

PART FIVE: COMPETITION POLICY

Chapter XI : Competition Policy

Article XI .1 Purpose

The purposes of this Chapter are to ensure that the benefits of trade liberalization are not undermined by anticompetitive activities and to promote cooperation and coordination between the competition authorities of the Parties.

Article XI .2 General Principles

1. Each Party shall adopt or maintain measures to proscribe anticompetitive activities and shall take appropriate enforcement action pursuant to those measures, recognizing that such measures will enhance the fulfillment of the objectives of this Agreement.

2. Each Party shall ensure that the measures referred to in paragraph 1, and the enforcement actions pursuant to those measures, are applicable on a non-discriminatory basis.

3. For the purpose of this Chapter, anticompetitive activities include, but are not limited to, the following:

- (a) anticompetitive agreements, anticompetitive concerted practices or anticompetitive arrangements 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;
- (b) anticompetitive practices by an enterprise or group of enterprises that has market power in a relevant market or group of markets; and
- (c) mergers or acquisitions with substantial anticompetitive effects;

unless such activities are excluded, directly or indirectly, from the coverage of a Party's own laws or authorized in accordance with those laws. All such exclusions and authorizations shall be transparent and should be periodically assessed by each Party to determine whether they are necessary to achieve their overriding policy objectives.

4. Each Party shall ensure that:

- (a) the measures it adopts or maintains to proscribe anticompetitive activities, which implement the obligations set out in this Chapter, whether occurring before or after the coming into force of the Agreement, are published or otherwise publicly available; and
- (b) any modifications to any such measures occurring after the coming into force of this Agreement are notified to the other Party within 60 days, with advance notification to be provided where possible.

5. Each Party shall establish or maintain an impartial competition authority that is:

- (a) authorized to advocate pro-competitive solutions in the design, development and implementation of government policy and legislation; and
- (b) independent from political interference in carrying out enforcement actions and advocacy activities.

6. Each Party shall ensure that its judicial and quasi-judicial proceedings to address anticompetitive activities are fair and equitable, and that in such proceedings, persons that are directly affected:

- (a) are provided with written notice when a proceeding is initiated;
- (b) are afforded an opportunity, prior to any final action in the proceeding, to have access to relevant information, to be represented, to make submissions, including any comments on the submissions of other persons, and to identify and protect confidential information; and
- (c) are provided with a written decision on the merits of the case.

7. Each Party shall ensure that, where there are any judicial or quasi-judicial proceedings to address anticompetitive activities, an independent domestic judicial or quasi-judicial appeal or review process is available to persons subject to any final decision arising out of those proceedings.

Article XI .3 Cooperation

1. The Parties recognize the importance of cooperation and coordination of enforcement actions including notification, consultation and exchange of information.

2. Subject to Article XI.4, and unless providing notice would harm its important interests, each Party shall notify the other Party with respect to its enforcement actions that may affect that other Party's important interests, and shall give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming those interests.

3. For the purpose of this Chapter, enforcement actions that may affect the important interests of the other Party and therefore will ordinarily require notification include those that:

- (a) are relevant to enforcement actions of the other Party;
- (b) involve anticompetitive activities, other than mergers or acquisitions, carried out in whole or in part in the territory of the other Party and that may be significant for that Party;
- (c) involve mergers or acquisitions in which one or more of the enterprises involved in the transaction, or an enterprise controlling one or more of the enterprises to the transaction, is incorporated or organized under the laws of the other Party or one of its provinces;
- (d) involve remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at conduct in that territory; or
- (e) involve the seeking of information located in the territory of the other Party, whether by personal visit by officials of a Party or otherwise, except with respect to telephone contacts with a person in the territory of the other Party where that person is not the subject of enforcement action and the contact seeks only an oral response on a voluntary basis.

4. Notification will ordinarily be given as soon as the competition authority of a Party becomes aware that the notifiable circumstances pursuant to paragraphs 2 and 3 are present.

5. In accordance with their laws, the Parties may enter into additional cooperation and mutual legal assistance agreements, arrangements, or both in order to further the objectives of this Chapter.

Article XI .4 Confidentiality

Nothing in this Chapter shall require the provision of information by a Party or its competition authority contrary to its laws. The Parties shall, to the fullest extent possible, maintain the confidentiality of any information communicated to it in confidence by the other Party. Any

information communicated shall only be used for the purpose of the enforcement action for which it was communicated.

Article XI .5 Technical Assistance

In order to achieve the objectives of this Chapter, the Parties agree that it is in their common interest to work together in technical assistance initiatives related to competition policy, measures to proscribe anticompetitive activities and enforcement actions.

Article XI .6 Consultations

1. The Parties shall consult either at least once every two years, or pursuant to Article XIII.4 (Cooperation) on the written request of a Party, to consider matters regarding the operation, implementation, application or interpretation of this Chapter and to review the Parties' measures to proscribe anticompetitive activities and the effectiveness of enforcement actions. Each Party shall designate one or more officials, including an official from each competition authority, to be responsible for ensuring that consultations, when required, occur in a timely manner.
2. If the Parties do not arrive at a mutually satisfactory resolution of a matter arising from the written request of a Party made under paragraph 1, they shall refer the matter to the Commission for consideration under Article XIII.1.2(c) (The Free Trade Commission).
3. Except as provided in paragraph 1, neither Party may have recourse to dispute settlement under this Agreement or to any kind of arbitration for any matter arising under this Chapter.

Article XI .7 Definitions

For purposes of this Chapter, these terms shall have the following definitions: anticompetitive activities means any conduct or transaction that may be subject to penalties or other relief under:

- (a) for Canada, the Competition Act, R.S.C. 1985, c. C-34;
- (b) for Costa Rica the "Ley de Promoción de la Competencia y Defensa Efectiva del Consumidor" (Act for the Promotion of Competition and Effective Defense of the Consumer) Act No.7472 of 20 December 1994;

as well as any amendments thereto, and such other laws or regulations as the Parties may jointly agree to be applicable for purpose of this Chapter.

competition authority(ies) means:

- (a) for Canada, the Commissioner of Competition.
- (b) for Costa Rica, the "Comisión para promover la competencia" (Commission for the Promotion of Competition) established under the Act No.7472 of 20 December 1994, or its successor.

enforcement action(s) means any application of measures referred to in paragraph 1 of Article XI .2 by way of investigation or proceeding.

measures means laws, regulations, procedures, practices or administrative rulings of general application.