

FTAA – Free Trade Area of the Americas

Draft Agreement

Chapter on Competition Policy

• **CHAPTER ON COMPETITION POLICY**

1. COMPETITION LAW

1.1 Each Party shall [endeavor to] adopt or maintain measures, at a national or subregional level, to proscribe anticompetitive [business] conduct [,both private and public,] [among and within the countries of the hemisphere], with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct. The Parties recognize that undertaking these obligations will enhance the fulfillment of the objectives of the FTAA Agreement.

[**1.2** Each Party undertakes to permit access, on a non-discriminatory basis, to natural or legal persons resident in the territory of any Party to the mechanisms and procedures of its national competition law.]

[**1.3** Any exclusions or exceptions from the coverage of national or sub-regional competition measures shall be transparent and [should] be reviewed periodically by the Party or subregional entity to evaluate if they are necessary to achieve their overriding policy objectives. [After the entry into force of this Agreement, the Parties shall make a notification to the Committee provided for in point 3.5 [3.2] of any new or extended exclusion or exception.]]

[The Parties agree not to exclude from the coverage of national or subregional competition measures, the export cartels.]

[**1.4** The Parties agree that national or sub-regional laws will proscribe anti-competitive [business] conduct [that has as its objective or effect to limit, restrict, falsify or distort free competition [or market access] and that affects trade between or within the Parties and which harms or may harm economic efficiency and consumer welfare]. Anti-competitive [business] conduct includes, but is not limited to:

1.4.1 anticompetitive agreements, anticompetitive concerted practices or anticompetitive arrangements by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce. [This category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realization of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Party's own laws, or (iii) are authorized in accordance with those laws.]

1.4.2 anticompetitive practices or abuses by an enterprise [or group of enterprises] that has [market power] [dominant position] in a relevant market [or group of markets]; and

1.4.3 [Concentrations, mergers or acquisitions with substantial anticompetitive effects.]]

[**1.5** Parties shall ensure the application of the principles of non-discrimination, transparency and due process to the national or sub-regional competition measures adopted or maintained according to sub-article 1.1. of this chapter and to each Party's law and their enforcement.]

1.6 [In accordance with its national or subregional law,] each Party shall ensure:

(a) that prior to the imposition of a final sanction or remedy for violation of its competition law, it will afford the to the natural or legal person subject to such sanction or remedy, an opportunity to be heard and to present evidence, and that such sanction or remedy is subject to independent review.

(b) [appropriate] protection of confidential information obtained from natural or legal persons in connection with an investigation or proceeding.

[2. [REGULATORY POLICIES AND PRACTICES, [LEGAL] [DESIGNATED] MONOPOLIES [, ANTI-COMPETITIVE AGREEMENTS] , STATE ENTERPRISES [, STATE AIDS AND INTER-GOVERNMENTAL AGREEMENTS]]

[Anti-competitive [business] practices may have their origin in regulatory policies and practices, administrative measures, [legal] [designated] monopolies], and state aids].]

[2.1 Regulatory Policies and [Practices] [Measures]

With respect to regulatory policies and practices, the Parties [shall endeavor to] undertake to:

2.1.1 Observe that they are in accord with the provisions of this chapter, and that their design supports the use of pro-competitive regulatory principles[, and that they respect the principles of transparency, non-discrimination and due process];

2.1.2 Prevent them from [unreasonably] limiting access to the markets or in any way [unreasonably] impairing the conditions of competition in the FTAA.] [When applying the criterion of reasonably the objective of this Chapter must be taken into account.]

[2.2 [Designated] [Legal] Monopolies

2.2.1 No provision of this Agreement shall be construed to prevent a Party from designating, [authorizing] [or maintaining] a monopoly, [as long as its law allows,] [insofar as they are subject to national or sub-regional rules on promotion and protection of competition.]

2.2.2 Where a Party designates [or authorizes] a monopoly and the designation may affect the interests of persons of another Party, the Party shall:

- (a) at the time of the designation endeavour to introduce such conditions on the operation of the monopoly as will minimize or eliminate any nullification or impairment of benefits in the sense of Chapter XX (Chapter on nullification or impairment) ; and
- (b) provide written notification[, in advance wherever possible,] to the [Committee established in this Chapter] [Parties] of the designation and any such conditions.

[2.2.3 Each Party shall ensure [, through regulatory control, administrative supervision or the application of other measures,] that any privately owned [that it designates] and government monopoly that it designates or has designated prior to entry into force of this Agreement and existing on that date:

- (a) acts in a manner that is not inconsistent with the Party's obligations under this [chapter] [Agreement] [without prejudice to the provisions in the Chapters on Government Procurement and Market Access] 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 licenses, approve commercial transactions or impose quotas, fees or other charges];
- (b) acts solely in accordance with commercial considerations [in harmony with the public interest and without prejudice to the provisions in [this Agreement] the Chapters on Government Procurement, Market Access, Investment and Services,] in its purchase or sale of the monopoly good or service in the relevant market [in the territory of the Party], [including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale,] except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d);
- (c) [provides non-discriminatory treatment to investments of investors, to goods[, services,] and [to service providers] of another Party in its purchase or sale of the monopoly good or service in the relevant market [in the territory of the Party], [in accordance with the Chapters on Investment and Services of this

Agreement and without prejudice to the public interest.] [Differences in pricing in different geographic markets in the Party's territory, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions in those markets, are not in themselves inconsistent with this provision;]] and

- (d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in markets outside its designated monopoly market that, in the Party's territory, adversely affect investments of investors, services, or goods of another Party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct. [Differences in pricing between classes of customers or between related and non-related firms, and cross-subsidization, are not in themselves inconsistent with this provision; rather, they are subject to this subparagraph when they are used as instruments of anticompetitive behavior by the monopoly firm].

2.2.4 Paragraph 2.2.3 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.]

[2.3 [Anticompetitive] [Authorized] Agreements

Each Party shall ensure that any agreement it authorizes [in accordance with article 1.4]:

- (a) acts solely in accordance with commercial considerations in harmony with the public interest and without prejudice to the provisions in this Chapter; and
- (b) does not use its cartel position to engage, directly or indirectly, in anticompetitive practices in markets outside the territory of the Party or Parties who has authorized it.]

[2.4 State Enterprises

2.4.1 No provision of this Agreement shall be construed to prevent a Party from maintaining or establishing a state enterprise, [insofar as they are subject to national or sub-regional rules on promotion and protection of competition.]

[2.4.2 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 XX (Investment), YY ([Services, including] Financial Services) and Chapter ZZ (Government Procurement)] [this Agreement] [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 licenses, approve commercial transactions or impose quotas, fees or other charges.]

2.4.3 Each Party shall ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment to investments in the Party's territory of investors of another Party in the sale of its goods or services [, without prejudice to the provisions in the Chapters on Services, Investment, Government Procurement among others.]]

[2.5 State aids

The Parties undertake, in a time period to be determined, to [negotiate] [study] the treatment of state aids that could limit, restrict or distort competition and that could affect trade between Parties.]

[2.6 Inter-governmental agreements

The provisions in this Chapter will not apply to inter-governmental agreements signed or to be signed by the Parties.]

[2.7 For purposes of provisions 2.2 and 2.3 in this Chapter:

Delegate [includes] [means] to transfer government authority to the monopoly [or State enterprise] by means of legislative grant, government order, directive or other act, or to authorize the exercise by the monopoly [or State enterprise] of government authority.

Designate means to establish, [designate] or authorize a monopoly, 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 favorably than an unaffiliated enterprise, or
- b. one class of enterprises more favorably than another,

in like circumstances;

Government monopoly means a monopoly that is owned, or controlled [through ownership interests,] by the [federal or central [national], regional and municipal] [[federal or central] [national]] government of a Party [whatever its political or territorial organization] 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 [in question]];

[Maintain a monopoly [or State enterprise] means its designation prior to the date of entry into force of this Agreement and existing on _____, 200_;

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

[Relevant Market means the [relevant] geographic and product market for a good or service;]

[Designated] [Legal] Monopoly means [a private or governmental] [an] entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated [, formally or in effect,] 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];

State enterprise means an enterprise owned, or controlled [directly or indirectly] [through ownership interests,] by a Party.]

3. INSTITUTIONAL PROVISIONS

3.1 Each Party shall establish or maintain an authority or authorities, at the national or sub-regional level, that has the responsibility to enforce measures related to the protection of competition. These authorities [shall] [should] have reasonable [resources,] enforcement powers and enforcement autonomy, and the ability to promote a culture of competition and to advocate pro-competitive policies and laws, including before other national or sub-regional government bodies, [and be independent from political interference in carrying out enforcement actions and advocacy activities]. [Further, Parties shall have jurisdiction over practices that have occurred in its territory which have an effect on another Party's territory.]

[**3.2** The Parties shall establish a Committee comprised of [one representative] [representatives] [with competence in competition issues] from each Party, and/or sub-regional entity, with [only] the following functions:

3.2.1 Monitor progress in the implementation of the provisions of this Chapter by the Parties and sub-regional entities.

3.2.2. [Monitor [the impact of such implementation on cross border trade and investment] [the cross border impact of that implementation]]

3.2.3 Promote cooperation among the [[competent] [relevant] authorities of the] Parties and sub-regional entities on issues arising under this Chapter.

3.2.4 Coordinate [the provision of] technical assistance.

[**3.2.5** Communicate to the Parties the notifications made by the countries under articles 2 and 4 of this Chapter.]

3.2.6 [Conduct reviews] [Provide a forum] and establish a basic plan for the conduct of the reviews under the Competition Policy Review Mechanism and their frequency.

3.2.7 [Make recommendations [, as necessary,] [to the Parties] [to the FTAA Commission] on the implementation [and interpretation] of this chapter [,and on whether changes to the provisions under this chapter are warranted].]

3.2.8 [Disseminate and update [non-confidential] information on competition [policy] issues through electronic means]]

[**3.3** [The Committee shall act by consensus], and unless it decides otherwise, its reports shall be public.]

[**3.4** The Committee may establish its own practices and procedures to perform its functions.]

3.5 Competition Policy Review Mechanism

3.5.1 The Parties recognize the value of transparency of government policies affecting competition. Accordingly, a Competition Policy Review Mechanism is established.

3.5.2 The Competition Policy Review Mechanism shall include periodic review[s] of [[the Parties'] [each Party's] implementation of the provisions of this Chapter] [competition legislation, policies and enforcement activities of [the Parties] [each Party]]. Any results of such reviews will be non-binding. [The Parties understand that the results of these reviews shall not constitute a prejudgement of any disputes that may arise under this Chapter.]

3.5.3 These reviews will be based on a detailed report supplied by [the Party under review] [experts appointed by the FTAA Commission].

3.5.4 The reviews will be subject to appropriate measures for ensuring the protection of confidential information.]

4. MECHANISMS FOR COOPERATION AND FOR EXCHANGE OF INFORMATION

4.1 Parties recognize the importance of cooperation and coordination among [competent] [relevant] authorities to further effective competition law enforcement and development of competition policies in the FTAA.

4.2 If there is evidence to indicate that anticompetitive [business] conduct with cross-border impact is being carried out, the Parties will [cooperate] [consider cooperating] in investigating and taking appropriate action [as long as their national law allows].

4.3 Parties will cooperate, as appropriate, and taking into account confidentiality provisions, on a bilateral, sub-regional or regional basis, on matters relating to the enforcement of competition laws and the development of competition policies[, including in the following ways:

[**4.3.1** Notify [other Parties] [the affected Parties][and][the Committee], by means of specific notification procedures, when a competition law enforcement action may affect another Party's [important] interests[, unless such notification harms the notifying Party's [important] interests];]

[**4.3.2** Take into account the [important] interests of other Parties when enforcing competition laws (negative comity);]

[**4.3.3.** If there is evidence that anticompetitive [business] conduct is being carried out in the territory of a Party, and that this conduct negatively affects the [important] interests of another Party, and in the event that such conduct [is not permitted under] [appears to violate] the competition law of the Party in which it is occurring, [the competition authority of] the affected Party may request that [the [competent] [relevant] [competition] authority of] the other Party take appropriate action, pursuant to its own legislation. Nothing in this provision limits the discretion of the requested Party's competition authority under its competition laws and enforcement policies as to whether to undertake enforcement activities with respect to the anticompetitive activities identified in a request. (positive comity)]

[**4.3.4** Mechanisms for the exchange of information; and]

[**4.3.5** Joint investigation in cases that merit it.]

[**4.4** For effective implementation of cooperative relationships, the Parties recognize the value of entering into cooperation agreements or arrangements. When developing their cooperation agreements or arrangements, the Parties agree to consider providing for notification, exchange of information, consultation, positive comity and coordination in related matters. (alternative text to 4.3.1, 4.3.4, and 4.3.5)]

5. CONSULTATIONS [AND DISPUTE SETTLEMENT]

5.1 CONSULTATIONS

Each Party, upon request from any other Party, agrees to consult with that Party on any matter arising under the provisions of this Chapter.

[5.2 DISPUTE SETTLEMENT

Alternative A:

[Disputes arising between Parties relating to the interpretation of, application of, or non-compliance with, the provisions of this Chapter shall be settled through the general Dispute Settlement Mechanism under this Agreement.

The Dispute Settlement Mechanism of the FTAA shall not be applicable for challenging or reviewing [administrative or [judicial] [jurisdictional] decisions of Parties with respect to their competition law [and policy].] [the legality of the [judicial] [jurisdictional] or administrative proceedings of Parties in respect of the enforcement of their competition law.]]

Alternative B.1:

[The provisions on monopolies and state enterprises in this chapter may be subject to the general provisions on dispute settlement of this Agreement, as well as to those provisions on investor-state dispute settlement.] [Except as set forth in the preceding sentence regarding [legal][designated] monopolies and state enterprises, dispute settlement for matters arising from this Chapter shall be available only through the mechanisms set forth in articles 3.5 (Competition Policy Review Mechanism) and 5.1 (Consultations).]

Alternative B.2:

[5.2.1] Except as provided in Article 5.2.2, no Party may have recourse to dispute settlement under this Agreement, arbitration or any other means for settlement of disputes for any matter arising under this Chapter.

5.2.2 Monopolies and state enterprises [may] [shall] be subject to the provisions for dispute settlement under this Agreement.]]

6. TECHNICAL ASSISTANCE

6.1 The Parties agree [to work] [that it is in their interests to work] together in technical assistance activities related to the adoption, implementation, and enforcement of competition laws and policies.

6.2 Taking into account reasonably available resources, the Parties [will provide for technical assistance] [[agree] [shall endeavour] to participate in technical assistance activities], including sharing expertise and information, training officials, sending experts to participate in events related to competition [policy] issues, and exchanging personnel.

[7. TRANSITIONAL [PERIOD] [MEASURES]

The adoption of competition rules, the implementation of institutional provisions to apply such rules and the initiation of effective application of the provisions of this chapter shall be carried out within a time frame established by the Parties, taking into account the differences in the level of development and size of economies and the situation of Parties that do not have competition laws [and the vulnerability of the Parties.]]

8. CONFIDENTIALITY

8.1 Nothing in this Chapter shall require the provision of information by a Party or its competition authority contrary to its laws, including those regarding disclosure of information, confidentiality or business secrecy, [or its important [law enforcement] interests.]

[8.2 Each Party shall, [to the fullest extent possible consistent with its laws,] maintain the confidentiality of any information communicated to it in confidence by another Party and oppose any application [by a third party] for disclosure of such confidential information.

8.3 Parties shall not communicate any confidential information to third parties without the consent of the Party which provided that information and any information communicated shall only be used for the purpose of the enforcement action for which it was communicated.]

9. DEFINITIONS

For purposes of this Chapter:

[The principle of due process means to ensure fair, independent and equitable procedures, before the competent and pre-established authorities, observing the formalities and guarantees established in the national and subregional laws or legislation.

[This principle includes the [natural or] legal persons subject to the application of the law right:

- [to be duly notified;]
- to be informed of the reasons, nature and characteristics of the trial or proceedings;
- to offer or present arguments and evidence;
- [that decisions issued by the competent authority are duly founded and motivated;]]]

[The principle of transparency means [, *inter alia*] that each Party shall publish [and] [or] otherwise make available laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this chapter.]

[The principles of “non-discrimination” and “non-discriminatory treatment” mean [the better of] national treatment and most favored nation treatment, as set out in the relevant provisions of this Agreement.]

[Regulatory [Practices] [Measures] mean any rules that affect the price or quantities traded in a relevant market, or investments in the sector of activity affected by such rules.]]