



**Asia-Pacific  
Economic Cooperation**

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Agenda Item: 9

## **Canada's Approach to Competition Policy in Free Trade Agreements**

Purpose: Information  
Submitted by: Canada



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## Canada's approach to competition policy in free trade negotiations



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Canada 

### Agenda

- Increased interest in bilateral free trade agreements (FTAs)
  - International environment
  - Domestic environment
- The current state of play of Canada's trade negotiation agenda
- Canada's approach to competition policy in its FTAs
- FTA negotiation issues and trends of interest to the Competition Bureau (the Bureau)





## **Growing interest in bilateral trade agreements**

### **International environment**

- Idling of the World Trade Organization Doha Development Round
  - Launched in 2001
  - Collapse of talks
- FTAs quicker to negotiate
- Ability to cover a broader range of trade issues
  - i.e. competition policy, investment, etc.
- Allows parties to achieve greater levels of trade liberalization



## **Growing interest in bilateral trade agreements**

### **Domestic environment**

- Government of Canada's Foreign Policy Plan
  - Increase and diversify commercial engagement in key markets in Asia-Pacific, and in Latin America through a co-ordinated whole of government approach
  - Government of Canada is revising its Global Commerce Strategy
    - Increasing importance of emerging economies on global trade
    - Identification of key markets
- Increased lobbying activity from business community advocates on the Government of Canada



## A Glimpse of Canada's Current FTA Agenda

Concluded FTAs	Ongoing FTAs
<ul style="list-style-type: none"><li>•Canada-US (1989)</li><li>•NAFTA (1994)</li><li>•Israel (1997)</li><li>•Chile (1997)</li><li>•Costa Rica (2002)</li><li>•Colombia (2008)</li><li>•Jordan (2009)</li><li>•EFTA (2009)</li><li>•Peru (2009)</li><li>•Panama (2011)</li><li>•Honduras (2012)</li></ul>	<ul style="list-style-type: none"><li>•Trans Pacific Partnership</li><li>•European Union</li><li>•India</li><li>•Japan</li><li>•Morocco</li><li>•Ukraine</li><li>•CARICOM</li><li>•Korea</li><li>•Costa-Rica (modernization)</li><li>•Singapore</li></ul>



## Canada's approach to competition policy in its FTAs

### Bureau role in FTA negotiations


- The Department of Foreign Affairs and International Trade (DFAIT) is lead in the negotiation of Canada's FTAs
  - While most FTA chapters are negotiated by DFAIT, matters falling outside DFAIT's mandate (i.e. Labour, Environment, Agriculture, Competition) are negotiated by other Government of Canada departments and agencies
- The Bureau leads negotiations of the Competition Policy Chapter and is also called upon to lead discussions on competition related aspects in other FTA chapters (i.e. Monopolies and State Enterprises (MSEs), Exceptions, Telecom, etc.)
  - Bureau participates in all stages of FTA negotiations, including exploratory discussions and joint studies





## Canada's approach to competition policy in its FTAs


### Canada's model

- Canada considers it important to include general provisions on competition policy in its FTAs
    - Ensures that the benefits of trade liberalization are not offset by anticompetitive business conduct
  - Canada's typical approach to competition policy is largely based on the model developed in the North American Free Trade Agreement (NAFTA)
  - Provisions on competition policy and those dealing with MSEs are grouped in a single chapter due to the cross-cutting nature of these obligations
    - Bureau leads on competition policy, whereas DFAIT leads on MSEs.
      - Competition policy obligations apply to MSEs however MSE obligations transcend competition policy and go beyond the mandate of the Commissioner of Competition
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## Canada's approach to competition policy in its FTAs

### Canada's model

- In all of its FTAs, Canada seeks to include obligations on the FTA parties to:
    1. Adopt and maintain measures to proscribe anticompetitive business conduct in the free trade area
    2. To discuss the effectiveness of those measures
    3. To ensure that the measures are consistent with the principles of transparency, non-discrimination and procedural fairness
    4. To exclude the competition policy provisions from all forms of dispute settlement under the FTA
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## Canada's approach to competition policy in its FTAs

### Canada's model

1. *Adopt and maintain measures to proscribe anticompetitive business conduct in the free trade area*
  - Provision originated in NAFTA to address the fact that Canada and the United States had competition laws, whereas Mexico had yet to develop a competition enforcement framework
  - Aimed at ensuring that Canada's FTA partners have in place measures to address anticompetitive business conduct
  - Canada recognizes that FTA parties are independent in the administration and enforcement of their respective competition laws
    - For this reason, Canada prefers not to define the terms “anticompetitive business conduct” in its FTAs as countries' definition of the terms may differ from Canada's
      - i.e. cases where competition laws do not address merger enforcement, etc.



## Canada's approach to competition policy in its FTAs

### Canada's model

2. *Discuss the effectiveness of those measures*
  - Canada's approach is to include a provision specifying that the Parties will cooperate and coordinate on matters of competition law enforcement in the free trade area
  - Canada does not formalize cooperation obligations (i.e. notification, mutual legal assistance, positive and negative comity, and exchange of information) in the FTA as these are not trade related obligations
    - In circumstances where formalizing cooperation on competition enforcement matters is beneficial to the parties, Canada's approach is to negotiate separate and distinct cooperation instruments amongst the parties' respective competition enforcement authorities.



## Canada's approach to competition policy in its FTAs

### Canada's model

3. *Ensure that measures are consistent with the principles of transparency, non-discrimination and procedural fairness*
  - Transparency of laws and law enforcement foster greater confidence on the part of private actors and increase the likelihood that firms will pursue opportunities to trade and invest in foreign markets
  - Canada also seeks to include a provision ensuring that exclusions from each party's competition laws are transparent and that public information about those exclusions be made available to each other
  - On the issue of discrimination, while most competition laws do not discriminate between domestic and foreign businesses, it is the case that certain exemptions from competition law do have the effect of discriminating against foreign competition
  - On the issue of procedural fairness, Canada believes that competition laws should provide, for example, reasonable access to the justice system, a right to petition competition authorities, fairness in the conduct of investigations and rights to bring private actions.



## Canada's approach to competition policy in its FTAs

### Canada's model


4. *Exclusion of competition policy provisions from all forms of dispute settlement under the FTA*
  - It is Canada's view that decisions of the FTA parties' competition authorities are matters of domestic law and policy, and should not be subject to dispute settlement by an international body
  - General consensus on this policy objective amongst competition enforcement authorities
  - As such, Canada seeks to exempt competition policy provisions from all forms of dispute settlement under the FTA, including state-to-state and investor-state dispute settlement
    - Definition of "Party" under the FTA does not necessarily include investors, thus the need to specify that the exemption applies to investor-state dispute settlement as well
      - Canada has noted that this distinction is not present in the FTAs of many of its trading partners





## Canada's approach to competition policy in its FTAs


### Competition related issues outside the Competition Policy Chapter

- Monopolies and State Enterprises
    - Canada's *Competition Act* applies equally to all business in Canada, including the commercial activities of MSEs
    - Monopolies created by Parliament (corporate agents) that are not engaged in commercial activities (whether actual or potential), are not subject to the provisions of the *Competition Act*
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## Canada's approach to competition policy in its FTAs


### Competition related issues outside the Competition Policy Chapter

- Non-disclosure of information
    - Canada's approach is to include a non-disclosure provision in the Exceptions Chapter of its FTAs, which specifies that the parties and the competition authorities of the parties are not required to furnish or allow access to information protected under their respective competition laws
    - The non-disclosure clause is in the interests of the FTA parties because it sets out a class text for information protected under a country's competition law, not an injury test
    - Our past experience, in cases such as *UPS v. Government of Canada*, has taught us to seek an increased level of certainty that confidential competition information of a competition authority will not be subject to disclosure during a dispute settlement proceeding under an FTA, and that non-disclosure will not lead to adverse inferences by a dispute settlement panel
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## FTA Trends and issues of interest for the Bureau

- Growing demand for competition related cooperation amongst FTA parties
    - Small and emerging economies increasingly seeking technical assistance and formal cooperation obligations in FTAs
  - Increased focus on the complex role of state-owned enterprises (SOEs)
    - How will obligations pertaining to SOEs impact domestic competition enforcement?
  - Moving beyond bilateral towards regional and multilateral trade agreements
    - i.e. Trans Pacific Partnership, ASEAN, MERCOSUR, China-Japan-South Korea
    - Will this result in more ambitious competition policy related obligations?
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