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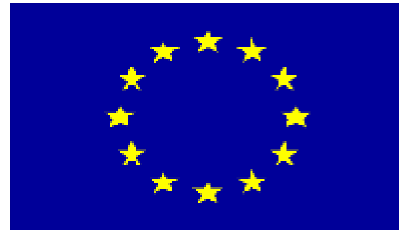

CPFTR PAPER XV: THE CONTRIBUTION OF BILATERAL TRADE OR COMPETITION AGREEMENTS TO COMPETITION LAW ENFORCEMENT COOPERATION BETWEEN CANADA AND COSTA RICA

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INTRODUCTION

This paper analyses the structure and operation of the cooperation agreement on competition matters between Canada and Costa Rica. It is one of three separate but related papers written by the authors which detail the contribution of bilateral trade or competition agreements to trans-national competition law enforcement cooperation.[1]

Specifically, this paper identifies:

(i) the factors bearing on the choice of cooperative instrument chosen by Canada and Costa Rica;

(ii) the relative effectiveness and contribution to enhanced cooperation in competition matters of the competition provisions in the Canada-Costa Rica Free Trade Agreement (CCRFTA) vs. the enforcement cooperation provisions in other agency-agency enforcement arrangements;

(iii) the relative effectiveness and contribution of 'competition cooperation' provisions in the Canada-Costa Rica FTA to formal enforcement cooperation, informal enforcement cooperation and non-enforcement related cooperation between Canada and Costa Rica;

(iv) the factors which legitimately and illegitimately impede cooperation between Canada and Costa Rica; and

(v) recommendations for Canadian and Costa Rican policymakers about how to improve the effectiveness of their competition enforcement cooperation arrangement.

Very little literature exists at present on the Canada-Costa Rica cooperation arrangement and there are as yet no publicly available official reports on its operation. The authors thus conducted their research by *inter alia* sending detailed

[1] The other two papers are concerned with the cooperation frameworks established between Canada and Chile (CPFTR Paper XIV) and the EU and Mexico (CPFTR Paper XVI).

questionnaires to and interviewing officials from the following departments or agencies:

- The Canadian Competition Bureau and
- The Costa Rican Commission for the Promotion of Competition.

PART I: LEGAL AND ECONOMIC CONTEXT OF THE COMPETITION LAWS AND THE COOPERATION AGREEMENT

The Canada-Costa Rica Free Trade Agreement (CCRFTA)[2] came into effect on the 1st of November 2001 and established, in conformity with Article XXIV of the General Agreement on Tariffs and Trade 1994,[3] a free trade area between the countries of Canada and Costa Rica. The agreement aimed to provide both countries with the benefits associated with trade liberalisation and trans-national commerce, while at the same time allowing Costa Rica the opportunity to experience the workings of a free trade regime that was intended to act as a prelude to its eventual entry into the North American Free Trade Agreement (NAFTA) or its effective participation in the development of a Free Trade Area of the Americas (FTAA).[4] Canada saw the negotiation process of the agreement as an opportunity to "experiment with the kind of trade law reform that would be impossible with American participation in the negotiations".[5]

The agreement covered many different aspects of trade (e.g. rules of origin, national treatment; trade in goods; market access; customs; antidumping; and trade facilitation to name a few). It also provided the necessary institutional framework and dispute

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[2] Available at: http://www.dfait-maeci.gc.ca/tna-nac/costa_rica-en.asp.

[3] Which is part of the Marrakesh Agreement Establishing the World Trade Organization: see www.wto.org and Article I.1 CCRFTA.

[4] See: *Canada-Costa Rica Free Trade Initiative*, published by the Estey Centre for Law and Economics in International Trade (April 2000) at p.1, available at www.esteycentre.com. See also: Trade Law Update of July 2001, "Canada Follows Previous Bilateral Agreements in Costa Rican Accord", at page 1, available at: www.stikeman.com.

[5] America had been excluded from such negotiations due to the executive's failure to secure a 'fast-track' approach to the negotiation of free trade agreements: *ibid.*

settlement procedures required to ensure its effective administration and enforcement. Finally, some exceptions to the free trade regime were detailed relating to for example national security; balance of trade; information dissemination; and industrial and cultural matters.

This agreement attempts to take into account the relative size and stage of development of both countries. As a result, tariff rates in Canada are being reduced as a quicker pace than those in Costa Rica: Costa Rica has eliminated all tariffs on two-thirds of its imports from Canada, with the rest being eliminated over a fourteen year period; Canada by contrast has eliminated eighty-six percent of its tariffs, while the remainder will be abolished over an eight year period.

The CCRFTA, apart from its provisions on services, investment and competition[6], relies heavily on both the North American Free Trade Agreement (NAFTA) and the text of the FTA agreed between Canada and Chile in 1997.[7] It was hoped at the time of its ratification that the agreement, especially its provisions on competition law, would act as some kind of framework for the eventual conclusion of an agreement that will establish a Free Trade Area of the Americas. It is still agreed however that the CCRFTA goes further than both the NAFTA and the Canada-Chile FTA in setting out "more liberal rules of origin for some products; and unprecedented bilateral agreements on trade facilitation".[8]

In order to ensure that the benefits of the FTA were not undermined by private barriers to trade—established perhaps through anticompetitive business conduct—the parties agreed to include provisions on competition policy and cooperation and coordination thereof in the trade agreement;[9] instead of concluding an agency-to-agency agreement, the parties decided to include their cooperation and coordination obligations in a comprehensive chapter in the FTA itself. Chapter XI states that the parties must prohibit anticompetitive behaviour in their respective jurisdiction;

[6] Both NAFTA and the CCRFTA contain provisions relating to competition. The CCRFTA however is much more detailed and contains obligations which are much broader in their scope.
[7] The Canada-Chile FTA (CCFTA) is available at: http://www.dfait-maeci.gc.ca/tna-nac/cda-chile/menu-en.asp.
[8] See Chapter 28 (Bill C-32) *"An Act to Implement the Canada-Costa Rica Free Trade Agreement and Related Agreements",* 18th December, 2001, at p. 2.
[9] See Chapter XI of the CCRFTA.

establish or maintain an independent and impartial competition authority; adhere to the principles of non-discrimination and transparency; establish or maintain fair and equitable procedures and a review and appeal process for any judicial or quasi-judicial proceeding involving competition law; and cooperate in their antitrust enforcement behaviour through *inter alia* communications, publications, notifications, consultations and exchanges of information. They are also free to conclude further competition agreements between them addressing for example cooperation arrangements or mutual legal assistance.

This paper investigates the relative effectiveness of these provisions with the aim of making recommendations to improve their success in trans-national competition enforcement and to ensure that the benefits of free trade are not eliminated or reduced through private anticompetitive action.

PART II: NEGOTIATION OF THE COOPERATION AGREEMENT

The Canadian Prime Minister Jean Chrétien and the Costa Rican President Miguel Angel Rodríguez agreed in January 2000 to explore the possibility of a Canada-Costa Rica free trade agreement. The Canadian International Trade minister, Pierre Pettigrew, launched the negotiations that would lead to the conclusion of such an FTA on June 30th 2000. Before this date the Canadian provinces and territories as well as its citizens, industry leaders and citizen's organisations had been consulted about whether a free trade area with Costa Rica was in their best interests. The results from such consultations were essentially positive and thus reinforced the Canadian government's resolve to create a free trade area between the two countries.[10] In Costa Rica too the results of the consultation between business groups and the International

[10] See the Canadian Competition Bureau's Press Release 170 of 30 June 2000 entitled "Free Trade Negotiations with Costa Rica Launched": http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?publication_id=377896& Language=E.

Trade Minister were very positive, leading the Central American country to begin the process of official trade negotiations with the Canadians.[11]

The Canadian and Costa Rican delegations were led respectively by, Claude Carrière, Director General of Trade Policy at the Department of Foreign Affairs and International Trade, and Anabel González, Vice-Minister of the Costa Rican Ministry of Foreign Trade. These delegations would conclude seven rounds of negotiations before formally agreeing on the final text of the Canada-Costa Rica Free Trade Agreement. The delegations discussed a wide variety of topics including *inter alia* market access, customs arrangements, rules of origin, dispute settlement procedures, institutional arrangements and competition policy.[12] Labour and environmental issues were also discussed and would form the basis of two further cooperation agreements between Canada and Costa Rica.[13]

A separate agency-to-agency cooperation agreement between the competition authorities of both countries was not negotiated at this stage.[14] Instead, the competition (and cooperation) provisions of the FTA would act as the principal guide for these competition authorities and they were thus much more detailed than for example those included in the Canada-Chile FTA of 1997.[15] At the outset of the negotiation it was agreed that the competition provisions in particular should establish a framework for the design, implementation and application of competition law and policy as well as for enforcement cooperation among competition agencies that could be used by other countries at both national and regional levels. Canada also had an

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[11] This information was obtained directly from the Costa Rican Competition Authorities in their answer to our questionnaire.

[12] Since NAFTA, Canada's FTA's have included provisions related to competition policy. These provisions aim 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. In relation to the CCRFTA it seems that both the Canadian and Costa Rican Government were conscious of the need for such provisions.

[13] These agreements are available at: http://www.dfait-maeci.gc.ca/tna-nac/costa_rica-en.asp.

[14] It should be noted however that the Canadian Competition Bureau did lead the Canadian delegation that negotiated the competition provisions of the CCRFTA, and thus on one side at least the competition authorities had a substantial input into competition related provisions contained in the final FTA. Through their answer to the questionnaire sent to them, officials from the Canadian Competition Bureau confirmed their belief that there is no current need for a separate agency-to-agency agreement between Canada and Costa Rica.

[15] A separate agency-to-agency agreement ('the Canada-Chile MOU') was subsequently added to this FTA in 2001. The competition provisions of the CCRFTA are very similar to the provisions of this MOU: see Part V *infra*.

eye to the eventual conclusion of an agreement on a free trade area that would encompass most if not all of the Americas and the inclusion in such an agreement of comprehensive, unambiguous competition policy obligations.[16] After nine months negotiations the competition provisions of the FTA were finally concluded in March 2001, resulting in a chapter of the free trade agreement that could serve as a framework for other countries in the "design, implementation and application of competition law and policy at the national or sub-regional level", as well as with respect to cooperation and coordination among antitrust authorities.[17]

On April 23, 2001 Prime Minister Jean Chrétien announced the conclusion of the negotiation of all aspects of the CCRFTA. The Free Trade Agreement—along with the accords on labour and environmental cooperation—was signed on this date by the International Trade Minister Pierre Pettigrew and his Costa Rican counterpart Tomás Duenas. These agreements entered into force on the 1st of November 2001.[18]

PART III: THE OBJECTIVES OF THE COOPERATION AGREEMENT

The overall objectives of the Canada-Costa Rica Free Trade Agreement (CCRFTA) are contained in both the Preamble and Chapter I of this agreement. The specific objectives of the competition provisions of the FTA are contained in Article XI.1 CCRFTA.

Objectives of the CCRFTA

The following constitute the general objectives of the Free Trade Agreement between Canada and Costa Rica:

[16] See footnote 5, *supra*.

[17] See page 1 of the Joint Submission of Canada and Costa Rica to the UNCTAD Intergovernmental Expert Group on Competition Law and Policy: http://r0.unctad.org/en/subsites/cpolicy/docs/crica-canadach11.pdf.

[18] The Agreement was enacted in Canada through the Chapter 28 (Bill C-32) *"An Act to Implement the Canada-Costa Rica Free Trade Agreement and Related Agreements"* on 18th December, 2001 and in Costa Rica through the "*Decreto No. 30879*" on the 22nd November 2002.

a. To establish a free trade area;
b. To promote regional integration through an instrument that contributes to the establishment of the Free Trade Area of the Americas (FTAA) and to the progressive elimination of barriers to trade and investment;
c. To create opportunities for economic development;
d. To eliminate barriers to trade in, and facilitate the cross-border movement of goods between the territories of the parties;
e. To increase substantially investment opportunities in the territories of the parties;
f. To facilitate trade in services and investment with a view to developing and deepening the parties' relations under the CCRFTA;
g. To promote conditions of fair competition in the free trade area;
h. To establish a framework for further bilateral, regional and multilateral cooperation to expand and enhance the benefits of the CCRFTA; and
i. To create effective procedures for the implementation and application of the CCRFTA, for its joint administration and for the resolution of disputes.[19]

The Preamble to his FTA also details in general language the goals that increased cooperation through trade agreements tries to achieve. For example: increased employment; expansion of secure markets for their goods; reduction in distortion of trade; and the harmonious development and expansion of world and regional trade to name a few.[20]

Objectives of the Competition Provisions of the FTA

Article X.1 (1) CCFTA states that the purpose of the competition provisions is to ensure that any benefits derived from trade liberalisation are not eliminated by (private) anticompetitive behaviour. Also, the provisions aim to promote "cooperation and coordination" between the competition authorities of both Canada and Costa Rica. As yet there is no specific agency-to-agency agreement between these competition authorities and thus the agreement intends to act as a guide for the relevant enforcement institutions in the execution of their enforcement activities.

[19] Article I.2 (1) CCRFTA.
[20] For the full list see of course the Preamble to the CCRFTA.

According to both Canadian and Costa Rican officials, the competition provisions and their ambitious objectives were negotiated in part to serve as a model for a competition policy framework in a Free Trade Area of the Americas agreement.[21] It also intended to serve as a framework for other countries in the "design, implementation and application of competition law and policy at the national or sub-regional level", as well as with respect to cooperation and coordination among antitrust authorities.[22]

The Preamble to this agreement also states that the parties have resolved: (a) to enhance the competitiveness of their firms in global markets; and (b) to ensure that the benefits of free trade are not undermined by anticompetitive activities.[23] These goals cannot be achieved without a comprehensive competition policy and law and thus can be included in the objectives that are specific to the competition provisions.

<u>PART IV:</u> MAIN PROVISIONS IN THE COOPERATION AGREEMENT

Chapter XII contains the agreement's general provisions relating to communication, publication, notification and provision of information.[24] Chapter XI contains the agreement's comprehensive competition provisions which include: an obligation on parties to adopt or maintain a law proscribing anti-competitive activities, including cartels, abuse of dominance and anti-competitive mergers; an obligation to establish or maintain an impartial and independent competition authority to ensure the effective application and enforcement of such laws; mechanisms to promote cooperation and coordination of investigations, such as notification, consultations and exchange of information; and a recognition of the importance of technical assistance initiatives related to competition policy.

[21] See page 1 of the Joint Submission of Canada and Costa Rica to the UNCTAD Intergovernmental Expert Group on Competition Law and Policy: http://r0.unctad.org/en/subsites/cpolicy/docs/crica-canadach11.pdf.
[22] *Ibid.*
[23] Preamble to the CCRFTA at paragraphs 12 and 13.
[24] See especially Articles XII.1, XII.2 and XII.3 CCRFTA.

Section 1: General Provisions Relating to Communication, Publication, Notification and Provision of Information

Communication

Each party must designate, within 60 days of the entry into force of the FTA, a "contact point" to facilitate communications between the parties on any matter covered by the agreement, including competition policy. The contact point assists the other party in facilitating communicating with the office or official responsible for the matter such party wishes to discuss.[25]

Publication

The parties must also ensure that its "laws, regulations, procedures and administrative rulings of general application respecting any matter covered by [the FTA]" are promptly published or made available to interested parties, including the other party to the FTA.[26] There are further obligations on the parties to: (a) publish in advance any such measure that it proposes to adopt; and (b) provide interested persons and the other party a reasonable opportunity to comment on such proposed measures.[27]

Notification and Provision of Information

In relation to notification, each party must notify the other of any "actual or proposed" measure that may materially affect the operation of the FTA or that may "substantially affect" the other party's interests under the agreement.[28] There is also an obligation on the parties to promptly provide information and to respond to questions relating to actual or proposed measures when requested to do so by a party to the agreement, even if such measures have not been notified to that party.[29]

Section 2: The Competition Provisions

[25] Article XII.1 CCRFTA.
[26] Article XII.2 (1) CCRFTA.
[27] Article XII.2 (2) CCRFTA.
[28] Article XII.3 (1) CCRFTA. Such a measure must be notified irrespective of whether or not it violates the CCRFTA: Article XII.3 (3) CCRFTA.
[29] Article XII.3 (2) CCRFTA.

The competition provisions of Article XI CCRFTA deal with the following areas: general principles;[30] cooperation;[31] confidentiality;[32] technical assistance;[33] consultations[34] and definitions.[35]

General Principles

The primary obligations of the parties as far as competition law and policy is concerned are:

(1) to adopt or maintain measures to proscribe anticompetitive activities; and

(2) to take appropriate enforcement action pursuant to those measures.

These measures and the action taken to enforce them in the respective jurisdictions of Canada and Costa Rica enhance the fulfilment of the objectives of the agreement, as detailed above.[36] The principle of non-discrimination applies to the implementation of both these obligations.[37]

The agreement lists the following as examples of anticompetitive activities:

(i) 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; and

(ii) anticompetitive practices by an enterprise or group of enterprises that has market power in a relevant market or group of markets; and

(iii) mergers or acquisitions with substantial anticompetitive effects.[38]

[30] Article XI.2 CCRFTA.
[31] Article XI.3 CCRFTA.
[32] Article XI.4 CCRFTA.
[33] Article XI.5 CCRFTA.
[34] Article XI.6 CCRFTA.
[35] Article XI.7 CCRFTA.
[36] Article XI.2 (1) CCRFTA.
[37] Article XI.2 (2) CCRFTA.
[38] Article XI.2 (3) CCRFTA. These anticompetitive activities should be prohibited under Canadian and Costa Rican law unless such activities are "*excluded*, directly or indirectly, from the coverage of a Party's own laws or *authorized* in accordance with those laws": *ibid* (emphasis added). Further, such exclusions or authorisations must be both transparent and necessary to achieve their policy objectives: *ibid*.

Additional provision for publication and notification of such measures is provided in this article: all measures whether newly adopted or simply maintained should be published and be made publicly available;[39] any modifications should be notified to the other party within 60 days.[40]

This agreement also obliges each party to establish or maintain an independent and impartial competition authority authorized to advocate pro-competitive solutions in the "design, development and implementation of government policy and legislation."[41] Further, any judicial or quasi-judicial proceedings that address anticompetitive activities should be "fair and equitable"[42] and that an independent domestic judicial or quasi-judicial appeal or review process be made available to persons subject to any final decision arising out of these proceedings.[43]

Cooperation

According to the FTA cooperation may include the following (important) activities: notification, consultation and the exchange of information.[44]

Each party must notify[45] the other of any enforcement actions that it intends to take that may affect that party's "important interests."[46] Further, the enforcing party must give "full and sympathetic consideration" to the possibility of enforcement actions that achieve their policy objective yet do not harm the important interests of the other party.[47]

Enforcement action that will be notified under the agreement may include those that:

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[39] Article XI.2 (4) (a) CCRFTA.
[40] Article XI.2 (4) (b) CCRFTA.
[41] Article XI.2 (5) CCRFTA.
[42] Article XI.2 (6) CCRFTA. This article also states that each party must ensure that any person directly affected by such proceedings: (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.
[43] Article XI.2 (7) CCRFTA.
[44] Article XI.3 (1) CCRFTA.
[45] This obligation allows for two exceptions: (i) where notification would violate the confidentiality laws of the notifying country; and (ii) where notification would be harmful to the notifying country's "important interests": Article XI.3 (2) CCRFTA.
[46] Article XI.3 (2) CCRFTA.
[47] *Ibid.*

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.[48]

Notifications should be given as soon as the competition authorities of the enforcing country become aware that notifying circumstances are present.[49]

The parties are aware that the objectives of the FTA may be furthered by the conclusion of additional cooperation and mutual legal assistance agreements and thus are allowed to enter into either or both of these arrangements provided that such agreements do not violate their respective laws.[50]

Confidentiality and the Exchange of Information

The competition provisions are subject to the confidentiality laws of each of the parties to the agreement; nothing in the FTA requires the exchange of information either by a party or its competition authority contrary to these laws.[51] When information is exchanged between the parties, the receiving party must maintain its

[48] Article XI.3 (3) CCRFTA.
[49] Article XI.3 (4) CCRFTA.
[50] Article XI.3 (5) CCRFTA.
[51] Article XI.4 CCRFTA.

confidentiality and shall only use such information for the purpose for which it was communicated.[52]

Technical Assistance

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.[53] This form of cooperation will help achieve the objectives of the competition provisions as detailed in Article XI.1 CCRFTA.[54]

Consultations

The parties agreed that they should meet at least once every two years or pursuant to Article XIII.4 CCRFTA[55] on the written request of a party to consider matters regarding the "operation, implementation, application or interpretation" of the competition provisions and to review the parties' efforts to proscribe anticompetitive activities and the effectiveness of their enforcement actions.[56] Each party designates 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."[57] If after such a process the parties have not resolved the matter forming the substance of the written request in a mutually satisfactory manner, they can refer the issue to the Free Trade Commission[58] for consideration under Article XIII.1.2(c).[59] This is the only time that any matter involving the competition provisions of this FTA will be resolved through dispute resolution procedures or arbitration.[60]

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[52] *Ibid.*

[53] Article XI.5 CCRFTA.

[54] *Ibid.* The following point however must be noted: "Technical assistance is a different concept from cooperation. Technical assistance refers to the provision of advice to countries without competition laws, those in the process of drafting or implementing them, or those seeking to enhance their institutional capacity. Cooperation endeavours to handle issues of common interest arising from the enforcement of those laws." Communication from Canada to the WTO Working Group on the Interaction between Trade and Competition Policy, WT/WGTCP/W/155, (19 December 2000) at p. 1.

[55] This article states that the parties "shall at all times endeavour to agree on the interpretation and application of [the CCRFTA] and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation."

[56] Article XI.6 (1) CCRFTA.

[57] *Ibid.*

[58] This body comprises cabinet-level representatives of the parties or their designees: Article XIII.1 (1) CCRFTA.

[59] This provision allows for the Free Trade Commission to consider "any other matter" that may affect the operation of the agreement.

[60] Article XI.2 (3) CCRFTA.

Definitions and Scope

The following terms are defined in Article XI.7 CCRFTA and restrict accordingly the scope of application of the competition provisions contained within that article:

(a) “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 Defence 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 Chapter XI CCRFTA;

(b) “competition authority(ies)” means:

i. for Canada, the Commissioner of Competition.
ii. 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;

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

(d) “measures” means laws, regulations, procedures, practices or administrative rulings of general application.

PART V: COMPARISON TO, AND RELATIVE CONTRIBUTION OF, MORE RIGOROUS COOPERATION ARRANGEMENTS, OR SIMPLER INFORMAL COOPERATION ARRANGEMENTS

The competition provisions of the Canada-Costa Rica FTA of November 2001 follow a long line of similar bilateral (and sometimes trilateral) agreements concluded between countries wishing to cooperate in trans-national competition law enforcement. In fact, since the first OECD Recommendation in 1967[61] over twenty cooperation agreements[62] have been signed between countries as diverse as Iceland, Australia, Chile and even Papua New Guinea.[63] These agreements invariably aim (a) to promote cooperation and coordination between the parties; (b) to reduce the possibility and or impact of differences in the parties' competition law and policy; and (c) more recently, to protect free trade areas from the effects of anticompetitive activities. The Canada-Costa Rica agreement is no different: as Article XI.1 of the FTA makes clear, the parties have concluded such an arrangement "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".[64]

Although the cooperation arrangement between Canada and Costa Rica was agreed as part of an FTA between these two jurisdictions, it is submitted that in substance it resembles very closely the kind of specialised agreement envisaged by the OECD Recommendation. In fact, the mechanism bears a striking resemblance to the competition cooperation 'Memorandum of Understanding' established between Canada and Chile, which was negotiated at a similar time and entered into force a month after the Canada-Costa Rica FTA. Further, since the signing of the North American Free Trade Agreement between the US, Canada and Mexico the inclusion of competition provisions within FTAs has become the norm, at least for the Canadian authorities. It is for these reasons that the authors wish to highlight in this short

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[61] This was a rather vague yet useful document that attempted to establish norms of cooperation in international antitrust enforcement. Its recommendations were voluntary. It has been modified on various occasions, most recently in 1995: Recommendation of the Council of 27th and 28th July of 1995 [C (95) 130 (Final)].

[62] These agreements are agreements specific to competition cooperation. They do not include competition cooperation provisions contained within FTAs. They include 'state-to-state' as well as 'agency-to-agency' cooperation agreements. As state-to-state agreements are concluded between governments as opposed to competition authorities, it is axiomatic that they may sometimes reflect governmental priorities, policies and interests that are not usually expressed in pure agency-to-agency arrangements. The Canada-Chile MOU is an agency-to-agency agreement.

[63] Free trade agreements have also incorporated detailed competition provisions similar to those included in specific cooperation agreements e.g. Annex XV to the EU-Mexico FTA. The Canada-Costa Rica competition cooperation mechanism is of course contained in the free trade agreement.

[64] Article XI.1 of the CCRFTA.

section the substantial contribution of both the OECD Recommendation and the NAFTA in general and the US-Canada and EU-US Agreements[65] and the Canada-Chile MOU in particular to the composition of the antitrust cooperation arrangement between Canada and Costa Rica.

The OECD Recommendation

As stated above the OECD adopted its first Recommendation in 1967.[66] Since then it has been modified four times: in 1973,[67] 1979,[68] 1986[69] and 1995.[70] At its most basic the Recommendation acknowledges that competition law enforcement cooperation between countries must be encouraged but that such cooperation must not be construed so as to affect or undermine any country's idea of sovereignty or in particular any country's use of extraterritoriality with respect to competition law.[71] Significantly, the type of agreement envisaged under the Recommendation does not have any bearing or direct effect on competition law harmonization. Instead, a mutual understanding or rather a nonbinding guide for conflict avoidance seems to be contemplated. According to the latest Recommendation, cooperation may take the following forms:

1. The notification of the competition authorities of the other party when the "important interests" of that party's country may be affected by enforcement (or other) activity taken within the notifying jurisdiction;[72]
2. The coordination of parallel investigations where "appropriate and practicable";[73]
3. The sharing of information in order to permit the party whose important interests are affected to comment to, and consult with, the notifying party;[74]

[65] In fact there are two EU-US Agreements: one signed in 1991 and the other in 1998: Agreement between the Government of the USA and the Commission of the European Communities Regarding the Application of their Competition Laws, 23 Sept. 1991, [1991] 4 CMLR 823, 30 ILM 1487 and The EU-US Positive Comity Agreement, 4th June 1998, [1998] OJ L173/28, [1999] 4 CMLR 502. For our purposes the 1991 Agreement is pertinent, unless otherwise stated.
[66] Recommendation of the Council concerning cooperation between member countries on restrictive business practices affecting international trade of 5 October 1967 [C (567)53(Final)].
[67] Recommendation of the Council of 3rd July 1973 [C (73) 99 (Final)].
[68] Recommendation of the Council of 25th September 1979 [C (79) 154 (Final)].
[69] Recommendation of the Council of 21st May of 1986[C (86) 44 (Final)].
[70] Recommendation of the Council of 27th and 28th July of 1995 [C (95) 130 (Final)].
[71] See the Preamble to the 1995 Recommendation at recital 11.
[72] 1995 Recommendation at Article I. A. 1.
[73] *Ibid* at Article I. A. 2.
[74] *Ibid* at Article I.A. 1.

4. Consultations aimed at developing or applying "mutually satisfactory and beneficial measures" for dealing with anticompetitive practices that affect international trade;[75]
5. The supply of relevant information on anticompetitive activity in order to further the objective of point 4 above, subject of course to confidentiality laws and the restrictions imposed by their respective interests;[76]
6. The use of the principle of "negative comity" when the interests of another party are affected by enforcement activity;[77] and
7. The use of "positive comity".[78]

Number 7 above was added by the 1973 Recommendation. It is perhaps the most progressive element of the Recommendation and has been included in many bilateral cooperation agreements. Essentially it allows one party, whose interests are affected by anticompetitive activity occurring in whole or in part within the territory of the other party, to request that party to take enforcement action against such anticompetitive behaviour. It is the one major aspect of the OECD Recommendation that was not explicitly contained in the competition chapter of the Canada-Costa Rica FTA.

The proposals of the OECD were left deliberately vague: they can thus be adapted to suit the various purposes or needs of the contracting parties. However, the basic elements (notifications, exchange of information, consultations, coordination, and negative comity etc.) find expression in most if not all of the twenty plus competition cooperation agreements mentioned above, including the Canada-Costa Rica agreement.[79] The OECD was the frontrunner in encouraging jurisdictions to conclude these kinds of arrangements in competition matters and as a result its influence on the Canada-Costa Rica FTA should not be forgotten. It should also be noted however that the hortatory nature of the OECD Recommendation has also informed the philosophy

[75] *Ibid* at Article I. A. 3.
[76] *Ibid.*
[77] *Ibid* at Recital 7 of the Preamble.
[78] *Ibid* at Article I.B.5.a) and Article I.B.5.c).
[79] Strictly speaking the Canada-Costa Rica arrangement is not part of this group of agreements *specific* to competition cooperation i.e. the Canada-Costa Rica arrangement forms part of a larger free trade agreement. Despite this fact, it is submitted that the difference is one of form and not substance: the provisions of the competition chapter of the CCRFTA is as detailed if not more detailed than most of these specialised agreements.

behind the Canadian-Costa Rican approach: the chapter does not affect domestic law in any way; current law and practice relating to the exchange of information remains unchanged; and the obligations established are essentially non-binding. In effect, the Recommendation envisages an agreement that utilises a form of 'soft' law. As will become apparent in the next section[80] this is exactly the form of law dictating the operation of the Canadian-Costa Rican approach.

NAFTA

The NAFTA agreement of 1994 established a free trade area between Canada, the US and Mexico. In order to prevent the benefits of such a free trade area from being eliminated through (private) anticompetitive behaviour the agreement included a chapter on competition policy: Chapter 15. The CCRFTA contains a competition chapter whose substance was influenced to a degree by Chapter 15 of the NAFTA. In fact all FTAs entered into by Canada since the NAFTA have included a somewhat similar competition chapter.[81] In brief these competition chapters include the following obligations which are also contained in Chapter 15 of the NAFTA:

- The obligation to adopt or maintain measures to proscribe anti-competitive business conduct;
- The obligation to take appropriate action to enforce such measures; and
- The obligation to consult from time to time about the effectiveness of such action.[82]

Further, both the NAFTA and the CCRFTA recognise the importance of cooperation and coordination, advocating their implementation through mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.[83] Finally, the competition provisions of the NAFTA and the CCRFTA are not subject to dispute settlement procedures.[84]

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[80] Part VI *infra*.

[81] For example: Chapter 7 of the Free Trade Agreement between the Government of Canada and the Government of the State of Israel available at http://www.dfait-maeci.gc.ca/tna-nac/cifta-en.asp; and Chapter J of the Canada-Chile Free Trade Agreement available at http://www.dfait-maeci.gc.ca/tna-nac/bilateral-en.asp.

[82] See Article 1501.1 of the NAFTA and Article XI.2 (1) of the CCRFTA.

[83] See Article 1501.2 of the NAFTA and Articles XI.3 and XI.6 of the CCRFTA.

[84] See Article 1501.3 of the NAFTA and Article XI.2 (3) of the CCRFTA.

The US-Canada[85] and the EU-US Cooperation Agreement[86]

The provisions of the competition chapter of the Canada-Costa Rica FTA are very similar in detail to those contained in the various competition cooperation agreements concluded between the US and Canada (in 1984 and 1995) and the EU and the US (in 1991).[87] Although other bilateral cooperation agreements were in existence before 2001 and thus may have had some impact upon the composition of the cooperation arrangement between Canada and Chile it is submitted that due to *inter alia* (a) the importance of both the EU, the US and Canada for international trade; (b) the detailed nature of the 1991 and 1995 agreements; (c) the fact that the agreements have served their purpose relatively well over the previous ten to fifteen years; and (d) the fact that the OECD Recommendation was a rather vague document containing broad suggestions, the authorities of both Canada and Chile would have been influenced by both the 1991 EU-US Cooperation Agreement and the 1995 US-Canada agreement when drafting a similar arrangement that would be applied to their own situation.[88] The following similarities can be detected:

Notifications: The three agreements require parties to notify the other side of any enforcement activity that may affect their "important interests".[89] Prior to 1991 cooperation agreements that contained this provision did not specify what these interests might include. The EU-US Agreement changed this. Article II.2 of the agreement provided a list of enforcement activities that would be appropriate for notifications. The Canada-Costa Rica FTA, like the US-Canada agreement, follows

[85] See: Memorandum of Understanding between the Government of the United States of America and the Government of Canada as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, March 9, 1984, United States-Canada, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,503A. The US and Canada also entered into a cooperation agreement in 1995, available at: http:// cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02007e.html.

[86] Agreement between the Government of the USA and the Commission of the European Communities Regarding the Application of their Competition Laws, 23 Sept. 1991, [1991] 4 CMLR 823, 30 ILM 1487.

[87] It should be noted that these agreements are 'state-to-state' agreements specific to competition enforcement cooperation between the respective antitrust/competition law authorities.

[88] It should be noted however that the 1991 and 1995 agreements were also influenced by earlier arrangements e.g. the 1984 US-Canada MOU, *op. cit.* From now on the 'US-Canada Cooperation Agreement' refers to the 1995 agreement unless otherwise stated.

[89] At Article II.1 of the EU-US Cooperation Agreement ('EU-US'); Article II.1 of the US-Canada Cooperation Agreement ('US-Canada'); and Article XI.3 (2) CCRFTA.

the EU-US example and details those situations which are suitable for notification; all five of its examples are taken from the EU-US Agreement.[90]

Exchange of Information: What is important with these three agreements is not what information they *allow* for, but rather what information they *do not permit* to be exchanged. In this respect the agreements are identical: (a) no information will be exchanged pursuant to the agreement which could not have been exchanged in its absence; (b) information cannot be exchanged which would be contrary to the confidentiality laws of the parties; and (c) the exchange of information which would be contrary to the interests of the party in possession of the information is prohibited.[91] Further, any confidential information received must remain confidential and the receiving party must oppose its disclosure to unauthorised third parties.[92]

Coordination: The three documents allow the parties involved to coordinate their enforcement activities when it is both practicable and appropriate.[93]

Consultations: The EU-US Agreement states that the parties agree to consult promptly with one another upon request: Article VII. Article VIII of the US-Canada agreement contains a similar obligation. The Canada-Chile MOU contains a similar obligation in Article XI.6: officials of the parties should consult at least once every two years or upon the written request of a party.

Negative/Traditional Comity: Negative comity[94] is a doctrine of politeness and good manners between states; it involves the consideration and balancing of numerous factors by one state before deciding to take enforcement or judicial action. The importance of this concept has been reduced somewhat by the jurisprudence of US courts: essentially it is applied only in very exceptional circumstances i.e. in the case

[90] Compare Article II.2 EU-US with Article XI.3 (3) CCRFTA.
[91] Article VIII.1 EU-US; Artilce X.1 and XI US-Canada; Article XI.4 CCRTFA.
[92] Article VIII.1 EU-US; Article X.2 US-Canada; Article XI.4 CCRFTA.
[93] Article IV EU-US; Article IV US-Canada; Article XI.3 (1) CCRFTA.
[94] The concept of positive comity, included in Article V of the EU-US agreement and in Article V of the US-Canada agreement (and also forming the substance of a later EU-US agreement), is not included in the Canada-Costa Rica FTA.

of a “true conflict”[95] between jurisdictions.[96] Despite this jurisprudence the EU-US Agreement provides a list of factors to be considered when applying the comity principle.[97] Article XI.3 (2) of the CCRFTA provides for the concept of negative comity: an enforcing party is to “give full and sympathetic consideration to possible ways of fulfilling its enforcement needs” without harming the other party’s interests in the application of its competition law.[98] However, unlike with both the EU-US and the US-Canada agreements, a list of factors to be considered when avoiding conflicts (through the use of the concept of negative comity) is not provided in the CCRFTA.

Domestic Law: Both the EU-US and US-Canada agreement state that domestic law is not to be affected in any way by the operation of their provisions.[99] The Canada-Costa Rica FTA expressly restates the prohibition of the exchange of information between parties which is contrary to their laws.[100]

The Canada-Chile MOU

The competition chapter of the Canada-Costa Rica FTA is also very similar in detail to the provisions of the Canada-Chile MOU, signed in the same year, 2001. The Canada-Costa Rica FTA however contains provisions that in some respects impose obligations that go further than the obligations imposed by the competition provisions of either the Canada-Chile FTA or the Canada-Chile MOU. For example Chapter XI of the Canada-Costa Rica FTA contains provisions creating the following obligations that are not expressly included in either of the documents relating to Chile:

- The obligation to establish or maintain an independent and impartial competition authority authorized to advocate pro-competitive solutions in the

[95] This is when full compliance with the laws of both jurisdictions is impossible or if the foreign law requires conduct contrary to the Sherman Act. See the following cases: *Timberlane Lumber Co. v. Bank of America,* 549 F. 2d 597 (9th Circuit, 1976); *Hartford Fire Insurance Co. v. California,* 509 US 764, 113 S. Ct. 2891 (1993).
[96] A distinction can be made however between ‘judicial comity’ (the use of comity to determine whether extraterritorial jurisdiction can be asserted in order to enforce the antitrust laws) and ‘agency-to-agency comity’ (the use of comity by the antitrust agencies both in its dealings with other agencies and in determining the appropriate enforcement action to be taken in the case of a violation of the antitrust laws). In the former case comity is only used in the context of a ‘true conflict’ between jurisdictions. However its application between antitrust agencies may be much more extensive.
[97] Article VI.3 of the EU-US Agreement. Article VI.5 US-Canada provides a similar list.
[98] Article XI.3 (2) CCRFTA.
[99] Article IX EU-US; Article XI US-Canada.
[100] Article XI.4 of the CCRFTA.

"design, development and implementation of government policy and legislation";[101]

- The obligation to adhere to the principle of non-discrimination in relation to the implementation of the objectives of the competition chapter;[102] and
- The obligation to work together in technical assistance initiatives related to competition policy, measures to proscribe anticompetitive activities and enforcement actions. [103]

Cooperation Agreements that Provide for the Exchange of Confidential Information

Like almost all competition enforcement cooperation arrangements established to date the effectiveness of the Canada-Costa Rica cooperation framework is undermined by the fact that (a) the competition provisions of the CCRFTA do not have any impact on the confidentiality laws of the parties; and (b) the exchange of confidential information is extremely limited under the national laws of the parties.

However, these observations do not apply to the more proactive agreements that have been concluded between different trade partners: there *are* two agreements that expressly provide for the exchange of confidential information between competition authorities, although both are subject to a commitment that they will use the confidential information only for the purposes stipulated in the agreement: the bilateral agreement established between the US and Australia[104] and the trilateral agreement established between Iceland, Norway and Denmark.[105] All five parties to the above agreements had already passed national legislation allowing for the exchange of confidential information before negotiating their agreements.

As should be obvious from the above, the OECD Recommendation, the NAFTA, the EU-US and US-Canada Cooperation Agreements and perhaps the Canada-Chile MOU

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[101] Article XI.2 (5) CCRFTA.
[102] Article XI.2 (2) CCRFTA.
[103] Article XI.5 CCRFTA.
[104] Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, available at www.apeccp.org.tw /doc/USA/Cooperation/usaus7.htm.
[105] Agreement between Denmark, Iceland and Norway on Co-operation in Competition Cases: www.globalcompetitionforum.org/regions/europe/Denmark/Agreemen1.pdf.

have had a substantial effect on the composition of the competition chapter of the Canada-Costa Rica FTA: not only has its philosophy followed that of the former documents but its provisions are strikingly similar to those recommended by the OECD and those contained in the EU-US and US-Canada agreements and the Canada-Chile MOU, although in some respects the CCRFTA goes further. At their most basic, the EU-US and US-Canada Cooperation Agreements, the MOU and the competition chapter of the CCRFTA strive to avoid conflict in the application of different competition laws by encouraging cooperation in its many forms and in particular by allowing their authorities to share any information not prohibited by their laws. Of course due to the soft law nature of the obligations and the absence of any dispute settlement procedures the success of all these agreements depends to a very high degree on the goodwill of the parties involved, a point that is highlighted in the section that follows.

PART VI: A SUBSTANTIVE ANALYSIS OF BOTH THE PRACTICAL USES AND THE LIMITATIONS OF THE COOPERATION ARRANGEMENT

Before any substantive analysis of the cooperation framework at issue is undertaken it must first be noted that as the free trade agreement between Canada and Costa Rica is a document of very recent origin it may be too early as of yet to measure the real extent of any benefits or limitations of its relatively detailed and progressive provisions. With that caveat established, the following two sections will detail respectively with both the perceived benefits (Section 1) and limitations (Section 2) of the competition enforcement cooperation arrangement developed between these countries as a result of their free trade agreement.

Section 1: The Perceived Benefits of the Cooperation Arrangement

The philosophy behind the inclusion of competition provisions in free trade agreements should indicate to a high degree the need for trans-national competition enforcement cooperation. National competition law aims *inter alia* to prevent the elimination of the benefits of trade liberalisation by private anticompetitive conduct; the inclusion of competition provisions in FTAs recognises and highlights its importance in this regard. Cooperation between the antitrust agencies of the countries forming a free trade area is seen as vital in order to ensure that one country's antitrust policy (or lack thereof) does not undermine the advantages of the free trade arrangement for the other parties involved. In short, competition law and competition law enforcement cooperation is believed to play an important role in the fulfilment of the objectives of an FTA. The question that has to be asked, and the issue that is under discussion in this section of the paper, is to what extent do the provisions of the Canada-Costa Rica Free Trade Agreement discharge their duties in this respect. In other words, to what extent have the competition cooperation provisions of the CCRFTA succeeded in (1) helping to lead to increased effective cooperation and coordination of competition enforcement between the competition agencies of Canada and Costa Rica; (2) providing an effective mechanism should the need for such cooperation and coordination arise; and (3) ensuring that anticompetitive business practices do not undermine the benefits of trade liberalisation.

The Canada-Costa Rica FTA established a relatively comprehensive framework for both cooperation and coordination in relation to antitrust enforcement activity. Chapter XI CCRFTA provides for the practical implementation of such cooperation and coordination through notifications, consultations and the exchange of (non-confidential) information.[106] This chapter expressly states that other cooperation and mutual legal assistance agreements may be concluded by the parties. No such specific cooperation agreements have yet been concluded between Canada and Costa Rica: their free trade agreement comprises the totality of their competition enforcement cooperation framework.

In broad terms Chapter XI has introduced a working relationship between the respective antitrust agencies of Canada and Costa Rica, allowing both these agencies

[106] Article XI.3 (1) CCRFTA.

the opportunity to benefit from an increased awareness of each other's existence and importance.[107] Although to date there has been little or no cooperation on specific cases, the agreement has put in place a mechanism that can be used by the parties to address any future anticompetitive behaviour that may impact on the important interests of either party in this free trade area. It is not suggested that the signing of the FTA will *inevitably*[108] increase interaction between these agencies[109] only that should contact become necessary a framework is now in place that can direct and improve such interaction. It is hoped, nevertheless, that this mechanism will lead to an increased focus on the significance[110] of effective cooperation between the competition enforcement agencies of both Canada and Costa Rica—at least when the important interests of one or more of the parties is at issue—helping to promote a culture of cooperation and perhaps more contact between the agencies involved. It is helpful to note in this regard that the competition provisions of the CCRFTA are general in nature and could relate to *any* competition issue impacting on important competition law and policy interests of both jurisdictions. Thus potential for cooperation is great. Further, it is expected that any future communication or cooperation will lead to a deeper understanding of each other's regime, developing in the process mutual trust and confidence between the agencies involved. It was also confirmed however by a variety of trade officials that such trust and confidence is also developed by the informal meetings of competition officials at various multilateral fora such as the Organisation for Economic Cooperation and Development (OECD) or the International Competition Network (ICN).[111]

[107] It appears from comments of officials involved in competition enforcement in the free trade area that prior to the signing of the CCRFTA in 2001 there was very little interaction between the Costa Rican and Canadian competition authorities.

[108] Notifications for example will increase interaction between the agencies if certain conditions are satisfied e.g. that the important interests of the party to be notified are affected by (prospective) enforcement action. The competition provisions of the FTA do not ensure the inevitability of the existence of such circumstances.

[109] Some officials have opined that communications between agencies are "very likely" to be more frequent than they would have been absent the FTA provisions. However, given the figures for cooperation between both countries since 2001 such an opinion has yet to be conclusively validated.

[110] One competition official commented that the inclusion of cooperation principles in an FTA provides an important government-to-government policy statement (i.e. that competition agencies should or will cooperate with one another).

[111] A fact that arguably undermines somewhat the need for formal written arrangements. It could also be argued however that cooperation agreements provide a framework for officials with respect to how they should conduct such informal meetings. In fact, at least one competition official admitted that cooperation agreements function best when approached in an informal manner.

The provisions dealing with notifications are particularly important for a number of reasons. Notification of imminent enforcement action can act as an early warning of anticompetitive activities, perhaps bringing the existence of such activities to the notified competition agency for the first time. This early warning provides the authorities with an opportunity to react to anticompetitive activities that it may not have had otherwise. Notification of course also helps to establish and develop channels of communication between competition agencies. Finally, the fact that cooperation agreements contain provision for notifications sends a clear signal to undertakings that competition authorities are both willing and able to communicate and thus that national borders can no longer be relied upon as protection against enforcement activities. Consultations between antitrust agencies are also important, presenting as they do the opportunity for one agency to offer its support, advice and experience to its foreign counterpart. Information exchange, even if it only concerns non-confidential information, is also important for the same reasons.

Despite the potential for the cooperation agreement in theory, the practice has been somewhat less enthusiastic. First, there have been no notifications made under the agreement. It is conceded however that this is probably due to the fact that notifiable cases, as defined by the agreement, have not arisen rather than an omission by the parties. Second, there have been at the most two requests for cooperation made under the FTA. There has been disagreement on the number of requests, perhaps due to differences in the definition of "request for cooperation" between the two agencies involved: officials of one agency stated that there had been no requests for cooperation while the other believed that both agencies had made and received one request for cooperation each. Regardless, to date cooperation has been minimal. Nonetheless, both parties do believe that it is in their common interest to work together on technical assistance initiatives that benefit competition policy and enforcement action. In fact, the parties are currently planning a technical assistance cooperation project between the agencies pending the support of the World Bank. Moreover, both parties are currently in the process of establishing contacts in the enforcement agencies to consult on future case related and non-case related topics (e.g. FTAA issues) impacting both jurisdictions. Finally, no requests for positive

comity have been made.[112] As a result of the above 'statistics', it is submitted that the agreement has the potential for effective cooperation and coordination of enforcement activity, but has yet to display this conclusively.

When discussing the perceived benefits of the cooperation agreement a final issue is whether the instrument used, i.e. a chapter of an FTA, was the most effective one for their purposes. At issue here is whether a *chapter of an FTA* that contains usually generally worded obligations in relation to competition law enforcement cooperation (which may or may not be subject to dispute settlement procedures) is any more or less effective than a specific *agency-to-agency* competition cooperation agreement concluded between the antitrust agencies themselves which contains detailed commitments not subject to dispute settlement.

To answer this question the following thesis from the study's terms of reference has to be considered:

> The fundamental question that all the case studies in this work package will be asking is: what value-added do formal cooperation agreements have over and above the natural evolution of inter-agency cooperation?
>
> The core question can be expressed in terms of comparing two hypotheses:
>
> 1. Competition arrangements in bilateral trade arrangements do not create significant value added over and above the spontaneous co-operation that evolves between competition agencies, and that agreements initiated and negotiated directly by competition agencies are likely to be more effective, especially in terms of achieving the objectives of the agencies.
> 2. Alternatively, that because international competition cooperation is likely to involve trade, there is value added in putting competition cooperation agreements into trade agreements and that this is likely to assist the evolution of natural cooperation including follow-on inter agency agreements.

We find that the Canada-Costa Rica Free Trade Agreement has been as useful and effective as enforcement cooperation provisions that could have been included in an agency-to-agency agreement[113] between the competition authorities of Canada and Costa Rica at this stage of their relationship. There is *very little difference in substance* between the cooperation framework established by Chapter XI CCRFTA

[112] Although the agreement does not expressly provide for positive comity, it does not prevent such requests from being made.
[113] Or indeed a state-to-state agreement dealing only with competition law enforcement cooperation.

and that established by for example the EU-US Cooperation Agreement[114] or the Canada-Chile MOU[115]: the competition chapter of the CCRFTA establishes a framework that seeks to avoid conflict and improve cooperation by creating soft law, non-binding obligations in relation to notification, consultation, exchange of (non-confidential) information and the provision of technical assistance. In fact, the competition chapter of the CCRFTA is considered sufficient by both the Canadian and Costa Rican authorities and there are no plans for the conclusion of any agency-to-agency agreements between their respective competition authorities in the future. It is submitted here that as such an agreement is highly unlikely to include provision for the exchange of *confidential* information there is currently no need for an agency-to-agency cooperation agreement to be concluded between the antitrust authorities of Canada and Costa Rica.

<u>Section 2:</u> Limitations on the Scope of the Cooperation Agreements

Limitations on the actual *scope* of the provisions of the competition chapter of the Canada-Costa Rica Free Trade Agreement have been detailed in the section of this paper that deals specifically with the content of this agreement.[116] In this section, the authors wish to consider the *institutional* and *operational* limitations of these provisions, paying particular attention to the cooperation framework they attempt to establish.

Chapter XI of the CCRFTA creates obligations for the parties in relation to competition law and cooperation. As detailed above, this chapter obliges the parties to adopt or maintain measures that aim to prevent or eliminate anticompetitive conduct; to take enforcement action with respect to such measures; and to cooperate with one another in competition matters through notifications, consultations and information exchange. Provision is also made for technical assistance. It has already

[114] With the exception of course of positive comity, a concept whose use has not been prohibited by the CCRFTA.
[115] In fact, in comparison to both cases, the CCRFTA goes further: there are express obligations to for example: (1) establish and maintain an independent, impartial competition authority; and (2) use the principle of non-discrimination in all competition enforcement activities.
[116] *Viz.* Part V *supra.*

been stated that these 'obligations' are not exactly commitments of the 'hard law' variety: they are characterised more accurately as 'soft law' obligations. Hard law obligations can be identified by the following three characteristics:

(a) they are legally binding;
(b) they are relatively precise (or are capable of being made precise by adjudication or regulation); and
(c) they delegate legal authority to interpret and implement their scope and substance.[117]

'Soft law' by contrast is the term used to refer to obligations that lack one or more of these elements; it is a term used to describe legal provisions that are weakened by an absence of sanctions, precision, or delegation of authority.[118] The obligations created by the competition chapter of the CCRFTA are soft law obligations as they are not legally binding on the parties: the parties suffer no sanctions for refusal to comply with the provisions of this chapter; the parties cannot have recourse to the dispute settlement procedures of the FTA for an alleged breach of any of the competition provisions.[119]

It could be argued that the absence of sanctions and dispute resolution procedures deprives the competition provisions and the cooperation framework of its effectiveness, as parties are free to decide whether or not to comply with their obligations or not.[120] On the other hand, it can also be argued that cooperation agreements with nonbinding obligations allow parties the flexibility and autonomy to delineate their own competition policy—within very broad core principles such as non-discrimination and transparency— while at the same time existing as guides to help the parties to cooperate when appropriate. Further, as has been opined by some officials, the use of dispute settlement mechanisms in the case of trans-national competition enforcement cooperation could undermine this discretion of national

[117] See: K.Abbott, R. Keohane, A. Moravcsik and A-M Slaughter, "The Concept of Legalisation" 54:3 International Organisation, (2000), 401.
[118] *Ibid* at 422.
[119] See the very limited exception of Article XI.6 (2) CCRFTA. In such a case the parties may use the Free Trade Commission to help resolve their dispute in a mutually satisfactory manner. In such a case however they do not use the formal dispute resolution procedures of the CCRFTA.
[120] Of course the imposition of formal legal sanctions is not the only way to discipline a non-complying party: informal sanctions might take the form of a refusal to cooperate in the future. In other words, a non-complying party might find that his actions have put in motion a process of tit-for-tat non-cooperation in which the non-compliance of his counterpart acts as an informal punishment for his previous behaviour.

competition authorities, with the potential creation of mutual resentment between agencies, and a souring of their working relationship. It is submitted here that the nonbinding nature of the provisions is not a major problem. In fact, it may be a necessary condition for the acceptance and thus the conclusion of cooperation agreements in the first place as well as for the development of trust and confidence between the competition agencies of the parties.

Problems associated with discretion and the concept of soft law obligations are not the only perceived limitations of the cooperation arrangement between Canada and Costa Rica: ensuring the confidentiality of business information imposes limitations on enforcement cooperation. Like almost all cooperation agreements, Chapter XI of the CCRFTA recognises concerns about the exchange of confidential information: its provisions are subject to the confidentiality laws of each of the parties to the agreement; nothing in this chapter requires the exchange of information either by a party or its competition authority contrary to these laws.[121] As a result the FTA does not require any information exchange that would otherwise—in the absence of such an agreement—be inaccessible.

The 'confidentiality clauses' of Articles XI.4 and XIV.5 CCRFTA highlight the traditional conflict between the competition authorities, who want to have as much information at their disposal so that they can enforce the national competition law effectively,[122] and the business community who possess anxieties not only about the protection of their business secrets but also about the purpose for which such information will be used. In general the parties' national law protects the confidentiality of an undertaking's business secrets.[123] There may be certain exceptions to this rule under the parties' domestic law, including of course the right of an undertaking to waive its confidentiality rights.[124] It is conceded that undertakings may have a strong incentive to consent to waive their confidentiality rights[125] in order

[121] Article XI.4 of the CCRFTA.
[122] It must also be remembered however that the exchange of confidential business information has a potential to harm competition, especially if the information were to fall into the hands of the information holder's business rivals.
[123] Canada allows for the exchange of confidential information in a limited number of circumstances. See, for example, Section 29 of the Canadian Competition Law, RS 1985, c. C-34.
[124] See for example Section 29 (2) of the Canadian Competition Act, *op. cit*.
[125] Under the condition of course that the information retains its status as confidential information in relation to third parties and that the information is only used for the purpose for which it was provided.

to facilitate a timely merger approval, but such an incentive appears to be absent in the other perceivable cases of alleged anticompetitive conduct, including alleged collusive behaviour.[126] In any case, the decision to waive of course remains with the possessor of the confidential information, undermining somewhat the cooperation mechanism and hence the ability of the competition agencies to investigate alleged anticompetitive behaviour of foreign firms. Most officials believe that the issue of confidentiality is the *chief limitation* of enforcement cooperation agreements and hence it is submitted that the majority of effort should be concentrated on overcoming this particular obstruction to effective cooperation between antitrust agencies.

In sum, the benefits of the cooperation arrangement between Canada and Costa Rica can be summarised as follows:

- Competition provisions in FTAs are themselves important government-to-government policy statements concerning the significance of competition policy and competition enforcement cooperation for the achievement of the objectives of free trade areas.
- The benefits of free trade areas will be less likely to be undermined by private anticompetitive practices, by virtue of the existence of the laws of the parties and growing awareness that the authorities will exchange information and otherwise cooperate with one another, particularly where the parties use the cooperation mechanism to work together on actual cases to prevent (private) anticompetitive behaviour within their respective jurisdictions.
- The cooperation arrangement introduces a working relationship between the antitrust agencies of the parties.
- Cooperation agreements promote trust and confidence between the competition agencies of the parties.
- The framework established by such arrangements can be relied on in the future to avoid potential conflicts in trans-national competition enforcement.
- Notifications are important for three reasons: (a) they can act as an early warning to the notified party of anticompetitive behaviour; (b) they establish channels of communication between the agencies of the parties; and (c) they

[126] Another possible exception may be a waiver given in the course of a leniency application.

send a clear signal to undertakings that agencies are communicating and that national borders can no longer be relied upon as protection against enforcement activities.

- Consultations and exchanges of information provide the opportunity for one agency to offer its support, advice and experience to its foreign counterpart.

The limitations of the cooperation arrangement can be summarised as follows:

- The obligations it creates are of the 'soft law' variety and thus are unenforceable in law between the parties.
- There are no dispute settlement procedures which apply in the case of conflict between the competition agencies.
- The parties effectively decide the extent of their obligations.
- The agreement does not affect the parties' abilities in relation to the exchange of confidential business information between their respective competition agencies, even if such information was still to remain confidential *vis-à-vis* third parties and could only be used for the purpose for which it was provided.
- The agreement does not require or permit any information exchange that would otherwise not be accessible.

PART VII: RECOMMENDATIONS

- General:

The authors agree that despite the obvious limitations of cooperation agreements due to their prohibition on the exchange of confidential information, they are useful and valuable documents. Nevertheless it *could be argued* that there is *less need* for these formal agreements now than before (unless some parties get to the point where they wish to change their confidentiality laws) as (1) a lot is already possible through informal bilateral cooperation, although of course confidential

information cannot be exchanged; (2) the agreements that have already been concluded, especially between the EU and the US, provide guidance to other agencies on how to conduct their (informal) cooperation; and (3) the development of the ICN provides a forum for (formal and informal) competition cooperation on both a bilateral and multilateral basis. However, in relation to point three, it was highlighted at interview that although the ICN serves a networking purpose among competition authorities, it could not be stated with certainty if the informal networking of this arrangement could/would replace the detail of cooperation agreements, and indeed the authors doubt that the ICN could (or even should) evolve in such a case-specific manner.

- Specific:

  (1) An agency-to-agency agreement between Canada and Costa Rica is not required: the cooperation mechanism is sufficient; most agency-to-agency cooperation agreements go no further than this arrangement. However, such an agreement would be welcomed and indeed would only be worthwhile if it expressly allowed for the exchange of confidential business information between the competition authorities of the parties. A change in the domestic law of both parties may be required before such a provision could be negotiated.

  (2) This next step could arguably involve a "worldwide" solution as a precursor to a bilateral approach. The OECD may be the better place to deal with such a task than two parties, as the issue of the exchange of confidential information is not specific to any one nation or trading relationship, and this body has the greatest degree of representation by agencies with a long history of enforcement, and of enforcement cooperation, including formal Recommendations. Indeed, it is unlikely that any one bilateral relationship will advance to permitting exchange of confidential information absent a more general consensus to do so.[127] This solution must include provision for the exchange of confidential

[127] See how such an approach has evolved within the European Competition Network for example.

information if progress is to be made in international competition cooperation. Of course, there may be disagreements concerning such an approach: (a) between what some jurisdictions would allow to be included in a definition of confidential information; and (b) what some jurisdictions would ultimately do with the information (e.g. some jurisdictions may allow criminal sanctions against those who commit anticompetitive behaviour while others may not; the use of confidential information in criminal cases may be a move too far for those jurisdictions that do not have criminal sanctions).

PART VIII: REFERENCES/SOURCES

Books

The EU-Mexico Free Trade Agreement, (Eds. Holbein and Ranieri) 2002, Trans-National Publishers, NY

International Agreements

General Agreement on Tariffs and Trade, available at http://www.wto.org/english/docs_e/legal_e/06-gatt.doc

General Agreement on Trade in Services, available at http://www.wto.org/english/docs_e/legal_e/26-gats.doc

Marrakesh Agreement Establishing the World Trade Organization, available at http://www.wto.org/english/docs_e/legal_e/03-fa.doc

Free Trade Agreements

Canada-Chile Free Trade Agreement especially Chapters J and M, available at http://www.dfait-maeci.gc.ca/tna-nac/cda-chile/menu-en.asp

Canada-Costa Rica Free Trade Agreement, available at http://www.dfait-maeci.gc.ca/tna-nac/Costa_Rica_toc-en.asp

Canada-Israel Free Trade Agreement, available at http://www.dfait-maeci.gc.ca/tna-nac/cifta-en.asp

EU-Mexico Free Trade Agreement (Goods), available at http://europa.eu.int/comm/external_relations/mexico/doc/a4_dec_02-2000_en.pdf

EU-Mexico Free Trade Agreement (Services), available at http://europa.eu.int/comm/external_relations/mexico/doc/a5_dec_02-2001_en.pdf

North American Free Trade Agreement, available at http://www.dfait-maeci.gc.ca/nafta-alena/agree-en.asp

Competition Enforcement Cooperation Agreements

Agreement between Denmark, Iceland and Norway on Co-operation in Competition Cases, available online at the following website: www.globalcompetitionforum.org/regions/europe/Denmark/Agreemen1.pdf

Agreement between the Government of Canada and the European Communities Regarding the Application of their Competition Laws, available at http://cb-bc.gc.ca/epci/internet/incb-bc.nst/en/ct01242e.html

Agreement between the Government of Canada and the Government of the Mexican States Regarding the Application of their Competition Laws, available at http:// cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02503e.html

Agreement between the Government of Canada and the Government of the United States of America on the Application of Positive Comity Principles to the Enforcement of their Competition Laws, available at http:// cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02957e.html

Agreement between the Government of the USA and the Commission of the European Communities Regarding the Application of their Competition Laws, 23 Sept. 1991, [1991] 4 CMLR 823, 30 ILM 1487

Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, available at www.apeccp.org.tw/doc/USA/Cooperation/usaus7.htm

Cooperation Arrangement between the Commissioner of Competition (Canada) and Her Majesty's Secretary of State for Trade and Industry and the Office of Fair Trading in the United Kingdom Regarding the Application of their Competition and Consumer Laws, available at http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02729e.html

Cooperation Arrangement between the Commissioner of Competition (Canada), the Australian Competition and Consumer Commission and the New Zealand Commerce Commission Regarding the Application of their Competition and Consumer Laws, available at http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02030e.html

EC-Canada Cooperation Agreement, [1999] L 175/49, [1999] 5 CMLR 713

EU-US Positive Comity Agreement, 4th June 1998, [1998] OJ L173/28, [1999] 4 CMLR 502

The Memorandum of Understanding between the Commissioner of Competition (Canada) and the Fiscal National Economico (Chile) Regarding the Application of their Competition Law Reports, available at http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02320e.html

U.S./Canada Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (1995), available at http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02007e.html

Articles

ABOTT and SNIDAL, "Hard and Soft Law in International Governance", 54:3 International Organisation, (2000), 421

ABBOTT, KEOHANE, MORAVCSIK and A-M SLAUGHTER, "The Concept of Legalisation" 54:3 International Organisation, (2000), 401

COCUZZA and MONTINI, 'International Antitrust Cooperation in a Global Economy' [1998] ECLR 156

DALY, "Canada-Chile: Free Trade Agreement" 36 I.L.M. 1067 (1997)

LAMPERT, 'International Cooperation among Competition Authorities' [1999] ECLR 214

PARISI, "Enforcement Cooperation among Antitrust Authorities" presented to the IBC's UK Conference on EC Competition Law, London, England, 19th of May 1999, available at [1999] ECLR 133

Websites

www.cfc.gob.mx/

www.dfait-maec.gc.ca/

www.europa.eu.int/

www.fne.cl/

www.internationalcompetitionnetwork.org/

www.meic.go.cr/esp/promocion/index.html

www.oecd.org/

www.wto.org/

www.unctad.org/

www.usdoj.gov/

Other

Communication from Canada, received by the WTO Working Group on the Interaction between Trade and Competition Policy, WT/WGTCP/W/155, (19 December 2000)

Interviews with Chilean, Mexican and EU officials

OECD Recommendations: Recommendation of the Council concerning cooperation between member countries on restrictive business practices affecting international trade of 5 October 1967 [C (567)53(Final)]; Recommendation of the Council of 3rd July 1973 [C (73) 99 (Final)]; Recommendation of the Council of 25th September 1979 [C (79) 154 (Final)]; Recommendation of the Council of 21st May of 1986[C (86) 44 (Final)]; Recommendation of the Council of 27th and 28th July of 1995 [C (95) 130 (Final)]

Reply to the questionnaire sent to the Canadian Competition Bureau

Reply to the questionnaire sent to the Costa Rican competition authorities

Reply to the questionnaire sent to the Mexican competition authorities

Report on Development and Enforcement of Competition Policy and Laws in the Western Hemisphere, prepared by the Tripartite Committee of the Organization of American States, FTAA.ngcp/inf/04/Rev.2 January 15, 2003

ANNEX I: CHAPTER XI OF THE CANADA-COSTA RICA FTA

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 fulfilment 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

2. The Parties recognize the importance of cooperation and coordination of enforcement actions including notification, consultation and exchange of information.
3. 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.
4. 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.
5. 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.

6. 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 Defence 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:

iii. for Canada, the Commissioner of Competition.
iv. 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.

ANNEX II: DISCRIPTION OF DOMESTIC COMPETITION LAW ENFORCEMENT REGIME[128]

Section 1: Competition Law in Canada

Introduction

In Canada, the initial concerns and interests for the protection of competition began in the early 1870s where intermittent complaints about cartels and trusts were made. However, it was not until 1889 with the adoption of the *Anti-Combines Act*[129], which prohibited combines or conspiracies in restraint of trade to fix prices or restrict output and which was integrated into the Criminal Code in 1892, that these concerns were formally granted legal protection.[130] Regularly since then there have been amendments to the Canadian competition law to adjust to industrial developments as well as evolving economics. In 1986 the current legal provisions were introduced – *the Competition Act*[131] and the *Competition Tribunal Act.*[132]

Purpose of the Competition Act

Part 1.1 states that the purpose of the Competition Act is "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy". It continues by explaining that there is a need for expansion of the opportunities for Canadian participation in world markets, while at the same time acknowledging foreign competition in Canada. Equally there is a need to ensure that (a) small and medium-sized enterprises have an equal opportunity in the Canadian

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[128] Section 1 was written by Ms Hedvig Schmidt, B.Sc. (CBS – DK), LL.M. (Essex) and Section 2 by Mr Peter Whelan, LL.B. (Ling. Fran.), LL.M. (Trinity College Dublin), Research Fellow and Intern respectively at the British Institute of International and Comparative Law.

[129] *Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade,* S.C. 1889, c. 41.

[130] Trebilcock, Michael, Winter, Ralph A., Collins, Paul and Iacobucci, Edward M.: "The Law and Economics of Canadian Competition Policy" University of Toronto Press, Toronto 2002, p. 10.

[131] R.S. 1985, c. C-34.

[132] *Competition Tribunal Act,* S.C. 1985 c. 19 (2nd Supp.)

market; and (b) that consumer welfare is protected, by providing consumers with competitive prices and product choice.

The Institutions Regulating Competition

There are two leading institutions regulating competition in Canada, the Commissioner of Competition (appointed under subsection 7(1)) (hereafter the Commissioner) and head of the Competition Bureau and the Competition Tribunal (hereafter the Tribunal) established under the *Competition Tribunal Act* subsection 3(1). The Tribunal consists of judges (maximum six) and lay members (maximum eight) who are "knowledgeable in economic, industry, commerce or public affairs."[133] Proceedings before the Tribunal must be heard by a sitting panel of three to five members of which one must be a judicial person and one a lay member.[134] The Tribunal has the jurisdiction to hear and dispose of all applications made under Part VII.1 (Deceptive marketing practices) and VIII (Matters reviewable by Tribunal) of the Competition Act as well as any matter under Part IX which is subject to a reference under subsection 124.2(2).

The Tribunal is a purely adjudicative body without investigative powers that operates independently of any governmental department. Its function is to make findings and issue remedial orders.

The Competition Bureau led by the Commissioner is responsible for the administration and enforcement of the Competition Act.

Under the Competition Act, the Commissioner can initiate inquiries, intervene as a competition advocate before federal and provincial bodies, challenge civil and merger matters before the Competition Tribunal and make recommendations on criminal matters to the Attorney General of Canada. In order to make the application and enforcement of the Competition Act more transparent, the Commissioner can issue written opinions on the request of any person. The opinion will remain binding on the

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[133] *Competition Tribunal Act* S.C. 1985, c. 19 (2nd Supp.) s. 3 and Trebilcock, Winter, Collins, and Iacobucci, p. 22.

[134] *Competition Tribunal Act* 10(1).

Commissioner for as long as the material facts of which the opinion was based upon remain substantially unchanged.[135]

Prohibitions

The prohibitions in the Competition Act can be divided in to two categories: criminal offences and civilly reviewable matters.

The criminal offences are listed in Part VI. Section 45 makes it a criminal offence to conspire, combine, agree or arrange to limit, prevent or lessen or otherwise restrain or injure competition unduly.

Section 47 finds 'bid-rigging' illegal *per se* unless the person calling for the bids is notified in advance of the agreement.[136]

Section 48 bans agreements in relation to professional sports, and Section 49 restrict agreements or arrangements of federal financial institutions meaning banks and building societies, although there is here a list of exemptions for agreements in relation to certain services offered by banks in general.

Section 50 illegalises price discrimination in relation to both products and geographic markets and predatory pricing by a supplier.

Finally Section 61 states that price maintenance in the business of producing and supplying in relation to credit cards or have an exclusive right conferred by a patent, copyright, trademark or other types of intellectual property rights is a criminal offence. Equally, refusal to supply or other types of price discrimination is illegal if the refusal is due to the customer's low pricing policies.

The civilly reviewable matters consist basically of mergers and abuses undertaken by a company with a dominant position. Such abuses include squeezing by a vertically integrated supplier, vertical integration with the intent to eliminate competition, freight equalisation for the purpose of preventing entry, use of 'fighting brands',

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[135] *Competition Act*, 124.1.
[136] Trebilcock, Winter, Collins, and Iacobucci, p. 30.

purchasing products to prevent price erosion, adoption of product specifications incompatible with other products on the market and thereby excluding entry or elimination of competitors on the market, refusal to supply or discrimination of customers, and predatory pricing,[137] This list however, should not be seen as exhaustive.[138] Whether a type of conduct really is abusive depends on whether the conditions in Section 79 are fulfilled. The conditions are:

a) one or more persons substantially or completely in control, throughout Canada or any area thereof, a class or species of business;
b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts; and
c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in the market.[139]

If all the above conditions are met the Tribunal can order the conduct[140] to be ceased and order an appropriate remedy which is reasonable and necessary to overcome the effects of the abusive conduct.[141]

Mergers are as mentioned also civilly reviewable under Section 92 of the Competition Act. Section 91 sets out the definition of mergers, Section 92 establishes that mergers or proposed mergers found by the Tribunal to prevent or lessen or likely to prevent or lessen competition substantially can be dissolved or prohibited by the Tribunal.[142] Section 93 lists eight factors which should be taken into consideration by the Tribunal when assessing the merger's or proposed merger's ability to substantially prevent or limit competition. These factors are:

1) the extent to which foreign products or competitors provide effective competition to the market where the merger will or has taken place;
2) whether there is a possibility of a 'failing firm' defence of the merger;
3) the extent to which there are or likely to be substitutes for the products supplied by the parties to the merger;
4) whether there are any barriers to entry to the market;
5) the extent to which effective competition will remain post-merger;

[137] *Competition Act*, s. 78.
[138] Trebilcock, Winter, Collins, and Iacobucci, p. 24.
[139] *Competition Act,* s. 79(1).
[140] *Competition Act,* s. 79(1).
[141] *Competition Act,* s. 79(2).
[142] *Competition Act,* s. 92(1).

6) the likelihood that the merger or proposed merger will resolve in the removal of a vigorous and effective competitor;

7) the nature and extent of change and innovation in a relevant market; and

8) any factors specific to the relevant market in which the merger takes place which could be affected by the merger.[143]

A proposed merger can, however, also be approved by the Tribunal subject to certain conditions.[144] This is particularly so where the merger brings about efficiency gains, which are greater than the harm caused to competition because of the merger and that these efficiency gains would not be reachable if a prohibition order was made.[145] When deciding whether the efficiency gains of a merger outweighs the effects limiting competition one must evaluate whether there has been either:

a) a significant increase in real value exports; or

b) a significant substitution of domestic products for imported products.

Section 95 makes it clear that certain types of joint ventures are not subject to the merger provisions of the Competition Act, when these are not formed within a corporation as such, but are mere projects or programmes, which would not otherwise occur in the absence of such a combination. If the joint venture does not prevent or lessen competition except to the extent reasonably required to undertake and complete the joint venture, the joint venture is exempted from the merger provisions.[146]

Other horizontal specialisation agreements are dealt with under Section 86 of the Competition Act, the principle of efficiency gains outweighing the lessening of competition (found in the merger provisions) also applies for these agreements.[147]

Vertical agreements or practices between upstream and downstream buyers and suppliers are dealt with under Section 75. This section allows the Tribunal to force a company to make another company its customer, if the latter is substantially affected

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[143] *Competition Act,* s. 93(a)-(h).
[144] Trebilcock, Winter, Collins, and Iacobucci, p. 25-26.
[145] *Competition Act*, s. 96(1).
[146] *Competition Act*, s. 95(1)(a)-(e).
[147] Trebilcock, Winter, Collins, and Iacobucci, p. 27.

in its business due to an inability to obtain adequate supplies of a product on usual trade terms.[148]

Equally, consignment selling, exclusive dealing, tying, and market restrictions are reviewable by the Tribunal.[149]

Remedies/ Sanctions

Equivalent to the prohibitions, the sanctions available depend on whether the infringement fall under the criminal or civil provisions. The criminal offences which include conspiracy, bid-rigging, discriminatory and predatory pricing, price maintenance, misleading advertising and deceptive marketing practices, are prosecuted before criminal courts that may impose fines, order imprisonment, issue prohibition orders and interim injunctions, or any combination of these remedies.

The civil provisions include mergers and abuse of dominant position such as refusal to deal, consignment selling, exclusive dealing, tied selling market restriction and delivered pricing. These matters are reviewable by the Tribunal, which has powers to issue injunctive and remedial orders with respect to mergers and anti-competitive practices likely to prevent or lessen competition substantially.

As regards abuse of a dominant position the Tribunal can order a prohibition of the conduct taking place.[150] However if the Tribunal finds that the anti-competitive conduct has had such a devastating effect on competition in the market that the mere ceasing of the conduct is not likely to restore competition within that market, the Tribunal may "make an order directing any or all persons against whom an order it sought to take such actions, including the divesture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market." [151]

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[148] *Competition Act*, s. 75(1)(a)-(e).
[149] *Competition Act*, s. 76-77.
[150] *Competition Act*, s. 79(1).
[151] *Competition Act*, s. 79(2).

In respect of mergers the Tribunal can dissolve mergers which have already taken place[152] or prohibit a merger or parts of a merger from taking place if it finds that the merger is contrary to the provisions laid down in the Competition Act.[153]

The Federal Court[154] has special powers in relation to agreements dealing with licensing of intellectual property rights. It may

(a) declare void, in whole or in part, any agreement, arrangement or license relating to that use;

(b) restrain any person from carrying out or exercising any or all of the terms or provisions of the agreement, arrangement or license;

(c) direct the grant of licenses under any such patent, copyright or registered integrated circuit topography to such persons and on such terms and conditions as the court may deem proper or, if the grant and other remedies under this section would appear insufficient to prevent that use, revoking the patent;

(d) direct that the registration of a trade-mark in the register of trade-marks or the registration of an integrated circuit topography in the register of topographies be expunged or amended; and

(e) direct that such other acts be done or omitted as the Court may deem necessary to prevent any such use.

Procedures

In the proceedings of the Competition Tribunal, the judicial members will determine any question related to law; those questions which are mix of facts and law will be dealt with by all sitting members. In the event of a difference of opinion when determining a question the opinion of the majority shall prevail. In the event of an equally divided opinion among the members, the presiding member may determine the question. It has been pointed out by others that the presiding member must be a

[152] *Competition Act*, s. 92(1)(e).
[153] *Competition Act*, s. 92(1)(f).
[154] The Federal Court is Canada's national trial court which hears and decides legal disputes arising in the federal domain including claims against the Government of Canada, civil suits in federally-regulated areas and challenges to the decisions of federal tribunals. See: http://www.fct-cf.gc.ca/index_e.html.

judicial member; however, the actual Competition Tribunal Act does not clarify this.[155]

Any decisions or orders, whether final or interim can be appealed to the Federal Court of Appeal, however, it is to the Federal Court of Appeal's discretion whether it will hear an appeal on a question of fact.[156] Moreover, the Tribunal may withdraw or vary a consent agreement or order on the application by the Commissioner or a person who consented to the agreement or a person whom the order was made against, if the Tribunal finds that the original circumstances that led to the making of the agreement or order have changed, or the parties involved or the Commissioner has consented to an alternative agreement or order. A person directly affected by but not a party to a consent agreement or order may apply directly to the Tribunal within 60 days of the registration of the consented agreement or order to have it rescind or varied.

Exemptions

There is a clear statement in the Act that trade unions as well as collective bargaining are outside the scope of the Act. In particular the fishing industry has been excluded from the scope of the Act in relation to agreements between them and so have travel agents although on as regards Section 45 (agreements between companies) and 61 (price maintenance).

<u>Section 2:</u> Competition Law in Costa Rica

Introduction

Costa Rica, in line with the practice of other countries in Latin America, introduced a new competition law in the mid-1990s. The increasing acceptance of trade liberalisation and the growing awareness of the benefits of market economics both played their part in the promulgation of this new law. At the time, the introduction of a progressive competition law and policy was deemed to be an essential element in the development of a market led, deregulated, liberal economy. It was hoped that the

[155] Trebilcock, Winter, Collins, and Iacobucci, p. 23.
[156] *Competition Tribunal Act* 13(1) and (2)

passing of the Law on the Promotion of Competition and Effective Consumer Defence[157] in 1995 would help ensure that private barriers to trade could not and would not replace those public barriers that were slowly being removed through the various free trade agreements entered into by the government of Costa Rica.

This short article will highlight the main provisions of this law in order to provide a general outline of the Costa Rican competition regime so that deeper and more meaningful analysis of the Canada-Costa Rica Free Trade Agreement will be possible.

At the outset it should be noted that although the law of 1995 is unquestionably the most important for our analysis of the Costa Rican competition regime, other sources of law may also have to be considered. In fact the following sources comprise the totality of the competition law of Costa Rica:

1. Article 46 of the Political Constitution of the Republic of Costa Rica;[158]
2. Law on the Promotion of Competition and Effective Consumer Defence;
3. General Law on Public Administration;[159]
4. Regulations of the Law on Promotion of Competition and Effective Consumer Defence;[160]
5. Regulation of Judicial Proceedings;[161] and
6. Article 47 of the Law on Protection to Workers.[162]

Purpose of the Competition Law

The overall objective of the Costa Rican competition law is to protect the rights and legitimate interests of consumers as well as monitoring and promoting competition and free enterprise.[163] In relation to competition, the law is designed to prevent and prohibit monopolies, monopolistic practices and other restraints on the *efficiency* of

[157] Law No. 7472, published n the *Federal Register* of 19 January 1995. Known hereafter as LPCECD.
[158] Available at http://www.costaricalaw.com/legalnet/constitutional_law/engtit1.html.
[159] Law No. 6627, published in the *Federal Register* of 2 May 1978.
[160] Executive Decree No. 25234-MEIC, published in the *Federal Register* of 1 July 1996. Known hereafter as the LPCECD Regulations.
[161] Law No. 3367, published in the *Federal Register* of 17 April 1966.
[162] Law No. 7983, published in the *Federal Register* of 16 February 2000.
[163] Article 1 LPCECD.

the market.[164] Further, competition is also to be promoted by the elimination of unnecessary regulations affecting business.[165]

The Institutions Regulating Competition

The ultimate enforcement body for antitrust matters in Costa Rica is the Commission for Promotion of Competition (CPC), an independent body attached to the Ministry of Economy, Industry and Commerce. It has the authority to initiate investigations into alleged anticompetitive behaviour. The CPC may initiate these investigations *sua sponte* or upon complaint.[166] The CPC consists of the following elements:

1. five Commissioners and five alternates, appointed for staggered four year terms;[167]
2. the Chairman of the Commission, who is elected from among the Commissioners by majority vote;[168]
3. a Secretary;[169]and
4. the Technical Support Unit (TSU).[170]

The Commission has legal powers and functions in relation to the following three areas:

1. economic deregulation;
2. recommendations for setting prices; and
3. promotion of competition.

(1) <u>Economic Deregulation:</u>

Article 3 LPCECD ensures that the CPC is given responsibility for "for verifying that procedures and regulatory requirements governing trade are at all times consistent with the provisions of the Law, that they are essential and necessary to achieving its objectives, and that they are based on considerations of public health and safety, the

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[164] *Ibid*.
[165] *Ibid*.
[166] Article 18 LPCECD.
[167] Article 19 LPCECD.
[168] His duties are set out in Article 78 of the LPCECD Regulations.
[169] This person may or may not be a Commissioner. His duties are set out in Article 79 of the LPCECD Regulations.
[170] The work of this body is devoted full-time to competition matters, and it conducts such studies and investigations as the Commission may request within its mandate. Its duties are set out in Article 23 of the LPCECD Regulations.

environment or quality standards, as determined by *ex post* review, so as to ensure that the principle of due dispatch is respected, and that competition requirements and procedures do not become barriers to trade."

(2) Recommendations for Setting Prices:
The Commission advises the President on the desirability of setting prices[171] under abnormal market conditions or conditions of monopoly or oligopoly affecting goods and services.[172]

(3) Promotion of Competition:
Article 10 LPCECD requires the CPC to ensure the promotion of competition by investigating alleged practices that obstruct free competition or unnecessarily disrupt the market flow. Article 24 LPCECD gives the CPC the powers required to carry out its duties in this regard. The Commission thus has authority to:

a. investigate the existence of monopolies, cartels, practices or collusion prohibited by law and apply penalties when appropriate;[173]
b. punish actions in restraint of supply of products when they have effects that disrupt free competition in the market;
c. establish machinery for cooperation to punish and prevent monopolies, cartels, concentrations and illegal practices;
d. issue opinions on questions of competition and free enterprise, with regard to laws, regulations, agreements, notices, and other administrative acts.[174]

Prohibitions

A general prohibition of public and private monopolies and monopolistic practices that impede or restrain competition is established by virtue of Article 10 LPCECD.

[171] The Government of Costa Rica may set the prices of certain goods, but it can only do so under exceptional circumstances and only for a short period of time.
[172] Article 5 LPCECD.
[173] In carrying out this function the law gives the Commission authority to require private parties and other public and private economic agents to provide the pertinent information or documents.
[174] These opinions are not legally binding: Article 24 LPCECD.

More specifically the law prohibits three kinds of conduct: total monopolistic conduct; partial monopolistic conduct[175] and certain types of concentrations.

Total monopolistic practices are considered to be practices that are so detrimental to efficiency of the market that they are prohibited *per se* i.e. in and of themselves, without any analysis of the actual effects of such conduct. The presumption of inefficiency cannot be overcome with the so-called "efficiency defence." Article 11 details the total monopolistic practices that are prohibited. Essentially they are horizontal agreements that have the object or effect of:

(a) price fixing;
(b) output restriction;
(c) market division; or
(d) bid rigging.[176]

Partial monopolistic practices are those practices[177]—other than total monopolistic practices that "improperly displace other agents from the market, substantially limit their access, or establish exclusive advantages in favour of other persons."[178] They are not considered illegal however unless it is shown that:

(1) the entity in question has "substantial market power"[179]; and
(2) the practices in question involve goods or services pertaining to that market.[180]

The "efficiency defence" is available, but the burden of proof is on the person who wishes to rely on this defence.

The law does not admit any exceptions to prohibited practices, subject of course to the definition of the scope of application of the law, explained *infra*.

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[175] The concepts of "total" and "partial" monopolistic practices are very similar to the concepts of "absolute" and "relative" monopolistic practices contained in Articles 9 and 10 respectively of the Mexican competition law passed in 1992: Federal Law on Economic Competition, *Diario Oficial de la Federación* (Federal Register), December 24 1992.
[176] Article 11 LPCECD.
[177] Six examples are given in Article 12 LPCECD. It should be noted that these examples must also comply with the substantive test in order to be prohibited. Also, these examples are not exhaustive as evidenced by the catch-all provision in Article 12 (g) LPCECD.
[178] Article12 LPCECD.
[179] Article 15 LPCECD provides a list of factors that should be taken into account by the CPC when determining the existence or not of "substantial market power."
[180] See Article 13 LPCECD.

Remedies/Sanctions

By virtue of Article 25 LPCECD the Commission may impose both monetary and corrective penalties. In fact the Commission may order any of the following:

a) suspension, correction, or elimination of the practice or concentration concerned;
b) total or partial break-up of any illegal arrangements, without prejudice to payment of the corresponding fine;
c) payment of up to 65 times the minimum monthly wage (MMW) for having given false testimony or false information to the Commission, aside from other penalties that may have occurred;
d) payment of a fine of up to 50 times the MMW for failing to submit information requested by the Commission in a timely manner;
e) payment of a fine of up to 680 times the MMW for engaging in a total monopolistic practice;
f) payment of a fine of up to 410 times the MMW for having engaged in a partial monopolistic practice; or
g) payment of a fine of up to 75 times the MMW for persons who were directly involved in the prohibited monopolistic practices or concentration or who were acting on behalf of the companies or entities and on their account and direction.[181]

The Commission takes into account the following when deciding on the size of the fine to be imposed: the severity of the infraction; the threat or damage caused; indications of intent; the violator's share of the market; the size of the market affected; the duration of the practice; recurrence of the offence; and the violator's ability to pay.[182]

[181] Article 25 LPCECD.
[182] *Ibid*.

Failure to comply with the orders of the Commission may result in criminal prosecution as a result of Article 305 of the Criminal Code.[183]

Procedures

The Commission for Promotion of Competition has primary jurisdiction in competition matters, which must first be exhausted before legal proceedings can be initiated.[184]

Proceedings must be commenced within six months of the date the practice occurs or becomes known to the injured party. A continuous act can suspend application of the time limit—the six months will begin to run in that case from the moment the act ends.[185] The CPC, as stated above, may initiate an investigation *sua sponte* or on complaint. In either case the Technical Support Unit will be requested by the CPC to investigate the alleged conduct. The TSU's task is to verify whether there is sufficient evidence to justify the opening of administrative proceedings. It reports to the Commission on its findings and the Commission will then either reject the complaint or order an administrative trial to be carried out by the TSU.[186] This 'trial' is subject to the normal administrative procedure established under the General Law on Public Administration.[187] After the hearing the Commission has fifteen days within which to give its ruling. This period can however be extended if for example the executive organ wishes to introduce new evidence. The CPC decides whether an extension should be granted. The CPC will schedule a second hearing within fifteen days of its decision to allow an extension. There will be no more than two hearings.[188] The proceedings must be concluded within two months after its start or after the presentation of the complaint or petition of the party.[189]

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[183] This article states that "whoever disobeys an order issued by a public official in the exercise of his duties shall be liable to imprisonment of from fifteen days to one year."

[184] There is an exception for acts of "unfair competition." These acts are resolved by the courts following summary procedures: see Article 17, 18 and 24 LPCECD.

[185] Article 27 LPCECD.

[186] See Articles Article 30, 34, 35, 38 and 39 of the LPCECD Regulations.

[187] Principles of due process, informal pleading, disclosure, impartiality, and publicity will thus apply.

[188] Article 38 LPCECD Regulations.

[189] *Ibid*.

Article 21 of the Regulation of Judicial Proceedings allows a party to request *reconsideration* of a final ruling of the CPC.

After exhaustion of the administrative procedures, the final decisions can be *appealed* on grounds of illegality to the Superior Administrative Tribunal, by means of an abbreviated administrative procedure.[190] According to Article 61 LPCECD the action must be brought within one month of the final decision. The Second Section of the Superior Administrative Tribunal hears the action and its decision may be further appealed to the Third Section of the Tribunal.[191]

Mergers

Article 16 LPCECD prohibits concentrations that by design or effect restrain, damage, or impede competition or free enterprise. Concentrations are defined as any "merger, acquisition of control, or any other act by virtue of which there is a joining of companies, associations, stock, trusts, or assets in general of competitors, suppliers, clients, or other economic agents."[192] There is no requirement of pre- or post-merger notification in Costa Rica.[193] However the Commission has the power to order total or partial dismantling of any improperly constituted concentration.[194]

Exemptions

The competition law of Costa Rica applies to all economic agents[195] engaged in any type of economic activity.[196] There are however specific exemptions for the following:

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[190] Article 61 LPCECD.
[191] *Ibid*.
[192] Article 16 LPCECD.
[193] There is one exception to this rule: pension operator company mergers must be first approved by the Pension Superintendence, after consultation with the CPC. This is provided for in Article 47 of the Law on Protection to Workers, *op. cit*.
[194] Article 25 (b) LPCECD.
[195] Article 9 LPCECD.
[196] Article 2 LPCECD.

a. Agents who provide *public services* by virtue of a concession, granted under law for undertaking the necessary activities for provision of services;[197]

b. *State monopolies created by law*, as long as there are special laws authorizing them to carry out specific activities;[198] and

c. *Municipalities,* with respect both to their internal rules and regulations and to their dealings with third parties.[199]

<u>ANNEX III:</u> CANADA-COSTA RICA QUESTIONNAIRE

<u>Part 1: Questions Specific to the Competition Provisions of the Canada-Costa Rica Free Trade Agreement FTA</u>

Impact on Competition Enforcement Cooperation

1. What impact have the competition law provisions of the Canada-Costa Rica FTA had upon competition law enforcement cooperation between Canada and Costa Rica?

a. Has cooperation between Canada and Costa Rica in competition matters improved as a direct result of the FTA? Please cite examples that explain why you think this is the case.

b. Has cooperation between Canada and Costa Rica in competition matters been unaffected by the FTA? Please cite examples that explain why you think this is the case.

[197] Article 9 LPCECD.
[198] Article 29 LPCECD.
[199] Article 69 of the LPCECD Regulations.

2. Do you believe that the competition provisions of the FTA between Canada and Costa Rica have contributed in any direct manner to the development of the core principles of either country's competition law or policy? If so, how? If not, why not?

3. Do the competition law provisions of the Canada-Costa Rica FTA have any practical effect? Please cite examples.

Objectives

4. To what extent have the objectives of the competition provisions in the Canada-Costa Rica FTA been achieved?

5. What are the factors that triggered the negotiation and signing of the Canada-Costa Rica FTA?

6. Are there any specific reasons why the competition law provisions had to be included in this FTA? Which party and within which department or ministry was the demandeur?

Benefits of the Competition Provisions

7. Are the benefits that the competition provisions in the Canada-Costa Rica FTA offer positive, net of their expense in negotiation and upkeep? If so how do you measure this?

8. Are the net benefits of an FTA positive where agency-to-agency agreements already exist? If so, why? If not, why not?

9. Please name any examples of cases/parties that have benefited directly from the competition provisions of the Canada-Costa Rica FTA?

10. Have the trade summits or meetings of senior trade officials under the Canada-Costa Rica FTA produced any direct benefits for competition law enforcement in Canada or Costa Rica?

Limitations

11. What, if any, are the limitations of an FTA as an instrument of competition enforcement cooperation?

12. What is possible in terms of cooperation in competition enforcement as a result of the Canada-Costa Rica FTA? Can you account for any discrepancy between the potential and actual results of the Canada-Costa Rica FTA?

Confidentiality

13. How worried should businesses be about the possible consequences for confidential business information under the Canada-Costa Rica FTA? Why?

Trust

14. What impact do the competition provisions of the Canada-Costa Rica FTA have upon the development of trust between the Canadian and Costa Rican competition authorities?

15. Are FTAs and the regular trade summits or meetings between senior trade officials that they set up conducive to the development of trust required to improve enforcement cooperation between competition officials? How? What examples illustrate your point?

16. Would the use of dispute settlement procedures under the FTA be detrimental to the cooperative relationship that has been created between the relevant competition authorities? If so, how? If not, why not?

Exchange of Information

17. Does the Canada-Costa Rica FTA require the exchange of information that would otherwise not be accessible to the requesting partner? If not does it allow, i.e. create additional authority for, information exchanges that would otherwise be impossible? If not does it provides new channels or procedures for exchanges which would already be allowed but are given a more formal framework in the agreement?

Trade and Competition

18. What relationship exists between competition obligations and trade obligations on both Canada and Costa Rica? In particular, do the competition provisions of the FTA only cover competition matters *that affect trade* or do they cover competition matters in general?

Failure to Act

19. What if any are the sanctions, both formal and informal, for "failure to act" on the part of one competition authority under the Canada-Costa Rica FTA? Have these sanctions ever been used? Explain with examples.

Hard Law/Soft Law

20. Would you describe the Canada-Costa Rica FTA as "hard law" or "soft law"? Explain.

21. Are the Canada-Costa Rica FTA's formal rules broad in scope and consistent with the emergence of strong informal contacts?

Mutual Recognition

22. Does the Canada-Costa Rica FTA require both parties to mutually recognise the competition provisions of the other signatory party?

Improvements

23. How, in your opinion, would you improve upon the competition provisions in the Canada-Costa Rica FTA?

Approval?

24. Despite your possible criticisms, would you recommend an FTA as an instrument of competition enforcement cooperation to other trading partners? Why?

Part 2: Questions Specific to the Competition Enforcement Cooperation Provisions of the Canada-Costa Rica FTA

Impact on Competition Enforcement Cooperation

25. What impact have the competition enforcement cooperation provisions of the FTA between Canada and Costa Rica had upon competition law enforcement cooperation between these two countries?

   a. Has cooperation between Canada and Costa Rica in competition matters improved as a direct result of the cooperation provisions of the FTA? Please cite examples that explain why you think this is the case.

   b. Has cooperation between Canada and Costa Rica in competition matters been unaffected by the cooperation provisions of the FTA? Please cite examples explaining why you think this is the case.

26. Do you believe that the competition enforcement cooperation provisions of the Canada-Costa Rica FTA have contributed in any direct manner to the development of the core principles of either country's competition law or policy? If so, how? If not, why not?

Objectives

27. What are the factors that triggered the inclusion of the competition enforcement cooperation provisions in the FTA between Canada and Costa Rica?

28. To what extent have the objectives of the competition enforcement cooperation provisions of the Canada-Costa Rica FTA been achieved?

Trust

29. What impact do the competition enforcement cooperation provisions of the Canada-Costa Rican FTA have upon the development of trust between the Canadian and Costa Rican competition authorities?

Benefits

30. Did the competition enforcement cooperation provisions of the Canada-Costa Rican FTA actually change the relationship between the agencies of Canada and Chile, or did it merely place an already existing situation of cooperation on paper? If the provisions did more than just formalise an existing situation, what specific benefits have you seen as a result of the cooperation provisions that you would not have seen otherwise?

Limitations

31. What, if any, are the limitations of the competition enforcement cooperation provisions of the Canada-Costa Rican FTA as an instrument of competition enforcement cooperation?

32. What is possible in terms of cooperation in competition enforcement as a result of the competition enforcement cooperation provisions of the Canada-Costa Rican FTA? Can you account for any discrepancy between the potential and actual results of these provisions?

Confidentiality

33. Is the fact that confidential information cannot be exchanged under the competition enforcement cooperation provisions of the Canada-Costa Rican FTA a help or hindrance for the competition authorities?

Improvements

34. How, in your opinion, would you improve upon the competition enforcement cooperation provisions of the Canada-Costa Rican FTA?

Approval?

35. Despite your criticisms, would you recommend the competition enforcement cooperation provisions of the Canada-Costa Rican FTA as an instrument of competition enforcement cooperation to other trading partners? Why?

Part Three: The Issue of an Agency-to-Agency Competition Enforcement Cooperation Agreement between Canada and Costa Rica

Need

36. Do Canada and Costa Rica need an agency-to-agency competition enforcement cooperation agreement? Why?

Impact on Competition Enforcement Cooperation

37. What impact would the conclusion of an agency-to-agency agreement between the competition authorities of Canada and Costa Rica have upon competition law enforcement cooperation between these two countries?

Trust

38. How would the development of trust between the competition authorities of Canada and Costa Rica be affected by the conclusion of a competition enforcement cooperation agreement between their *competition authorities*?

Benefits

39. Would you agree with the assertion that, *in contrast to the FTAs*, enforcement cooperation agreements at an *agency-to-agency level* contribute a very great deal to enforcement cooperation directly in terms of:

a. providing the formal mechanism through which cooperation can occur;
b. providing the requisite information and trust through the operation of the mechanism; and
c. providing opportunities for further exchanges of information, both formal and informal?

Limitations

40. What, if any, are the limitations of an MOU or agency-to-agency agreement as an instrument of competition enforcement cooperation?

Confidentiality

41. Is the fact that confidential information cannot usually be exchanged under an agency-to-agency agreement a help or hindrance for the competition authorities?

Approval?

42. Despite your possible criticisms, would you recommend an agency-to-agency agreement as an instrument of competition enforcement cooperation to other trading partners? Why?

Part Four: General Issues Relating to Competition Enforcement Cooperation Between Canada and Costa Rica

The National Competition Laws of Canada and Costa Rica

43. Can you think of any aspect of Canadian competition law that is particularly worrying for the competition authorities of Costa Rica from a trade, competition or competition law enforcement perspective?

44. Can you think of any aspect of the Costa Rican competition law that is particularly worrying for the Canadian competition authorities from a trade, competition or competition law enforcement perspective?

45. Do the competition authorities in the developing country partner i.e. Costa Rica have policy objectives other than protecting the competitive process, consumer welfare, or economic efficiency, such as the promotion of small to medium-sized enterprises or other social objectives e.g. employment. Does the agreement contain any provisions which could directly or indirectly affect the ability of Costa Rica to give effect to these aims?

46. Are there different standards of legal protection between Canada and Costa Rica in competition matters (e.g. criminalisation of cartels), and if so how has this situation been addressed?

Cooperation between the Competition Authorities of Canada and Costa Rica

47. What factors, both formal and informal, impede enforcement cooperation between national competition authorities?

40. What factors, both formal and informal, can improve enforcement cooperation between national competition authorities?

48. In practice, is informal cooperation more effective in resolving potential disputes or complicated cases than formal cooperation? Why?

49. Are formal arrangements necessary to facilitate informal cooperation, despite their various limitations? To that end are they sufficient?

50. Can you identify and explain the factors that determined the choice of cooperative instrument i.e. an FTA in the relationship between Canada and Costa Rica?

51. Other than notifications can you detail any concrete examples of enforcement cooperation in practice between the competition agencies of Canada and Costa Rica?

52. Please detail the *flow of cooperation* between the competition agencies of Canada and Costa Rica:

a. How many notifications have the Canadian competition authorities received from Costa Rica since the signing of the Canada-Costa Rican FTA?

b. How many notifications have the Costa Rican competition authorities received from Canada since the signing of the Canada-Costa Rica FTA?

c. How many requests for cooperation have the Canadian competition authorities received from Costa Rica since the signing of the Canada-Costa Rica FTA?

d. How many requests for cooperation have the Costa Rican competition authorities received from Canada since the signing of the Canada-Costa Rica FTA?

e. How many requests for the use of positive comity have the Canadian competition authorities received from Costa Rica since the signing of the Canada-Costa Rican?

f. How many requests for the use of positive comity have the Costa Rican competition authorities received from Canada since the signing of the Canada-Costa Rica FTA?

53. What remains to be done in relation to the development of cooperation between Canada and Costa Rica in competition enforcement matters?

Notification

54. How are mutual notification provisions necessary or helpful in bilateral agreements?

55. Please detail any examples of notification in practice between the agencies of Canada and Costa Rica?

56. How did notification benefit either party in the above examples?

Positive Comity

57. Please detail any concrete examples of the use of informal or formal positive comity in practice between the agencies of Canada and Costa Rica?

58. Do you believe the use of positive comity has benefited either Canada or Costa Rica? Why?

Trust

59. How important to improved enforcement cooperation is the development of trust between national competition authorities?

60. How do governments usually promote trust between national competition authorities?

61. How do the competition agencies themselves usually foster trust with their counterparts abroad?

62. Does trust precede or follow the signing of competition agreements? In other words, is trust a pre-requisite for or a consequence of such agreements?

Assistance

63. How important is technical assistance (in its many forms) for the operation of a so-called North-South agreement on competition enforcement cooperation?

The Relationship between FTAs and Agency-to Agency Agreements

64. Would an agency-to-agency agreement be ineffective in the absence of a corresponding FTA, with its dispute resolution provisions? If so how? If not, why not?

65. Are the competition law provisions of the Canada-Costa Rica FTA weakened by the absence of an agency-to-agency agreement? If so, how? If not, why not?

Potential Conflict?

66. Are agreements of the kind concluded between Canada and Costa Rica a way of exporting the competition regime of the Northern partner to the Southern partner? If this can be documented, then is there a potential for future conflicting provisions should a developing country, in this case Costa Rica, sign agreements with more than one Northern nation?

Improvements/Recommendations

67. How, in your opinion, could competition enforcement cooperation be improved between the Canadian and Costa Rican authorities?

68. What is the next step in the process of improving competition enforcement cooperation between the competition authorities of Canada and Costa Rica?

69. Do you have any further comments on the contribution of bilateral trade or competition agreements to competition law enforcement cooperation between Canada and Costa Rica?