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COMPETITION PROVISIONS IN TRADE AGREEMENTS – Contribution
from Canada****- Session II -
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More documentation related to this discussion can be found at: oe.cd/cpta.

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Competition Provisions in Trade Agreements

“Ensuring that the benefits of trade liberalisation are not offset by anti-competitive conduct”

- Contribution from Canada* –

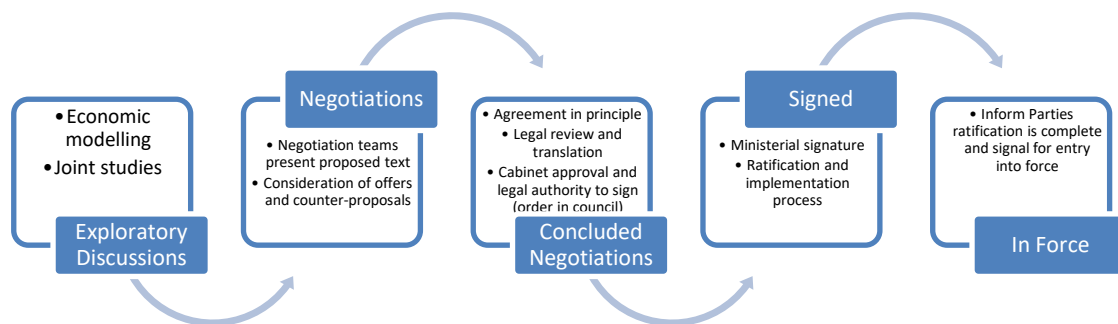
1. Introduction

1. Canada’s Competition Bureau (“Bureau”) is pleased to provide this submission to the OECD Global Forum on Competition on the topic of “Competition Provisions in Trade Agreements”.
2. The Bureau, headed by the Commissioner of Competition (“Commissioner”), is an independent law enforcement agency of the Federal Government of Canada responsible for the administration and enforcement of the [Competition Act](#) and certain other statutes. In carrying out its mandate, the Bureau ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace.
3. This submission sets out Canada’s governance model and the Bureau’s role in negotiating competition provisions in Canada’s free trade agreements (FTAs). It also provides examples of how FTAs can impact Canada’s competition law and policy framework, particularly in the area of information sharing and other cooperation activities. Lastly, the submission highlights the importance of monitoring cross-cutting issues in other chapters of Canada’s FTAs, such as provisions that address disclosure of information.

2. Background

4. Canada pursues an ambitious free trade agenda and its growing trade network gives Canadian companies preferred access to diverse markets all over the world. Canada currently has 14 bilateral FTAs in force (see Annex I). A high-level overview of the process Canada undertakes to negotiate trade agreements, as set by [Global Affairs Canada](#), is illustrated in the diagram below.

* This contribution was prepared by the Competition Bureau Canada.



5. The Bureau is involved in all of these steps and supports Global Affairs Canada (Global Affairs) and Canada's economic and trade agenda by pursuing ambitious competition provisions to ensure that the benefits of trade liberalisation are not offset by anti-competitive conduct.

6. The time required to conclude an agreement can vary widely based on priority, level of engagement by Parties, alignment (or misalignment) of interests and complexity of the ratification process.

3. Role of the Competition Authority and Canada's Approach

7. In Canada, Global Affairs is the federal department leading all free trade negotiations on behalf of the Canadian government. Global Affairs works in close collaboration with other federal departments on certain chapters that require subject matter expertise in complex areas of the FTA including market access, investment, environment, intellectual property and competition policy.

8. A unique feature of the Canadian approach is that the Bureau has historically led the negotiations of competition policy chapters in all of Canada's FTAs through an agreement with the department of Innovation, Science and Economic Development (ISED). While the Bureau is located within ISED, another Branch carries out the competition policy function and is formally responsible for binding agreements. ISED and Global Affairs approve the final text that Bureau representatives have negotiated. This model works because of the expert knowledge of the Bureau on the administration and enforcement of competition law in Canada, and close collaboration and extensive domestic consultation on text proposals in advance of all negotiating rounds. In addition, designated employees at ISED are typically made available during negotiating rounds to facilitate decision making and approvals as required.

9. In order to ensure that the benefits of trade liberalisation are not offset by anti-competitive conduct, Canada normally seeks several key provisions in competition policy chapters. These provisions have evolved over time, and include commitments to:

1. Adopt and maintain laws to proscribe anti-competitive conduct (including consumer protection);

2. Maintain a competition authority to administer those laws with **detailed** commitments to adhere to the principles of procedural fairness, non-discrimination and transparency;
 3. Encourage cooperation activities; and
 4. Exclude the chapter from both state to state and investor-state dispute settlement.
10. Annex II sets out the main elements of each provision Canada seeks to include when negotiating competition policy chapters. Excluding the competition policy and consumer protection provisions from dispute settlement is the most critical element of Canada's approach. Because there is no international competition or consumer protection law, there is general agreement amongst competition authorities (including those responsible for the enforcement of consumer protection laws) that the domestic enforcement of these laws should not be subject to international panels such as dispute settlement bodies established by FTAs.
11. Recognizing that FTAs can be used to advance women's economic empowerment and gender equality in Canada and around the world, Global Affairs also conducts a Gender-based Analysis Plus (GBA+) on each chapter of Canada's FTAs. GBA+ assessments inform ongoing negotiations by identifying opportunities to add new gender-responsive and gender-inclusive trade provisions across trade agreements, including in the area of competition policy. This requirement led the Bureau to consider the link between competition and gender and has led to international work on the topic. Specifically, in November 2018 the Organisation for Economic Co-operation and Development (OECD) commissioned a paper that established a framework in which competition authorities could consider the links between competition and gender. Further research in this area will provide insights to competition authorities on how they can integrate gender considerations in enforcement, advocacy and compliance work, and will be of assistance when performing GBA+ assessments on future trade agreements.

4. Impact of Competition Provisions

12. Negotiating ambitious outcomes in competition policy chapters brings important benefits to competition authorities. By advocating for strong institutions and legal frameworks, we promote convergence on competition law and policy, and therefore level the playing field for Canadian firms abroad and vice versa for firms looking to do business in Canada.
13. In the absence of international competition law, these agreements can secure assurances that competition authorities will enforce competition laws and policies in a manner consistent with the principles of transparency, non-discrimination and procedural fairness. Agreements also establish frameworks in which authorities can explore cooperation activities such as notification, investigative assistance and, where appropriate, technical assistance.

4.1. Case Study: Canada's Expert Deployment Mechanism for Trade and Development

14. Government funding is made available to help developing countries negotiate, implement, adapt to, and benefit from their trade and investment agreements with Canada. Eligible countries are able to submit a request for technical assistance under the [Expert Deployment Mechanism \(EDM\) for Trade and Development](#) which deploys Canadian and

international technical experts based on specific country needs. This can include building capacity in competition enforcement, such as merger review, cartel investigations and designing remedies to address anti-competitive conduct. Such funding enables the sharing of expertise, best practices and specialized knowledge amongst competition authorities and leads to tangible outcomes that stem directly from the *cooperation* and/or *technical assistance* provisions found in Canada's competition policy chapters.

4.2. Case Study: Legislative Changes that would have stemmed from Bill C-100, an Act to implement the Agreement between Canada, the United States of America and the United Mexican States

15. Competition provisions in FTAs can lead to legislative changes in the area of competition law. For example, outcomes negotiated in the Competition Chapter of CUSMA led to [Bill C-100](#) which proposed a legislative change in Part III of the Competition Act dealing with Mutual Legal Assistance. The competition provision linked to this amendment is [CUSMA Article 21.3](#) on Cooperation, which requires the Parties to adopt or maintain sufficient measures to permit negotiations of cooperation instruments, including in the area of mutual legal assistance in competition matters. This bill expired without passing at the conclusion of the 42nd Canadian Parliamentary session.

16. As seen in Bill C-100, competition provisions in FTAs can trigger proposals for legislative changes to bridge gaps or otherwise give authorities the tools that they need to uphold their obligations under the negotiated agreement.

5. Cross-cutting issues and other important chapters in Canada's FTAs

17. In addition to leading negotiations of the competition policy chapter, the Bureau also closely monitors other chapters such as *Investment*, *Intellectual Property* and *Environment* by working with other negotiating leads to ensure that commitments made under those chapters are consistent with Canada's competition laws. As such, the scope of our work extends beyond the competition policy chapter itself. For a full list of cross-cutting issues and implications, please consult Annex III.

18. The Bureau also works with Global Affairs on broader cross-cutting institutional issues such as *Preamble*, *General Definitions*, *Anti-Corruption and Transparency*, *Committees*, *Cooperation*, and most importantly, *Exceptions and General Provisions*. This unique feature of Canada's approach ensures that commitments made under these various chapters align with and correspond to existing competition laws in Canada and do not commit the Commissioner to furnish information in contravention of Canadian law or prevent the Commissioner from taking enforcement action that would otherwise be in contravention with commitments made in Canada's FTAs.

5.1. Case Study: *United Parcel Service of America, Inc. v. Government of Canada* ("UPS v Canada")

19. The [UPS v Canada case](#) illustrates the importance of monitoring cross-cutting issues in FTAs, many of which fall outside of the competition policy chapter itself. In April 2000, UPS filed a notice of arbitration and statement of claim under NAFTA's Chapter Eleven investor-state dispute settlement (ISDS) provisions alleging, among other things,

that Canada had breached its NAFTA obligations by failing to ensure that Canada Post Corporation did not engage in anti-competitive practices.

20. Canada successfully challenged the jurisdiction of the NAFTA Investor-State Arbitration Tribunal to decide on issues relating to anti-competitive conduct, cross-subsidization and predatory pricing. The Tribunal held, in its decision on jurisdiction, that an Investor-State Dispute Settlement tribunal had no jurisdiction over claims relating to competition law matters except to the extent that those claims were associated with alleged violations of NAFTA Chapter Eleven on Investment. In the Bureau's view, this was the correct decision as ISDS provisions in Canada's FTAs were never intended to be used as a means for international review of competition authorities' decisions or actions.

21. The Bureau is of the view that confidential information obtained or received by the Commissioner should be more effectively protected from disclosure in international dispute settlement proceedings. The Bureau's position is that competition law and policy matters, including decisions of the Commissioner, are exclusively domestic in nature due to the important national policy interests they represent, and that any dispute regarding the administration or enforcement of Canadian competition law should be settled in Canadian courts (not by an international body).

22. The Bureau has worked with Global Affairs' trade law experts to develop language for the [Exceptions and General Provisions Chapter](#) of our trade agreements including CUSMA to ensure that the Bureau is not required to disclose confidential information during trade related proceedings such as dispute settlement or committee work. This provision states that the Agreement "[...] does not require a Party to furnish or allow access to information, the disclosure of which would be contrary to its law or would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private".

5.2. Case Study: CUSMA Investment Chapter and Performance Requirements

23. Another example demonstrating the importance of monitoring cross-cutting issues can be drawn from the Investment Chapter which seeks to facilitate cross border investment and minimize barriers that would prevent the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in the party's territory.

24. While these provisions are critical to the success of free trade and facilitate investment opportunities within the parties economies, the Bureau works with the lead negotiator to ensure that these obligations do not prevent or impede the enforcement of Canadian competition law. Specifically, [CUSMA Article 14.10](#) on *Performance Requirements* builds in exemptions that allow competition authorities to impose commitments or consent agreements designed to address alleged violations of competition laws, even though these requirements (such as divestitures, for example) can place conditions on international investments.

25. When there are implications for competition, the Bureau collaborates closely with the lead department responsible for negotiating the corresponding text and consults with provinces, as appropriate. This unique approach creates convergence across the Canadian government and aims to keep all the relevant stakeholders informed of how *all* the commitments made in FTAs might impact their work and individual mandates. It also allows relevant authorities to advocate for provisions that are in line with existing laws,

mitigating the risk of legal disputes, and allows relevant stakeholders to plan for changes that will arise once an FTA enters into force.

6. Conclusion

26. Negotiating ambitious outcomes in competition policy chapters bring important benefits to competition authorities. Advocating for strong institutions and legal frameworks through FTAs promotes convergence on competition law and policy and therefore levels the playing field for Canadian firms abroad, and for firms looking to do business in Canada.

27. In the absence of international competition law, these agreements can secure assurances that competition authorities will enforce competition laws and policies in a manner consistent with the principles of transparency, non-discrimination and procedural fairness. FTAs also establish frameworks in which authorities can explore cooperation activities.

28. Canada's experience also shows that FTAs can be vehicles for legislative change to allow competition authorities to meet their obligations under the FTAs.

Annex I: List of Canada's bilateral free trade agreements (FTAs)

* indicates that the FTA's Competition Chapter also covers State-Owned Enterprises (SOEs) and Designated Monopolies

FTA:	Date of entry into force:	Competition chapter:	Link to Competition Policy Chapter:
Canada-United States-Mexico Agreement (CUSMA)	TBD	Yes	https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/r-cusma-21.pdf
Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)	December 30, 2018	Yes	https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/16.aspx?lang=eng
Canada-European Union Comprehensive Economic and Trade Agreement (CETA)	September 21, 2017	Yes	https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/17.aspx?lang=eng
Canada-Ukraine Free Trade Agreement (CUFTA)	August 1, 2017	Yes *	https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/09.aspx?lang=eng
Canada-Korea Free Trade Agreement (CKFTA)	January 1, 2015	Yes *	https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/korea-coree/fta-ale/15.aspx?lang=eng
Canada - Honduras Free Trade Agreement	October 1, 2014	Yes *	https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/honduras/fta-ale/15.aspx?lang=eng
Canada-Panama Free Trade Agreement	April 1, 2013	Yes *	https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/14.aspx?lang=eng
Canada-Jordan Free Trade Agreement	October 1, 2012	No	https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/jordan-jordanie/fta-ale/09.aspx?lang=eng
Canada-Colombia Free Trade Agreement	August 15, 2011	Yes *	https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/13.aspx?lang=eng
Canada-Peru Free Trade Agreement	August 1, 2009	Yes *	https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/13.aspx?lang=eng
Canada-European Free Trade Association (EFTA) Free Trade Agreement	July 1, 2009	Yes *	https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/european-association-europeenne/fta-ale/index.aspx?lang=eng#a4
Canada-Costa Rica Free Trade Agreement	November 1, 2002	Yes	https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/costa_rica/fta-ale/11.aspx?lang=eng
Canada-Chile Free Trade Agreement	July 5, 1997	Yes *	https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/03j.aspx?lang=eng
Canada-Israel Free Trade Agreement	January 1, 1997	Yes *	https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/15.aspx?lang=eng
North American Free Trade Agreement (NAFTA)	January 1, 1994	Yes *	https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/15.aspx?lang=eng

Annex II: Key provisions of Canada's Competition Policy Chapters

Competition Law and Authorities	• Requirement to have competition laws • Laws should apply to all commercial activity • Exemptions are permitted but need to be transparent • Requirement to have competition authorities • Non-discrimination
Procedural Fairness in Competition Law Enforcement	Various procedural fairness elements (non-exhaustive list): • Transparency • Timelines • Representation by legal counsel and privilege • Confidentiality • Notice and opportunity to defend • Independent review
Cooperation	• Encourages cooperation during investigations – through investigative assistance, notification, consultations and exchange of information • Share information on competition laws and policies • Technical cooperation and capacity building • Recognizes the OECD and ICN
Consumer Protection	• Recognition that consumer protection is also important. • Requirement to have consumer protection laws covering fraudulent and deceptive commercial activities. • Recognition of importance of cooperation such as exchange of complaints/other information
Transparency	• Recognition that transparency is important • Obligation to share information among the Parties
Consultations	• Provides for a consultation mechanism to address issues under the Chapter
Non-Application of Dispute Settlement	• Excluded from all forms of dispute settlement

Annex III: Cross-cutting issues and links to Competition Policy

This list is non-exhaustive and provides examples of Chapters that intersect with Competition, from Canada's perspective.

Cross-cutting issue by Chapter	Link to Competition and/or Consumer Protection
Preamble	General language on competitiveness and ensuring that the benefits of trade liberalisation are not offset by anti-competitive activities
General Definitions	Typically apply to all chapters so important to ensure consistency with and applicability to competition policy chapter
Transparency and Anticorruption	- Transparency is an article within competition policy chapter so it is important to ensure consistency in commitments - Anticorruption provisions can implicate bid-rigging and other cartel enforcement activities
Committees	- Typically do not implicate competition matters but some older FTAs do - Useful to advise FTA Joint Commissions of cooperation activities such as signing of cooperation instruments on competition matters
Cooperation	Cooperation is an article within competition policy chapter so its important to ensure consistency in commitments
Exceptions and General Provisions	Addresses disclosure of information
Technical Barriers to Trade	Can implicate competition authorities responsible for labelling regulations
Government Procurement	Can implicate cartel enforcement
Digital Trade / E-Commerce	Implicates consumer protection which is also covered in competition policy chapter
Investment	Need to ensure adequate carve out to allow for competition law remedies
Good Regulatory Practises	Can include language on avoiding unnecessary restrictions on competition
Intellectual Property	Need to ensure adequate carve-out to allow for competition law remedies
Environment	Can include provisions related to Voluntary Measures on promotion of environmental goods. Important to ensure compliance with deceptive marketing laws
State-Owned Enterprises and Designated Monopolies	Sometimes covered under one chapter with competition policy