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**THE RELATIONSHIP BETWEEN REGIONAL TRADE AGREEMENTS AND THE MULTILATERAL
TRADING SYSTEM:**

COMPETITION

This paper forms part of a broader study on the relationship between Regional Trade Agreements and the Multilateral Trading System. Together with other chapters and an overall assessment, it will be incorporated into a consolidated document to be submitted to the Trade Committee on 28-30 October 2002.

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COMPETITION POLICY

I. Key points emerging

1. The purpose of this paper is to survey competition-related provisions in regional trading agreements (RTAs) and highlight where these may differ from those in the WTO Agreements. To this end, Part II provides an overview of competition-related provisions in the WTO Agreements while Part III surveys how competition policy has been addressed in RTAs.¹ The paper thus provides a link between the WTO and RTAs, while also acknowledging the plethora of co-operative anti-trust arrangements aimed at facilitating competition law enforcement.

2. One of the immediate observations to come out of this brief survey is the widespread use of competition-related provisions in RTAs. They appear in trade agreements covering all parts of the globe and with memberships varying between, and across, both developed and developing countries. This suggests a broad consensus on the value and appropriateness of having competition-related provisions in trading agreements. An idea which still remains subject to discussion at the multilateral level.

3. A second key theme to emerge from the paper is the disparate nature of these various RTAs and the extent of integration on competition-related matters that they seek. This theme first appears in the paper's examination of the extent to which RTAs seek co-ordination of competition standards and rules [Part III (i)]. In particular, RTAs calling for close harmonisation of specific competition standards and rules, such as in the EU, contrast with those setting out more general obligations to take action against anti-competitive business conduct, sometimes entailing an obligation to adopt and enforce competition laws, as reflected in the NAFTA. The approach towards co-ordination tends to vary with the degree of economic integration contemplated by the various agreements. This is not, however, exclusively the case as manifested, for example, in certain Euro-Mediterranean Association Agreements which call for co-ordination of substantive competition rules in trading agreements with relatively limited market integration objectives. The extent of co-ordination also tends to be closely associated with the role assigned to supranational institutions for the enforcement of competition rules.

4. Another more tentative observation relates to RTAs precluding the application of anti-dumping remedies in conjunction with co-operation on competition policy matters [Part III (iv)]. This has traditionally occurred where there has been deep integration on competition-policy matters such as in the EU or ANZCERTA but has also, most recently, appeared in RTAs that discuss competition-policy at a much broader level of generality such as the Canada-Chile FTA. The link between anti-dumping and competition policy continues to be considered in the negotiation of new RTAs and is an area where regional approaches may differ considerably from what is currently contemplated multilaterally and under the disciplines of the WTO.

¹ It should be noted that as such the paper focuses on the provisions of these various agreements and does not evaluate the practical experiences, or lack thereof, under them.

5. Finally, when examining both the treatment of monopolies and enterprises with special and exclusive rights [Part III (ii)] as well as mechanisms for consultation, co-operation and enforcement [Part III (iii)], the paper highlights that RTAs tend to go beyond existing provisions in the WTO. This is not surprising, given that regulation of the trade and competition interface remains embryonic in the WTO.

II. Provisions in WTO agreements

6. The recent Doha Ministerial Declaration has augmented the role of competition policy in the WTO by not only recognising the case for a multilateral framework to enhance the contribution of competition policy to international trade and development but also by agreeing that negotiations to that end will take place after the 5th Ministerial Conference.² In the two year interim, the WTO Working Group on the Interaction between Trade and Competition Policy has been asked to focus on clarification of certain core principles, including transparency, non-discrimination, procedural fairness and provisions on hardcore cartels; modalities for voluntary co-operation; and support for the progressive reinforcement of competition institutions in developing countries through capacity building.

7. While the Doha Ministerial Declaration is an important development, competition-policy is not a *new* issue in the context of the WTO. Nonetheless, it has not yet been systematically developed.

8. Historically, the 1947 Havana Charter, and the International Trade Organisation that it contemplated, envisaged multilateral regulation and review of restrictive business practices. In particular Chapter V of the Charter, entitled “Restrictive Business Practices”, contained a number of articles “to prevent, on the part of private or commercial public enterprises, business practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control”.³

9. Chapter V was not, however, included in the original GATT (1947). Rather a diluted Decision on Arrangements for Consultations on Restrictive Business Practices was eventually adopted in 1960 by the GATT Contracting Parties.⁴ This Decision, recognised “that the activities of international cartels and trusts may hamper the expansion of world trade and... thereby frustrate the benefits of tariff reductions and of the removal of quantitative restrictions or otherwise interfere with the objectives of the General Agreement” and further “that international co-operation is needed to deal effectively with harmful restrictive practices in international trade”. Nonetheless, the Contracting Parties recorded that at the time it would not be practicable to undertake any form of control of such practices, nor to provide for investigations. Thus, the 1960 Decision is limited to recommending that Contracting Parties enter into

² The launch of negotiations will, however, be contingent on “a decision to be taken by explicit consensus, at that [5th] session on modalities of negotiations”, see WTO Ministerial Declaration, Ministerial Conference, 4th Session, 14 November 2001, WT/MIN(01)/DEC/W/1 at paras 23-25. This paper does not intend therefore to prejudge the question of whether negotiations will or should be initiated in the future within the WTO.

³ Article 46.1, Havana Charter for an International Trade Organisation, Final Act and related documents, United Nations Conference on Trade and Employment, Havana, Cuba, from 21 November 1947 to 24 March 1948. The Charter specified six key anticompetitive practices considered potentially harmful to trade, namely: (i) price fixing and other related practices; (ii) exclusion of enterprises from markets or allocation of markets and customers and fixing sales and purchase quotas; (iii) discrimination against certain enterprises; (iv) output restrictions and quotas; (v) agreements preventing the development and use of patented or unpatented technology and inventions; and (vi) certain extensions of the use of rights under patents, trademarks or copyrights. Furthermore, the ITO envisaged investigating and ruling on complaints with the power to request Members to take remedial action.

⁴ BISD 9S/ 28-29.

consultations in the event of harmful restrictive practices in international trade on either a bilateral or multilateral basis.⁵

10. Beyond the 1960 Decision, competition-related provisions have been incorporated in the GATT and the subsequent WTO Agreements in a piecemeal manner. A number of reviews of these provisions has already been undertaken by the OECD,⁶ the WTO⁷ and academia.⁸ What follows, therefore, is a selective summary highlighting core provisions in the various agreements.

11. Article XVII of GATT 1994 (State Trading Enterprises), concerning state trading enterprises and other enterprises that benefit from exclusive or special privileges, is significant. The article recognises that such enterprises may be operated in a manner creating serious obstacles to trade and notes the importance of negotiations, on a reciprocal and mutually advantageous basis, to reduce such obstacles.

12. In the services area, GATS Article VIII (Monopolies and Exclusive Service Suppliers) sets out an obligation for WTO Members to ensure that such monopolies and exclusive service suppliers do not act in a manner which is inconsistent with their obligations under Article II (Most-Favoured-Nation Treatment) and specific scheduled commitments. In addition, Article IX of GATS (Business Practices) recognises that anti-competitive business practices of services suppliers “may restrain competition and thereby trade in services”. As regards basic telecommunications services, an additional Reference Paper on Regulatory Principles contains a commitment to adopt appropriate measures to prevent anti-competitive practices by major suppliers.

13. In the area of trade-related intellectual property rights, Article 8.2 of the TRIPs Agreement (Principles) allows a Member to take appropriate measures in order to prevent the abuse of IPRs by right-holders or practices which unreasonably restrain trade or adversely affect the transfer of technology, provided that they are consistent with the other provisions of the TRIPS Agreement. Article 40.2 (Control of Anti-Competitive Practices in Contractual Licenses) authorises Members to specify in their legislation licensing practices or conditions that may, in particular cases, constitute an abuse of IPRs having an adverse effect on competition in the relevant market. Finally, Article 31 (Other Use Without Authorization of the Right Holder) recognises anti-competitive practices as one of the grounds for compulsory licensing.

14. Under the Agreement on Safeguards, Article 11.3 (Prohibition and Elimination of Certain Measures) obliges WTO Members not to encourage or support the adoption of non-governmental measures equivalent to voluntary export restraints, orderly marketing arrangements, or other governmental arrangements prohibited under Article 11.1 of that agreement.

15. With respect to trade-related investment measures, competition-related provisions are limited to Article 9 of the TRIMs Agreement (Review by the Council for Trade in Goods) which mandates the

⁵ These arrangements have been invoked on only three occasions, all in 1996, between the US and Japan concerning business practices affecting consumer photographic film and paper.

⁶ OECD (1999) *Trade and Competition: Policies for Tomorrow*, Chapter 4: “Competition Elements in International Trade Agreements”. OECD (1994) “Competition Elements in International Instruments”, Background Document for a Joint Roundtable of the Trade and Competition Law and Policy Committees held on 15 April 1994, 21 March 1994, COM/DAFFE/CLP/TD(94)35; see also the Note of Discussions held at the Roundtable, COM/DAFFE/CLP/TD(94)76.

⁷ WTO Annual Report 1997, Special Topic: Trade and Competition Policy, Volume 1, World Trade Organisation, 1997 [Hereinafter WTO Annual Report 1997].

⁸ See for example, EU Petersmann, “International Competition Rules for Governments and for Private Business”, *Journal of World Trade*, 1996, 30:3, at 5.

Council for Trade in Goods to consider whether the agreement should be complemented with provisions on investment and competition policy.

16. Elements of competition policy are arguably also found in the Agreement on Technical Barriers to Trade, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Preshipment Inspection, the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft. Also of potential relevance, are the more general rules of the WTO relating to non-discrimination and transparency, the consultation and co-operation arrangements under each of the main WTO Agreements and the WTO dispute settlement mechanism.⁹

17. Another GATT 1994 provision which could be seen to relate to competition policy is Article VI (Anti-dumping and Countervailing Duties) and the accompanying Agreement on the Application of Article VI (Anti-dumping Agreement). These allow for anti-dumping duties in cases where dumping has been determined to occur. Furthermore, the concept of non-violation nullification and impairment, based on Article XXIII of GATT 1994 may provide a basis to challenge denials of market access that fundamentally undermine bargained concessions. It has been argued that it is not precluded that restrictive business practices could be a factor in such situations.¹⁰

18. Finally, competition related issues are frequently raised in the context of Trade Policy Reviews and have been studied extensively by the WTO Working Group on the Interaction between Trade and Competition Policy since its establishment at the 1996 Singapore Ministerial Conference. As mentioned, the recent Doha Ministerial Declaration has renewed the WTO Working Group's mandate calling for clarification of various issues at the trade and competition interface between now and the 5th Ministerial Conference.

III. Provisions in Regional Trade Agreements

19. While the focus of this paper is to examine how RTAs have dealt with competition-related matters, it is important to highlight that RTAs represent only one of several institutional settings addressing competition law and policy at the international level. For example, beyond regional and bilateral trade agreements, a plethora of co-operative anti-trust arrangements to facilitate competition law enforcement exist at the multilateral, regional and bilateral levels. These include the United Nations Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices,¹¹ a number of OECD Recommendations¹² and various bilateral arrangements incorporating *inter alia* both traditional and positive comity principles.¹³

⁹ The potential relationships of these to competition policy are described in Chapter VI of the WTO Annual Report 1997, pp. 76-80.

¹⁰ OECD (1999) p. 75.

¹¹ *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* was adopted under UNGA Resolution 35/63 of 5 December 1980. The fourth review Conference of the Set "calls upon all Member States to implement the provisions of the Set" (TD/RBP/CONF.5/15 of 4 October 2000). The set nonetheless remains a non-binding instrument.

¹² See OECD (1995) "Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade" [C(95)130/Final]; and OECD (1998) "Recommendation of the Council Concerning Effective Action Against Hard Core Cartels" [C(98)35/Final].

¹³ See UNCTAD (2001), "Experiences Gained So Far on International Co-operation on Competition Policy Issues and the Mechanisms Used", Advance Copy, 8 May 2001, TD/B/COM.2/CLP/21 which

20. In analysing approaches to competition policy in RTAs this paper has adopted a thematic approach based on the following headings: (i) the extent of co-ordination of substantive competition standards and rules; (ii) the treatment of monopolies and enterprises with special and exclusive rights; (iii) mechanisms for consultation, co-operation and enforcement; and (iv) the relationship of competition policy rules to the application of trade remedies.¹⁴

21. Given the embryonic and somewhat indirect nature of competition-related disciplines in the WTO, the RTAs surveyed here almost by definition expand upon the WTO disciplines. A qualification applies however where RTAs no longer permit the application of anti-dumping remedies where they can only be said to differ from, rather than expand upon, the WTO provisions.

The extent of co-ordination of competition standards and rules

22. Amongst the RTAs dealing with competition policy a broad distinction can be drawn on the basis of the *extent* of co-ordination of competition standards and rules that they envisage. In this regard it is possible to distinguish between those trade agreements that contain general obligations to take action against anti-competitive business conduct (such as an obligation to adopt a domestic competition law without setting out specific standards or provisions it should contain) and others that call for more extensive co-ordination of specific competition standards and rules (potentially requiring common competition laws and procedures). Clear categorisation along these lines is limited to the extent that, in reality, RTAs fall along a spectrum of convergence on competition policy. Furthermore, while RTAs which have supranational elements and institutions necessarily entail considerable co-ordination of competition standards and rules, a number of RTAs which are not supranational in character have also achieved similar co-ordination. Despite such difficulties in categorisation, however, this section provides a framework for identifying two broad approaches to competition policy in RTAs.

23. An example of the former approach entailing general obligations to take action against anti-competitive business conduct is the NAFTA. Its Chapter 15, titled "Competition Policy, Monopolies and State Enterprises", requires member countries to "adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto",¹⁵ without however prescribing specific competition standards or rules. In connection with this obligation, Mexico enacted a comprehensive modern competition law in 1993.¹⁶ A similar provision exists in both the Canada-Chile and Mexico-Chile FTAs. The Japan-Singapore Economic Partnership Agreement (JSEPA) provides that each party shall take measures which it considers appropriate against anti-competitive activities. Similarly, the EU-Mexico FTA, focuses on ensuring the implementation and enforcement of the parties' *respective* competition laws in a manner recalling the side agreements on environment and labour standards embedded in NAFTA.

distinguishes amongst six types of international instruments dealing with competition law and policy. They are (a) bilateral or tripartite agreements focussing on co-operation, (b) mutual legal assistance treaties, (c) friendship, commerce and navigation treaties, (d) agreements for technical co-operation in economic regulation, (e) RTAs, and (f) multilateral arrangements.

¹⁴ This categorisation follows, to a certain extent, that of the WTO Annual Report 1997 pp. 82-87.

¹⁵ Article 1501.

¹⁶ The European Energy Charter Treaty is somewhat analagous in approach requiring contracting parties to ensure that within their jurisdictions they have and enforce such laws as are necessary and appropriate to address anti-competitive conduct in economic activity in the energy sector.

24. The chapter on competition policy (Chapter XI) of the recently signed Canada-Costa Rica FTA (CCRFTA) adopts a comparable approach.¹⁷ It includes an obligation on the Parties to adopt or maintain legal measures to proscribe the carrying out of anti-competitive business activities including, in a non-exhaustive list, cartels, abuse of dominance and anti-competitive mergers (Chapter XI, XI.2, para 3(a)-(c)). The FTA is noteworthy as it is a concrete embodiment of many of the concepts that the WTO Working Group on the Interaction between Trade and Competition Policy has been mandated to focus on following the Doha Ministerial Declaration. For example, the framework includes a commitment to the principle of *transparency*, with each Party to ensure that measures adopted or maintained to proscribe anticompetitive activities “are published or otherwise publicly available” (Chapter XI, XI.2, para 4(a)).¹⁸ Furthermore any exclusions or special authorizations from competition disciplines that a Party may have established shall also “be transparent and should be periodically assessed by each Party to determine if they are necessary” (Chapter XI, XI.2, para 3). The FTA also contains commitments to *non-discrimination*, as measures taken to proscribe anti-competitive activities should be applied in a non-discriminatory basis (Chapter XI, XI.2, para 2); and *procedural fairness*, as judicial and quasi-judicial proceedings should be fair and equitable with an appeal or review process to any final decision (Chapter XI, XI.2, para 6). Finally, the Chapter also includes explicit agreement that it is in the Parties “common interest to work together in technical assistance initiatives related to competition policy” (Chapter XI, XI.5).

25. In contrast to these broad initiatives containing general obligations to take action against anti-competitive business conduct, co-ordination of specific competition standards and rules has occurred in a variety of other RTAs. This is particularly the case with respect to the highly advanced regional system of competition rules found in the European Union (EU), a majority of EU trading agreements with third countries and a variety of sub-regional groupings in Africa and Latin America.

26. The EU has supra-national competition rules which are linked by the *Treaty Establishing the European Community (1957)* (EC Treaty)¹⁹ to the fundamental objective of establishing a common market.²⁰ The EC Treaty rules in the field of competition cover *inter alia* agreements or concerted practices between undertakings (Article 81²¹), abuses of dominance by undertakings (Article 82²²) as well as competition distorting state aid under the guise of subsidies (Article 87²³). The EU has also adopted associated rules, since 1989, regarding concentrations which meet certain sales thresholds, designed to cover transactions that may affect trade between EU Member States. Notably, co-ordination of these specific rules is ensured by the principle of primacy of EC competition law over national competition

¹⁷ The CCRFTA was recently presented to the WTO Working Group on the Interaction between Trade and Competition Policy, see Joint Communication from Canada and Costa-Rica, 2 July 2001, WT/WGTCP/W/173. Copies of the full text are available at http://www.dfait-maeci.gc.ca/tna-nac/Costa_Rica-e.asp.

¹⁸ Furthermore, any modifications to such measures are to be notified to the other Party within 60 days, with advance notification to be provided where possible (Chapter XI, XI.2, para 4(b)).

¹⁹ Revised by the Treaty of Amsterdam which came into force on 1 May 1999.

²⁰ The EC Treaty sets out as a fundamental objective, “the institution of a system ensuring that competition in the common market is not distorted”, para 3(g) [ex para 3(f)].

²¹ ex Article 85.

²² ex Article 86.

²³ ex Article 92.

law.²⁴ At the same time, however, its Member States still have separate and distinct national competition laws and national competition authorities which may differ substantially from one another.²⁵

27. The EU is also at the centre of a web of trade agreements with non-member countries which call for adoption and co-ordination of specific competition standards and rules, although the extent of such co-ordination varies with the degree of economic integration contemplated by the various agreements. A prominent example is the Agreement on the European Economic Area (EEA), concluded by the EU with most countries of the European Free Trade Association (EFTA²⁶), whereby all practices liable to impinge on trade and competition among the EEA participants are subject to rules that are closely related to the EC competition law. Thus, competition rules applicable to undertakings in Articles 53 and 54 of the EEA are virtually identical to Articles 81 and 82 of the EC Treaty. Similarly, the EEA extends to the control of mergers which are declared incompatible with the agreement where they create or strengthen a dominant position which would significantly impede effective competition in the territory covered by the EEA.²⁷ Somewhat analogous are the Europe Agreements, concluded with countries in Central and Eastern Europe, as well as the Central European Free Trade Agreement (CEFTA), where competition standards are closely aligned with those of the EC Treaty in the event that trade between the EU and another signatory is affected.²⁸ While the Stabilisation and Association Agreements which the EU has concluded with certain countries in South East Europe also include provisions closely related to those of the Europe Agreements, they go beyond them in two important respects. Firstly, in addition to requiring the approximation of signatories' existing and future competition legislation with EC competition laws, they explicitly refer to law enforcement; and secondly, they set strict temporal deadlines for progress in both approximation and enforcement.²⁹

28. The recent Euro-Mediterranean Association Agreements also introduce a number of specific competition provisions similar to those in the EC Treaty relating to collusive behaviour, the abuse of a dominant market position and competition-distorting state aid. While these provisions have yet to be implemented, they are significant to the extent that they involve trading relations with a number of Middle-

²⁴ The EU represents an advanced model of co-ordination. When comparing this approach to others, however, it should be noted that it represents a customs union rather than a free trade area.

²⁵ As the reach of EC competition rules is confined to practices and conduct which may affect trade between EC Member States, they have not displaced national competition laws of Member States.

²⁶ EFTA members are Iceland, Liechtenstein, Norway and Switzerland.

²⁷ Secondary EC competition law is also incorporated into the EEA in areas such as exclusive dealing agreements, technology transfer, specialisation and research and development agreements etc.

²⁸ Notably, the Europe Agreements declare as incompatible (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition; and (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of the country in question as a whole or a substantial part thereof. The Europe Agreements also include rules on the granting of state aids, although these are more closely aligned with the EU rules applicable to the least prosperous regions of the EU and allow for exemptions in connection with the CAP and the Treaty Establishing the European Coal and Steel Community. Under the CEFTA, see in particular Articles 22 and 23.

²⁹ See for example Article 68 (Approximation of Laws and Law Enforcement) of the Stabilisation and Association Agreement Between the European Communities, of the one part, and the Former Yugoslav Republic of Macedonia, of the other part, (Brussels, 26 March 2001, 2001/0049 (ACV) [available at http://europa.eu.int/comm/external_relations/see/fyrom/saa/saa03_01.pdf]

Eastern and North African countries at considerably different levels of development, with different motivations and incentives compared to those of the Central and Eastern European or EFTA states.³⁰

29. Co-ordination of competition standards and rules within RTAs is not confined to those concluded by the EU. Notably, competition law and policy is starting to be addressed more extensively in African sub-regional agreements with the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) prohibiting, in Article 55, “any agreement between undertakings or concerted practices which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market” (subject to a proviso for the granting of exemptions by the COMESA Council). Furthermore, COMESA contemplates formulating and implementing a regional competition policy which will harmonise existing national competition policies, or introduce them where they were absent, in the context of a transition to a full customs union.³¹ Other examples of RTAs which have adopted or are developing specific co-ordinated competition rules are the MERCOSUR,³² the Andean Community³³ and EFTA.³⁴

30. ANZCERTA provides another example of a RTA co-ordinating specific competition laws. Both Australia and New Zealand have committed themselves to harmonising their business laws, including their competition statutes. In addition, in conjunction with eliminating anti-dumping actions in Trans-Tasman trade, both countries amended their competition laws so that their misuse of substantial market power prohibitions apply not just to their own markets but also to the "Trans-Tasman" market. In particular, this means that both Australian and New Zealand prohibitions of predatory pricing and of anti-competitive price discrimination can be directly applied to businesses located in either country. This also means that an abuse of dominance case arising anywhere in the trans-Tasman market can be prosecuted by either country's competition authority.³⁵

The treatment of monopolies and enterprises with special and exclusive rights

31. The impact that state trading enterprises, monopolies, and enterprises with special or exclusive rights can have on market access for imports has been a matter of longstanding concern in international trade relations. As a result, and in contrast to the relative dearth of provisions on substantive competition rules elsewhere in the WTO Agreements, the WTO includes a number of competition-related provisions regarding monopolies, state enterprises and enterprises with exclusive or special privileges. Similarly, many RTAs provide for extensive obligations regarding the conduct of such enterprises.

32. The Free Trade Agreement between Mexico, Colombia and Venezuela (the “Group of Three Agreement”) is illustrative as its competition component *only* applies to state-owned monopolies and enterprises, requiring them to act on the basis of commercial considerations in operations in their own

³⁰ Notably, the EU-Med Agreement with Tunisia has detailed substantive competition provisions under Articles 36, 81, 82 and 87.

³¹ J. Musonda, “Enhanced Technical Assistance and Co-operation: Priorities for the Effective Implementation of Competition Policy in Africa – the Case of COMESA”, Paper presented at the WTO Regional Workshop on Competition Policy, Economic Development and the Multilateral Trading System, Capetown, South Africa, February 2000 [Hereinafter Musonda (2000)].

³² See in particular the December 1996 protocol on competition policy.

³³ See in particular the March 1991, Decision No. 285, of the Commission of the Cartagena Agreement, entitled "Norms to Prevent or Correct Distortions in Competition Caused by Practices that Restrict Free Competition".

³⁴ See in particular Article 15.1.

³⁵ OECD (2001), *Trade and Competition Policies: Options for a Greater Coherence*, OECD, 2001, page 19.

territories and not to use their monopoly positions to engage in anti-competitive practices in a non-monopolised market in such a way as to affect enterprises in other member States.

33. Article 1502 of NAFTA affirms the right of a Member to designate both privately-owned and public monopolies, subject to the constraints that they must: (a) act in accordance with the obligations under NAFTA law; (b) act solely in accordance with commercial considerations in their purchase or sale of the monopoly good or service; (c) provide non-discriminatory treatment to NAFTA investors and investments, and to NAFTA goods and service providers in the purchase or sale of the monopoly good or service in the relevant market; and (d) must not use their monopoly position to engage in anti-competitive behaviour in a non-monopolised market. With respect to state enterprises, pursuant to Article 1503, these must act in a manner consistent with the NAFTA obligations on investment and financial services and must maintain non-discriminatory treatment in their sales to NAFTA investors or investments.

34. The EC Treaty is perhaps the most far-reaching example where regional laws have been enacted, in this area, with the objective of removing obstacles to trade. Notably, Articles 28 and 31³⁶ have been employed with respect to state monopolies of a commercial character to ensure the elimination of measures having the effect of quantitative restrictions and the avoidance of discrimination between EU member States.³⁷ In particular, Article 31 has been interpreted to require the elimination of a commercial monopoly's exclusive import rights.³⁸ With respect to state enterprises or enterprises with special or exclusive rights, Article 86³⁹ of the EC Treaty, makes it explicitly clear that these are bound by the other rules in the EC Treaty, notably those on competition. Similar provisions can be found in the Europe Agreements and the EEA.

Mechanisms for consultation, co-operation and enforcement

35. Consultation and co-operation mechanisms concerning the application of measures against anti-competitive conduct, such as procedures for notification, exchange of information and enforcement of competition rules, are provided for in most RTAs. This is one area, in particular, where RTAs should be read in conjunction with other co-operative anti-trust arrangements that the parties may have in place. It is also an area where lessons learnt from such co-operative arrangements have been incorporated into subsequent RTAs.⁴⁰

36. There is a significant difference, however, between RTAs which are limited to consultation and co-operation between national competition authorities and those that provide for elements of supranationality. The latter often assign a key role to supranational institutions in the enforcement of competition rules while the former rely primarily on non-institutionalised procedures. The EC Treaty

³⁶ Ex Articles 30 and 37.

³⁷ Article 31 explicitly states that it "shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others."

³⁸ *Pubblico Ministero v Flavia Manghera and Others*, Case 59/75 [1976] ECR 91.

³⁹ Ex Article 90.

⁴⁰ For example, the concept of "positive comity", whereby a party may request that another party initiate enforcement action against anti-competitive conduct which is seen as adversely affecting its interests, has been incorporated in a number of RTAs (including the European Energy Charter Treaty and the Europe Agreements) following its use in various bilateral co-operation arrangements (such as the 1991 Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws).

provides the most far reaching example where enforcement of international competition rules has been assigned to a supranational institution as the application of EC competition law is primarily the responsibility of the EC Commission. Nonetheless, it should be noted that certain EC competition laws and rules can be applied by national courts and by national competition authorities – an aspect that has gained increasing importance in recent years as the EC Commission is encouraging a more decentralised application of EC competition law.⁴¹ The “two pillars system” of the EEA also allows for supranational enforcement powers, allocated between the EU Commission and the EFTA Surveillance Authority respectively.⁴² The Andean Community institutions also have supranational powers, as the Board of the Cartagena Agreement is assigned the responsibility to investigate alleged anti-competitive infringements, and its subsequent orders have direct legal effect in member countries. On a lesser scale, the MERCOSUR Technical Committee on Competition Policy and the Commerce Commission may issue orders for the enforcement of its provisions which must then be implemented by national agencies of the member countries.

37. Reliance on international institutions does not, however, preclude co-operation between national competition authorities. By way of illustration, the EC Commission co-operates with the competition authorities of member States during investigations, with respect to the exchange of documents, at oral hearings (by allowing for member State representation) and by allowing the opportunity for comments on draft decisions. The EEA also includes a number of additional provisions to ensure co-operation not only with national competition authorities but also between the EC Commission and the EFTA Surveillance Authority.

38. An example of a RTA with considerable jurisdictional reach yet which is not reliant upon independent supranational institutions is the ANZCERTA. Under this RTA, each country’s competition authority and courts have a unique model of “overlapping jurisdiction” – whereby complaints relating to the misuse of substantial market power may be filed and heard in either jurisdiction and valid and enforceable subpoenas and remedial orders issued in the other country. These are buttressed by a separate bilateral enforcement agreement providing for extensive investigatory assistance, the exchange of information (subject to rules of confidentiality) and co-ordinated enforcement.

39. NAFTA and the Canada-Chile FTA adopt a different approach which does not rely on supranational institutions for enforcement. Furthermore, detailed procedures for co-operation are not set out and recourse to dispute settlement is excluded.⁴³ Rather, general consultation and co-operation requirements call on the parties to consult on the effectiveness of their national competition laws and to co-operate on the enforcement of those laws via mutual legal assistance, notification, consultation and the exchange of information. Here, however, a full picture would need to take into account bilateral co-operation arrangements that exist between the parties.⁴⁴ The EFTA only refers to the possibility of dealing

⁴¹ For example, the EC Commission has now adopted a draft regulation which provides for the devolution to national jurisdictions of its powers under Article 81 of the EC Treaty to investigate restrictive business practices and to grant exemptions (Article 82 can already be enforced at the national level). The Commission would however continue to undertake enforcement in cases which are of general importance to the European Union.

⁴² The EFTA Surveillance Authority is set up under Article 108 of the EEA and allocation of jurisdiction between it and the EC Commission is regulated under Article 56 of the EEA.

⁴³ See NAFTA Articles 1501, 1502, 1503 and 1504.

⁴⁴ For example, the 1995 Agreement Between the Government of Canada and the Government of the United States of America Regarding the Application of their Competition and Deceptive Marketing Practices Laws contains detailed provisions regarding notifications, exchanges of information, co-ordination of enforcement actions, co-operation regarding anticompetitive activities that affect the interests of the other party (“positive comity”), avoidance of conflicts (“traditional comity”), and consultations. The 2000

with abuses of its competition provisions through consultation and complaints procedures in Article 31 which, unlike those in the EC Treaty, EEA and the Andean Community, do not include the power to launch investigations, compel firms to supply information or modify practices.⁴⁵

40. Finally, the Asia-Pacific Economic Co-operation forum (APEC), provides a forum for a broad exchange of views, technical co-operation and discussion of competition issues.⁴⁶ Within the context of negotiations of the competition policy provisions of the FTAA, most countries within the region with competition laws have undertaken to co-operate with one another, in accordance with their respective laws, to improve enforcement and disseminate best practices in this area and to encourage efforts by economies that do not yet have solid competition regimes to develop their legal frameworks and to advance competition principles. Under the JSEPA, Japan and Singapore will consider extending co-operation to co-ordinated enforcement activities. As Singapore does not have a comprehensive competition law or authority, this RTA provides an example of the potential for such co-operation with countries which do not have comprehensive competition regimes or institutions.

41. The WTO Agreements also provide for co-operation and consultation obligations with respect to competition-related provisions. Beyond the general consultation procedures applicable to WTO disputes, special consultation procedures are provided under: (a) the 1960 Decision, which recommends that parties enter into consultations on harmful restrictive practices in international trade at the request of another party;⁴⁷ (b) GATS Article IX and (c) TRIPS Article 40.3. Notably, the latter two provisions also provide for the exchange of non-confidential information. RTAs that set out requirements for consultation and co-operation with respect to their competition provisions tend nonetheless to be more extensive than those in the WTO. This is particularly the case where the co-operation obligations cover a broader number of disciplines and where they extend to the direct enforcement of competition rules including investigations of complaints, hearings and judgements. With respect to the latter, while the WTO dispute settlement mechanism provides an international institution for the enforcement of breaches of WTO competition-related provisions it is limited to these provisions which, as mentioned in Part I, have been developed in a piecemeal manner.⁴⁸

The relationship of competition policy rules to the application of trade remedies

42. Some RTAs prohibit the use of antidumping measures between signatories in light of co-operation on competition policy matters (see also Chapter on Contingency Protection).

Mexico-USA Agreement and the 2001 Mexico-Canada Agreement, regarding the application of their competition laws, contain similar provisions.

⁴⁵ See OECD (1994) para 51.

⁴⁶ Members have however undertaken in the legally non-binding APEC Principles to Enhance Competition Policy and Regulatory Reform 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.

⁴⁷ The 1960 Decision recommends that if addressed a party should accord sympathetic consideration to, and should afford adequate opportunity for consultations with, the requesting party with a view to reaching mutually satisfactory conclusions. If it agrees that such harmful effects are present it should take such measures as it deems appropriate to eliminate these effects. As mentioned, these arrangements have only been invoked on three occasions, see above at note 5.

⁴⁸ See WTO Annual Report 1997 for a discussion of how WTO dispute settlement potentially relates to this area.

43. A key example is ANZCERTA which, as already mentioned, has phased out, since 1 July 1990, the application of antidumping remedies in bilateral trade relations between Australia and New Zealand in parallel with the amendment of domestic competition laws to make their misuse of substantial market power prohibitions fully applicable to anti-competitive transactions occurring within the region. Similarly, and matching their non-application within the EU, the EEA precludes the application of anti-dumping measures, countervailing measures and measures against illicit commercial practices in the relations between the Contracting Parties.⁴⁹ Under MERCOSUR, although the use of anti-dumping duties remains possible in internal trade, it is envisaged that these measures will be gradually eliminated in parallel with ongoing progress to harmonise competition policy.⁵⁰

44. The Canada-Chile FTA also provides for the reciprocal elimination of anti-dumping actions between the two parties.⁵¹ The agreement is significant in this regard as it is the first to prohibit anti-dumping measures between the parties while only addressing competition policy in general terms elsewhere in the RTA.⁵² The approach to the interface between anti-dumping and competition adopted in the Canada-Chile FTA diverges considerably from that of the NAFTA which, while containing similarly broad competition policy provisions, maintains the parties' rights to apply anti-dumping or countervailing measures (Article 1902).⁵³ What direction the Free Trade Area of the Americas (FTAA) initiative will follow, and whether it will adopt a model similar to the Canada-Chile FTA or that of the NAFTA, has not yet been determined but will likely need to accommodate a number of country specific considerations, including the fact that less than half the countries in the region currently have competition laws.⁵⁴

45. Beyond NAFTA, RTAs that continue to allow for the application of anti-dumping measures in line with the GATT/WTO commitments include the EU-Mexico FTA and the Euro-Mediterranean Association Agreements. Similarly, the COMESA Treaty provides for anti-dumping trade remedies which are seen as a necessary tool "to ensure that the regional liberalisation programme does not unfairly disadvantage weak and vulnerable industries".⁵⁵ A challenge in this respect, may be how to reconcile this notion of "unfairness" with a treaty including competition provisions aimed in principle at the protection of consumers and economic efficiency.

46. As noted earlier, the GATT/WTO provides for the use of anti-dumping duties. Thus to the extent that such duties are no longer permitted under a RTA then it differs from the WTO. The use of competition measures in lieu of anti-dumping measures in intra-regional trade, where anti-dumping measures would

⁴⁹ EC Treaty, Article 91; EEA, Article 26.

⁵⁰ Decision 28/00, see Chapter on Contingency Protection.

⁵¹ Article M-01 (Reciprocal Exemption from the Application of Anti-dumping Duty Laws) of the Canada-Chile FTA sets out that [Subject to Article M-03] "as of the date of entry into force of this Agreement each Party agrees not to apply its domestic anti-dumping law to goods of the other Party". Specifically: (a) neither Party shall initiate any anti-dumping investigations or reviews with respect to goods of the other Party; (b) each Party shall terminate any ongoing anti-dumping investigations or inquiries; (c) neither Party shall impose new anti-dumping duties or other measures in respect of such goods; and (d) each Party shall revoke all existing orders levying anti-dumping duties. Furthermore, each Party shall amend, and publish as appropriate, its relevant domestic anti-dumping law in relation to goods of the other Party to ensure that the objectives of the article are achieved.

⁵² In contrast, as noted earlier in this paper the ANZCERTA, EU and EEA have been matched by significant harmonisation of substantive competition rules.

⁵³ The NAFTA has established its own dispute settlement procedures in the field of anti-dumping.

⁵⁴ See "OAS AD Study Sees Lessons for FTAA from Canada-Chile Pact", *Inside US Trade*, 20 April 2001.

⁵⁵ Musonda (2000).

still apply to third parties, has been raised by certain WTO Members as risking potential distortions in the international trading system where both regimes are based on different criteria and conditions.⁵⁶ Certainly it is an area where it has been suggested that the relationship between “competition policy and RTAs should be explored”.⁵⁷

⁵⁶ See WTO (2000), “Synopsis of ‘Systemic’ Issues Related to RTAs”, WTO Committee on Regional Trade Agreements, 2 March 2000, WT/REG/W/37 at p 7.

⁵⁷ Japanese contribution in the WTO Committee on Regional Trade Agreements, see “Note of the Meetings of 27 November and 4-5 December 1997”, WTO Committee on Regional Trade Agreements, 13 January 1998, WT/REG/M/15 at para 29. See also the contribution by Canada which concluded that the consequences under GATT Article XXVI(5) of parties to a RTA doing away with anti-dumping remedies and adopting a different mechanism to deal with price discrimination “was not clear, and this deserved more consideration... (as) there might be a link between the two elements that would need to be further explored”, para 26. Most recently, the Joint Study Group for the JSEPA acknowledged that “whilst non-application of AD... could have a significant positive demonstration effect, there were differing interpretations regarding its consistency with the WTO MFN obligation” and thus suggested that it remain a subject for “further negotiations”, see JSEPA Joint Study Report, paras 48 – 49.

GLOSSARY

ANDEAN COMMUNITY: Bolivia, Colombia, Ecuador, Peru and Venezuela.

ANZCERTA (Australia-New Zealand Closer Economic Relations Trade Agreement): Australia and New Zealand

APEC (Asia Pacific Economic Co-operation Forum): Australia; Brunei Darussalam; Canada; Chile; China; Hong Kong, China; Indonesia; Japan; Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; the Philippines; Russia; Singapore; Chinese Taipei; Thailand; United States; Vietnam.

CARICOM (Caribbean Community): Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Republic of Suriname and Trinidad and Tobago. The Bahamas does not participate in the common market and Haiti is not yet a full member.

CEFTA (Central European Free Trade Agreement): Bulgaria, Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia.

COMESA (Common Market for Eastern and Southern Africa): Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Zambia, Zimbabwe.

EFTA (European Free Trade Association): Iceland, Liechtenstein, Norway and Switzerland.

EEA (Agreement on the European Economic Area): Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, United Kingdom, Spain, Sweden.

EU (European Union) : Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, United Kingdom, Spain, Sweden.

Europe Agreements: The EU has concluded these with Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic, Slovenia.

Euro-Med (Euro-Mediterranean Association Agreements) (First-generation): The EU has concluded these with Cyprus, Malta, Turkey.

Euro-Med (Euro-Mediterranean Association Agreements): The EU has concluded these with Tunisia, Israel, Morocco and the Palestinian Authority.

Euro-Med (Euro-Mediterranean Co-operation Agreements): The EU has concluded these with Algeria, Egypt, Jordan, Lebanon and Syria.

FTAA (Free Trade Area of the Americas): Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua,

Panama, Paraguay, Peru, St Lucia, St Kitts and Nevis, St Vincent and Grenadines, Suriname, Trinidad and Tobago, Uruguay, United States, Venezuela.

Group of Three Agreement: Colombia, Mexico and Venezuela.

MERCOSUR (Mercado Común del Sur / *Southern Common Market Agreement*): Argentina, Brazil, Paraguay and Uruguay.

NAFTA (North American Free Trade Agreement): Canada, Mexico, United States.