# Submission Concerning the FTAA Competition Chapter

NATIONAL COMPETITION LAW SECTION

CANADIAN BAR ASSOCIATION

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# PREFACE

The Canadian Bar Association is a national association representing 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association

# Submission Concerning the FTAA Competition Chapter

## I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to respond to questions concerning the FTAA Competition Chapter posed by the International Affairs Section, Competition Policy Branch, of the Competition Bureau.

### A. Competition Law

**Question 1:** *We note that the 1999 CBA "Submission on the Internationalization of Competition Policy" was in favour of including in an FTAA an obligation that competition laws proscribe cartels, abuse of dominance and anti-competitive mergers. Does this remain the CBA's position?*

The CBA Section continues to hold the position that substantive provisions of the FTAA should include agreement in the area of mergers, cartels and abuse of dominance. This will reduce the transaction and information costs of international business transactions.

A further consideration is that the FTAA competition chapter is intended to improve market access between and within FTAA countries. This is consistent with the primary purpose of trade agreements. In this regard, we reiterate the connection between competition and trade policy in creating a single market. The words of EU Commissioner Monti at Fordham in 2001 are especially clear on this point:

> After having painstakingly dismantled the barriers to trade represented by the

> national laws and regulations, we must be watchful for them not to be replaced by market segmentations introduced by firms.

Opinion on the issue of enforcement of dominant position and other unilateral business conduct is not unanimous. Some suggest that this type of conduct can effectively preclude market access, just as an anticompetitive merger or conspiracy could. This may especially be the case in those developing FTAA countries where there are currently national champions in particular industries. While the FTAA would work to reduce barriers to trade in such countries, without rules against abuse of dominance, foreign companies would find it difficult to enter a market effectively. This is because the incumbent national champion would be free to engage in predatory, exclusionary and disciplinary conduct against its (foreign) competitors. Thus, obligations to enforce abuse of dominance obligations should be as strong as those that would apply to cartels or mergers.

Nevertheless, the CBA Section's view is that the FTAA should not enforce obligations with respect to abuse of dominant position and other unilateral business conduct unless these obligations relate closely to market access. This is because market access should be a central theme if the objective is to open markets to trade-enhancing competition. Analysis of unilateral conduct requires complex rules-of-reason analysis. This may place excessive burdens on enforcement authorities with little experience and resources. Rules on single-firm conduct provide significant potential for strategic use by competitors seeking to obstruct rivals for private business reasons, rather than for legitimate competition law concerns.

With respect to export cartels, the CBA Section has difficulty seeing how Canada, the U.S. or other jurisdictions could seek to preserve export cartel exemptions in the context of an FTAA with a meaningful competition policy component. The fact that this was not addressed in Chapter 15 of NAFTA is one of many reasons why more vigorous provisions on export cartels need to be explored.

The various definitions in the proposed Article 2 incorporate competition law terms relating to "markets". These terms may prove to be complex and difficult concepts to use in the context of the obligations of governments to each other (and potentially to private investors) under an international treaty. On the other hand, it may not be appropriate to discourage the use of these terms in the FTAA, because they are crucial foundations of competition issue analysis. Avoiding their introduction may prolong the inevitable, leaving room for countries to accept or adopt other less helpful or relevant concepts.

**Question 2:** *How should exemptions from competition laws and regulations be treated? Should a majority approve exceptions?*

There can be legitimate domestic policy reasons for having exclusions and exceptions from a domestic competition law. For example, in the Canadian context, the *Competition Act* does not apply to agreements relating to collective bargaining between or among fishermen or associations of fishermen, and between or among amateur sport clubs and leagues.

Nevertheless, exceptions also raise an issue of consistency. Competition laws and policies diverge due to different objectives, priorities and economic philosophies. This is particularly the case in the FTAA, where only 12 of the 34 countries are involved in the negotiation of the FTAA. Allowing each FTAA state to impose exceptions unilaterally may lessen the effectiveness of the policy objectives of the FTAA.

Non-legislated exemptions raise potentially more difficult issues. For example, the Regulated Conduct Exemption is not specifically contained in the *Competition Act*. Nevertheless, it makes specific conduct or activity subject to regulation that would otherwise be caught by competition law. It is arguable that this exemption is inconsistent with the FTAA's proposed rule that designated monopolies are

"subject to national or sub-regional rules on promotion and protection of competition".

Therefore, it is the CBA Section's position that exceptions need to be limited, strictly defined and transparent. At the very least, exceptions from the coverage of national or sub-regional measures to proscribe anti-competitive business conduct should be reviewed periodically, to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. In this sense, the CBA Section supports the present drafting of Article 1.3 of the Competition Chapter which states, in part:

> Any exclusions or exceptions from the coverage of national or sub-regional competition measures shall be transparent and [should] be reviewed periodically by the Party or sub-regional entity to evaluate if they are necessary to achieve their overriding policy objectives.

## B. Core Principles

**Question 3:** *How does the principle of National Treatment apply in the competition policy context?*

The concepts of National Treatment and non-discrimination are intended to prevent governments from granting preferential treatment to domestic persons and firms as compared to foreign persons and firms in like circumstances. National treatment serves to emphasize the central point of competition – that the economy should be open to competition from all enterprises capable of serving a market. It may be appropriate in the FTAA to adopt this as a statement of principle.

Should such a principle be included in the FTAA, Canada will wish to consider any implication for domestic competition law and policy. For example, in Canada, the right of six Canadian residents to require the Commissioner of Competition to commence an inquiry into activities that may contravene the *Competition Act* is an important residual accountability mechanism. However,

foreign persons or entities could perceive this mechanism as discriminating against non-residents from FTAA countries.

Interestingly, Most Favoured Nation is not directly addressed in the FTAA agreement. A number of countries, including Canada, have bilateral agreements on cooperation that provide access to information, legal assistance and other considerations not accessible to non-parties. Much more work is needed to understand how this principle would apply in a competition regime.

**Question 4:** *Should the chapter include transparency obligations beyond publication of competition laws and regulations?*

Transparency is important to an emerging international agreement on competition policy. Assuming that an agreement on general principles is reached at some point in the future, a diverse system is likely to emerge, with slightly different approaches being applied in various countries. In this instance, the principle of transparency becomes increasingly significant.

For businesses to conduct their affairs in accordance with the laws of the countries whose markets they seek to enter, they must be able to access and assess those laws. Transparency fosters consistency, encourages public confidence and helps member states to ensure that domestic laws are not misused or used strategically to protect local business. Using laws in this way would defeat the purpose of an international cooperation agreement. Transparency should also allow for closer monitoring of the compliance level of member states and a more expedient resolution of any serious difficulties. Transparency should require that the Competition Authority follow its own guidelines and regulations.

The Authority should also explain to the public its priorities, how it investigates and makes decisions and the reasoning behind its enforcement and policy decisions.

**Question 5:** *What procedural fairness guarantees should at a minimum be provided for in each Parties' competition law?*

Although it may not be feasible to attempt to include all aspects of procedural fairness in the FTAA, some basic guarantee is necessary. Of particular importance would be a central document filing procedure, incorporating principles of transparency, to alert member nations when claims are filed in domestic courts. Additionally, the criteria for granting primary party and intervenor status could be outlined, including rights of appeal and the right to commence civil proceedings. Rights and remedies regarding investigation processes should also be generally outlined. Finally, procedural fairness should include the right to be heard, the right to make submissions and the right to be provided with a written decision, especially in cases where there is an adverse decision made against the parties.

**Question 6:** *What kind of safeguards should we seek to preclude any possibility of review of national decisions in disputes relating to core principles?*

Generally speaking, the dispute settlement mechanism should be worded in a manner that precludes review of national decisions. NAFTA's Article 1501(3), for example, does not give parties recourse to the dispute settlement process with respect to adopting, maintaining and enforcing domestic competition laws. This might be an appropriate model for the FTAA.

It is the Section's position that dispute settlement is an important issue and that private as well as governmental rights should be considered. The experience under NAFTA Chapter 11 generally, and in *UPS v. Canada* Chapter 15/11 state enterprise claim, will be relevant to examine.

## C. Cooperation

**Question 7:** *Should the Chapter include enforcement cooperation obligations*

*beyond recognition that Parties may enter into bilateral cooperation arrangements, assuming adequate confidentiality safeguards are established? If so, what type of enforcement cooperation obligations would be appropriate?*

The Competition Chapter should not go beyond a recognition that parties may enter into bilateral cooperation agreements. While the extraterritorial application of competition laws can help to deter or reduce anti-competitive behaviour, it raises significant and complicated jurisdictional and sovereignty issues.

Should the FTAA Parties nonetheless proceed to include enforcement cooperation obligations, the CBA Section agrees with the Draft Paper that a cooperative multinational enforcement agreement might be modelled on the 1995 OECD *Revised Recommendation Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade*. This calls for member countries to inform each other of possible competition violations, to forewarn each other of cases which may affect the other's interests, to request the other agency to act against practices which affect the requesting country's interests, to collect and share information to the extent permitted under national confidentiality laws and to coordinate investigations and remedial action.

Like the 1995 OECD Recommendations, the FTAA could call for positive comity to be respected. It could also contain a conciliation process. It may be necessary for coordinated enforcement to be voluntary and non-binding in the early stages, to respect the sovereignty of individual member states. The commitment of member states to concerted enforcement action may become clearer over time as the commitment to competition policy in general strengthens. The FTAA draft Chapter on Competition, as presently drafted, already includes many of these elements.

The CBA's 1995 *Commentary on the Competition Dimension of the NAFTA* suggests that an ideal level of cooperation should reflect a balancing of expected benefits and costs. This means that cooperation should not be required where the

benefits are low and the costs are high. Importantly, it states that cooperation should be left to the voluntary initiatives of the competition law authorities except for areas where bare minimum requirements are warranted.

The existence of any such obligations raise serious confidentiality concerns that need to be addressed.

**Question 8:** *What are the potential implications of the application of the Most-Favoured Nation principle to discretionary cooperation which the Competition Bureau may undertake with certain, but not all competition authorities in the hemisphere?*

Clearly, discretionary cooperation raises the potential for a breach of the MFN principle. Typically "measures" covered by the FTAA will be broadly defined to include policies and practices. Moreover, the FTAA's vague references to "pro-competitive regulatory principles" make this an area with potentially vast implications that must be analyzed very carefully.

## D. Confidentiality

**Question 9:** *What kinds of confidentiality safeguards are required?*

The international business community is legitimately concerned that its confidential information might come into the hands of competitors or even those of authorities in other countries that may utilize such information in a manner unrelated to the competition law matter in question. Such information may also become accessible to third parties, including possible plaintiffs, through access to information statutes or through state-owned competitors. The owner of proprietary information, moreover, may not be made aware in the event of its exchange or disclosure.

We suggest that at a minimum, the following procedural safeguards be part of the FTAA and be implemented to protect against improprieties in the exchange of confidential information:

- Prior notification should be given to a business that confidential information will be provided to another governmental authority, unless such notice would jeopardize an investigation – in which case notice should be given as soon as possible;
- There should be the possibility for independent review of any adverse decisions;
- There should be substantial convergence and similarity between one jurisdiction and another on the laws protecting lawyer/client privileged information;
- There should be an assurance that the information will not be disclosed to parties outside of the receiving authority;
- The jurisdiction seeking the information must provide competition-law enforcement immunity equal to or greater than the protection provided in the jurisdiction disclosing the information;
- The party receiving the information must agree to reciprocate;
- Any exchange of information should lead to less delay in the investigation process; and
- Competition authorities should assume all information they receive from another authority is confidential or a business secret unless it is explicitly identified as public in nature.

## E. Compliance Review

**Question 10:** *Can enforcement discretion of national competition authorities be preserved if the general dispute settlement provisions are applied to the Chapter*

*on Competition Policy? Are there alternative forms of compliance review, such as compliance review based on de jure compliance of competition laws and regulations with obligations, which may be more effective in preserving enforcement discretion?*

The CBA Section believes that, with careful language in the text of the Agreement, there are alternative forms of compliance review which may be more effective in preserving enforcement discretion. It is important to note that the present wording of the Chapter with respect to adopting domestic competition laws is very general. Article 1.1 states that each Party "shall [*endeavour* to] adopt or maintain measures […] to proscribe anticompetitive [business] conduct" (emphasis added). Article 1501 of NAFTA, however, uses the stronger language of "shall adopt" (although it should be noted that no disputes have arisen under NAFTA on this issue).

Article 1.1 can be contrasted with the language in Article 2.2.3, which states that Parties "shall ensure" that monopolies act in the specified manner (this is identical to the wording in article 1502(3) of NAFTA). The distinction found in the FTAA Chapter between Articles 1.1 and 2.2.3 seems to indicate that a measure of discretion was intended for the general enforcement obligation.

## F. Peer Review

**Question 11:** *What form of peer review may be appropriate in the FTAA context? What kinds of limits, if any, should be placed on peer review?*

Peer review is a method by which countries can assess the quality and effectiveness of their policies, legislation, policy environments and key institutions. It provides a forum where policies can be explained and discussed, where information can be sought and concerns expressed, on a non-confrontational and non-adversarial basis. The feedback provides the reviewee with a yardstick for measuring its system against those of other peers while also

informing the reviewing countries. Peer review mechanisms are used extensively in the OECD. Currently, the WTO has one such mechanism, the Trade Policy Review Mechanism (TPRM).

The benefits of peer review include:

- Greater convergence of competition laws and enforcement practices:
- Greater transparency
- Improved domestic policy-making
- Policy examination mechanism
- Technical assistance and capacity building

Possible potential models include:

- Trade Policy Review Mechanism (WTO)
- OECD Country Reviews of Regulatory Reform, including reviews of Competition Policy
- Economic and Development Review Committee

## G. Competition Committee

**Question 12:** *What purpose and function could a Competition Committee/Council serve, e.g. peer review, information sharing, implementation, technical assistance?*

In addition to peer review as noted above, the Competition Committee should communicate to parties any notifications made under articles 2 and 4, plan for the conduct of reviews and their frequency, make recommendations with respect to changes to the FTAA competition chapter and disseminate information to parties (see section 3.2 FTAA). The role of the Committee should not involve any kind of enforcement or binding review of any enforcement actions that may be undertaken at a national or sub-regional level.

## H. Monopolies And State Enterprises

**Question 13:** *What kinds of disciplines on monopolies and state enterprises should be included in the FTAA?*

It is recognized that governments may establish and maintain monopolies and state enterprises to serve various national public purposes. The FTAA agreement should permit the designation and maintenance of such monopolies and state enterprises. The FTAA agreement should also put in place appropriate disciplines, such as notification, non-discrimination and acting in accordance with commercial disciplines. The aim would be to ensure that monopolies and state enterprises do not act as a barrier to the general objective and to efforts made toward trade liberalization in the FTAA region.

The CBA's 1995 *Commentary on the Competition Dimension of the NAFTA* also suggested adopting article 37 of the Treaty of Rome. The Treaty deals with "state monopolies of a commercial character", forbidding state monopolies to discriminate in any way against EU persons or entities in the procurement or supply of goods. It requires Member States to "progressively adjust" state monopolies of a commercial character so that at the end of the transitional period "no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States." Consequently, state monopolies may not protect their own dominance by hindering the importation of competing goods (see *Pubblico Ministero v. Manghera* (Case 59/79, [1976] ECR 91 at 101) where the Court of Justice held that "the exclusive right to import manufactured products of the monopoly […] constitutes, in respect of Community exporters, discrimination prohibited by Article 37(1)."). Article 37 is a useful model to consider.

## II. CONCLUSION

The CBA Section hopes that its observations are of assistance to the Competition Bureau. We would be pleased to consult further on the FTAA Competition Chapter if requested.