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LATIN AMERICAN COMPETITION FORUM

-- Session I: Competition Provisions in Regional Trade Agreements --

Note by the United States

10-11 September 2008, Panama City

The attached document is circulated to the Latin American Competition Forum FOR DISCUSSION under session I of its forthcoming meeting to be held on 10-11 September (Panama).

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INTER-AMERICAN DEVELOPMENT BANK



**LATIN AMERICAN COMPETITION FORUM
10-11 September 2008, Panama City**

-- Session I: Competition Provisions in Regional Trade Agreements --

Note by the United States

1. The United States has signed several trade agreements in the Americas that contain competition provisions: the North American Free Trade Agreement (NAFTA), the U.S.-Chile Free Trade Agreement, and Trade Promotion Agreements with Peru and Colombia.¹ While there are some differences between them, the differences are minor and the general themes are quite similar. Another agreement, the Central America Free Trade Agreement, does not contain competition provisions.² This paper will focus primarily on the NAFTA.

2. NAFTA reinforces, but in no way supplants, the national competition laws of Canada, Mexico, and the United States. Chapter 15 of the NAFTA covers competition policy, designated monopolies and state enterprises. The chapter addresses two separate classes of conduct: anticompetitive business conduct and certain governmental conduct that could affect trade. A network of antitrust bilateral cooperation agreements, which are independent of the NAFTA, set forth the working relationships between the four competition authorities in the NAFTA area. With the exception of provisions that address officially designated monopolies and state enterprises, none of these agreements create rights or obligations that are subject to formal dispute settlement, although they are considered binding obligations by the three parties.

¹ At this date, the Colombia agreement (along with the U.S.-Panama free trade agreement, which does not have a competition chapter) have not been ratified by the United States Senate.

² When the negotiations for the Central America Free Trade Agreement were getting started, negotiations for the Free Trade Area of the Americas (FTAA) were underway. The draft of the FTAA contained a competition chapter that covered many of the same topics covered by the competition chapters of other U.S. agreements.

1. The NAFTA Competition Policy Provisions

1.1 Anticompetitive Business Conduct

3. The core of NAFTA's provisions on anticompetitive business conduct is found in Article 1501. That Article requires that each party "shall adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto." Article 1501 is silent as to the nature and form of measures required, and Article 201 defines a measure to include "any law, regulation, procedure, requirement or practice." In practice, however, all three parties have complied with Article 1501 through legislation: the Sherman, Clayton, and Federal Trade Commission Acts in the United States; the Competition Act in Canada; and the Federal Law on Economic Competition in Mexico. NAFTA is similarly silent as to what might constitute "appropriate action" with respect to anticompetitive business conduct.

4. NAFTA also provides that the parties will cooperate on issues of competition law enforcement policy, including as examples notification, consultation, and exchange of information. The provision applies at the party level, but does not specifically address cooperation at the level of the parties' competition authorities. As will be discussed, agency to agency cooperation is addressed in a trio of bilateral antitrust cooperation agreements that is separate from the NAFTA framework.

5. Article 1501 provides that no party may have recourse to any NAFTA dispute resolution process for any dispute arising out of that article. Instead, it includes a consultation process to address questions that might arise about the effectiveness of a party's measures to address anticompetitive business conduct.

1.2 Government Conduct Affecting Competition

6. In recognition of the fact that government action can distort competition, NAFTA Articles 1502 and 1503 impose limited disciplines on two situations where governmental conduct could affect competition. The first of these is when the state gives official authorisation to a monopoly; the second is when the state itself operates a commercial enterprise. A state owned enterprise that has an official monopoly would be subject to both disciplines.

7. Both provisions reaffirm the right of any NAFTA country to officially designate monopolies or to establish and operate state enterprises. Indeed, all three countries have them. Canada Post, the United States Postal Service, and Petróleos Mexicanos (PEMEX), for example, are all state-owned enterprises with designated monopolies in certain sectors, but each also has significant operations outside of the designated monopoly markets. The idea of Articles 1502 and 1503 is not to outlaw the monopolies, but to limit the ability of the state to distort trade or hinder investment through state ownership or designation of monopolies.

1.2.1 Officially designated monopolies

8. There is a single discipline that applies to all officially designated monopolies, whether designated at the federal or subfederal (*i.e.*, state, provincial, or territorial) level. Under Article 1502(2), when a party designates a new monopoly, it must if possible notify other parties affected by the designation and try to introduce conditions that will offset any impairment of benefits under the agreement that the designation might create. Whether the remaining disciplines apply depends on who owns the monopoly, who officially designated it, and when it was designated.

Coverage Rules

9. The coverage rules for the other disciplines are complex. They apply to designated monopolies owned by the federal government of one of the NAFTA parties that were in existence on NAFTA's effective date, January 1, 1994, or that were designated after that date. They do not apply to those owned by subfederal entities at all. The coverage rules also apply to private firms that were designated as official monopolies by a federal or sub-federal government after NAFTA's effective date.

10. The Chapter also makes it clear that disciplines on designated monopolies do not apply to situations where the monopoly exists solely by virtue of a grant of intellectual property rights.

11. Although complex, the coverage rules do reflect some logic. First, Canada, the United States, and Mexico are all federal systems in which the subfederal states and provinces have significant constitutional powers. The ability of federal governments to address governmental acts by subfederal governments is correspondingly limited. On the other hand, federal governments can control the monopolies they designate themselves. Second, while the federal governments have the power to alter official monopolies they have granted to themselves, limitation of monopoly rights granted to private entities before NAFTA took effect could be viewed as inappropriately interfering with private property rights. Consequently, the NAFTA parties undertook to discipline designations of monopolies to private parties on a prospective basis only.

Disciplines on covered designated monopolies

12. Article 1503 provides four disciplines on those designated monopolies that are within its coverage rules.

13. First, Article 1502(3)(a) restricts the ability of governments to use officially designated monopolies to circumvent other NAFTA obligations in cases where it delegates governmental powers to them, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges.

14. Second, the Article requires designated monopolies to act in accord with commercial considerations with regard to the purchase or sale of the good or service covered by the monopoly, except to the extent needed to comply with the grant of its monopoly. This provision would allow it to trade in its monopoly goods or services at an artificially high or low cost if so required by the terms of its designation (if, for example, a monopoly was designated in order to make basic foodstuffs available at below market costs), but otherwise requires the monopolist to sell in accordance with commercial considerations. "In accordance with commercial considerations" is defined as consistent with "normal" business practices of privately held enterprises in the relevant business or industry.

15. Third, the designated monopolist must provide 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.

16. Fourth, Article 1502 restricts the ability of an officially designated monopolist to leverage its official monopoly in order to gain an anticompetitive advantage in a non-monopolised market. This provision covers the use of a firm's designated monopoly position to engage in anticompetitive practices in a non-monopolised 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-subsidisation, or predatory conduct.

1.2.2 *State Enterprises*

17. The article on state enterprises is more limited in its reach than its counterpart addressing officially designated monopolies. It has a similar provision that restricts the ability of governments to use state enterprises to circumvent certain NAFTA obligations in cases where they delegate governmental powers to state enterprises, such as the power to grant licenses, expropriate, approve commercial transactions or impose quotas, fees or other charges.

18. The only other discipline applicable to state enterprises is that parties must ensure that they afford non-discriminatory treatment in the sale of their goods or services to investments of investors from other NAFTA states.

1.2.3 *Dispute Settlement*

19. Articles 1502 and 1503, concerning designated monopolies and state enterprises, are generally subject to NAFTA's state-to-state dispute settlement mechanism. Certain provisions on state enterprises or official monopolies are also subject to the investor-state dispute settlement mechanism set forth in the investment chapter of NAFTA. An investor may, on its own behalf or on behalf of an enterprise it controls, bring a claim based on a violation of the anti-circumvention provisions applicable to state enterprises and designated monopolies when the violation impairs the investor's rights under the investment chapter of NAFTA. By contrast, Article 1501, concerning antitrust cooperation, is not subject to any kind of dispute settlement.

2. **Antitrust Cooperation among the NAFTA Parties**

20. The NAFTA obligation that parties cooperate on issues of competition law enforcement policy is written in general terms and speaks primarily to enforcement policy issues. The United States antitrust agencies' day-to-day enforcement cooperation with their Canadian and Mexican counterparts is addressed by bilateral antitrust cooperation agreements with Canada and Mexico. These agreements are independent of NAFTA, and are intended to foster bilateral cooperation rather than to fulfill any obligation imposed by NAFTA. Because of the proximity of the three parties, the close existing cooperation relationships, and the volume of commerce between them, bilateral agreements were thought desirable between these countries.

2.1 *The bilateral agreements*

21. The bilateral agreements are similar. With some variations in wording, the purpose of each is to promote cooperation and coordination among the competition authorities of the parties, to avoid conflicts arising from the application of the parties' competition laws, and to minimise the impact of differences upon their respective important interests.³

22. The agreements have similar provisions with respect to notification. They provide that one party will notify the other with respect to enforcement activities that affect the important interests of the other. These include (i) activities that are relevant to the enforcement activities of the other party; (ii) non-merger anticompetitive activities carried out in substantial part in the territory of the other; (iii) mergers involving an entity from the other party; (iv) conduct believed to have been required, encouraged, or approved by the other party; (v) remedies affecting the other party's territory; and (vi) the seeking of information in the

³ One significant variation is that the US/Canada agreement also contains provisions on deceptive marketing practices, which reflects the common consumer protection/fair business practices jurisdiction shared by the U.S. Federal Trade Commission and the Canadian Competition Bureau.

other party's territory. The agreements also acknowledge that either party's officials may visit the other party's territory in the course of conducting an investigation upon notification and consent.

23. These provisions on cooperation and coordination are subject to two important limitations: no party is required to provide information that is protected by its confidentiality laws, and no party is required to act in a manner inconsistent with its existing law or to require changes in its existing laws. As all three countries have strong confidentiality laws, the practical scope of these provisions reaches only information outside of the protection of those laws. Depending on the country involved, this may include the sharing of publicly available information, information as to which the party submitting the information has waived the protection of confidentiality laws, and a limited class of information that is maintained in confidence as a matter of agency practice but is not protected by confidentiality laws. As most of this information could also be shared in the absence of an agreement, the amount of actual cooperation that can fairly be said to directly derive from this provision is more limited than it might first appear.⁴ The presence of the provisions, however, does serve as a catalyst to increased cooperation.⁵

2.2 *Application to actual cases*

24. The record of cooperation between the three countries' competition authorities shows that cooperation between Canada, the United States, and Mexico is more than just theoretical. One of the most common areas of cooperation is merger cases. When mergers affect both Canada and the United States, for example, it is routine for the staffs of the agencies to work together and, where indicated, for the parties to execute waivers that permit competition agency staffs to discuss information that they have obtained.⁶ While agencies in different countries will take separate actions in cases where they believe a transaction has disparate effects in two countries, they will generally work together towards a goal of ensuring that the remedies achieved are complementary.

25. A good example of such cooperation is the 2001 acquisition of Blue Circle by Lafarge. The cement acquisition had effects in the Great Lakes region along the U.S./Canada border. Having been granted waivers of confidentiality by the parties, the Federal Trade Commission and the Competition Bureau worked together with the parties to negotiate parallel, complementary orders that achieved relief in both countries.⁷

3. **The competition agencies and the negotiating process**

26. In recognition of the relationship between trade and competition, the internal governmental process surrounding negotiation of competition chapters of trade agreements is a collaborative one between the U.S. trade and antitrust agencies. Both the FTC and DOJ participate in the internal deliberative process, along with the United States Trade Representative (USTR), the Department of Commerce, the

⁴ Both the United States and Canada have legislation in place that would allow them to enter into agreements that would allow them to provide civil investigational assistance to one another. International Antitrust Enforcement Assistance Act (USA), 15 U.S.C. §6201 et seq.; Competition Act (Canada), Part III, R.S.C. 1985, c. C-34. To date, however, no such agreement has been made.

⁵ See R. Tritell and E. Kraus, The Federal Trade Commission's International Antitrust Program, (April 18, 2007), available at <http://www.ftc.gov/bc/international/docs/ftcintantiprogram0407.pdf>.

⁶ E.g., International Competition Network, Waivers of Confidentiality, available at <http://www.internationalcompetitionnetwork.org/NPWaiversFinal.pdf>.

⁷ Lafarge/Blue Circle, FTC Docket C-4014, available at <http://www.ftc.gov/opa/2001/06/lafarge.htm>; Canadian information available at : <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=519&lg=e>.

Department of State, and other interested agencies. Decisions on whether to seek to include a competition chapter are normally taken by inter-agency consensus, subject to the ultimate authority of the President or his designee to resolve any disagreement.

27. There is no clear pattern that would delimit when a competition chapter is included in a trade agreement. In some cases, the impetus comes from the U.S. side, but in others it has come from the other country involved. In some cases, the need for a competition chapter has not been seen as strong enough to justify inclusion of a chapter, and indeed, the CAFTA and draft Panama agreements contain no competition chapter.

28. Once a decision to move forward with a competition chapter has been made, the U.S. antitrust agencies are centrally involved with the negotiation of the text. DOJ or FTC co-chairs, with USTR, the U.S. delegation charged with negotiating the competition chapter, and both agencies participate in all decisions concerning what language should be sought.

4. Conclusions

29. The two types of provisions found in the competition chapters of U.S. trade agreements in the Americas serve two very different purposes. The provisions on designated monopolies and state monopolies are primarily intended to address trade distortions that could be caused by discrimination resulting from a commercial enterprise's holding a state-sanctioned monopoly position or ownership by the state. These provisions have little impact on the enforcement authorities' daily activities. Because the agreements do operate at the conceptual interface between competition and trade, the U.S. antitrust agencies have been integrally involved in both the inter-agency and international negotiations surrounding these agreements.

30. The general provisions relating to anticompetitive business conduct signal a serious commitment by the parties to principles of market competition and to elimination of anticompetitive business conduct. But they have not been used at the level of enforcement cooperation, nor were they intended for that purpose.

31. Bilateral antitrust cooperation agreements have been of substantial utility for promoting bilateral cooperation. Because bilateral antitrust cooperation agreements are designed to foster practical agency to agency relationships rather than the more complex and remote state-to-state relationships that trade agreements create, they are better suited, to the extent that a formal agreement is needed at all, for promoting cooperation between agencies. However, successful bilateral antitrust enforcement cooperation neither has its roots in such agreements nor can it grow from formal agreements alone. These goals can be fostered only by building strong relationships and trust, which in turn can be built only by the experience of working together. Antitrust cooperation instruments are thus best viewed as the formalisation of an existing relationship, rather than as the basis for creating one.