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TO REVIEW ALL ASPECTS OF THE SET OF
MULTILATERALLY AGREED EQUITABLE
PRINCIPLES AND RULES FOR THE CONTROL
OF RESTRICTIVE BUSINESS PRACTICES
Geneva, 25 September 2000
Item 8 (a) of the provisional agenda

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

Report by the UNCTAD secretariat

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CORRIGENDUM ISSUED AT THE REQUEST OF CANADA

In paragraph 19 of the report TD/RBP/CONF.5/4, line 13 onwards, delete **"the agreement also abolishes the application of anti-dumping and countervailing duties between the parties after a transitional period (there are also competition chapters in the Canada-Israel Free Trade Agreement)"**, and insert **"There is also a competition chapter in the Canada-Israel Free Trade Agreement**."

CONTENTS

Executive summary

This report focuses on three types of international instruments dealing with competition law and policy, namely: bilateral competition law enforcement cooperation agreements; free trade, customs union or common market agreements; and multilateral instruments. The implementation of such agreements has helped to minimize conflicts among Governments and to facilitate enforcement in this area. However, several concerns continue to impede the further development of enforcement cooperation. Moreover, developing countries have not so far significantly participated in such cooperation. To overcome such impediments and to promote the participation of developing countries, it would be necessary to build up mutual confidence gradually, by evolving from simple to more complex cooperation agreements.

Balanced cooperation among developing countries would provide a learning experience and help ensure that cooperation with more advanced partners was fruitful. Free trade or common market agreements might provide a conducive framework for this purpose, but regional rules, institutions and mechanisms would need to be adapted accordingly, and a degree of compatibility ensured among national, subregional and interregional competition regimes. The consultations mechanism established under the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices might be used to discuss how this might be done and what might be the appropriate balance between convergence and diversity in competition laws and policies; it might also promote cooperation in specific cases. Such consultations could provide an input to the ongoing discussions or any future negotiations within the World Trade Organization.

INTRODUCTION

1. **In line with a request made by t**he Expert Meeting on Competition Law and Policy, held in November 1997,[1] * the UNCTAD secretariat *** submitted** a preliminary report of a study on experiences gained so far in international cooperation on competition policy issues and the mechanisms **used *** to the first session of the Intergovernmental Group of Experts on Competition Law and Policy, held from 29 to 31 July 1998**. The Group of Experts requested *** the UNCTAD secretariat to prepare for consideration *** at its second session a report on the same subject *.**[2] **At that second session, held from 7 to 9 June 1999, the Group of Experts requested the UNCTAD secretariat to prepare for consideration by the Fourth Review Conference a revised report on the same subject, taking into account commentary and information to be received from member States by 31 January 2000. * The present** report has been prepared in response to this request**; it takes into account comments received on the previous report, and also updates the information provided in the previous report.**[3] Additions to the text have been indicated in bold script; deletions have been indicated with stars.

2. For the purposes of this study, international cooperation in the area of competition law and policy is interpreted in a broad sense, covering ***** cooperation aimed at**: (a)** avoiding conflicts between Governments; *** (b)** facilitating enforcement against restrictive business practices (RBPs) (which is reciprocal in principle); *** (c) provision of** technical assistance for adopting, reforming or enforcing competition law and policy by countries which are more experienced in this domain to those less experienced; *** (d)** the promotion of convergence or harmonization of competition laws or policies**; and (e) within the context of a regional grouping, the strengthening of economic integration.** However, the present study mainly concentrates on (a) **and (b)** (experiences in respect of technical assistance are discussed in TD/B/COM.2/CLP/12). **It should be noted that, in practice, any cooperation agreement or cooperative activity may have more than one of these objectives, which are indeed often interlinked.**

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

Chapter I

INSTRUMENTS OF INTERNATIONAL COOPERATION ON COMPETITION LAW AND POLICY

A. Overview

4. This chapter distinguishes **among** the following six types of international instruments dealing with competition law and policy **(the first four types of which are of a bilateral nature):** (a) bilateral agreements focusing on cooperation in competition law enforcement; (b) * mutual legal assistance treaties, which would apply to criminal antitrust cases as well as other criminal cases; (c) friendship, commerce and navigation treaties concluded between the United States and several other countries, which include clauses referring to cooperation on antitrust matters; (d) * agreements for technical cooperation in economic regulation, including competition law and policy; (e) free trade, customs union or common market agreements, including regional or subregional agreements or bilateral agreements concluded within a regional framework, covering competition law and policy as one element in a broader relationship; and (f) multilateral instruments, whether or not they are of a legally binding nature, which are universally applicable or are of a plurilateral nature, and cover a range of issues or focus specifically on competition law and policy. In practice, the borderlines between these different categories of instruments are often blurred, while other instruments not mentioned here may also have some bearing on competition law and policy. Some typical provisions of such agreements and notable features of specific agreements are described below. **While bilateral enforcement agreements and some multilateral instruments deal solely with competition law and policy, other types of agreements deal with cooperation on competition law and policy as one element in a wider agreement.** Each type of instrument is dealt with in a separate section of this chapter *.

B. Bilateral agreements on competition law enforcement

5. As may be seen from annex 1, the United States is party to most of the agreements of this type ***; it has such agreements with Australia, Brazil, Canada, the European Union, Germany, Israel and** Japan. *** The European Union has so far concluded such agreements only with Canada and the United States but, as discussed below, has agreed to undertake enforcement cooperation with some other countries within the context of free trade, customs union or common market agreements.** Typical provisions of many of these agreements include: notification of enforcement activities affecting the other party's important interests; commitments to take into account the other party's significant interests when investigating or applying remedies against RBPs (traditional comity); consultations to resolve conflicts between the parties' respective laws, policies and national interests; coordinated action in respect of related RBPs occurring in both countries; requests for assistance in investigations when RBPs on the territory of the party requested are adversely affecting the significant interests of the requesting party; requests for enforcement of an order by one party in the territory of another party; and commitments (subject to compatibility with national laws and important interests, and to the availability of resources) to give serious consideration to such requests for investigatory assistance or enforcement, including by providing non-confidential information and, in a few cases, confidential information (subject to safeguards). While the older agreements

of this type are usually more concerned with avoiding or managing conflicts between Governments arising out of enforcement proceedings (particularly where extraterritorial action is involved), the newer generation of agreements, while still concerned with avoiding conflicts, also often aim at collaborative international action against RBPs.

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

7. However, such a limitation may not necessarily apply to the provision of investigatory assistance. Under the International Antitrust Enforcement Assistance Act of 1994, the United States federal competition authorities are authorized (subject to reciprocity and not in the case of mergers) to conclude international agreements providing for the possibility of exchange of confidential information on a case-by-case basis (provided certain conditions are met), and 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 within 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 1997 agreement between the United States and Australia. **It has recently been recommended that the United States antitrust authorities expand the jurisdictions with which they have modern antitrust cooperation agreements, including those that feature positive comity provisions; cooperative arrangements should be sought with qualified jurisdictions that have newer competition systems as well as those with newly established competition laws.[4] It has also been suggested that cross-border cooperation in reviewing mergers should be encouraged and further deepened, and work-sharing arrangements be developed.**

C. * Mutual legal assistance treaties

8. Antitrust cooperation in criminal cases can take place through bilateral mutual legal assistance treaties applying to criminal matters generally. Although the United States has concluded such treaties with a number of countries, the only one under which antitrust cooperation has taken place is the Treaty between the Government of Canada and the Government of the United States on Mutual Legal Assistance in Criminal Matters (1990). This provides for, *inter alia*, the obtention of evidence regarding possible criminal offences (including through the use of compulsory processes such as search warrants) and sharing of confidential information (subject to safeguards relating to divulgation).

D. Friendship, commerce and navigation treaties

9. Friendship, commerce and navigation (FCN) treaties concluded between the United States and a number of other countries contain clauses relating to cooperation on competition law enforcement. Under the 1954 FCN treaty between Germany and the United States, for instance, each Government agrees to consult with the other, at the request of either, with respect to RBPs having harmful effects upon commerce between their respective territories, and to take such measures, not precluded by its legislation, as it deems appropriate to eliminate such harmful effects. However, it is now many years since treaties of this nature were concluded between the United States and other countries.

E. Technical cooperation agreements

10. There are also bilateral agreements which organize technical assistance on competition law in the context of assistance on different forms of economic regulation. Under a 1992 technical cooperation agreement between the French Direction-Générale de la Consommation et de la Répression des Fraudes (DGCCRF) and the Direction-Générale de la Consommation (DGCN) of Gabon, for example, the two authorities undertake to cooperate in such areas as competition policy, consumer protection, unfair competition, product quality and safety, and price control. In the implementation of this agreement, the DGCN has sent personnel to centres run by the DGCCRF for short-term or long-term training, initially in price control, and now in competition law. **There is a similar agreement between France and the Russian Federation.**

F. Free trade, customs union or common market agreements

11. These agreements, which are often of a regional nature, may, depending on the degree of integration envisaged among the parties thereto **and the scope of supranational powers granted to the institutions created**, contain rights and obligations of varying strength and detail relating to, *inter alia*, the adoption or maintenance and effective enforcement of competition laws and policies; competition norms applicable to trade between the parties, sometimes with the concomitant exclusion of anti-dumping and/or countervailing duty trade remedies; substantial harmonization of competition laws; control of subsidies; control of discriminatory or other action by State enterprises or enterprises with special or exclusive rights; enforcement of common norms by supranational institutions; consultations on, and coordination of, enforcement between national and supranational institutions and among national institutions; dispute settlement; and technical assistance.[5] A fundamental difference between such agreements and the types of

bilateral agreements referred to above is that the former include substantive competition rules **providing for some degree of harmonization (although this is far less pronounced in the case of free trade agreements)**, rather than just procedural rules relating to cooperation**; this is no doubt due to their market integration objectives**. The most advanced regional system of competition rules is that of the European Union, which is also at the centre of a web of agreements with neighbouring countries involving varying intensities of cooperation in competition law and policy. The **competition policy** system ***** within the European Union **(which, because of its supranational character, goes beyond just inter-State cooperation)** also appears to provide a model for some of the subregional groupings in Africa and Latin America, albeit with some variations. An alternative model is that created under the North American Free Trade Agreement (NAFTA), which provides for a much less intense degree of cooperation. Cooperation envisaged so far within the Asia-Pacific region is even less intense, except for the close collaboration between Australia and New Zealand in this area.

12. The European Union has supranational competition rules (relating to RBPs, to public undertakings and undertakings granted special or exclusive rights, and to subsidies), which are linked by the Treaty of Rome to the fundamental objective of establishing a common market. These rules apply to practices affecting trade between member States, even if they occur within a single European Union country or an area within a country. There is provision for: coexistence between national and European Union competition laws, subject to the primacy of European Union law; a system for allocating competence among European Union and national competition authorities and courts (*** which** may also apply European Union law), aimed at balancing subsidiarity with the uniformity of the competition regime within the European Union; cooperation in the investigation or evaluation of practices; exchange of documents (including confidential information); representation at hearings; the communication of opinions on draft decisions for comments; and the provision by institutions of the European Union to national institutions of information or rulings on facts or European Union law. **However, there are legal obstacles to the exchange of confidential information between the European Commission and national authorities, as well as among national authorities. The Commission has now proposed devolving to national jurisdictions its powers under article 85 of the Treaty of Rome to investigate RBPs and to grant exemptions (article 86 can already be enforced at the national level); the Commission would continue to undertake enforcement in cases which are of general importance to the EU.** A step further in cooperation has recently been taken by the competition authorities of France, Germany and the United Kingdom, which have established a single form for the notification of mergers falling within the jurisdiction of at least two of these authorities. Anti-dumping or countervailing duty action among members of the European Union is precluded. Special sectoral arrangements are provided for under the Treaty Establishing the European Coal and Steel Community.

13. Under the Agreement on the European Economic Area (EEA), concluded by the European Union with most countries of the European Free Trade Area (EFTA), all practices liable to impinge on trade and competition among the EEA participants are subject to rules that are virtually identical to European Union competition law. Either the European Commission or the EFTA Surveillance Authority have supranational authority over practices affecting trade within the area (there are rules for allocation of jurisdiction between them). There are provisions for the exchange of information (applying even to confidential information), consultations (including the communication of opinions by an authority in proceedings brought before the

other authority), coordinated enforcement and dispute settlement; anti-dumping and countervailing duty action within the EEA is precluded. However, the accession of many former EFTA countries to the European Union has now reduced the practical scope of the Agreement on the EEA. As regards those EFTA countries not party to the EEA, there are procedures under free trade agreements for consultations and conciliation relating to practices affecting trade with the European Union.

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

15. Under the Euro-Mediterranean agreements, obligations similar to those under the Europe agreements, except in respect of the requirement to align competition rules, have been extended to trade between the European Union and several Mediterranean countries. Implementing rules for these Euro-Mediterranean agreements have not yet been adopted. Negotiations on other Euro-Mediterranean agreements are proceeding with other Mediterranean countries. Less far-reaching partnership and cooperation agreements have also been concluded between the European Union and countries of the Commonwealth of Independent States (CIS), under which the parties agree to work to remedy or remove restrictions on competition, whether caused by enterprises or by State intervention, and to enforce their competition laws, and the members of the CIS are to endeavour to ensure that their competition legislation is gradually made

compatible with that of the European Union. The granting of export aid is restricted and further negotiations on other types of aid is provided for. Technical assistance is an important component of these agreements. Similar obligations limited to the energy sector are provided for under the Energy Charter Treaty concluded by the European Union with some members of the CIS. Even lower-intensity cooperation is provided for under a network of framework cooperation agreements concluded between the European Union and its member States and, respectively, Argentina (2 April 1990), the Central American republics (1993), the member countries of the Andean Pact (21 January 1993), Brazil (29 June 1995), the Southern Common Market (MERCOSUR) (15 December 1995) and Chile (21 June 1996); in the context of provisions on cooperation in a broad range of areas, the parties agree to hold a regular dialogue on the monitoring of RBPs, to identify and eliminate obstacles to industrial cooperation by means of measures which encourage respect for competition laws, and to make resources available for these purposes. Negotiations are under way for the conclusion of free trade agreements with Chile * and MERCOSUR**; agreements have been concluded with Mexico and South Africa which provide for mechanisms for the enforcement of both parties' competition laws**. **** The recent Partnership Agreement between the African, Caribbean and Pacific States (ACP) and the EU and its Member States (the Cotonou Agreement) provides that the Parties will reinforce cooperation for formulating and supporting effective competition policies with the appropriate national competition agencies so as to progressively ensure effective enforcement, including by assistance in drafting and enforcing an appropriate legal framework.***

16. While the European Union is at the centre of agreements with all of these countries or regional groupings, agreements have also been concluded among some of the countries which are party to agreements with the European Union. The EFTA countries not party to the EEA have available long-standing procedures for mandatory consultations and dispute settlement relating to practices affecting trade among EFTA countries. Free trade agreements with competition provisions have also been concluded by some EFTA countries and by Israel with some Eastern European countries, as well as within this latter group of countries, under the Central European Free Trade Agreement (which provides for general information exchange and notification of individual cases). Cooperation agreements on anti-monopoly matters have been concluded by Poland with Ukraine (December 1993) and with the Russian Federation (March 1994)**; agreements have also been concluded by Romania with Belarus, Bulgaria, the Czech Republic, Georgia and the Russian Federation**. The CIS has also agreed, in the context of the creation of an economic union among its members, to create conditions for fair competition, including a mechanism for anti-monopoly regulation. A **** Treaty on Conducting the Agreed Antimonopoly Policy*** has now been signed; the Coordination Council of the Anti-monopoly Agencies monitors its implementation, and provides a mechanism for exchanging experiences and for assisting in the improvement and the implementation of national legislation. But all the agreements to which the European Union is not a party tend to involve relatively weaker rights and obligations.

17. Competition law and policy is starting to be addressed more extensively in African subregional agreements, often on the basis of the model of the Treaty of Rome. The 1964 Brazzaville Treaty Establishing the Central African Customs and Economic Union (UDEAC), already provided that means should be found to achieve the progressive elimination of RBPs in trade among member States. The Treaty Establishing the Economic and Monetary

Community of Central Africa (CEMAC) which, when in force, will replace the UDEAC treaty, provides for the establishment of common competition rules to control both RBPs and governmental activities; two draft regulations dealing respectively with these two subjects, are currently being elaborated. In pursuance of the Treaty on the Harmonization of Business Law in Africa, it is also proposed to elaborate and adopt a uniform act dealing with competition law, which would have direct legal effect on the territory of its 16 member States from West and Central Africa.[6] Under the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA), the member States agree, in terms similar to article 85 of the Treaty of Rome, to prohibit RBPs which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, with a proviso for the granting of exemptions by the COMESA Council. The Council is to elaborate regulations on competition within member States. Subsidies distorting competition which affect trade among member States are also prohibited, subject to some exceptions. The Southern African Development Community (SADC) has agreed that member States shall implement measures within the Community that prohibit unfair business practices and promote competition.

18. In the Latin American region, the 1973 Treaty Establishing the Caribbean Community (CARICOM) is relatively cautious in its approach. The member States recognize that certain practices (defined along the lines of articles 85 and 86 of the Treaty of Rome), are incompatible with the Caribbean Common Market insofar as they frustrate the benefits expected from the trade liberalization required by the CARICOM Treaty. If any such practice is referred to the CARICOM Council, it may publish a report on the matter. The Council is to consider whether further provisions dealing with RBPs are necessary; no such provisions have been adopted so far. Member States also undertake to introduce as soon as practicable uniform legislation for controlling RBPs, giving particular attention to practices affecting intra-CARICOM trade. State aid affecting subregional trade is also prohibited (subject to specific exceptions), as are trade-restricting or discriminatory practices by public enterprises. More recently, MERCOSUR has adopted a protocol on competition policy proscribing individual conduct or concerted agreements impeding, restricting or distorting competition or free access to markets or abusing a dominant position in a relevant regional market within MERCOSUR and affecting trade between its member States. The MERCOSUR Technical Committee on Competition Policy and Commerce Commission may issue orders to enforce these norms, which would be implemented by national agencies of the member countries, with limited supranational supervision. Common norms to control anti-competitive acts and agreements are expected to be completed soon, and national competition agencies are to adopt measures to enhance cooperation in such areas as information exchange, training and joint investigations. A dispute-settlement system has been set up. The treatment of anti-dumping within MERCOSUR is to be discussed in 2000. Decision 285 of the Commission of the Cartagena Agreement (established under the Andean Pact) also provides for the prevention of, or remedies against, distortions to competition resulting from RBPs. However, unlike MERCOSUR, Andean Pact institutions have supranational powers; member States or any enterprise with a legitimate interest may request the Board of the Cartagena Agreement for authorization to apply measures to prevent or correct the threat of injury or injury to production or exports, and which are a consequence of RBPs, and the Board's orders have direct effect in member States' legal orders. Anti-dumping action or countervailing duty action among Andean Pact countries is regulated but not precluded.

19. The North American Free Trade Agreement (NAFTA) between Canada, the United States and Mexico provides for each party to adopt or maintain measures to proscribe or take action against RBPs, to consult with the other parties on the effectiveness of such measures, and to cooperate on enforcement issues, including through mutual legal assistance, notification, consultation and the exchange of information on enforcement in the free trade area. However, detailed procedures for cooperation are not set out, and recourse to dispute settlement in competition policy matters is excluded. There are also provisions that state that monopolies or State enterprises should not operate in a manner which is inconsistent with the Agreement, nullifies or impairs its benefits, or discriminates in the sale of goods or services. A working group has been established to report on relevant issues concerning the relationship between competition law and trade polices in the free trade area. Similar provisions are contained in the free trade agreement between Canada and Chile, **with the exception of the establishment of a Working Group; * the agreement also abolishes the application of anti-dumping and countervailing duties between the parties after a transitional period (there are also competition chapters in the Canada-Israel Free Trade Agreement.** The so-called "G3 Agreement" between Mexico, Colombia and Venezuela is more limited applying only to State-owned monopolies; these are to act only on the basis of commercial considerations in operations on their own territories, and may not use their monopoly positions to use RBPs in a non-monopolized market in such a way as to affect enterprises in the other member States. A mechanism for cooperation in competition policy has now been created in the context of discussions on the establishment of a free trade area for the Americas. The communiqué adopted on 20 October 1998 at the first Antitrust Summit of the Americas, which was attended by most of the countries in the region that have competition laws, affirms that participating countries plan to cooperate with one another, in accordance with their respective laws, to improve enforcement, to disseminate best practices in this area (with the emphasis on institutional transparency), to encourage efforts by small economies in the region that do not yet have solid competition regimes to complete the development of their legal frameworks, and to advance competition principles in the Negotiating Group on Competition Policy of the Free Trade Area of the Americas.[7]

20. A similar forum for exchanges of views, technical cooperation and discussion of competition issues has been established under the auspices of the Asia-Pacific Economic Cooperation Forum (APEC), whose members have undertaken in **the APEC Principles to Enhance Competition Policy and Regulatory Reform (which is** a legally non-binding instrument) to introduce or maintain effective, adequate and transparent competition policies or laws and enforcement, to promote competition among APEC economies, and to take action in the area of deregulation. Such low-intensity cooperation contrasts with that between Australia and New Zealand, which no longer apply their anti-dumping laws to conduct affecting trade between them and instead apply their competition laws relating to predatory conduct by dominant firms (which have been harmonized). For the purpose of enforcing this, each country's competition authority and courts have "overlapping jurisdiction" - complaints may be filed before them, hearings held, and valid and enforceable subpoenas and remedial orders issued in the other country. Separately, a bilateral enforcement agreement provides for extensive investigatory assistance, the exchange of information (subject to rules on confidentiality), and coordinated enforcement.

G. Multilateral and plurilateral instruments

21. The sole universally applicable multilateral instrument in this area is the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, negotiated under the auspices of UNCTAD. The numerous instruments formulated by the Organisation for Economic Co-operation and Development (OECD) that cover competition law and policy (listed in annex 3) apply only to a restricted group of countries, although the recommendation concerning effective action against hard-core cartels states that it is open to non-OECD member countries to associate themselves with this recommendation and to implement it (and several such countries have indicated interest in associating themselves[8]; **and the recent Guidelines for Multinational Enterprises have been adopted not only by the Member countries of the OECD but also by some Latin American countries and the Slovak Republic**. The Set of Principles and Rules and the OECD instruments contain many of the types of provisions adopted in bilateral enforcement cooperation agreements and in free trade, customs union or common market agreements, but with variations, omissions or additional provisions, particularly in the case of the Set. The Set of Principles and Rules, like the OECD instruments, is concerned with the adverse impact of RBPs on international trade, but is, in addition, concerned with their impact on development. A unique feature of both the Set and the * 1978 **and 2000** OECD instruments is that they recommend not only norms to be followed by Governments, but also rules for the conduct of enterprises, with a particular focus on transnational corporations *. Both also provide for the adoption or maintenance and effective enforcement of competition laws and policies, and recommend competition norms of a general nature to be applied by member States. The Set also provides for work aimed at achieving common approaches in national policies relating to RBPs compatible with the Set (article F.1), and continued work on the elaboration of a model law or laws on RBPs in order to assist developing countries in devising appropriate legislation (article F.2); the OECD instruments do not have such provisions, but the 1998 OECD recommendation recommends convergence in (as well as effective enforcement of) laws prohibiting hard-core cartels. While the Set deals solely with RBP control, the 1986 OECD instrument is also concerned with the interface between competition policy and trade measures; it recommends that policy makers should, when considering a prospective trade measure or reviewing existing measures, evaluate their likely effects, including the impact on the structure and functioning of the relevant markets, and it suggests a checklist of the main effects of trade measures, including competition effects. The OECD has also adopted instruments dealing with competition-promoting regulatory reform.

22. The Set of Principles and Rules and the OECD instruments all provide for cooperation on enforcement, the OECD instruments having influenced or been inspired by the bilateral enforcement agreements concluded among OECD countries. The 1995 OECD recommendation (which replaces a long series of instruments recommending progressively closer cooperation) provides for notification, consultations, the exchange of non-confidential and confidential information (subject to safeguards), the coordination of investigations, investigatory assistance, traditional and positive comity, consultations and a conciliation mechanism to resolve disputes. The 1998 recommendation encourages cooperation and comity specifically in respect of enforcement against hard-core cartels, and provides for transparency and periodic reviews relating to exempted cartels. The Set also provides for consultations (envisaged both within and outside UNCTAD) and the exchange of non-confidential and confidential information. In addition, the Set contains the following provisions: States should take due

account of the extent to which the conduct of enterprises is accepted under applicable legislation (article C.6); States, particularly developed countries, should, in controlling RBPs, take into account the development, financial and trade needs of developing countries, particularly the least developed countries (article C.7); and States should seek appropriate measures to control RBPs within their competence when it comes to their attention that RBPs adversely affect international trade, particularly the trade and development of developing countries (article E.4). The Set makes no provision for dispute settlement; the Intergovernmental Group of Experts or its subsidiary organs are proscribed from acting like a tribunal or otherwise passing judgement on the activities or conduct of individual Governments or enterprises in connection with specific business transactions (article G.4). An important component of the Set not present in the OECD instruments is the provision of technical assistance to developing countries, both by countries with greater expertise in this area and by UNCTAD.

23. Unlike the Set and the above-mentioned OECD recommendations, the Uruguay Round agreements are legally binding, and are backed by strong dispute-settlement mechanisms. Different provisions with a bearing on competition law and policy are included in, *inter alia*, the articles or agreements dealing with: State enterprises and enterprises with exclusive rights; anti-dumping; subsidies; safeguards; trade-related aspects of intellectual property rights (TRIPs); trade-related aspects of investment measures (TRIMs); and trade in services, particularly telecommunications and financial services. Those provisions of a substantive character are not reviewed here in detail, as they have already been covered in a previous study by the UNCTAD secretariat.[9] Instead, an analysis is undertaken in terms of obligations relating to consultations, the exchange of non-confidential and confidential information, and positive comity. Apart from the general consultation procedures applicable to all WTO-related disputes, special consultation procedures are provided under: (a) the GATT Decision on Arrangements for Consultations on Restrictive Business Practices of 18 November 1960;[10] (b) the TRIPs Agreement, whereby a WTO member considering competition enforcement against a firm of another member can seek consultations with that member, aimed at securing compliance, while a country whose firms are subject to such action may also ask for consultations; and (c) the General Agreement on Trade in Services (GATS), in respect of certain business practices by a monopoly supplier of services and an exclusive supplier. The latter two agreements also provide for the exchange of non-confidential information and, subject to domestic laws and a satisfactory agreement concerning the safeguarding of confidentiality of confidential information. A degree of positive comity is provided for under the 1960 Decision; the party to whom a request for consultations is addressed shall, if it agrees that such harmful effects are present, take such measures as it deems appropriate to eliminate these effects. The label of positive comity might also be attached to the obligation on contracting parties under article XVII of the General Agreement on Tariffs and Trade (GATT) 1947 (now incorporated in GATT 1994) to ensure that State enterprises or private enterprises with exclusive rights act in a non-discriminatory manner in importing or exporting goods, and in particular to the GATS obligations to control certain practices by monopoly suppliers of services and exclusive service suppliers (backed by more detailed obligations in the areas of telecommunications and, to a lesser extent, financial services).

Chapter II

ENFORCEMENT COOPERATION

A. Overview

24. Enforcement cooperation has, in cases with international implications, helped to improve the quality and effectiveness of enforcement, and decrease its cost, helping to resolve difficulties in obtaining access to information held in other countries, in serving process or in undertaking enforcement against entities whose headquarters or assets are located abroad. It has also reduced friction that might arise between countries because of recourse to extraterritorial enforcement of competition laws or of jurisidictional conflicts. However, difficulties are sometimes experienced in implementing such cooperation. It takes place primarily between developed countries in the application of bilateral enforcement agreements, mutual legal assistance treaties (limited to criminal action against cartels), free trade, customs union or common market agreements, and the relevant OECD instruments. There is no evidence that FCN treaties have been utilized as vehicles for cooperation.[11] And, while the maintenance of informal links with other competition authorities has been an important way of keeping informed of developments in competition law and policy in other jurisdictions and in exchanging views, such informal cooperation has been found to be of limited usefulness where an authority requires enforcement assistance in a particular matter, or confidential information.[12] The bilateral cooperation experiences of the European Union and the United States are reviewed below; the impediments to cooperation, as well as factors conducive to cooperation, are identified; and some suggestions are made as to how developing countries might play a more prominent role in enforcement cooperation, using the frameworks provided by regional groupings and by the Set of Principles and Rules.

B. Cooperation between the European Union and the United States

25. The effect of the 1991 Agreement between the European Union and the United States was to stimulate a spirit of cooperation among the competition authorities of both jurisdictions; even though much of the cooperation undertaken in the implementation of the Agreement could have taken place before, it spurred the competition authorities concerned to "seek opportunities for cooperation in a more structured and proactive way".[13] The Agreement has been a vehicle both for exchanging information and views on enforcement policy developments, and for cooperation in individual cases. There is now routine notification of cases which concern the important interests of the other party.[14] Successive notifications may occur in the same case; in a merger case, for example, notification may be undertaken at the outset, again when the decision is taken to initiate proceedings, and again before the final decision is taken, far enough in advance to enable the other party's views to be taken into account. Where both the European Union and United States authorities undertake proceedings in respect of the same transaction, there is coordination of enforcement activities, which may involve the exchange of information and discussions on the following: the timing of their respective procedures; the delimitation of relevant markets (mainly product markets, discussions on geographical markets being limited because each authority is concentrating on effects on its own market); the anti-competitive effects of transactions; remedies that might be envisaged and the avoidance of conflict between them; and the law of, and publicly available facts in, the other jurisdiction. In one recent case, there has been successful synchronization of investigations and searches, thus avoiding the risk

of destruction of evidence in the other jurisdiction.[15] Even where these authorities take different views on certain points, such contacts have enabled them to understand each other's thinking and refine their analyses accordingly. However, in merger cases, differing deadlines for review have limited the scope for cooperation, although useful results have still been obtained.

26. The main obstacle to coordinated enforcement has been that it can often only be based on exchanges of non-confidential information **(however, a distinction is made between confidential agency information, which may be shared relatively more easily, and confidential business information, which is prohibited by law from being shared** unless the enterprises concerned have waived their objections to the exchange of confidential information ***).** Such waivers have been granted only where it is in the interests of the enterprises to do so, and enterprises are often reluctant to allow information to be shared if it might disclose RBPs and expose them to sanctions in both jurisdictions. No waivers have so far been provided in cartel investigations. Where enterprises have been prepared to waive their objections to the exchange of confidential information, this has facilitated a successful outcome. In the Microsoft case, for instance, such a waiver enabled the European Union and United States authorities to coordinate their investigations in respect of similar practices by a dominant computer software firm in both jurisdictions, and this contributed to similar settlements being reached, despite substantive differences in competition laws.[16] However, even the exchange of non-confidential information has helped to draw attention to possible anti-competitive behaviour, improved the handling of cases and contributed to similarity in the analyses undertaken by the different authorities and the compatibility of remedies.

27. Such cooperation has not always made it possible to avoid conflicting views or to reach commonly accepted solutions, because of differences in laws, in economic doctrines, in the effects on each market, or in the evidence available in each jurisdiction. In the Upjohn/Pharmacia merger, for instance, the European Commission cleared a merger, but the United States Federal Trade Commission required the divestiture of some United States assets; similarly, the Ciba-Geigy/Sandoz merger was cleared by the European Commission, but the Federal Trade Commission, considering that the "innovation market" would be adversely affected, ordered the licensing of gene therapy rights and other technology (the concept of an "innovation market" is not used in the European Union, and there are differences in the scope of intellectual property rights in each jurisdiction).[17] On the other hand, in the Boeing/MDD case, involving the merger of two United States aircraft manufacturing companies, the Federal Trade Commission cleared the merger, but the European Commission intervened because it considered that the merger would give the companies concerned a strengthened position of dominance in the market for large aircraft. However, in this situation, traditional comity came into play to some extent; the European Commission took into account, to the extent consistent with European Union law, concerns expressed by the United States Government relating to important United States defence interests and to the undesirability of divestiture, limited the scope of its action to the civil side of the companies' operations, and approved the merger subject to a number of conditions, which did not include divestiture. As regards positive comity, it has normally been possible to take into account concerns expressed in an informal manner, with one party simply deferring its investigations while awaiting the outcome of investigations in the other jurisdiction, being kept informed of progress and being provided with the opportunity to comment on the proposed remedy. This happened, for example, in the A.C. Nielsen case (involving abuses of dominance in the contracting practices by a United States firm providing

retail tracking services, which may have been adversely affecting exports to Europe by its competitors based in the United States).[18] Positive comity procedures have so far only been formally activated once; the United States Department of Justice has asked the European Commission to investigate allegations that a computerized reservation system set up by three European airlines was operated in an anti-competitive manner to prevent computerized reservation systems based in the United States from competing in European markets; the case is under investigation by the European Commission in cooperation with the Department of Justice. Dissatisfaction has been expressed by some members of the United States Congress with the operation of positive comity, because it is considered not to have led to improved market access for United States exports so far; United States business people have also alleged that there have been delays in investigations by the European Commission, that there are insufficient powers to compel the discovery of documents, and that evidentiary standards are too high. However, the Department of Justice has expressed confidence in the quality of European Union enforcement, and has stated that positive comity will need time to work, even if it may not have immediate success, and is better than the alternative.[19] The Federal Trade Commission has also stated that disagreements are the exception rather than the rule, and that there is a "slow but steady convergence of review and mutual respect" between the United States and European Union.[20]

C. Impediments and factors conducive to cooperation

28. As appears from the above, cooperation is facilitated by a degree of commonality of approach; differences in substantive competition laws or doctrines, enforcement practices or procedures, or interpretations of the underlying facts may all constitute impediments. Differences in legal doctrines relating to extraterritoriality may also adversely affect cooperation; while the strengthening of cooperation between the European Union and the United States may have been facilitated by the assertion by the European Union of jurisdiction based on "objective" territoriality[21] (which has some similarities with extraterritorial jurisdiction based upon the "effects doctrine" asserted by the United States), substantial differences still persist,[22] and the view has been expressed that the fundamental objection of the United Kingdom Government, and many others, to the extraterritorial enforcement of United States antitrust law has significantly limited the cooperation possible.[23] Cooperation may also be limited by concerns about having enforcement priorities and resource allocation determined by positive comity requests from other countries, or **about** exposing national firms to sanctions by a foreign authority **or court (including, where applicable, orders of United States courts for payment of treble damages in private suits following on from action by enforcement agencies).[24] *** Reciprocity would also be a concern. As noted in chapter I, it is a requirement, for instance, under the provisions of the United States International Antitrust Enforcement Assistance Act of 1994. **Under the Canadian Competition Act, the Competition Bureau has the authority to communicate confidential information to a foreign competition authority where doing so would advance the Canadian case (which would include a joint Canadian/foreign case). Most often, this would occur where the foreign authority would be able to provide the Bureau with information or other assistance in return. The Bureau does not have the authority to communicate confidential information solely to advance a foreign case of a civil nature. It does have such authority in criminal antitrust cases falling under a Mutual Legal Assistance Treaty (however, such treaties do not cover conduct which would not be treated as criminal under Canadian law).** The German *** Monopolies Commission (which is an independent body with advisory status) has proposed** that reciprocity and the

"earmarking" of confidential information, as well as the justified interests of the companies concerned, should be taken into account in concluding cooperation agreements and that such agreements might initially be limited to those countries that have secrecy regulations themselves, guarantee the implementation of those regulations and choose to cooperate.[25] Cooperation may also be hampered by perceptions of national industrial or trade policies influencing competition decisions, or inspiring leakage of confidential information - a senior official of the European Union has suggested that a lesson from the Boeing case is that successful cooperation depends on rigorous economic analysis based on strictly legal rules, and that issues of trade policy should not be allowed to become entwined with competition issues when scrutinizing transactions,[26] while a senior official from the Department of Justice, discussing enforcement against international cartels, has stated that the greatest impediment to cooperation is the fear, or the suspicion, that evidence will be used for trade purposes.[27] While the trend towards greater convergence in this area[28] may help to reduce such considerations and concerns, they will not disappear, since what may maximize welfare in one country may reduce it in another.

29. Competition law and policy have also been linked more directly to trade issues. A version of positive comity (in terms of competition advocacy rather than enforcement) has operated with some success on an informal level between the United States and other countries. First within the context of the Structural Impediments Initiative in 1989, and then through the Deregulation and Competition Policy Working Group set up under the Framework for a New Economic Partnership in 1993, the United States has strongly encouraged a more stringent competition policy in Japan, especially in instances where it perceived anti-competitive activity as impeding competition from foreign products.[29] Similar initiatives have been taken through the Competition Policy Working Group set up within the context of the Dialogue for Economic Cooperation between the United States and the Republic of Korea. As a result, the Republic of Korea decided to strengthen its competition law and enforcement, apply competition principles in deregulation, improve access to television and radio advertising slots, address RBPs by industry associations and revise regulations and guidelines that might impede pro-competitive activities.[30] In a recent case, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes was invoked by the United States in relation to alleged Japanese measures affecting the distribution and sale of imported consumer photographic film and paper (contrary to GATT 1994), as well as a number of measures allegedly affecting distribution services in general (contrary to GATS); consultations were also requested by both the United States and Japan, in pursuance of the 1960 GATT Decision, in respect of alleged RBPs affecting imports of photographic film and paper into each other's markets (the European Union also asked to join in these consultations). The procedures under GATS and the 1960 Decision were suspended, while the complaint under GATT 1994 was rejected by the Dispute Settlement Panel.[31]

30. It is therefore likely that countries will be prepared to cooperate voluntarily only if there is a shared perception of common interest and mutual benefit. This may be one reason why enforcement cooperation agreements leave such a large measure of discretion to the parties as to whether or not to cooperate in individual cases. It may also help to explain why some free trade agreements exclude competition law and policy issues from the purview of dispute settlement, and why the conciliation machinery provided for in successive OECD recommendations on this subject has not so far been resorted to (although, in 1987, the OECD Committee of Experts on Restrictive Business Practices took the view that this was mainly because the notification,

exchange of information and consultation procedures provided for had been effective in avoiding or resolving conflicts).[32] The difficulty of enforcing these agreements may in fact facilitate their conclusion, and the potential impediments to cooperation identified above would be weighed against the benefits from the conclusion or further development of enforcement cooperation agreements. Thus, a senior official of the European Commission has called for the conclusion of "second-generation" cooperation agreements making it possible to share confidential information and use compulsory process on behalf of other countries; this official does not accept that concerns relating to differences between competition rules and to risks that confidential information might be used in a way which harms European interests should prevent this, as the experiences of existing cooperation between the European Union and the United States show that the views of the parties are more often likely to coincide than to differ, as differences between rules are less important in the case of the most serious infringements (particularly in the case of hard-core cartels and the most serious abuses of dominance) and as discrepancies between rules in other areas have not precluded effective cooperation.[33] The same official has expressed the view that a key ingredient in successful enforcement cooperation is mutual confidence in enforcement capabilities and in respect for confidentiality, arising from a shared commitment to upholding the competitive process.[34] Building up such mutual confidence requires a progressive approach. It has been suggested that after starting with a simple cooperation agreement, countries could evolve to more complex agreements involving the exchange of confidential information as confidence and a tradition of cooperation is built up, increasing the level of both obligation and mutual benefit, and that the extent and intensity of cooperation would depend on institutional capabilities, the actual experience of cooperation and the degree of trust built up over time.[35] Even agreements which might not be regarded as optimal by all parties may pave the way for further agreements. For instance, before the 1997 Agreement between the United States and Australia was concluded, the view was expressed that the 1982 Agreement between the two countries was one-sided, but that the experience of its implementation had provided a more conducive environment for expanding cooperation.[36] For the purpose of strengthening enforcement cooperation, it has been suggested that developing common standards is important, and that a balance between transparency and the protection of confidential information should be found, as an international consensus on the latter would facilitate the conclusion of agreements featuring close cooperation between enforcement authorities.[37] **But it has also been suggested that a broader limitation to bilateral cooperation is that it tends to take place among countries which are economically interdependent and share a similar level of experience in competition law enforcement, or the same ideas on competition policy.[38]**

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

31. Developing countries have not so far * participated **to any great extent** in **intensive case-specific** enforcement cooperation. In the *French/West African Shipowners' Committees*[39] case, for instance, the European Commission brought a case against cartels or exclusionary abuses by liner conferences or shipowners' committees with dominant positions in the maritime traffic between Europe and 11 West and Central African States. In its decision, which had pro-competitive effects in the countries concerned,[40] the Commission indicated that it was ready to enter into talks with the authorities of these countries with a view to helping their carriers secure a greater share of the traffic generated by their external trade. However, it appears that,

prior to taking its decision, the Commission had not consulted with the African countries concerned, most of which did not have functioning competition laws or institutions at that time, and whose shipping authorities had in fact authorized cargo reservations by the shipping companies concerned. The circumstances were similar in the *CEWAL Liner Conference* case, involving traffic to Angola and the Congo.[41] Enforcement cooperation between the European Union and the countries concerned might not only have led to traditional comity coming into play, but might also have facilitated data-gathering by the Commission (it took five years for the Commission to take a decision in the *Shipowners* case). **However, developing countries' competition authorities now sometimes participate in exchanges of general information, and some case-specific technical assistance has occasionally been provided; for example, the Kenyan Monopolies and Prices Commission provided consultancy services to the Zambian Competition Commission in respect of a beer sector case in Zambia.**[42] To the extent that enforcement cooperation is not strengthened, there is also a higher risk that, as developing countries become more active in this area, firms will have to deal with the procedures and possibly inconsistent orders of several jurisdictions - as happened in the *Gillette/Wilkinson* case (where a proposed merger was examined in 14 jurisdictions, including Brazil and South Africa).[43] Conversely, assistance with information-gathering and enforcement in relation to RBPs originating overseas and affecting their markets would be a major potential benefit for developing countries entering into enforcement cooperation agreements - for example, in two cases in the United States where international cartels for lysine (an ingredient in animal feed) and citric acid were successfully prosecuted, the Department of Justice discovered evidence of price-fixing and market allocation relevant to other countries, but could not share such evidence with those countries which were not party to antitrust cooperation agreements with the United States.[44]

32. The time is now ripe for change. The majority of developing countries have adopted or are in the process of drafting competition laws, and this trend is continuing. Fully effective implementation of all such competition laws will take time, depending on a gradual learning process, but progress is being made. The initiation and progressive practice of enforcement cooperation would both enhance effective implementation of competition laws and prepare the ground for more advanced cooperation. Enforcement cooperation among developing countries with limited experience in this area, but facing similar circumstances, may be of a more balanced character than cooperation with countries with more experience in this area, and would also constitute a learning experience, ensuring that cooperation with more advanced partners is fruitful.

33. While the eventual conclusion of bilateral enforcement cooperation agreements would be necessary for full cooperation to take place, enforcement cooperation might initially take place on an informal basis. This would be facilitated by the initiation of informal discussions and exchanges of general information, including within the framework of any free trade, customs union or common market agreements to which the countries concerned are party. Within regional or subregional groupings, political will or relative uniformity of economic development and culture may make it easier to build up mutual trust and perception of common interests (which may be looked at within the context of the overall relationship rather than just in terms of competition law and policy).

34. There is little evidence that developing countries party to such agreements have so far taken advantage of them either to undertake enforcement cooperation or to prepare the ground for it. Direct use of free trade or common market agreements for enforcement cooperation appears so far to have taken place only within the European Union or the EEA, but they have in other cases provided a framework conducive to bilateral cooperation. Within NAFTA, for example, the Working Group on Competition **and Trade** has so far focused on studying members' competition laws, as well as transborder cases. **It has now essentially completed its work, but competition and trade officials still meet to continue, among other objectives, to explore the possibility of formal cooperation arrangements.** The Mexican competition authority has also had extensive bilateral consultations with the Canadian and United States authorities on technical aspects of applying competition law and on specific cases, including cases involving RBPs with a transborder dimension (cases with implications for other member countries are notified).[45] Even within regional groupings, however, enforcement cooperation may be limited by some of the concerns and differences highlighted above, by the fact that regional institutions or mechanisms are not adapted for enforcement cooperation, or simply because trade is limited between some countries in the grouping or RBPs affecting such trade are rare. It is therefore likely that, at least initially, cooperation will develop in an asymmetrical manner among different member countries within regional groupings. Within MERCOSUR, for instance, **it has been suggested that** there may be little incentive to open and conduct investigations when trade interests are involved, given the relative institutional weights of the regional Committee for the Defence of Competition and the Commerce Commission; it has also been suggested that problems may arise from ambiguities in the definitions of RBPs and in institutional mandates, as well as from asymmetries among member States in terms of the adoption and implementation of competition laws.[46] While several agreements between competition authorities of MERCOSUR member States have been concluded, providing for procedures for reciprocal consultations and technical assistance, linkages have so far been generated mainly between the Argentine and Brazilian authorities, helping to unify criteria applied by the two authorities.[47] Within the Andean Pact, it has been suggested that the requirements for proving RBPs within the definitions provided in Decision 285, as well as the lack of enforcement power of the Andean Board, explain why Andean Pact competition legislation and case law have not developed as fast as that of member countries.[48] **Consideration is now being given to the amendment of Decision 285.**

35. To realize the potential of regional groupings in this respect, therefore, some reflection would be appropriate as to which substantive competition regimes, institutional structures and mechanisms would promote cooperation. For this purpose, consultations might be undertaken within UNCTAD on how to maximize utilization of regional frameworks for enforcement cooperation. This would be in line with the Set of Principles and Rules, which provides for the establishment of appropriate mechanisms at the regional and subregional levels to promote the exchange of information on RBPs and on the application of national laws and policies in this area, and to provide mutual assistance in RBP control (article E.7). The framework established under the Set might also be used more directly to further enforcement cooperation. So far, the consultation mechanisms provided for in the Set have mostly been used, with success, for presentations, the exchange of experiences and discussions on different competition issues. In one case in the mid-1980s, a developing country, using the UNCTAD secretariat as an intermediary, requested consultations with a developed country regarding the prohibition by one of its pharmaceutical firms of exports from a neighbouring developing country of

pharmaceuticals manufactured under a licence granted by the firm. The matter was referred by the authorities of the developed country to the firm in question, and its reply explaining the circumstances of the prohibition was transmitted to the developing country (the matter was brought to the attention of the Intergovernmental Group of Experts on Restrictive Business Practices during informal consultations). It might be worth exploring the potential for further case-specific consultations of this type, which might be stimulated by a practice of notification of enforcement activities affecting the important interests of other States party to the Set **to the States concerned**. The aim would be to reinforce or promote cooperation under bilateral or regional agreements, rather than to replace such cooperation, since enforcement cooperation under non-binding OECD instruments tends to be less intensive and case-oriented if not backed up by a binding bilateral agreement.[49]

36. Such case-specific enforcement cooperation would not be at the expense of other forms of cooperation, but would rather aim to link with and build on them in a synergistic manner. There are extensive contacts among competition authorities for the purpose of exchanging general information, experiences or ideas; such contacts take place either on an informal basis or in pursuance of bilateral or regional agreements, as well as under the Set of Principles and Rules and under OECD instruments.[50] Substantial technical assistance also takes place, in the form of: seminars and training courses; visits to, or training attachments with, competition authorities in developed countries; short-term missions to countries needing cooperation, including analyses of their situation and needs, workshops, group training, assistance on particular issues or in the drafting of legislation; and long-term secondments of personnel from authorities with experience in this area for the purposes of training and giving advice to the authorities of countries with limited experience. The European Commission, for example, has arranged study visits and responded to numerous requests for information from several competition authorities, and has assisted in the preparation of a compendium of Latin American competition laws, a list of national authorities, the joint publication of a Latin American competition bulletin (posted on the Internet), a list of the technical cooperation needs of many Latin American countries and subregional organizations, and a proposed biennial programme of technical assistance for MERCOSUR that includes a section on competition.[51] To the extent that the communication of experiences or provision of technical assistance by one or more countries induces other countries to adopt or amend competition legislation or modify enforcement policies or procedures along similar lines, this promotes "soft" convergence (in contrast to the varying degrees of convergence or harmonization provided for in this area by free trade, customs union or common market agreements). It has been suggested that "one advantage of convergence by learning and imitation is its flexibility; if a particular approach does not work out in the circumstances of a country's economic system, it can be modified or even abandoned".[52]

37. Yet, as indicated above, some degree of commonality is necessary in this area for enforcement cooperation to be successful, and there is a risk in particular of some lack of coherence among national competition regimes, and between national and different levels of regional competition regimes. A study on CEMAC, for instance, highlights such impediments to the implementation of a regional competition policy as the inadequate implementation of competition laws at the national level (in those member countries which have such laws), and the lack of compatibility between the objectives of these laws and the proposed regional regulation on competition policy.[53] It therefore suggests the establishment within the CEMAC secretariat of a special consultation mechanism to manage the transition to the entry into force of the

regulation, to be eventually replaced by a regional competition board, which would focus on investigating and analysing those RBPs which hamper the development of trade within the subregion (in the transport sector for instance). It also recommends that efforts should be made to ensure compatibility between the proposed CEMAC regulations and national sectoral policies (including structural adjustment policies agreed upon with international financial institutions), the uniform act to be adopted under the Treaty on the Harmonization of Business Law in Africa (some of the member States of the Organization for the Harmonization of Business Law in Africa are signatories of CEMAC), and the provisions of the treaty to replace the Lomé Convention. Regarding these recommendations, it might be noted that any provisions relating to competition policy within African or Caribbean subregional groupings, or in a post-Lomé treaty, would presumably (as in the Euro-Mediterranean agreements) apply only to practices affecting trade within or between regions, and not to practices having effects solely within national borders. Within the European Union itself, some countries have maintained national competition regimes significantly different from that of the European Union (Italy, for instance, did not even have a competition law until 1990), although the trend is towards convergence. Nevertheless, as indicated in chapter I, there is no hard and fast line between practices affecting individual countries and those affecting a region, and it may not be easy for ACP countries which have little experience in this area to maintain separate regimes for national, subregional and interregional transactions. Nor might this be conducive to trade or direct foreign investment. Thus, it may be appropriate to undertake consultations within UNCTAD on how to ensure compatibility, coexistence and mutual reinforcement among national, subregional and interregional competition regimes. This would involve discussing how much convergence * **among substantive, procedural and enforcement policy aspects of** competition laws and policies is necessary to further enforcement cooperation, and what the appropriate balance would be between promoting such convergence and allowing room for diversity and experimentation by each country or subregional grouping to work out what is appropriate for its needs. It may be noted in this connection that the competition authorities of Gabon, which is a signatory to the CEMAC treaty, have suggested that UNCTAD might help to ensure the conformity of the practices of regional and subregional States with competition principles. Such consultations could provide a useful input to the ongoing discussions or possible future negotiations within WTO on the interaction between trade and competition policy. **It may also be noted that a high-level advisory body has recommended that the United States explore the scope for collaboration among interested Governments and international organizations to create a new forum (called the "Global Competition Initiative") for fostering dialogue directed towards greater convergence of competition law and analysis, common understandings and common culture.**[54]

Notes

[1] See paragraph 5 (c) of the agreed conclusions in annex I of the Report of the Expert Meeting on Competition Law and Policy (TD/B/COM.2/9-TD/B/COM.2/EM/12).

[2] See paragraph 7 (a) of the Agreed Conclusions in annex I of the Report of the Intergovernmental Group of Experts on Competition Law and Policy (TD/B/COM.2/13-TD/B/COM.2/CLP/5).

[3] **Written comments on the question of international cooperation on competition law and policy have been received from the Governments of Brazil, Canada, Finland, Hungary, Japan, Kenya, Malta, New Zealand, Peru, Poland, Romania, the Slovak Republic, Slovenia, the United Republic of Tanzania and the United States, as well as from the secretariat of the Andean Community.**

[4] **See International Competition Policy Advisory Committee to the Attorney-General and Assistant Attorney-General for Antitrust, "Final Report", United States Department of Justice, 2000.**

[5] This categorization follows to some extent that adopted in World Trade Organization, *Annual Report 1997*, vol. 1, *Special Topic: Trade and Competition Policy*.

[6] See Price Waterhouse Fidafrica, *Le nouveau droit des affaires en Afrique - OHADA*, Paris, 1997.

[7] See "FTC and DOJ publish communiqué from first "Antitrust summit of the Americas", *Antitrust & Trade Regulation Report*, 8 October 1998, vol. 75, p. 416.

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

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

[10] Now incorporated in GATT 1994.

[11] See OECD, "History and potential benefits of positive comity" (DAFFE/CLP/WP3(98)3).

[12] See H. Spier and T. Grimwalde, "International engagement in competition law enforcement: the future for Australia", *Trade Practices Law Journal* 5 (1997), p. 232.

[13] See WTO Working Group on the Interaction between Trade and Competition Policy, "Submission from the United States" (WT/WGTCP/W/48).

[14] See Commission of the European Communities, "Commission report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws - 1 January 1997 to 31 December 1997", Brussels, 11 May 1998.

[15] Ibid.

[16] Reported in UNCTAD, "Restrictive business practices that have an effect in more than one country, in particular developing and other countries, with overall conclusions regarding the issues raised by these cases" (TD/RBP/CONF.4/6).

[17] See WT/WGTCP/W/48, op. cit.

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

[19] See "Klein, Pitofsky, business leaders brief senators on pitfalls of foreign enforcement", *Antitrust & Trade Regulation Report* 75, 8 October 1998, p. 417.

[20] See "FTC Chairman discusses competition policy trends in international antitrust enforcement", *Antitrust & Trade Regulation Report* 75, 12 November 1998, p. 555.

[21] See *Ahlstrom et al. v. European Commission* (1988) ECR 5193 (1988) 4 C.M.L.R. 901, and WT/WGTCP/W/48, op. cit.

[22] See TD/B/COM.2/EM/2, op. cit.

[23] See M. Bloom, "International cooperation between competition authorities", speech to the Law Society's Solicitors' European Group Annual Conference, Bristol, 13 June 1997, p. 5, cited in OECD, op. cit.

[24] **See OECD, "Trade and Competition Policies - Exploring the Ways Forward", p. 19.**

[25] See German Monopolies Commission, *The Twelfth Biennial Report 1996/1997: Opening up Markets Extensively*, Nomos Verlagsgesellschaft, Baden-Baden, 1998.

[26] Ibid.

[27] See "A note of caution with respect to a WTO agenda on competition policy", address by Joel L. Klein, Acting Assistant Attorney-General, United States Department of Justice, to the Royal Institute of International Affairs, London, 18 November 1996.

[28] See UNCTAD, "The basic objectives and main provisions of competition laws and policies" (UNCTAD/ITD/15) and TD/B/COM.2/EM/2, op. cit.

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

[30] Ibid.

[31] "Japan - Measures affecting Consumer Photographic Film and Paper" (WT/DS44/R, 31 March 1998).

[32] See OECD, *Competition Policy and International Trade: Instruments of Cooperation*, Paris, 1987.

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

[34] See Schaub, op. cit.

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

[36] See Spier and Grimwalde, op. cit.

[37] See the statement by the representative of Brazil in paragraph 55 of WT/WGTCP/M/74, op. cit.

[38] **See WTO, "Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council" (WT/WGTCP/3), para. 44.**

[39] Reported in TD/RBP/CONF.4/6, op. cit.

[40] See Y. Kenfack, "La politique de la concurrence dans les transports maritimes internationaux: enjeux pour les pays en développement", study prepared for the UNCTAD secretariat.

[41] See TD/RBP/CONF.4/6, op. cit.

[42] **Information provided by the Kenyan competition authority.**

[43] Ibid.

[44] See "A note of caution with respect to a WTO agenda on competition policy", address by Joel L. Klein, Acting Assistant Attorney-General, United States Department of Justice, to the Royal Institute of International Affairs, Chatham House, London, 18 November 1996.

[45] Communication by the Mexican authorities to the Secretary-General of UNCTAD. See also WTO Working Group on the Interaction between Trade and Competition Policy, "Report of the meeting of 27 and 28 November 1997" (WT/WGTCP/M/3, statement of the representative of Mexico in paragraph 65).

[46] See G. Castañeda, "Mexico: competition policy and economic integration in NAFTA and MERCOSUR", *International Business Lawyer* 26 (1998), p. 496**; and J. Tavares de Araujo and L. Tineo, "Harmonization of competition policies among MERCOSUR countries", *The Antitrust Bulletin* XLIII (1998), p. 45**.

[47] See the statement by the representative of Argentina in paragraph 53 of WT/WGTCP/M/4, op. cit.

[48] See B. Ciuffetelli, "Role of antitrust law in Latin American integration", *International Business Lawyer* 26 (1998), p. 522.

[49] See Schaub, op. cit.

[50] For information on the intensive exchanges taking place within the OECD, see WTO Working Group on the Interaction between Trade and Competition Policy, "Communication from OECD" (WT/WGTCP/W/21).

[51] See European Commission, *XXVIIth Report on Competition Policy 1997*, Brussels-Luxembourg, 1998.

[52] WTO Working Group on the Interaction between Trade and Competition Policy, "Report on the meeting of 11-13 March 1998" (WT/WGTCP/M/4), paragraph 52.

[53] See Y. Kenfack, "Réglementation communautaire de la concurrence et renforcement du processus d'intégration économique en Afrique Centrale", study prepared for the UNCTAD secretariat.

[54] **See International Competition Policy Advisory Committee, op. cit.**

ANNEX 1

BILATERAL AGREEMENTS ON COMPETITION LAW ENFORCEMENT

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

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

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

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

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

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

Agreement between the United States of America and Australia on Mutual Antitrust Enforcement (1997).

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

Canada-European Communities Agreement Regarding the Application of their Competition Laws (29 April 1999).

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

Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil regarding Cooperation between their Competition Authorities in the Enforcement of their Competition Laws.

ANNEX 2

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

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

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

Convention establishing the European Free Trade Association (Stockholm, 4 January 1960).

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

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

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

Treaty Establishing the Caribbean Community (Chaguaramas, 4 July 1973; entry into force, 1 August 1973).

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

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

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

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

Central European Free Trade Agreement (entry into force, 1 March 1993).

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

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

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

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

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

Europe agreements between the European Communities and their member States, of the one part, and, respectively: the Republics of Hungary and Poland, of the other part (Brussels, 16 December 1991; entry into force, 1 February 1994); the Republics of Bulgaria and Romania (entry into force, 1 February 1995); the Republics of Estonia, Latvia and Lithuania (12 June 1995); and Slovakia and Slovenia (15 June 1995).

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

Agreements on free trade and trade-related matters between the European Community, the European Coal and Steel Community, and the European Atomic Energy Community, of the one part, and, respectively: the Republics of Estonia, Latvia and Lithuania (12 June 1995); and the Republics of Slovakia and Slovenia (15 June 1995).

Agreements on partnership and cooperation between the European Community, the European Coal and Steel Community and the European Atomic Energy Committee, of the one part, and, respectively: Ukraine (14 June 1994); the Russian Federation (24 June 1994); the Republic of Kazakhstan (23 January 1995); the Kyrgyz Republic (9 February 1995); the Republic of Moldova (28 November 1994); and the Republic of Belarus (6 March 1995).

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

Euro-Mediterranean agreements establishing an association between the European Communities and their member States, of the one part, and, respectively: the State of Israel, of the other part (Brussels, 22 November 1995); the Kingdom of Morocco (30 January 1996); the Republic of Tunisia (17 July 1996); the Palestinian Authority (2 June 1997); and Jordan (24 November 1997).

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

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

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

ANNEX 3

MULTILATERAL AND PLURILATERAL INSTRUMENTS DEALING WITH COMPETITION LAW AND POLICY

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

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

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

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

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

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

Recommendation of the OECD Council concerning effective action against hard-core cartels.

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

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