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**CPFTR PAPER XIV: THE CONTRIBUTION OF BILATERAL
TRADE OR COMPETITION AGREEMENTS TO COMPETITION
LAW ENFORCEMENT COOPERATION BETWEEN CANADA
AND CHILE**

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CONTENTS

INTRODUCTION

PART I: LEGAL AND ECONOMIC CONTEXT OF THE
COMPETITION LAWS AND THE COOPERATION
AGREEMENT

PART II: NEGOTIATION OF THE COOPERATION
AGREEMENT

PART III: OBJECTIVES OF THE COOPERATION
AGREEMENT

PART IV: MAIN PROVISIONS IN THE COOPERATION
AGREEMENT

PART V: COMPARISON TO, AND RELATIVE
CONTRIBUTION OF, MORE RIGOROUS
COOPERATION ARRANGEMENTS, OR SIMPLER
INFORMAL COOPERATION ARRANGEMENTS

PART VI: A SUBSTANTIVE ANALYSIS OF BOTH THE
PRACTICAL USES AND THE LIMITATIONS OF
THE COOPERATION ARRANGEMENT

PART VII: RECOMMENDATIONS

PART VIII: REFERENCES/SOURCES

ANNEX I: CHAPTER J OF THE CANADA-CHILE FTA

ANNEX II: THE CANADA-CHILE MOU

ANNEX III: DESCRIPTION OF THE DOMESTIC COMPETITION
LAW ENFORCEMENT REGIMES

ANNEX IV: CANADA-CHILE QUESTIONNAIRE

INTRODUCTION

This paper analyses the structure and operation of the cooperation agreements on competition matters between Canada and Chile. It is one of three separate but related papers written by the authors which detail the contribution of bilateral trade or competition agreements to trans-national competition law enforcement cooperation.¹

Specifically, this paper identifies:

- (i) the factors bearing on the choice of cooperative instruments chosen by Canada and Chile;
- (ii) the relative effectiveness and contribution to enhanced cooperation in competition matters of the competition provisions in the Canada-Chile Free Trade Agreement (CCFTA) and the Canada-Chile MOU vs. the enforcement cooperation provisions in other agency-agency enforcement arrangements;
- (iii) the relative effectiveness and contribution of ‘competition cooperation’ provisions in both the Canada-Chile FTA and MOU to formal enforcement cooperation, informal enforcement cooperation and non-enforcement related cooperation between Canada and Chile;
- (iv) the factors which legitimately and illegitimately impede cooperation between Canada and Chile; and
- (v) recommendations for Canadian and Chilean policymakers about how to improve the effectiveness of their competition enforcement cooperation arrangements.

Very little literature exists at present on the Canada-Chile cooperation arrangements and there are as yet no publicly available official reports on its operation. The authors thus conducted their research by *inter alia* sending detailed questionnaires to and interviewing officials from the following departments or agencies:

¹ The other two papers are concerned with the cooperation frameworks established between Canada and Costa Rica (CPFTR Paper XV) and the EU and Mexico (CPFTR Paper XVI).

- The Canadian Competition Bureau; and
- The Chilean National Economic Prosecutor's Office.²

Very little literature exists at present on the Canada-Chile cooperation arrangements. It is hoped that this paper will change this situation and contribute substantially to the current debate surrounding the effectiveness of bilateral competition enforcement cooperation agreements.

**PART I: LEGAL AND ECONOMIC CONTEXT OF THE COMPETITION
LAWS AND THE COOPERATION AGREEMENTS**

The Canada-Chile Free Trade Agreement (CCFTA)³, signed in Santiago, Chile in December 1996, came into force on July 5th 1997. The agreement, in conformity with Article XXIV of the General Agreement on Tariffs and Trade (GATT)⁴ and Article V of the General Agreement on Trade in Services (GATS),⁵ established a 'free trade area' between the countries of Canada and Chile. The idea behind its adoption was to give Canada an economic advantage in Chile that is not enjoyed by the EU, the US or other trading nations, while providing a boost to the Chilean government in its campaign to enter the North American Free Trade Agreement (NAFTA).⁶

The agreement covered many different aspects of trade (e.g. trade in goods; market access; customs; trade in services; investment; telecommunications; and state enterprises to name a few). It also provided the necessary institutional framework and dispute settlement procedures required to ensure its effective administration and

² A Chilean trade official was also present at interview.

³ A copy of the agreement is available at the Canadian Competition Bureau website: <http://www.dfait-maeci.gc.ca/tna-nac/cda-chile/menu-en.asp>.

⁴ See: http://www.wto.org/english/docs_e/legal_e/06-gatt.doc.

⁵ See: http://www.wto.org/english/docs_e/legal_e/26-gats.doc. Both the GATT and the GATS are part of the Marrakesh Agreement Establishing the World Trade Organization. See generally: www.wto.org.

⁶ See Daly, "Canada-Chile: Free Trade Agreement" 36 I.L.M. 1067 (1997), 1067. The text of the NAFTA is available at <http://www.dfait-maeci.gc.ca/nafta-alena/agree-en.asp>.

enforcement. Finally, some exceptions to the free trade regime were detailed relating to for example national security; balance of trade; information dissemination; and industrial and cultural matters.

As the Canada-Chile FTA is seen as a stepping stone to membership of the NAFTA for Chile many of its provisions are similar in scope and substance to those of the NAFTA. This is particularly true in relation to rules of origin, customs modalities and importantly for our purposes its provisions on competition policy. Unlike the NAFTA however the CCFTA does not include provisions on intellectual property rights; technical standards; sanitary and phytosanitary measures for agriculture; energy; or government procurement. In relation to trade remedies it could be argued however that the CCFTA exceeded the accomplishments of the NAFTA: anti-dumping measures between Canada and Chile were to be phased out over a six year period.

As a result of the agreement, from July 1997 onwards 85% of Canadian imports to Chile would be imported free of any import duty.⁷ Over five years, the eight percent duty that applied to the rest of the goods and services was gradually reduced to zero. Moreover, there are additional benefits and significantly improved guarantees for Canadian investors in Chile. This agreement would help ensure that over the next eight years two-way trade between Canada and Chile—based on both Canadian and Chilean import statistics—would increase by 54 percent. Further, in terms of investment Canada is now the third largest player in Chile.⁸

In order to ensure that the benefits of the FTA were not undermined by private barriers to trade—established perhaps through anticompetitive business conduct—the parties agreed to include provisions on competition policy and cooperation and coordination thereof in the trade agreement.⁹ To this end, in late 2001 the competition authorities of both Canada and Chile also signed a Memorandum of Understanding¹⁰ which details how cooperation is to be achieved in practice.

⁷ Most Chilean goods had already been benefiting from a levy free regime in Canada, so the immediate trade benefits would be especially clear in terms of Canadian imports.

⁸ See: <http://www.dfait-maeci.gc.ca/tna-nac/ccftabrochure-en.asp>.

⁹ See Articles J-01 (1) and J-01 (2) CCFTA.

¹⁰ Available at: <http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02320e.html>.

This paper investigates the relative effectiveness of the competition and cooperation provisions in the FTA and the MOU respectively with the aim of making recommendations to improve the effectiveness of trans-national competition enforcement and to ensure that the benefits of free trade are not eliminated or reduced through private anticompetitive action.

PART II: NEGOTIATION OF THE COOPERATION AGREEMENTS

The history of the negotiation of the Canada-Chile Free Trade Agreement begins with the launch of the NAFTA in January 1994. This agreement established a free trade area between the US, Canada and Mexico. It also contained provisions for other countries to accede to the agreement and become part of the free trade area, something the government of Chile was eager to do. The Summit of the Americas in December 1994 presented the occasion for the three signatories of the NAFTA to officially invite Chile to begin accession talks. These talks, after various preparatory meetings, began in earnest on the 7th of June 1995,¹¹ but were to break down later that year as the US executive, in a disagreement with Congress, would lose its ‘fast track’ authority to conclude international trade agreements.¹²

With the negotiations for accession to the NAFTA on hold for the foreseeable future¹³, both Canada and Mexico decided to conclude bilateral free trade treaties with Chile. On December 29 1995 the governments of both Canada and Chile officially committed to negotiate their FTA. In February 1995 the parties further agreed to include side agreements on the environment and labour as part of the overall free trade package. As the agreement was intended to be a stepping stone for the eventual

¹¹ With the meeting of the Ministers of Foreign Trade of Canada (Roy MacLaren), the US (Mickey Kantor), Mexico (Herminio Blanco) and Chile (Eduardo Aninat).

¹² Chile did not wish to continue the negotiations in the absence of such authority.

¹³ On November 27 2000, after the conclusion of FTAs between Canada and Mexico, Chile resumed negotiations with the US for Chile’s eventual accession to the NAFTA.

accession of Chile to the NAFTA, its provisions mirrored to a large degree both the substance and form of the provisions of the NAFTA. In negotiating the agreement, Canada and Chile had also been particularly mindful of the need to ensure full compliance with WTO obligations, including the provisions of Article XXIV of the GATT 1994.¹⁴

On November 18 1996, after almost five months of negotiations the Canada-Chile Free Trade Agreement was signed in Ottawa by the Prime Minister of Canada, Jean Chrétien, and the President of Chile, Eduardo Frei. The FTA came into force on July 4 1997. It was the first free trade agreement signed between Chile and a member of the G 7.

The agreement contains a rather brief and general competition chapter which is very similar in composition to Chapter XV of the NAFTA. Apart from obliging both Canada and Chile to adopt measures preventing anticompetitive behaviour and to take enforcement action with respect to such measures, this chapter also allows for further cooperation agreements to be concluded between these countries. In fact it was not long before another cooperation agreement, this time in the form of an agency-to-agency agreement, was signed between these two countries: on December 17, 2001, in Santiago, Chile the competition authorities of both Canada and Chile signed a Memorandum of Understanding that set out a practical framework for notification, cooperation and coordination of enforcement activities, information exchange and conflict avoidance. This MOU came into force upon signing.

PART III: OBJECTIVES OF THE COOPERATION AGREEMENTS

The Canada-Chile FTA

Article A-02 of the Canada-Chile FTA, along with the numerous provisions relating to national treatment, most-favoured-nation treatment and transparency, details the

¹⁴ For the text of these agreements see: www.wto.org.

main objectives of this trade agreement. In short, the parties seek to eliminate barriers to trade affecting the movement of goods and services between their respective territories; to facilitate cross-border trade; to promote fair competition in the free trade area; and to increase investment opportunities between them. The FTA aims to create effective procedures for: (a) the implementation and application of its substantive provisions; (b) joint administration of its regime; and (c) the resolution of trade disputes between Canada and Chile. It is hoped that the agreement will establish a framework for further bilateral, regional and multilateral cooperation to expand and enhance the perceived benefits of the free trade area. The preamble to the FTA also states that the agreement aims to enhance the competitiveness of Canadian and Chilean firms in global markets.

In relation to the provisions dealing with competition policy, the parties “recognise” that measures proscribing anti-competitive behaviour and any enforcement action taken pursuant to such measures “enhance the fulfilment” of the above mentioned objectives.¹⁵ Further, Canada and Chile acknowledge the importance of official antitrust cooperation and coordination for effective competition law enforcement in the free trade area.¹⁶

The Canada-Chile MOU

The purpose of the MOU is to promote cooperation and coordination between Canada and Chile in competition law matters, thus formalising the obligations of Article J-01 (2) while reducing the effect of potential differences in the application of their relevant laws.¹⁷ The parties to the MOU, reflecting the language of Chapter J CCFTA, recognise the importance of cooperation and coordination among competition authorities to further effective competition law enforcement in the free trade area established between Canada and Chile. The MOU aims to promote cooperation and coordination by providing for *inter alia* formal notification, requests for assistance and the holding of meetings of competition officials.

¹⁵ Article J-01 (1) CCFTA.

¹⁶ Article J-01 (2) CCFTA.

¹⁷ MOU I (1).

PART IV: MAIN PROVISIONS IN THE COOPERATION AGREEMENTS

Section 1: The Canada-Chile FTA

Chapter L of the CCFTA contains general obligations relating to cooperation such as notifications, consultations and exchanges of information. Chapter J of the CCFTA contains the substantive provisions relating to competition policy¹⁸, monopolies¹⁹ and state enterprises,²⁰ as well as definitions specific to these areas.²¹

Notifications, Consultations and Exchanges of Information²²

Under the agreement each party must designate a contact point to facilitate communications between them on any matter covered by the FTA, including competition policy.²³ On the request of the other party, the contact point shall identify the office or official responsible for the matter and assist, as necessary, in facilitating communication with the requesting party.²⁴

Each Party must also ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by the FTA, including competition policy, are promptly published or otherwise made available in such a manner as to enable interested persons and the other party to become acquainted with them.²⁵ To the extent possible, both Canada and Chile must:

- (a) Publish in advance any such measure that it proposes to adopt; and

¹⁸ Article J-01 CCFTA.

¹⁹ Article J-02 CCFTA.

²⁰ Article J-03 CCFTA.

²¹ Article J-04 CCFTA.

²² Any notification or exchange of information under the CCFTA will of course be subject to the exemption in Article O-05: "Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions."

²³ Article L-01 CCFTA.

²⁴ *Ibid.*

²⁵ Article L-02 (1) CCFTA.

(b) Provide interested persons and the other party a reasonable opportunity to comment on such proposed measures.²⁶

Each party is obliged to notify the other of any proposed or actual measure that the party considers might materially affect the operation of the FTA or otherwise substantially affect the other party's interests under the FTA.²⁷ Information can be obtained upon request and should be provided promptly if such a request is made and a party must respond to questions pertaining to any actual or proposed measure, regardless of whether the other party has been previously notified of that measure.²⁸ Any notification and information should be supplied irrespective of whether the measures are consistent with the FTA.²⁹

Competition Policy

The parties to the agreement undertake to:

- (1) “adopt or maintain” certain measures that proscribe anticompetitive behaviour;
- (2) take “appropriate” enforcement action pursuant to such measures in order to fulfil the objectives of the FTA;
- (3) “consult from time to time” in order to assess the effectiveness of the measures taken to enforce their competition laws;³⁰ and
- (4) “cooperate” on the issues of competition law enforcement.³¹

The provisions on competition policy are relatively brief and arguably ill-defined: no definition is given for example on the meaning of the words “measures” or “anticompetitive business conduct.”³² On the other hand, the relative vagueness of the provisions provides a certain amount of flexibility to both parties in the execution of their obligations. The concept of “cooperation” however is more detailed: its many forms may include mutual legal assistance, notification, consultation and exchange of

²⁶ Article L-02 (2) CCFTA.

²⁷ Article L-03 (1) CCFTA.

²⁸ Article L-03 (2) CCFTA.

²⁹ Article L-03 (3) CCFTA.

³⁰ All three obligations find their source in Article J-01 (1) CCFTA.

³¹ Article J-01 (2) CCFTA.

³² “Anticompetitive business conduct” is defined (by reference to the competition laws of the parties) in the MOU subsequently concluded between the agencies of Canada and Chile: Article I (2) (a) MOU.

information.³³ It should also be noted that there is no mention of establishing or maintaining an (independent and impartial) competition authority.³⁴

As with the NAFTA³⁵, neither Canada nor Chile may have recourse to the dispute settlement procedures of the FTA for any matter arising under the article in relation to competition policy.³⁶

Monopolies

Neither party is prevented by the agreement from designating a monopoly if either party so wishes.³⁷ However, if a party intends to designate a monopoly, and such designation would affect the interests of persons of the other party, the designating party must³⁸ (a) wherever possible, provide prior written notification to the other party of the designation; and (b) endeavour to introduce at the time of the designation such conditions on the operation of the monopoly as will minimize or eliminate any nullification or impairment of benefits.³⁹

Each party must also ensure, “through regulatory control, administrative supervision or the application of other measures”⁴⁰, that any privately-owned monopoly that it designates and any government monopoly that it maintains or designates:

(a) acts in a manner that is not inconsistent with the party's obligations under the FTA wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the party has delegated to it in connection with the monopoly good or service;⁴¹

(b) except to comply with any terms of its designation that are not inconsistent with either (c) or (d), acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability,

³³ *Ibid.*

³⁴ *Cf.* the Canada-Costa Rica FTA, available at: http://www.dfait-maeci.gc.ca/tna-nac/Costa_Rica_toc-en.asp.

³⁵ See Article 1501 (3) NAFTA, *op. cit.*

³⁶ Article J-01 (3) CCFTA.

³⁷ Article J-02 (1) CCFTA.

³⁸ According to Article J-02 (2) CCFTA.

³⁹ Such nullification or impairment is defined in Annex N-04 CCFTA.

⁴⁰ Article J-02 (3) CCFTA.

⁴¹ Such as the power to grant import or export licences, approve commercial transactions or impose quotas, fees or other charges: *ibid.*

marketability, transportation and other terms and conditions of purchase or sale;

(c) provides non-discriminatory treatment to investments of investors, to goods and to service providers of the other party in its purchase or sale of the monopoly good or service in the relevant market; and

(d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, its subsidiary or other enterprise with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of the other party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct.⁴²

The above rules do not apply to procurement by government agencies of goods and services for “pure governmental purposes” and not commercial purposes.⁴³

State Enterprises

As regards state enterprises, nothing in the agreement restricts the maintenance or establishment of a state enterprise.⁴⁴ However, each party must ensure that a state enterprise, which exercises any regulatory control, administrative or other governmental authority as delegated to it by the party, acts in a manner not inconsistent with Chapter G (Investment) of the FTA.⁴⁵

Both parties must ensure that that any state enterprise applies non-discriminatory treatment in sale of its goods or services to investors of the other party in its territory.⁴⁶

Definitions and Scope

The following definitions are included in Chapter J and restrict the scope of its application accordingly:

⁴² *Ibid.*

⁴³ Article J-02 (4) CCFTA.

⁴⁴ Article J-03 (1) CCFTA.

⁴⁵ Article J-03 (2) CCFTA.

⁴⁶ Article J-03 (3) CCFTA.

- (i) To “designate” means to establish, designate or authorize, or to expand the scope of a monopoly to cover an additional good or service, after the date of entry into force of this Agreement;
- (ii) “Discriminatory provision” includes treating:
 - (a) A parent, a subsidiary or other enterprise with common ownership more favourably than an unaffiliated enterprise; or
 - (b) One class of enterprises more favourably than another, in like circumstances;
- (iii) “Government monopoly” means a monopoly that is owned, or controlled through ownership interests, by the national government of a party or by another such monopoly;
- (iv) “In accordance with commercial considerations” means consistent with normal business practices of privately-held enterprises in the relevant business or industry;
- (v) “Market” means the geographic and commercial market for a good or service;
- (vi) “Monopoly” means an entity, including a consortium or government agency, which in any relevant market in the territory of a party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant;
- (vii) “Non-discriminatory treatment” means the better of national treatment and most-favoured-nation treatment, as set out in the relevant provisions of this Agreement;
- (viii) “State enterprise” means, except as set out in Annex J-04 CCFTA, an enterprise owned, or controlled through ownership interests, by a party.

As stated above, certain important concepts are not defined in the agreement, for example “anticompetitive business conduct” and “enforcement measures.”⁴⁷

Section 2: The Canada-Chile MOU

⁴⁷ And specifically whether such measures should include civil, criminal or administrative action.

The MOU concluded between the competition authorities of Canada and Chile contains provisions relating to notifications⁴⁸, cooperation and coordination⁴⁹, avoidance of conflicts⁵⁰, meetings of competition officials⁵¹ and communications between competition authorities.⁵² The agreement also includes provisions relating to confidentiality⁵³ as well as definitions that restrict the scope of its application.⁵⁴ The MOU is necessarily more detailed than the provisions on cooperation in the FTA; it builds on and formalises the commitments contained in the earlier agreement.

Notifications

According to the MOU, each party will notify the other of enforcement activities that may “affect the other party’s interest in the application of its competition law.”⁵⁵ The following activities are expressly stated in the MOU as inviting notification by the enforcing party:

- (a) those that are relevant to the enforcement activities of the other party;
- (b) those that involve anticompetitive activities, other than mergers or acquisitions, carried out in whole or in part in the other party's territory, except where those activities are insubstantial;
- (c) those that involve mergers or acquisitions in which one or more of the parties to the transaction, or a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other party's territory;
- (d) those that involve remedies that expressly require or prohibit conduct in the other party's territory or are otherwise directed at conduct in that territory;
- and
- (e) those that involve the seeking of information located in the other party's territory, whether by personal visit by officials of a party or otherwise, except

⁴⁸ Article II MOU.

⁴⁹ Article III MOU.

⁵⁰ Article IV MOU.

⁵¹ Article V MOU.

⁵² Article VII MOU.

⁵³ Article VI MOU.

⁵⁴ Article I MOU.

⁵⁵ Article II (1) MOU. Such notification is of course subject to the confidentiality rules elaborated in Article VI MOU.

with respect to telephone contacts with a person in the other party's territory where that person is not the subject of investigation and the contact seeks only an oral response on a voluntary basis.⁵⁶

There is no *formal* timetable as such for notifications under the MOU. All that is required is that the notifying party fulfils its obligation towards the other competition authority “as soon as it becomes evident that notifying circumstances exist.”⁵⁷ Only a *preliminary* notification is required, unless (a) the notifying party becomes aware of new issues bearing on the interests of the other party in the application of its competition law; or (b) the notified party requests otherwise.⁵⁸ The required *content* of a notification is not detailed in the MOU. Notifications will however include “the nature of the anticompetitive activities under investigation” and the “competition law provisions concerned” and will be “sufficiently detailed” to enable the notified party to make an “initial evaluation of the effect” of the enforcement activities on its interests in the application of its competition law.⁵⁹

Each party will also “promptly” notify the other party of any amendment to its competition law.⁶⁰ This provision is not contained in the Canada-Chile FTA.

Cooperation and Coordination

The provisions of the MOU concerning cooperation and coordination are relatively brief. Article III (1) MOU states that it is in the parties “common interest” to *cooperate* and to share information where appropriate and practicable. Likewise, Article III (2) MOU states that the parties should endeavour to *coordinate* their enforcement activities when it is both appropriate and practicable. The agreement does not detail the specific forms that such coordination will take.

Avoidance of Conflicts

The parties to the MOU both agreed that it is within their common interest to minimise potential adverse effects of one party’s enforcement activities on the other

⁵⁶ *Ibid.*

⁵⁷ Article II (2) MOU.

⁵⁸ Article II (3) MOU.

⁵⁹ Article II (4) MOU.

⁶⁰ Article I (3) MOU.

party's interests in the application of its competition law.⁶¹ Conflicts are to be avoided in the following manner: where one party informs the other that a specific enforcement activity by the second party may affect the first party's interests in the application of its competition law, the second party will endeavour to provide timely notice of significant developments relating to those interests and an opportunity to provide input regarding any proposed penalty or remedy.⁶² This opportunity to "provide input" is a particular form of negative comity. The agreement does not expressly provide for the use of positive comity i.e. requests by one party for enforcement action to be taken in the other party's jurisdiction.

Meetings of Competition Officials

Officials of the parties to the MOU are to meet "periodically" to ensure the effective functioning of the mechanisms of the MOU.⁶³ Their activities may include:

- (a) exchanging information on their enforcement efforts and priorities in relation to competition law;
- (b) exchanging information on economic sectors of common interest;
- (c) discussing competition policy changes under consideration;
- (d) discussing other matters of mutual interest relating to the application of their competition laws or the operation of the MOU; and
- (e) discussing the possibility of negotiating an agreement between Canada and Chile regarding the application of their competition laws.⁶⁴

Communications between Competition Authorities

Article VII MOU states that communications under the agreement are to be carried out directly between the competition authorities of Canada and Chile. Each party will designate a communications authority and notify the other party in writing as to its identity.⁶⁵

Confidentiality of Information

⁶¹ Article IV (1) MOU.

⁶² Article IV (2) MOU.

⁶³ Article V MOU.

⁶⁴ *Ibid.*

⁶⁵ Article VII MOU.

Mirroring Article O-05 of the Canada-Chile FTA, the MOU does not require any action or omission that is inconsistent with the laws of either party nor does it require a change in the (confidentiality or any other) laws of either Canada or Chile.⁶⁶ Further, neither party is required to communicate information to the other party if such communication would be “incompatible with the first party's interests” in the application of its competition law.⁶⁷

In brief, no information will be exchanged pursuant to the MOU which could not have been exchanged in the absence of this Memorandum.⁶⁸

Information exchanges may be subject to and depend upon “the acceptability of the assurances given by the other Party with respect to confidentiality and with respect to the purposes for which the information will be used.”⁶⁹

Unless otherwise agreed by the parties, each party should maintain the confidentiality of any information communicated to it in confidence by the other party. Further, each party will oppose any request by a third party for communication of such confidential information, unless the party providing the confidential information consents in writing to its communication.⁷⁰

Definitions and Scope

The following definitions are included in the MOU and limit the scope of its application accordingly:

- (a) "Anticompetitive activity(ies)" means any conduct or transaction that may be subject to penalties or other relief under the competition law administered and enforced by the Parties;
- (b) "Competition law(s)" means:
 - (i) for the Commissioner of Competition, the *Competition Act*, R.S.C. 1985, c. C-34, except sections 52 through 60 and Part VII.1;
 - (ii) for Fiscal Nacional Economico, Decree Law-211 of 1973;

⁶⁶ Article VI (1) MOU.

⁶⁷ Article VI (2) MOU.

⁶⁸ *Ibid.*

⁶⁹ Article VI (3) MOU.

⁷⁰ Article VI (4) MOU.

as well as any amendments thereto, and such other laws or regulations as the parties may from time to time agree in writing to be a "competition law" for the purposes of the MOU;

(c) "Enforcement activity(ies)" means any investigation or proceeding conducted by a party in relation to the competition law it administers and enforces; and

(d) "Territory" means the territory in which a party has jurisdiction.

**PART V: COMPARISON TO, AND RELATIVE CONTRIBUTION OF,
MORE RIGOROUS COOPERATION ARRANGEMENTS, OR SIMPLER
INFORMAL COOPERATION ARRANGEMENTS**

The competition provisions of the Canada-Chile FTA of July 1997 and the Canada-Chile MOU of December 2001 follow a long line of similar bilateral (and sometimes trilateral) agreements concluded between countries wishing to cooperate in transnational competition law enforcement. In fact, since the first OECD Recommendation in 1967⁷¹ over twenty cooperation agreements⁷² have been signed between countries as diverse as Iceland, Australia, Chile and even Papua New Guinea. These agreements invariably aim (a) to promote cooperation and coordination between the parties; (b) to reduce the possibility and or impact of differences in the parties' competition law and policy; and (c) more recently, to protect free trade areas from the effects of anticompetitive activities. The Canada-Chile agreements are no different: as Article I (1) of the MOU makes clear, the parties have concluded such an

⁷¹ This was a rather vague yet useful document that attempted to establish norms of cooperation in international antitrust enforcement. Its recommendations were voluntary. It has been modified on various occasions, most recently in 1995: Recommendation of the Council of 27th and 28th July of 1995 [C (95) 130 (Final)].

⁷² These agreements are agreements specific to competition cooperation. They do not include competition cooperation provisions contained within FTAs. They include 'state-to-state' as well as 'agency-to-agency' cooperation agreements. As state-to-state agreements are concluded between governments as opposed to competition authorities, it is axiomatic that they may sometimes reflect governmental priorities, policies and interests that are not usually expressed in pure agency-to-agency arrangements. The Canada-Chile MOU is an agency-to-agency agreement.

arrangement “to promote cooperation and coordination between the parties and to reduce the effect of potential differences in the application of competition law in Canada and Chile”;⁷³ measures taken pursuant to Chapter J of the FTA will “enhance the fulfillment of the objectives of [the free trade] agreement”⁷⁴ e.g. the elimination of barriers to trade in, and the facilitation of the cross-border movement of, goods and services between both jurisdictions.

As explained above the competition chapter of the CCFTA is quite vague and brief; the real substance of the cooperation arrangement lies with the MOU concluded between these countries. It is this MOU which resembles very closely the kind of specialised agreement envisaged by the OECD Recommendation. In fact, the mechanism bears a striking resemblance to the competition cooperation agreement established between the US and the EU in 1991.⁷⁵ Further, since the signing of the North American Free Trade Agreement between the US, Canada and Mexico the inclusion of competition provisions within FTAs has become the norm, at least for the Canadian authorities. It is for these reasons that the authors wish to highlight in this short section the substantial contribution of both the OECD Recommendation and the NAFTA in general and the US-Canada and EU-US Cooperation Agreements⁷⁶ in particular to the composition of the antitrust cooperation arrangement between Canada and Chile.

The OECD Recommendation

As stated above the OECD adopted its first Recommendation in 1967.⁷⁷ Since then it has been modified four times: in 1973,⁷⁸ 1979,⁷⁹ 1986⁸⁰ and 1995.⁸¹ At its most basic

⁷³ Article 1.1 of the Canada-Chile MOU.

⁷⁴ Article J-01 (1) CCFTA.

⁷⁵ Agreement between the Government of the USA and the Commission of the European Communities Regarding the Application of their Competition Laws, 23 Sept. 1991, [1991] 4 CMLR 823, 30 ILM 1487. The EU-US Positive Comity Agreement, 4th June 1998, [1998] OJ L173/28, [1999] 4 CMLR 502 is not relevant here as the Canada-Chile MOU does not provide for positive comity.

⁷⁶ It should be noted that the Canada-Chile MOU is also very similar to the agreement concluded between Canada, Australia and New Zealand in 2000. See: strategis.ic.gc.ca/SSI/ct/euro-agree_e.pdf. Due to considerations of length, the authors propose to deal with only the EU-US and US-Canada Agreements.

⁷⁷ Recommendation of the Council concerning cooperation between member countries on restrictive business practices affecting international trade of 5 October 1967 [C (567)53(Final)].

⁷⁸ Recommendation of the Council of 3rd July 1973 [C (73) 99 (Final)].

⁷⁹ Recommendation of the Council of 25th September 1979 [C (79) 154 (Final)].

⁸⁰ Recommendation of the Council of 21st May of 1986[C (86) 44 (Final)].

⁸¹ Recommendation of the Council of 27th and 28th July of 1995 [C (95) 130 (Final)].

the Recommendation acknowledges that competition law enforcement cooperation between countries must be encouraged but that such cooperation must not be construed so as to affect or undermine any country's idea of sovereignty or in particular any country's use of extraterritoriality with respect to competition law.⁸² Significantly, the type of agreement envisaged under the Recommendation does not have any bearing or direct effect on competition law harmonization. Instead, a mutual understanding or rather a nonbinding guide for conflict avoidance seems to be contemplated. According to the latest Recommendation, cooperation may take the following forms:

1. The notification of the competition authorities of the other party when the “important interests” of that party's country may be affected by enforcement (or other) activity taken within the notifying jurisdiction;⁸³
2. The coordination of parallel investigations where “appropriate and practicable”;⁸⁴
3. The sharing of information in order to permit the party whose important interests are affected to comment to, and consult with, the notifying party;⁸⁵
4. Consultations aimed at developing or applying “mutually satisfactory and beneficial measures” for dealing with anticompetitive practices that affect international trade;⁸⁶
5. The supply of relevant information on anticompetitive activity in order to further the objective of point 4 above, subject of course to confidentiality laws and the restrictions imposed by their respective interests;⁸⁷
6. The use of the principle of “negative comity” when the interests of another party are affected by enforcement activity;⁸⁸ and
7. The use of “positive comity”.⁸⁹

Number 7 above was added by the 1973 Recommendation. It is perhaps the most progressive element of the Recommendation and has been included in many bilateral

⁸² See the Preamble to the 1995 Recommendation at recital 11.

⁸³ 1995 Recommendation at Article I. A. 1.

⁸⁴ *Ibid* at Article I. A. 2.

⁸⁵ *Ibid* at Article I.A. 1.

⁸⁶ *Ibid* at Article I. A. 3.

⁸⁷ *Ibid*.

⁸⁸ *Ibid* at Recital 7 of the Preamble.

⁸⁹ *Ibid* at Article I.B.5.a) and Article I.B.5.c).

cooperation agreements. Essentially it allows one party, whose interests are affected by anticompetitive activity occurring in whole or in part within the territory of the other party, to request that party to take enforcement action against such anticompetitive behaviour. It is the one major aspect of the OECD Recommendation that was not explicitly contained in either the Canada-Chile MOU or the competition chapter of the Canada-Chile FTA.

The proposals of the OECD were left deliberately vague: they can thus be adapted to suit the various purposes or needs of the contracting parties. However, the basic elements (notifications, exchange of information, consultations, coordination, and negative comity etc.) find expression in most if not all of the twenty plus competition cooperation agreements mentioned above, including the Canada-Chile agreement. The OECD was the frontrunner in encouraging jurisdictions to conclude these kinds of arrangements in competition matters and as a result its influence on the Canada-Chile arrangement should not be forgotten. It should also be noted however that the rather traditional nature of the OECD Recommendation has also informed the philosophy behind the Canadian-Chilean approach: neither the competition chapter nor the MOU affect domestic law in any way; current law and practice relating to the exchange of confidential information remains unchanged; and the obligations established are essentially non-binding. In effect, the Recommendation envisages an agreement that utilises a form of ‘soft’ law. As will become apparent in the next section⁹⁰ this is exactly the form of law dictating the operation of the Canadian-Chilean approach.

NAFTA

The NAFTA agreement of 1994 established a free trade area between Canada, the US and Mexico. In order to prevent the benefits of such a free trade area from being eliminated through (private) anticompetitive behaviour the agreement included a chapter on competition policy: Chapter 15. The free trade agreement signed between Canada and Chile in 1997 contained a competition chapter which in form and substance was almost identical to Chapter 15 of the NAFTA. In fact all FTAs entered into by Canada since the NAFTA have included a somewhat similar competition

⁹⁰ Part VI *infra*.

chapter.⁹¹ In brief these competition chapters include the following obligations which are also contained in Chapter 15 of the NAFTA:

- The obligation to adopt or maintain measures to proscribe anti-competitive business conduct;
- The obligation to take appropriate action to enforce such measures; and
- The obligation to consult from time to time about the effectiveness of such action.⁹²

Further, both the NAFTA and the CCFTA recognise the importance of cooperation and coordination, advocating their implementation through mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.⁹³ Finally, the competition provisions of the NAFTA and the CCFTA are not subject to dispute settlement procedures.⁹⁴

The US-Canada⁹⁵ and the EU-US Cooperation Agreements⁹⁶

The provisions of the Canada-Chile MOU are very similar in detail to those contained in the various competition cooperation agreements concluded between the US and Canada (in 1984 and 1995) and the EU and the US (in 1991). Although other bilateral cooperation agreements were in existence before 2001 and thus may have had some impact upon the composition of the cooperation arrangement between Canada and Chile it is submitted that due to *inter alia* (a) the importance of the EU, the US and Canada for international trade; (b) the detailed nature of the 1991 and 1995 agreements; (c) the fact that these agreements have served their purpose relatively well over the previous ten to fifteen years; and (d) the fact that the OECD

⁹¹ For example: Chapter 7 of the Free Trade Agreement between the Government of Canada and the Government of the State of Israel available at <http://www.dfait-maeci.gc.ca/tna-nac/cifta-en.asp>; and Chapter XI of the Canada-Costa Rica Free Trade Agreement available at http://www.dfait-maeci.gc.ca/tna-nac/costa_rica-en.asp.

⁹² See Article 1501.1 of the NAFTA and Article J-01(1) of the CCFTA.

⁹³ See Article 1501.2 of the NAFTA and Article J-01(2) of the CCFTA.

⁹⁴ See Article 1501.2 of the NAFTA and Article J-01 (3) of the CCFTA.

⁹⁵ See: Memorandum of Understanding between the Government of the United States of America and the Government of Canada as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, March 9, 1984, United States-Canada, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,503A. The US and Canada also entered into a cooperation agreement in 1995, available at: <http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02007e.html>.

⁹⁶ Agreement between the Government of the USA and the Commission of the European Communities Regarding the Application of their Competition Laws, 23 Sept. 1991, [1991] 4 CMLR 823, 30 ILM 1487.

Recommendation was a rather vague document containing broad suggestions, the authorities of both Canada and Chile would have been influenced by both the 1991 EU-US Cooperation Agreement and the 1995 US-Canada agreement when drafting a similar arrangement that would be applied to their own situation.⁹⁷ The following similarities can be detected:

Notifications: The three agreements require parties to notify the other side of any enforcement activity that may affect their “important interests”.⁹⁸ Prior to 1991 cooperation agreements that contained this provision did not specify what these interests might include. The EU-US Agreement changed this. Article II.2 of the agreement provided a list of enforcement activities that would be appropriate for notifications. The Canada-Chile MOU, like the US-Canada agreement, follows the EU-US example and details those situations which are suitable for notification; all five of its examples are taken from the EU-US Agreement.⁹⁹ The agreements also require that enough information be included in the notification to permit an effective evaluation.¹⁰⁰

Exchange of Information: What is important with these three agreements is not what information they *allow* for, but rather what information they *do not permit* to be exchanged. In this respect the agreements are identical: (a) no information will be exchanged pursuant to the agreement which could not have been exchanged in its absence; (b) information cannot be exchanged which would be contrary to the confidentiality laws of the parties; and (c) the exchange of information which would be contrary to the interests of the party in possession of the information is prohibited.¹⁰¹ Further, any confidential information received must remain confidential and the receiving party must oppose its disclosure to unauthorised third parties.¹⁰²

⁹⁷ It should be noted however that the 1991 and 1995 agreements were also influenced by earlier arrangements e.g. the 1984 US-Canada MOU, *op. cit.* From now on the ‘US-Canada Cooperation Agreement’ refers to the 1995 agreement unless otherwise stated.

⁹⁸ At Article II.1 of the EU-US Cooperation Agreement (‘EU-US’); Article II.1 of the US-Canada Cooperation Agreement (‘US-Canada’); and Article II.1 of the Canada-Chile MOU (‘the MOU’).

⁹⁹ Compare Article II.2 EU-US with Article II.2 of the MOU.

¹⁰⁰ Article II.6 EU-US; Article II.9 US-Canada; and Article II.4 of the MOU.

¹⁰¹ Article VIII.1 EU-US; Article X.1 and XI US-Canada; Article VI.2 of the MOU.

¹⁰² Article VIII.1 EU-US; Article X.2 US-Canada; Articles VI.3 and VI.4 of the MOU.

Coordination: The three documents allow the parties involved to coordinate their enforcement activities when it is both practicable and appropriate.¹⁰³

Consultations: The EU-US Agreement states that the parties agree to consult promptly with one another upon request: Article VII. Article VIII of the US-Canada agreement contains a similar obligation. The Canada-Chile MOU contains a similar obligation in Article V: officials of the parties should meet “periodically” to discuss various issues detailed within.

Negative/Traditional Comity: Negative comity¹⁰⁴ is a doctrine of politeness and good manners between states; it involves the consideration and balancing of numerous factors by one state before deciding to take enforcement or judicial action. The importance of this concept has been reduced somewhat by the jurisprudence of US courts: essentially it is applied only in very exceptional circumstances i.e. in the case of a “true conflict”¹⁰⁵ between jurisdictions.¹⁰⁶ Despite this jurisprudence the EU-US Agreement provides a list of factors to be considered when applying the comity principle.¹⁰⁷ Article IV of the MOU provides for the concept of negative comity: an enforcing party is to “minimize any potentially adverse effects of one party’s enforcement activities” on the other party’s interests in the application of its competition law.¹⁰⁸ However, unlike with both the EU-US and the US-Canada agreements, a list of factors to be considered when avoiding conflicts (through the use of the concept of negative comity) is not provided in the MOU.

¹⁰³ Article IV EU-US; Article IV US-Canada; Article III.2 of the MOU.

¹⁰⁴ The concept of positive comity, included in Article V of the EU-US agreement and in Article V of the US-Canada agreement (and also forming the substance of a later EU-US agreement), is not included in the Canada-Chile MOU.

¹⁰⁵ This is when full compliance with the laws of both jurisdictions is impossible or if the foreign law requires conduct contrary to the Sherman Act. See the following cases: *Timberlane Lumber Co. v. Bank of America*, 549 F. 2d 597 (9th Circuit, 1976); *Hartford Fire Insurance Co. v. California*, 509 US 764, 113 S. Ct. 2891 (1993).

¹⁰⁶ A distinction can be made however between ‘judicial comity’ (the use of comity to determine whether extraterritorial jurisdiction can be asserted in order to enforce the antitrust laws) and ‘agency-to-agency comity’ (the use of comity by the antitrust agencies both in its dealings with other agencies and in determining the appropriate enforcement action to be taken in the case of a violation of the antitrust laws). In the former case comity is only used in the context of a ‘true conflict’ between jurisdictions. However its application between antitrust agencies may be much more extensive.

¹⁰⁷ Article VI.3 of the EU-US Agreement. Article VI.5 US-Canada provides a similar list.

¹⁰⁸ Article IV.1 of the MOU.

Domestic Law: The EU-US agreement, the US-Canada agreement and the Canada-Chile MOU state that domestic law is not to be affected in any way by the operation of their provisions.¹⁰⁹

The Canada-Costa Rica FTA¹¹⁰

The Canada-Chile MOU is also very similar in detail to the competition chapter of the Canada-Costa Rica FTA, signed in the same year, 2001. The Canada-Costa Rica FTA however contains provisions that in some respects impose obligations that go further than the obligations imposed by the competition provisions of either the Canada-Chile FTA or the Canada-Chile MOU. For example Chapter XI of the Canada-Costa Rica FTA contains provisions creating the following obligations that are not expressly included in either of the documents relating to Chile:

- The obligation to establish or maintain an independent and impartial competition authority authorized to advocate pro-competitive solutions in the “design, development and implementation of government policy and legislation”;¹¹¹
- The obligation to adhere to the principle of non-discrimination in relation to the implementation of the objectives of the competition chapter;¹¹² and
- The obligation to work together in technical assistance initiatives related to competition policy, measures to proscribe anticompetitive activities and enforcement actions.¹¹³

Cooperation Agreements that Provide for the Exchange of Confidential Information

Like almost all competition enforcement cooperation arrangements established to date the effectiveness of the Canada-Chile cooperation framework is undermined by the fact that (a) neither the CCFTA nor the Canada-Chile MOU have any impact on the confidentiality laws of the parties; and (b) the exchange of confidential information is extremely limited under the national laws of the parties.

¹⁰⁹ Article IX EU-US; Article XI US-Canada; Article VI.1 of the MOU.

¹¹⁰ Available at: http://www.dfait-maeci.gc.ca/tna-nac/Costa_Rica_toc-en.asp.

¹¹¹ Article XI.2 (5) CCRFTA.

¹¹² Article XI.2 (2) CCRFTA.

¹¹³ Article XI.5 CCRFTA.

However, these observations do not apply to the more proactive agreements that have been concluded between different trade partners: there *are* two agreements that expressly provide for the exchange of confidential information between competition authorities, although both are subject to a commitment that they will use the confidential information only for the purposes stipulated in the agreement: the bilateral agreement established between the US and Australia¹¹⁴ and the trilateral agreement established between Iceland, Norway and Denmark.¹¹⁵ All five parties to the above agreements had already passed national legislation allowing for the exchange of confidential information before negotiating their agreements.

As should be obvious from the above, the OECD Recommendation, the NAFTA and *inter alia* the EU-US and the US-Canada Cooperation Agreements appear to have had a substantial effect on the composition of the cooperation arrangement established between Canada-Chile by their FTA and MOU. First, by establishing a voluntary cooperation framework that is not subject to dispute settlement procedures, both the FTA and MOU follow a philosophy identical to that of the former documents. Second, there is a strong similarity between the content of the provisions: the provisions of the competition chapter of the CCFTA follow those of the NAFTA; the detailed MOU resembles very closely the previous US-Canada and EU-US Cooperation Agreements. Essentially, the NAFTA and the CCFTA provide that the parties must (a) adopt or maintain measures to proscribe anti-competitive business conduct; and (b) take enforcement action to implement such measures. At their most basic, both the MOU and the US-Canada and EU-US agreements strive to avoid conflict in the application of different competition laws by encouraging cooperation in its many forms and in particular by allowing their authorities to share any information not prohibited by their laws. Of course due to the soft law nature of the obligations and the absence of any relevant dispute settlement procedures the success of both the competition chapter of the FTA and the cooperation provisions of the MOU (and of the other cooperation agreements mentioned) depends to a very high degree on the goodwill of the parties involved, a point that is highlighted in the section that follows.

¹¹⁴ Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, available at www.apeccp.org.tw/doc/USA/Cooperation/usaus7.htm.

¹¹⁵ Agreement between Denmark, Iceland and Norway on Co-operation in Competition Cases: www.globalcompetitionforum.org/regions/europe/Denmark/Agreemen1.pdf.

**PART VI: A SUBSTANTIVE ANALYSIS OF BOTH THE PRACTICAL USES
AND THE LIMITATIONS OF THE COOPERATION ARRANGEMENT**

Before any substantive analysis of the cooperation arrangements is undertaken it must first be noted that as the free trade agreement and the MOU between Canada and Chile are documents of relatively recent origin it may be too early as of yet to measure the real extent of any benefits or limitations of their competition and cooperation provisions. With that caveat established, the following two sections will detail respectively with both the perceived benefits (Section 1) and limitations (Section 2) of the competition enforcement cooperation arrangements developed between these countries as a result of their FTA and their Memorandum of Understanding.

Section 1: The Perceived Benefits of the Cooperation Mechanism

The philosophy behind the inclusion of competition provisions in free trade agreements indicates to a high degree the need for trans-national competition enforcement cooperation. National competition law aims *inter alia* to prevent the elimination of the benefits of trade liberalisation by private anticompetitive conduct; the inclusion of competition provisions in FTAs recognises and highlights its importance in this regard. Cooperation between the antitrust agencies of the countries forming a free trade area is seen as vital in order to ensure that one country's antitrust policy (or lack thereof) does not undermine the advantages of the free trade arrangement for the other parties involved. In short, competition law and competition law enforcement cooperation is believed to play an important role in the fulfilment of the objectives of an FTA. The question that has to be asked, and the issue that is under discussion in this section of the paper, is to what extent do the provisions of

both the Canada-Chile Free Trade Agreement and the Canada-Chile MOU discharge their duties in this respect. In other words, to what extent has the cooperation framework established by both these documents succeeded in (1) helping to lead to increased effective cooperation and coordination of competition enforcement between the Canadian and the Chilean competition agencies; (2) providing an effective mechanism should the need for such cooperation and coordination arise; and (3) ensuring that anticompetitive business practices do not undermine the benefits of trade liberalisation.

The Canada-Chile FTA and MOU established a relatively comprehensive framework for both cooperation and coordination in relation to antitrust enforcement activity. Chapter J of the free trade agreement provides for the practical implementation of such cooperation and coordination through notifications, consultations and the exchange of (non-confidential) information. The MOU builds on these commitments in its provisions on notifications¹¹⁶, cooperation and coordination¹¹⁷, avoidance of conflicts¹¹⁸, meetings of competition officials¹¹⁹ and communications between competition authorities.¹²⁰

The competition chapter of the CCFTA—although clearly not as detailed as the MOU in terms of its provisions dealing with enforcement cooperation—has nonetheless contributed towards the establishment of an effective cooperation framework between the antitrust agencies of Canada and Chile.¹²¹ First, the inclusion of cooperation principles in the CCFTA provides an important government-to-government policy statement,¹²² highlighting in the process the significance of cooperation and conflict avoidance for the competition agencies of the parties. Second, Chapter J of the CCFTA specifies succinctly the different methods of cooperation that may be useful in avoiding conflicts. Third, as the cooperation obligations established in Chapter J are general in nature and could potentially relate to *any* competition issue impacting

¹¹⁶ Article II MOU.

¹¹⁷ Article III MOU.

¹¹⁸ Article IV MOU.

¹¹⁹ Article V MOU.

¹²⁰ Article VII MOU.

¹²¹ Indeed prior to the negotiations of the CCFTA the agencies had no direct one-to-one contact with each other: the negotiations themselves brought the agencies together for the first time.

¹²² That competition agencies should or will cooperate with one another.

on important competition law and policy interests of both jurisdictions, the potential for cooperation under its articles is great.

In broad terms the MOU¹²³ has consolidated a working relationship between the respective antitrust agencies of Canada and Chile, allowing both these agencies the opportunity to benefit from an increased awareness of each other's existence and importance. At its most basic the agreement has put in place a detailed mechanism that can be used by the antitrust authorities of the parties to address any future anticompetitive behaviour that may impact on the important interests of either party in this free trade area. It is not suggested that the signing of the Canada-Chile MOU will *inevitably*¹²⁴ increase interaction between these agencies only that should contact become necessary a framework is now in place that can direct and improve such interaction. It is hoped, nevertheless, that this mechanism will lead to an increased focus on the significance of effective cooperation between the competition enforcement agencies of both Canada and Chile—at least when the important interests of one or more of the parties is at issue—helping to promote a culture of cooperation and perhaps more contact between the agencies involved. Further, it is expected that any future communication or cooperation will lead to a deeper understanding of each other's regime, developing in the process mutual trust and confidence between the agencies involved. It was also confirmed however by a variety of competition officials that such trust and confidence is also developed by the informal meetings of competition officials at various multilateral fora such as the Organisation for Economic Cooperation and Development (OECD) or the International Competition Network (ICN).¹²⁵

¹²³ The benefits of the MOU detailed *infra* can be applied to Chapter J CCFTA, with the proviso of course that as the MOU is more detailed and comprehensive, it may be of more *practical use* to competition officials both in avoiding conflicts and in promoting inter-agency enforcement cooperation.

¹²⁴ Notifications for example will increase interaction between the agencies if certain conditions are satisfied e.g. that the important interests of the party to be notified are affected by (prospective) enforcement action. Neither the competition provisions of the FTA nor the MOU ensure the inevitability of the existence of such circumstances.

¹²⁵ A fact that arguably undermines somewhat the need for formal written arrangements. It could also be argued however that cooperation agreements provide a framework for officials with respect to how they should conduct such informal meetings. In fact, at least one competition official admitted that cooperation agreements function best when approached in an informal manner.

The provisions dealing with notifications are particularly important for a number of reasons. Notification of imminent enforcement action can act as an early warning of anticompetitive activities, perhaps bringing the existence of such activities to the notified competition agency for the first time. This early warning provides the authorities with an opportunity to react to anticompetitive activities that it may not have had otherwise. Notification of course also helps to establish and develop channels of communication between competition agencies. Finally, the fact that cooperation agreements contain provision for notifications sends a clear signal to undertakings that competition authorities are both willing and able to communicate and thus that national borders can no longer be relied upon as protection against enforcement activities. Consultations between antitrust agencies are also important, presenting as they do the opportunity for one agency to offer its support, advice and experience to its foreign counterpart. Information exchange is also important for the same reasons.

There has been one notification made pursuant to the notification provisions of the MOU. This was sent from Canada to Chile.¹²⁶ There have been no notifications received by Canada from Chile. The parties have also exchanged non-confidential information and views on merger files and on policy issues of mutual interest. Informal discussions between enforcement officers discussing approaches to certain practices have also occurred. Although the MOU provides for “periodic” meetings of competition officials such meetings have not been taking place as regularly as had been expected. Time, scarce resources and actual investigations have influenced the parties’ approach to this obligation.¹²⁷ The parties have been in contact however when case related issues arise or when specific matters require it e.g. to establish a technical assistance programme or to help develop best practices. The MOU does not provide for positive comity, although nothing in the agreement prevents the parties from making requests for positive comity either. No requests have been made. It appears then that although the potential for cooperation under the FTA and MOU is great, enforcement cooperation between the parties has been relatively infrequent.

¹²⁶ The parties were unable to provide any specific information about this notification.

¹²⁷ It seems that there is a slight disagreement about the *regularity* of these meetings. One official commented at interview that meetings have not been happening (with the exception of certain informal meetings at international fora e.g. at the OECD in October of 2004), while his counterpart abroad believes that although enforcement cooperation between the agencies is infrequent, there have been periodic discussions between the authorities on *case related* issues when appropriate.

When discussing the perceived benefits of the cooperation mechanism a final issue is which of the instruments used, i.e. a chapter of an FTA and an agency-to-agency agreement, was the most effective one for their purposes. At issue here is whether a *chapter of an FTA* that contains usually generally worded obligations in relation to competition law enforcement cooperation (which may or may not be subject to dispute settlement procedures) is any more or less effective than a specific *agency-to-agency* competition cooperation agreement concluded between the antitrust agencies themselves, which contains detailed commitments not subject to dispute settlement.

To answer this question the following thesis from the study's terms of reference has to be considered:

The fundamental question that all the case studies in this work package will be asking is: what value-added do formal cooperation agreements have over and above the natural evolution of inter-agency cooperation?

The core question can be expressed in terms of comparing two hypotheses:

1. Competition arrangements in bilateral trade arrangements do not create significant value added over and above the spontaneous co-operation that evolves between competition agencies, and that agreements initiated and negotiated directly by competition agencies are likely to be more effective, especially in terms of achieving the objectives of the agencies.
2. Alternatively, that because international competition cooperation is likely to involve trade, there is value added in putting competition cooperation agreements into trade agreements and that this is likely to assist the evolution of natural cooperation including follow-on inter agency agreements.

We find that from a consideration of both the Canada-Chile FTA and the Canada-Chile MOU, in this relationship at least, the agency-to-agency agreement contributes more to enforcement cooperation than the chapter in the FTA. The relevant competition officials generally conceded that more practical effects were felt as a result of the conclusion of the MOU than the competition chapter of the FTA; indeed as the MOU provided a more detailed explanation of the parties' obligations than the relatively brief articles of Chapter J and as it has been used to facilitate and develop frequent contact among competition officials, it is submitted that the provisions of the agency-to-agency agreement—at least in this case¹²⁸—have been of more practical use and relevance than those of this FTA.

¹²⁸ Cf. Annex XV of the EU-Mexico FTA or Chapter XI of the Canada-Costa Rica FTA.

Section 2: Limitations of the Cooperation Mechanism

Limitations on the actual *scope* of the provisions of both Chapter J of the Canada-Chile Free Trade Agreement and the Canada-Chile MOU have been detailed in the section of this paper that deals specifically with the content of these agreements.¹²⁹ In this section, the authors wish to consider the *institutional* and *operational* limitations of these provisions, paying particular attention to the cooperation mechanism they attempt to establish.

Chapter J of the CCFTA creates obligations for the parties in relation to competition law and cooperation. As detailed above, this chapter obliges the parties to adopt or maintain measures that aim to prevent or eliminate anticompetitive conduct; to take enforcement action with respect to such measures; and to cooperate with one another in competition matters through notifications, consultations and information exchange. The MOU formalises this arrangement. It has already been stated that these ‘obligations’ are not exactly commitments of the ‘hard law’ variety: they are characterised more accurately as ‘soft law’ obligations. Hard law obligations can be identified by the following three characteristics:

- (a) they are legally binding;
- (b) they are relatively precise (or are capable of being made precise by adjudication or regulation); and
- (c) they delegate legal authority to interpret and implement their scope and substance.¹³⁰

‘Soft law’ by contrast is the term used to refer to obligations that lack one or more of these elements; it is a term used to describe legal provisions that are weakened by an absence of sanctions, precision, or delegation of authority.¹³¹ The obligations created by the Canada-Chile cooperation arrangement are soft law obligations as they are not legally binding on the parties: the parties suffer no legal sanctions for refusal to

¹²⁹ *Viz.* Part V *supra*.

¹³⁰ See: K.Abbott, R. Keohane, A. Moravcsik and A-M Slaughter, “The Concept of Legalisation” 54:3 International Organisation, (2000), 401.

¹³¹ *Ibid* at 422.

comply with the provisions of either Chapter J CCFTA or the Canada-Chile MOU; the parties cannot have recourse to the dispute settlement procedures of the FTA for an alleged breach of any of the competition provisions.

It could be argued that the absence of sanctions and dispute resolution procedures deprives the competition provisions and the cooperation framework of its effectiveness, as parties are free to decide whether or not to comply with their obligations or not.¹³² On the other hand, it can also be argued that cooperation agreements with nonbinding obligations allow parties the flexibility and autonomy to delineate their own competition policy—within very broad core principles such as non-discrimination and transparency— while at the same time existing as guides to help the parties to cooperate when appropriate. Further, as was opined by some officials at interview, the use of dispute settlement mechanisms in the case of transnational competition enforcement cooperation could undermine this discretion of national competition authorities, with the potential creation of mutual resentment between agencies, and a souring of their working relationship. It is submitted here that the nonbinding nature of the provisions is not a major problem. In fact, it may be a necessary condition for the acceptance and thus conclusion of cooperation agreements in the first place as well as for the development of trust and confidence between the competition agencies of the parties.

Problems associated with discretion and the concept of soft law obligations are not the only perceived limitations of the cooperation arrangement between Canada and Chile: ensuring the confidentiality of business information imposes limitations on enforcement cooperation. Like almost all cooperation agreements, both the Canada-Chile FTA and MOU recognise concerns about the exchange of confidential information: its provisions are subject to the confidentiality laws of each of the parties to the agreements; nothing in either agreement requires the exchange of information either by a party or its competition authority contrary to these laws.¹³³ As a result

¹³² Of course the imposition of formal legal sanctions is not the only way to discipline a non-complying party: informal sanctions might take the form of a refusal to cooperate in the future. In other words, a non-complying party might find that his actions have put in motion a process of tit-for-tat non-cooperation in which the non-compliance of his counterpart acts as an informal punishment for his previous behaviour.

¹³³ Article 6 of the Canada-Chile MOU and Article O-05 CCFTA.

neither the MOU nor the FTA require any information exchange that would otherwise—in the absence of such an agreement—be inaccessible.

The ‘confidentiality clauses’ of Article O-05 CCFTA and Article 6.1 MOU¹³⁴ highlight the traditional conflict between the competition authorities, who want to have as much information at their disposal so that they can enforce the national competition law effectively,¹³⁵ and the business community who possess anxieties not only about the protection of their business secrets but also about the purpose for which such information will be used. In general the parties’ national law protects the confidentiality of an undertaking’s business secrets.¹³⁶ There may be certain exceptions to this rule under the parties’ domestic law, including of course the right of an undertaking to waive its confidentiality rights.¹³⁷ It is conceded that undertakings may have a strong incentive to consent to waive their confidentiality rights¹³⁸ in order to facilitate a timely merger approval, but such an incentive appears to be absent in the other perceivable cases of alleged anticompetitive conduct, including alleged collusive behaviour.¹³⁹ In any case, the decision to waive of course remains with the possessor of the confidential information, undermining somewhat the cooperation mechanism and hence the ability of the competition agencies to investigate alleged anticompetitive behaviour of foreign firms. Most officials believe that the issue of confidentiality is the *chief limitation* of enforcement cooperation agreements and hence it is submitted that the majority of effort should be concentrated on overcoming this particular obstruction to effective cooperation between antitrust agencies.

In sum, the benefits of the cooperation arrangement between Chile and Canada can be summarised as follows:

¹³⁴ While neither of these provisions expressly uses the word “confidentiality”, it is understood that the laws of the parties—in particular their privacy/confidentiality laws—will remain unchanged despite the cooperation provisions of both agreements. In this (tacit) sense then these provisions fulfil the functions of ‘confidentiality clauses’.

¹³⁵ It must also be remembered however that the exchange of confidential business information has a potential to harm competition, especially if the information were to fall into the hands of the information holder’s business rivals.

¹³⁶ Canada allows for the exchange of confidential information in a limited number of circumstances. See, for example, Section 29 of the Canadian Competition Law, RS 1985, c. C-34.

¹³⁷ See for example Section 29 (2) of the Canadian Competition Act, *op. cit.*

¹³⁸ Under the condition of course that the information retains its status as confidential information in relation to third parties and that the information is only used for the purpose for which it was provided.

¹³⁹ Another possible exception may be a waiver given in the course of a leniency application.

- Competition provisions in FTAs are themselves important government-to-government policy statements concerning the significance of competition policy and competition enforcement cooperation for the achievement of the objectives of free trade areas.
- The benefits of free trade areas will be less likely to be undermined by private anticompetitive practices, by virtue of the existence of the laws of the parties and growing awareness that the authorities will exchange information and otherwise cooperate with one another, particularly where the parties use the cooperation mechanism to work together on actual cases to prevent (private) anticompetitive behaviour within their respective jurisdictions.
- The FTA introduces and the agency-to-agency cooperation agreement consolidates a working relationship between the antitrust agencies of the parties.
- Cooperation agreements promote trust and confidence between the competition agencies of the parties.
- The framework established by such arrangements can be relied on in the future to avoid potential conflicts in trans-national competition enforcement.
- Notifications are important for three reasons: (a) they can act as an early warning to the notified party of anticompetitive behaviour; (b) they establish channels of communication between the agencies of the parties; and (c) they send a clear signal to undertakings that agencies are communicating and that national borders can no longer be relied upon as protection against enforcement activities.
- Consultations and exchanges of information provide the opportunity for one agency to offer its support, advice and experience to its foreign counterpart.

The limitations of the cooperation arrangements can be summarised as follows:

- The obligations they create are of the ‘soft law’ variety and thus are unenforceable in law between the parties.
- There are no dispute settlement procedures which apply in the case of conflict between the competition agencies.
- The parties effectively decide the extent of their obligations.

- The arrangements do not affect the parties' abilities in relation to the exchange of confidential business information between their respective competition agencies, even if such information was still to remain confidential *vis-à-vis* third parties and could only be used for the purpose for which it was provided.
- The arrangements do not require or permit any information exchange that would otherwise not be accessible.

PART VII: RECOMMENDATIONS

- General:

The authors agree that despite the obvious limitations of cooperation agreements due to their prohibition on the exchange of confidential information, they are useful and valuable documents. Nevertheless it *could be argued* that there is *less need* for these formal agreements now than before (unless some parties get to the point where they wish to change their confidentiality laws) as (1) a lot is already possible through informal bilateral cooperation, although of course confidential information cannot be exchanged; (2) the agreements that have already been concluded, especially between the EU and the US, provide guidance to other agencies on how to conduct their (informal) cooperation; and (3) the development of the ICN provides a forum for (formal and informal) competition cooperation on both a bilateral and multilateral basis. However, in relation to point three, it was highlighted at interview that although the ICN serves a networking purpose among competition authorities, it could not be stated with certainty if the informal networking of this arrangement could/would replace the detail of cooperation agreements, and indeed the authors doubt that the ICN could (or even should) evolve in such a case-specific manner.

- Specific:

- (1) No further agency-to-agency agreement between Canada and Chile is required at this stage: the cooperation mechanism of the MOU is sufficient; most cooperation agreements go no further than this arrangement. However, such an agreement would be welcomed and indeed would only be worthwhile if it expressly allowed for the exchange of confidential business information between the competition authorities of the parties. A change in the domestic law of both parties may be required before such a provision could be negotiated.
- (2) This next step could arguably require a “worldwide” solution as a precursor to a bilateral approach. The OECD may be the better place to deal with such a task than two parties, as the issue of the exchange of confidential information is not specific to any one nation or trading relationship, and this body has the greatest degree of representation by agencies with a long history of enforcement, and of enforcement cooperation, including formal Recommendations. Indeed, it is unlikely that any one bilateral relationship will advance to permitting exchange of confidential information absent a more general consensus to do so.¹⁴⁰ This solution must include provision for the exchange of confidential information if progress is to be made in international competition cooperation. Of course, there may be disagreements concerning such an approach: (a) between what some jurisdictions would allow to be included in a definition of confidential information; and (b) what some jurisdictions would ultimately do with the information (e.g. some jurisdictions may allow criminal sanctions against those who commit anticompetitive behaviour while others may not; the use of confidential information in criminal cases may be a move too far for those jurisdictions that do not have criminal sanctions).

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¹⁴⁰ See how such an approach has evolved within the European Competition Network for example.

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ANNEX I: CHAPTER J OF THE CANADA-CHILE FTA

Chapter J

Competition Policy, Monopolies and State Enterprises

Article J-01: Competition Law¹

1. Each Party shall adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto, recognizing that such measures will enhance the fulfilment of the objectives of this Agreement. To this end the Parties shall consult from time to time about the effectiveness of measures undertaken by each Party.
2. Each Party recognizes the importance of cooperation and coordination among their authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.
3. Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under this Article.

Article J-02: Monopolies and State Enterprises²

1. Nothing in this Agreement shall be construed to prevent a Party from designating a monopoly.
2. Where a Party intends to designate a monopoly and the designation may affect the interests of persons of the other Party, the Party shall:
 - (a) wherever possible, provide prior written notification to the other Party of the designation; and
 - (b) endeavour to introduce at the time of the designation such conditions on the operation of the monopoly as will minimize or eliminate any nullification or impairment of benefits in the sense of Annex N-04 (Nullification and Impairment).

3. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately-owned monopoly that it designates and any government monopoly that it maintains or designates:
 - (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licences, approve commercial transactions or impose quotas, fees or other charges³;
 - (b) except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d), acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale⁴;
 - (c) provides non-discriminatory treatment to investments of investors, to goods and to service providers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and
 - (d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, its subsidiary or other enterprise with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of the other Party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct.
4. Paragraph 3 does not apply to procurement by governmental agencies of goods or services for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the provision of services for commercial sale.
5. For purposes of this Article "maintain" means designate prior to the date of entry into force of this Agreement and existing on that date.

Article J-03: State Enterprises

1. Nothing in this Agreement shall be construed to prevent a Party from maintaining or establishing a state enterprise.

2. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapter G (Investment) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licences, approve commercial transactions or impose quotas, fees or other charges.
3. Each Party shall ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment in the sale of its goods or services to investments in the Party's territory of investors of the other Party.

Article J-04: Definitions

For purposes of this Chapter:

designate means to establish, designate or authorize, or to expand the scope of a monopoly to cover an additional good or service, after the date of entry into force of this Agreement;

discriminatory provision includes treating:

(a) a parent, a subsidiary or other enterprise with common ownership more favourably than an unaffiliated enterprise, or

(b) one class of enterprises more favourably than another,

in like circumstances;

government monopoly means a monopoly that is owned, or controlled through ownership interests, by the national government of a Party or by another such monopoly;

in accordance with commercial considerations means consistent with normal business practices of privately-held enterprises in the relevant business or industry;

market means the geographic and commercial market for a good or service;

monopoly means an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant;

non-discriminatory treatment means the better of national treatment and most-favoured-nation treatment, as set out in the relevant provisions of this Agreement; and

state enterprise means, except as set out in Annex J-04, an enterprise owned, or controlled through ownership interests, by a Party.

Annex J-04

Country-Specific Definition of State Enterprises

For purposes of Article J-03(3), with respect to Canada, "state enterprise" means a Crown corporation within the meaning of the *Financial Administration Act* (Canada), a Crown corporation within the meaning of any comparable provincial law or equivalent entity that is incorporated under other applicable provincial law.

ANNEX II: THE CANADA-CHILE MOU

MEMORANDUM OF UNDERSTANDING BETWEEN THE COMMISSIONER OF COMPETITION (CANADA) AND THE FISCAL NACIONAL ECONOMICO (CHILE) REGARDING THE APPLICATION OF THEIR COMPETITION LAWS

The Commissioner of Competition, Competition Bureau, of the Government of Canada, and the Fiscal Nacional Economico, of the Government of the Republic of Chile (hereinafter referred to as the "Parties");

Having regard to Chapter J of the Canada-Chile Free Trade Agreement and the importance of cooperation and coordination among competition authorities to further effective competition law enforcement in the free trade area; and

Recognizing that cooperation in enforcement activities and the coordination of such activities may, in certain cases, result in a more effective resolution of the Parties' respective competition law concerns than would be attained through independent action;

Understand as follows:

I. PURPOSE AND DEFINITIONS

1. The purpose of this Memorandum is to promote cooperation and coordination between the Parties and to reduce the effect of potential differences in the application of competition law in Canada and Chile;

2. In this Memorandum, these terms will have the following definitions:

(a) "Anticompetitive activity(ies)" means any conduct or transaction that may be subject to penalties or other relief under the competition law administered and enforced by the Parties;

(b) "Competition law(s)" means

(i) for the Commissioner of Competition, the *Competition Act*, R.S.C. 1985, c. C-34, except sections 52 through 60 and Part VII.1;

(ii) for Fiscal Nacional Economico, Decree Law-211 of 1973; as well as any amendments thereto, and such other laws or regulations as the Parties may from time to time agree in writing to be a "competition law" for the purposes of this Memorandum; and

(c) "Enforcement activity(ies)" means any investigation or proceeding conducted by a Party in relation to the competition law it administers and enforces; and

(d) "Territory" means the territory in which a Party has jurisdiction.

3. Each Party will promptly notify the other of any amendments to its competition law.

II NOTIFICATION

1. Subject to Article VI, each Party will notify the other Party with respect to its enforcement activities which may affect the other Party's interests in the application of its competition law, including those that:

a. are relevant to the enforcement activities of the other Party;

b. involve anticompetitive activities, other than mergers or acquisitions, carried out in whole or in part in the other Party's territory, except where those activities are insubstantial;

- c. involve mergers or acquisitions in which one or more of the parties to the transaction, or a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other Party's territory;
 - d. involve remedies that expressly require or prohibit conduct in the other Party's territory or are otherwise directed at conduct in that territory;
 - e. involve the seeking of information located in the other Party's territory, whether by personal visit by officials of a Party or otherwise, except with respect to telephone contacts with a person in the other Party's territory where that person is not the subject of investigation and the contact seeks only an oral response on a voluntary basis.
2. Notification will ordinarily be given as soon as it becomes evident that notifiable circumstances are present.
 3. Once a particular matter has been notified, subsequent notifications on that matter need not be made unless the notifying Party becomes aware of new issues bearing on the interests of the other Party in the application of its competition law, or unless the notified Party requests otherwise.
 4. Notifications will include the nature of the anticompetitive activities under investigation and the competition law provisions concerned and will be sufficiently detailed to enable the notified Party to make an initial evaluation of the effect of the enforcement activities on its interests in the application of its competition law.

III. COOPERATION AND COORDINATION

1. It is in the Parties' common interest to cooperate and share information where appropriate and practicable.
2. Where both Parties are pursuing enforcement activities with regard to the same or related matters, they will endeavour to coordinate their enforcement activities where appropriate and practicable.

IV. AVOIDANCE OF CONFLICTS

1. It is in the Parties' common interest to minimize any potentially adverse effects of one Party's enforcement activities on the other Party's interests in the application of its competition law.

2. Where one Party informs the other that a specific enforcement activity by the second Party may affect the first Party's interests in the application of its competition law, the second Party will endeavour to provide timely notice of significant developments relating to those interests and an opportunity to provide input regarding any proposed penalty or remedy.
3. Any questions arising out of this Memorandum will be addressed in as timely and as practicable a manner as circumstances permit.

V. MEETINGS

Officials of the Parties will meet periodically, as necessary, to:

- a. exchange information on their enforcement efforts and priorities in relation to competition law;
- b. exchange information on economic sectors of common interest;
- c. discuss competition policy changes under consideration;
- d. discuss other matters of mutual interest relating to the application of their competition laws or the operation of this Memorandum; and
- e. discuss the possibility of negotiating an agreement between Canada and Chile regarding the application of their competition laws.

VI. EXISTING LAWS AND CONFIDENTIALITY OF INFORMATION

1. Nothing in this Memorandum will require a Party to take any action, or to refrain from acting, in a manner inconsistent with existing law, or will require any change in the law of Canada or Chile.
2. Notwithstanding any other provision in this Memorandum, neither Party is required to communicate information to the other Party if such communication would be incompatible with the first Party's interests in the application of its competition law. No information will be exchanged pursuant to this Memorandum which could not have been exchanged in the absence of this Memorandum.
3. The degree to which either Party communicates information to the other pursuant to this Memorandum may be subject to, and dependent upon, the acceptability of the assurances given by the other Party with respect to confidentiality and with respect to the purposes for which the information will be used.

4. Unless otherwise agreed by the Parties, each Party will, to the fullest extent possible, maintain the confidentiality of any information communicated to it in confidence by the other Party. Each Party will oppose, to the fullest extent possible, any request by a third party for communication of such confidential information, unless the Party providing the confidential information consents in writing to its communication.

VII. COMMUNICATIONS UNDER THIS MEMORANDUM

Communications under this Memorandum will be carried out by direct communication between the Parties. Each Party may designate a communications authority, as notified in writing to the other Party.

VIII. ENTRY INTO FORCE AND TERMINATION

1. This Memorandum shall enter into force upon signature of the Parties.
2. This Memorandum will remain in force until 60 days after the date on which either Party notifies the other in writing that it wishes to terminate, or until the time of the entry into force of an agreement between Canada and Chile regarding the application of their competition laws.

IN WITNESS WHEREOF, the undersigned, have signed this Memorandum.

DONE at Santiago, in duplicate, this 17th day of December, 2001, in the English, French and Spanish languages, each text being equally authentic.

For the Commissioner of Competition, Competition Bureau, of the Government of Canada.

For the Fiscal Nacional Economico, of the Government of the Republic of Chile.

**ANNEX III: DESCRIPTION OF THE DOMESTIC COMPETITION LAW
ENFORCEMENT REGIMES**¹⁴¹

Section 1: Competition Law in Canada

Introduction

In Canada, the initial concerns and interests for the protection of competition began in the early 1870s where intermittent complaints about cartels and trusts were made. However, it was not until 1889 with the adoption of the *Anti-Combines Act*¹⁴², which prohibited combines or conspiracies in restraint of trade to fix prices or restrict output and which was integrated into the Criminal Code in 1892, that these concerns were formally granted legal protection.¹⁴³ Regularly since then there have been amendments to the Canadian competition law to adjust to industrial developments as well as evolving economics. In 1986 the current legal provisions were introduced – *the Competition Act*¹⁴⁴ and the *Competition Tribunal Act*.¹⁴⁵

Purpose of the Competition Act

Part 1.1 states that the purpose of the Competition Act is “to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy”. It continues by explaining that there is a need for expansion of the opportunities for Canadian participation in world markets, while at the same time acknowledging foreign competition in Canada. Equally there is a need to ensure that (a) small and medium-sized enterprises have an equal opportunity in the Canadian

¹⁴¹ This annex was written by Ms Hedvig Schmidt, B. Sc. (CBS – DK), LL.M. (Essex), Research Fellow at the British Institute of International and Comparative Law.

¹⁴² *Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*, S.C. 1889, c. 41.

¹⁴³ Trebilcock, Michael, Winter, Ralph A., Collins, Paul and Iacobucci, Edward M.: “The Law and Economics of Canadian Competition Policy” University of Toronto Press, Toronto 2002, p. 10.

¹⁴⁴ R.S. 1985, c. C-34.

¹⁴⁵ *Competition Tribunal Act*, S.C. 1985 c. 19 (2nd Supp.)

market; and (b) that consumer welfare is protected, by providing consumers with competitive prices and product choice.

The Institutions Regulating Competition

There are two leading institutions regulating competition in Canada, the Commissioner of Competition (appointed under subsection 7(1)) (hereafter the Commissioner) and head of the Competition Bureau and the Competition Tribunal (hereafter the Tribunal) established under the *Competition Tribunal Act* subsection 3(1). The Tribunal consists of judges (maximum six) and lay members (maximum eight) who are “knowledgeable in economic, industry, commerce or public affairs.”¹⁴⁶ Proceedings before the Tribunal must be heard by a sitting panel of three to five members of which one must be a judicial person and one a lay member.¹⁴⁷ The Tribunal has the jurisdiction to hear and dispose of all applications made under Part VII.1 (Deceptive marketing practices) and VIII (Matters reviewable by Tribunal) of the Competition Act as well as any matter under Part IX which is subject to a reference under subsection 124.2(2).

The Tribunal is a purely adjudicative body without investigative powers that operates independently of any governmental department. Its function is to make findings and issue remedial orders.

The Competition Bureau led by the Commissioner is responsible for the administration and enforcement of the Competition Act.

Under the Competition Act, the Commissioner can initiate inquiries, intervene as a competition advocate before federal and provincial bodies, challenge civil and merger matters before the Competition Tribunal and make recommendations on criminal matters to the Attorney General of Canada. In order to make the application and enforcement of the Competition Act more transparent, the Commissioner can issue written opinions on the request of any person. The opinion will remain binding on the

¹⁴⁶ *Competition Tribunal Act* S.C. 1985, c. 19 (2nd Supp.) s. 3 and Trebilcock, Winter, Collins, and Iacobucci, p. 22.

¹⁴⁷ *Competition Tribunal Act* 10(1).

Commissioner for as long as the material facts of which the opinion was based upon remain substantially unchanged.¹⁴⁸

Prohibitions

The prohibitions in the Competition Act can be divided in to two categories: criminal offences and civilly reviewable matters.

The criminal offences are listed in Part VI. Section 45 makes it a criminal offence to conspire, combine, agree or arrange to limit, prevent or lessen or otherwise restrain or injure competition unduly.

Section 47 finds ‘bid-rigging’ illegal *per se* unless the person calling for the bids is notified in advance of the agreement.¹⁴⁹

Section 48 bans agreements in relation to professional sports, and Section 49 restrict agreements or arrangements of federal financial institutions meaning banks and building societies, although there is here a list of exemptions for agreements in relation to certain services offered by banks in general.

Section 50 illegalises price discrimination in relation to both products and geographic markets and predatory pricing by a supplier.

Finally Section 61 states that price maintenance in the business of producing and supplying in relation to credit cards or have an exclusive right conferred by a patent, copyright, trademark or other types of intellectual property rights is a criminal offence. Equally, refusal to supply or other types of price discrimination is illegal if the refusal is due to the customer’s low pricing policies.

The civilly reviewable matters consist basically of mergers and abuses undertaken by a company with a dominant position. Such abuses include squeezing by a vertically integrated supplier, vertical integration with the intent to eliminate competition, freight equalisation for the purpose of preventing entry, use of ‘fighting brands’,

¹⁴⁸ *Competition Act*, 124.1.

¹⁴⁹ Trebilcock, Winter, Collins, and Iacobucci, p. 30.

purchasing products to prevent price erosion, adoption of product specifications incompatible with other products on the market and thereby excluding entry or elimination of competitors on the market, refusal to supply or discrimination of customers, and predatory pricing,¹⁵⁰ This list however, should not be seen as exhaustive.¹⁵¹ Whether a type of conduct really is abusive depends on whether the conditions in Section 79 are fulfilled. The conditions are:

- a) one or more persons substantially or completely in control, throughout Canada or any area thereof, a class or species of business;
- b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts; and
- c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in the market.¹⁵²

If all the above conditions are met the Tribunal can order the conduct¹⁵³ to be ceased and order an appropriate remedy which is reasonable and necessary to overcome the effects of the abusive conduct.¹⁵⁴

Mergers are as mentioned also civilly reviewable under Section 92 of the Competition Act. Section 91 sets out the definition of mergers, Section 92 establishes that mergers or proposed mergers found by the Tribunal to prevent or lessen or likely to prevent or lessen competition substantially can be dissolved or prohibited by the Tribunal.¹⁵⁵ Section 93 lists eight factors which should be taken into consideration by the Tribunal when assessing the merger's or proposed merger's ability to substantially prevent or limit competition. These factors are:

- 1) the extent to which foreign products or competitors provide effective competition to the market where the merger will or has taken place;
- 2) whether there is a possibility of a 'failing firm' defence of the merger;
- 3) the extent to which there are or likely to be substitutes for the products supplied by the parties to the merger;
- 4) whether there are any barriers to entry to the market;
- 5) the extent to which effective competition will remain post-merger;

¹⁵⁰ *Competition Act*, s. 78.

¹⁵¹ Trebilcock, Winter, Collins, and Iacobucci, p. 24.

¹⁵² *Competition Act*, s. 79(1).

¹⁵³ *Competition Act*, s. 79(1).

¹⁵⁴ *Competition Act*, s. 79(2).

¹⁵⁵ *Competition Act*, s. 92(1).

- 6) the likelihood that the merger or proposed merger will resolve in the removal of a vigorous and effective competitor;
- 7) the nature and extent of change and innovation in a relevant market; and
- 8) any factors specific to the relevant market in which the merger takes place which could be affected by the merger.¹⁵⁶

A proposed merger can, however, also be approved by the Tribunal subject to certain conditions.¹⁵⁷ This is particularly so where the merger brings about efficiency gains, which are greater than the harm caused to competition because of the merger and that these efficiency gains would not be reachable if a prohibition order was made.¹⁵⁸ When deciding whether the efficiency gains of a merger outweighs the effects limiting competition one must evaluate whether there has been either:

- a) a significant increase in real value exports; or
- b) a significant substitution of domestic products for imported products.

Section 95 makes it clear that certain types of joint ventures are not subject to the merger provisions of the Competition Act, when these are not formed within a corporation as such, but are mere projects or programmes, which would not otherwise occur in the absence of such a combination. If the joint venture does not prevent or lessen competition except to the extent reasonably required to undertake and complete the joint venture, the joint venture is exempted from the merger provisions.¹⁵⁹

Other horizontal specialisation agreements are dealt with under Section 86 of the Competition Act, the principle of efficiency gains outweighing the lessening of competition (found in the merger provisions) also applies for these agreements.¹⁶⁰

Vertical agreements or practices between upstream and downstream buyers and suppliers are dealt with under Section 75. This section allows the Tribunal to force a company to make another company its customer, if the latter is substantially affected

¹⁵⁶ *Competition Act*, s. 93(a)-(h).

¹⁵⁷ Trebilcock, Winter, Collins, and Iacobucci, p. 25-26.

¹⁵⁸ *Competition Act*, s. 96(1).

¹⁵⁹ *Competition Act*, s. 95(1)(a)-(e).

¹⁶⁰ Trebilcock, Winter, Collins, and Iacobucci, p. 27.

in its business due to an inability to obtain adequate supplies of a product on usual trade terms.¹⁶¹

Equally, consignment selling, exclusive dealing, tying, and market restrictions are reviewable by the Tribunal.¹⁶²

Remedies/ Sanctions

Equivalent to the prohibitions, the sanctions available depend on whether the infringement fall under the criminal or civil provisions. The criminal offences which include conspiracy, bid-rigging, discriminatory and predatory pricing, price maintenance, misleading advertising and deceptive marketing practices, are prosecuted before criminal courts that may impose fines, order imprisonment, issue prohibition orders and interim injunctions, or any combination of these remedies.

The civil provisions include mergers and abuse of dominant position such as refusal to deal, consignment selling, exclusive dealing, tied selling market restriction and delivered pricing. These matters are reviewable by the Tribunal, which has powers to issue injunctive and remedial orders with respect to mergers and anti-competitive practices likely to prevent or lessen competition substantially.

As regards abuse of a dominant position the Tribunal can order a prohibition of the conduct taking place.¹⁶³ However if the Tribunal finds that the anti-competitive conduct has had such a devastating effect on competition in the market that the mere ceasing of the conduct is not likely to restore competition within that market, the Tribunal may “make an order directing any or all persons against whom an order it sought to take such actions, including the divesture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.”¹⁶⁴

¹⁶¹ *Competition Act*, s. 75(1)(a)-(e).

¹⁶² *Competition Act*, s. 76-77.

¹⁶³ *Competition Act*, s. 79(1).

¹⁶⁴ *Competition Act*, s. 79(2).

In respect of mergers the Tribunal can dissolve mergers which have already taken place¹⁶⁵ or prohibit a merger or parts of a merger from taking place if it finds that the merger is contrary to the provisions laid down in the Competition Act.¹⁶⁶

The Federal Court¹⁶⁷ has special powers in relation to agreements dealing with licensing of intellectual property rights. It may

- (a) declare void, in whole or in part, any agreement, arrangement or license relating to that use;
- (b) restrain any person from carrying out or exercising any or all of the terms or provisions of the agreement, arrangement or license;
- (c) direct the grant of licenses under any such patent, copyright or registered integrated circuit topography to such persons and on such terms and conditions as the court may deem proper or, if the grant and other remedies under this section would appear insufficient to prevent that use, revoking the patent;
- (d) direct that the registration of a trade-mark in the register of trade-marks or the registration of an integrated circuit topography in the register of topographies be expunged or amended; and
- (e) direct that such other acts be done or omitted as the Court may deem necessary to prevent any such use.

Procedures

In the proceedings of the Competition Tribunal, the judicial members will determine any question related to law; those questions which are mix of facts and law will be dealt with by all sitting members. In the event of a difference of opinion when determining a question the opinion of the majority shall prevail. In the event of an equally divided opinion among the members, the presiding member may determine the question. It has been pointed out by others that the presiding member must be a

¹⁶⁵ *Competition Act*, s. 92(1)(e).

¹⁶⁶ *Competition Act*, s. 92(1)(f).

¹⁶⁷ The Federal Court is Canada's national trial court which hears and decides legal disputes arising in the federal domain including claims against the Government of Canada, civil suits in federally-regulated areas and challenges to the decisions of federal tribunals. See: http://www.fct-cf.gc.ca/index_e.html.

judicial member; however, the actual Competition Tribunal Act does not clarify this.¹⁶⁸

Any decisions or orders, whether final or interim can be appealed to the Federal Court of Appeal, however, it is to the Federal Court of Appeal's discretion whether it will hear an appeal on a question of fact.¹⁶⁹ Moreover, the Tribunal may withdraw or vary a consent agreement or order on the application by the Commissioner or a person who consented to the agreement or a person whom the order was made against, if the Tribunal finds that the original circumstances that led to the making of the agreement or order have changed, or the parties involved or the Commissioner has consented to an alternative agreement or order. A person directly affected by but not a party to a consent agreement or order may apply directly to the Tribunal within 60 days of the registration of the consented agreement or order to have it rescind or varied.

Exemptions

There is a clear statement in the Act that trade unions as well as collective bargaining are outside the scope of the Act. In particular the fishing industry has been excluded from the scope of the Act in relation to agreements between them and so have travel agents although on as regards Section 45 (agreements between companies) and 61 (price maintenance).

Section 2: Competition Law in Chile

Introduction

Chile is a relatively small open economy in South America with a population of approximately 15 million; it has a civil law system based on the continental tradition. Chile has been a pioneer in the field of competition policy in South America.¹⁷⁰

¹⁶⁸ Trebilcock, Winter, Collins, and Iacobucci, p. 23.

¹⁶⁹ *Competition Tribunal Act* 13(1) and (2)

¹⁷⁰ See: http://www.oecd.org/document/32/0,2340,en_2649_33759_24957152_1_1_1_1,00.html.

Chile adopted in 1973 its current competition law 1 DL 211—the '*Law for the Defence of Free Competition*' (hereafter DL 211) - in a response to the previous government-owned and planned economy. Since 1973, there have been several amendments to DL 211, the last and most extensive in February 2004, where a new specialised court in competition law was established—the Court for the Defence of Free Competition. This Court also replaces the previous competition tribunal—the Antitrust Commission.

Moreover, this amendment also included a brief description of the goals of competition regulation and a condensed list of prohibitions, as well as bringing changes to the enforcement procedures.

The Goals of the Chilean Competition Law

The original approach of the DL 211 acknowledged the importance of economic freedom. This was illustrated in the policy of granting greater importance to the freedom to compete than economic efficiency; hence certain types of vertical agreements were deemed illegal *per se* without consideration for whether the agreements could be justified as being efficient or beneficial to consumers.

The purpose of the DL 211 is "to promote and defend competition in the markets".¹⁷¹ It reflects the current trend in Chile's economic policy and the amendment of competition law was also a part of an overall change of Chile's economic legislation in an attempt to create a free market economy and adapt to the increased global trade.¹⁷²

While recent case law shows a change in the enforcement policy towards a more efficiency-based approach,¹⁷³ "[n]onetheless, the Constitutional and statutory emphasis on freedom suggests that Chilean competition cases may continue to give

¹⁷¹ Article I, Section 1 of DL 211 of 1973 as amended.

¹⁷² Bustamante, José Manuel "The Antitrust Review of the Americas 2005: Chile", Global Competition Review (<http://www.globalcompetitionreview.com/ara/chile.cfm#>).

¹⁷³ OECD Report "Competition Law and Policy in Chile, A Peer Review" January 2004, p. 21.

special weight to this value, perhaps even doing so might seem counterproductive to advocates of a strict efficiency-based approach"¹⁷⁴

The Competition Institutions

The 1973 version of DL 211 introduced a tripartite institutional enforcement system: the National Economic Prosecutor's Office (hereafter the Prosecutor), which acts as an enforcement agency; the Antitrust Commission, which was a quasi-judicial body and a form of a tribunal; and a number of largely advisory Preventative Commissions with an independent Antitrust Tribunal.

The new amendment to DL 211, Chilean Law No. 19.911 published 14 November 2003, changed the institutional structure: the Antitrust Commission and the Preventative Commissions have now been replaced by a new specialised competition court.

The Preventative Commissions were unusual in the institutional structure of Chilean competition law and policy. Their main purpose was to answer questions and determine whether companies, individuals or government entities breached the competition law in their dealings. They could alert the Prosecutor and even had the powers to order any conduct they found illegal to be ceased.

The Antitrust Commission was the highest body in the pre-2004 amendment competition law system—it was a form of a specialised tribunal chaired by a judge from the Supreme Court and hence subject to the Court's supervision. Its main function was to decide cases brought by the Prosecutor or a private claimant. Moreover the Commission could open an investigation on own initiative.

The new Court for the Defence of Free Competition (hereafter the Court) replaces the old Antitrust Commission and the Preventative Commissions. It is an independent body with judicial powers but not formally part of the judiciary, although under

¹⁷⁴ OECD Report, p. 21.

supervision from the Supreme Court.¹⁷⁵ It consists of five members. Its President must be a lawyer with at least ten years experience in competition law while the rest of the members must include two lawyers and two economists with experience in competition issues. The amended version of the competition law gives a detailed description of how the Court should be set up in practice, including the selection process of the members and the wages of the Court's staff.¹⁷⁶

Most of the tasks previously assigned to the Commissions are now handled by the Court, which has as its object to "safeguard free competition in the markets."¹⁷⁷

Article II, Section 17C delegates the following duties and functions to the Court:

- a) To hear on the request of the Prosecutor situations that might contravene DL 211;
- b) To hear at the request of any person who has a legitimate interest or the Prosecutor, matters of a non-contentious nature that might constitute a breach to DL 211, regarding existing deeds, actions or contracts, and those that might be submitted by persons planning to execute or fulfil them. In both cases the Court may establish conditions that such deeds, acts or contracts need to fulfil;
- c) To issue instructions of a general nature in accordance with the law, which individual parties should take into account in the acts or contracts they plan to execute or fulfil, when they relate to free competition or might affect it in any way;
- d) To suggest to the President of the Republic the modification or derogation of legal and regulatory provisions that might affect free competition, as well as request him to issue legal or regulatory rules deemed to be necessary for the development of competition or for the regulation of certain economic activities that take place in non-competitive conditions; and
- e) Any other actions established by law.

The Court cannot—unlike the earlier Commission—initiate investigations; this power lies solely with the Prosecutor.

¹⁷⁵ Article II, Section 7 of DL 211 of 1973 as amended.

¹⁷⁶ Article II, Section 8-17B.

¹⁷⁷ Article I, Section 2.

The Prosecutor is responsible for investigating and bringing enforcement cases. Although being part of the Ministry of the Economy and by law subject to supervision by the Ministry, the Prosecutor is independent.¹⁷⁸ There has been a slow move towards making the Prosecutor more powerful than hitherto and recent reorganisation and management change makes such a prospective promising.

The Prosecutor will have the following powers and duties:

- 1) To conduct the preliminary investigations considered necessary to prove breaches of DL211, informing the affected party of this fact;
- 2) To act as a party, representing the general economic interest of the community, appearing before the Court and the national courts of justice, with all the corresponding duties and powers;
- 3) To request that the Court exercises any of its powers and adopts preventive measures in view of the investigations that the Prosecutor's Office is carrying out;
- 4) To ensure the fulfilment of the rulings, decisions, dictums and instructions issued by the Court or by the courts of justice in matters related to this law.
- 5) To issue the reports requested by the Court in those cases in which the Prosecutor is not part of the proceedings;
- 6) To request the compulsory collaboration of any public service or organisation officer, of municipal officers or of companies, entities or societies in which the State or the municipalities have representation, contribution or participation;
- 7) To execute and celebrate all kind of actions and contracts regarding property and real estate and regarding corporal or incorporeal things that are part of the patrimony of the Service, including those that allow for the disposal of property and transfer of dominion, yield rights, actions and obligations, both contractual or extracontractual;
- 8) To request oral or written statements from representatives, administrators, advisors and dependants of the entities or persons who might have knowledge of facts, actions or conventions that are under investigation, and from any other person who might have executed or celebrated with the

¹⁷⁸ Article III, Section 27.

former acts and conventions of any nature, related to any event he should know of in the fulfilment of his duties;

- 9) To request from State technical organisations the reports he considers necessary, and contract the services of specialists or technicians;
- 10) To celebrate agreements or memorandums of agreement with agencies or other foreign organisms devoted to the promotion or defence of free competition in the economy; and
- 11) To draw up agreements with other State and public institutions for the electronic transfer of information that is considered non-classified by law, in order to facilitate its operations; and

Prohibitions

The DL 211 prohibits any act or convention carried out or undertaken by any person individually or collaterally which “prevents, restrict or obstructs free competition”¹⁷⁹

It continues by listing actions which fall under this category:

- 1) express or tacit agreements or practices between economic agents, which have as their object to fix prices, limit production, or divide the markets or quotas, abusing the power that those agreements or practices give them;
- 2) abusive exploitation of a dominant position by a part of an enterprise, or group of enterprises with a common controller, such as price fixing, dividing markets or quotas, or imposing similar actions on third parties; and
- 3) predatory prices or unfair competition, carried out in order to attain, maintain or increase a dominant position¹⁸⁰

Judging from the wording of Article I, Section 3—“among others, the following deeds”—the list is not exhaustive.

These prohibitions are remarkably different from the old ones that consisted of a much broader list of anti-competitive conduct, which had a reputation for being confusing.¹⁸¹ Moreover, the previous prohibitions were of a criminal nature and based

¹⁷⁹ Article I, Section 3.

¹⁸⁰ Article I, Section 3.

¹⁸¹ Bustamante, *op. cit.*

on the United States' Sherman Antitrust Act.¹⁸² Although there may be a change in the substantive structure, the statutory language remains broad as in the pre-2004 amendment version and hence it can be expected that the development of Chilean antitrust will continue to progress through individual cases.

Another important aspect is the missing definition for 'free competition'. The Court has as of yet not issued any opinions on this matter, and hence one must continue to rely on previous rulings from the old Commissions, which have recognised that "...the objective of the competition legislation contained in DL 211 of 1973 is not only the protection of consumer interests, but also to protect the freedom of all participants in an economic activity".¹⁸³

Remedies/ Sanctions

It is important to note that the amended DL 211 has eliminated the criminal sanctions that it originally had. To compensate there has been a significant increase in the fines, from approx. US\$ 400,000 to approx. US\$ 11 million.¹⁸⁴ Decriminalisation removes Chilean competition law further a field from US antitrust law, although it must be noted that the Chilean criminal sanction never was applied.¹⁸⁵

Article II, Section 17K laid down the different options of remedies or sanctions available for the Court to apply to the individual breach of DL 211. Firstly, the Court is permitted to modify or terminate any actions, contracts or agreements that go against the law. Secondly, the Court may order the modification or dissolution of societies, corporations or other private juridical entities that intervened in the above actions or agreements. Finally, the Court may grant penalties for a sum equivalent to twenty thousand tax units per annum. The corresponding entity, its directors, administrators or any other person that has participated in the action may be penalised. The fine has to be allocated in accordance with the following criteria: "the economic benefit obtained from the breach, its gravity and the fact that the transgressor is a second offender".

¹⁸² OECD Report, p. 31.

¹⁸³ Resolving Commission, Ruling 93 of 1981.

¹⁸⁴ Bustamante, *op. cit.*

¹⁸⁵ Bustamante, *op. cit.*

These remedies can only be given by the Court in its definitive ruling. Nevertheless the decision can be challenged at the Supreme Court but only after the claimant has paid 10% of the fine he was issued.¹⁸⁶

Procedures

A proceeding may be initiated by the Prosecutor or a private individual;¹⁸⁷ however, there is a statutory limitation of two years from carrying out the conduct deemed harmful to free competition.¹⁸⁸ All proceedings are written, except of the public trials.¹⁸⁹ The Court can invite the parties to reach a settlement; if this fails an additional period of time will be granted until the parties will meet in court. As regards means of evidence Section 341 of the Civil Procedural Code applies. Additionally the parties can bring all indicators and antecedents that the Court may consider pertinent and permissible. The Court can at any time, even after its ruling in the case request methods of presenting proof when this is essential to clarify actions that remains obscure and doubtful.¹⁹⁰ Witnesses and oral testimony can be used.

Once a case is brought to Court the parties are automatically forbidden to continue the alleged abusive behaviour or agreement until the Court has ruled its verdict.¹⁹¹ Furthermore, Article II, Section 17J allows for the Court to issue interim measures, if it finds it necessary to “prevent the negative effects of the behaviours submitted to its hearing, and to protect common interest”. The criterion of having such interim measures issued is the “evidence of grave presumption of the right claimed or the deeds denounced”.

Under Article II, Section 17Ñ damages can be sought as a result of a final ruling from the Court at a competent civil court. When establishing the amount of damages the civil court will take into consideration “the conducts, facts and juridical qualification

¹⁸⁶ Article II, Section 17L.

¹⁸⁷ Article II, Section 17E.

¹⁸⁸ Bustamante, *op. cit.*

¹⁸⁹ Article II, Section 17E.

¹⁹⁰ Article II, Section 17G.

¹⁹¹ Bustamante, *op. cit.*

of the damages, established in the verdict of the Court”. Again damages have to be sought within four years from when the Court has giving its final ruling.¹⁹²

Mergers

In July 2004 a bill was submitted to Congress providing for a mandatory concentration control system. As of this date, is not possible to make a forecast as to when this bill will be dismissed by Congress or if it will be finally passed as a law.

ANNEX IV: CANADA-CHILE QUESTIONNAIRE

Part 1: Questions Specific to the Competition Provisions of the Canada-Chile Free Trade Agreement (FTA)

Impact on Competition Enforcement Cooperation

1. What impact have the competition law provisions of the Canada-Chile FTA had upon competition law enforcement cooperation between Canada and Chile?

a. Has cooperation between Canada and Chile in competition matters improved as a direct result of the FTA? If so, please cite examples that explain why you think this is the case.

b. Has cooperation between Canada and Chile in competition matters been unaffected by the FTA? If so, please cite examples that explain why you think this is the case.

¹⁹² Bustamante, *op. cit.*

2. Do you believe that the competition provisions of the FTA between Canada and Chile have contributed in any direct manner to the development of the core principles of either country's competition law or policy? If so, how? If not, why not?

3. Do the competition law provisions of the Canada-Chile FTA have any practical effect? Please cite examples.

Objectives

4. To what extent have the objectives of the competition provisions in the Canada-Chile FTA been achieved?

5. What are the factors that triggered the negotiation and signing of the Canada-Chile FTA?

6. Are there any specific reasons why the competition law provisions had to be included in this FTA? Which party and within which department or ministry was the demandeur?

Benefits of the Competition Provisions

7. Are the benefits that the competition provisions in the Canada-Chile FTA offer positive, net of their expense in negotiation and upkeep? If so how do you measure this?

8. Are the net benefits of an FTA's competition provisions positive where agency-to-agency agreements already exist? If so, why? If not, why not?

9. Please name any examples of cases/parties that have benefited directly from the competition provisions of the Canada-Chile FTA?

10. Have the trade summits and the meetings of senior trade officials under the Canada-Chile FTA produced any direct benefits for competition law enforcement in Canada or Chile?

Limitations

11. What, if any, are the limitations of an FTA as an instrument of competition enforcement cooperation?

12. What is possible in terms of cooperation in competition enforcement as a result of the Canada-Chile FTA? Can you account for any discrepancy between the potential and actual results of the competition provisions of the Canada-Chile FTA?

Confidentiality

13. How worried should businesses be about the possible consequences for confidential business information under the FTA? Why?

Trust

14. What impact do the competition law provisions of the Canada-Chile FTA have upon the development of trust between the Canadian and Chilean competition authorities?

15. Are FTAs and the regular trade summits or meetings between senior trade officials that they set up conducive to the development of trust required to improve enforcement cooperation between competition officials? How? What examples illustrate your point?

16. Would the use of dispute settlement procedures under the FTA be detrimental to the cooperative relationship that has been created between the relevant competition authorities? If so, how? If not, why not?

Exchange of Information

17. Does the Canada-Chile FTA require the exchange of information that would otherwise not be accessible to the requesting partner? If not does it allow, i.e. create additional authority for, information exchanges that would otherwise be impossible? If not does it provides new channels or procedures for exchanges which would already be allowed but are given a more formal framework in the agreement?

Trade and Competition

18. What relationship exists between competition obligations and trade obligations on both Canada and Chile? In particular, do the competition provisions of the FTA only cover competition matters *that affect trade* or do they cover competition matters in general?

Failure to Act

19. What if any are the sanctions, both formal and informal, for “failure to act” on the part of one competition authority under the Canada-Chile FTA? Have these sanctions ever been used? Explain with examples.

Hard Law/Soft Law

20. Would you describe the Canada-Chile FTA as “hard law” or “soft law”? Explain.

21. Are the Canada-Chile FTA’s formal rules broad in scope and consistent with the emergence of strong informal contacts?

Mutual Recognition

22. Does the Canada-Chile FTA require both parties to mutually recognise the competition provisions of the other signatory party?

Improvements

23. How, in your opinion, would you improve upon the competition provisions in the Canada-Chile FTA?

Approval?

24. Despite your possible criticisms, would you recommend an FTA as an instrument of competition enforcement cooperation to other trading partners? Why?

Part 2: Questions Specific to the Memorandum of Understanding (MOU) Concluded Between the Competition Authorities of Canada and Chile

Impact on Competition Enforcement Cooperation

25. What impact has the Memorandum of Understanding (MOU) between the competition authorities of Canada and Chile had upon competition law enforcement cooperation between these two countries?

a. Has cooperation between Canada and Chile in competition matters improved as a direct result of the MOU? Please cite examples that explain why you think this is the case.

b. Has cooperation between Canada and Chile in competition matters been unaffected by the MOU? Please cite examples explaining why you think this is the case.

26. Do you believe that the competition provisions of the MOU between the competition authorities of Canada and Chile have contributed in any direct manner to the development of the core principles of either country's competition law or policy? If so, how? If not, why not?

Objectives

27. What are the factors that triggered the negotiation and signing of the MOU between the competition authorities of Canada and Chile?

28. To what extent have the objectives of the MOU between the competition authorities of Canada and Chile been achieved?

Trust

29. What impact does the MOU have upon the development of trust between the Canadian and Chilean competition authorities?

Benefits

30. Did the MOU actually change the relationship between the agencies of Canada and Chile, or did it merely place an already existing situation of cooperation on paper? If the MOU did more than just formalise an existing situation, what specific benefits have you seen as a result of the MOU that you would not have seen otherwise?

31. Would you agree with the assertion that, *in contrast to the FTAs*, enforcement cooperation agreements at an *agency-to-agency level* contribute a very great deal to enforcement cooperation directly in terms of:

- a. providing the formal mechanism through which cooperation can occur;
- b. providing the requisite information and trust through the operation of the mechanism; and
- c. providing opportunities for further exchanges of information, both formal and informal?

Limitations

32. What, if any, are the limitations of an MOU or agency-to-agency agreement as an instrument of competition enforcement cooperation?

33. What is possible in terms of cooperation in competition enforcement as a result of the Canada-Chile MOU? Can you account for any discrepancy between the potential and actual results of the Canada-Chile MOU?

Confidentiality

34. Is the fact that confidential information cannot be exchanged under the MOU a help or hindrance for the competition authorities?

Improvements

35. How, in your opinion, would you improve upon the Canada-Chile MOU?

Approval?

36. Despite your possible criticisms, would you recommend an agency-to-agency agreement as an instrument of competition enforcement cooperation to other trading partners? Why?

Part Three: General Issues Relating to Competition Enforcement Cooperation Between Canada and Chile

The National Competition Laws of Canada and Chile

37. Can you think of any aspect of Canadian competition law that is particularly worrying for the Chilean competition authorities from a trade, competition or competition law enforcement perspective?

38. Can you think of any aspect of the Chilean competition law that is particularly worrying for the Canadian competition authorities from a trade, competition or competition law enforcement perspective?

39. Do the competition authorities in the developing country partner i.e. Chile have policy objectives other than protecting the competitive process, consumer welfare, or economic efficiency, such as the promotion of small to medium-sized enterprises or other social objectives e.g. employment. Does the agreement contain any provisions which could directly or indirectly affect the ability of Chile to give effect to these aims?

40. Are there different standards of legal protection between Canada and Chile in competition matters (e.g. criminalisation of cartels), and if so how has this situation been addressed?

Cooperation between the Competition Authorities of Canada and Chile

41. What factors, both formal and informal, impede enforcement cooperation between national competition authorities?

42. What factors, both formal and informal, can improve enforcement cooperation between national competition authorities?

43. In practice, is informal cooperation more effective in resolving potential disputes or complicated cases than formal cooperation? Why?

44. Are formal arrangements necessary to facilitate informal cooperation, despite their various limitations? To that end are they sufficient?

45. Can you identify and explain the factors that determined the choice of cooperative instruments in the relationship between Canada and Chile?

46. Other than notifications can you detail any concrete examples of enforcement cooperation in practice between the competition agencies of Canada and Chile?

47. Please detail the *flow of cooperation* between the competition agencies of Canada and Chile:

- a. How many notifications have the Canadian competition authorities received from Chile since the signing of the Canada-Chile FTA and the conclusion of the subsequent MOU?
- b. How many notifications have the Chilean competition authorities received from Canada since the signing of the Canada-Chile FTA and the conclusion of the subsequent MOU?
- c. How many requests for cooperation have the Canadian competition authorities received from Chile since the signing of the Canada-Chile FTA and the subsequent MOU?
- d. How many requests for cooperation have the Chilean competition authorities received from Canada since the signing of the Canada-Chile FTA and the conclusion of the subsequent MOU?
- e. How many requests for the use of positive comity have the Canadian competition authorities received from Chile since the signing of the Canada-Chile FTA and the conclusion of the subsequent MOU?
- f. How many requests for the use of positive comity have the Chilean competition authorities received from Canada since the signing of the Canada-Chile FTA and the conclusion of the subsequent MOU?

48. What remains to be done in relation to the development of cooperation between Canada and Chile in competition enforcement matters?

Notification

49. How are mutual notification provisions necessary or helpful in bilateral agreements?

50. Please detail any examples of notification in practice between the agencies of Canada and Chile?

51. How did notification benefit either party in the above examples?

Positive Comity

52. Please detail any concrete examples of the use of informal or formal positive comity in practice between the agencies of Canada and Chile?

53. Do you believe the use of positive comity has benefited either Canada or Chile? If so, how? If not, why not?

Trust

54. How important to improved enforcement cooperation is the development of trust between national competition authorities?

55. How do governments usually promote trust between national competition authorities?

56. How do the competition agencies themselves usually foster trust with their counterparts abroad?

57. Does trust precede or follow the signing of competition agreements? In other words, is trust a pre-requisite for or a consequence of such agreements?

Assistance

58. How important is technical assistance (in its many forms) for the operation of a so-called North-South agreement on competition enforcement cooperation?

The Relationship between FTAs and Agency-to Agency Agreements

59. Would an agency-to-agency agreement be ineffective in the absence of a corresponding FTA, with its dispute resolution provisions? If so, how? If not, why not?

60. Would the competition law provisions of an FTA be weakened by the absence of an agency-to-agency agreement? If so how? If not, why not?

Potential Conflict?

61. Are agreements of the kind concluded between Canada and Chile a way of exporting the competition regime of the Northern partner to the Southern partner? If this can be documented, then is there a potential for future conflicting provisions should a developing country, in this case Chile, sign agreements with more than one Northern nation?

Improvements/Recommendations

62. How, in your opinion, could competition enforcement cooperation be improved between the Canadian and Chilean authorities?

63. What is the next step in the process of improving competition enforcement cooperation between the competition authorities of Canada and Chile?

64. Do you have any further comments on the contribution of bilateral trade or competition agreements to competition law enforcement cooperation between Canada and Chile?