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Session II: Regional Competition Agreements

Contribution from the United States

3-4 September 2013, Lima, Peru

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LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

Session II: Regional Competition Agreements

CONTRIBUTION FROM THE UNITED STATES

1. The United States has entered into several trade agreements in the Americas that contain competition chapters: the North American Free Trade Agreement (NAFTA), the U.S.-Chile Free Trade Agreement, and Trade Promotion Agreements with Peru and Colombia. Two other U.S. agreements, the Central America Free Trade Agreement and the U.S.-Panama Trade Promotion Agreement, do not contain competition provisions. Significantly, the United States or its competition agencies, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ), are party to several antitrust cooperation agreements in the region. This paper will focus primarily on NAFTA and cooperation agreements in the region.

1. The NAFTA Competition Policy Provisions

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 government conduct that could affect trade. A network of antitrust bilateral cooperation agreements, which are independent of NAFTA, set forth the working relationships between and among the four competition authorities in the NAFTA area. Although these agreements create binding obligations on the three parties, none of these rights or obligations are subject to formal dispute settlement, with the exception of certain provisions that address officially designated monopolies and state enterprises.

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

The Trans-Pacific Partnership (TPP), currently under negotiation, contains draft competition provisions that will, if ultimately adopted, apply to several countries in the region, including the United States, Canada, Chile, Mexico, and Peru.

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 practice, such as notification, consultation, and exchange of information. The provision 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 this 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. The parties have never used this mechanism.

1.2 Government Conduct Affecting Competition

- 6. Recognizing that government action can distort competition, NAFTA Articles 1502 and 1503 impose limited trade disciplines in two situations where governmental conduct could affect competition. The first is when the state gives official authorization 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. Articles 1502 and 1503 do not outlaw the monopolies, but rather 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. A single NAFTA discipline 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

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 existed 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. The coverage rules also apply to private firms that have been

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designated as official monopolies by a federal or sub-federal government after NAFTA's effective date.

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.

• <u>Disciplines on Covered Designated Monopolies</u>

Article 1502 provides four disciplines on those designated monopolies that are within its coverage rules.

First, Article 1502(3)(a) restricts the ability of governments to use officially designated monopolies to circumvent other NAFTA obligations in cases in which 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.

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 a designated monopoly 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 were 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.

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.

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-monopolized market. This provision covers the use of a firm's designated monopoly position to engage 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.

1.2.2 State Enterprises

- 9. The article on state enterprises is more limited in its reach than the article addressing officially designated monopolies. It contains 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.
- 10. 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

11. 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 issues, is not subject to dispute settlement.

2. Antitrust Cooperation Between and Among the NAFTA Parties and in the Region

12. 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' 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 foster bilateral enforcement cooperation between and among the competition agencies rather than fulfilling any obligation imposed by NAFTA. Bilateral cooperation agreements between the three parties are important because of their proximity, the close existing cooperation relationships, and the volume of commerce between them. Elsewhere within the region, the U.S. has bilateral antitrust cooperation agreements with Brazil and Chile. The latter agreements are substantially similar to the Canada and Mexico agreements, and have facilitated a growing level of enforcement and policy cooperation between the respective agencies.

2.1 The Bilateral Agreements

- 13. The U.S. has bilateral cooperation agreements with Canada and with Mexico that are similar in a number of respects. With some variations in wording, the purpose of each is to promote cooperation and coordination between competition authorities, to avoid conflicts arising from the application of the parties' competition laws, to minimize the impact of differences upon their respective important interests, and to provide assurances that any information shared between agencies will be kept confidential.²
- 14. The agreements have similar provisions with respect to notification. Each agreement provides 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) seeking information in the 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.
- 15. 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 that would require changes to its existing laws. Depending on the country involved, this may include the sharing of publicly available information,

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 FTC and the Canadian Competition Bureau.

information for which the submitting party has waived the protection of confidentiality laws, and a limited class of information that is maintained in confidence as a matter of agency practice (known in some contexts as "agency confidential" information) but is not protected by confidentiality laws. In many cases, the U.S. agencies have been able to share this kind of information so long as they have obtained adequate assurance of confidentiality. Since most of this information could also be shared in the absence of an agreement, the amount of actual cooperation directly derived from these provisions is more limited than it might first appear. The presence of the provisions, however, does serve as a catalyst to increased cooperation.⁴

- 16. The United States also has legislation, the International Antitrust Enforcement Assistance Act ("IAEAA"),⁵ which authorizes the U.S. agencies to negotiate antitrust mutual assistance agreements that apply to civil as well as criminal matters. The United States has one agreement under the IAEEA, which it entered in 1999 with Australia.⁶
- 17. The United States and Canada also have entered into an enhanced positive comity agreement. While not invoked to date, this agreement provides that antitrust enforcers in one country may request the other country's antitrust agency to investigate and take appropriate law enforcement action against anticompetitive conduct that both adversely affects the interests of the country requesting the investigation and violates the laws of the country responding to the request. The agreement also provides that the competition agency of the requesting party will normally defer or suspend its enforcement activities in favor of a positive comity referral to the other country in cases where the foreign anticompetitive activities do not directly or principally affect the requesting party's consumers or where they do have such an impact but occur principally in and are directed principally towards the other Party's territory.

2.2 Application to actual cases

18. There is frequent cooperation between and among the competition authorities in Canada, the United States, and Mexico. One of the most common areas of cooperation is merger cases. When mergers affect both Canada and the United States, for example, staffs of the agencies routinely work together and, where indicated, for the parties to execute waivers that permit competition agency staffs to discuss information that they have obtained. While agencies in different countries will take separate actions where they believe a transaction has disparate effects, they will work together to try to achieve complementary remedies.

19. A good example of such cooperation is the 2010 acquisition of Alcon, Inc. by Novartis, which was reviewed by the FTC and the authorities in Canada and Mexico. Novartis and Alcon were the only two U.S. providers of the class of drugs known as injectable miotics. The parties granted waivers of confidentiality, allowing the FTC, the Competition Bureau, and the Mexican Federal Competition

Such assurance can come from several sources, including bilateral cooperation agreements, the 1995 OECD Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, or the International Competition Network's Framework for Merger Cooperation.

See R. Tritell and E. Kraus, The Federal Trade Commission's International Antitrust Program, (March 2013), available at http://www.ftc.gov/bc/international/docs/ftcintantiprogram.pdf.

International Antitrust Enforcement Assistance Act (USA), 15 U.S.C. §6201 et seq.

The United States is also party to Mutual Legal Assistance Treaties (MLATs) with a number of countries in the Americas; such MLATs apply to criminal matters.

⁷ E.g., International Competition Network, Waivers of Confidentiality, available at http://www.internationalcompetitionnetwork.org/NPWaiversFinal.pdf.

Commission to work together with the parties to negotiate parallel, complementary orders that achieved relief in all three countries.

20. Another good example of cooperation is the 2012 acquisition of Goodrich Corporation (Goodrich) by United Technologies Corporation (UTC). The \$18.4 billion acquisition was the largest merger in the history of the aircraft industry and, as originally proposed, likely would have resulted in higher prices, less favorable contractual terms, and less innovation for several critical aircraft components, including generators, engines and engine control systems. DOJ worked with its Canadian and European Commission counterparts to negotiate a remedy that eliminated the potential for anti-competitive effects in the US and Canada, and held several discussions with Mexico's Federal Competition Commission and with Brazil's CADE.

3. Conclusion

- 21. Competition-related agreements to which the U.S. is a party operate at two different levels. At the aspirational level, the general provisions of U.S. trade agreements relating to anticompetitive business conduct signal a serious commitment to principles of market competition and to elimination of anticompetitive business conduct. Because bilateral antitrust cooperation agreements are designed to foster practical agency to agency relationships, however, they are typically better suited to 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 formalization of an existing relationship, rather than as the basis for creating one.
- 22. The experience of the United States, Canada, and Mexico contrasts with regional economic integration groupings, such as the European Union or CARICOM, where member states have ceded certain sovereign powers to a community body authorized to act, on behalf of the community, in certain fields such as competition policy. The NAFTA states have developed a highly effective network of enforcement relationships that have allowed the application of separate but closely aligned and coordinated competition policies.