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REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES

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Regional Competition Agreements: Benefits and Challenges

-- United States --

1. The United States is not a member of any regional competition agreements, but it is a Party to the North American Free Trade Agreement (NAFTA), which has a chapter on Competition Policy, Monopolies and State Enterprises. This paper describes the provisions of that chapter, and then summarizes changes to the NAFTA competition provisions in the newly negotiated United States-Mexico-Canada Agreement (USMCA), which takes effect when ratified by the three jurisdictions. The USMCA competition chapter adds provisions on limiting antitrust exemptions, non-discrimination in enforcement, and comity, and includes a new article with procedural fairness disciplines. This paper discusses bilateral antitrust cooperation agreements among the competition authorities in North America, and concludes by comparing the effects on enforcement cooperation of the NAFTA/USMCA and the bilateral cooperation agreements.

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 bilateral antitrust cooperation agreements, which are independent of NAFTA, guides the working relationships between and among the four competition authorities in the NAFTA area. Although these agreements and Chapter 15 create binding obligations on the Parties, none of these rights or obligations are subject to formal dispute settlement, with the exception of certain NAFTA 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 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 discussed below, agency-to-agency cooperation is covered 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 the 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 formally invoked this mechanism.

1.2. Government Conduct Affecting Competition

6. Recognizing that government action can distort competition, NAFTA Articles 1502 and 1503 apply to 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 enterprise that has an official monopoly would be subject to both disciplines.

7. Both provisions reaffirm the right of any NAFTA Party 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 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. Article 1502 provides four disciplines on designated monopolies. First, Article 1502(3)(a) restricts a government's ability 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.

9. Second, the Article generally 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. The Article defines "commercial considerations" as consistent with "normal" business practices of privately held enterprises in the relevant business or industry. This provision allows 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 cost). But, if not required by the terms of the monopoly's designation, the Article requires the monopolist to sell in accordance with commercial considerations.

10. Third, the designated monopolist may not discriminate against investments of investors, goods, and service providers of another Party in its purchase or sale of the monopoly good or service in the relevant market.

11. 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. Such anticompetitive practices include the discriminatory provision of the monopoly good or service, cross-subsidization, or predatory conduct.

1.2.2. State Enterprises

12. The article on state enterprises is more limited in its reach than the article addressing officially designated monopolies. It similarly 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. 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.

1.3. Dispute Settlement

13. 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 that 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 NAFTA's investment chapter. By contrast, Article 1501, concerning antitrust issues, is not subject to dispute settlement.

2. The United States-Mexico-Canada Agreement (USMCA)

14. On September 30, 2018, the United States Trade Representative announced that Canada, the United States, and Mexico had reached agreement on the USMCA in the renegotiation of the NAFTA. The USMCA, which is undergoing approval procedures in the three Parties, revised parts of Chapter 15. The state enterprise and designated monopoly provisions have been expanded in a separate chapter, with a broader coverage of state-owned enterprises (SOEs) and new disciplines on transparency and non-commercial assistance provided by Parties to their SOEs.

15. The new Competition Policy chapter adds provisions on limiting exemptions from the coverage of antitrust laws; non-discriminatory enforcement; comity; nexus of remedial measures to harm in the territory of the agency imposing the remedy; and a separate article recognizing the importance of consumer protection policy and enforcement. There is also a new article on procedural fairness that includes provisions on transparency, time frames for enforcement actions, affording a reasonable opportunity to be represented by counsel, including through the recognition of attorney-client privilege, treatment of confidential information, reasonable opportunity of parties to contest allegations, engagement with the agency, access to evidence, the ability to contest allegations before an impartial authority, and the availability of judicial review of remedies. There are also new general articles on transparency of enforcement and advocacy policies and on consultations. Finally, the chapter is excluded from dispute settlement provisions in the treaty.

3. Antitrust Cooperation Between and Among the NAFTA Parties

16. The experience of the United States, Canada, and Mexico contrasts with regional economic integration organizations, 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.

17. 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. 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.

3.1. The Bilateral Agreements

18. The United States has bilateral cooperation agreements with Canada and Mexico that are similar in a number of respects. With some variation 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 be kept confidential.

19. 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.

20. The 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, 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.¹ Since

¹ Such assurance can come from several sources, including bilateral cooperation agreements, the 2014 OECD Recommendation concerning International Cooperation on Competition Investigations and Proceedings (<http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf>),

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 at first appear. The presence of the provisions, however, does serve as a catalyst to increased cooperation.²

21. The United States and Canada have entered into an enhanced positive comity agreement. Although not invoked to date, this agreement allows antitrust enforcers in one country to 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: (1) the foreign anticompetitive activities do not directly or principally affect the requesting party's consumers, or (2) the activities do have such an impact but occur principally in and are directed principally towards the other Party's territory.

3.2. Application to Actual Cases

22. 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 more than one jurisdiction, for example, staffs of the agencies routinely work together and, where appropriate, the parties will execute waivers that permit competition agency staffs to discuss information that they have obtained.³ While agencies in different jurisdictions will seek different remedies appropriate to the particular market conditions in their territories, they will work together to try to achieve complementary and consistent remedies.

23. A good example of such cooperation is the 2014 acquisition of ZF Friedrichshafen AG and TRW Automotive Holdings Corp., which was reviewed by the FTC and the authorities in Canada and Mexico.⁴ ZF and TRW were two of only three North American suppliers of heavy vehicle tie rods. The FTC alleged that the merger would eliminate competition between ZF and TRW and increase the likelihood of coordination between a combined ZF/TRW and its only other North American competitor. Extensive cooperation between the United States, Canada, and Mexico along with the European Commission led to a consent order that addressed competition concerns for all jurisdictions involved.

or the International Competition Network's Framework for Merger Cooperation (<http://www.internationalcompetitionnetwork.org/uploads/library/doc803.pdf>).

² See R. Tritell and E. Kraus, The Federal Trade Commission's International Antitrust Program (March 2013), <http://www.ftc.gov/bc/international/docs/ftcintantiprogram.pdf>.

³ E.g., International Competition Network, Waivers of Confidentiality, <http://www.internationalcompetitionnetwork.org/NPWaiversFinal.pdf>.

⁴ See Press Release, Fed. Trade Comm'n, FTC Requests Public Comment on Application from ZF Friedrichshafen AG and TRW Automotive Holdings Corp. to Approve Divestiture of TRW's Linkage and Suspension Business in North America and Europe, available at <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-puts-conditions-merger-auto-parts-suppliers-zf>.

24. Another good example of cooperation is the 2012 acquisition of Goodrich Corporation by United Technologies Corporation. 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 favourable 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 anticompetitive effects in the United States and Canada, and held several discussions with Mexico's COFECE and with Brazil's CADE.

4. Conclusion

25. Competition-related agreements to which the United States is a party operate at two different levels. 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. With the negotiation of the USCMA, minimum procedural fairness provisions, transparency, and non-discrimination principles are now also part of the regional framework. However, because bilateral antitrust cooperation agreements are designed to foster practical agency-to-agency relationships, they are typically better suited to promoting closer cooperation between agencies. That being said, successful bilateral antitrust enforcement cooperation does not have 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.