

Unclassified**English - Or. English****24 October 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION PROVISIONS IN TRADE AGREEMENTS – Contribution
from the United States****- Session II -****5 December 2019**

This contribution is submitted by the United States under Session II of the Global Forum on Competition to be held on 5-6 December 2019.

More documentation related to this discussion can be found at: oe.cd/cpta.

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Competition Provisions in Trade Agreements

- Contribution from the United States -

1. The United States is a party to eight trade agreements with competition chapters (about one third of its total number of free trade agreements):

- **NAFTA** - <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement?mvid=1&secid=323701f4-4dd8-493b-bcc6-3698200bbeae>
- **Australia** - https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file918_5159.pdf
- **Chile** - https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file616_4010.pdf
- **Singapore** – (Chapter 12, pp. 133-140)
https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf
- **Peru** - https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file729_9536.pdf
- **Colombia** - https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file552_10187.pdf
- **Korea** - https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file193_12715.pdf
- **United States – Mexico – Canada Agreement (USMCA)**¹ - https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/21_Competition_Policy.pdf (Competition Policy) and https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/22_State-Owned_Enterprises.pdf (SOEs)

2. The objective of these chapters is to promote competitive markets in our trade partners. The agreements generally include provisions aimed at: (1) non-discriminatory and fair treatment in antitrust proceedings of each partner, (2) cooperation between antitrust agencies, and (3) disciplines related to designated monopolies and state enterprises. For example, the chapter of the U.S.-Singapore agreement on Anticompetitive Business Conduct, Designated Monopolies, and Government Enterprises, art. 12.1, states that “Recognizing that the conduct subject to this Chapter has the potential to restrict bilateral

¹ The USMCA replaces the North America Free Trade Agreement (NAFTA) and will enter into force when formally approved in each of the three jurisdictions.

trade and investment, the Parties believe proscribing such conduct, implementing economically sound competition policies, and engaging in cooperation will help secure the benefits of this Agreement.”

3. These competition provisions are not intended to have any effect on the substantive antitrust enforcement abilities of either the United States or the applicable trading partner, nor do they conflict with existing U.S. law, regulations, or guidelines. The chapters have also contributed to the adoption of bilateral cooperation agreements (e.g., Mexico, Chile, Colombia, Peru, and Korea), and helped to strengthen the relationships between the U.S. antitrust agencies (DOJ and FTC) and their trading partner counterparts.

4. Dispute settlement under the trade agreements has been explicitly carved out for the competition law enforcement provisions; however, the competition chapters normally include consultation provisions. The consultation provisions have been invoked on one occasion, in a matter involving procedural fairness disciplines that is currently under discussion between the U.S. and Korea pursuant to that agreement. *See* <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/july/ustr-pursues-competition-related>.

5. Some of the competition chapters have basic monitoring provisions. The original NAFTA, for example, established an Article 1504 Working Group² to discuss the relationship between competition laws and policies and trade in the free trade area. The Working Group met on ten occasions over a five year period and was a valuable forum for exchanging views and developing relationships between the agencies. The USMCA’s SOE chapter would establish a Committee on State-owned Enterprises and Designated Monopolies to review the chapter, provide a forum for consultations on request, and promote the principles underlying the chapter’s disciplines in other multilateral institutions.

6. From the list in the annex to the call for country contributions, provisions covering the following categories are included in competition policy chapters of the trade agreements mentioned above:

- Promoting competition
- Adopting or maintaining competition laws
- Ensuring minimum procedural fairness principles³
- Setting forth cooperation mechanisms⁴

² “The Commission shall establish a Working Group on Trade and Competition, comprising representatives of each Party, to report, and to make recommendations on further work as appropriate, to the Commission within five years of the date of entry into force of this Agreement on relevant issues concerning the relationship between competition laws and policies and trade in the free trade area.”

³ The USMCA, the most recent agreement, has the most extensive procedural fairness provisions, followed by Korea (2012); the earlier agreements have minimal due process provisions.

⁴ Note that in practice, the U.S. agencies cooperate pursuant to bilateral antitrust cooperation agreements, the OECD cooperation recommendation, and long-standing cooperation relationships. 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 USMCA, detailed minimum procedural fairness provisions, transparency, and non-discrimination principles are now also part of the regional

- Regulating designated monopolies and state enterprises⁵

7. 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 DOJ and FTC participate in the internal deliberative process, along with the United States Trade Representative (USTR), the U.S. Department of Commerce, the U.S. 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 the President's designee to resolve any disagreement. There is no clear pattern that would determine when a competition chapter is included in a trade agreement. In some past free trade agreements, the impetus comes from the U.S. side, but in others it has come from the other party. In some cases, the need for a competition chapter has not been seen as strong enough to justify its inclusion. 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. The U.S. antitrust agencies and USTR have led the U.S. delegation charged with negotiating the competition chapter, and an interagency process determines what language should be sought. Participation of the U.S. antitrust agencies is key to maintaining the proper role of the competition agency and sound objectives of competition policy, while accounting for the goals of our trade negotiators.

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 the relevant agencies.

⁵ Note that in the USMCA, the most recently negotiated agreement, the chapter on SOEs is separate from the Competition Policy chapter.