



INTER-AMERICAN DEVELOPMENT BANK



LATIN AMERICAN COMPETITION FORUM
10-11 September 2008, Panama City

-- Session I: Competition Provisions in Regional Trade Agreements --

Incorporating Competition Principles into Regional Trade Agreements: Options for Policymakers

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Executive Summary

1. Drawing upon the latest research concerning the different ways in which competition-related matters have been incorporated into regional trade agreements, this paper identifies a set of policy options that decision-makers may wish to consider in this regard. This set is richer than many may be aware of and reflects considerable creativity on the part of negotiators. The notion can be set aside that competition principles are entirely subverted to the imperative to liberalise trade, as some in the competition law community fear. Instead, competition principles are being used in numerous chapters of regional trade agreements to improve the economic governance of markets at home and abroad.

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1. Introduction

2. Whether through cross-border consolidation, "greenfield" foreign direct investment, licensing, or trade, the international integration of markets for goods and services continues apace. Along with this integration have been developments in national and international economic governance, two significant elements of which are the enactment for the first time of competition laws in many jurisdictions and their progressive strengthening in others; and the proliferation of regional trade agreements (RTAs), with dozens coming into force since the turn of the decade. Moreover, RTAs have grown in scope and are now vehicles for advancing state-to-state co-operation and shared values (such as the promotion of competition) across a wide range of commercial, scientific, and social matters of mutual interest, thus having moved well beyond the original goal of such RTAs, namely the mercantilistic exchange of access to the signatories' markets. Indeed, such is the expansion in scope of RTAs that referring to them as "trade agreements" risks being more and more misleading over time. However labels matter to some, especially to those who fear that the imperatives of trade negotiations might colour the manner in which cooperation between state bodies is codified in RTAs.

3. The purpose of this paper is, on the basis of recent, detailed extensive research into the various ways in which competition-related matters and principles have been incorporated into regional trade agreements, to identify and describe a set of policy options available to decision-makers as they contemplate their priorities for future international initiatives on competition law and policy. At this time these policy options may be of particular interest to countries in Latin America and the Caribbean. A number of Central and Southern American countries are engaged in, or are about to start, RTA negotiations with the European Commission, representing as it does in many policy areas the member states of the European Union. The question arises as to whether these RTA negotiations can be used to advance the specific interests of countries in the region. In contrast, many of the Caribbean nations have initialled and are considering ratification of an Economic Partnership Agreement with the EC. That agreement included specific provisions on competition law and policy and no doubt some will want to make an assessment of the final agreed text, especially in the light of the considerable controversy surrounding the negotiation of this accord.² (Of course, these are not the only RTA negotiations that the countries in Latin America and the Caribbean are engaged in and similar comments could apply to other initiatives.)

4. It is also important to state what this paper is not about. On the basis of the available evidence it is simply too early to come to a definitive judgment as to the efficacy of the different types of competition-related provision found in RTAs. As the next section makes clear, to the best of my knowledge there is only one econometric study of the impact of such provisions (Anderson and Evenett 2006). The absence of a body of quantitative findings on these matters must surely qualify any qualitative assessment of the merits of competition provisions in RTAs and it is for this reason that the emphasis here is on the options available to policymakers, rather than on recommendations. Moreover, there is simply not enough known about the relative merits of measures to promote competition law and principles in trade agreements and in other international accords, such as bilateral agreements between competition agencies, for a definitive view to be advanced here--or, in the author's opinion, anywhere else. Readers may wish to bear these points in mind.

5. The remainder of this paper is organised as follows. In the next section the main findings of recent analyses of the competition-related provisions in RTAs are summarised. This summary is useful as a number of initial conceptions about RTAs have been subsequently amplified and, in some cases, clarified. This account provides the basis for the description, in section three, of the various options for policymakers that are interested in including competition principles and measures into regional trade agreements.

2 Dawar and Evenett (2008) is such an assessment.

As indicated earlier, this set of policy options is considerably richer than some might appreciate. Some concluding remarks are offered in section four of this paper.

2. Summary of recent analyses of competition-related provisions in RTAs.

6. Unlike the investment and certain other provisions of RTAs, only in recent years have analysts begun to document and assess the different competition-related provisions found in RTAs.³ Silva (2004) provided an early discussion of these provisions; the contributions to Brusick, Alvarez, and Cernat (2005) are another source of information, especially on the experience with respect to certain RTAs. During 2004 and 2005 this author commissioned a number of studies of the competition provisions of specific RTAs (namely, MERCOSUR, ANZCERTA, Canada-Chile, Canada-Costa Rica, EU-Mexico, and EU-South Africa) as part of a larger project titled "Competition Policy Foundations for Trade Reform, Regulatory Reform and Sustainable Development."⁴ Before these analyses and their successors⁵ there was little information concerning the extent to which trade agreements had furthered, or even conflicted with, the proper enforcement of competition law and the advancement of sound competition principles.⁶

7. The first significant comparative analysis of competition-related provisions of RTAs was undertaken by two OECD staff members, Solano and Sennekamp (2006). These authors sought, amongst other goals, to "create a taxonomy to collect and classify existing agreements and the type of competition provision they contain" (page 5). To do so they carefully examined the competition law chapters of 86 RTAs, 59 percent of which had only developing country signatories and a further 27 percent of which involved at least one developing country signatory and one industrialised country signatory. Without in any way implying that each RTA included every single type of competition-related provision, Solano and Sennekamp found that the competition chapters they analysed included provisions on:

1. Adopting, maintaining and applying competition measures,
2. Coordination and co-operation provisions, specifically, general co-operation provisions, notification provisions, provisions relating to exchange of evidence and/or information, provisions relating to competition policy and enforcement, and provisions relating to negative and positive comity.
3. Provisions addressing anti-competitive behaviour including anti-competitive agreements (horizontal and vertical), abuse of dominance or monopolization, state aids or subsidies, anti-competitive mergers and acquisitions, and provisions relating to the potential for anti-competitive behaviour by state enterprises or state monopolies,
4. Competition-specific provisions concerning the principles of non-discrimination, due process, and transparency,

3 In this paper the term "regional trade agreement" is used rather than "free trade agreement" or "bilateral trade agreement." The former term is the official term used at the World Trade Organization for this type of international agreement.

4 Copies of these studies are available from this author upon request.

5 One such recent qualitative analysis of competition provisions in a selected number of RTAs can be found in Bourgeois, Dawar, and Evenett (2007).

6 That is not to say that there was no information available about the form and consequences of cross-border anti-competitive practices (of which the evidence on international cartels is probably the strongest) or about the ways in which national enforcement of competition law can result in sub-optimal outcomes (from the perspective of the global allocation of resources), both of which provide in principle a rationale for further international measures on competition law and cooperation between enforcement agencies.

5. Provisions not to apply so-called trade remedies (anti-dumping measures, countervailing duties, and safeguards),
6. Provisions to limit the recourse to trade remedies,
7. Provisions concerning dispute settlement that arise with respect to the application of the competition provisions within a RTA, and,
8. Provisions that offer flexibility and progressivity, two forms of special and differential treatment, to developing country signatories to a RTA.

8. On the basis of this taxonomy, and analysis thereof, Solano and Sennekeamp made a number of observations. The first observation concerns the rationale for including competition provisions in the RTAs. These authors argue that "Trade is the overriding principle," by which they mean:

"While some agreements have more explicit language than others, in most of the analysed agreements the parties emphasise that anti-competitive practices can undermine the trade objectives of the agreement. As such, parties express that measures adopted to combat anti-competitive behaviour will enhance the trade objectives of the agreement" (pages 8 and 9).

9. With respect to the relative frequency of different types of competition provisions being included in RTAs, Solano and Sennekamp note:

"A first general observation is that RTAs take different approaches as to substantive competition rules and setting up of mechanisms on competition-related matters. Thus it is notable that agreements which contain more provisions addressing anticompetitive behaviour tend to have fewer provisions concerning coordination and cooperation between national competition entities and visa versa.

"Most of the agreements containing provisions addressing anticompetitive behaviour have been concluded by the EC or among non-EC European countries in (South-) Eastern Europe. On the other hand, agreements that focus more on coordination and cooperation provisions have been concluded in the Americas (or involving a North- or South-American party) and with some Asian countries. Therefore, it is appropriate to distinguish between two "families" of agreements, the EC-style agreements and the US-style agreements." (pages 14 and 15).⁷

10. These authors note that relatively few RTAs contain competition provisions on anti-competitive mergers, due process, the elimination or application of trade defence measures, and flexibility and non-reciprocity towards developing countries. The authors further note that RTAs differ markedly in the manner in which disputes that arise from the application of competition provisions are taken forward, and in some cases the competition chapter is excluded from the application of any RTA-wide dispute settlement mechanism.

11. The study by Solano and Sennekamp broke important ground and helped identify a number of important matters that they authors themselves did not make much of. First, their study showed that competition provisions need not target only private anti-competitive practices, but also state measures that

7 In fairness to these authors, they go on to argue "Furthermore it should be noted that, the denominations EC-style and US-style do not imply that the EC or US are a member of every agreement in that category. It rather describes the agreement as oriented either towards cooperation or towards substantive rules. While this distinction is true for many of the analysed agreements it is not the case for all of the agreements in this study. There is overlap between these two "families," especially in cross-regional agreements such as Chile-Korea, EC-Chile, EC-Mexico, EFTA-Mexico, or Korea-Singapore. Nevertheless, this categorisation can provide a useful structure for further analysis" (page 15).

can distort market outcomes. Those state measures can include direct steps, such as subsidisation, but also indirect state influence over state-controlled enterprises and state monopolies. For this reason it would be incorrect to conclude that competition provisions ostensibly target the private sector or are necessarily opposed to private sector development. It is perfectly possible to construct a set of competition provisions that "**tame the state**" or the application of state power.

12. Second, their study demonstrates that competition provisions in RTAs be create obligations to both enact competition law and implementing legislation and to effectively enforce competition law. The impact of such provisions then is not just on international commerce and on domestic firms that face international competition as a national competition law can apply to commercial transactions that involve only domestic (ie. non-foreign) parties. To the extent, that promoting competition in national markets is an ingredient for private sector development and for nurturing internationally competitive firms, then, RTAs can be an instrument for **improving the domestic governance of markets**--even if the apparent motivation initially was trade-related. Moreover, an obligation to effectively enforce competition law could be drafted in such a way as to have implications for the powers, human resources, and budget of a competition authority. In addition, nothing prevents competition provisions being drafted to as to mandate the legal independence of a competition authority (it being recognised that there are many different facets to the independence of regulatory agencies). In which case, competition provisions in RTAs can have **institution-building and institution-protecting** components.

13. Third, Solano and Sennekamp's study shows that there are a number of different ways in which competition provisions in RTAs can be used to influence the form and extent of **cross-border co-operation** between competition authorities. Such cooperation need not be confined to discussions of general approaches to competition law and policy and, as a logical possibility, co-operation on the enforcement of competition law is possible. (Indeed, the positive comity provisions of some RTAs would suggest that some negotiating parties are open to certain types of enforcement-related cooperation.) Care is needed here as some feel it is impossible to mandate the degree of voluntary cooperation between enforcement agencies. However, mandating co-operation may not be the only option available to RTA signatories. The question arises as to whether non-cooperation could be discouraged, perhaps through unfulfilled requests for co-operation triggering a public written explanation from the unco-operative party or a party forgoing some other benefits of the RTA as a result of the denial of co-operation by an enforcement body. More generally, further attention could be given to the practicalities of strengthening co-operation between competition authorities on enforcement and non-enforcement matters and to the subtle incentives that could promote such cooperation.

14. An assessment of Solano and Sennekamp's study can be found in Anderson and Evenett (2006). While recognising the breakthrough that this study represented, especially for those analysts and policymakers seeking a comprehensive overview of what might be called the landscape of competition provisions in RTAs, Anderson and Evenett expressed three reservations concerning both the approach taken and the conclusions drawn. Anderson and Evenett contend that the earlier study's focus on the provisions in the competition chapters of RTAs may omit important ways in which competition principles and pro-competitive logic are incorporated into RTAs. Examples of competition-related provisions found in non-competition chapters of RTAs were provided, in particular examples drawn from chapters on certain service sectors (typically telecommunications and financial services), government procurement, and intellectual property. Moreover, it was pointed out that a number of RTAs include provisions that restrict state aid or restrict the behaviour of state-owned or state-controlled enterprises in chapters other than the competition chapter. Overlooking the former may downplay the role that RTAs can play in "taming the state" or as some prefer to put it "levelling the playing field."

15. The second reservation is that in some RTAs agreement-wide obligations on non-discrimination, procedural fairness, and transparency apply to the provisions of the competition chapter without the former

being mentioned in the latter chapter. Therefore, a general obligation not to discriminate against foreign commercial entities could limit the ability of a competition authority, that may have been established under legislation following commitments made in a competition chapter of a RTA, to treat a merger or acquisition that involved a foreign firm any differently than a combination involving only domestic firms. A RTA, then, may have implications for the enforcement of competition law whether or not a RTA has a separate chapter on competition law and policy. Review of the general or horizontal principles included in a RTA and in the provisions for a RTA to come into force is required to determine if this reservation applies to a particular accord.

16. Anderson and Evenett's third reservation concerns the general conclusion that "trade is the overriding principle" in shaping the competition provisions of RTAs. It is true that many competition chapters of RTAs state, as Solano and Sennekamp argue, that preventing the erosion by anti-competitive acts of the potential benefits created by trade liberalisation is an objective. However, Anderson and Evenett provide examples of RTAs that refer directly to the goals of promoting competition, consumer welfare, and economic efficiency. This is not a quibble as a growing number of the stated objectives in RTAs have nothing to do with trade liberalisation *per se*, mercantilism and its associated rhetoric (that many outside of the field of trade negotiations object to.) Perhaps, then, it is better to characterise RTAs as state-to-state instruments to promote a number of common or shared goals and values, including those relating to competition.

17. Anderson and Evenett's critique was taken on board by Teh in his very recently completed analysis of the competition-related provisions of 74 RTAs (Teh 2008). Therefore, Teh's analysis can shed light on whether the examples provided in and the considerations raised by Anderson and Evenett (2006) are special cases or of more general relevance. Teh devised a "mapping" of the many different ways in which competition-related provisions could enter a RTA and systematically applied it, in so doing compiling a large table that may be a useful reference guide for policy-makers and analysts.⁸ Teh's paper contains a number of important findings including:

"Whereas the OECD study suggests that competition provisions in RTAs are all about trade, the mapping suggests a much more nuanced relationship between trade and competition. While the competition principles are embedded in trade agreements, they are not necessarily subordinated to trade tests or concerns. This paper also emphasises the non-preferential nature of a significant number of competition rules that are included in regional trade agreements, a feature that sharply distinguishes them for example from traditional RTA provisions on market access." (page 3).

18. With respect to prominence given to competition principles in the general objectives of RTAs, Teh notes:

"While one expects that removing obstacles to trade or expansion of trade would be universal, a surprisingly large proportion of the RTAs (42 percent of the sample) see the promotion and advancement of 'conditions of competition' between the RTA partners as one of the principal objectives of the trade agreement. In addition, a number of RTAs (EU-Chile, Mexico-Japan, and Japan-Singapore) explicitly refer to the establishment of cooperation in the field of competition as an objective of the agreement. This appears to demonstrate that many RTAs place an intrinsic or independent value on the promotion of competition and do not consider it as necessarily subordinate to the trade goals of the agreement" (page 18).

8 Specifically Table 2 of Teh (2008).

19. Moreover, Teh found that over half of the RTAs examined contained a general obligation of transparency (that must be applied to all laws covered by the agreement) or a specific obligation relating to transparency in the competition chapter of the agreement. More generally, agreement-wide provisions on transparency were more prevalent than those relating to procedural fairness and far more prevalent than those relating to non-discrimination.

20. With respect to the inclusion of competition-related provisions in sectoral chapters of RTAs, Teh finds that 15 RTAs (accounting for just over 20 percent of his sample) had investment chapters containing such provisions. Interestingly, in 12 RTAs the very concept of National Treatment in chapters on trade in services is defined in terms of the "conditions of competition" facing domestic firms and their foreign rivals. Appeal then is made to a competition-based metric to interpret a major concept in international trade law; here, the competition horse then pulls the trade cart and not the other way around! Teh also found that the telecommunications chapters of 20 RTAs contained a number of provisions that seek to deter anti-competitive conduct by incumbent firms and to ensure that public obligations in this sector (such as Universal Service obligations) do not have the effect of unduly limiting competition. Competition-related provisions were found in the maritime transport chapters of six RTAs and in the financial services chapters of five RTAs. Last but not least, Teh also describes a number of ways in which competition-related provisions enter into the government procurement chapters of 17 RTAs.

21. Taken together, Teh's findings imply that it is misleading to view RTAs entirely through a mercantilist lens. For sure, today it is still possible to draft RTA provisions that seek only to liberalise trade between signatories. However, it ought to be recognised that many RTAs have gone beyond this point and other considerations have been invoked either as distinct objectives of RTAs or employed in the interpretation of trade concepts, such as National Treatment. Moreover, Teh's paper also identifies circumstances when discrimination against a firm is permitted if a competition-related concern is present; that is, circumstances are envisaged when the objective of limiting discrimination in international commerce is subordinated to competition principles. In the light of these findings, no overarching conclusion about the prominence given to any one objective in RTAs seems tenable.

22. In addition to a discussion of Solano and Sennekamp's taxonomy of RTA provisions, Anderson and Evenett (2006) also contained an empirical analysis of the effects of different types of competition provisions on the total value of cross-border mergers and acquisitions flowing into 116 countries during the years 1989 to 2004. To the best of this author's knowledge, this is the only attempt to quantify the effect of competition-related RTA provisions. Countries that already have a merger review law on the statute books were conservatively estimated to receive 43 percent more inward mergers and acquisitions if they signed a RTA with a transparency-related provision in a competition chapter. Countries that signed RTA provisions on transparency, non-discrimination, due process, and on anti-competitive mergers were estimated (again conservatively) to receive 19 percent more inward mergers and acquisitions. These findings suggest that certain competition-related provisions influence the pace of cross-border corporate consolidation, that tends to be triggered by trade liberalisation and by international market integration more generally. Some caution, though, is needed as it would be unwise to base policy recommendations on one empirical study. Moreover, while this study examined the impact of certain competition-related provisions (and controlled for other plausible determinants of the total value of inward mergers and acquisitions), it did not compare the impact of these provisions with other international initiatives that might improve the enforcement of competition law in a given jurisdiction. Policymakers may well be interested in the differential impact of international initiatives and not just the effects of any one instrument to promote inter-state co-operation. This preference may be perfectly reasonable, unfortunately the paucity of empirical studies on related matters implies that it cannot be satisfied at present.

23. The last piece of very recent evidence that will be discussed in this section relates to the spread of certain competition-related RTA provisions throughout the Americas and beyond. Baldwin, Evenett and

Low (2007) examined five areas of government policy covered by RTA provisions to see if more non-discriminatory norms were being adopted over time. One of the five areas of policy was competition law and particular attention was given to three NAFTA provisions, one of which was found in the competition chapter and two that were not. The latter two (specifically, Articles 1305.1 and 1305.2) proscribe anti-competitive conduct by state monopolies in the telecommunications sector and commit signatories to take steps to tackle anti-competitive conduct in that sector. Baldwin, Evenett, and Low found that in the 10 years after the signing of NAFTA identical or similar provisions had been incorporated into plenty of other RTAs. The figures at the end of this paper summarise the spread of these two telecommunications-related provisions in the Americas and into East Asia. Provisions identical or very similar to Article 1305.2 were found in 16 subsequent RTAs, demonstrating that a non-discriminatory competition-related norm can spread through regional trade agreements. It would seem that some degree of learning or benchmarking across agreements has taken place and that RTAs can be a vehicle for advancing non-mercantilist norms. Further research may wish to examine the extent to which other competition principles have been adopted in RTAs, there being no reason to believe *a priori* that the NAFTA agreement is exceptional in this regard.

24. The purpose of this section has been to summarise the main findings of a number of recent analyses of the content and spread of competition-related provisions in RTAs. While the recent uptick of research on these matters has added considerably to our understanding of the options available to policymakers and qualified some earlier perceptions of these RTA provisions, readers were cautioned that the evidential base is not sufficient to definitively rank the various ways in which international accords can strengthen national competition law and enforcement and cross-border co-operation. Clearly, this is an area of substantial innovation, and perhaps even experimentation, by policymakers and hopefully future analysis will shed better light on the relative merits of alternative state initiatives in this field.

3. Options for policy-makers

25. Reflection upon the above advances in our understanding of competition matters and RTAs yielded the following options for policy-makers as they consider ways in which competition principles and related matters might be incorporated into RTAs:

1. The objectives of competition law (promoting efficiency, consumer welfare, and improvements in the allocation of resources) could be included in the overall goals of the RTA.⁹
 - a. To the extent that a social or economic objective is stated as "trumping" competition-related objectives, then the state measures taken should be those that do the least harm to those competition objectives. Provisions could be included to ensure that such competition considerations be taken into account when those state measures are designed, when they are reviewed, revised, or challenged before any official body.
 - b. The desire to enhance the welfare of RTA signatories could manifest itself in bans on provisions (including exemptions) from competition law and other economic laws that promote or facilitate anti-competitive practices in the jurisdiction of another party. Exemptions for competition law for export cartels could, thus, be banned.
2. The general principles of non-discrimination, transparency, and due process could apply to the content and enforcement of the signatories' competition law.

9 This option plus the option described in point 1a. below could applied to each chapter that relates to a specific economic sector (e.g. telecommunications, financial services) or to specific government policies (e.g. government policy, investment policies, and intellectual property right policies.)

3. With respect to the RTA's dispute settlement provisions:
 - a. Matters relating to the contents of a signatories' competition law and its enforcement could fall under the provisions of the RTA's dispute settlement provisions.
 - b. Consistent with entrenching competition law objectives, a competition-related defence of any measure would be admissible in an otherwise trade-related dispute settlement proceeding and would, if established, take precedence over violations of national treatment or other pertinent non-discrimination clause.
4. Provisions in a RTA could be included that mandate that, over a specified period of time, signatories will adopt competition laws that can tackle the full range of private and state-created anti-competitive practices and outcomes.
 - a. Signatories could be required to consider established international best practice with respect to investigative measures, transparency, due process, and sanctions before drafting of a competition law, or revising such a law. The competition authorities of RTA partners could be given rights to comment upon drafts of a signatory's competition law before submission is made to a legislature.
5. Provisions in a RTA could be included that mandate signatories to empower at least one national competition authority with powers relating to competition advocacy, including possibly the right to comment upon any governmental regulation that may have consequences for conditions of competition.
6. Provisions could be included in RTAs that strengthen the agencies responsible for enforcing national competition law, including provisions that each signatory must at all times provide:
 - a. Each competition agency with independence, taken to be at least the right to independently open an investigation and close an investigation without interference.
 - b. Each competition agency with the human resources and budget to undertake the agency's stated functions by employing international best practices. Insufficient human and budgetary resources could be a matter for state-to-state dispute settlement and comparisons with the resources received by peer agencies perceived to be operating at international best practices in comparable economic circumstances could be allowed.
7. Provisions in a RTA could be included that state the importance the signatories attach to co-operation between competition authorities, and between other state bodies that a competition authority chooses to seek assistance from. Furthermore, it could be specified that:
 - a. Co-operation on the enforcement of competition law is as important as co-operation between competition authorities.
 - b. Notification requirements and penalties could be triggered if a signatory fails to certify that a competition authority in another party has not undertaken co-operation consistent with the goals of the RTA. Such failure to certify could be taken to dispute settlement.
8. Review procedures could be incorporated into a RTA whereby reports are prepared by the competition authorities of the signatories on the degree to which experience since the RTA came into force has attained the specific and overall competition-related goals of the RTAs. Potential future reforms could be identified, including the negotiation of stronger inter-agency or inter-governmental accords. Such reviews could occur at regular intervals, such as every five years.

4. Concluding remarks

26. Regional trade agreements are not what they used to be. Their scope, the values advanced, and the measures and sectors covered have broadened considerably in recent years, so much so that characterising RTAs as mercantilistic accords is incomplete and ultimately misleading. Why does any of this matter for competition authorities and associated practitioners? It transpires that many RTAs now include not just chapters devoted to competition law and its enforcement, but have sought to entrench competition principles in the overall objectives of such accords and in the implementation of a number of laws with potentially significant economic impact. Establishing what opportunities are afforded by the recent proliferation of RTAs--and therefore what opportunities could be missed--requires appreciation of the options available to policymakers. The purpose of this paper, therefore, was to summarise the latest findings of analyses of RTAs that contain competition-related provisions and to present a broad range of measures that could inform priority setting in RTA negotiations and in other international initiatives pertaining to competition law and its enforcement.

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Adoption of common/similar rules: Spread of NAFTA Art. 1305.1



