

## **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 Anti-competitive conduct with cross-border impact**

**[1.2.1** If there is evidence to indicate that anticompetitive conduct with cross-border impact is being carried out, [especially hard-core cartels,][especially hard-core cartels, abuse of dominant position, and anti-competitive mergers, acquisitions and concentrations,] the Parties will consider cooperating in investigating and taking appropriate action, carrying out joint investigations, where appropriate.]

**1.2.2** If there is evidence that anticompetitive practices are being carried out in the territory of a Party, and that these practices negatively affect the interests of another Party, and in the event that such activities are not permitted under the competition law of the Party in which they are occurring, the competition authority of the affected Party may request that the competition authority of the other Party investigate and, as appropriate, take appropriate action, pursuant to its own legislation.

**[1.2.3** Each Party undertakes to permit access, on a [national treatment] [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.]]

**[1.2.4** The application of the rules to prevent or correct conduct with cross-border impact could be the responsibility of the authorities of the Party affected, of the Party in which the practice originates, or of both.]]

**[1.3 Exclusions and exceptions**

**[1.3.1** The Parties may not establish exclusions or exceptions to the enforcement of the principles and measures of competition established in this Chapter [for sectors in which competition is technologically possible, except those adopted in the areas later agreed by the Parties.]]

**[1.3.2** However, if the legislation of the Parties contains exceptions or exclusions that are not included in the agreement, their elimination shall be subject to a time limit, depending on the degree of development of the Party.]

**[1.3.3** Any exclusions and exceptions from the coverage of national or sub-regional competition measures shall be transparent and [should] [could] be reviewed periodically by the Party or subregional entity to evaluate if they are [both] [strictly] necessary [and not broader than necessary] to achieve the overriding policy objectives [of the Party]. After the entry into force of this Agreement, the Parties shall make an [annual] notification to the Committee provided for in point 3.5 of any new exclusion or extended exclusion or category of authorization related to hard core cartels.]]

**[1.4** The Parties agree that national or sub-regional laws will [, at a minimum,] proscribe [anti-competitive] practices [that have as their objective or effect to limit, restrict, falsify or distort free competition or market access and that affect trade between or within the Parties]. Anti-competitive practices include [collusion, conspiracy, and exclusion from the market of any economic agent.] anti-competitive agreements and in particular hard core cartels, abuse of dominant position in the market, [as well as anti-competitive mergers, acquisitions and concentrations.]]

***1.5 Alternative A:***

[1.5.1 The Parties agree that agreements, anti-competitive concerted practices, and anticompetitive acts among actual or potential competitors, which have [the following] as their object or effect, will be considered to be anti-competitive, among others:

- a) To fix or manipulate prices or conditions of purchase or sale, including imports or exports;
- b) The failure to produce or restriction of the supply and demand of goods and services;
- c) The division, distribution or allocation of the actual or potential market for goods or services;
- d) Agreement or coordination of tenders or non-participation in bids in public bidding processes;
- e) The refusal to supply potential importers and other limitations that set up barriers to entry to competitors;

1.5.2 The dominant position will be defined as having the power to determine, directly or indirectly, the conditions in a market. When a dominant position exists, the following conduct will be considered an abuse of dominant position, among others:

- a) Unjustified establishment of an exclusive distribution of goods and services;
- b) Conditioning the signing of contracts on the acceptance of additional conditions which, according to the nature of the contract or commercial usage, bear no relation to the object of such contracts;
- c) Adoption of conditions that are different from those imposed on similarly situated third parties in the case of identical offerings, resulting in a competitive disadvantage;
- d) Unjustified refusal to buy or sell products or services;
- e) Predatory conduct against competitors;
- f) Fixing prices at which export goods can be resold in importing countries;
- g) Imposition of restrictions on the import of goods that have been legitimately registered abroad; and
- h) Other conduct with similar effects that unduly hinders or damages the competitive process in production, processing, distribution, and sale of goods and services, or limits access to the market.

1.5.3 Similarly, the following will be considered to be restrictions on competition:

- a) Measures by the Parties that create barriers that obstruct, illegally or unreasonably, access or continued presence of economic agents in the market;
- b) Conditioning of the provision of goods or services on the acceptance of restrictions on the distribution or production of the goods of competitors, or on the purchase of other goods or services of the provider, or of an entity designated by it; and
- c) Impeding the access of competitors to inputs, raw materials, technology or channels of distribution.]

***1.5 Alternative B:***

[1.5.1 A non-exhaustive list of such behaviors, whenever they may harm the general economic interest, would be the following:

- a) fix, impose or put into practice, directly or indirectly, in agreement with competitors or individually, in any form, prices and conditions of purchase or of sale of goods, provision of services or production;
- b) obtain and influence the adoption of uniform and concerted commercial behaviors between competitors;
- c) regulate markets of goods and services, establishing agreements to limit or control research and technological development, production of goods or provision of services, or to hinder investments directed to the production of goods or services or their distribution;
- d) divide the markets of services or products, finished or semi-finished, or the sources of supply of raw materials or intermediate products;
- e) limit or prevent access by new firms into the market;
- f) agree on prices or advantages that could affect competition in public tenders;
- g) adopt, in relation to third party contractors, unequal conditions, in the case of equivalent provision, placing them in a situation of competitive disadvantage;
- h) subordinate the sale of a good to acquisition of another or to utilization of a service, or subordinate the provision of a service to utilization of another or acquisition of a good;
- i) prevent access by competitors to inputs, raw materials, equipment or technologies, and distribution channels;
- j) require or grant exclusivity for the dissemination of advertising in the communication media;
- k) subject the purchase or sale to the condition of not using or acquiring, selling or supplying goods or services produced, processed, distributed or marketed by a third party;
- l) sell merchandise below cost price for reasons not justifiable by commercial practice,
- m) reject without justification the sale of goods or provision of services;
- n) interrupt or reduce production on a large-scale, without justified cause;
- o) destroy, put out of action or stockpile raw materials, intermediate or final products, as well as destroy, put out of action or hinder the operation of equipment used to produce, distribute or transport them;
- p) abandon, force the abandonment or destroy crops or plantations, without just cause; and
- q) manipulate the market to impose prices.]

[1.6 The Parties shall, for purposes of ensuring competition in the hemisphere, apply the principles and criteria which, in the main, are accepted by the doctrine ([particularly] the rule of reason), while the criterion of wrongfulness, per se, may be applied in cases of anticompetitive practices [that have no economic justification,] [that affect general economic welfare] such as, for example, hard-core cartels.]

[1.7 Parties should ensure that their competition laws effectively halt and deter hard core cartels.]

[1.8 Parties shall ensure that in administrative or [judicial] [jurisdictional] proceedings, and the adoption of policies and other measures related to competition, the principles of non-discrimination, transparency and due process will apply. ]

**[2.] REGULATORY POLICIES AND PRACTICES, [LEGAL] [OFFICIAL] MONOPOLIES, STATE ENTERPRISES [AND STATE AIDS] ]**

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

**[2.1 Regulatory Policies and Practices**

With respect to regulatory policies and practices, the Parties 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; ]and

**[2.1.3** Ensure that they are subject to [non-binding] review under the Competition Policy Review Mechanism.] ]

**[2.2 [Legal] [Official] Monopolies**

**2.2.1** No provision of this Agreement shall be construed to prevent a Party from designating [or maintaining] a monopoly, [insofar as they act in accordance with national or subregional rules on promotion and protection of competition and that they act consistently with the principles of non-discrimination, [transparency and due process] and that the purchases or sales that affect trade between the Parties take place in accordance with commercial considerations.]

**2.2.2** Where a Party intends to designate a monopoly and the designation may affect the interests of persons of another Party, the Party shall:

a) [whenever possible,] provide prior written notification to the other Party of the designation, and

[b] endeavor 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.]

**[2.2.3** 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 [chapter] [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 licenses, approve commercial transactions or impose quotas, fees or other charges;

(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 sale;

(c) provides non-discriminatory treatment to investments of investors, to goods and to service providers of another 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 another Party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct.]

[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.]

[2.2.5 Nothing in provision 2.2 shall be construed to prevent a monopoly from setting different prices in different geographic markets, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions in those markets.

2.2.6 Differences in pricing between classes of customers, between affiliated and non-affiliated firms, and cross-subsidization are considered inconsistent with provision 2.2.3 (d) only when they are used as instruments of anticompetitive behavior by the monopoly firm.]]

### **[2.3 State Enterprises**

2.3.1 Nothing in this [Agreement] [chapter] [shall be construed to prevent] [shall prevent] a Party from maintaining or establishing a state enterprise [, insofar as they act in accordance with national or subregional rules on protection and promotion of competition and that said enterprises act consistently with the principles of non-discrimination and that the purchases or sales that affect trade between the parties take place in accordance with commercial considerations.]

[2.3.2 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) and YY ([Services, including] Financial Services)] [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.]]

[2.3.3 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 another Party.] ]

### **[2.4 State aids**

2.4.1 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.] ]

### **3. INSTITUTIONAL PROVISIONS**

**3.1** Each Party shall establish or maintain an [appropriate] authority or authorities, at the national or sub-regional level, that has the responsibility to enforce measures related to the protection of competition.

**3.2** [The authority or authorities shall have, at a minimum:

**3.2.1** [reasonable] independence, autonomy [functional and administrative] with legal status;

**3.2.2** [accountability];

**3.2.3** [jurisdiction over cross-border practices] [practices that have occurred in a Party's territory that have an effect on another Party's territory, from a cross-border origin];]

**3.2.4** capacity to initiate investigations on its own initiative;

**3.2.5** responsibility for competition advocacy;

**3.2.6** capacity to investigate and sanction anti-competitive practices [including those in regulated sectors] in the domestic market; and

**3.2.7** [adequate resources to perform its (their) functions.]]

**3.3** [[Decisions] Resolutions of] the competition authority (ies) responsible for [sanctioning or suspending actions] anticompetitive conduct [should] [may] be subject to review [in an independent process by a judicial [jurisdictional] authority].

**[3.4** The national or sub-regional competition authority or authorities of each Party:

[a) Shall endeavor to issue recommendations when the agencies or entities of their country's public administration, whatever their nature or level of organization, perform functions of any kind, within the scope of their authority, connected with the process of free economic competition and unrestricted competition.]

b) Shall promote a culture of competition in their market through the availability of information and the process of education of consumers, producers and distributors.

[c) May express themselves in a non-binding manner [before the agencies or entities of their country's public administration] in regard to the effects on competition resulting from any regulation or practice [produced by any Party].] ]

***Alternative A:***

**3.5** [The Parties shall establish a Committee comprised of the representatives of [each one of them][the competition authority of each Party] [and/or designated experts, including trade officials [with competence in competition issues], of the respective Party], with [only] the following functions:

**3.5.1** Promote cooperation among the Parties' competition authorities;

**3.5.2** Monitor the progress in the implementation of measures and competition policies by the countries in the region or in sub-regional agreements.

**3.5.3** Coordinate and provide technical assistance.

*Alternative B: Exactly the same as alternative A, plus the following:*

**3.5.4** [conduct a review under the Competition Policy Review Mechanism, the results of which will be non-binding;]

**3.5.5** [make recommendations [to the FTAA Commission] on the implementation [and interpretation] of this chapter[, and on whether changes to the provisions under this chapter are warranted.]]

**[3.5.6** Monitor the possible impact of decisions by competition authorities on the jurisdiction of other Parties;

**3.5.7** Conduct joint studies and research with competition authorities involved in decisions having cross-border effects, in order to prepare reports on such impact and make projections for evaluating their consequences.]

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

**[3.7 Competition Policy Review Mechanism**

**3.7.1** The Parties recognize the value of transparency in government competition policies.

**3.7.2** The Competition Policy Review Mechanism shall include periodic reviews of the competition legislation, policies and enforcement activities [and regulatory policies and practices] of the Parties, [and the activities of [legal][official] monopolies and state enterprises]. The recommendations or results of such reviews will be non-binding.

**3.7.3** [The Committee] shall establish a basic plan for the conduct of the reviews and their frequency. These reviews will be based on a detailed report supplied by the Party under review.

**3.7.4** Reviews will be subject to appropriate safeguards for the protection of confidential investigatory and business information.

**3.7.5** [Nothing in the chapter on competition policy 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.]]

#### **4. MECHANISMS FOR COOPERATION AND FOR EXCHANGE OF INFORMATION**

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

**4.2** 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:

**4.2.1** [Notify other Parties, 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;]

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

**4.2.3** [Request by a Party's authority to another Party's authority to investigate and identify anti-competitive practices that affect important interests of the requesting Party and take appropriate measures with respect thereto (positive comity);]

**4.2.4** Mechanisms for the exchange of information;

**4.2.5** [Mutual legal assistance;] and

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

## 5. [DISPUTE SETTLEMENT]

5.1 Each Party [may] [agrees to] consult with any other Party, upon request, on any matter arising under the provisions of this chapter.

### 5.2

#### *Alternative A:*

[Disputes arising between Parties relating to the interpretation and application of, or non-compliance with the provisions of this chapter shall be settled through the general dispute settlement mechanism under this Agreement. [Given the specific nature of the subject matter, the Dispute Settlement Body shall require the advice of representatives of the Committee referred to in Article 3.5 of this chapter, for the hearing of such cases.]The Dispute Settlement Mechanism of the FTAA shall not be applicable for challenging or reviewing the administrative or [judicial] [jurisdictional] decisions of Parties with respect to competition law and policy.]

#### *Alternative B:*

[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][official] monopolies and state enterprises, dispute settlement for matters arising from this chapter shall be available only through the mechanisms set forth in 3.7 (Competition Policy Review Mechanism) and 5.1 (Consultations).]

## **6. TECHNICAL ASSISTANCE AND INFORMATION DISSEMINATION**

**6.1** The Parties [will work] [agree that it is in their interest to work] together in technical assistance activities related to the adoption and enforcement of competition laws and policies [to enhance the ability to fulfill the commitments made by the Parties in the present chapter].

**6.2** [Taking into account reasonably available resources,] the Parties [undertake to provide technical assistance including] [will establish mechanisms to provide for], among others:

**6.2.1** [Building up and] enhancement of Parties' institutional capacity;

**6.2.2** Assistance to national competition authorities, where requested, through programs of exchanges of information on legislation, jurisprudence and case law and experience in investigation, as well as with the training of technicians, including exchange of personnel and interns;

[**6.2.3** Sending experts to speak at conferences and events organized or financed by other Parties;]

[**6.2.4** Participation, at the Party's request, by staff from agencies with experience to assist agencies with less experience in the administration of cases; and]

**6.2.5** [The improvement of common tools, using, among other mechanisms, jointly-built data bases and an [Internet] site for competition policy in the FTAA that would be periodically updated]

## **[7. TRANSITIONAL MEASURES**

### **7.1 Possible transition period**

[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 that has been agreed to, taking into account the size of the economies and the vulnerability of the Parties.]

### **7.2 Mechanism for review of policy-making and enforcement of competition rules**

[In order to ensure compliance with the obligations derived from the principles and rules contained in this chapter, a mechanism shall be created for the review of policy-making and application of competition rules and will incorporate principles of transparency, but will not include the power to issue binding recommendations or rulings. The Parties understand that the results of this review shall not constitute a prejudgment of any disputes that may arise under this Agreement.]

## **8. DEFINITIONS**

**[8.1** For purposes of this Chapter:

**Hard core cartel** is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement 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. The hard core cartel 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.

**[The principle of due process** includes:

- Ensure fair, independent and equitable procedures;
- Request the initiation of proceedings to apply competition laws;
- To be duly notified;
- To be informed of the reasons, nature and characteristics of the trial or proceedings, [except in qualified cases that may require confidentiality];
- To offer or present arguments and evidence;
- The authority's decisions must be duly grounded and motivated;
- To appeal decisions of competition authorities, judicially or jurisdictionally;
- To ensure the confidentiality of sensitive information;
- To bring private actions.]

**The principle of transparency** includes:

- The publication of and easy access to decisions of general application, policies and adopted measures.

**The principle of non-discrimination** means:

- The better of national treatment and most favored nation treatment, as set out in the relevant provisions of this Agreement.

**8.2** For purposes of provisions 2.2 and 2.3 in this Chapter:

**Delegation** includes a legislative grant, and a government order, directive or other act transferring to the monopoly, or authorizing the exercise by the monopoly of, government authority;

**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 parent, a subsidiary or other enterprise with common ownership more favorably than an unaffiliated enterprise, or
- 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, regional and municipal] [federal or central] 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;

**[Maintain** means [, for purposes of the provision on Monopolies,] designate prior to the date of entry into force of this Agreement and existing on \_\_\_\_\_, 200\_;

**Market** means the [relevant] [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 favored nation treatment, as set out in the relevant provisions of this Agreement; and

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