

## ***Decision 285, Rules and regulations for preventing or correcting distortions in competition caused by practices that restrict free competition***

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THE COMMISSION OF THE CARTAGENA AGREEMENT,

HAVING SEEN: Chapter VIII of the Cartagena Agreement, Decisions 230, 258, and 281 and Board Proposal 223/Rev. 2;

WHEREAS:

The Commission approved Decision 230, which contains rules and regulations for preventing or correcting practices that could distort competition;

Decision 258 stipulates that the Commission, at the proposal of the Board, shall review the rules and regulations on competition;

Decision 281 stipulates that the Commission, at the proposal of the Board and by March 31, 1991 at the latest, shall review the rules and regulations on competition established in Decision 230;

In order to achieve the objectives of the integration process, it is advisable to perfect Subregional rules and regulations on competition so that they can act as effective mechanisms for preventing or correcting any distortions that could be caused by business behaviors that restrict, hinder or distort that competition;

Due to their origin and scope, it is necessary to distinguish between the practices that are the subject-matter of this Decision, and dumping and subsidy practices and restrictions on exports;

DECIDES:

### **I. SCOPE OF APPLICATION ➔**

**Article 1.-** The purpose of the rules and regulations provided for in this Decision is to prevent or correct distortions in competition caused by practices that restrict free competition.

**Article 2.-** Member Countries or enterprises that have a legitimate interest may ask the Board for authorization or a mandate to take measures to prevent or correct the threat of injury or injury to production or exports, caused by practices that restrict free competition originating in the Subregion or involving an enterprise that carries out its economic activity

in a Member Country.

Originating in the Subregion is understood to mean practices carried out by enterprises that pursue their economic activities in one or more Member Countries. The involvement in a Member Country is understood to mean a practice carried out among enterprises whose economic activities are conducted in one or more Member Countries and enterprises located outside the Subregion.

Excluded from this Decision are practices carried out by one or more enterprises located in a single Member Country that do not generate any effects in the Subregion. In those cases the respective national legislation shall be applicable.

For purposes of this Decision, a significant delay in building up national production is considered as a threat of injury.

**Article 3.-** Practices restricting free competition are understood to mean agreements, parallel behaviors or collusion between enterprises that restrict, impede or distort competition or that could do so.

The agreements referred to in the previous clause may include horizontal or vertical agreements entered into by related parties.

For purposes of this Decision, the abusive exploitation by one or several enterprises of their dominant position in the market, is also considered a practice that restricts free competition.

It is understood that one or several enterprises enjoy a dominant position if they are able to act independently, without considering the competitors, buyers or suppliers, due to factors such as significant participation of the enterprises in the respective markets, the characteristics of supply and demand for the products, the degree of technological development of the products involved, and the access of competitors to financing and sources of supplies, as well as to distribution networks.

**Article 4.-** The following are considered agreements, parallel behaviors or collusion:

- a. The wrongful of manipulation or direct or indirect setting of prices or other marketing condition, on terms that are discriminatory with relation to what would have prevailed in a normal commercial situations.
- b. The limitation or control of production, distribution, technical development or investments. Also limitations or prohibitions on exporting, importing or competing;
- c. The allocation Distribution of the market or of supply sources, especially maneuvers intended to disrupt the normal supply of raw materials;
- d. Application in trading of unequal conditions to equivalent goods or relationships services, which place some competitors at a disadvantage to others;
- e. Subordination of contract signing to the acceptance of supplementary goods or services that, by nature or according to commercial practice, have nothing to do with the subject-matter of those contracts; and
- f. Other cases with equivalent effects.

**Article 5.-** The following are considered abuses of a position of dominance in the market:

- a. The wrongful manipulation or direct or indirect setting of prices or other marketing conditions, on terms that are discriminatory with relation to what would have existed in normal commercial situations.
- b. The limitation or control of production, distribution, technical development or investments. Also limitations or prohibitions on exporting, importing or competing;
- c. Unjustified refusal to satisfy demands for purchases of products, among other things, failure to furnish supplies to enterprises with which they are disputing the market for the end product.
- d. Application in trade or service relationships of unequal conditions to equivalent goods or services, which place some competitors at a disadvantage to others;
- e. Subordination of contract signing to the acceptance of supplementary goods or services that, by nature or according to commercial practice, have nothing to do with the subject-matter of those contracts; and
- f. Other cases with equivalent effects.

## **II. PROCEDURE** ➔

**Article 6.-** The following have the right to submit a written petition:

- a. Member Countries through their respective liaison institutions; and
- b. The enterprise or enterprises that have a legitimate interest, to the extent permitted by national legislation.

The written petition must contain the following information:

- the nature of the restrictive practices and their duration;
- the characteristics of the products or services that are the subject of the practices;
- the characteristics of the products that are affected;
- the enterprises involved;
- the evidence that may make it possible to presume the existence of a threat of injury or injury to production or exports caused by practices that restrict free competition;
- the characteristics of the measures requested.

Upon receipt of the claim, the Board shall proceed to inform the liaison institutions of the

Member Countries where the enterprises involved in the investigation carry out their economic activities.

**Article 7.-** The Board shall not initiate the investigation if the petition is incomplete. In that case, it shall so advise the claimant, indicating in detail what information is missing, within ten working days after presentation of the petition.

If the petition is deemed adequate, within ten working days after its presentation, the Board shall pronounce itself to that effect through a Resolution. Furthermore, that Resolution shall be communicated to the claimant enterprise or enterprises.

**Article 8.-** During the investigation, the Board may request and collect evidence and information from the liaison institutions and, either through them or directly, from the producers, exporters, importers or consumers with a legitimate interest in the investigation. They may also furnish information or, as the case may be, present pleadings to the.

In cases where the Board requests, collects or receives evidence and information directly, it shall report this to the respective liaison institutions.

**Article 9.-** In exercising its power to request and collect evidence, the Board may decide to treat the information given to it as confidential if the party furnishing that information asks for and justifies such treatment, since as the source of that information, its dissemination may have unfavorable consequences for it.

Moreover, the parts of internal documents prepared by the Board or Member Countries which contain that kind of information may also be of a confidential nature.

When confidential treatment of evidence is sought, the petitioner shall provide a summary of the information that may be disclosed or an explanation of why that information cannot be summarized. In the latter case, the Board does not have to accept that explanation, in which case it may not take that evidence into consideration.

Likewise, even if the petition is justified, the information may not be taken into account if the entity offering it fails to submit a non-confidential summary of its contents, provided that this information is capable of being summarized.

Those interested in the investigation may submit a written request for the information furnished or prepared pursuant to this Decision and this information may be supplied to them if it is not confidential in nature.

This article does not impede the disclosure of general information and, in particular, of the grounds for the Resolutions referred to in this Decision, if required in the course of a judicial proceeding. In making that disclosure, it shall be kept in mind that the trade secrets of those that have a legitimate interest in the investigation must not be revealed.

**Article 10.-** In the course of the investigation, the Board may, on its own initiative or at the petition of any of the interested parties, call meetings for the purpose of seeking a direct settlement; the commitments made and the results of these meetings shall be recorded in the minutes.

No interested party shall be compelled to attend a meeting and the absence of said party shall not be detrimental to its case.

The Board shall go on record with its opinion through a Resolution that will state what commitments have been assumed and whether the investigation shall be suspended or shall continue at the request of the claimant.

Enterprises or the authorities of the country where the practice is carried out shall furnish the necessary information for verifying compliance with the commitments assumed. If these commitments fail to be fulfilled or the pertinent information is not furnished, the Board shall resume the investigation.

**Article 11.-** The Board shall have a period of two months as of the date of publication of the Resolution to which Article 7 of this Decision refers, in which to conduct its investigation.

In special cases, the deadline may be extended up to two additional months, in which case the Board must so inform the claimant.

**Article 12.-** In order to issue its opinion, the Board must consider the existence of positive evidence regarding:

- a. the practices that are restricting free competition;
- b. The threat of injury or injury; and
- c. A cause-and-effect relationship between the practices and the threat of injury or injury.

**Article 13.-** The determination of the existence of a threat of injury or injury and of the cause-and-effect relationship with the practices restricting free competition may be based, among other things, on the examination of:

- a. The volume of trade in the products that are the subject of those practices, particularly to determine if it has changed significantly, both in absolute terms and in relation to the production and consumption of the Member Country affected;
- b. The prices of the products or services that are the subject of the practices, particularly to determine whether they are considerably different from the prices of similar products or services in the absence of those practices; and
- c. The effects on the production or exports affected by the practices, as deduced from the real or virtual trends in pertinent economic factors, such as: production, domestic sales, exports, distribution, market share, use of installed capacity, employment, stocks, and profits.

**Article 14.-** At the conclusion of the investigation, and within ten working days after the event provided for in Article 11, the Board shall place issues an opinion through a Resolution, in accordance with its conclusions and based on the available information.

The Resolution shall indicate the characteristics of the measures to be established, the deadlines for their adoption and their duration. Also, when applicable, the conditions that will determine the duration of those measures.

**Article 15.-** Once the Board has verified, at the request of the liaison institutions or of the interested parties, the change in or elimination of the causes that gave grounds for the

Resolution to which the previous article refers, it shall repeal that Resolution partially or totally by amending or derogating it. The Board shall have two months in which to issue its opinion.

The Board may also verify on its own initiative the change in or elimination of the causes that gave grounds for the Resolution in question and amend or repeal it.

### **III. MEASURES** ➔

**Article 16.-** The Board shall issue its opinion through an injunction if it determines the existence of a practice restricting free competition that threatens to cause or causes injury. It may also decide on the implementation of measures designed to eliminate or lessen the distortions that generated the claim. Member Countries shall adopt the necessary measures to ensure that the effects of those restrictions cease.

The corrective measures may consist in authorizations to countries where the enterprises that are affected carry out their economic activities, allowing them to apply preferential tariffs, with regard to Subregional tariff commitments, to imports of the products affected by the practice that restricts free competition.

**Article 17.-** In the event that the threat of injury or injury is evident, the Board may, in the course of its investigation, issue recommendations aimed at bringing the practice to an end.

### **VI. FINAL PROVISION** ➔

**Article 18.-** This Decision replaces Decision 230 as regards to the rules and regulations for preventing or correcting distortions in competition caused by practices that restrict free competition.

Signed in the city of Lima on the twenty-first of March of nineteen ninety-one.