

FTAA – Free Trade Area of the Americas

Draft Agreement

Chapter XIX Competition Policy

CHAPTER XIX Competition Policy

Section A General Aspects

Article 1. [General] [Objective] [Statement]

[1.1 [Recognizing that the conduct subject to this Chapter has the potential to restrict trade and investment in the hemisphere,] the Parties believe that proscribing [such] [anti-competitive] conduct, implementing [economically sound] competition policies, and engaging in cooperation will help secure the benefits of this Agreement.]¹

Article 2. Scope of Application

Article 3. General Provisions

[3.1. Nothing in this Chapter shall alter, or be construed as altering, rights or obligations set out in any other Chapter of the Agreement.]

[3.1. The rights and obligations set out in this Chapter, can not be altered or interpreted by the provisions established in any other Chapter of this Agreement.]

Article 4. Confidentiality

4.1. Nothing in this Chapter shall require the provision of [confidential] information by a Party or its competition authority that is contrary to its laws or policies [or practices], including those regarding disclosure of information, confidentiality, or business secrecy[, or its [important] national interests].

[4.2. Each Party shall, in accordance with its laws or policies, maintain the confidentiality of any information communicated to it in confidence by another Party and oppose any application for disclosure of such confidential information.

4.3. 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.]

Article 5. Definitions

[5.1. For purposes of provisions under Article 9. ([Market Regulatory Policies and Measures, [Legal] [Designated] Monopolies, State Enterprises)] of Section B (Substantive Provisions):

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] [Establish legally] means to establish, [designate] or authorize a monopoly, or to expand the scope of a monopoly to cover an additional good or service in accordance with its national or subregional laws.

¹ [Some delegations consider that this paragraph enhances the obligations that have not yet been negotiated in this Chapter.]

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.]

Commercial considerations means consistent with normal business conducts of privately held enterprises in the market in question.

[Market is where consumers and suppliers of a good or service meet from which transactions could result in prices and quantities commercialized.]

[Relevant Market means the geographic and product market for a good or service as used in antitrust analysis.]

[Designated] [Legally established] Monopoly means a [private or public] entity, 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, among others,] by a Party.][, whose criteria for establishment and performance comply with the national or subregional legislation of each Party, without prejudice to the provisions set forth in Article 6. (Competition Law [and Authorities]).]

[Market Regulatory Policies and 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.]

Section B Substantive Provisions

The Parties recognize that undertaking the obligations in this section helps to ensure that the benefits of the FTAA liberalization process are not undermined by anti-competitive [business] conduct [by economic agents],[including conduct with cross border effects].

Article 6. Competition Law [and Authorities]

6.1. Each Party shall [endeavor to] adopt or maintain competition laws or regulations, at a national or subregional level, to proscribe anticompetitive [business] conduct [by private and public economic agents], [with the objective of promoting] [so as to promote] economic efficiency and consumer welfare, [and shall take appropriate action with respect to such conduct].

[6.2. [Subject to any exclusions or exceptions [or authorizations]] [Without prejudice to Article 7. (Exclusions, Exceptions [or Authorizations])] the Parties agree that anticompetitive [business] conduct

under Article 6.1 [whose objective or effect is to limit, restrict or distort free competition,] [and that could affect trade between or within the Parties,] includes *inter alia*:

- a) anticompetitive agreements or arrangements between competitors to fix prices, restrict output, rig bids, or divide markets;
- b) abuses [with [substantial] anticompetitive effects] by an enterprise or group of enterprises that has a dominant position [and consequently exercises market power] in a relevant market; and
- c) [concentrations, mergers, or acquisitions [with [substantial] anticompetitive effects] [whose consequences harm economic efficiency and consumer welfare].]

[6.3. Each Party shall establish or maintain an authority or authorities, at the national or subregional level, with the responsibility and power to enforce national or subregional competition laws and advocate pro-competitive policies and laws, before its own national or subregional bodies. [Further, the Parties shall have jurisdiction over conduct that has occurred in its territory and has an effect on another Party's territory.]]

6.4. Each Party undertakes to:

- a) ensure that the provisions of its competition statutes and regulations do not discriminate on the basis of the nationality of the natural or legal persons of the Parties.
- b) [permit access on a non-discriminatory basis][not deny access [solely] [principally] on the basis of nationality], to natural or legal persons of the Parties, to its procedures for enforcing its national or subregional competition laws.]
- c) publish or otherwise make available any laws, regulations, procedural rules, implementing guidelines, final judicial or quasi judicial decisions or administrative rulings of general application respecting matters covered by this Section.
- d) ensure that its national or subregional law allows natural or legal persons to be heard and to present evidence prior to the imposition of any final sanction or remedy, on such persons pursuant to its competition laws or regulations. The person upon whom a sanction or remedy was imposed may appeal or seek review of that sanction or remedy in accordance with the Party's national or subregional laws by a body that is independent of the body that imposed the sanction or remedy. [No Party may resort to [indefinite] interim measures [to circumvent the obligations of this paragraph.]]
- e) protect confidential information obtained from natural or legal persons in connection with an investigation or proceeding.

Article 7. Exclusions, Exceptions [or Authorizations]

7.1. Any exclusions or exceptions [or authorizations] from the coverage of national or subregional 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.

[7.2. Within six months after the entry into force of this Agreement, the Parties shall notify the Committee provided for in Article 12. (Institutional Provisions) of any existing exclusions or exceptions [or authorizations]. Thereafter the Parties shall promptly notify the Committee of any new or significantly modified exclusions or exceptions [or authorizations].]

[7.2. The exclusions or exceptions [or authorizations] of each Party are set forth in Annex XX of this Chapter. Future exclusions or exceptions [or authorizations] of each Party shall be notified annually to the Committee provided for in Article 12. (Institutional Provisions). If any Party adopts exclusions or exceptions [or authorizations], whether by sector or by type of enterprise, it shall have no recourse to the FTAA dispute settlement mechanism regarding competition issues covered by this Chapter with respect to sectors or enterprises that have been excluded or excepted [or authorized] from its national or subregional legislation.]

[7.3. Each Party shall [endeavor to] ensure that the exclusions, exceptions, [or authorizations] referred to in the previous paragraph do not, directly or indirectly, produce anticompetitive effects in markets outside the territory of the Party that excluded, exempted [or authorized] them.

[7.4. Similarly, each Party shall [endeavor to] ensure that the exclusions, exceptions, [or authorizations] are not discriminatory in its territory, affecting the interests of other Parties.]

[7.5. The Parties agree not to exclude export cartels from the coverage of national or subregional competition laws or regulations.]

[Inter-governmental agreements]

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

Article 8. Mechanisms for [Cooperation] [Collaboration] and for Exchange of Information among [Competition] Authorities²

8.1. Parties recognize the importance of cooperation and coordination among their authorities to further effective competition law enforcement and development of competition policies in the FTAA.

8.2. If there is evidence to indicate that anticompetitive [business] conduct [of economic agents] with cross-border impact is being carried out, the Parties will [endeavor to cooperate] [cooperate] [and promote the exchange of information,] in investigating and taking appropriate action.

[8.3. The Parties may conduct joint investigations.]

[8.4. 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 and negative comity and coordination in related matters.]

[8.5. Each Party shall notify the affected Parties when a competition law enforcement action may affect another Party's interests.]

² Some delegations believe that this Article belongs in Section C (Procedures and Institutions) of this Chapter.

[8.6. When a Party notifies another Party about a competition law enforcement action that may affect its interests, the notified Party shall provide detailed information about the action in question.]

[8.7. A Party may request another Party to take appropriate action when there are indications that anticompetitive [business] conduct [of economic agents] is being carried out contrary to the competition law in the territory of the requested Party and that such conduct negatively affects the interests of the requesting Party. Nothing in this article 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.]

[Article 9. Market Regulatory Policies and Measures, [Legal] [Designated] Monopolies, State Enterprises]

[Market regulatory policies and measures

9.1. With respect to market regulatory policies and measures, the Parties recognize the importance of considering pro-competitive principles [, taking into account the objectives of this Agreement].]

[Legal][designated] monopolies

9.2. No provision of this Agreement shall be construed to prevent a Party from maintaining or designating a monopoly.

[9.3. Where a Party designates a monopoly and such designation may affect the interests of persons of another Party, the Party shall:

- [a) at the time of the designation endeavor to introduce such conditions on the operation of the monopoly as will minimize or eliminate any nullification or impairment of benefits of trade liberalization in the FTAA; and]
- b) provide written notification as soon as possible to the Committee established in Article 12. (Institutional Provisions) of the designation and the conditions referred to in item a), if any.]

[9.3. Where a Party allows the operation in its territory of a monopoly that could damage the interests of another Party vis-à-vis its competition policy, the Party that established or authorized the monopoly shall notify such establishment or authorization in writing [in advance, to the extent possible,] and any conditions thereof [to the Committee established under this Chapter].]

[9.4. Each Party shall ensure that any privately owned monopoly [that it designates after the date of entry into force of this Agreement] and any government monopoly that it designates or has designated:

- 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];³

- 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];] 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 a non-monopolized market in its territory [that adversely affect covered investments].]

9.5. Paragraph 9.4. 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.]

[State enterprises

[9.6. Nothing in this Agreement shall be construed to prevent a Party from maintaining or establishing a state enterprise, according to its national or subregional legislation.

[9.7. 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), XX ([Services, including] Financial Services) and Chapter XX (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.]⁴

9.8. 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].]

[9.6. Nothing in this Chapter shall be construed to prevent a Party from maintaining or establishing a state enterprise [,insofar as they are subject to national or subregional rules on promotion and protection of competition].]

³ [Some delegations proposed to move this provision to the general provisions chapter of the Agreement and refer it to the TCI.]

⁴ [Some delegations proposed to move this provision to the general provisions chapter of the Agreement and refer it to the TCI.]

[9.9. The charging of different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as supply and demand conditions, is not in itself inconsistent with Article XX ([Legal][designated] monopolies) and XX (State Enterprises).]

[Article 10. State Aids

[10.1. 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.]

[10.1. The Parties recognize that some state aids may distort competition by favoring specific enterprises or the production of certain goods.

10.2. Moreover, the Parties recognize that discriminatory state aids that adversely affect competition are contrary to the objectives of this Agreement.

10.3. Any Party that grants state aids shall provide detailed information on the aid granted, particularly in cases where another Party feels adversely affected and so requests.

10.4. If a Party that has requested detailed information on a particular case of state aid feels, after reviewing the information obtained, that it is being adversely affected by the aid being granted by another Party, it shall have the right to hold consultations in order to seek a mutually acceptable solution.

10.5. When a Party has requested consultations in accordance with the previous paragraph, these consultations shall be held on a mutually agreed date, but no later than sixty (60) consecutive days after the consultations are requested.]]

[Article 11. [Transitional Measures] [Special and Differential Treatment]

11.1. The adoption of national or subregional competition rules, the establishment of authorities to apply such rules, and the initiation of effective application of the provisions of this Chapter shall be carried out with flexibility and progressivity, within a time frame established under this Chapter, taking into account the differences in the level of development, size [and vulnerability] of economies [that merit consideration for special and differential treatment].]

Section C Procedures and Institutions

Article 12. Institutional Provisions

[Committee on Competition

12.1. A Committee on competition shall be established comprised of representatives designated by each Party and/or subregional entity. [The members of the Committee shall be competent in competition issues [as determined by the designating Party].]

12.2. Functions of the Committee:

- a) Monitor progress by the Parties and subregional entities in the implementation of the provisions[on competition policy referred to in this Chapter] [[of Section B (Substantive Provisions) of] this Chapter [with the exception of Article 9. ([Market Regulatory Policies and Measures, [Legal] [Designated] Monopolies, State Enterprises)]] [and their effect in achieving the goals of [this Chapter][the Agreement]].
- b) Promote cooperation among the Parties and subregional entities on [competition] issues arising under this Chapter.
- c) Assist in coordinating technical assistance.
- [d) Establish procedures for making and distributing to the Parties any notifications made in accordance with this Chapter.]
- [e) Establish and review when necessary a basic plan and schedule for the conduct of the reviews under the Competition Policy Review Mechanism and conduct said reviews, in accordance with Article XX (Competition Policy Review Mechanism)]
- [f) Report as necessary, to the FTAA Commission on the implementation of the provisions of this chapter.]
- [g) Promote the dissemination and updating of public information on competition policy issues through the FTAA Secretariat.]

[12.3. Rules and Procedures of the Committee:

- [[a) The Committee shall at each meeting appoint a Chair and Vice-Chair and determine an agenda for the following meeting. The Chair or, if unavailable, the Vice-Chair, will, with the assistance of the FTAA Secretariat, supervise all preparations for the meeting, preside over the meeting and prepare a public record of the meeting.]
- [b) The Committee shall act by consensus. [A quorum to be determined by the Committee shall be required for all meetings.] [The Parties, who are not represented at the meetings of the Committee shall have a time period of thirty (30) days to analyze the reports and make a statement on them].]
- [c) The Committee may establish such additional procedures as are necessary to perform its functions.]]
- [a) The Committee may establish its own procedures to perform its functions.]]

[Competition Policy Review Mechanism

12.4. The Parties agree to establish a Competition Policy Review Mechanism with the following objectives:

- a) to promote dialogue and information sharing about issues related to competition law and policy;
- b) to advance the development and encourage the effective enforcement of competition

laws and policies in the region; and

- c) to encourage the adherence by Parties to the commitments made under [Section B of] this Chapter [with the exception of Article 9. (Market Regulatory Policies and Measures, [Legal] [Designated] Monopolies, State Enterprises)].

12.5. The Competition Policy Review Mechanism shall consist of a periodic review of the competition policies of each Party, including a review of the competition legislation, regulations, enforcement and advocacy activities, exclusions or exceptions, institutions, cooperation and technical assistance activities [and other measures which may affect competition, such as [market regulatory policies and measures, [legal] [designated] monopolies, state enterprises] [and state aids]]. Parties that implement the obligations of this Chapter at the subregional level may request of the Committee on Competition to be reviewed within their respective subregional competition framework.

[12.6. Each Party shall be reviewed when it expresses an interest to this effect, unless two thirds of the Members determine that a Party shall be reviewed, in which case it shall be mandatory for the said Party.]

[12.6. All Parties shall be reviewed at least once in a [...] year period.]

12.7. The review conducted by the Committee pursuant to Article 12.5. will be based on the following:

- a) a report supplied by the Party under review in response to a questionnaire from the Committee on Competition [; and
- b) a report prepared by an expert appointed by the Committee on Competition[, based on the information available to the expert, including information provided by that Party under review]. The expert may make recommendations to the Committee on Competition with respect to the Party under review].

12.8. The Committee on Competition shall prepare a report based on the information before it and its discussions [and containing recommendations]. The content of the report shall not be binding. The report of the Committee on Competition shall be promptly published or otherwise made publicly available after the conclusion of the review.

12.9. The Competition Policy Review Mechanism is not intended to serve as a basis for enforcement of specific obligations under this Agreement [through] [or for] dispute settlement procedures or to impose any new commitments on Parties. No document prepared for or statement made in the review process shall be admissible in any dispute settlement proceedings commenced under this Agreement.

[12.10. The Committee on Competition shall review the Competition Policy Review Mechanism not more than five (5) years after entry into force of the Agreement to assess whether it has achieved its objectives. The results of the assessment, and any suggested recommendations, will be presented to the FTAA Council.]

Article 13. Mechanisms for [Cooperation] [Collaboration] and for Exchange of Information among [Competition] Authorities⁵

[Article 14. Consultations

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

[Article 14. Consultations on Competition Issues

14.1. Any Party may request in writing consultations with any other Party regarding the interpretation or application of Section B (Substantive Provisions) of this Chapter [with the exceptions of Article 9. ([Market Regulatory Policies and Measures, [Legal] [Designated] Monopolies, State Enterprises]) and Article 10. (State Aids)].

14.2. The Party requesting consultations (the “Requesting Party”) shall deliver the request for consultations to the other Party (the “Responding Party”) and to the Committee on Competition through the FTAA Secretariat.

14.3. The Responding Party shall respond to the request within [twenty (20)] days of receipt, and shall enter into consultations with the Requesting Party within [thirty (30)] days of the date of the delivery of the request.

14.4. The Requesting Party and Responding Party (the “Consulting Parties”) shall provide sufficient information to enable a full examination of any matter raised in the request for consultations and shall make every attempt to arrive at a mutually satisfactory solution.

14.5. Within [one hundred and twenty (120)] days of delivery of the request for consultations, the Consulting Parties shall inform the Committee on Competition through the FTAA Secretariat that,

- a) they have reached a mutually satisfactory solution, or
- b) they have been unable to reach a mutually satisfactory resolution and that further consultation is unlikely to resolve the matter.]

[Article 15. Dispute Settlement

[[15.1 The only provisions of this Chapter that [shall] [can] be subject to the General Dispute Settlement Mechanism of this Agreement are the following articles: Articles XX.]

[15.2 The Dispute Settlement Mechanism shall not be applicable to Article 9. ([Market Regulatory Policies and Measures, [Legal] [Designated] Monopolies, State Enterprises]) of Section B (Substantive Provisions) of this Chapter.]

15.3 The Dispute Settlement Mechanism under this Agreement shall not be applicable for challenging or reviewing administrative and judicial [or jurisdictional] decisions of Parties with respect to the enforcement of their competition law [and policy].]

⁵ Some delegations believe that this Article belongs in Section B (Substantive Provisions) of this Chapter, see Article 6. (Competition Law [and Authorities]) for text of the provision.

[15.1. With the exception of the provisions under Article 9. ([Market Regulatory Policies and Measures, [Legal] [Designated] Monopolies, State Enterprises]), no Party may have recourse to any dispute settlement under this Agreement, nor may any investor have recourse to investor-state arbitration under Chapter XX, for any matter arising under this Chapter.]]

Article 16. Technical Assistance

16.1. The Parties agree that it is in their interest to work together on technical assistance activities related to the development, adoption, implementation, and enforcement of competition laws and policies, including by sharing expertise and information, training officials, sending experts to participate in events related to competition issues, and exchanging personnel, when appropriate.