



INTER-AMERICAN DEVELOPMENT BANK



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-- Session I: Competition Provisions in Regional Trade Agreements --

Note by El Salvador

1. GENERAL LEGAL AND INSTITUTIONAL FRAMEWORK FOR TRADE AGREEMENTS IN EL SALVADOR

1. The 1983 Constitution of the Republic of El Salvador (article 168) establishes, among the principal functions of the Executive Branch and specifically of the President of the Republic, that of negotiating international treaties and conventions, submitting them to the Legislative Assembly for ratification, and seeing to their enforcement, as well as directing foreign relations.

2. Executive Decree 24 of 18 April 1989, constituting the Internal Regulations of the Council of Ministers, establishes (article 37.7) that the Ministry of Economy is responsible for developing domestic, regional and international trade and the opening and the expansion of markets for national products.

3. The Internal Regulations of the Ministry of Economy, issued via Executive Order 1347 of 19 October 2006, distribute responsibilities as follows:

1) Vice Ministry of Economy:

- Cooperate with the Minister in strengthening regional and international trade through the adoption of a trade policy and strategies for its development, and in coordinating international trade negotiations and the administration of trade agreements signed by the

country, so as to contribute to the opening and expansion of new markets and to strengthen existing markets in the interest of the country's productive activities.

2) Trade Policy Directorate:

- Provide the Ministry with the technical fundamentals required to define and implement the country's trade policy.
- Ensure that trade policy is consistent with other policies contained in government programmes.
- Coordinate and maintain constant communication with public and private institutions involved in the country's trade policy, in order to provide information and receive observations.
- Define, design and carry out strategies for El Salvador's participation in regional and international trade negotiations.
- Coordinate, conduct and monitor regional trade negotiations in the context of Central American economic integration.
- Coordinate consultations with other offices, entities and sectors involved in the trade negotiation process.

3) Trade Agreements Administration Directorate

- Direct and supervise the administration of agreements, conventions, treaties and other trade instruments in force, in coordination with this Ministry's representative to the World Trade Organisation (WTO) and the World Intellectual Property Organisation (WIPO).

4. The Competition Law of El Salvador, approved by Legislative Decree 528 of 26 November 2004 and in force since 1 January 2006, includes (article 13.(m)) among the responsibilities of the Superintendent: to participate in the negotiation and discussion of international treaties or agreements relating to competition policy. Consequently, since it began operations on 1 January 2006, the Superintendency of Competition has worked with the Ministry of Economy in negotiating trade agreements and in the process of Central American integration.

5. The Legislative Assembly is not directly involved in formulating trade policy, but it nevertheless plays an important role in that it must ratify the bilateral, regional and multilateral trade agreements signed by El Salvador in order for them to become the law of the land.

2. FREE-TRADE AGREEMENTS

6. The Superintendency of Competition recognises that the thrust of the country's trade policy is to strengthen and diversify trade relations with countries and economic blocs, as platforms for achieving more effective integration into the globalisation process. Trade agreements and treaties seek to eliminate tariff and non-tariff barriers in order to make trade flows smoother and more transparent, and to reduce the impact of non-tariff measures that constitute obstacles to market entry or exit, as well as administrative procedures that affect imports and exports, including customs formalities, permits, licenses and phytosanitary requirements.

7. This means that, with the trade liberalisation created by trade agreements and treaties, the private sector now has the potential to substitute tariff and nontariff barriers with restrictive trade practices that limit competition, with the result that the benefits of trade liberalisation are not passed on to the domestic market and the consumer.

8. For this reason, some countries have opted to include provisions or chapters relating to competition, in trade agreements and treaties, as mechanisms to prevent and correct such conduct. They are also pursuing efforts to standardise the obligations of economic agents in the markets covered by such an agreement or treaty.

2.1. FREE-TRADE AGREEMENT WITH COMPETITION PROVISIONS

9. To date, El Salvador has signed seven free-trade agreements, five of which have a chapter on competition policy.

A) Free-trade agreements signed and in force:

- The Free Trade Agreement between Central America and the Dominican Republic, ratified by the Legislative Assembly of El Salvador on 27 May 1999 and by the Dominican Republic on 15 March 2001, came into force for both countries on 4 October 2001;
- The Free-Trade Agreement between Central America and Chile, ratified by the Legislative Assembly of El Salvador on 4 October 2001 and by Chile on 24 January 2002, came into force on 1 June 2002.

B) Free-trade agreements signed:

- The Free-Trade Agreement between Central America and Panama was ratified by the Legislative Assembly of El Salvador on 3 October 2002;
- The Free-Trade Agreement between Guatemala, Honduras, El Salvador and Colombia was signed on 9 August 2007.

10. The trade agreements and free-trade treaties that El Salvador has signed were negotiated before the Competition Act came into force, and consequently there was no competition authority to back up those efforts. As noted earlier, the Ministry of Economy is responsible for trade negotiations on behalf of the Government of El Salvador. In addition, before the Competition Act came into force and the Superintendency of Competition began operations, it was the Ministry that was charged with promoting the adoption of a competition law in El Salvador, an effort that was achieved in November 2004.

11. It is also important to note that Honduras, Nicaragua and Guatemala were in the same situation as El Salvador: only Costa Rica had a competition law, approved in 1995. The free-trade treaties now in force that contain competition provisions were negotiated jointly by the five Central American countries. Yet because most Central American countries had no competition legislation at the time, they decided to negotiate general provisions, which include the following:

- ✓ Countries that have not yet adopted national legislation in this area committed themselves to make the necessary efforts to adopt a competition law in order to prevent anticompetitive conduct from impairing the benefits of the Agreement.
- ✓ To create a cooperation mechanism among the parties to facilitate and promote the development of competition policy and guarantee the enforcement of free competition rules between and within the parties to the free-trade area.
- ✓ To establish future work programs in which parties to the treaty or agreement would analyze, in light of their specific legislation in this area, the possibility of developing and expanding the content of this chapter, within the limits established in such legislation.

12. In the specific case of the Free Trade Agreement signed with Panama, in addition to its general provisions, it went a step further by introducing provisions on monopolies, which in El Salvador have their legal basis in article 110 of the Constitution. The commitments on monopolies and state-owned enterprises can be summarised as follows:

- ✓ States parties to the trade agreement are free to designate or maintain a monopoly or state-owned enterprise, provided their legislation so permits.
- ✓ The designation of monopolies and state-owned enterprises is to be transparent in cases where the national legal framework so permits.
- ✓ In designating a monopoly or state enterprise, states must endeavour to introduce such conditions on the operation of the monopoly as will minimise or eliminate any nullification or impairment of the benefits of the trade agreement.

Comparative Table of Competition Policy Provisions in Free-Trade Agreements

| Chile | Dominican Republic | Panama |
|--|--|--|
| <p>Part V Competition Policy Chapter 15 Competition Policy</p> | <p>Chapter XV Competition Policy</p> | <p>Part V Competition Policy Chapter 15 Competition policy, monopolies and state enterprises</p> |
| <p>Article 15.01 Cooperation 1. The parties shall endeavour to ensure that the benefits of this Agreement are not impaired by anticompetitive business conduct. They shall also endeavour to further the adoption of common measures to avoid such conduct.</p> <p>2. The parties shall also endeavour to establish mechanisms that will facilitate and promote the development of competition policies and guarantee the enforcement of free competition rules between and within the parties, in order to avoid the adverse effects of anticompetitive business conduct in the free-trade area.</p> | <p>Article 15.01 Enforcement 1. The parties shall endeavour to ensure that the benefits of this Agreement are not impaired by anticompetitive business conduct. They shall also endeavour to further the adoption of common measures to avoid such conduct.</p> <p>2. The parties shall also endeavour to establish mechanisms that will facilitate and promote the development of competition policies and guarantee the enforcement of free competition rules between and within the parties, in order to avoid the adverse effects of anticompetitive business conduct in the free-trade area.</p> | <p>Section A - Competition policy Article 15.01 Cooperation 1. The parties shall endeavour to ensure that the benefits of this Agreement are not impaired by anticompetitive business conduct. They shall also endeavour to further the adoption of common measures to avoid such conduct.</p> <p>2. The parties shall also endeavour to establish mechanisms that will facilitate and promote the development of competition policies and guarantee the enforcement of free competition rules between and within the parties, in order to avoid the adverse effects of anticompetitive business conduct in the free-trade area.</p> |

| Chile | Dominican Republic | Panama |
|---|---|--|
| | <p>Article 15.02 Free Trade and Competition Committee The Free Trade and Competition Committee shall be created, comprising two members of each party. The committee shall, as its principal function, seek the most appropriate means to enforce the provisions of paragraphs 1 and 2, and shall perform any other task assigned to it by the Council.</p> | |
| | | <p>Article 15.02 Future work program Within two years after the entry into force of this Agreement, the parties shall examine, in accordance with their specific legislation on the matter, the possibility of developing and expanding the contents of this chapter, within the limits of that legislation..</p> <p>In this respect, the development and expansion of the contents of this chapter shall be done with special reference to conduct the purpose or effect of which would unduly damage or impede the process of free economic competition and free competition in the production, processing, distribution, supply or marketing of goods and services.</p> |
| <p>Article 15.02 Monopolies and state enterprises 1. For purposes of this Article: Monopoly means an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant; and Non-discriminatory treatment means the better of national treatment and most-favoured-nation treatment, as set out in the relevant provisions of this Agreement.</p> | | <p>Section B – Monopolies and state enterprises</p> <p>Article 15.03 Monopolies and state enterprises</p> |

| Chile | Dominican Republic | Panama |
|---|--------------------|--|
| <p>2. Nothing in this Agreement shall be construed to prevent a Party from maintaining or establishing monopolies and state enterprise, where their legislation so permits.</p> | | <p>1. Nothing in this Agreement shall be construed to prevent a Party from maintaining or establishing monopolies and state enterprise, where their legislation so permits.</p> |
| <p>3. Each party shall adapt to the provisions of this Agreement to ensure that any monopoly or state enterprise established or maintain acts in a manner compatible with the party's obligations under this Agreement and grants and non-discriminatory treatment to the investments of investors, to goods and to service providers of the other Party. .</p> | | <p>2. If its legislation so permits, where a Party intends to designate a monopoly and the designation may affect the interests of persons of the other Party, the Party shall:</p> <p>(a) wherever possible, provide prior written notification to the other Party of the designation; and</p> <p>(b) endeavour to introduce at the time of the designation such conditions on the operation of the monopoly as will minimise or eliminate any nullification or impairment of benefits.</p> <p>3. If its legislation so permits, Each Party shall ensure that any monopoly that it maintains or designates, or any state enterprise:</p> <p>(a) acts in a manner consistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licences, approve commercial transactions or impose quotas, fees or other charges</p> <p>b) provides non-discriminatory treatment to investments of investors, to goods and to service providers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and</p> <p>(c) does not use its monopoly position to engage, either directly or indirectly, in anticompetitive practices that adversely affect an investment of an investor of the other Party.</p> |
| <p>4. This Article does not apply to procurement by governmental agencies of goods or services for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the provision of services for commercial sale</p> | | <p>4. Paragraph 3 does not apply to procurement by governmental agencies of goods or services for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the provision of services for commercial sale</p> |

C) Free-trade treaties are agreements in the process of negotiation

- Free-trade agreement between CA4 and Canada

13. These negotiations have stalled, but among the issues that have been discussed is a chapter on competition, which focuses on a mechanism for cooperation between competition authorities for the effective enforcement of the law, including the exchange of information. While the process was active, El Salvador did not yet have a competition authority. If the negotiations resume, the Superintendency of Competition will participate actively, defending the position on the inclusion of a competition chapter in a free-trade agreement, as set forth in section 2.2 of this paper.

- Agreement of Association with the European Union

14. The negotiation of the Agreement of Association between the European Union and Central America is now underway. It establishes a region-to-region approach, within which Central American competition rules and the Central American Competition Authority, which is in the process of construction, are the focus of discussion. We may say that the chapter is based on a model of specific rules, as one of the articles lists the practices that the parties must monitor to avoid distortion in their trade. In addition, the chapter makes provision for establishment of a cooperation and coordination mechanism among competition authorities.

3. ECONOMIC INTEGRATION IN CENTRAL AMERICA

15. The trade policy that the Central American region has adopted since the 1990s, whereby countries of the region have negotiated trade agreements and treaties as a bloc and have been deepening Central American integration, has focused on promoting access to new technologies and productive processes, eliminating barriers to trade, expanding opportunities for trade at the regional and world levels, and fostering a climate attractive for investment. This policy is changing internal market conditions in each of the region's member countries: it is driving them to diversify their products, to make their economic agents more competitive and, most importantly, to ensure that their markets are efficient and that the benefits are passed on to consumers. This last objective can only be achieved through a regional competition policy.

16. At the present time, four countries of the region have special competition laws in place and one country, while it does not have special legislation, has various provisions relating to competition within its national legal framework. All these countries are thus able to apply principles in favour of free competition. At the request of the competition authorities, the Central American Working Group on Competition Policy has been established, by mandate of the Vice Ministers of Foreign Trade. That group comprises the competition authorities of the countries of the region. Its objectives include the adoption of Central American competition regulations and the creation of an independent authority with the power to investigate and punish anticompetitive conduct that has a regional dimension, i.e. that produces cross-border effects among the countries of the Isthmus. The process is just beginning, but it is part of a series of measures that will be adopted to conform with the realities of international trade.

17. This process of negotiating Central American rules should not be confused with the work underway in the negotiations with the European Union. The difference lies in the fact that the regional effort involves reinforcing competition rules so that countries of the region can move toward the long-awaited consolidation of the customs union. On the other hand, the negotiations with the European Union are based on the determination of the five Central American countries to adopt a regional authority and rules.

18. The progress that is being made towards consolidating a customs union in the context of Central American integration is visible and reaffirms the fact that borders between countries of the region are disappearing, and national markets are expanding into a regional market. There is now a clear need to complement the legal instruments of integration with a legal framework governing competition, so that the benefits won to date are not impaired by anticompetitive conduct in any country of the region.

4. POSITION OF THE SUPERINTENDENCY OF COMPETITION WITH RESPECT TO THE NEGOTIATION OF TRADE AGREEMENTS AND TREATIES

19. Since it began operations on 1 January 2006, the Superintendency of Competition has participated in the competition aspects involved in the negotiation of trade agreements and treaties, together with the Ministry of Economy, and has sat at the negotiating table on that issue. For these purposes, the Executive Council of the Superintendency of Competition, by means of Resolution RC-AG-06/2006 of 26 July 2006, adopted a position on this topic, known as the "Competition Policy with Respect to a Competition Chapter in Trade Agreements or Treaties to be Signed by the Republic of El Salvador".

20. That Resolution recognised the fact that the exclusions that trade agreements and treaties may contain, relating for example to export cartels and government subsidies designed to enhance the country's competitiveness, may have an impact on competition in a given market or sector.

21. There are normally two ways to address the competition issue in a trade treaty or agreement. A chapter can be drafted referring to substantive rules or to specific conduct:

1. Competition chapter with substantive rules:

The substantive rules model is intended to define whether the obligation is limited to ensuring the effective enforcement of national regulations or whether, within the free-trade area, there will be room for substantive international regulation, or only for positive comity. Whatever the option selected, the essential basis of the agreement is cooperation between the competition authorities.

2. Competition chapter targeting specific conduct:

The specific-conduct model is intended to define clearly what are the prohibited anticompetitive practices. If this model is adopted, there must be a prior analysis, beginning with verification as to whether the states parties to the trade agreement or treaty have a competition law and an operational enforcement authority. Indeed, the essential point of the specific-conduct model is that there must be similarity in the conduct regulated by the competition laws of the states parties. Nevertheless, the analysis begins by identifying the types of conduct. This analysis must take into account the exclusions contained in the different laws, and determine whether there is asymmetry among them.

22. Regardless of the approach taken, the range of potential obligations may be binding to varying degrees. These commitments range from the least binding, which may take the form of a commitment to best efforts in the enforcement of competition legislation and cooperation, to legally mandatory cooperation provisions, positive and negative comity, dispute settlement mechanisms, and compulsory consultation.

23. There are other important elements that each country must address internally, in advance of negotiating trade agreements or treaties, if a competition chapter is to be incorporated in the outcome.

24. That evaluation must begin with a decision as to whether the chapter is to be covered or not by the dispute settlement mechanism of the agreement. Dispute settlement chapters are applicable across the entire spectrum of disciplines regulated by the agreement, and because the competition chapter is an integral part of the agreement it would be covered as well. Any breach of the provisions in the competition chapter could trigger the state-to-state dispute settlement mechanism, and would be resolved through commercial arbitration. Yet the procedures for settling competition cases entail a technical, economic and legal analysis as required in national laws.

25. The decision to include the chapter under the dispute settlement mechanism must consider the approach taken in the competition chapter, evaluating the type of sanctions to be imposed (administrative or criminal) and whether it is the national competition rule that is to be enforced or rather a substantive international rule. In addition, due attention must be paid to the human and financial resources and the time needed to defend cases arising from treaty application.

26. One element that is commonly overlooked in the analysis is the level or degree of understanding of competition issues on the part of economic agents and civil society in general.

27. Because competition laws are of territorial applicability in the State party to the trade agreement, specific definitions must be considered for the chapter, relating primarily to market, economic agent, measures, connected person [*persona vinculada*], etc., but this will always depend on the model adopted for the chapter.

28. A crucial element for effective enforcement of competition rules and the development and implementation of competition policies in states parties, in connection with trade agreements or treaties, is cooperation and coordination between competition authorities. Any commitment between authorities must contain provisions for dealing with indications of anticompetitive conduct with a cross-border impact, allowing the parties involved to cooperate in the investigation and, if feasible, to conduct joint investigations and adopt the necessary measures.

29. In this respect, the Executive Council of the Superintendency of Competition considers that the best way to ensure the proper functioning of markets and the effective enforcement of competition legislation and policies is to negotiate bilateral cooperation arrangements between the competition authorities of the states parties, which could take the form of parallel accords to the main agreements. This would make it possible to address cases of anticompetitive conduct that threaten to impair the benefits of trade agreements, by providing clear procedures for the competition authorities to coordinate their treatment of connected [*vinculados*] economic agents and the market, and by retaining clarity in the enforcement of the law with respect to the territories involved.

4. CONCLUSION

30. An essential condition for the success of competition legislation and policy in any country is to create awareness among the various economic players and participants, i.e. to create, foster and consolidate a culture of competition. The Superintendency of Competition has been working and continues to work toward this goal.

31. With respect to progress in Central American integration, there is a need to promote and secure approval of competition laws in those countries that still do not have them, and to provide technical support for creating and developing the authority responsible for competition law enforcement in countries that have no such body. It is also essential to have a regional legal framework regulating economic concentrations that can affect trade in the Isthmus and proscribing collusive cross-border behaviour,

particularly of the kind that can spread into the Central American Customs Union space, and to create an independent regional competition authority with budgetary and financial autonomy.

32. As mentioned above, the inclusion of competition provisions in trade agreements and treaties is a viable alternative. However, the best route, and one of undeniable importance, is to negotiate bilateral cooperation and coordination arrangements between the competition authorities, which can serve as parallel instruments to the regional or international agreements signed.