "enhanced positive comity", that is, a presumption that the competition authorities of an affected party will defer or suspend their own enforcement where its consumers are not directly harmed, or where the anti-competitive activities occur principally in and are directed principally towards the other party's territory (although the United States federal enforcement agencies are bound by this agreement, the courts are not). Each party pledges to devote adequate resources and its best efforts to investigate matters referred to it and to inform the other side's competition authorities on request, or at reasonable intervals, of the status of the case. A similar agreement has recently been signed between Canada and the United States. In practice, positive comity would appear to come into play mainly when the requesting party is seeking to protect its export trade, reducing recourse to extraterritorial

action in such cases. While it would not be necessary for the *requesting* country's competition laws to be infringed for a request to be made, the *requested* country's competition laws would need to be infringed for action to be considered; thus, positive comity would not enable action to be taken against export cartels, for instance.

6. Such a limitation may not apply in certain situations, including to the provision of investigatory assistance, pursuant to the recent Nordic Cooperation Agreement or agreements entered into by the US competition agencies pursuant to the International Antitrust Enforcement Assistance Act of 1994 (IAEAA). The IAEAA authorizes the United States federal competition authorities (subject to reciprocity and not in the case of mergers) to conclude international agreements providing for the possibility of employing compulsory processes to acquire information at the request of a foreign competition authority whose important national interests are affected by anti-competitive behaviour organized within the United States, even if such behaviour is not illegal under United States law. The only agreement concluded so far under the IAEAA is the 1997 agreement between the United States and Australia (whose cooperation agreement with New Zealand is also quite far-reaching in this respect). The Australia-United States agreement also contains a clause, envisaged under the IAEAA, requiring notification to the extent compatible with laws, enforcement policies and other important interests, of information about activities appearing to be anticompetitive that may be relevant to, or warrant enforcement by, the other party's competition authority, even if no enforcement action is undertaken by the notifying party itself. A few other enforcement cooperation agreements, such as one between the EU and Japan, contain similar notification clauses. The 2000 ICPAC report recommended that the United States antitrust authorities expand the jurisdictions with which they have modern antitrust cooperation agreements, including those that feature positive comity provisions.<sup>9</sup> It also suggested that cross-border cooperation in reviewing mergers should be encouraged further which, as discussed later in this report, has been a feature of the International Competition Network's recent work.

### **C. Mutual legal assistance treaties**

7. Antitrust cooperation in criminal cases can take place through bilateral mutual legal assistance treaties (MLATs) applying to criminal matters generally. The United States has concluded such treaties with a number of countries (the MLAT between the United States and the United Kingdom has recently been extended to cover criminal prosecutions in competition cases), MLATs provide for, among other things, the obtaining of evidence regarding possible criminal offences (including through the use of compulsory processes such as search warrants) and sharing of confidential information (subject to safeguards). However, even in the absence of such a treaty, international judicial assistance in criminal antitrust matters may take place on the basis of national law; Germany, for instance, has granted such assistance, which requires approval of the competition authority and of other governmental bodies.<sup>10</sup>

### **D. Friendship, commerce and navigation treaties**

8. Friendship, commerce and navigation (FCN) treaties concluded between the United States and a number of other countries contain clauses relating to cooperation on competition law enforcement. Under the 1954 FCN treaty between Germany and the United States, for instance, each Government agreed to consult with the other, at the request of either, with respect to RBPs having harmful effects upon commerce between their respective



territories and to take such measures, not precluded by its legislation, as it deems appropriate to eliminate such harmful effects. However, it is now many years since treaties of this nature were concluded between the United States and other countries and, in practice, these are not relied on to engage in antitrust cooperation.

#### **E. Technical cooperation agreements**

9. There are also bilateral agreements or arrangements which either focus specifically on technical assistance on competition law and policy (there is such an agreement between the competition authorities of South Africa and Zimbabwe, for instance) or include such assistance within the context of assistance on different forms of economic regulation. Under a 1992 technical cooperation agreement between the French Direction-Générale de la Consommation et de la Répression des Fraudes (DGCCRF) and the Direction-Générale de la Consommation (DGCN) of Gabon, for example, the two authorities undertook to cooperate in such areas as competition policy, consumer protection, unfair competition, product quality and safety and price control. In the implementation of this agreement, the DGCN had sent personnel to centres run by the DGCCRF for short-term or long-term training, initially in price control and subsequently, in competition law. There is a similar agreement between France and the Russian Federation.

#### **F. Free trade, customs union, economic partnership or common market agreements**

10. These types of agreements, which are often but not always of a regional nature, are here collectively termed “regional trade agreements” (RTAs) for the sake of convenience. A fundamental difference between such RTAs and the enforcement cooperation agreements referred to above is that the former often include substantive competition rules providing for some degree of harmonization (although this is far less pronounced, or non-existent, in the case of free trade agreements), rather than just procedural rules relating to cooperation. Such substantive rules vary widely among different RTAs in terms of scope, strength and detail.<sup>11</sup> Some RTAs contain general obligations to take action against anticompetitive conduct, others prescribe specific standards and rules, and a few require common laws and procedures. Some RTAs contain provisions regarding the applicability, content and/or effective enforcement of competition rules relating only to RBPs affecting trade among the parties (sometimes with the concomitant exclusion of anti-dumping and/or countervailing duty trade remedies), while others contain such obligations with respect to all RBPs. RTAs may also contain provisions with respect to control of State aids and of discriminatory or other action by State enterprises or enterprises with special or exclusive rights. Those RTAs with a supranational character will usually entail enforcement of common norms by supranational institutions, and may also include provision for consultations on, and coordination of, enforcement between national and supranational institutions and among national institutions, but even some agreements without supranationality may also involve similar common norms and coordination involving regional institutions. There may also be provision for dispute settlement in competition policy matters, but this is sometimes excluded. Technical assistance among the parties is sometimes provided for. RTAs often provide for the issuance of complementary regulations or decisions on cooperation, and may also be supplemented by enforcement cooperation agreements or decisions involving some of the parties to the RTA. The most advanced regional system of competition rules is that of the European Union, which is also at the centre of a web of agreements with neighbouring countries involving varying intensities of cooperation in

competition law and policy. The competition policy system within the European Union (which, because of its supranational character, goes beyond just inter-State cooperation) also appears to provide a model for some of the subregional groupings in Africa and Latin America, albeit with some variations. An alternative model is that created under the North American Free Trade Agreement (NAFTA), which provides for a much less intense degree of cooperation. Cooperation envisaged so far within the Asia-Pacific region is even less intense, except for the close collaboration between Australia and New Zealand in this area.

11. The European Union has supranational competition rules (relating to RBPs, to public undertakings and undertakings granted special or exclusive rights and to subsidies), which are linked by the Treaty of Rome to the fundamental objective of establishing a common market. These rules apply to practices affecting trade between member States, even if they occur within a single European Union country or an area within a country. There is provision for: coexistence between national and European Union competition laws, subject to the primacy of European Union law; a system for allocating competence among European Union and national competition authorities and courts (which may also apply European Union law), aimed at balancing subsidiarity with the uniformity of the competition regime within the European Union; cooperation in the investigation or evaluation of practices; exchange of documents (including confidential information); representation at hearings; the communication of opinions on draft decisions for comments; and the provision by institutions of the European Union to national institutions of information or rulings on facts or on European Union law. The Commission has now adopted a Modernisation regulation which provides for the devolution to national jurisdictions of its powers under article 81 of the Treaty of Rome to investigate RBPs and to grant exemptions (article 82 can already be enforced at the national level); the Commission continues to undertake enforcement in cases which are of general importance to the European Union, and the Commission and national competition authorities also work closely together in the application of arts. 81 and 82, within the framework of the European Competition Network. A further effort towards cooperation has been taken by the competition authorities of France, Germany and the United Kingdom, which established, on an optional basis, a single form for the notification of mergers falling within the jurisdiction of at least two of these authorities, on which these authorities may choose to rely. Requests for judicial assistance in competition matters may also be made under the Schengen Agreement, although the procedure is lengthy. Anti-dumping or countervailing duty action among members of the European Union is precluded.

12. Under the Agreement of the European Economic Area (EEA), concluded by the European Union with most countries of the European Free Trade Area (EFTA), all practices liable to impinge on trade and competition among the EEA participants are subject to rules that are virtually identical to European Union competition law. Either the European Commission or the EFTA Surveillance Authority have supranational authority over practices affecting trade within the area (there are rules for allocation of jurisdiction between them). There are provisions for the exchange of information (applying even to confidential information), consultations (including the communication of opinions by an authority in proceedings brought before the other authority), coordinated enforcement and dispute settlement; anti-dumping and countervailing duty action within the EEA is precluded. However, the accession of many former EFTA countries to the European Union has now reduced the practical scope of the Agreement on the EEA. As regards those EFTA countries

not party to the EEA, there are procedures under free trade agreements for consultations and conciliation relating to practices affecting trade with the European Union.

13. Under the Europe agreements between the European Union and those Central and Eastern European countries which are not yet EU members, competition standards based upon European Union competition rules are applicable where trade between the European Union and the other signatory is affected. In addition, the non-EU signatories are bound to ensure the approximation of their existing and future competition legislation with European Union competition law (which is not required under EEA or even European Union rules), and their national legislation to implement the agreements needs to be approved by the association councils established under the agreements. Where cases fall within the competence of both parties, the European Union and the other party are to notify each other of any action envisaged (unless the transmission of information is prohibited by law or is incompatible with their respective interests); notification is also required where a case falling within the exclusive competence of one party would affect the important interests of the other party. Provision is made for consultations and the possibility of requests by one party to the other to take remedial action against RBPs having harmful cross-border effects. Consultation with the association councils is necessary before action can be taken against a practice deemed not to have been adequately dealt with by the other party. The Europe agreements make no provision for supranational competition authorities, and do not apply to trade among the Eastern European countries themselves (unlike among the EFTA members of the EEA). State aid may be granted to enterprises of the Eastern European countries concerned under rules similar to the European Union rules applicable to the least prosperous regions of the European Union. Exemptions are provided for the granting of State aid in connection with the Common Agricultural Policy, or to practices which are necessary for the attainment of its objectives. Enterprises with special or exclusive rights cannot engage in practices enabling them to restrict trade or to discriminate between nationals of the European Union and those of the other countries. Each party must inform the other party before imposing anti-dumping or countervailing duty measures. Similar obligations have been extended to Turkey under free trade agreements.

14. Under the Euro-Mediterranean agreements, obligations similar to those under the Europe agreements, except in respect of the requirement to align competition rules, have been extended to trade between the European Union and several Mediterranean countries. However, these agreements do provide for a number of substantive competition provisions similar to those in the Treaty of Rome, to be applicable to situations where trade between the EU and the Mediterranean countries concerned is hampered. Implementing rules for these Euro-Mediterranean agreements have not yet been adopted.. Less far-reaching partnership and cooperation agreements have also been concluded between the European Union and countries of the Commonwealth of Independent States (CIS), under which the parties agree to work to remedy or remove restrictions on competition, whether caused by enterprises or by State intervention, to enforce their competition laws and the members of the CIS are to endeavour to ensure that their competition legislation is gradually made compatible with that of the European Union. The granting of export aid is restricted and further negotiations on other types of aid is provided for. Technical assistance is an important component of these agreements. Similar obligations limited to the energy sector are provided for under the Energy Charter Treaty concluded by the European Union with some members of the CIS. Even lower-intensity cooperation is provided for under a network of Stabilisation and Association Agreements concluded by the European Union and its member States with some

Balkan countries, as well as framework cooperation agreements with respectively, Argentina (2 April 1990), the Central American republics (1993), the member countries of the Andean Pact (21 January 1993), Brazil (29 June 1995), the Southern Common Market (MERCOSUR) (15 December 1995) and Chile (21 June 1996). In the context of provisions on cooperation in a broad range of areas, the parties agree to hold a regular dialogue on the monitoring of RBPs, to identify and eliminate obstacles to industrial cooperation by means of measures which encourage respect for competition laws and to make resources available for these purposes. But the EU has also concluded more advanced free trade agreements with Chile, MERCOSUR, Mexico and South Africa, which provide mechanisms for the enforcement of both parties' competition laws, as well as cooperation procedures (including elements of both traditional and positive comity) and technical assistance. The Partnership Agreement between the African, Caribbean and Pacific States (ACP) and the EU and its member States (the Cotonou Agreement) provides that the parties undertake to implement national or regional rules and policies controlling agreements, decisions and concerted practices that have as their object or effect the prevention, restriction or distortion of competition and to prohibit abuse of a dominant position in the European Union and in the territory of ACP States, in order to ensure the elimination of distortions to sound competition and with due consideration for the different levels of development and economic needs of each ACP country. The parties also undertake to reinforce cooperation for formulating and supporting effective competition policies with the appropriate national competition agencies so as to progressively ensure effective enforcement, including by assistance in drafting and enforcing an appropriate legal framework, with particular reference to the special situation of the least developed countries. Economic Partnership Agreements to implement the provisions of the Cotonou Agreement are now under negotiation.

15. While the European Union is at the centre of agreements with all of these countries or regional groupings, agreements have also been concluded among some of the countries which are party to agreements with the European Union. The EFTA countries not party to the EEA have available long-standing procedures for mandatory consultations and dispute settlement relating to practices affecting trade among EFTA countries. Free trade agreements with competition provisions have also been concluded by EFTA countries, Israel and Turkey with Eastern European non-EU member countries, as well as within this latter group of countries; the EFTA countries have also concluded free trade agreements with a large number of other countries, including some developing countries. A large number of free trade agreements with competition policy provisions and cooperation agreements on anti-monopoly matters have also been concluded among the Central and Eastern European and CIS countries, as well as cooperation programmes between competition authorities of these countries (such as programmes between the Polish and Russian and the Polish and Ukrainian authorities providing for exchange of legislation and experience on competition problems and proceedings). The CIS has also agreed, in the context of the creation of an economic union among its members, to create conditions for fair competition, including a mechanism for anti-monopoly regulation. An Agreement on Implementation of Common Anti Monopoly Policy between CIS member countries, has now been signed; ICAP monitors its implementation and provides a mechanism for exchanging experiences and for assisting in the improvement and the implementation of national legislation. A Regulation on Cooperation of the States in Suppression of Monopolistic Activity and Unfair Competition establishes cooperation mechanisms in cross-border cases, on the basis of the principle of positive comity. But many of the agreements to which the European Union is not a party tend to involve relatively weaker rights and obligations.

16. Competition law and policy is addressed more extensively in African subregional agreements, often on the basis of the model of the Treaty of Rome.. The Treaty Establishing the Economic and Monetary Community of Central Africa (CEMAC) provides for the establishment of common competition rules to control both RBPs and Government activities; two regulations dealing respectively with these two subjects have been adopted. In pursuance of the Treaty on the Harmonization of Business Law in Africa, a uniform act dealing with competition law has also been adopted, which has direct legal effect on the territory of its 16 member States from West and Central Africa. The Western African Economic and Monetary Union (UEMOA) has also issued a regional regulation on competition, which applies to all practices within the sub-region whether or not they affect trade among Member States; while the UEMOA Commission has sole competence in this regard, the institutional division of labour between the Commission and national authorities remains to be worked out.<sup>12</sup> Under the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA), the member States agree, in terms similar to article 85 of the Treaty of Rome, to prohibit RBPs which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, with a proviso for the granting of exemptions by the COMESA Council. The Council has elaborated regulations on competition within member States. Moreover, a regional competition policy has been formulated which aims to harmonize existing national competition policies.<sup>13</sup> Subsidies distorting competition which affect trade among member States are also prohibited, subject to some exceptions. The Southern African Development Community (SADC) has agreed that member States shall implement measures within the Community that prohibit unfair business practices and promote competition, while the Southern African Customs Union (SACU) has adopted more far-reaching competition policy provisions. The East African Community has agreed to establish a Customs Union, which is to include details on competition in a Protocol.

17. In the Latin American and Caribbean region, Protocol VIII to the 1973 Treaty Establishing the Caribbean Community (CARICOM) provides that the Community shall establish appropriate norms and institutional arrangements to prohibit and penalize anti-competitive conduct (the Protocol does not apply to mergers), while member States shall adopt competition legislation, establish institutions and procedures for enforcement and ensure access to enforcement authorities by nationals of other member States.<sup>14</sup> A Competition Commission is established at the regional level to apply competition rules in respect of anti-competitive cross-border business conduct, promote competition in the Community and coordinate the implementation of the Community Competition Policy – it is to collaborate on enforcement with national competition authorities. MERCOSUR has also adopted a protocol on competition policy proscribing individual conduct or concerted agreements impeding, restricting or distorting competition or free access to markets or abusing a dominant position in a relevant regional market within MERCOSUR and affecting trade between its member States. The MERCOSUR Technical Committee on Competition Policy and Commerce Commission may issue orders to enforce these norms, which would be implemented by national agencies of the member countries with limited supervision at the regional level. A Regulation to the Protocol sets out the relevant procedures in more detail. A dispute-settlement system has been set up. The treatment of anti-dumping within MERCOSUR is to be reviewed. However, the Protocol has not yet been fully implemented and discussions are currently being held on its revision. Decision 285 of the Commission of the Cartagena Agreement (established under the Andean Pact) also provides for the prevention of, or remedies against, distortions to competition resulting from RBPs. However,

unlike MERCOSUR, Andean Pact institutions have supranational powers; member States or any enterprise with a legitimate interest may request the Board of the Cartagena Agreement for authorization to apply measures to prevent or correct the threat of injury or injury to production or exports and which are a consequence of RBPs and the Board's orders have direct effect in member States' legal orders. Anti-dumping action or countervailing duty action among Andean Pact countries is regulated but not precluded.

18. The North American Free Trade Agreement (NAFTA) between Canada, the United States and Mexico provides for each party to adopt or maintain measures to proscribe or take action against RBPs, to consult with the other parties on the effectiveness of such measures and to cooperate on enforcement issues, including through mutual legal assistance, notification, consultation and the exchange of information on enforcement in the free trade area. However, detailed procedures for cooperation are not set out and recourse to dispute settlement in competition policy matters is excluded. There are also provisions that state that monopolies or State enterprises should not operate in a manner which is inconsistent with the Agreement, nullifies or impairs its benefits, or discriminates in the sale of goods or services.. Similar but more far-reaching provisions are contained in the free trade agreements which the United States has entered into with Australia, Chile, Colombia, Peru and Singapore, as well as in the agreement between Canada and Chile.<sup>15</sup> There are also competition chapters in the Canada-Israel Free Trade Agreement and the Canada-Costa Rica Free Trade Agreement. Chile has also signed Free Trade Agreements, with Mexico, with the Governments of the countries which make up the Central American Common Market (CACM), i.e. Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, and with EFTA, the EU, MERCOSUR, Mexico and the Republic of Korea containing chapters on competition policy, including RBP control and the regulation of State monopolies. The so-called "G3 Agreement" between Mexico, Colombia and Venezuela is more limited, applying only to State-owned monopolies; these are to act only on the basis of commercial considerations in operations on their own territories and may not use their monopoly positions to use RBPs in a non-monopolized market in such a way as to affect enterprises in the other member States. Competition policy provisions are also contained in, or have been established pursuant to, the free trade agreements that Mexico has entered into with EFTA, the EU, Israel, Japan and Uruguay, as well as in the ones between Costa Rica and CARICOM and between the CACM countries and the Dominican Republic and Panama respectively. A mechanism for cooperation in competition policy has been created in the context of discussions on the establishment of a free trade area for the Americas. The communiqué adopted on 20 October 1998 at the first Antitrust Summit of the Americas, attended by most of the countries of the region with competition laws, affirms that participating countries plan to cooperate with one another, in accordance with their respective laws, to improve enforcement, disseminate best practices in this area (with the emphasis on institutional transparency), encourage efforts by small economies in the region that do not yet have solid competition regimes to complete the development of their legal frameworks and to advance competition principles in the Negotiating Group on Competition Policy of the Free Trade Area of the Americas (FTAA).<sup>16</sup> Negotiations are proceeding on a chapter on competition policy within the FTAA.

19. A similar forum for the exchange of views, technical cooperation and discussion of competition issues was established under the auspices of the Asia-Pacific Economic Cooperation Forum (APEC). Members have undertaken in the APEC Principles to Enhance Competition Policy and Regulatory Reform (which is a legally non-binding instrument) to introduce or maintain effective, adequate and transparent competition policies or laws and enforcement, to promote competition among APEC economies and to take action in the area

of deregulation. An APEC-OECD co-operative initiative aims to support the implementation of the principles relating to regulatory reform adopted by both organizations; work has so far focused on exchange of information and experiences on good regulatory practices and concepts. The APEC training course on competition policy, which also aims at supporting the implementation of those Principles especially focusing on competition policy, has contributed to the encouragement of competition culture and the effective enforcement of competition law in the region through exchange of views and information. Such low-intensity cooperation contrasts with that between Australia and New Zealand, which no longer apply their anti-dumping laws to conduct affecting trade between them and instead apply their competition laws relating to predatory conduct by dominant firms (which have been harmonized). For the purpose of enforcing this, each country's competition authority and courts have "overlapping jurisdiction" – complaints may be filed before them, hearings held and valid and enforceable subpoenas and remedial orders issued in the other country. Separately, a bilateral enforcement agreement provides for extensive investigatory assistance, the exchange of information (subject to rules on confidentiality) and coordinated enforcement. The economic partnership agreements which Japan has signed with Malaysia, Mexico, Phillipines and Singapore also provide for cooperation in the field of competition policy (each agreement has been supplemented by an implementing agreement). The free trade agreements which Singapore has concluded with Australia, the EFTA countries, New Zealand and the United States also contain competition policy provisions, as do the agreements which Thailand has concluded with Australia and New Zealand, the free trade agreement between Chile and the Republic of Korea and the economic partnership agreement signed between Brunei Darussalam, Chile, New Zealand and Singapore.

### **G. Multilateral and plurilateral instruments**

20. The sole universally applicable multilateral instrument in this area is the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set), negotiated under the auspices of UNCTAD. The ICN's Recommended Practices for Merger Notification and Review Procedures, which address interagency coordination in the context of merger review, were adopted by the ICN's membership (including over 90 member agencies from over 80 jurisdictions), and are being promoted among non-member agencies as well. The numerous instruments formulated by the Organization for Economic Cooperation and Development (OECD) that cover competition law and policy (listed in annex 3) have been negotiated by a restricted group of countries, but the recommendations concerning effective action against hard-core cartels and merger review provide for non-OECD member countries to associate themselves with this recommendation and to implement it (and several such countries have indicated interest in associating themselves with the hard-core cartel recommendation)<sup>17</sup>; and the Guidelines for Multinational Enterprises have been adopted not only by the member States of the OECD but also by some Latin American countries and the Slovak Republic. The Set and the OECD instruments contain many of the types of provisions adopted in bilateral enforcement cooperation agreements and in free trade, customs union or common market agreements, but with variations, omissions or additional provisions, particularly in the case of the Set. The Set, like the OECD instruments, is concerned with the adverse impact of RBPs on international trade, but is, in addition, concerned with their impact on development. A unique feature of both the Set and the 1978 and 2000 OECD instruments is that they recommend not only norms to be followed by Governments, but also rules for the conduct of enterprises, with a particular focus on transnational corporations. Both also provide for the adoption or maintenance and

effective enforcement of competition laws and policies and recommend competition norms of a general nature to be applied by member States. The Set also provides for work aimed at achieving common approaches in national policies relating to RBPs compatible with the Set (article F.1) and continued work on the elaboration of a model law or laws on RBPs in order to assist developing countries in devising appropriate legislation (article F.2). The OECD instruments do not have such provisions, although the 1998 OECD recommendation recommends convergence in (as well as effective enforcement of) laws prohibiting hard-core cartels. While the Set deals solely with RBP control, the 1986 OECD instrument is also concerned with the interface between competition policy and trade measures; it recommends that policy makers should, when considering a prospective trade measure or reviewing existing measures, evaluate their likely effects, including the impact on the structure and functioning of the relevant markets and it suggests a checklist of the main effects of trade measures, including competition effects. The OECD has also adopted instruments dealing with merger process and information sharing in cartel investigations, as well as competition-promoting regulatory reform.

21. The Set, the ICN Recommended Practices and the OECD instruments all provide for cooperation on enforcement, with the OECD instruments having influenced or been inspired by the bilateral enforcement agreements concluded among OECD countries. The ICN Recommended Practices are limited to coordination in the context of merger review. The 1995 OECD recommendation (which replaces a long series of instruments recommending progressively closer cooperation) provides for notification, consultations, the exchange of non-confidential and confidential information (subject to safeguards), the coordination of investigations, investigatory assistance, traditional and positive comity, consultations and a conciliation mechanism to resolve disputes. The 1998 recommendation encourages cooperation and comity specifically in respect of enforcement against hard-core cartels and provides for transparency and periodic reviews relating to exempted cartels. The recently adopted OECD recommendation on merger review provides *inter alia* that member countries should, without compromising effective enforcement of domestic laws: seek to cooperate and coordinate their reviews of transnational mergers; endeavour to avoid inconsistencies in remedies; consider national legislation and bilateral and multilateral agreements and other instruments for this purpose; and encourage merging parties to facilitate coordination among competition authorities, including with respect to timing of notifications and voluntary waivers of confidentiality rights. International Competition Network (ICN) members, comprising virtually all competition authorities, have also approved guiding principles and recommended practices on merger notification and review (which provide *inter alia* that competition agencies should seek to coordinate their review of mergers that may raise competitive issues of common concern). The Set also provides for consultations (envisaged both within and outside UNCTAD) and the exchange of non-confidential and confidential information. In addition, it contains the following provisions: States should take due account of the extent to which the conduct of enterprises is accepted under applicable legislation (article C.6); States, particularly developed countries, should, in controlling RBPs, take into account the development, financial and trade needs of developing countries, particularly the least developed countries (article C.7); and States should seek appropriate measures to control RBPs within their competence when it comes to their attention that RBPs adversely affect international trade, particularly the trade and development of developing countries (article E.4). The Set makes no provision for dispute settlement; the Intergovernmental Group of Experts or its subsidiary organs are proscribed from acting like a tribunal or otherwise passing judgement on the activities or conduct of individual Governments or enterprises in



connection with specific business transactions (article G.4). An important component not present in the OECD instruments is the provision of technical assistance to developing countries, both by countries with greater expertise in this area and by UNCTAD.

22. In contrast to the above-mentioned instruments, the Uruguay Round agreements are legally binding and are backed by strong dispute-settlement mechanisms. Different provisions with a bearing on competition law and policy are included in, among other things, the articles or agreements dealing with: State enterprises and enterprises with exclusive rights; anti-dumping; subsidies; safeguards; trade-related aspects of intellectual property rights (TRIPs); trade-related aspects of investment measures (TRIMs); and trade in services, particularly telecommunications and financial services. Those provisions of a substantive character are not reviewed here in detail, as they have already been covered in a previous study by the UNCTAD secretariat.<sup>18</sup> Instead, an analysis is undertaken in terms of obligations relating to consultations and the exchange of non-confidential and confidential information and positive comity. Apart from the general consultation procedures applicable to all WTO-related disputes, special consultation procedures are provided under: (a) the GATT Decision on Arrangements for Consultations on Restrictive Business Practices of 18 November 1960;<sup>19</sup> (b) the TRIPs Agreement, whereby a WTO member considering competition enforcement against a firm of another member can seek consultations with that member, aimed at securing compliance, while a country whose firms are subject to such action may also ask for consultations; and (c) the General Agreement on Trade in Services (GATS), in respect of certain business practices by service suppliers that are not monopolies under Article VII. The latter agreement also provides for the exchange of non-confidential information subject to domestic laws and to a satisfactory agreement concerning the safeguarding of confidentiality of confidential information. A degree of positive comity is provided for under the 1960 Decision, under which the party to whom a request for consultations is addressed should consult and, if it agrees that such harmful effects are present, should take such measures as it deems appropriate to eliminate these effects. Also, under article XVII of the General Agreement on Tariffs and Trade (GATT) 1947 (now incorporated in GATT 1994) Members must ensure that State enterprises or private enterprises with exclusive rights act in a non-discriminatory manner in importing or exporting goods<sup>20</sup> while the GATS also provides for obligations upon Members to ensure that monopolies and exclusive service suppliers do not abuse their monopoly positions to act in Members' territories in a manner inconsistent with specific commitments. (There are more detailed obligations of this nature in the areas of telecommunications and to a lesser extent, financial services.) Relatively few WTO cases involving competition policy aspects have been heard so far.<sup>21</sup>

## Chapter II

### ENFORCEMENT COOPERATION

#### A. Overview

23. Enforcement cooperation has, in cases with international implications, helped to improve the quality and effectiveness of enforcement and decrease its cost, helping to resolve difficulties in obtaining access to information held in other countries, in serving process or in undertaking enforcement against entities whose headquarters or assets are located abroad. It has also reduced friction that might arise between countries because of recourse to extraterritorial enforcement of competition laws or of jurisdictional conflicts. However, difficulties are sometimes experienced in implementing such cooperation. Case-specific enforcement cooperation pursuant to the instruments described above takes place primarily between developed countries in the application of bilateral enforcement agreements, mutual legal assistance treaties (limited to criminal action against cartels), free trade, customs union or common market agreements and the relevant OECD instruments. There is no evidence that FCN treaties have been utilized as vehicles for cooperation.<sup>22</sup> The maintenance of informal links with other competition authorities has been an important way of keeping informed of developments in competition law and policy in other jurisdictions through the exchanging of views, although the usefulness of such informal cooperation has sometimes been found to be limited in cases where an authority requires enforcement assistance in a particular matter, or confidential information.<sup>23</sup> The bilateral cooperation experiences of the European Union and the United States are reviewed below, the impediments to cooperation, as well as factors conducive to cooperation, are identified and some suggestions are made as to how developing countries might play a more prominent role in enforcement cooperation, using the frameworks provided by regional groupings and by the Set of Principles and Rules.

#### B. Cooperation between the European Union and the United States

24. The ongoing cooperation between these two major jurisdictions is described here as an example of the effect of a cooperation agreement upon enforcement cooperation. The effect of the 1991 Agreement between the European Union and the United States was to stimulate a spirit of cooperation among the competition authorities of both jurisdictions. Although the cooperation undertaken in the implementation of the Agreement could have taken place before, it spurred the competition authorities concerned to “seek opportunities for cooperation in a more structured and proactive way.”<sup>24</sup> The Agreement has been a vehicle for exchanging information and views on enforcement policy developments and for cooperation in individual cases. There is now routine notification of cases which concern the important interests of the other party. Successive notifications may occur in the same case; in a merger case, for example, notification may be undertaken at the outset, again when the decision is taken to initiate proceedings and again before the final decision is taken, far enough in advance to enable the other party’s views to be taken into account. Where both the European Union and United States authorities undertake proceedings in respect of the same transaction, there is coordination of enforcement activities, which may involve the exchange of information and discussions on the following: the timing of respective procedures; the delimitation of relevant markets (mainly product markets, discussions on geographical markets being limited because each authority is concentrating on effects on its own market);

the anti-competitive effects of transactions; remedies that might be envisaged and the avoidance of conflict between them; and the law of and publicly available facts in the other's jurisdiction. Under a 1999 agreement, European Union and United States officials may, subject to consent by each Government and by the firms concerned, attend certain hearings or meetings held during investigation of cases. There has been successful synchronization of investigations and searches, thus avoiding the risk of destruction of evidence in the other's jurisdiction. Even where these authorities take different views on certain points, such contacts have enabled them to understand each other's thinking and refine analyses accordingly. However, in merger cases, differing deadlines for review have limited the scope for cooperation, although useful results have still been obtained.

25. The main obstacle to coordinated enforcement has been that it can often only be based on exchanges of non-confidential information (however, a distinction is made between confidential agency information, which may be shared relatively more easily and confidential business information, which is prohibited by law from being shared unless the enterprises concerned have waived their objections to the exchange of confidential information). Such waivers have been granted only where it is in the interests of the enterprises to do so. Moreover, enterprises are often reluctant to allow information to be shared if it might disclose RBPs and expose them to sanctions in both jurisdictions. Where enterprises have been prepared to waive their objections to the exchange of confidential information, this has facilitated a successful outcome. However, even the exchange of non-confidential information has helped draw attention to possible anti-competitive behaviour, improved the handling of cases and contributed to similarity in the analyses undertaken by the different authorities and the compatibility of remedies. Positive comity procedures have, to date, only been formally activated once,<sup>25</sup> but it has normally been possible to take into account concerns expressed in an informal manner, with one party simply deferring its investigations while awaiting the outcome of investigations in the other jurisdiction, being kept informed of progress and being provided with the opportunity to comment on the proposed remedy.<sup>26</sup> Such cooperation has not always made it possible to avoid conflicting views or to reach commonly accepted solutions, but it has been authoritatively stated that disagreements are the exception rather than the rule and that there is a "slow but steady convergence of review and mutual respect" between the United States and the European Union.<sup>27</sup>

### **C. Impediments and factors conducive to cooperation**

26. As appears from the above, cooperation is facilitated by a degree of commonality of approach; conversely, differences in substantive competition laws or economic doctrines, enforcement practices or procedures, effects on each market or the evidence available in each jurisdiction, or interpretations of the underlying facts, may all constitute impediments to cooperation. Differences in legal doctrines relating to the scope of extraterritoriality may also adversely affect cooperation<sup>28</sup>. Cooperation may also be limited by concerns about having enforcement priorities and resource allocation determined by positive comity requests from other countries, or about exposing national firms to sanctions by a foreign authority or court (including, where applicable, orders of United States courts for payment of treble damages in private suits following on from action by enforcement agencies).<sup>29</sup> Reciprocity would also be a concern. As noted in chapter I, reciprocity of confidentiality protection is also required to enter into agreements pursuant to the United States International Antitrust Enforcement Assistance Act of 1994. Under the Canadian Competition Act, the Competition Bureau has the authority to communicate confidential information to a foreign competition authority

where doing so would advance the Canadian case (which would include a joint Canadian/foreign case). Most often, this would occur where the foreign authority would be able to provide the Bureau with information or other assistance in return. Cooperation may also be hampered by perceptions of national industrial or trade policies influencing competition decisions, or inspiring leakage of confidential information.<sup>30</sup> In recent years, a key obstacle to enhanced cooperation on enforcement against international cartels area has arisen from the confidentiality that is accorded under national leniency programmes to information from leniency applications.<sup>31</sup> While the trend toward greater convergence in this area<sup>32</sup> may help to reduce such considerations and concerns, they are unlikely to disappear, since what may maximize welfare in one country may reduce it in another. Nevertheless, increased reliance on economic theory in both the enforcement of trade and competition rules, is likely to help to alleviate but not eliminate these concerns.<sup>33</sup>

27. Competition law and policy have also been linked more directly to trade issues. A version of positive comity (in terms of competition advocacy rather than enforcement) has operated with some success on a formal and informal level between the United States and other countries. First within the context of the Structural Impediments Initiative in 1989 and through the Regulatory Reform and Competition Policy Initiative set up under the U.S.-Japan Economic Partnership for Growth in 2001, the United States has strongly encouraged a more effective competition policy in Japan, especially in instances where it perceived anti-competitive activity as impeding competition from foreign products.<sup>34</sup> Similar initiatives have been taken through the Competition Policy Working Group set up within the context of the Dialogue for Economic Cooperation between the United States and the Republic of Korea. As a result, the Republic of Korea took steps to strengthen its competition law and enforcement, apply competition principles in deregulation, improve access to television and radio advertising slots, address RBPs by industry associations and revise regulations and guidelines that might impede pro-competitive activities.<sup>35</sup>

28. The foregoing discussion suggests that countries are more likely to cooperate voluntarily if there is a shared perception of common interest and mutual benefit. This may be one reason why enforcement cooperation agreements leave such a large measure of discretion to each agency over whether or not to cooperate in individual cases. It may also help explain why enforcement cooperation agreements do not provide for dispute settlement while most free trade agreements exclude competition law and policy issues from the purview of dispute settlement and why the conciliation machinery provided for in successive OECD recommendations on this subject have not been resorted to (although, in 1987, the OECD Committee of Experts on Restrictive Business Practices took the view that this was mainly because the notification, exchange of information and consultation procedures provided for had been effective in avoiding or resolving conflicts).<sup>36</sup> Nevertheless, the difficulty of enforcing these agreements may in fact facilitate their conclusion. In fact, these potential impediments have not stopped competition authorities from looking towards the possibility of entering into second-generation cooperation agreements that would make it possible to share confidential information and use compulsory process on behalf of other countries.<sup>37</sup> Importantly, a former senior official of the European Commission expressed the view that a key ingredient in successful enforcement cooperation is mutual confidence in enforcement capabilities and in respect for confidentiality, arising from a shared commitment to upholding the competitive process.<sup>38</sup> Building-up such mutual confidence requires a progressive approach. It has been suggested that after starting with a simple cooperation agreement, countries could evolve to more complex agreements perhaps ultimately involving

the exchange of confidential information as confidence and a tradition of cooperation is built up, while the extent and intensity of cooperation would depend on institutional capabilities, the actual experience of cooperation and the degree of trust built-up over time.<sup>39</sup> For the purpose of strengthening enforcement cooperation, it has been suggested that developing common standards is important and that a balance between transparency and the protection of confidential information should be found, and that an international consensus on the latter could help to facilitate the conclusion of agreements featuring close cooperation between enforcement authorities.<sup>40</sup> It has also been stated that three key ingredients for the success of cooperation are that: the competition area has to be perceived as legal rather than political or policy-infused, with mergers being an area of particular concern; there needs to be greater substantive convergence in respect of the goals pursued by competition laws; and there also needs to be greater understanding regarding procedural systems, particularly as regards the severity of penalties and the possibility of recovering treble damages through private actions.<sup>41</sup> Nevertheless, it has also been suggested that a broader natural limitation to bilateral cooperation exists, in that it tends to take place among countries which are economically interdependent and share a similar level of experience in competition law enforcement or the same ideas on competition policy.<sup>42</sup> A report prepared by the OECD secretariat for the Global Forum also notes that cooperation tends to occur most frequently between jurisdictions that have such things in common as geographic proximity (although not always the case), a strong trading relationship, a history of having been affected by the same mergers, and an existing cooperation agreement; meaningful co-operation in merger investigations is often also dependent upon the willingness of the merging parties to grant waivers of confidentiality protection, so that jurisdictions new to merger control that have not acquired a reputation for sound and fair merger control and protection of confidential information are less likely to benefit from cooperation from other competition authorities.<sup>43</sup>

#### **D. Developing countries, regional groupings and the Set of Principles and Rules**

29. Most developing countries have not so far participated to any great extent in intensive case-specific enforcement cooperation. In the *French/West African Shipowners' Committees*<sup>44</sup> case, for instance, the European Commission brought a case against cartels or exclusionary abuses by liner conferences or shipowners' committees with dominant positions in the maritime traffic between Europe and 11 West and Central African States. In its decision, which had pro-competitive effects in the countries concerned,<sup>45</sup> the Commission indicated that it was ready to enter into talks with the authorities of these countries with a view to helping their carriers secure a greater share of the traffic generated by their external trade. However, it appears that, prior to taking its decision, the Commission had not consulted with the African countries concerned, most of which did not have functioning competition laws or institutions at that time, and whose shipping authorities had in fact authorized cargo reservations by the shipping companies concerned. The circumstances were similar in the *CEWAL Liner Conference* case, involving traffic to Angola and the Congo.<sup>46</sup> Enforcement cooperation between the European Union and the countries concerned might not only have led to traditional comity coming into play, but might also have facilitated data-gathering by the Commission (it took five years for the Commission to take a decision in the *Shipowners* case). The mutual benefit arising from enhanced and wider cooperation in this area may be reinforced by the fact that many international cartels discovered in recent years by the United States federal antitrust agencies have conducted their meetings in other countries in an attempt to evade criminal anti-cartel prosecutions by these authorities; moreover, it has been

suggested that similar concerns may arise with respect to some other countries as they implement stricter penalties and strengthen enforcement against cartels.<sup>47</sup> To the extent that enforcement cooperation is not strengthened, there is also a higher risk that, as developing countries become more active in this area, firms will have to deal with the procedures and possibly inconsistent orders of several jurisdictions – as happened in the *Gillette/Wilkinson* case (where a proposed merger was examined in 14 jurisdictions, including Brazil and South Africa).<sup>48</sup> Conversely, assistance with information-gathering and enforcement in relation to RBPs originating overseas and affecting their markets would be a major potential benefit for developing countries entering into enforcement cooperation agreements. For example, in two cases in the United States where international cartels for lysine (an ingredient in animal feed) and citric acid were successfully prosecuted, the Department of Justice discovered evidence of price-fixing and market allocation relevant to other countries, but could not share such evidence with those countries not party to antitrust cooperation agreements with the United States.<sup>49</sup>

30. To some extent, the relatively low participation of developing countries in case-specific international cooperation in this area may be due to the relative inexperience of most of them in applying their competition laws at the national level. In the case of India, for instance, its competition law provides authority to the Competition Commission of India to enter into arrangements/memoranda of understanding with foreign competition authorities, with the approval of the Government of India; however, the Commission has not as yet acted on this pending full enforcement of the substantive provisions of its law.<sup>50</sup> However, developing countries' competition authorities increasingly participate in exchanges of general information, as well as some case-specific exchanges of information. Responses to a questionnaire sent out by the OECD to several non-OECD competition authorities, including those of some developing countries, indicated that five authorities had engaged in communications with another authority about a merger, but none had engaged in more than two such transactions; Brazil had also had exchanges with other countries relating to market definition, competitive impact and remedies.<sup>51</sup> The competition authorities of South Africa, Zambia and Zimbabwe, for instance, regularly exchange information relating to mergers affecting more than one national market (such as the background, practices and intentions of merging parties, possible effects on relevant markets, application of respective national laws and policies, and "best practice" procedures).<sup>52</sup> The time is now ripe for further change. Most developing countries have adopted or are in the process of drafting competition laws and this trend is continuing. Fully effective implementation of all such competition laws will take time, depending on a gradual learning process, but progress is being made. The initiation and progressive practice of enforcement cooperation can help to both enhance effective implementation of competition laws and prepare the ground for more advanced cooperation. It has indeed been recommended that the United States antitrust agencies take initiatives to advance international convergence objectives, including by: expanding and fostering bilateral relationships with the authorities of other countries (through cooperation agreements with jurisdictions with more established competition regimes and technical assistance programmes for emerging competition regimes); and encouraging and facilitating the participation of competition officials of developing countries in bilateral and regional enforcement coordination and cooperation efforts, as well as in the international policy convergence dialogue.<sup>53</sup>

31. While the eventual conclusion of bilateral enforcement cooperation agreements would be necessary for full cooperation to take place, enforcement cooperation might initially

take place on an informal basis. It is important to note that just as much information may be exchanged informally as may be exchanged through most bilateral cooperation instruments (with the exception of MLATs and IAEEA agreements, such as that between the United States and Australia). Cooperation would be facilitated by the initiation of informal discussions and exchanges of general information, including within the framework of any RTAs to which the countries concerned are party. Within regional or subregional groupings, political will or relative uniformity of economic development and culture may make it easier to build up mutual trust and perception of common interests (which may be looked at within the context of the overall relationship rather than just in terms of competition law and policy). Enforcement cooperation among developing countries with limited experience in this area, but facing similar circumstances, may also be of a more balanced character than cooperation with countries with more experience in this area and would also constitute a learning experience, ensuring that cooperation with more advanced partners is fruitful.

32. Direct use of free trade or common market agreements for enforcement cooperation appears to have taken place so far only within the European Union or the EEA, although in other cases, they have provided a framework conducive to bilateral cooperation. Even within regional groupings, however, enforcement cooperation may be limited by some of the concerns and differences highlighted above; the heterogeneity of countries participating in such groupings in terms of size, levels of development or maturity of competition systems in the Latin American and Caribbean region has been emphasized, for instance.<sup>54</sup> Regional institutions or mechanisms may also not be fully adapted for enforcement cooperation. It has been suggested, for instance, that lack of implementation measures, among other factors, has limited the effectiveness of the competition provisions in the Euromed Agreements, and it has accordingly been recommended that the Councils of Association of these agreements adopt appropriate implementation measures.<sup>55</sup> Enforcement cooperation may also be limited simply because trade is limited between some countries in the grouping or RBPs affecting such trade are rare. Therefore, it is likely that, at least initially, cooperation will develop in an asymmetrical manner among different member countries within regional groupings. Moreover, there is also a risk of lack of coherence among national competition regimes and between national and different levels of regional competition regimes. A review of the competition regimes established under CEMAC and UEMOA suggests that their substantive rules have been largely inspired by the EU model but need further elaboration, and also highlights the extent to which national systems are subordinated to the regional systems under these regimes, as well as the manner in which private firms are sometimes associated with the control of RBPS.<sup>56</sup> However, there has already been an important case involving complex questions relating to harmonization and cooperation within and between these African two sub-regional groupings and their member States.<sup>57</sup> Another study argues that the Mediterranean countries that have entered into Euromed agreements with the EU should align their competition rules with those of the EU, as this would bring about a series of benefits; however, as there would also be costs involved, the study recommends that: the transposition of EU competition rules (including secondary legislation) should not be automatic, but should rather be based on the local circumstances of each country, and what is appropriate in this respect could be worked out by these countries with the support of the EU and other institutional donors.<sup>58</sup> Significant recommendations have been made relating to the lessons to be learnt by other regional groupings from EU experience in this area, taking into account its experiences with the modernization scheme and the formation of the European Competition Network.<sup>59</sup>

33. To realize the potential of regional groupings in this respect, therefore, some reflection would be appropriate as to which substantive competition regimes, institutional structures and mechanisms would promote cooperation. For this purpose, consultations might be undertaken within UNCTAD on how to maximize utilization of regional frameworks for enforcement cooperation. This would be in line with the Set of Principles and Rules, which provides for the establishment of appropriate mechanisms at the regional and subregional levels to promote the exchange of information on RBPs and on the application of national laws and policies in this area, as well as to provide mutual assistance in RBP control (article E.7). It would also be in line with paragraph 104 of the São Paulo Consensus, which provides that UNCTAD should 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. The framework established under the Set might also be used more directly to further enforcement cooperation. So far, the consultation mechanisms provided for in the Set have mostly been used, with success, for presentations, the exchange of experiences and discussions on different competition issues. In one case in the mid-1980s, a developing country, using the UNCTAD secretariat as an intermediary, requested consultations with a developed country regarding the prohibition by one of its pharmaceutical firms of exports from a neighbouring developing country of pharmaceuticals manufactured under a licence granted by the firm. The matter was referred by the authorities of the developed country to the firm in question and its reply explaining the circumstances of the prohibition was transmitted to the developing country (the matter was brought to the attention of the Intergovernmental Group of Experts on Restrictive Business Practices during informal consultations). It might be worth exploring the potential for further case-specific consultations of this type, which might be stimulated by the supply of information necessary for the effective control of RBPs to other States, particularly developing countries, in line with para. E.9 of the Set to the States concerned. The aim would be to reinforce or promote cooperation under bilateral or regional agreements, rather than to replace such cooperation, since enforcement cooperation under non-binding OECD instruments tends to be less intensive and case-oriented if not backed-up by a binding bilateral agreement.<sup>60</sup>

34. Such case-specific enforcement cooperation would not come at the expense of other forms of cooperation, but would rather aim to link with and build on them in a synergistic manner. There are extensive contacts among competition authorities for the purpose of exchanging general information, experiences or ideas; such contacts take place either on an informal basis or in pursuance of bilateral or regional agreements, as well as under the Set of Principles and Rules and under OECD instruments.<sup>61</sup> Substantial technical assistance also takes place, in the form of: seminars and training courses; visits to, or training attachments with, competition authorities in developed countries; short-term missions to countries needing cooperation, including analyses of their situation and needs, workshops, group training, assistance on particular issues or in the drafting of legislation; and long-term secondments of personnel from authorities with experience in this area for the purposes of training and giving advice to the authorities of countries with limited experience. To the extent that the communication of experiences or provision of technical assistance by one or more countries induces other countries to adopt or amend competition legislation or modify enforcement policies or procedures along similar lines, this promotes “soft” convergence (in contrast to the varying degrees of convergence or harmonization provided for in this area by free trade, customs union or common market agreements). It has been suggested that “one advantage of convergence by learning and imitation is its flexibility; if a particular approach



does not work out in the circumstances of a country's economic system, it can be modified or even abandoned".<sup>62</sup>

35. The Fifth Review Conference called upon States to increase cooperation between their competition authorities and Governments for the mutual benefit of all countries in order to strengthen effective international action against anticompetitive practices as covered by the Set, especially when these occur at the international level, adding that "such cooperation is particularly important for developing countries and economies in transition".<sup>63</sup> It highlighted a number of subjects relevant to international cooperation in this area for UNCTAD to work on. Within the framework of the resolution, specific issues for discussion might include the following: (a) how to ensure compatibility, coexistence, coordination and mutual reinforcement among national, subregional and interregional competition regimes; (b) how much convergence among substantive, procedural and enforcement policy aspects of competition laws and policies is necessary to further enforcement cooperation; (c) what is the appropriate balance between promoting such convergence and allowing room for diversity and experimentation by each country or subregional grouping to work out what is appropriate for its needs (taking into account paragraph 8 of the São Paulo Consensus);<sup>64</sup> (d) whether and how the principle of preferential or differential treatment for developing countries might be better reflected in agreements dealing with this area, in the light of the findings of report TD/B/COM.2/CLP/46/Rev.1; (e) what types of dispute avoidance or resolution mechanisms, if any, might be appropriate in different contexts, and how such mechanisms as applicable might be tailored and developed for cooperation on competition law and policy in the light of the findings of report TD/B/COM.2/CLP/37/Rev.2; (f) how diversity or compatibility/convergence among national, bilateral, regional and multilateral regimes might be catered for or reconciled through such principles or mechanisms as applicable; and (g) how best to promote exchange of experiences in this area so as to further develop bilateral and regional cooperation mechanisms, including the organization, functions and powers of the competent institutions .

Further issues for discussion might be identified in the light of views expressed since the Review Conference. At the seventh session of the Group of Experts, it was suggested that competition authorities should be more active in the design of regional trading agreements (RTAs), and UNCTAD should be asked to design rules for this purpose.<sup>65</sup> The view was also expressed that international cooperation in this area currently did not work as well as it should (especially in resolving individual cases), mainly because of the confidentiality obligations of competition authorities; it was accordingly suggested that grants of leniency could be used to convince companies to waive sharing of confidential information relating to themselves, thus enabling competition authorities to exchange the relevant information freely.

<sup>66</sup> Subsequent to that session, a communication by one competition authority recommends that, in addition to the adoption of effective implementation rules with respect to CRPs in RTAs, international cooperation with respect to anti trust investigations be improved to facilitate the exchange of confidential information and establish acceptable minimum standards on substantive and procedural antitrust rules, with UNCTAD playing an intermediary and capacity-building role.<sup>67</sup> The communication quotes from a report (written in a personal capacity) in an UNCTAD publication, suggesting that the relatively weak implementation record of competition-related provisions (CRPs) in the majority of RTAs so far can only partly be explained by their relatively recent nature and that "expeditious progress can only be expected if strengthening of implementation capacity in developing and transition RTAs is accompanied by reinforced commitment from developed countries to

effectively address the main competition policy concerns of their trading partners." <sup>68</sup>  
Accordingly, the Group of Experts at its eight and subsequent sessions, may wish to reflect upon the above-mentioned suggestions.

**Annex I****BILATERAL AGREEMENTS ON COMPETITION LAW  
ENFORCEMENT**

Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany relating to Mutual Cooperation regarding Restrictive Business Practices (Bonn, 23 June 1976).

Agreement between the Government of the United States of America and the Government of Australia relating to Cooperation on Antitrust Matters (Washington, D.C., 29 June 1982).

Agreement of the Federal Republic of Germany and the Government of the French Republic concerning Cooperation on Restrictive Business Practices (28 May 1984).

Agreement between the Government of the United States of America and the Commission of the European Communities on the Application of Their Competition Laws (Washington, D.C., 23 September 1991; entry into force, 10 April 1995).

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

Agreement between the Government of the United States of America and the Government of Canada regarding the Application of their Competition and Deceptive Marketing Practices Laws (Washington, D.C., 1 August 1995 and Ottawa, 3 August 1995).

Agreement of Co-operation between the State Competition and Consumer Protection Office of the Republic of Lithuania and the Anti Monopoly Office of the Republic of Poland, 3 January 1996.

Agreement on Co-operation between the State Competition and Consumer Protection Office of the Lithuanian Republic and the Antimonopoly Committee of Ukraine, 18 February 1996.

Memorandum of Understanding between the Competition Authorities of the Republic of Estonia, the Republic of Latvia and the Republic of Lithuania, 11 April 1996.

The Agreement of Co-operation between the Competition Authorities of the Republic of Latvia and the Republic of Lithuania, 11 April 1996.

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

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

Agreement between the Government of the United States of America and the Commission of the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws (Brussels and Washington, D.C, 4 June 1998).

Agreement between the Government of the United States of America and the State of Israel, regarding the Application of their Competition Laws, (Washington, 15 March 1999).

Agreement between the Government of Canada and the European Communities Regarding the Application of their Competition Laws ( Bonn, 17 June 1999).

Agreement between the Government of Japan and the Government of the United States of America concerning Cooperation on Anticompetitive Activities (Washington, D.C., 7 October 1999).

Agreement between the Government of the People's Republic of China and the Government of the Republic of Kazakhstan on Cooperation in the Field of Countering Unfair Competition and Antimonopoly, (1999).

Agreement between the Government of the United States of America and the Government of Japan regarding Cooperation on Anti-competitive activities, (Washington, D.C., 7 October 1999).

Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil regarding Cooperation between their Competition Authorities in the Enforcement of their Competition Laws, (Washington, D.C., 26 October 1999).

Agreement on Cooperation between Georgian and Romanian Competition Authorities, Tbilisi, 18 November 1999.

Co-operation and Co-ordination Agreement between the Australia Competition and Consumer Commission and Papua New Guinea Consumer Affairs Council, 26 November 1999.

Memorandum on Cooperation between the Fair Trade Commission of the Republic of Korea and the Ministry of the Russian Federation for Antimonopoly Policy and Support for Entrepreneurship, Seoul, 7 December 1999.

Agreement between the Government of the United States of America and the Government of the United Mexican States regarding the application of their competition laws, (Mexico City, 11 September 2000).

Cooperation Arrangement between the Commissioner of Competition (Canada) the Australian Competition and Consumer Commission and the New Zealand Commerce Commission Regarding the Application of their Competition and Consumer Laws, (Wellington, October 2000).

Agreement between Denmark, Iceland and Norway regarding cooperation in competition cases, (Copenhagen, 16 March 2001, entry into force 1 April 2001).

Agreement between Mexico and Canada for Cooperation on Economic Competition, Veracruz, 14 November 2001.

Memorandum of Understanding between the Fiscalía Nacional Económica of Chile and the Competition Bureau of Canada, 17 December 2001.

Agreement on Cooperation in the sphere of Competition Policy between the Government of the Federative Republic of Brazil and the Government of the Russian Federation, 2001.

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

Agreement between the Governments of Georgia and the Ukraine on Cooperation in the area of Competition Policy, Tbilisi, 16 July 2002.

Cooperation Arrangement between the Fair Trade Commission of the Republic of Korea and the Australian Competition and Consumer Commission regarding the Application of their Competition and Consumer Protection Laws, 29 September 2002.

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

Memorandum regarding Cooperation in Competition Policy among the Fair Trade Commission of the Republic of Korea, the Interstate Council for Antimonopoly Policy of CIS countries, the Competition Council of the Republic of Latvia and the Competition Council of Romania, September 2003.

Cooperation Arrangement between the Commissioner of Competition (Canada) and Her Majesty's Secretary of State for Trade and Industry and the Office of Fair Trading regarding the Application of their Competition and Consumer Laws, 14 October 2003.

Cooperation Arrangement between the Australian Competition and Consumer Commission, the Commerce Commission in New Zealand and Her Majesty's Secretary of State for Trade and Industry and the Office of Fair Trading regarding the Application of their Competition and Consumer Laws, 16 October 2003.

Arrangement between the Fair Trade Commission of the Republic of Korea and the Federal Competition Commission of the United Mexican States regarding the Application of their Competition Laws, April 2004.

Agreement between the Government of the United States of America and the Government of Canada on the Application of Positive Comity Principles to the Enforcement of their Competition Laws, Washington, 5 October 2004.

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

Agreement between the Government of Japan and the Government of Canada concerning Cooperation on Anticompetitive Activities, Ottawa, 6 September 2005, entry into force 6 October 2005.

Memorandum of Understanding on Cooperation between the Fair Trade Commission of the Republic of Korea and the Turkish Competition Authority, 11 November 2005.

Cooperation Arrangement between the Fair Trade Commission of the Republic of Korea and the Competition Bureau of the Government of Canada regarding the Enforcement of their Competition Law, 4 May 2006.

Memorandum of Understanding on Cooperation between the Romanian Competition Council and the Turkish Competition Authority.

## Annex II

### **SELECTED FREE TRADE, CUSTOMS UNION, ECONOMIC PARTNERSHIP OR COMMON MARKET AGREEMENTS WITH COMPETITION LAW AND POLICY PROVISIONS**

Treaty Establishing the European Coal and Steel Community (Paris, 18 April 1951).

Treaty Establishing the European Economic Community (Rome, 25 March 1957).

Convention establishing the European Free Trade Association (Stockholm, 4 January 1960), amended at Vaduz on 21 June 2001.

Association Agreement between the European Economic Community and Turkey (1961), with Decision No. 1/95 of the European Union-Turkey Association Council on Implementing the Final Phase of the Customs Union (22 December 1995).

Treaty Establishing the Central African Customs and Economic Union (Brazzaville, December 1964).

Andean Subregional Integration Agreement (Cartagena, 26 May 1969), together with Decision 285 of the Andean Commission, "Norms to prevent or correct competitive distortions caused by practices that restrict free competition" (21 March 1991).

Australia-New Zealand Closer Economic Relations Agreement (entry into force, 1 January 1983), with the Protocol on the Acceleration of Free Trade in Goods (1988; entry into force, 1 July 1990), and the Memorandum of Understanding between the Government of New Zealand and the Government of Australia on Harmonization of Business Law (1 July 1988).

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

Treaty Establishing the Southern African Development Community (Windhoek, 17 August 1992), together with the Protocol on Trade (August 1996).

North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United States of Mexico (Washington, D.C., 8 and 17 December 1992; Ottawa, 11 and 17 December 1992; and Mexico City, 14 and 17 December 1992).

Traité Modifié de l'Union Economique Et Monétaire Ouest Africaine (UEMOA), 29 January 2003.

Commonwealth of Independent States Treaty on Economic Union (Moscow, 24 September 1993).

Treaty on the Harmonization of Business Law in Africa (Port Louis, 17 October 1993).

Treaty Establishing the Common Market for Eastern and Southern Africa (Kampala, 5 November 1993).

Agreement on Implementation of Common Antimonopoly Policy between CIS member countries, Ashkhabad, 23 December 1993, as amended on 25 January 2000.

Agreement on the European Economic Area between the European Communities, their member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Kingdom of Sweden (13 December 1993; entry into force, 1 January 1994).

Treaty Establishing the Central African Economic and Monetary Community (N'Djamena, 16 March 1994).

Europe agreements establishing an association between the European Communities and their member States, of the one part and of the other part respectively, the Republics of Bulgaria and Romania (entry into force, 1 February 1995).

Agreements on partnership and cooperation between the European Community of the one part and of the other part respectively: Ukraine (14 June 1994); the Russian Federation (24 June 1994); the Republic of Kazakhstan (23 January 1995); the Kyrgyz Republic (9 February 1995); the Republic of Moldova (28 November 1994); the Republic of Belarus (6 March 1995), Azerbaijan, Georgia and Armenia (22 April 1996).

Osaka Action Agenda, 1995, adopted by the Asia-Pacific Economic Cooperation forum (APEC).

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

Framework cooperation agreement leading ultimately to the establishment of a political and economic association between the European Community and its member States, of the one part, and the Republic of Chile, of the other part (Florence, 21 June 1996).

Protocol on Trade in the Southern African Development Community, Maseru, 24 August 1996

Canada/Chile Free Trade Agreement (Ottawa, 14 November 1996; entry into force, 1 June 1997).

Treaty on Free Trade between the Republic of Chile and the Republic of Mexico, 1998.



Treaties on Free Trade between the Dominican Republic and each of the member countries of the Central American Common Market, 1998.

Treaties on Free Trade between the Republic of Chile and each of the member countries of the Central American Common Market (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua), 1999.

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

Treaty Establishing the East African Community, Arusha, 20 November 1999.

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

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

Free Trade Agreement between the EFTA States and Mexico, Mexico City, 27 November 2000.

Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000 and Economic Partnership, Political Co-ordination and Co-operation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, 28 September 2000.

The Treaties on Free Trade and Preferential Exchange between Panama and each of the member countries of the Central American Common Market, 2001.

Free Trade Agreement between Chile and Mexico, 2001.

Free Trade Agreement between the Government of Canada and the Government of the Republic of Costa Rica (Ottawa, 23 April 2001).

Stabilization and Association Agreement between the European Communities and their Member States, of the one hand, and on the other hand, respectively: The former Yugoslav Republic of Macedonia (26 March 2001) and the Republic of Croatia, 29 October 2001.

Agreement between Japan and the Republic of Singapore for a New Age Economic Partnership and Implementing Agreement pursuant to article 7, 13 January 2002.

Free Trade Agreement between the EFTA States and Singapore, Egilsstaðir (Iceland), 26 June 2002.

Southern African Customs Union Agreement between the Governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland, 21 October 2002.

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

Free Trade Agreement between the Republic of Korea and the Republic of Chile, Seoul, 15 February 2003.

Singapore-United States Free Trade Agreement, Washington, 6 May 2003.

Chile-United States Free Trade Agreement, Miami, 6 June 2003.

Australia-United States Free Trade Agreement, Washington, 18 May 2004.

Australia-Thailand Free Trade Agreement, 5 July 2004.

Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership, Mexico City, 17 September 2004.

Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership and Implementing Agreement pursuant to article 132, 17 September 2004.

COMESA Competition Rules and Regulations, Lusaka, 7 December 2004.

Thailand-New Zealand Closer Economic Partnership Agreement, 19 April 2005. Free Trade Agreements between Albania and respectively, Bosnia and Herzegovina, Bulgaria, Croatia, Serbia and Montenegro, Macedonia, Moldova and the United Nations Interim Administration Mission in Kosovo (Unmik).

Free Trade Agreements between Armenia and respectively, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, the Russian Federation, Turkmenistan and Ukraine.

Free Trade Agreements between the Republic of Bulgaria and respectively, the State of Israel, Turkey and the Former Yugoslav Republic of Macedonia.

Free Trade Agreements between Croatia and Bosnia and Herzegovina.

Free Trade Agreements between the EFTA States and respectively, Chile, Croatia, Jordan, the Former Yugoslav Republic of Macedonia, Morocco, Palestine, Romania and Turkey.

Interim Agreements between the EU and, respectively, Croatia and the Former Yugoslav Republic of Macedonia.

Free Trade Agreements between Georgia and respectively, Azerbaijan, Kazakhstan, Russia, Turkmenistan and Ukraine.

Free Trade Agreements between the Kyrgyz Republic and respectively, Kazakhstan, Moldova, the Russian Federation, Ukraine and Uzbekistan.

Protocol on Trade in the Southern African Development Community.

Free Trade Agreements between Turkey and respectively, Bosnia and Herzegovina, Croatia, Israel and the Former Yugoslav Republic of Macedonia.

Agreement between New Zealand and Singapore on a Closer Economic Partnership.

Trans-Pacific Strategic Economic Partnership Agreement among Brunei Darussalam, Chile, New Zealand and Singapore, June 2005, entry into force 1 May 2006.

Agreement between Japan and the Government of Malaysia for an Economic Partnership, Mexico City, 13 December 2005.

Stabilization and Association Agreement between the European Communities and their Member States, on the one hand, and the Republic of Albania, of the other hand, Luxembourg, 25 June 2006

Agreement between Japan and the Republic of the Phillipines for an Economic Partnership, Helsinki, 9 September 2006.

United States – Peru Trade Promotion Agreement, Washington DC, 12 April 2006.

United States-Colombia Trade Promotion Agreement, Washington DC, 22 November 2006.

### **Annex III**

#### **MULTILATERAL AND PLURILATERAL INSTRUMENTS DEALING WITH COMPETITION LAW AND POLICY**

Recommendation of the OECD Council on restrictive business practices affecting international trade, including those involving multinational corporations (20 July 1978).

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, adopted by General Assembly resolution 35/63 of 5 December 1980.

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

Recommendation of the OECD Council, “minimizing conflicting requirements: approaches of moderation and restraint” (1987).

Final Act of the Uruguay Round of Multilateral Trade Negotiations (Marrakech, April 1994).

Revised recommendation of the OECD Council concerning cooperation between member countries on anti-competitive practices affecting international trade (27 and 28 July 1995 (C(95)130/FINAL)).

Recommendation of the OECD Council concerning effective action against hard-core cartels (13-May-1998, C(98)35/FINAL).

WTO Agreement on Basic Telecommunications Services (15 February 1997; entry into force, 1 January 1998).

OECD Guidelines for Multinational Enterprises, adopted by the Governments of the 29 Member countries of the OECD and of Argentina, Brazil, Chile and Slovakia at the OECD Ministerial Meeting on 27 June 2000.

Recommendation of the OECD Council on merger review (25 March 2005, C(2005)34).

International Competition Network, Guiding Principles for Merger Notification and Review, 29 September 2002.

## Notes

---

<sup>1</sup> A preliminary report on this subject had been submitted to the first session of the Intergovernmental Group of Experts on Competition Law and Policy, held from 29 to 31 July 1998.

<sup>2</sup> See para. 4 of its agreed conclusions in UNCTAD, *Report of the Intergovernmental Group of Experts on Competition Law and Policy on its third session* (TD/RBP/COM.2/CLP/24, TD/B/COM.2/32), para. 3 of its agreed conclusions in UNCTAD, *Report of the Intergovernmental Group of Experts on Competition Law and Policy on its fourth session* (TD/B/COM.2/42, TD/B/COM.2/CLP/32).

<sup>3</sup> See paragraph 2 of the Group's agreed conclusions in UNCTAD, "Report of the Intergovernmental Group of Experts on Competition Law and Policy on its sixth session" (TD/B/COM.2/48). A written communication relating to the report was received from the Government of Indonesia.

<sup>4</sup> See Resolution Adopted By The Conference At Its Closing Plenary Meeting On 18 November 2005, The 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, Antalya, Turkey, 14–18 November 2005 (TD/RBP/CONF.6/14), para. 10. Written communications relating to this report were received from the Governments of Canada, India, Montenegro and the United States.

<sup>5</sup> See paragraph 8 of the Group's Agreed Conclusions in UNCTAD, "Report of the Intergovernmental Group of Experts on Competition Law and Policy on its seventh session" (TD/B/COM.2/CLP/57). Written communications relating to the report have been received from the Governments of Georgia, Japan, Poland, Republic of Korea and Turkey.

<sup>6</sup> See P. Brusick and J. Clarke, "Operationalizing special and differential treatment in cooperation agreements on competition law and policy", in UNCTAD, *Trade and Competition Issues: Experiences at regional level (UNCTAD/DITC/CLP/2005/1)*.

<sup>7</sup> See OECD Global Forum on Competition, Information sharing in cartel investigations - Note by the Secretariat, CCNM/GF/COMP(2002)1.

<sup>8</sup> See OECD Global Forum on Competition, International Co-operation in mergers – Summary of responses to questionnaire to invitees and suggested issues for discussion – Note by the Secretariat, CCNM/GF/COM(2002)6.

<sup>9</sup> See International Competition Policy Advisory Committee to the Attorney-General and Assistant Attorney-General for Antitrust, "Final Report", United States Department of Justice, 2000, (ICPAC Report).

<sup>10</sup> Communication from the Government of Germany.

<sup>11</sup> See OECD, The relationship between regional trade agreements and the multilateral trading system, TD/TC/WP(2002)19/FINAL, and World Trade Organization, *Annual Report 1997*, vol. 1, *Special Topic: Trade and Competition Policy*.

<sup>12</sup> See Communication de l'Union Economique et Monétaire Ouest Africaine, Intergovernmental Group of Experts on Competition Law and Policy, Sixth Session.

<sup>13</sup> See J. Musonda, "Regional competition policy for COMESA countries and implications for an FTA in 2000", in UNCTAD, *Competition policy, trade and development in the Common Market for Eastern and Southern Africa* (UNCTAD/ITCD/CLP/Misc.18), p. 103; and G. Lipimile and E. Gachuiru, Allocation of competence between national and regional competition authorities: the case of COMESA, in UNCTAD, *Trade and Competition Issues: experiences at regional level (UNCTAD/DITC/CLP/2005/1)*.

<sup>14</sup> See T. Stewart, Special cooperation provisions on competition law and policy: The case of small economies (CARICOM), in *UNCTAD/DITC/CLP/2005/1*.

<sup>15</sup> The phrase in a previous version of the report "... the agreement also abolishes the application of anti-dumping and countervailing duties between the parties after a transitional period" was deleted from that version at the request of the Canadian Competition Bureau.

<sup>16</sup> See "FTC and DOJ publish communiqué from first "Antitrust summit of the Americas", *Antitrust & Trade Regulation Report*, 8 October 1998, vol. 75, p. 416.

<sup>17</sup> See WTO Working Group on the Interaction between Trade and Competition, "Policy report on the meeting of 11-13 March 1998" (WT/WGTCP/M/4), paragraph 57.

<sup>18</sup> "The scope, coverage and enforcement of competition laws and policies and analysis of the provisions of the Uruguay Round agreements relevant to competition policy, including their implications for developing and other countries" (TD/RBP/COM.2/EM/2). See also the WTO *Annual Report 1997*, op. cit.

<sup>19</sup> Now incorporated in GATT 1994.

<sup>20</sup> See however J. Mathis, WTO Core Principles and Prohibition: Obligations Relating To Private Practices, National Competition Laws and Implications for a Competition Policy Framework (consultant report UNCTAD/DITC/CLP/2003/2) for the limits of the obligations upon WTO member States under this article and under the analogous GATT art. II.4.

<sup>21</sup> In the case of *Japan - Measures affecting Consumer Photographic Film and Paper* (WT/DS44/R, 31 March 1998), the United States brought proceedings in respect of alleged Japanese measures affecting the distribution and sale of imported consumer photographic film and paper (contrary to GATT 1994), as well as a number of measures allegedly affecting distribution services in general (contrary to GATS). Consultations were also requested by both the United States and Japan, in pursuance of the 1960 GATT Decision, in respect of alleged RBPs affecting imports of photographic film and paper into each other's markets (the European Union also asked to join in these consultations). The procedures under GATS and the 1960 Decision were suspended, while the complaint under GATT 1994 was rejected by the Dispute Settlement Panel. See also the important *Telmex* case, reviewed in TD/B/COM.2/CLP/46/Rev.1.

<sup>22</sup> See OECD, "History and potential benefits of positive comity" (DAFFE/CLP/WP3(98)3).

<sup>23</sup> See H. Spier and T. Grimwalde, "International engagement in competition law enforcement: the future for Australia", *Trade Practices Law Journal* 5 (1997), p. 232. See also OECD, Hard core cartels: Recent progress and challenges ahead (CCNM/COMP/TR(2003)7) and Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation, 2006; and Chang, Deuk-Soo, "Suggestions For Enhancing Effectiveness Of Cooperation On Competition Law and Policy At Regional Level From Korea's Experience", in *UNCTAD/DITC/CLP/2005/1*.

<sup>24</sup> See WTO Working Group on the Interaction between Trade and Competition Policy, "Submission from the United States" (WT/WGTCP/W/48).

<sup>25</sup> See E. M. Armani, "Sabre contre Amadeus e.a.: un dossier riche en enseignements", in *Competition Policy Newsletter*, 2000, no. 3, p. 27.

<sup>26</sup> See also "Consorzio del Prosciutto de San Daniele - Consorzio del Prosciutto di Parmì" (Rif. 1138, Delibera del 19.06.96 - Boll. N. 25/1996) (production quotas maintained by Parma ham producers in Italy; the Federal Trade Commission deferred enforcement action to the Italian competition authority).

<sup>27</sup> See "FTC Chairman discusses competition policy trends in international antitrust enforcement", *Antitrust & Trade Regulation Report* 75, 12 November 1998, p. 555.

<sup>28</sup> See TD/B/COM.2/EM/2, op. cit.

<sup>29</sup> See OECD, "Trade and Competition Policies - Exploring the Ways Forward", p. 19.

<sup>30</sup> See "A note of caution with respect to a WTO agenda on competition policy", address by Joel L. Klein, then Acting Assistant Attorney-General, United States Department of Justice, to the Royal Institute of International Affairs, London, 18 November 1996 and A. Schaub, "International cooperation in antitrust matters: making the point in the wake of the Boeing/MDD proceedings", *EC Competition Policy Newsletter*, No. 1 (1998), p. 2.

<sup>31</sup> See TD/B/COM.2/CLP/46/Rev.1 and references cited in 21 above.

<sup>32</sup> See UNCTAD, "The basic objectives and main provisions of competition laws and policies" (UNCTAD/ITD/15) and TD/B/COM.2/EM/2, op. cit.

<sup>33</sup> See OECD, *Hard Core Cartels*, 2000.

<sup>34</sup> See WTO Working Group on the Interaction between Trade and Competition Policy, "Communication from the United States - The impact of regulatory practices, State monopolies, and exclusive rights on competition and international trade" (WT/WGTCP/W/83).

<sup>35</sup> *Ibid.*

<sup>36</sup> See OECD, *Competition Policy and International Trade: Instruments of Cooperation*, Paris, 1987.

<sup>37</sup> See A. Schaub, "International cooperation in antitrust matters: making the point in the wake of the Boeing/MDD proceedings", *EC Competition Policy Newsletter*, No. 1 (1998), p. 2.

<sup>38</sup> *Ibid.*

<sup>39</sup> See statements by the representatives of Brazil, Canada and the United States in WTO Working Group on the Interaction between Trade and Competition Policy, "Report on the meeting of 11-13 March 1998" (WT/WGTCP/M/74, paras. 41, 54 and 55).

<sup>40</sup> See the statement by the representative of Brazil in paragraph 55 of WT/WGTCP/M/74, op. cit.

<sup>41</sup> See American Society of International Law, 91 ASIL PROC. 145 (1997), remarks by Diane P. Wood. This speaker suggested that a key reason for the exclusion of cooperation on mergers from the scope of the IAEEA was that merger control was treated by most countries as involving highly discretionary questions of national industrial or economic policy.

<sup>42</sup> See WTO, "Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council" (WT/WGTCP/3), para. 44.

<sup>43</sup> See CCNM/GF/COMP(2002)6, op. cit.

<sup>44</sup> Reported in UNCTAD, “Restrictive business practices that have an effect in more than one country, in particular developing and other countries, with overall conclusions regarding the issues raised by these cases” TD/RBP/CONF.4/6.

<sup>45</sup> See Y. Kenfack, “La politique de la concurrence dans les transports maritimes internationaux: enjeux pour les pays en développement”, study prepared for the UNCTAD secretariat.

<sup>46</sup> See TD/RBP/CONF.4/6, *op. cit.*

<sup>47</sup> See W. Kolasky, *Criminalizing Cartel Activity: Lessons from the U.S. Experience*, address to the Global Competition Law Centre, at <http://gclc.coleurop.be/documents/Kolasky%20-%20criminalizing%20cartel%20activity%208-04.pdf>.

<sup>48</sup> See CCNM/GF/COMP(2002)6, *op. cit.*

<sup>49</sup> See Klein, *op. cit.*

<sup>50</sup> Communication by the Government of India.

<sup>51</sup> See CCNM/GF/COMP(2002)6, *op. cit.*. The competition authorities to which the questionnaire was sent out included those of Brazil, Bulgaria, Chile, Estonia, Israel, Kenya, Indonesia, Lithuania, Romania, Russian Federation, Taiwan Province of China and Tunisia.

<sup>52</sup> See Communication submitted by Zimbabwe, Intergovernmental Group of Experts on Competition Law and Policy, Sixth Session.

<sup>53</sup> See American Bar Association Section of Antitrust Law, *The State of Federal Antitrust Enforcement 2004*, at [http://www.abanet.org/antitrust/comments/2004/state\\_of\\_fed\\_enforc.pdf](http://www.abanet.org/antitrust/comments/2004/state_of_fed_enforc.pdf).

<sup>54</sup> See ECLAC, *Cooperation on Competition Policy in Latin American and Caribbean Bilateral Trade Agreements*, LC/W.12, by V. Silva.

<sup>55</sup> See G. Damien, *Competition law and regional economic integration: an analysis of the Southern Mediterranean countries*, World Bank Working Paper series no. 35, 2004.

<sup>56</sup> See Samuel-Jacques Prisso-Essawe, *L'émergence d'un droit communautaire africain de la concurrence: "Double variation sur une partition européenne"*, *Revue Internationale du Droit Comparé*, 2004, p. 330.

<sup>57</sup> See UEMOA, *L'expérience de la recherche d'harmonisation entre l'Union Economique et Monétaire Ouest Africaine et la Communauté Economique des Etats de l'Afrique de l'Ouest*, Presentation to the Fifth Review Conference, at [http://www.unctadxi.org/templates/Page\\_\\_\\_\\_5758.aspx](http://www.unctadxi.org/templates/Page____5758.aspx).

<sup>58</sup> See Damien, *op. cit.*

<sup>59</sup> See F. Jenny and P. Horna, *Modernization of the European system of competition law enforcement: Lessons for other regional groupings*, in *UNCTAD/DITC/CLP/2005/1*.

<sup>60</sup> See Schaub, *op. cit.*

<sup>61</sup> For information on the intensive exchanges taking place within the OECD, see WTO Working Group on the Interaction between Trade and Competition Policy, “Communication from OECD” (WT/WGTCP/W/21).

<sup>62</sup> WTO Working Group on the Interaction between Trade and Competition Policy, “Report on the meeting of 11–13 March 1998” (WT/WGTCP/M/4), paragraph 52.

<sup>63</sup> See TD/RBP/CONF.6/14, para. 3.

<sup>64</sup> This paragraph states: “It is for each Government to evaluate the trade-offs between the benefits of accepting international rules and the constraints posed the loss of policy space. It is particularly important for developing countries, bearing in mind development goals and objectives, that all countries take into account the need for appropriate balance between national policy space and international disciplines and commitments.”

<sup>65</sup> See TD/B/COM.2/CLP/57, para. 19.

<sup>66</sup> *Ibid.*, para. 21.

<sup>67</sup> Communication to the UNCTAD secretariat by the Government of Turkey.

<sup>68</sup> See L. Cernat, *Eager to ink, but ready to act? RTA proliferation and international cooperation on competition policy in UNCTAD*, *Trade And Competition Issues: Experiences At Regional Level*. In UNCTAD, *Trade And Competition Issues: Experiences At Regional Level* (UNCTAD/DITC/CLP/2005/1), p. 31 at p. 64.

\* \* \* \* \*