UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

COMPETITION

UNCTAD Series
on issues in international investment agreements

UNITED NATIONS
New York and Geneva, 2004

Note

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The following symbols have been used in the tables:

Two dots (..) indicate that data are not available or are not separately reported. Rows in tables have been omitted in those cases where no data are available for any of the elements in the row;

A dash (-) indicates that the item is equal to zero or its value is negligible;

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Use of a hyphen (-) between dates representing years, e.g. 1994-1995, signifies the full period involved, including the beginning and end years.

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UNCTAD/ITE/IIT/2004/6

UNITED NATIONS PUBLICATION
Sales No. E.04.II.D.44
ISBN 92-1-112654-1

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PREFACE

The secretariat of the United Nations Conference on Trade and Development (UNCTAD) is implementing a work programme on international investment agreements. It seeks to help developing countries to participate as effectively as possible in international investment rule-making at the bilateral, regional, plurilateral and multilateral levels. The programme embraces policy research and development, including the preparation of a Series of issues papers; human resources capacity-building and institution-building, including national seminars, regional symposia, and training courses; and support to intergovernmental consensus-building, as well as dialogues between negotiators and groups of civil society.

This paper is part of this Series. It is addressed to Government officials, corporate executives, representatives of non-governmental organizations, officials of international agencies and researchers. The Series seeks to provide balanced analyses of issues that may arise in discussions about international investment agreements. Each study may be read by itself, independently of the others. Since, however, the issues treated closely interact with one another, the studies pay particular attention to such interactions.

The Series is produced by a team led by Karl P. Sauvant and James Zhan. The principal officer responsible for its production is Anna Joubin-Bret who oversees the development of the papers at various stages. The members of the team include Federico Ortino, Elisabeth Tuerk and Jörg Weber. The Series' principal advisors are Peter Muchlinski and Patrick Robinson. The present paper is based on a manuscript prepared by Peter Muchlinski that draws on a background study prepared by Cynthia Wallace. The final version reflects comments received from Philippe Brusick, Gesner Olivera Filho, Hassan Qaqaya, Pedro Roffe and Andreas Reindl. Research assistance was provided by Moritz Hunsmann and Christine Makori.

Carlos Fortin
Geneva, September 2004 Officer-in-Charge of UNCTAD

ACKNOWLEDGEMENTS

UNCTAD's work programme on international investment agreements is implemented by a team of UNCTAD staff members and consultants headed by James Zhan, under the overall guidance of Karl P. Sauvant and Khalil Hamdani. The team includes Hamed El-Kady, Deepali Fernandes, Nicolas Guerrero, Anna Joubin-Bret, Aurélie Legrand, Federico Ortino, Elisabeth Tuerk and Jörg Weber. Administrative support is provided by Séverine Excoffier-El Boutout and Jayanti Gupta.

UNCTAD has carried out a number of activities related to the work programme in cooperation with other intergovernmental organizations, including the Agence pour la Francophonie, Banco Centroamericano de Integración Económica, CARICOM Secretariat, German Foundation for Development, Inter-Arab Investment Guarantee Corporation, Inter-American Development Bank (BTD/INTAL), League of Arab States, Organization of American States, Secretaria de Integración Económica Centroamericana and the Secretaria General de la Comunidad Andina. UNCTAD has also cooperated with non-governmental organizations, including the Centre for Research on Multinational Corporations, the Consumer Unity and Trust Society (India), the Dutch Foundation for Research on Multinationals (SOMO) (the Netherlands), the Economic Research Forum (Egypt), the European Roundtable of Industrialists, the Friedrich Ebert Foundation (Germany), the German Foundation for International Development, the International Confederation of Free Trade Unions, the Labour Resource and Research Institute (LaRRI) (Namibia), Oxfam, the Third World Network and World Wildlife Fund International. Since 2002, a part of the work programme has been carried out jointly with the World Trade Organization (WTO).

Funds for the work programme have so far been received from Australia, Brazil, Canada, France, Japan, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom and the European Commission. Argentina, Botswana, China, Colombia, Costa Rica,

Croatia, Cuba, Czech Republic, Djibouti, Egypt, Gabon, Germany, Guatemala, India, Indonesia, Jamaica, Malaysia, Mauritania, Mexico, Morocco, Namibia, Pakistan, Peru, Qatar, Singapore, South Africa, Sri Lanka, Thailand, Trinidad and Tobago, Tunisia, Venezuela and Yemen have also contributed to the work programme by hosting regional symposia, national seminars or training events.

In pursuing this programme of work, UNCTAD has also closely collaborated with a number of international, regional and national organizations, particularly with the Centro de Estudios Interdisciplinarios de Derecho Industrial y Económico (the Universidad de Buenos Aires), the Indian Institute of Foreign Trade, the Legon Centre of Accra (Ghana), ProInversión (Peru), Pontificia Universidad Católica del Perú, the National University of Singapore, Senghor University (Egypt), the University of Dar Es Salaam (Tanzania), the University de Los Andes (Colombia), the University of Campinas (Brazil), the University of Lima (Peru), the Universidad del Pacífico (Peru), the University of Pretoria (South Africa), the University of Tunis (Tunisia), the University of Yaoundé (Cameroon), the Shanghai WTO Affairs Consultation Center (China) and the University of the West Indies (Jamaica and Trinidad and Tobago). All of these contributions are gratefully acknowledged.

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EXECUTIVE SUMMARY

The aim of this paper is to examine how competition issues have been addressed in international investment agreements (IIAs) and other relevant instruments dealing with international investment.

In section I, the paper identifies some of the main issues related to competition that arise in the context of foreign direct investment (FDI). First, it is necessary to determine the types of anticompetitive practices conducted by privately owned and operated undertakings, which are often referred to in international instruments as "restrictive business practices" (RBPs). Secondly, certain procedural issues arise in connection with competition rules and IIAs, in particular the issue of extraterritoriality and the issue of international cooperation in competition matters. The third major issue area addressed in the paper deals with the development of harmonization measures, mainly those that seek to create a unified substantive and procedural system of competition regulation at the supranational level and those that seek substantive harmonization of national competition policies.

Section II reviews the various ways in which competition is addressed in IIAs, focussing on the key issues identified in section I. Section III highlights points of interaction between competition, on the one hand, and other general issues addressed in IIAs (i.e. those covered in other papers of this Series), on the other. Finally, in the conclusions, the paper briefly examines the significance of different approaches to competition policy for economic development in individual countries and considers the various options open to negotiators when drafting competition provisions. The most basic choice is whether to include or to exclude provisions on this subject. Where the former choice is made, further alternatives exist as to how to deal with each of the issues identified in section I.

INTRODUCTION

The regulation of anti-competitive practices by private parties is an established aspect of economic regulation in national laws. By contrast, the linkage of competition issues to the concerns of investment liberalization in IIAs is a relatively recent phenomenon. It is the purpose of the present paper to discuss the principal issues arising out of the relationship between competition and investment, to undertake a review of existing competition related provisions in IIAs and to offer policy options in this regard.

A fundamental point from which competition provisions in IIAs must start concerns the extent to which they are linked to FDI issues, or whether they are seen as self-contained. The Declaration of the first ministerial meeting of the World Trade Organization (WTO) in Singapore in 1996 recognized the relationship between investment and competition policy. However, the WTO has suggested a limited interconnection between the two disciplines through the establishment of two separate working groups on trade and competition and trade and investment (box 1).

The inputs of both Working Groups were considered at the WTO's Third Ministerial in Seattle in December 1999, and were ultimately included as subjects in the Report of the Fourth Ministerial in Doha in 2001. However, the Doha Ministerial Declaration did not suggest that there should be a practical interface between the two.

Typically, competition issues have been addressed in IIAs mainly in connection with technology transfer. More recently**,** a growing network of bilateral and inter-regional cooperation agreements, to handle potential international competition/antitrust conflicts of interest, has emerged, to which developing, as well as developed, countries are parties. Such agreements, along with certain trade instruments that deal with competition issues, as well as European Union (EU) association agreements, form the basis for potential further instruments with specific competition provisions.

Box 1. WTO Singapore ministerial declaration on investment and competition

"20. Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs [Trade-Related Investment Measures] Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future, we also agree to:

- establish a working group to examine the relationship between trade and investment; and
- establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.

These groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora. As regards UNCTAD, we welcome the work under way as provided for in the Midrand Declaration and the contribution it can make to the understanding of issues. In the conduct of the work of the working groups, we encourage cooperation with the above organizations to make the best use of available resources and to ensure that the development dimension is taken fully into account. The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations."

Source: WTO, 1996, para.20.

Developed countries were the first to adopt competition laws and set up regulatory agencies. In 1980, fewer than 40 countries—mostly developed—had competition laws (UNCTAD, 1997, p. 189). Since then more developing countries and economies in transition have adopted competition laws as well and set up agencies to administer them. By 1996 the number of economies with competition rules and authorities in place had reached 77 (UNCTAD, 1997, p. 290). By the first half of 2003, some 93 economies had adopted competition rules and established competition agencies—in other words: almost half the world's economies (UNCTAD, 2003a, p. 135).

Some national laws in developing countries and economies in transition have followed developed country models. A significant number of laws in Central and Eastern Europe, moreover, have replicated the main provisions of the competition rules of the EU. This is especially so for economies in transition that have entered association agreements with the EU and that aspire, in due course, to full EU membership. For other countries, the 2002 United Nations Conference on Trade and Development (UNCTAD) Model Law on Competition (the Model Law) may provide a model. The Model Law reflects recent trends in competition legislation worldwide and is supplemented by related Commentaries that have proved to be important for the process (UNCTAD, 2002a). The text was also informed by the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted by the United Nations General Assembly at its thirty-fifth session on 5 December 1980 by resolution 35/63 (the United Nations Set), discussed more fully in section II below. Thus, attempts are being made to develop harmonized international approaches to competition law and policy. IIAs may also play a role in this process, as will be further discussed in the course of this paper.

The present paper proceeds by addressing the principal issues that arise out of the interaction of competition and investment matters in section I. This is followed by an analysis of the main types of competition related provisions in IIAs in section II. Section III examines the interactions between competition and other issues in IIAs, while section IV considers policy options available for dealing with competition issues in IIAs and their development implications.

I. EXPLANATION OF THE ISSUE

A. Restrictive business practices

Competition policy deals with the regulation of certain types of anticompetitive practices conducted by privately owned and operated undertakings. These are often referred to in international instruments as "restrictive business practices" (RBPs). There are basically four main types of restrictive business practices that can have anti-competitive effects in the relevant market: "horizontal" restraints, "vertical" restraints, practices by one or more firms in abuse of a dominant position, and anti-competitive mergers and acquisitions (M&As).[1] Each presents different issues and challenges, though they all share the common goal of preserving, as far as possible, the operation of a competitive market mechanism.[2] The reasons why these four main types of anti-competitive behaviour are regulated under competition rules will now be briefly described.

Collusion between otherwise independent firms can lead to distortions of market conditions. Such collusion can arise between competitors (horizontal collusion, often referred to as "cartelization" of the market) or between suppliers and/or producers and/or distributors (vertical collusion). Collusion between competitors may replace the market-based allocation of resources and the determination of prices with concerted action by private actors (whether suppliers, producers or distributors, as the case may be) that may undermine the capacity of the market to regulate these essential economic activities. Examples of such behaviour include concerted price fixing, market sharing arrangements, or agreed production quotas, or co-operation agreements. However, not all co-operative activities between competitors are necessarily caught. Thus, for example, joint ventures that may lead to the development of new products or technologies may be positively encouraged. Likewise, in cases of serious economic instability, co-operative restructuring arrangements between producers may be permissible. In addition, vertical co-operation is generally regarded as being less serious than horizontal co-operation so long as the market shares of the participants are relatively small, and the market is not highly concentrated among a small number of firms each operating a restrictive network of vertical arrangements for supply and/or distribution, as the case may be. Indeed, competition authorities in OECD countries are increasingly permissive towards vertical arrangements in the absence of significant market power as such arrangements may in fact allow for a more efficient allocation of responsibilities in vertical relationships.

Rules against the abuse of a dominant position (or “monopolization” of the market in United States terminology) seek to regulate anti-competitive behaviour carried out by a single economic undertaking that enjoys a dominant position on the market in question, or by more than one undertaking in such a position. Here, the reality of the market power of the undertaking(s) allows it (them) to act without taking into consideration the activities of its (their) nearest rivals, suppliers or distributors, and to ignore the interests of consumers. Examples of such behaviour include: monopolistic price rises that consumers have to bear in the absence of alternative suppliers, the imposition of unfair or discriminatory commercial terms upon suppliers and/or distributors, the use of predatory pricing to oust new entrants onto the market,[3] boycotts of firms that do not comply with the dominant firm's restrictive terms of doing business, the exclusive use of an essential commercial facility, or control over essential technologies or resources needed by competitors. However, it should be stressed that the mere possession of dominant market power is not in itself the mischief that competition policy seeks to control; rather it is the abuse of that power to achieve anti-competitive aims that is the object of regulation.

The main elements of what the regulator needs to establish so as to prove an abuse of a dominant position are as follows. First, a dominant position must be shown, either within the market as a whole or a substantial part of it. This, in turn, requires that a market analysis be undertaken, so as to establish the relevant product and geographical markets in which the dominant position is asserted. Economic analysis needs to be undertaken, based on the nature of the product in question; its use and application by consumers; its substitutability with other products on the part of consumers; and the nature of the supply side of the market, focusing on the ability of producers to move into the production of the product.[4] The dominant position may be held unilaterally by a single undertaking or collectively by more than one undertaking. The key issue here is whether the dominant undertaking(s) can act independently on the market without having to take account of the actions of competitors, customers or the interests of consumers. In the case of a supranational system of regulation, such as the European Commission (EC), the prohibition only applies where trade between member States is affected. Secondly, an abuse of the dominant position needs to be established. This is an issue of fact in each case, though, as will be shown in section II, competition provisions in international agreements may offer examples of the most egregious abuses.

The three preceding types of anti-competitive behaviour have in common one feature, namely that they are regulated *ex post*, that is after the collusion or abuse of market dominance has arisen. However, the control of M&As usually and indeed preferably, occurs *ex ante*, that is before a merger or acquisition has taken place, though it can also apply *ex post* to unravel an already completed but otherwise anti-competitive merger or acquisition. The aim here is to limit, as far as is foreseeably possible, the creation of a dominant position that might lead to anti-competitive abuses, on the part of the merging undertakings, or as a result of the acquisition of one undertaking by another. This process requires an economic analysis of the existing market structure and its comparison with the structure that would result after the merger or acquisition takes place. If the degree of projected concentration of the market reaches a level in which a dominant position is acquired, then the merger or acquisition may have to be modified in accordance with the conditions placed upon it by the regulatory authority, or it may be barred outright.

Having considered the main types of RBPs, and the reasons for their regulation, the discussion now focuses on the relationship between FDI and competition. FDI, particularly in developing countries, may, in certain cases, have undesirable effects on competition, stemming especially from anti-competitive agreements or concerted practices, including hard-core cartels, abuses of dominant positions and cross-border M&As. Competition law and policy are particularly important for FDI, because economic liberalization results in greater reliance on market forces to determine the development impact of FDI. Host countries want to ensure that the reduction of regulatory barriers to FDI and the strengthening of standards of treatment of foreign investors are not accompanied by the emergence of private barriers to entry and anticompetitive behaviour of firms. The major difficulty in developing countries is adopting effective competition legal frameworks and monitoring and enforcement systems. Given the commitment of many countries, including developing countries, to the progressive liberalization of the conditions for FDI, competition policy acquires an especially important place in the regulatory framework. This is so for a number of reasons. First, there is the risk that foreign investors may drive domestic enterprises out of the market; secondly, if foreign investors are in a strong market position they may adversely affect domestic prices; thirdly, the competitive environment in the host country may need to be regulated so as to ensure that it remains an attractive destination for FDI. In particular, anti-competitive State aids to industry that can favour not only domestic but also certain foreign investors may need to be controlled, as may the activities of national monopoly suppliers. In addition, competition policy may help to ensure positive technology transfer by foreign investors.

In light of such considerations, the United Nations Set recognizes, in its Preamble, that RBPs have the capacity to “impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting international trade” and affirms that “the adoption and efficient enforcement of competition legislation, including a merger-review system, can strengthen the way in which FDI liberalization can enhance market efficiency and consumer welfare and, ultimately, promote the development of developing countries”. Indeed, the Fourth United Nations Conference to Review All Aspects of the United Nations Set held in 2000 emphasized that, “without controls on anti-competitive practices, it is unlikely that all the benefits of liberalization and globalization will be passed on to consumers” (UNCTAD, 2000a, p. 2).

B. The main policy issues

In the light of the preceding discussion, certain issues related to competition can and do arise in the context of IIAs and related instruments:

1. Determining what amounts to a restrictive business practice

This issue can be sub-divided into three major parts: the addressee of a competition provision, definition of the major RBPs and RBPs that are actually covered by the provision.

a. Determining the subjects of competition provisions

An initial issue concerns the types of undertakings to which rules on RBPs apply. This is not a straightforward exercise. First, it is necessary to determine whether certain types of undertakings are to be excluded from the operation of competition rules. For example, the majority of national laws exclude trade unions from their purview. Similarly, intergovernmental co-operation arrangements, even if they lead to anti-competitive effects on the market, may be excluded. Secondly, it is necessary to offer a clear definition of what constitutes an "undertaking" for the purposes of the provision. In particular, in relation to complex transnational corporation (TNC) groups, it is necessary to determine whether the group forms a single undertaking for the purposes of regulation. Failure to define the boundaries of that undertaking could result in the control of perfectly legitimate internal administrative acts within the group, to the detriment of the economic gains to efficiency from group organization. Most national competition laws do not treat a corporate group as a set of separate entities, but, rather, look to the underlying economic reality and treat the group as one undertaking. This is known as the "enterprise entity" doctrine. International agreements may need to determine whether they too include this doctrine.

b. Defining restrictive business practices

Above it was noted that there are four types of RBPs, namely, horizontal and vertical anti-competitive agreements, abuse of a dominant position and M&As. Competition provisions in international instruments use definitions of these practices that broadly follow the explanations given above in sub-section A. Examples of definitional provisions in existing agreements will be given in section II.

c. Which kinds of restrictive business practices are covered by the competition provision in an IIA?

A further related issue concerns determining which types of practices are to be covered by the terms of the agreement. For example, even the most advanced supranational competition policy system, that of the European Communities, did not cover M&As until 1989, some 32 years after the entry into force of the Treaty of Rome, which contained provisions covering only horizontal and vertical restraints and abuse of a dominant position. Another issue is whether or not to include certain further anti-competitive practices that do not come within the four main types discussed above. Thus, a trend has been emerging of including competition provisions in bilateral free trade agreements that are confined to the restriction of trade distorting anti-competitive practices. In addition, the question arises whether trade/investment distorting state aids and/or government owned enterprises and monopolies should be covered. Furthermore anti-competitive taxation practices, such as transfer pricing manipulations might be included (see further UNCTAD, 1999). Equally, certain intellectual property issues associated with the transfer of technology have been the subjects of IIA provisions. Finally, certain international instruments have linked competition issues with development concerns. The choice of which RBPs to cover depends much on the policy behind the competition provision in question and the extent to which anti-competitive practices are to be covered by the IIA.

2. Procedural issues

In addition to the substantive issues discussed above, certain procedural issues arise in connection with competition rules. Two major interconnected issue areas can be identified: the issue of extraterritoriality and the issue of international cooperation in competition matters.

a. Extraterritoriality

Given the predominantly national and regional basis for competition regulation, there arises the risk that, in cases in which the anti-competitive practice under review has an international dimension, national competition/antitrust laws may be applied outside the limits of the jurisdiction of the regulating entity. This is known as the issue of "extraterritoriality" and has been defined as "a country's assertion of jurisdiction over activities occurring outside its borders" (Lao, 1994, p. 821). Indeed, it can be said that issues of extraterritorial jurisdiction first emerged in the field of competition/antitrust law (ibid). In particular, it has given rise to the "effects doctrine" as a justification for the unilateral extension of national or regional competition/antitrust law to cover anti-competitive conduct arising outside the jurisdiction in question. In essence, this doctrine asserts that an anti-competitive practice which occurs outside the jurisdiction of the regulating country and that has potential or actual distortive effects upon the internal market of that country, may justify that country to apply its competition rules outside its jurisdiction to the undertaking(s) participating in that practice (Wallace, 2002, pp. 700-701). Not infrequently, the assertion of such jurisdiction by countries has led to international protest or even conflict.

b. International cooperation in procedural matters

A closely related issue to that of extraterritoriality, and one that has seen the largest concentration of international arrangements in the competition field, is international cooperation in – and harmonization of – procedural matters pertaining to competition policy enforcement across national borders. In such instruments, cooperation is typically sought over information exchange, consultations, notification, dealing with extraterritorial evidence-gathering, and in resolving international jurisdictional questions on the basis of international comity. The focus of international efforts at multilateral cooperation on issues of competition law enforcement has been primarily in the area of M&As (including joint ventures). This may be partially due to the fact that merger control has been seen as the most difficult and controversial area, where the potential for jurisdictional conflict is the greatest, and most urgently calls for a coordinated approach. A further area of cooperation relevant to development issues is the provision of technical assistance for adopting, reforming or enforcing competition laws by countries which are more experienced in this field to those that are less experienced (UNCTAD, 2003b, p. 5).

3. Harmonization measures

The development of harmonization measures in IIAs is a third major issue area in the competition field. Such measures, as they appear in IIA provisions, can be divided into two main types. First, there are those that seek to create a common substantive and procedural system of competition regulation between the contracting parties. This approach was pioneered by the EC, which has established the first supranational competition regime. More recently, other regional groupings, including developing country groupings, have instituted common competition practices and institutions, though none has, as yet, developed a fully supranational system such as that of the EC. Secondly, provisions in international agreements can introduce a measure of substantive harmonization into the national competition policies of the member parties to an agreement.

Notes

1 UNCTAD, 1996a; Boner and Krueger, 1991.

2 For a full discussion of the basic economic principles underlying competition policy and its main aims and mechanisms, see Whish, 2003; Scherer and Ross, 1990.

3 Here the dominant firm (or firms) can use its (their) market power to trade at a loss for a period of time sufficient to drive less dominant competitors, who cannot sustain such prices for their products, from the market.

4 For example, the EC Commission has issued guidance on how such an analysis is to be undertaken, based on the extensive jurisprudence of the European Court of Justice in this area and on Commission practice. See EC Commission, 1997.

II. STOCKTAKING AND ANALYSIS

As noted in the Introduction, competition issues are usually dealt with in a specialized instrument rather than a general IIA. At the multilateral level, the only instrument that covers all aspects of competition regulation is the 1980 United Nations Set.[1] Indeed, the United Nations Set is the only major international instrument that makes a significant link between the economic policy concerns of developing countries and the control of anticompetitive practices. Competition provisions can also be found in a number of international agreements, including regional agreements, free trade agreements and specialized cooperation agreements in the field of competition. Their provisions are analysed below in the context of the main issues identified in the previous section.

A. Determining what amounts to a restrictive business practice

1. Determining the subjects of competition provisions

In national laws, the usual subjects of competition rules are the market actors themselves. In international agreements, the most comprehensive approach to this matter is found in Articles 81 and 82 of the EC Treaty (box II.1).

These two provisions indicate that the anti-competitive practices they seek to regulate are those committed by “undertakings”, “associations of undertakings” or by “one or more undertakings”, as the case may be, a phrase that has been broadly interpreted in EC law. Formulations other than the term “undertaking” have been used in other agreements, though to a similarly broad effect. Thus, the Protocol for the Protection of Competition in the Common Market of the Southern Cone (MERCOSUR), adopted by Decision 17/96 on 17 December 1996 (MERCOSUR Protocol), makes clear, in Article 2, that the rules contained in the instrument “apply to actions taken by natural and legal persons under public and private law, and other entities whose purpose is to influence or to bring influence to bear upon competition in the framework of the MERCOSUR and consequently to influence trade between the States Parties”. This provision goes on to assert that undertakings exercising a State monopoly are within the definition of juridical persons.

Box II.1. Articles 81 and 82 of the EC Treaty

According to article 81(1) of the EC Treaty:
"The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market […]."

According to Article 82 of the EC Treaty:
"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. […]"

Source: EC, The Treaty Establishing the European Community, http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html

By contrast, the United Nations Set speaks of "enterprises" as the main concern of its provisions. This term is defined as meaning "firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, private or State, which are engaged in commercial activities, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them" (section B(i)(3)). Again this is a wide approach, allowing for any type of commercial entity to be included. It is notable that the United Nations Set also expressly refers to TNCs as a separate type of entity, distinct from "other enterprises", whose RBPs are to be controlled.[2] No doubt this reflects the special concerns of the drafters of the United Nations Set as to the potential effects on development of anti-competitive practices carried out by TNCs in particular, given their often dominant position in the economies of developing host countries. Section B(ii)(4) of the United Nations Set states that, "[t]he Set of Principles and Rules applies to restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of these countries. It applies irrespective of whether such practices involve enterprises in one or more countries.” Of particular importance to TNCs are the contents of section D, entitled “Principles and Rules for Enterprises, including transnational corporations”. Section D begins by exhorting enterprises to conform to the RBP laws of States in which they operate, and to consult and co-operate with the competent authorities of countries whose interests are adversely affected by RBPs (section D(1) and (2)).

The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises also speak of “enterprises” as the addressees of the guideline on Competition. “Enterprises” is a term not specifically defined in the Guidelines. However, it is possible to infer from the introductory section on “Concepts and Principles” that it includes transnational (called “multinational” in the Guidelines), domestic, small and medium-sized enterprises. Again the coverage is broad.

As noted in section I, a specific issue that is of central concern is determining when a TNC should be treated as an undertaking to which the competition provisions in the agreement apply. Under EC law, a group is treated as a single entity where the undertakings belonging to it “form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings”.[3] This introduces a test of factual control as between the parent firm and affiliates. A similar approach has been adopted in the United Nations Set. Thus, section D(3) introduces an “economic entity” doctrine as a limitation on the applicability of RBP controls in the case of anti-competitive agreements or arrangements:

> “Enterprises, except when dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to act independently of each other, engaged on the market in rival or potentially rival

> activities, should refrain from practices such as the following […].”

The main issue raised by such provisions is**:** what amounts to control? This may be an issue of fact in each case, though certain presumptions may be made. For example, where an affiliate is “wholly” or “majority owned” by its parent firm, it is safe to assume that the two undertakings comprise a single economic entity. On the other hand, minority control could pose difficult questions. When is it sufficient to exercise a decisive influence on the conduct of an undertaking? Such issues are important given the value to the efficient organization of the supply side of the market of allowing commercial entities the free choice of means in determining their optimal industrial organization. One such choice is the group enterprise. Of itself, the creation of a group, even a large transnational group, is not an anti-competitive practice (Muchlinski, 1999, pp. 386-387).

2. Defining restrictive business practices

Competition provisions in IIAs and other international instruments tend to follow one of two main approaches to defining RBPs: either they contain a general definition clause supplemented by specific clauses covering particular types of RBPs, or they only contain clauses defining particular RBPs. The main kinds of general clauses will be considered first, followed by clauses covering the four types of RBPs that have been identified in section I. In this section, the discussion of the first two types, horizontal and vertical arrangements, will be considered together, as most agreements deal with them in a single provision. This will then be followed by an analysis of clauses covering abuse of a dominant position and, finally, clauses covering M&As.

a. General clauses

This kind of clause has been used in the United Nations Set and regional competition arrangements. As defined in the United Nations Set, RBPs comprise:

> "acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact" (section B (i)(1)).

This provision should be read as stating that an offence exists when a practice abuses a dominant position in the ways listed and such a practice has an adverse effect on trade or development. It does not make the adverse effect on developing countries the sole test of a RBP. In section B (ii)(9) the United Nations Set makes clear that it does not apply to "intergovernmental agreements, nor to restrictive business practices directly caused by such agreements". This definition is the only general definition of RBPs used in a multilateral instrument. It is distinct from other provisions dealing with competition issues not only for this reason but also for its focus on competition and development. Equally, it is of significance that the United Nations Set stresses the need for a dominant market position as a pre-requisite for any anti-competitive effect. This follows the view that only the anticompetitive practices of undertakings with significant market power need to be regulated.

The 1996 MERCOSUR Protocol also contains a general definition clause. According to article 4 of the Protocol:

> "Acts, whether individual or concerted, whatever their form, whose object or effect is to limit, restrict, falsify or distort competition or market access or which constitute an abuse of a dominant position in the relevant market of goods or services within MERCOSUR and which affect trade between States Parties, shall, irrespective of fault, be violations of the Rules of this Protocol."

The terms of this clause cover the main types of RBPs, illustrative examples of which are then offered in article 6 of the MERCOSUR Protocol (box II.2). Of note are the references to “concerted acts”, “object or effect” and “affect trade between States Parties”. These phrases are also found in Articles 81 and 82 of the EC Treaty and they have particular implications for the scope of operation of international competition provisions. The first of these, “concerted acts” (“concerted practices” in article 81(1) of the EC treaty), makes clear that not only formal agreements, but also informal cooperative arrangements that have an anti-competitive effect are covered by the instrument.[4] This is important, as otherwise it would be easy for competitors to escape review of their anti-competitive cooperative practices on the ground that there was no formal agreement to act in such a prohibited manner. Equally, as there is rarely a concluded formal agreement in such cases, the only proof of collusion may be that which arises from informal arrangements.[5]

Box II.2. Article 6 of the MERCOSUR Protocol

“The following forms of conduct, inter alia, insofar as they embody the hypotheses advanced in article 4, constitute practices which limit competition:

I. to fix, impose or practice, directly or indirectly, in collaboration with competitors or individually, in any form, the prices and conditions of the purchase or sale of goods, the providing of services or production;
II. to procure or to contribute to the adoption of uniform business practices or concerted action by competitors;
III. to regulate goods or service markets, entering into agreements to limit or control research and technological development, the production of goods or the supply of services, or to hinder investments intended for the production of goods or services or their distribution;
IV. to divide up the markets of finished or semi finished goods or services, or the supply source of raw materials and intermediate products;
V. to limit or prevent access of new enterprises to the market;
VI. to agree on prices or advantages which may affect competition in public bids;

/…

Box II.2. (concluded)

VII. to adopt, with regard to third parties, unequal conditions for equivalent services, thus placing them at a competitive disadvantage;
VIII. to subordinate the sale of one good to the purchase of another good or to the use of a service, or to subordinate the supply of a service to the use of another or to the purchase of a good;
IX. to prevent the access of competitors to raw materials, investment goods or technologies, as well as to distribution channels;
X. to require or to grant exclusivity with respect to the dissemination of publicity in the communication media;
XI. to subordinate buying or selling to the condition of not using or acquiring, selling or supplying goods or services which are produced, processed, distributed or marketed by a third party;
XII. to sell merchandise, for reasons unfounded on business practices, at prices below the cost price;
XIII. to reject without good reason the sale of goods or the supply of services;
XIV. to interrupt or to reduce production on a large scale, without any justifiable cause;
XV. to destroy, render useless or accumulate raw materials, intermediate or finished goods, as well as to destroy, render useless or obstruct the functioning of equipment designed to produce, transport or distribute them;
XVI. to abandon, cause to be abandoned or destroy crops and plantations without just cause;
XVII. to manipulate the market in order to impose prices."

Source: UNCTAD, 2000b, vol. IV.

As to "object or effect", this brings an element of intent and causation into the provision. The term "object" may be of importance where concerted action is involved. Proof of an anti-competitive intent on the part of the undertakings involved in the action is of great significance in establishing that a violation has occurred. On the other hand, where, in terms of economic effect, a concerted practice can have foreseeable anti-competitive results, the issue of intent may not matter – the probable, or indeed actual, anti-competitive effect would be decisive proof of a violation. Thus intent may strengthen a case of violation but the crucial factor is whether, in objective terms, the action has a potential or actual anti-competitive effect.

As to the phrase "affects trade between States Parties" ("Member States" in the EC Treaty), this offers a jurisdictional limit to the competence of the international regulatory system in question. Thus a regional arrangement such as MERCOSUR or the EU will only apply to anti-competitive acts occurring within the territory of the regional grouping. This can raise issues as to extraterritorial application of the regime, which will be considered in more detail below.

A final feature of the MERCOSUR Protocol that is worthy of note is the exclusion, in article 5, from offences against competition of "[m]ere market conquest resulting from the natural process of the most efficient economic agent among competitors […]". This introduces a basic principle of competition law into the Protocol, namely, that a superior market position gained through greater productive efficiency is not in itself an anti-competitive act. This is important in relation to the operations of TNCs in developing countries covered by the Protocol, where domestic enterprises may in fact be in a relatively weaker market position. This situation of itself cannot give rise to regulation of a TNC's activities on competition grounds.

Article 30 of the Annex to the 1973 Treaty Establishing the Caribbean Community (CARICOM) on the Caribbean Common Market is devoted to RBPs. The article is drafted in fairly general terms, naming as incompatible with the Treaty "agreements between enterprises, decisions by associations of enterprises and concerted practices between enterprises which have as their object or result the prevention, restriction or distortion of competition within the Common Market" (article 30(1)(a)) and such "actions by which one or more enterprises take unfair advantage of a dominant position within the Common Market or a substantial part of it" (article 30(1)(b)). This provision allows for the further development of competition policy within CARICOM in light of subsequent experience. A subsequent revision to this treaty including the CARICOM Single Market and Economy (CSME), opened for signature in 2000, contains competition provisions replacing *inter alia,* article 30 above. Chapter 8 (entitled "Competition Policy and Consumer Protection") of the revised treaty contains detailed provisions on anti-competitive business conduct, abuse of a dominant position and "any other like conduct by enterprises whose object or effect is to frustrate the benefits expected from the establishment of the CSME" (article 177(1)).

b. Horizontal and vertical arrangements

Under this heading, international agreements may deal with both types of arrangements in the same provision, or with horizontal arrangements only. The OECD Guidelines are an example of the latter. Thus, the guideline on Competition asserts that:

> "Enterprises should, within the framework of applicable laws and regulations, conduct their activities in a competitive manner. In particular, enterprises should:
> 1. Refrain from entering into or carrying out anti-competitive agreements among competitors:
>   a) To fix prices;
>   b) To make rigged bids (collusive tenders);
>   c) To establish output restrictions or quotas; or
>   d) To share or divide markets by allocating customers, suppliers, territories or lines of commerce."

The reference to "competitors" suggests that only horizontal arrangements, that is, arrangements between competing firms on the same level of the market, are covered. On the other hand, the reference to applicable laws and regulations suggests a wider coverage. As the Commentary to the Guidelines states, competition laws and policies prohibit "(a) hard core cartels; (b) other agreements that are deemed to be anti-competitive; (c) conduct that exploits or extends market dominance or market power; and (d) anti-competitive mergers and acquisitions" (paragraph 56). As enterprises are expected to act within the framework of such laws and regulations, it can be inferred that the guideline on Competition implicitly extends to such other practices. Nonetheless, the express terms of this provision are clear so far as the content of the guideline is concerned. The current draft should be contrasted with the earlier version of 1991, which contained a specific provision on both vertical and horizontal arrangements.[6] This change may reflect a shift in priorities for competition regulators in the OECD countries, who, as noted in section I, may no longer view vertical co-operation as anti-competitive in the absence of significant market power and market concentration.

The concern of the OECD with horizontal agreements is further emphasized by the 1998 OECD Council Recommendation Concerning Effective Action Against Hard Core Cartels (OECD Recommendation on Hard Core Cartels). In that document "hard core cartels" are defined as follows:

> "For the purposes of this Recommendation:
>
> a) a 'hard core cartel' is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce."

This provision uses the same terms as the Competition guideline, emphasising that such anti-competitive action is of central concern to the OECD. The Recommendation goes on to recommend to member countries that they should ensure their competition laws effectively halt and deter such cartels through, in particular, effective national legal sanctions and enforcement procedures. The Recommendation also excludes certain agreements, concerted practices or arrangements from this policy, in particular those that "(i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorised in accordance with those laws". However, member countries are required to ensure that all exclusions and authorizations of what would otherwise be hard core cartels are transparent and are reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives.

The principal provisions of the United Nations Set dealing with anti-competitive arrangements are contained in section D (3). It states in the relevant part as follows:

> "Enterprises [...] should refrain from practices such as the following when, through formal, informal, written or unwritten agreements or arrangements they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:
> (a) Agreements fixing prices, including as to exports and imports;
> (b) Collusive tendering;
> (c) Market or customer allocation arrangements;
> (d) Allocation by quota as to sales and production;
> (e) Collective action to enforce arrangements, e.g. by concerted refusals to deal;
> (f) Concerted refusal of supplies to potential importers;
> (g) Collective denial of access to an arrangement, or association, which is crucial to competition."

The reference to enterprises that are engaged on the market in rival or potentially rival activities could be read to suggest that only horizontal arrangements are in fact covered. However, the list of covered practices is broad enough to include vertical arrangements, though the wording could be clearer in this regard.

Other international agreements in this area cover both horizontal and vertical arrangements. The longest established example is article 81(1) of the EC Treaty (box II.3).

Box II.3. The EC regime

After the general description of the anti-competitive practices covered by this provision, article 81(1) goes on to list a number of illustrative practices prohibited by its terms. These include: directly or indirectly fixing purchase or selling prices or any other trading conditions; limiting or controlling production, markets, technical development or investment; sharing markets or sources of supply; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and**,** making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which, by their nature or according to their commercial usage, have no connection with the subject matter of such contracts.

These examples are not exhaustive as to the coverage of article 81(1). Thus any type of practice that has the prohibited effect can be reviewed by the EC Commission to test its conformity with the competition rules contained in article 81(1). Article 81(2) makes clear that "(a)ny agreements or decisions prohibited pursuant to this article shall be automatically void." However, article 81(3) introduces certain exceptions to the applicability of article 81(1). In accordance with this provision, the provisions of paragraph 1 may be declared inapplicable in the case of any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, or any concerted practice or category of concerted practices which contributes to improving the production or distribution of goods, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose, on the undertakings concerned, restrictions that are not indispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. This qualification of the prohibition in article 81(1) recognizes that not all types of collaboration between competing enterprises are necessarily harmful to competition. In particular, EC law has accepted that vertical agreements between undertakings at different levels of the market are unlikely to be anti-competitive unless the market is concentrated and the undertakings concerned have a large market share. Equally, joint ventures that seek to develop new products processes and technologies,

/…

Box II.3. (concluded)

through the pooling of expertise and know-how among competing firms, have been given approval. Indeed, the Commission regularly issues regulatory exemptions from article 81(1), based on the criteria in article 81(3), exempting certain types of restrictive agreements that are usually not anti-competitive from review under this provision. These are known as "block exemptions". Their main effect is to avoid unnecessary regulatory intervention by the EC Commission in the conclusion and operation of cooperative agreements or arrangements that are conducive to the enhancement of economic and technical efficiency and consumer benefit.

Source: UNCTAD.

In a similar vein, article 3 of the 1991 Andean Community Decision 285 on Rules and Regulations for Preventing or Correcting Distortions in Competition Caused by Practices that Restrict Free Competition refers to horizontal and vertical agreements entered into by related parties as an example of the types of RBPs covered by this instrument. Article 4 then enumerates examples of agreements, parallel behaviours or collusion that distort competition. These cover price fixing, production distribution or technical development controls, import or export controls, allocations of supplies, the imposition of unequal trading conditions on equivalent goods, or services tie-ins that are unrelated to the subject matter of the contract in question and "other cases with equivalent effects". Thus, the list is illustrative and not exhaustive of the types of restrictions that the instrument covers.

c. Abuse of a dominant position

Article 82 of the EC Treaty offers a classic definition of this type of RBP. It provides that "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States". This general prohibition is then followed by illustrative examples of abuse. These include the direct or indirect imposition of unfair purchase or selling prices or other unfair trading conditions; the limitation of production, markets or technical development to the prejudice of consumers; the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and making the conclusion of contracts subject to the acceptance of obligations with little or no connection to the subject matter of such contracts.

A more elaborate provision in this area can be found in the CARICOM Treaty, as revised in 2000. Chapter 8 sets down in some detail the steps to be taken by the regulatory authority to determine whether an abuse of a dominant position has occurred. As such it is a useful summary of the process of regulating such abuses (box II.4).

Box II.4. Articles 178 and 179 of the CARICOM Treaty

"Article 178: Determination of Dominant Position

For the purposes of this Chapter:

(a) an enterprise holds a dominant position in a market if by itself or together with an interconnected enterprise, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors;

(b) any two enterprises shall be treated as interconnected enterprises if one of them is a subsidiary of the other or both of them are subsidiaries of the same parent enterprise.

Article 179: Abuse of a Dominant Position

1. Subject to paragraph 2 of this Article, an enterprise abuses its dominant position in a market if it prevents, restricts or distorts competition in the market and, in particular but without prejudice to the generality of the foregoing, it:

(a) restricts the entry of any enterprise into a market;

(b) prevents or deters any enterprise from engaging in competition in a market;

(c) eliminates or removes any enterprise from a market;

(d) directly or indirectly imposes unfair purchase or selling prices or other restrictive practices;

/…

Box II.4. (concluded)

(e) limits the production of goods or services for a market to the prejudice of consumers;
(f) as a party to an agreement, makes the conclusion of such agreement subject to acceptance by another party of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of the agreement;
(g) engages in any business conduct that results in the exploitation of its customers or suppliers, so as to frustrate the benefits expected from the establishment of the CSME.

2. In determining whether an enterprise has abused its dominant position, consideration shall be given to:
(a) the relevant market defined in terms of the product and the geographic context;
(b) the concentration level before and after the relevant activity of the enterprise measured in terms of annual sales volume, the value of assets and the value of the transaction;
(c) the level of competition among the participants in terms of number of competitors, production capacity and product demand;
(d) the barriers to entry of competitors; and
(e) the history of competition and rivalry between participants in the sector of activity.

3. An enterprise shall not be treated as abusing its dominant position if it establishes that:
(a) its behaviour was directed exclusively to increasing efficiency in the production, provision or distribution of goods or services or to promoting technical or economic progress and that consumers were allowed a fair share of the resulting benefit;
(b) it reasonably enforces or seeks to enforce a right under or existing by virtue of a copyright, patent, registered trade mark or design; or
(c) the effect or likely effect of its behaviour on the market is the result of superior competitive performance of the enterprise concerned."

Source: UNCTAD, 2002b, Vol. VIII.

Section D(4) of the United Nations Set lists certain abuses of a dominant position committed by enterprises. It states:

> "Enterprises should refrain from the following acts or behaviour in a relevant market when through an abuse or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:
>
> (a) Predatory behaviour towards competitors, such as using below-cost pricing to eliminate competitors;
>
> (b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms and conditions in the supply and purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;
>
> (c) Mergers, takeovers, joint ventures or other acquisitions of control, whether of a horizontal, vertical or a conglomerate nature;
>
> (d) Fixing the prices at which goods exported can be resold in importing countries;
>
> (e) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence and where the purpose of such restrictions is to maintain artificially high prices;
>
> (f) When not ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:
>
> (i) Partial or complete refusals to deal on the enterprise's customary commercial terms;

(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;
(iii) Imposing restrictions concerning where, to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;
(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee."[7]

Section D (4) contains a definition of "abuse" in a footnote that has implications for group enterprises. The footnote states that the determination of whether acts or behaviour are abusive should be examined "with reference to whether they limit access to markets or otherwise unduly restrain competition [...]" and to whether they are, *inter alia*, "[a]ppropriate in the light of the organizational, managerial and legal relationship among the enterprises concerned, such as the context of relations within an economic entity and not having restrictive effects outside the related enterprises; […]". Thus, acts engaged in by related enterprises that are inappropriate to their organizational arrangements, and which result in the limitation of access or other restraints of competition outside the related enterprises, are covered where the related enterprises are in a position of market dominance. This suggests that intra-firm practices in general are subject to review under the Set. It is not clear how the line between legitimate and anticompetitive intra-firm practices should be drawn (Muchlinski, 1999, p. 407).

Finally, it should be noted that the current version of the OECD Guidelines does not contain any provision on abuse of a dominant position. Again the reference to "applicable laws and regulations" in the chapeau to the Competition guideline may suggest that this issue is now to be left to national regulation. By contrast, the previous version of 1991 did contain a specific provision on this issue.[8]

d. Mergers and acquisitions

As noted above, section D (4) (c) of the United Nations Set requests enterprises to refrain from mergers, takeovers, joint ventures or other acquisitions of control, whether of a horizontal, vertical or a conglomerate nature, when, through an abuse or acquisition and abuse of a dominant position of market power, they fall under the Set's definition of RBPs.[9] It is important to note here that the legitimacy of a merger is conditional on the parties not abusing – or acquiring and abusing – a dominant position. In this connection, the Set stipulates that: "Whether acts or behaviour are abusive or not should be examined in terms of their purpose and effects in the actual situation, in particular with reference to whether they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries […]" (see the footnote to section D(4) of the Set). Under this definition, the likelihood of adverse effects, in this case from a merger, constitutes an abusive act. More broadly, this definition suggests that adverse effects on the trade of developing countries should be made a test in determining whether any given M&A should be controlled.

Aside from the EC Merger Control Regulation (box II.5), in general IIAs and other instruments have not established specific regimes for the control of M&As. This issue has been more prominent in arrangements that seek to enhance co-operation between national competition authorities, as will be seen below.

Box II.5. The EC merger control regulation

The EC Merger Control Regulation is the most advanced international system of regulation in this area (EC Council, 1989; Whish, 2003, chapter 17). It is a highly complex instrument that has been revised since its entry into force in 1989 (EC Council, 1997, EC Council, 2004). Its principal features highlight what an international system for dealing with M&As requires. In particular it contains specific rules on: • *Jurisdiction*, to determine which transactions come within the competence of the member states of the EU

/…

Box II.5. (concluded)

and which come under the review powers of the EC Commission. The key test is whether **a** proposed merger or acquisition amounts to a "concentration" having a "Community dimension" as defined in the Commission's Guidance Notices on these issues.

- *Procedures* to be followed by applicants seeking to contest a given transaction, by the Commission, in its investigation.
- *Substantive rules* by which **a** proposed merger or acquisition is to be reviewed. In this regard the main question is whether the transaction will create or further enhance a dominant position on the relevant market such that the risk of an abuse of a dominant position is increased.
- *Enforcement powers* to be exercised by the Commission. This includes a power to prohibit the transaction under review or to allow it subject to terms and conditions and periodic review of the competitive situation on the market in which the transaction takes place.

Source: UNCTAD.

3. The kinds of issues covered

Having considered how competition provisions in international agreements have sought to define the main types of RBPs, the next issue to be considered is their scope. Not all provisions cover the same types of RBPs. As already noted in section I and in the previous sub-section, EC competition rules on M&As did not come into force until 1989, given the politically sensitive nature of such controls for national industrial policy and the reluctance of EC member States to cede jurisdiction to the EC Commission over this field, while OECD practice has tended to emphasise controls over horizontal cartels rather than vertical arrangements. Equally, it was not until the 1990s that provisions relating to competition actually appeared in WTO Agreements. Thus future IIAs can choose which, if any, of the four main types of RBPs they wish to cover and may also change that coverage over time by agreement of the parties. In addition, existing agreements show that there may be further choices as to whether certain types of competition related issues that do not fall within the main definitions of RBPs should be covered as well. In particular, certain free trade agreements have restricted competition provisions to trade related RBPs only. Other issues concern specific clauses on state aids, state enterprises and monopolies, transfer pricing manipulations, and technology transfer. Finally, the issue of the development dimension and competition has been considered in the United Nations Set.

a. Trade-related restrictive business practices

In recent years, a trend has arisen in free trade agreements requiring parties to regulate anticompetitive practices that may interfere with the conduct of cross-border trade between the signatory States. Such provisions are a significant feature of EU Association, Europe and Euro-Mediterranean Agreements and other free trade agreements, trade agreements of the European Free Trade Association (EFTA) and Turkey with some countries in Central and Eastern Europe (CEE) and between some CEE countries.

In EU association agreements, including Europe and Euro-Mediterranean agreements, competition standards based on EU competition rules are applicable where trade between the EU and the other signatory party is adversely affected by the anti-competitive practices specified in the competition provision.[10] The Euro-Mediterranean Agreements carry similar obligations to those of the Association Agreements.[11]

On the other hand, EC Partnership and Cooperation Agreements with certain member countries of the Commonwealth of Independent States (CIS) do not have so specific a provision on competition, as the aim is to foster closer economic cooperation with the non-EC party and not to bring competition rules into conformity with EC rules, in anticipation of that party's future integration into the EC.[12] A further variation of EC practice is used in some agreements between the EC and non-European partners to trade, development and cooperation agreements.[13]

The Convention Establishing the EFTA (EFTA Convention) uses language based on EC provisions in its Chapter VI on “Rules of Competition” (article 18). EFTA free trade agreements (FTAs) typically use the same model text in their standard provision on rules of competition concerning undertakings. For example, following closely the language of Articles 81 and 82 of the EC Treaty, article 18 of the 1992 Agreement between EFTA and the Czech Republic states that, in so far as they affect trade between an EFTA State and the Czech Republic, all anti-competitive agreements, concerted practices and abuses of a dominant position are incompatible with the proper functioning of the Agreement.[14] Similar provisions can be found in other bilateral free trade agreements (FTAs) between certain CEE countries.[15]

The Turkish bilateral FTAs take two approaches to competition issues. The first follows closely the structure and content of the abovementioned EFTA provisions. This formulation is found, for example, in the 1999 FTA between Turkey and Poland, with the difference that public undertakings are subject to competition disciplines from the inception of the Agreement (article 20). Other free trade agreements contain a somewhat different provision that is more wide-ranging in scope in that it includes a prohibition on anti-competitive state aids but does not mention public undertakings.[16] The provision on such state aids is subjected to a transparency obligation in article 25(2) and to any applicable WTO disciplines. This has the effect of incorporating the WTO Agreement on Subsidies and Countervailing Measures into this Agreement. Article 25 also introduces a system for dealing with anti competitive practices not dealt with by its substantive provisions, but which, in the view of either party, are causing material injury to it.[17] Also, Free Trade Area Agreements concluded by Turkey contain such a provision with some particular variations.[18] Thus the 1996 Turkey-Israel Agreement also mentions an exemption of agricultural products from the prohibition of state aids (article 25(4)). The 1997 FTA between Turkey and Romania is distinctive in that it expressly refers to the competition provisions in the EC Treaty as the basis of assessing any anti-competitive practices prohibited under the Agreement (article 24(2)).

b. State aids

As noted in the previous section, certain FTAs that contain a competition provision may extend its coverage to the control of anti-competitive state aids from the inception of the agreement. Such aids were also covered from the inception of the EC Treaty.[19]

c. State enterprises and monopolies

A further issue that might be covered by a competition provision in an IIA concerns the extension of competition disciplines to state enterprises and to government monopolies. EFTA free trade agreements extend such disciplines to public undertakings after a transitional period, while those Turkish FTAs that cover public undertakings apply competition disciplines from the outset. These matters are also covered by other, more recent, agreements. For example, article 12.6 of the 2003 FTA between the Republic of Korea and Chile requires that the parties ensure that designated monopolies, in the fields of public telecommunications, transport networks or services, do not use their monopoly position to engage in anti-competitive conduct, whether directly or through affiliates, in such a manner as to affect adversely a person of the other party. Such conduct may include cross-subsidization, predatory conduct and discriminatory provision of access to the designated sectors. Similarly, by article 07-12 of the 2003 FTA between Singapore and Australia, parties agree to ensure that a service monopoly supplier does not abuse its monopoly position to act in a manner that is inconsistent with commitments as to market access and national treatment made by such party in the agreement. At the regional level, article 35a of the 1997 Protocol II Amending the CARICOM Treaty subjects government monopolies "to the agreed rules of competition established for Community economic enterprises" (section 2(a)).

At the multilateral level, article VIII of the General Agreement on Trade in Services (GATS) contains a provision regulating the provision of monopoly and exclusive service suppliers. It covers competition issues to the extent that, where a member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside its monopoly rights and which is subject to that members specific commitments, "the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments" (article VIII:2). The Council for Trade in Services may request specific information on any operations that infringe this principle from the member in question. Members are obliged to notify the Council for Trade in Services of any new grants of monopoly rights that relate to the supply of a service covered by specific commitments. This provision has been influential in relation to similar provisions in some of the more recent bilateral FTAs, which closely follow its wording.[20]

d. Transfer pricing manipulations

Transfer pricing can be regarded as a TNC-related RBP. Indeed, the United Nations Set contemplates transfer pricing abuses by affiliated enterprises as a species of abuse of a dominant position. This was opposed in principle by some developed countries, which argued that such practices were better seen as taxation issues. However, these counties compromised on the basis that the then current version of the OECD Guidelines included, as an abuse of a dominant position, transfer pricing manipulations that adversely affected competition outside the affiliated enterprises.

e. Technology transfer

One area in which IIAs have addressed competition issues is that of technology transfer. Here, two main competition related matters have arisen: first the control of performance requirements connected with such transfer; and, second, the protection of intellectual property rights and technology transfer. These matters have been discussed in detail in another paper in this series (UNCTAD, 2001b, pp. 70-82). For present purposes, it suffices to note that in relation to the first issue, certain bilateral investment treaties (BITs) entered into by the United States, and more recently by Canada, contain a general prohibition on the imposition of performance requirements relating to the transfer of technology but specifically permit technology transfer requirements that are imposed by the courts, administrative tribunals or competition authorities of the host country which aim to remedy an alleged violation of competition laws. This approach is also taken in article 1116 of the North-American Free Trade Agreement (NAFTA). This provision was also followed verbatim in the 1996 FTA between Canada and Chile (article G-06). Some more recent bilateral FTAs contain similar provisions.[21]

As regards the second issue, the 1985 Draft International Code of Conduct on the Transfer of Technology contained specific regulatory rules concerning the use of restrictive conditions in technology transfer transactions. The developing countries sought to prohibit such clauses, while the developed countries preferred a competition based approach which subjected such terms to a “rule of reason” analysis whereby a restrictive term would be acceptable provided it could be said to be reasonable given the interests of the transferor and transferee. More recently, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) has reaffirmed a competition-based approach to this issue.[22] Thus by article 8(2) of the TRIPS Agreement, States may adopt such measures as may be needed “to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology”, provided these are consistent with other provisions of the Agreement (such as the non-discrimination principle). This approach is further developed in article 40 of the TRIPS Agreement, which provides certain examples of practices that may be controlled, such as exclusive grant back conditions, conditions preventing challenges to the validity of intellectual property rights and coercive package licensing.

NAFTA takes a similar approach in article 1704, which allows the parties to specify in their domestic law licensing practices or conditions that may, in particular cases, constitute an anti-competitive abuse of intellectual property rights in the relevant market (NAFTA, 1993, p. 671).

f. The development dimension and competition

The only instrument that covers all aspects of competition regulation, including from the development perspective, is the 1980s United Nations Set. This instrument not only stresses the close relationship between the control of RBPs and development policies, but also makes a significant link between the economic policy concerns of developing countries and the control of anticompetitive practices (UNCTAD, 1997, pp. 229-233 and UNCTAD, 2003a, p. 135). It represents an acceptance of the view that the basic norms of competition law, which have long been in use in developed countries, should extend to the operations of enterprises, including TNCs, in developing countries. Thus, the section on "Objectives of the Set" emphasises that interests of developing countries in particular should be taken into account in the elimination of RBPs that may cause prejudice to international trade and development. Furthermore, the Objectives section sees the Set as an international contribution to a wider process of encouraging the adoption and strengthening of laws and policies in this area at the national and regional levels. This objective should be seen alongside UNCTAD's work on the formulation of a Model Law on RBPs.

The draft Model Law embodies the principles laid down in the Set and couples these with a scheme for a national competition authority. It is intended for developing counties that do not, as yet, have a domestic system of competition regulation. Finally, section C(iii)(7) of the Set lays down a principle of preferential treatment for developing countries as an aspect of the equitable application of the principles contained in the Set. Thus, States, in particular developed countries, are to take into account in the application of their RBP controls the "development, financial and trade needs of developing countries, in particular those of the least developed countries, for the purposes especially of developing countries in: (a) promoting the establishment or development of domestic industries and the economic development of other sectors of the economy, and (b) encouraging their economic development through regional or global arrangements among developing countries". Therefore, the Set envisages "infant industry" and regional economic integration exceptions to the application of competition controls to enterprises and other organizations from developing countries. This provision was accepted by the developed States in return for the developing countries' acceptance of the principle that "States, while bearing in mind the need to ensure the comprehensive application of the Set of Principles and Rules, should take due account of the extent to which the conduct of enterprises, whether or not created or controlled by States, is accepted under applicable legislation or regulations [...]". Thus the Set accepts that States cannot interfere with another State's decision to exempt certain activities from the operation of competition laws (see also UNCTAD, 1997, p. 225).

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B. Procedural issues

1. Extraterritoriality

The two single most significant causes of international conflict arising out of the operations of TNCs in the FDI/competition interface relate to merger control and its trans-border effects and trans-border evidence-gathering (foreign discovery orders) in litigating competition cases.

a. Responses to extraterritorial effects of merger control

One of the most significant attempts to deal with this area of potential conflict is the 1991 "Agreement between the United States and the EC regarding the Application of Their Competition Laws". It calls for enhanced cooperation and, "in appropriate cases", coordination in the application of the two parties' respective competition laws and in enforcement proceedings between the two parties in an effort to avoid conflicts stemming from the extraterritorial reach of competition/antitrust laws and policy from either party. Under the Agreement, the parties have committed "to promote cooperation and coordination and lessen the possibility or impact of differences between [them] in the application of their competition laws" (article I (1)). The parties further agree that, from the time the competition authorities of one party become aware that their enforcement activities may have an adverse impact or effect on "important interests" of the other, these interests should be taken into account at all stages of enforcement activities of the initiating party (article II (1) and article VI). In addition, the other party should be notified of reportable M&As – or other matters where there are "notifiable circumstances" – well enough in advance of a consent decree (United States) or a decision or settlement (EC), to allow that party's views to be taken into account (article II (3)(a)(iii), (3)(b)(iii), and (4)). Under the Agreement, each party agrees to enter into consultations at the request of the other party, in an effort expeditiously to reach "mutually satisfying conclusions" (article VII (1)).

This Agreement gave rise to a new notion referred to as "positive comity". In accordance with the concept of "positive comity", each country undertakes to rely on the other country's local enforcement mechanisms, rather than resorting to the potentially controversial application of its own antitrust/competition law outside its borders. This is clearly distinguishable from the traditional concept of comity, in which moderation and restraint are exercised largely on the basis of balance of interests and broader foreign policy considerations (so called traditional or negative comity).

The effectiveness of positive comity has been questioned, partly because it is thought to be unrealistic to assume that any government will be willing to prosecute its nationals for the benefit of the interests of another sovereign.[23] It is nonetheless significant that the Agreement provides the first instance in which the notion of comity is codified in an international instrument relating to competition.

Though the 1991 Competition Cooperation Agreement between the United States and the EC is the most widely known bilateral co-operation agreement, it was not the first.[24] A myriad of similar bilateral cooperation agreements have since been concluded, involving many State parties, including developing countries. Initially, few of these cooperation agreements involved developing countries, with the exceptions of the 1991 Andean Common Market Commission Decision 285, the 1996 MERCOSUR Protocol and certain EU Association Agreements with various southern Mediterranean countries concluded since 1995. More recently, the 2000 "Partnership Agreement between the Members of the

African, Caribbean and Pacific Group of States and the EC", signed at Cotonou (Cotonou Agreement), includes a commitment in article 45 to implement national competition rules in the developing country parties and to further cooperation in this field. These are further discussed below.

At the multilateral level, there is no mention of the issue of extraterritoriality in the United Nations Set. The only multilateral instrument that can be said to concern itself directly with issues of "extraterritorial" jurisdiction is the Conflicting Requirements instrument of the 1976 OECD "Declaration and Decisions on International Investment and Multinational Enterprises". This instrument calls on member countries to avoid or minimize conflicting requirements imposed on TNCs by governments of different countries. It provides for consultations with the Committee on International Investment and Multinational Enterprises (CIME), or other mutually acceptable arrangements, for member countries with any problems arising from the fact that TNCs are made subject to conflicting requirements. At the same time it is recognized that, "while bilateral and multilateral co-operation should be strengthened when multinational enterprises are made subject to conflicting requirements, effective co-operation on problems arising therefrom may best be pursued in most circumstances on a bilateral level, although there may be cases where the multilateral approach would be more effective" (preamble to the OEDC Guidelines: Second Revised Decision of the Council, as amended in 1991).

b. Cross-border evidence-gathering in competition cases

The 1970 "Convention on the Taking of Evidence Abroad in Civil or Commercial Matters" signed within the framework of the Hague Conference on Private International Law (Hague Evidence Convention)[25] is geared in part, to mitigate controversy over the extraterritorial reach of competition/antitrust laws as regards cross-border evidence gathering. This can arise in the course of competition cases involving complex transnational groups, where relevant information required for the purposes of the case in question is held by a TNC in a foreign jurisdiction. The Hague Evidence Convention provides that, in civil or commercial matters, the courts of one contracting State have a right, by Letter of Request via a designated Central Authority (or certain specified other competent authorities (articles 15-17)) to obtain evidence or perform some other judicial act through the courts of another contracting State, for use in judicial proceedings, commenced or contemplated (articles 1-2). The Convention allows certain derogations from its rules where bilateral or plurilateral agreements are already in force (article 28). The original intent of the Hague Evidence Convention was basically two-fold. One objective was to facilitate the obtaining of evidence abroad that would otherwise be unobtainable or fraught with foreign government opposition or obstruction. The other was to contain the extraterritorial reach and scope of foreign parties in pre-trial discovery proceedings – so-called "fishing expeditions", which have proved to be a particular problem in United States litigation which allows for a far broader range of pre-trial discovery than other legal systems.

The United Nations Set also covers the issue of information gathering outside the regulating jurisdiction. According to the Set's provisions addressed to enterprises, specifically including TNCs, disclosure of information located abroad to be made by enterprises to their national authorities is to be subject to "applicable law or established public policy" in the target State, as well as to "safeguards normally applicable in this field" (section D (2)). Under the provisions addressed to States, the Set recommends that, where a State obtains such information from enterprises acting upon this directive which contain legitimate business secrets, that State equally "should accord such information reasonable safeguards normally applicable in this field, particularly to protect its confidentiality" (section E (5)). In either of these cases, the Set is not addressing litigation-related disclosure or "discovery". The Set goes on to exhort States to improve or institute procedures for procuring information from enterprises, expressly including TNCs (section E (6)). Here again, and throughout section E, individual States are directed to take national (or regional or sub-regional) measures to implement the international guidelines.

The 1995 OECD "Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive

Practices Affecting International Trade" (OECD Recommendation) also stresses the necessity of conformity with international law and due regard for international comity when developing any laws aimed at facilitating extraterritorial investigation and disclosure. It further emphasizes the importance of regard for the law and established policies and national interests of the country in which the documents are situated. It promotes the notion that moderation and restraint should be used by member States in the extraterritorial application of their competition laws. The OECD Recommendation appears generally to have provided a useful multilateral instrument; it was referred to by the European Court of Justice (ECJ) in the landmark *Wood Pulp* case, which established the right of the EC Commission to seek jurisdiction, in competition investigations, over any undertaking that had an active presence on the EC internal market whether through contractual links with customers or more substantial forms of business presence.[26]

In addition, operating under the OECD Recommendation, the United States has concluded a number of cooperative bilateral mutual legal assistance treaties. These have received statutory support through such legislation as the 1994 United States International Antitrust Enforcement Assistance Act (IAEAA),[27] and are considered to be playing a not insignificant role in policies of convergence. The Act gives the relevant authorities the power to enter into agreements with foreign competition authorities for the exchange of evidence located abroad, in the pursuit of antitrust investigations, on a reciprocal basis. This includes confidential information. Furthermore, United States Federal competition authorities are authorized to employ compulsory processes to acquire information at the request of a foreign competition authority whose important national interests are affected by anti-competitive behaviour organized in the United States, even if such behaviour is not illegal under United States law. The only agreement concluded so far on this basis is the 1999 "Agreement between the United States and Australia on Mutual Antitrust Enforcement Assistance" (UNCTAD, 2003b, p. 9).

In the absence of international legal standards specifically developed to provide for a comprehensive and consistent approach to the cross-border exchange of confidential information, competition authorities will continue to have limited access to requested documents and will be obliged to proceed on a case-by-case basis, relying on company waivers, relevant provisions of bilateral treaties, positive comity principles and, in criminal investigations, the provisions of mutual legal assistance treaties (UNCTAD, 2003b, p. 9). Indeed, bilateral agreements may continue to be the most effective interim solution, pending a broader international consensus.

2. International cooperation in procedural matters

Apart from issues of extraterritoriality, international cooperation also extends to the activities of information exchange, notification, consultations and mutual enforcement assistance. Such cooperation has been envisaged for some time in international instruments. The 1960 GATT Council "Decision on Arrangements for Consultations on Restrictive Business Practices" contained a recommendation that, at the request of any contracting party, bilateral consultations should be held on RBPs considered to be harmful to international trade (GATT, 1961, pp. 28-29). Equally, the OECD has been concerned with the question of international cooperation for a considerable time (BNA, 1994). The 1995 OECD Recommendation, referred to above, which replaces the earlier instruments, provides for notification, consultations, the exchange of information, the coordination of investigations, investigatory assistance, traditional and positive comity, consultations and a conciliation mechanism to resolve disputes (UNCTAD, 2003b, p. 17).

In more recent years, an increasing number of bilateral and regional cooperation agreements in the field of competition policy have been concluded. Bilateral agreements tend to deal solely with competition issues while regional agreements deal with cooperation in competition matters as one part of a wider agreement. Also of note is the fact that the concentration of cooperation agreements among OECD countries is not quite as heavy as before, with more countries outside this grouping undertaking agreements in the field (UNCTAD, 2003b, p. 7).

a. Bilateral cooperation agreements

Such agreements have been entered into mainly by the United States and the EU. Typical provisions of many of these agreements include: notification of enforcement activities affecting the other party's important interests; taking into account the other party's significant interests when applying remedies against RBPs (traditional or negative comity); consultations to resolve conflicting legal requirements, coordinated action against RBPs occurring on the territory of both parties; requests for assistance in investigations by one party concerning RBPs occurring on the territory of the other party that affect the requesting party's vital interests; requests for assistance in the enforcement of orders made by one party on the territory of the other party; and commitments to give serious consideration to such requests for investigatory assistance, including providing non-confidential information and confidential information subject to safeguards (UNCTAD, 2003b, p. 8).

The signing of the 1998 Agreement between the EC and the United States on the "Application of Positive Comity Principles in the Enforcement of their Competition Laws" (also known as the "Positive Comity Agreement") reconfirmed and reinforced cooperation between the European Commission and the relevant United States agencies. Article III of the Agreement encourages the use of positive comity in the enforcement of the two parties' competition/antitrust laws,[28] while article IV requires that, when the authority deemed to be better placed to investigate the conduct at issue agrees to do so, the other party will normally defer or suspend its own enforcement procedures. This later agreement does not endow the relevant authorities with any powers additional to those conferred by the 1991 Agreement, mentioned in the previous sub-section.

The bilateral agreements specific to mutual cooperation in antitrust matters concluded by the United States with Germany and with Canada as well as the agreement between France and Germany[29] and the 1995 OECD Recommendation on which these are essentially based, are less detailed and, with the notable exception of that between the United States and

Canada, less “engaged” than the United States-EC Agreement. The first of these, the 1976 United States-Germany Agreement, for example, calls for the regularization of cooperation between their antitrust authorities in connection with antitrust investigations, competition policy studies and possible changes in antitrust laws as well as information exchange, in connection with competition issues (article 2). The 1999 Agreement between the EC and Canada regarding the Application of Their Competition Laws follows closely the formula of the United States-Canada and the United States-EC Agreements. The major difference between the EU-Canada Agreement and the United States-EC Agreement is the more detailed provision regarding confidentiality (article X).

The EU has also concluded cooperation agreements with other countries that cover cooperation in the field of competition. For example, such agreements have been concluded with Mexico and with South Africa. The 1997 Economic Partnership, Political Coordination and Cooperation Agreement between the EC and Mexico calls for the establishment of mechanisms of cooperation and coordination in the mutual enforcement of the two parties’ competition rules, including mutual legal assistance, notification, consultation and exchange of information, towards more transparency in bilateral enforcement assistance (article 11(1)). The 1999 Agreement on Trade, Development and Cooperation between the EC and South Africa also contains similar cooperation provisions. Other lower-intensity cooperation agreements have been concluded between the EC and a number of Central and South American countries. Among the cooperation provisions, the parties typically commit, *inter alia*, to hold an ongoing dialogue on the monitoring of RBPs (UNCTAD, 2003b, p. 13).

Another model is furnished by European association and partnership agreements mentioned above. EC association agreements, including Europe and Euro-Mediterranean agreements, contain mutual notification requirements of anticipated action, particularly where a case falling under the exclusive competence of one party could affect the “important interests” of the other. Consultations are also required before action can be taken against a practice, not deemed to have been dealt with adequately by the other party. Requests may also be made to the other party to take remedial action against RBPs having harmful cross-border effects. It is important to note that these agreements make no provision for supranational competition authorities.

In the practice of EFTA, cooperation provisions generally follow the EU model. Indeed, under the Agreement of the European Economic Area (EEA), concluded by the EU with most countries of EFTA, all practices liable to impinge on trade and competition among the EEA members are subject to rules that are almost identical to EC competition law. The European Commission or the EFTA Surveillance Authority has the authority over such practices, and the Agreement has provisions for the exchange of information, consultations, coordinated enforcement and dispute settlement. However, the accession of many former EFTA members to the EU has now reduced the practical scope of this agreement (UNCTAD, 2003b, p. 11). As regards agreements between EFTA and non-European countries, the 2000 FTA between the EFTA States and Mexico extends to specific provisions on co-operation (article 52) and consultations (article 55). The parties agree to adopt or maintain (national) measures to proscribe anticompetitive business conduct (article 51(1)) and undertake to "apply their respective competition laws so as to avoid that the benefits of this Agreement may be undermined or nullified by anticompetitive business conduct **...** [giving] particular attention to anticompetitive agreements, abuse of market power and anticompetitive mergers and acquisitions in accordance with their respective competition laws" (article 51(2)). By contrast article 50 of the 2002 FTA between EFTA and Singapore provides only for a consultation mechanism in cases in which anti-competitive agreements, concerted practices or abuse of a dominant position may restrict trade between the parties. It specifically excludes the arbitration provisions of the agreement from competition matters.

Turning to the approach taken by certain Asian countries, the 2002 Agreement between Singapore and Japan for a New-Age Economic Partnership contains a simple, general provision on cooperation in controlling anti-competitive activities. It states, "[t]he Parties shall, in accordance with their respective laws and regulations, cooperate in the field of controlling anti-competitive activities subject to their available resources", leaving the details and procedures of cooperation in the field of competition, with special reference to information exchange, to be specified in an Implementing Agreement (article 104). The Agreement's competition rules guide each party to refer to its applicable national laws and regulations in taking appropriate measures against anti-competitive practices "in order to facilitate trade and investment flows between the Parties and the efficient functioning of its markets" (article 103). Of particular interest here is a direct reference to investment as well as trade, which is more common.

The 1999 "Agreement between the United States and Japan Concerning Cooperation on Anticompetitive Activities" similarly gives great deference to the laws and regulations of the respective State parties (article III(1) and (2)) and urges the respective competition authorities to "consider" coordinating their enforcement activities when pursuing enforcement activities with regard to related matters (article IV(1)). The purpose of the United States-Japan Agreement is summed up in article I as being "to contribute to the effective enforcement of the competition laws of each country through the development of cooperative relationships between the competition authorities of each Party... [which] shall, in accordance with the provisions of this Agreement, cooperate with and provide assistance to each other in their enforcement activities, to the extent compatible with the respective Party's important interests." There is provision for one party to request that the competition authority of the other party initiate appropriate enforcement activities (article V(1)), while giving "careful consideration to the important interests of the other Party" (article VI(1)). The overall emphasis of the Agreement, however, is on notification (article II) (for example, of M&As and enforcement activities); mutual assistance (article III); enforcement coordination (articles IV-VI); consultations (articles VII-VIII); and (carefully guarded) information exchange (articles VIII-X). As with the 2002 Japan-Singapore Agreement, the enforcement assistance to be rendered to the other party's competition authorities is engaged only “to the extent consistent with the laws and regulations of the country of the assisting Party and the important interests of the assisting Party, and within its reasonably available resources” (article III(1)). There is a provision that “either Party may, at any time, limit or terminate the coordination of enforcement activities and pursue their enforcement activities independently” (article IV(5)).

Finally, it should be noted that there are a few bilateral agreements that organize technical assistance on competition law as part of a wider commitment to cooperation over technical assistance on different forms of economic regulation. For example, under the 1992 Technical Cooperation Agreement between the French Direction-Générale de la Consommation et de la Repression des Fraudes and the Direction-Générale de la Consommation of Gabon, the two authorities undertook to cooperate in such areas as competition policy, consumer protection, unfair competition, product quality and safety and price control. In fulfilment of the terms of this agreement, the French authority sent personnel to Gabon to undertake short-term and long-term training in competition law. There is a similar agreement between France and the Russian Federation (UNCTAD, 2003b, p. 10).

b. Regional and inter-regional cooperation agreements

At the regional level, cooperation has tended to take place among developed countries, though it has also become more common among developing countries. The major examples come from North America and Latin America. Thus, Chapter Fifteen of NAFTA furnishes an example of competition provisions calling mainly for consultation and mutual assistance, along with information exchange (box II.6). It provides for the establishment of a Working Group on Trade and Competition, comprising representatives from each of the three parties to the Agreement, whose task is to report and make recommendations to the Commission on further work, “as appropriate”, within five years of the date of entry into force of the Agreement (article 1504).[30] There is a Negotiating Group on

Competition Policy of the Free Trade Area of the Americas, which has elaborated a draft chapter on competition policy (UNCTAD, 2003b, p. 15).

The 1991 Andean Community Decision 285 allows member countries, or those countries' enterprises having a legitimate interest, to request the Andean Group Board to apply measures to prevent or rectify damage to production or exports caused by business practices that restrict free competition in the region. The 1991 Decision specifies those types of business practices that fall under this rubric and enumerates the procedures to be followed to deal with them or their effects. Within the Andean Pact, it has been suggested that the requirements for proving RBPs as defined by Decision 285, coupled with the absence of enforcement powers on the part of the Andean Board, account for the failure of Andean Pact competition legislation and case law to develop as quickly as that of its member countries (Ciuffetelli, 1998, p. 522). An amendment to this Decision is under consideration, with the objective of establishing new Rules for the Promotion and Protection of Competition (UNCTAD, 2003b, p. 26).

Box II.6. NAFTA: chapter fifteen

"Article 1501: Competition Law

1. Each Party shall adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto, recognizing that such measures will enhance the fulfilment of the objectives of this Agreement.
2. Each Party recognizes the importance of cooperation and coordination among their authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area."

Source: http://www.sice.org/trade/nafta/naftatce.asp.

The 1996 MERCOSUR Protocol has provisions on enforcement procedures, cooperation and dispute settlement. In order to promote cooperation in the area of competition policy, article 30 of the Protocol requires the parties to adopt national measures establishing mechanisms for cooperation that include information exchange, training of experts, the collection of legal decisions related to the defence of competition and joint investigation of anti-competitive practices. This is to be supplemented by a common regulatory mechanism to be discussed below.

Outside the Western Hemisphere, the most significant cooperation mechanism involving both developed and developing countries can be found in the 2000 Cotonou Agreement. Under article 45 of that Agreement, the parties agree to reinforce cooperation for introducing and implementing “effective and sound” competition policies with the relevant national competition authorities for the purpose of progressively ensuring effective enforcement towards the goal of “sustainable industrialization” and “transparency in the access to markets”, and to “secure an investment friendly climate” (article 45(1)). This cooperation includes commitments to implement national or regional rules and policies “with due consideration to the different levels of development and economic needs of each ACP country”, as well as to eliminate practices that lead to the prevention, restriction or distortion of competition (article 45(2)), including the abuse of a dominant position. The Agreement promotes cooperation in formulating and supporting effective competition enforcement policies at the national level, including assistance in developing appropriate legal frameworks, and in supporting actual enforcement activities, with special reference to the least developed countries (article 45(3)).

At the inter-regional level, there are few agreements that deal with competition issues. However, article 6 of the Energy Charter Treaty obliges each contracting party “to work to alleviate market distortions and barriers to competition” and “to ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in economic activity in the energy sector” (paragraphs 1 and 2). The competition provisions that follow mainly deal with providing technical assistance in developing and implementing competition rules to contracting parties less experienced in these issues (article 6(3)), consulting and exchanging information (article 6(4)), and notifying counterpart authorities or other contracting parties of anti-competitive activities where enforcement assistance is needed by those authorities to combat such activities, with an emphasis on information and cooperation (article 6(5)). Although article 6(5) uses a mixture of "may" and "shall" language, the provisions in article 6(1-4) are binding ("shall").

In addition, the cooperation provisions of the 1998 OECD Recommendation on Hard Core Cartels require that all members control hard core cartels through the application of positive comity principles and the sharing of relevant information, subject to commercial confidentiality requirements.

c. Multilateral cooperation agreements

Multilateral cooperation is primarily addressed in the 1980 United Nations Set which links economic policy concerns of developing countries and the control of anti-competitive practices.[31] When calling for mutually reinforcing actions at the national, regional and international levels and intergovernmental collaboration and consultation (in section C(i)(1)), the Set also envisages that States with greater experience in the operation of systems of RBP control should share that experience with, or otherwise render technical assistance to, other States wishing to develop or improve such systems.

At the same time, the Set preserves the primacy of national laws ("[t]he provisions of the Set of Principles and Rules should not be construed as justifying conduct by enterprises which is unlawful under applicable national or regional legislation" (section C(i)(5)), and lays down only a minimum definition of offences, leaving it to individual States to expand this at the national level.

On the other hand, it provides some guidance as to acceptable behaviour on the part of States when controlling RBPs. In section E ("Principles and rules for States at national, regional and subregional levels"), States are called on to "[ensure] in their control of restrictive business practices, […]treatment of enterprises which is fair, equitable, on the same basis to all enterprises, and in accordance with established procedures of law. The laws and regulations should be publicly and readily available" (paragraph 3). Furthermore, States should protect the confidentiality of sensitive business information received from enterprises on the basis of reasonable safeguards normally applicable in this field.

The Set also includes a section on international measures to be taken under the auspices of UNCTAD for the control of RBPs, and establishes an institutional structure for the development of the Set by means of an Intergovernmental Group of Experts acting as a Committee of UNCTAD. This Intergovernmental Working Group provides a forum for multilateral consultations, discussions and exchanges of views by States on the Set; undertakes studies and research on RBPs; invites studies by other UN organizations in this field; studies matters arising under the Set and collects and disseminates information on such matters; makes appropriate reports and recommendations to States on matters within its competence, including the application and implementation of the Set; and, finally, submits an annual report.

Section G(ii)(4) of the Set makes clear, however, that "neither the Intergovernmental Group nor its subsidiary organs shall act like a tribunal or otherwise pass judgment on the activities or conduct of individual Governments or of individual enterprises in connection with a specific business transaction", and that "[t]he Intergovernmental Group or its subsidiary organs should avoid becoming involved when enterprises to a specific business transaction are in dispute". Thus, the institutional machinery set up under the auspices of UNCTAD cannot act in an investigative or adjudicatory capacity. In this the Intergovernmental Group is unlike bodies such as the EC Commission's Competition Directorate, which enjoys the abovementioned powers.

In addition to the Set, a further multilateral cooperation provision can be found in article IX of the GATS. By this provision:

> "1. Members recognise that certain business practices of service suppliers, other than those falling under Article VIII [Monopolies

> and Exclusive Service Suppliers], may restrain competition and thereby restrict trade in services.
> 2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member."

This provision introduces a mechanism for dealing informally with alleged abuses of competition rules by service suppliers. However, there is no indication as to what types of RBPs are covered, apart from the exclusion of monopolies, which are subject to the regime in article VIII. Presumably any practice, apart from monopolies, deemed to restrain competition and thereby to restrict trade in services is covered. This requires a causal element to be shown in that the mere existence of a restrictive practice is insufficient to bring the consultation process into operation. The requesting member must also show that the practice in question in fact, restricts trade in services.

3. Harmonization measures

Such measures can take either of two main forms: first harmonization effected through common institutional arrangements between the contracting parties; secondly, harmonization of substantive national competition rules through international provisions.

a. Harmonization through common institutions

A recent, though as yet gradual, trend in international agreements has been the adoption, by regional economic integration organizations, of competition policies administered by a common competition authority or through closer common cooperation. Examples include MERCOSUR and the Caribbean Community.

As to the MERCOSUR initiative, the 1996 Protocol provides for substantive harmonization, within a two year term, of “common norms for the control of acts and contracts, of any kind which may limit or in any other way prejudice free competition or result in the domination of the relevant regional market of goods and services, including those resulting in economic concentration, with a view to preventing their possible anti-competitive effects in the context of MERCOSUR” (article 7). In addition, the Protocol introduces a “Committee for the Defence of Competition”. This body is primarily responsible for the application of the Protocol being integrated with the national organs for the application of the Protocol in each State Party (article 8). This body can hear complaints initiated by national organs *ex officio* or on the basis of a reasoned representation by a party with a legitimate interest (article 10). The Committee will then carry out an investigation, issue a decision and order sanctions in accordance with the procedural provisions of the Protocol Chapter V. Proceedings can at any stage be settled by cessation of the practice under investigation under authority of the Commission in accordance with the procedures laid down in Chapter VI. Otherwise the Committee can order sanctions by way of penalty fines, or prohibitions on participation in government purchases, or public financial institutions in accordance with article 28 of the Protocol.

Chapter VIII of the 2001 Revised CARICOM Treaty provides that the Community shall establish appropriate norms and institutional arrangements to prohibit and penalise anti-competitive business conduct (article 170(1)(a)(i)). Article 170(1)(b) directs member States to enact local competition legislation and to establish local enforcement institutions and procedures, as well as to ensure access to enforcement authorities by nationals of other member States. In the case of cross-border anti-competitive business transactions of a regional dimension, competence resides in a Competition Commission which steps in to apply regional competition rules; promote competition within the Community; and to coordinate the implementation of CARICOM competition policy which calls for collaboration on enforcement among national competition authorities (articles 170-171).

b. Substantive harmonization through treaty provisions

EU Association Agreements require that the non-EU contracting party bring its national laws into conformity with those of the EU. Under the Europe Agreements between the EU and the majority of central and eastern European and Baltic countries respectively, competition standards based on EU competition rules are applicable where trade between the EU and the other signatory party is affected. In addition, the other parties are bound to ensure the approximation of their existing and future cooperation legislation with EU competition law. Such is not required under the Euro-Mediterranean Agreements or the Partnership and Cooperation Agreements concluded with the countries of the Commonwealth or Independent States (UNCTAD, 2003b, p. 12).

The establishment of common competition rules modelled on the 1957 Treaty of Rome has been addressed by regional organizations in Africa and through specialized intergovernmental agreements. Thus, the 1994 Treaty Establishing the Economic and Monetary Community of Central Africa (CEMAC) which, when in force, will replace the 1964 Treaty Establishing the Central African Economic and Customs Union (UDEAC), provides for the establishment of common competition rules to control RBPs and governmental activity; two draft regulations on these subjects are being formulated. Under the 1993 Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA), the parties agree to control RBPs along the lines of article 81 of the EC Treaty with provision for the COMESA Council to grant exemptions. The Council is also to elaborate competition rules for adoption within the member States. A regional competition policy will be formulated harmonizing national competition rules. The South African Development Community (SADC) has agreed that member States shall implement measures within the Community that prohibit unfair business practices and promote competition. The 1993 Treaty on the Harmonisation of Business Law in Africa[32] proposes to elaborate and adopt a common competition act, which would have direct effect within the territory of the 16 signatory States from West and Central Africa (UNCTAD, 2003b, p. 14).

Notes

[1] Updated information is available from: Hwww.unctad.org/en/subsites/cpolicy/ docs/CPSet/cpset.htmH. Unless otherwise noted, all instruments cited herein may be found in UNCTAD, 1996b, 2000b, 2001a, 2002b and 2004.

[2] Thus section A (4) of the United Nations Set states that among the objectives of this instrument is the elimination of "the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises […]."

[3] Case 30/87, *Corinne Bodson v SA Pompes Funèbres des Régions Libérées* [1988] ECR 2479, paragraph 4.

[4] An alternative approach to this issue is seen in article 3 of the Andean Community 1991 Decision 285 on Rules and Regulations for Preventing or Correcting Distortions in Competition Caused by Practices that Restrict Free Competition which states: "Practices restricting free competition are understood to mean agreements, parallel behaviours or collusion between enterprises that restrict, impede or distort competition or that could do so. […]". The reference to parallel behaviour connotes the fact that enterprises in a concentrated market can follow closely, and match, the commercial decisions of other competitors without necessarily being in collusion with them. It is only where such behaviour is collusive and actually distorts competition that it becomes a legitimate object of regulation. The distinction between innocent parallel behaviour and anti-competitive collusion evidenced by parallel behaviour is one of the most difficult issues in the regulation of such arrangements.

[5] This is particularly true of illegal horizontal arrangements, which may carry criminal penalties in some jurisdictions.

[6] Paragraphs 2 and 3 stated: "2. Allow purchasers, distributors and licensees freedom to resell, export, purchase and develop their operations consistent with law, trade conditions, the need for specialisation and sound commercial practice; 3. Refrain from participating in or otherwise purposely strengthening the restrictive effects of international or domestic cartels or restrictive

agreements which adversely affect or eliminate competition and which are not generally or specifically accepted under applicable national or international legislation; […].”

[7] It should be noted that according to section B (i) (2) of the Set: “‘Dominant position of market power’ refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.”

[8] Article 1 of the section on Competition of the 1991 version reads as follows: “Enterprises should, while conforming to official competition rules and established policies of the countries in which they operate: 1. Refrain from actions which would adversely affect competition in the relevant market by abusing a dominant position of market power, by means of, for example:

a) Anti-competitive acquisitions;
b) Predatory behaviour toward competitors;
c) Unreasonable refusal to deal;
d) Anti-competitive abuse of industrial property rights;
e) Discriminatory (i.e. unreasonably differentiated) pricing and using such pricing transactions between affiliated enterprises as a means of affecting adversely competition outside these enterprises; […]”.

[9] Horizontal mergers are mergers between firms dealing in the same products in the same markets; vertical mergers are mergers between firms which supply goods or services or parts in the same production line in the same market; conglomerate mergers are mergers between companies with different product lines, either indirectly related or totally non-related, in either the same or in different markets.

[10] See for example the 1991 EC-Poland Agreement (article 63); the 1991 EC-Hungary Agreement (article 62); the 1993 EC-Czech Republic Agreement (article 64); the 1993 EC-Romania Agreement (article 64); the 1991 EC-Slovakia Agreement (article 64); the 1993 EC-Bulgaria Agreement (article 64); the 1995 EC-Lithuania Agreement (article 64); and the 1996 EC-Slovenia Agreement (article 65). The 1997 Interim Agreement on Trade Related Matters between the EC and Macedonia contains a similar provision in article 33 even though it is not a full Association Agreement.

[11] See for example the 1995 EC-Tunisia Agreement (article 36). See too the 1995 EC-Israel Agreement (article 36); the 1996 EC-Morocco Agreement (article 36); the 2001 EC-Egypt Agreement (article 34); and the 1997 EC-the PLO Agreement (article 30). By contrast the 2002 EC-Algeria Agreement only covers anti-competitive agreements and concerted practices between

undertakings, decisions of associations of undertakings and abuse of a dominant position by one or more undertakings (article 41). The issue of special or exclusive rights granted to public enterprises is left for future decision (article 43). The same approach is followed by the 2002 EC-Lebanon Agreement (articles 35 and 37).

[12] See for example the 1994 EC-Moldova Partnership and Cooperation Agreement (article 48). Similar provisions can be found in the 1994 EC-Russia Agreement (article 53) and 1994 EC-Ukraine Agreement (article 49). However some Partnership and Cooperation Agreements have provisions concerning competition under the "legislative cooperation" title: see for example the 1995 EC-Kyrgyz Republic Agreement; the 1996 EC-Armenia Agreement; the 1996 EC-Georgia Agreement; the 1995 EC-Kazakhstan Agreement; and the 1996 EC-Uzbekistan Agreement.

[13] See for example, article 35 of the 1999 EC-South Africa Agreement on Trade, Development and Cooperation and article 11 of the 1997 EC-Mexico Partnership and Cooperation Agreement.

[14] Similar provisions, with minor changes of wording, can be found in the EFTA Agreements with Israel (article 17); the Slovak Republic (article 18); Poland (article 18); Romania (article 18); Estonia (article 16); Slovenia (article 17); Latvia (article 16); Morocco (article 17); Macedonia (article17); Croatia (article 19); Jordan (article 18); and the PLO (article 16).

[15] See, for examples, the 2001 FTA between Croatia and Hungary (article 20); the 2001 FTA between Slovenia and Bosnia and Herzegovina (article 17); the 1996 FTA between Latvia and Slovenia (article 16); and the 1997 FTA between Slovenia and Lithuania (article 22). See the examples in UNCTAD, 2003b, p. 13.

[16] See, for example, article 25 of the 1998 FTA between Turkey and Latvia.

[17] Similar provisions can be found in other bilateral FTAs concluded by Turkey. See, for example, the 1998 FTAs with Macedonia (article 24) and Slovenia (article 27).

[18] See the Free Trade Area Agreements concluded by Turkey with Lithuania in 1996 (article 25) and Estonia in 1997 (article 24).

[19] See articles 87-89 EC Treaty (UNCTAD, 1996b, vol. III).

[20] See, for example, the 1999 FTA between Singapore and Australia (article 07-12).

[21] See the 2003 FTA between the United States and Chile (article 10.5(1)(f) and 3(b), the 2003 FTA between the United States and Singapore (article 15.8(1)(f) and (3)(b)(ii) and the 2003 FTA between the Republic of Korea and Chile (article 10.7(1)(f).

[22] The TRIPS Agreement also contains provisions on compulsory licensing of intellectual property rights, which contain a competition element (article 31). See too the 2000 Andean Common Market Decision 486. For further discussion see UNCTAD, 2001b, pp. 38-43.

[23] Positive comity procedures have only been formally activated once when the United States Department of Justice requested the European Commission to investigate allegations that a computerized reservation system (CRS) set up by four European airlines provided more favourable treatment to those airlines at the expense of their American competitors who used an American based reservation system. This led the Commission to investigate one of the airlines against whom some evidence was found, but the case was dropped after the airline agreed to give equal treatment to the American based reservation system (UNCTAD, 2003b, p. 21).

[24] See too the 1976 "Agreement between the United States and the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices" / *Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Vereinigten Staaten von Amerika über die Zusammenarbeit in bezug auf restriktive Geschäftspraktiken (*UNCTAD, 2000b (Vol.V); the 1995 "Agreement Between the United States and Canada regarding the Application of their Competition and Deceptive Marketing Practices Laws" (UNCTAD, 2000b (Vol.V); and the 1984 Memorandum of Understanding between the United States and Canada as to "Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws", 23 I.L.M. 275 (1984).

[25] For the full text of the Convention see http://www.hcch.net/e/conventions/text20e.html.

[26] Joined Cases C-89/85, C-104/85, C-114/85, C-116 and 117/85, C-125-129/85, *A. Ahlström Osakeyhtiö and others v. Commission* [1988] ECR 5193, paragraphs 499-500. For a fuller discussion of the *Wood Pulp* case and the issue of "effects" and "implementation", see Wallace, 2002, pp. 755-763.

[27] International Antitrust Enforcement Assistance Act (IAEAA) of 1994, Pub. L. No. 103-438, 108 Stat. 4597 (1994), (*codified at* 15 U.S.C., ss. 6201 *et seq.*), *reprinted in* 67 Antitrust & Trade Reg. Rep. (BNA) No. 1683 (October 6, 1994), p. 417. This law authorizes the United States Department of Justice and the Federal Reserve Commission to enter into mutual legal assistance treaties.

[28] Article III of this agreement states: "The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anti-competitive activities in

accordance with the Requested Party's competition laws. Such a request may be made regardless of whether the activities also violate the Requesting Party's competition laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws."

29 See Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Französischen Republik über die Zusammenarbeit in bezug auf wettbewerbsbeschränkende Praktiken, 1984 BGBl II S. 758; Accord entre le Gouvernement de la République française et le Gouvernement de la République fédérale d'allemagne sur la coopération relative aux pratiques restrictives de la concurrence, [1984] JO 3460.

30 For the full text of the NAFTA see Hhttp://www.sice.org/trade/nafta/naftatce.aspH. Similar provisions are contained in the 1996 FTA between Canada and Chile, with the exception of the establishment of the working group. There are also competition chapters in the 2001 FTA between Canada and Israel and the 1996 FTA between Canada and Costa Rica. Chile has also signed FTAs with Mexico (1998) and some Central American countries (1999), containing chapters on competition policy, including RBPs and the control of State monopolies.

31 The following paragraphs are based on Muchlinski, 1999, pp. 407-411.

32 For the full text of the Treaty see http://www.ohada.com.

III. INTERACTION WITH OTHER ISSUES AND CONCEPTS

Given the relatively self-contained nature of competition issues in the context of IIAs, this subject has few significant interactions with other issues and concepts found in such agreements. However, certain potential interactions are worthy of note (table III.1).

Table III.1. Interaction across issues and concepts

Issues	Competition
Admission and establishment	++
Dispute settlement: investor-State	+
Dispute settlement: State-State	+
Employment	0
Environment	+
Fair and equitable treatment	++
Home country measures	+
Host country operational measures	++
Illicit payment	0
Incentives	++
Investment-related trade measures	+
MFN treatment	++
National treatment	++
Scope and definition	+
Social responsibility	+
State contracts	0
Taking of property	0
Taxation	0
Transfer of funds	0
Transfer of technology	++
Transfer pricing	++
Transparency	++

Source: UNCTAD.

Key: 0 = negligible or no interaction.
+ = moderate interaction.
++ = extensive interaction.

In particular, the application of competition laws by host countries can have significant effects on the operation of any obligations in IIAs dealing with entry and establishment of foreign investors, their treatment at the point of entry and after entry as well as on the operation of certain economic policy tools, such as taxation provisions, state aids, technology transfer provisions, incentives and performance requirements that may affect the rights of foreign investors, as determined in the provisions of IIAs to which the country in question is a party. Equally, certain procedural requirements might arise out of the provisions of IIAs, of which due process and transparency are of some importance.

- **Admission and establishment.** There is an interface of competition with admission and establishment issues, especially in relation to market entry by means of cross-border M&As. Of the many applications of competition or antitrust law, that pertaining to transnational M&As is susceptible to utilization as a mechanism for screening FDI on the basis of its impact upon the domestic market, thereby potentially affecting on market entry for TNCs. Where an IIA covers the pre-entry treatment of investors and investments, then the application of competition law at the point of entry is subject to compliance with the relevant standards of treatment contained in the agreement. If the IIA covers post-entry treatment only, then the host country is free to act as it sees fit in relation to the competition implications of a proposed investment at the point of entry. It need only observe the treatment standards in the IIA in the course of the subsequent application of competition laws after entry. On the other hand, an effective competition policy applied at the point of entry can ensure that only efficient investors and investments enter the host country. This can contribute to the enhancement of national economic development policy by protecting the competitive situation of domestic firms that might otherwise be "crowded out" of the local market by more dominant foreign firms. However, an ineffective application of competition law at this stage could undermine the benefits of increased market access in a liberalizing policy environment, as where this results in the protection of inefficient domestic firms against foreign competition or in the admission of foreign investment that tends to dominate the market and leads to abuses of a dominant position.

- **Fair and equitable treatment.** The fair and equitable treatment standard introduces certain basic notions of good governance to the treatment of foreign investors and their investments. In relation to competition policy, certain notions of good governance have been identified as core principles. Thus the 2001 Doha Declaration includes "procedural fairness" among these core principles. The WTO Working Group on Trade and Competition Policy has since discussed the meaning of this phrase. In the course of these discussions the view has been expressed that competition policy had to be applied in the light of certain standards of procedural fairness, such as notice of charges, fair and equitable administrative proceedings and an appeal process, so as to provide assurances to parties affected by competition investigations that proper procedures were followed to protect their rights and interests (WTO, 2003, p. 9). On the other hand, procedural fairness is a matter that has many national variations, and so may not be easy to deal with in an international instrument. In particular, the level of development of a host country could affect the meaning and content of procedural fairness. Accordingly, dealing with this aspect of competition policy in an international instrument would require that some sort of balance be struck between the differing national approaches to fairness and the need for agreed international standards that are both general and, at the same time, specific enough to act as a practical guide to competition authorities (WTO, 2003, p. 10).

- **Host country operational measures.** Where a host country introduces certain operational measures as a condition of entry for a foreign investor, this may become a competition related matter should no such requirements be placed upon other foreign or domestic investors. This may have a market distorting effect that cannot be accepted on a competition based analysis. It may require the use of special exemptions or exceptions based on national industrial policy. On the other hand, such measures may be applied to TNCs to counteract any potentially anti-competitive effects that their entry into the host country market might have. For example, technology transfer requirements may be placed on an investing firm to ensure that its domestic competitors can benefit from exposure to that investor's technical know-how. In addition, restrictions might be placed upon an investor against imposing restrictive covenants on former employees that might prevent them from working for local competitors, allowing the latter to benefit from that employee's exposure to the foreign investors know-how and business practices.

- **Incentives.** As noted in section II, certain agreements contain provisions dealing with the use of state aids or other types of incentives, as a means of offering a competitive advantage to certain enterprises. Where such an advantage is not offered to all enterprises in the same or like position, not only could this amount to a breach of the non-discrimination principle, but also to an infringement of competition related provisions covering the anti-competitive use of such industrial policy devices. Equally, incentives may have such an effect, *de facto*, as where they are offered to all investors in like circumstances but in fact the conditions attached to them may be met only by a certain category of investors.

- **National treatment and most-favoured-nation treatment.** National treatment and most-favoured-nation (MFN) treatment are significant concerns related to competition issues. BITs and competition cooperation agreements typically have national treatment provisions. Virtually all IIAs relating to FDI guarantee national treatment and MFN once a foreign affiliate is established in the host country, and some instruments also extend non-discrimination to the pre-entry stage. As noted in discussions before the WTO Working Group on the Relationship between Trade and Competition, the principle of non-discrimination is a core value of the multilateral trading system and is also vital to the credibility and effectiveness of competition policy (WTO, 2003, p. 7). Each aspect of the non-discrimination principle raises specific concerns. Thus, the MFN principle may give rise to issues concerning the interaction of different agreements. If not subjected to qualifications and exceptions, MFN could lead to the extension of wider provisions in certain agreements to agreements covering a narrower range of issues, based on preferential treatment for investors from certain countries. Thus, where MFN is to be included in agreements covering competition issues it may have to be subjected to exemptions based on national policy so as to avoid distortions of coverage between agreements (WTO, 2003, p. 8). This issue can also arise in relation to national treatment, where differences in treatment on competition matters arise between national and foreign investors on the basis of national policy concerns, including development concerns. One example could be a regime of preference in industrial policy for domestic small and medium-sized national firms based on sales thresholds (WTO, 2003, p. 8). In addition, if national treatment were to be applied without exceptions it could lead to the risk of "crowding out" of less competitive smaller national firms at the hands of TNCs.

- **Transfer of technology.** As noted in section II, transfer of technology has a strong interface with competition. The primary emphasis of this interface is in relation to the control of RBPs in licensing agreements. While licensing agreements may not be directly related to FDI, as normally defined, the subject was given much attention in the draft International Code of Conduct on the Transfer of Technology, negotiated under the auspices of UNCTAD between 1976 and 1985. The developing countries were of the view that the clauses in licensing technology agreements could thwart their development objectives and exploit their weaker bargaining position relative to that of technologically advanced foreign TNCs. The negotiations on the Code broke down essentially over the inability to reconcile this position with that of the industrialized countries, which favoured the regulation only of those licensing agreement clauses that could be regarded as unreasonable restrictions on the freedom of the recipient firm to compete with the foreign enterprise, or which placed unreasonable restraints on the competitive freedom of third parties (UNCTAD, 2001b, p.22). As noted in section II above, the TRIPS

Agreement introduced general rules that follow the competition-oriented model of technology transfer regulation.

- **Transfer pricing.** Transfer pricing interfaces with competition when intra-enterprise transfer prices are manipulated, thus becoming a restrictive business practice – i.e. anti-competitive – potentially shifting the revenue base to a tax-preferred territory and away from the true base of operations. This can be particularly burdensome to developing countries that may be depending on the tax revenues as a needed infusion of foreign capital. In addition, when transfer pricing (neutral in itself) is not abused, the domestic counterpart may still be put at a competitive disadvantage *vis-à-vis* the TNC if it is not equally in a position to enjoy tax savings through legitimate transfers among affiliates. Certain IIA provisions relating to transfer pricing as a RBP have been covered in section II above.

- **Transparency**. "Transparency" is mentioned as another "core principle" of competition policy in the 2001 Doha Declaration. Accordingly, where an IIA contains a transparency provision in its competition clause or as a general clause, competition authorities can be expected to conduct their activities in accordance with this requirement. In the absence of such special provisions it is possible that transparency in the conduct of competition policy may be seen as a part of the general obligation of fair and equitable treatment. On the other hand, a commitment to transparency does raise certain questions in relation to developing countries. For countries that already have competition laws it could lead to pressures for change in these laws, including the scope of exemptions from competition regulation. In countries where such laws do not yet exist it is not clear how transparency commitments could be met (WTO, 2003, p. 7). Another issue raised in this context concerns the extent to which competition authorities can be expected to disclose information that they acquire in the course of investigations. Here the usual practice would be to allow for transparency of all non-confidential information, but to introduce safeguards over the disclosure of confidential and/or commercially sensitive information.

CONCLUSION: ECONOMIC AND DEVELOPMENT IMPLICATIONS AND POLICY OPTIONS

The control of restrictive practices is a major issue for developing countries particularly because restrictive arrangements by TNCs can limit the positive developmental impact of FDI—say by reducing exports or limiting the use of technology.[1] This can happen if a parent company limits the external markets of its individual affiliates (Puri and Brusick, 1989; Correa and Kumar, 2003). A possible abuse of dominant positions can occur as a result of large cross-border M&As. Indeed, the main interface between competition law and FDI occurs when foreign affiliates are established by significant M&As.[2]

When foreign entry is accomplished by cross-border M&As, the probability of an anticompetitive impact increases for two reasons: first, because the number of competitors may be reduced; second, because cross-border M&As do not necessarily add new capacities. So countries tend to screen those transactions and often regulate them both at the entry and post-entry phases. Regulation at entry considers the potential market effects of an acquisition of a local enterprise by a foreign investor on competition in the host country industry, where the foreign investor might acquire sufficient market dominance to warrant such review. The control of potential post-entry anticompetitive behaviour by TNCs may be necessary to deal with the conflicting objectives of effective competition and local capacity building. Such action may be particularly needed for a host developing country in which the free play of market forces does not always bring the desired development results (UNCTAD, 1997, pp. 229–231). Of particular concern in the case of developing countries is that the market power of a foreign enterprise is often buttressed by the latest technology and procedures which, while welcomed for their input into the local economy through technology transfer, import substitution, and other benefits of foreign capital and know-how, may at the same time appear to threaten competing local firms endowed with less advanced technology.

In addition, the effect on developing countries of the most egregious form of RBPs, hard-core cartels, may be severe. Such cartels can raise prices and restrict the supply of essential goods and services (including industrial inputs) that make these unavailable to some users and unnecessarily expensive to others. Furthermore, such cartels can reduce the participating enterprises' incentives for cost control and the propensity to innovate and could, as a result, impede the transfer of technology to developing countries. On the other hand, hard-core cartels could be seen as a predominantly developed country problem, given the preponderance of such cases in those countries, giving rise to the possibility that developing countries might not see the regulation of such anti-competitive activities as a major priority. However, cartels can be a major issue for certain developing countries and they may wish to take action against them. There is a need here to clarify the precise effects of hard-core cartels on the development objectives of developing countries (WTO, 2003, pp. 11-13). Other types of cartels that may have implications for developing country competition policies are export cartels, which have a demonstrable anti-competitive effect on the developing country market and government sponsored arrangements. The latter tend to be excluded from competition policy as emphasised by the United Nations Set in section B(9).

Current models of competition law and policy do not distinguish firms by their nationality, only their impact on competition matters. Moreover, they assume that maintaining and strengthening competition would lead to more development. Indeed, a shielding from market forces may become counter-productive in the longer term if it prevents enterprises from responding positively to market stimuli; brings about a loss of productive efficiency and innovation; or allows collaborative research and development activity that is a front for anticompetitive collusion between enterprises.

A host country can limit the application of its competition policy when the expected benefits outweigh the welfare loss due to anticompetitive effects--say, for nurturing particular enterprises or new and innovative research and development--by providing temporary protection and exclusivity. The aim behind such an exception is to reduce the risk to infant enterprises—and to the undertaking of innovative research that may not be easily undertaken in full competitive conditions, or which requires a degree of inter-firm cooperation that might be otherwise incompatible with rules against anticompetitive collaboration between enterprises. Other reasons for limiting the application of competition policy—typically arising from competing objectives—include ensuring the provision of basic services, reducing foreign exchange shortages, safeguarding national security and culture and avoiding negative externalities through tightly regulating pollution, to mention a few (UNCTAD, 1997, pp. 229–233). Exceptions need to be treated with care, so that an exception unwarranted by market conditions is not permitted to continue indefinitely.

As regards international approaches to competition/antitrust standards, if these are to be development-friendly, they will have to focus on those international dimensions that are currently or prospectively most detrimental to developing countries and take into consideration the costs and capacity constraints, as well as differing national priorities, prevailing across the spectrum of this category of countries. A major consideration is enforcement capacity. Although developing countries are in increasing numbers introducing competition/antitrust regimes, the means to enforce the rules may, in some cases, be inadequate.[3] Having a competition law and authority does not necessarily mean effective action by governments (UNCTAD, 2003a, p.135). Indeed, developing countries have not thus far participated to any great extent in intensive case-specific enforcement cooperation (UNCTAD, 2003b, p. 24-25). However, this may be in the process of changing, as more developing countries adopt, or are in the process of adopting or drafting, competition laws. Indeed, the effective future enforcement of such laws may require increased cooperation, which may be achieved through cooperation agreements. In addition, even those countries with limited (or no) competition regimes may benefit to some extent from acquiring a degree of control over RBPs through international arrangements. This was the case, for example, with the member States of the EU, as not all of them had national competition laws in place upon becoming parties to the Treaty of Rome. Furthermore, international arrangements can help further technical assistance for developing countries seeking to establish, or evolve, their competition policies. Thus there may be certain development advantages arising out of international provisions in this field, given the value of competition policy to the development process, and the capacity of such arrangements to enhance that value.

Moreover, it is essential not to loose sight of the difficulties that developing countries may particularly experience through their participation in international agreements containing competition related provisions. Developing countries will find themselves in an asymmetrical relationship with developed country parties to such agreements. First, a relative lack of resources and experience on the part of the developing country party places greater emphasis on the developed country party to bear the brunt of any cooperative activity. Secondly, trade and investment flows are more likely to pass from developed to developing countries, creating an asymmetrical market structure between them. As a result, the problems of cooperation take on a different perspective from those arising between developed countries among themselves, where reciprocal cross-border flows of trade and investment may offer a higher level of mutual market integration, giving greater impetus to cooperation in the competition field. By contrast, there may be less of an incentive for a developed country to act in the case of relations with a developing country where the activity of undertakings on the market of the latter may have few effects on the market of the developed country party.

Agreements between developing countries themselves may also raise special problems. These may diminish the capacity for effective cooperation. The problem of limited resources and experience remains, and will be without the possible counterbalance of the resources and experience that a developed country party might bring, unless one or more of the developing country parties already has some experience in competition law investigation and enforcement that it can pass to the other parties. Furthermore, the actual cooperation mechanisms in place under the agreement might be unsuitable for fully developed cooperation to take place. Moreover, it is possible that trade and investment between developing country parties is limited, or the actual incidence of covered RBPs is rare, and so there are few occasions for cooperation to take place (UNCTAD, 2003b, p. 26).

In light of the preceding analysis, a number of policy options arise in IIAs in the area of competition/antitrust policies having an international dimension.

A. Policy option 1: no competition provisions

The first option is to continue the prevailing practice in current IIAs and exclude competition provisions. The advantage of this option is that countries are free to fashion competition policies according to their own local conditions and national objectives, unrestricted by the imposition of specialized international requirements. For instance, competition policy and its application remain subject to the general standards of treatment contained in IIAs for the protection of investors and their investments. Thus, competition rules may be subjected in particular to requirements of non-discrimination and fair and equitable treatment, whether at the post-entry stage or at pre-and post-entry stage, given the scope of the IIA in question.

The disadvantage of this approach might lie in the possibility of discouraging inward FDI if the locally adopted rules are not transparent or do not conform with some degree of consistency to other regimes. In addition, the exclusion of this important issue will also exclude the possibility of cooperation in the application of competition policy and of technical assistance in competition matters.

B. Policy option 2: the inclusion of competition provisions

Where an agreement does include competition provisions, these can be organized around a number of further options that vary according to the degree of legal obligation required of the parties and of the scope of substantive and procedural issues that they cover.

1. The extent of legal obligation

a. Non-binding "best efforts" approach

The least demanding competition clause is non-binding "best efforts" provision that urges the commitment of the signatory parties to adopt effective domestic competition laws and enforcement mechanisms and/or to strengthen enforcement and/or notification/consultation features of existing competition/antitrust laws. Such an approach could be attractive to countries that seek to place competition issues on their cooperation agenda, but do not wish to apply extensive efforts or resources to this task. It may be particularly useful in cases in which a developing country party is yet to adopt, or to develop the application of competition laws, but is interested in doing so, and in which developed country parties are willing to enter into a low level commitment to assist in this process, but do not wish to be encumbered by positive legal duties in this regard. The major disadvantage of this approach is that in the absence of positive action, it may be ineffective in furthering any progress on the development of national competition policy, or of international cooperation, on the part of the signatories.

b. Minimal binding obligations

Where the contracting parties to an IIA wish to include competition issues, they may seek a minimal approach that establishes binding obligations only in the most general terms. Such an approach is served through the use of a general definitional clause, covering only a minimal number of RBPs as selected by the parties, and offering no cooperation mechanism or a minimal mechanism based on consultations and voluntary exchange of non-confidential information. Such an approach may be useful in partnership and cooperation agreements that seek to improve the overall climate for trade and/or investment between the parties, but which does not aim at the development of a process of close procedural cooperation, or of substantive convergence, in competition matters. This approach is evident in bilateral agreements between countries within a region that has little or no experience of cross-border competition regulation or between parties from different regions in the global economy, where there is little need for close cooperation, but a desire to improve the mutual understanding of competition policy concerns between the parties. It is an approach that may also be attractive to a regional grouping that is as yet not ready to undertake a major commitment towards a supranational competition policy, but wishes to lay down some basic common policy standards and goals in the field.

c. Comprehensive legal obligations

The most developed form of competition provisions would entail the adoption of comprehensive binding legal obligations by the signatories. These could be focused on procedural cooperation alone, in the case of parties that already have established competition law and policy regimes under national laws; they could allow for cooperation in procedural matters and also introduce an element of substantive harmonization in the content of national competition laws and policies; or they could establish a common regime of cooperation in regulation, investigation and standard setting. As examined in section II, the various binding bilateral cooperation treaties are examples of the first approach, the EU Association Agreements are examples of the second, while MERCOSUR and COMESA regimes are examples of the third.

The second and third approaches could be used both by countries with established national competition law and policy regimes or by countries seeking to establish and/or further develop their national policies in an international cooperative setting. A fourth possible alternative is the establishment of a supranational regime modelled on the EC example. This may be a swift and effective way towards the adoption of a comprehensive competition law and policy system in countries that do not currently have one, as was the case in the EU. Equally, where the agreement involves smaller countries with limited regulatory capacities, a supranational approach could allow for more effective investigation and enforcement by allowing the burden of such regulation to be shared by all contracting parties. This was the experience of the smaller EU members in this field. The unilateral adoption of national competition laws based on existing national models, or upon the UNCTAD Model Law is a further possible alternative. Indeed, it is possible for a combined national and supranational approach to be taken to the development of competition law and policy.

2. The scope of competition provisions

Notwithstanding the particular choice made by parties to IIAs as to the legal force of competition provisions in the agreement in question, the second area of choice lies with the substantive and procedural scope of these provisions.

a. Substantive scope

Following the pattern of issues set down in section I, if the competition provisions of an IIA are to deal with substantive competition issues, they will have to define who the addressees of any substantive obligations should be; the approach to and content of definitional clauses; and the range of RBPs and related competition matters that the agreement should cover.

- ***Addressees of obligations.*** The provision may impose obligations on private actors to act in accordance with the substantive requirements of the provision and to refrain from engaging in RBPs and other competition related actions covered by the agreement, as the case may be. Here, the provision could be wide and extend to all commercial actors in the market or only to some. Thus the provision may refer to "undertakings" in general or to particular categories of market actors such as "competitors" at the same level of the market or to "enterprises" excluding for example non-business entities. In addition, certain express exemptions or exclusions could be added as for trades unions, charitable bodies or governmental organisations.

- ***The definition of RBPs.*** As noted in section II, the competition provisions of an IIA could have a general definitional clause only, a general clause coupled with more specific clauses defining particular RBPs or only specific clauses defining particular RBPs. Each type of clause could also have an illustrative list of RBPs covered by its terms, though in the second approach such a list is most likely to appear in the specific definitional clauses only. Most such clauses cover the four main types of RBPs: horizontal and vertical agreements or concerted practices, abuse of a dominant position and mergers and acquisitions.

- ***The range of RBPs covered.*** The third element of substantive scope concerns which RBPs and related competition issues the competition provisions of the IIA should cover. This is an issue of policy in each case and no hard and fast principles apply. However, the provision can cover any one or more of the four main RBPs and/or the specialized issue areas identified in section II above, namely, restriction to trade-related RBPs only, inclusion of specific provisions on state aids and other incentives, government sanctioned monopolies/state enterprises, anti-competitive taxation practices such as transfer pricing, technology transfer and related IPR issues, and performance requirement issues. Anti-dumping issues can also be included, though these can be seen as a specialized field of regulation that go beyond the main subject-matter of competition law and policy. The link between competition and anti-dumping is made in some agreements notably in the Revised CARICOM Treaty (chapter VIII). Development related provisions could also be included. These are discussed in more detail under the issue of special and differential treatment below.

b. Scope of procedural provisions

The procedural aspects of competition provisions in IIAs can cover any one or more of the matters discussed in section II. The range of coverage again depends on the policy goals of the contracting parties. Thus an agreement may cover any one or more of the following:

- control of extraterritorial conflicts in the investigation and enforcement of competition laws and policies;
- information exchange, which may be limited to non-confidential information but could be widened to cover confidential information subject to any applicable safeguards for confidential governmental or commercial information;
- cooperation in the investigation of alleged anti-competitive activities by one party through traditional and/or positive comity;
- cooperation in the joint investigation of alleged anti-competitive activities;
- cooperation in the enforcement of national decisions and remedies taken by one party on the territory of another;
- the establishment and use of common investigation and enforcement mechanisms at the supranational level;

- the adoption of transparency and due process obligations in the conduct of competition investigations.

The development implications of these types of provisions are hard to determine. However, the general points made in sub-section A as to the special problems that developing countries may have in their participation in international cooperative arrangements should be borne in mind.

c. Dispute settlement

A remaining question that arises in this field is whether there should be provision for dispute settlement in relation to competition issues. The predominant practice at present is to exclude dispute settlement provisions from competition issues unless an agreement seeks to establish a fully functioning supranational system of competition law and policy, as is the case with the EU, where the ECJ and the Court of First Instance can hear competition cases arising out of the competition provisions of the Treaty of Rome. Other agreements include less elaborate methods for dealing with possible issues or disagreements between the parties such as consultations. Provision is made for such an approach in, for example, the EC Association Agreements, EFTA Agreements and other cooperation agreements discussed in section II above.

d. Special and differential treatment for developing countries

As shown by the example of the United Nations Set, it is possible to take a flexible approach to the development implications of international competition arrangements and to introduce specialized, development-friendly provisions that may include an element of special and differential treatment for developing and least developed country parties. In particular, cooperative mechanisms for the further development of competition policy awareness could be included in IIAs. For example, the Asia-Pacific Economic Cooperation Forum (APEC) members have undertaken, in the non-binding 1999 APEC Principles to Enhance Competition Policy and Regulatory Reform,[4] to introduce and 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 de-regulation. An APEC-OECD cooperative initiative aims to support regulatory reform adopted by both organizations, as does an APEC training programme on competition policy, which aims, in particular, at supporting the implementation of those Principles as they focus on competition policy (UNCTAD, 2003b, p. 16). In addition, specific technical assistance provisions requiring cooperation between competition authorities in developed and developing countries could be concluded. Other provisions could take into account the practical difficulties that developing countries may face in cooperation over information exchange, investigation or enforcement and allow for greater obligations in this regard for developed country parties. Such obligations could help to fill the regulatory gap that the lower resources and experience of developing country parties might leave in relation to the control of anti-competitive practices that are harmful to the markets and undertakings of those developing country parties.

* * *

The issue of competition is undoubtedly gaining importance in the context of an increasingly integrated global economy in which governments are frequently pursuing greater FDI policy liberalization. The resulting openness may create greater opportunities for inward FDI but also certain risks, including the risk of weakening the competitive environment of host countries. Given this possibility, competition related provisions in IIAs may permit the evolution of a development-friendly balance between FDI openness and host country regulation of RBPs that can undermine the benefits of FDI. How far countries should go in developing international rules on competition matters is an issue of policy discretion. They may choose between relatively limited or highly developed commitments aimed at realizing the range of policy options outlined above. Whatever the outcome of this choice, it is clear that competition questions will play a significant role in the future evolution of FDI policies for development.

Notes

[1] These paragraphs are based on UNCTAD, 2003a, pp. 134-135.
[2] For an extensive discussion of this issue, see UNCTAD, 1997.
[3] Hoekman and Mavroidis, 2003, pp. 22-23.
[4] For the full text see http://www.apecsec.org.sg/apec/leaders_ declarations/1999/attachment_-_apec.html.

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