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Session II: Regional Competition Agreements

Background Note by the IADB Secretariat

3-4 September 2013, Lima, Peru

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LATIN AMERICAN AND CARIBBEAN REGIONAL COMPETITION AGREEMENTS

1. Introduction

1. In a global economy with multiple economic players operating in international markets (both regional and global), it is hard to continue to approach competition policy as a strictly domestic issue or confine it to national jurisdiction. Internationalisation of markets has brought anti-competitive conduct across country borders and this, in turn, has led to the need for regulations with an equally international scope. In this environment, it comes as no surprise that the various instruments governing economic integration would begin to reflect this reality.

2. The purpose of this paper is to analyse the evolution of competition policy within the framework of regional trade agreements and economic integration in Latin America and the Caribbean (hereinafter, the Region) and to better understand why its applications have been limited up to now.

3. Most countries in Latin America and the Caribbean (hereinafter, the Region) have signed legal-economic instruments to regulate their varied levels of economic integration and some have espoused a strong free trade agenda, such as: Chile, Colombia, Mexico and Peru.[1]. Without a doubt, the Region is fertile soil for the proliferation of trade agreements: (i) All countries in the Region, except the Bahamas, are member countries of the World Trade Organization (WTO); (ii) There are 4 trade blocs that aspire to create customs unions and single markets: the Central American Common Market (*Mercado Común Centroamericano* or CACM), the Andean Community (*Comunidad Andina* or CAN), the Southern Common Market (*Mercado Común del Sur* or MERCOSUR), and the Caribbean Community (CARICOM); there are several multilateral trade agreements such as the North American Free Trade Agreement (NAFTA), the Free Trade Agreement between Central America, the Dominican Republic and the United States of America (CAFTA-DR), the Mexican Free Trade Agreement with Costa Rica, El Salvador, Guatemala and Honduras, the Free Trade Agreement between Costa Rica and the Caribbean Community (CARICOM), the EU-CARIFORUM Economic Partnership Agreement (EPA), and the EU-Central America Association Agreement, among others; iv) several bilateral trade agreements have also been signed, such as the one between Chile and the United States of America, between Costa Rica and the People's Republic of China, between the United States of America and Panama, between the United States of America and Peru, and many others; v) recent developments include the formation of transcontinental agreements, such as the Trans-Pacific Partnership (TPP); and vi) unilateral concession programmes come into play, such as the United States of America's Andean Trade Promotion and Drug Eradication Act (ATPDEA), and the Caribbean Basin Economic Recovery Act (CBI/CBERA).

4. Since competition is central to a healthy marketplace and globalization, it is only natural that conditions regarding this topic be built into international treaties that have been signed among countries in the Region in recent years. The breakdown of barriers for entry into markets has little actual economic impact if companies in either country decide to manipulate the competitive process and create new barriers by dividing markets, setting limits on production, price fixing, refusals to purchase or sell, or any other distortion that could squelch the spirit of this kind of international agreement. Similarly, as integrated markets are formed, the potential effect of company mergers and market concentration becomes a more

[1] See: Alfonso Dingemans and César Ross, "*Los Acuerdos de Libre Comercio en América Latina desde 1990. Una evaluación de la diversificación de exportaciones, Revista CEPAL 108*" ["Free Trade Agreements in Latin America since 1990. An assessment of export diversification"], *CEPAL Journal* 108, December 2012.
Available at: http://www.eclac.org/publicaciones/xml/5/48615/RVE108DingemansRoss.pdf

marginal concern. For example, the Trade Agreement with the EU on one side, and Colombia and Peru on the other,[2], emphasises the importance of free competition for properly functioning markets, and also recognises that anti-competitive practices can have an impact on economic and social development, as well as economic efficiency and consumer welfare.

5. If containing rules of competition is an important element of tree trade agreements, it is even more so for economic integration processes in which members have made commitments that reach even further and whereby, the goal is basically to create a common market in which goods and services may flow freely.

6. The most relevant example is obviously the European Union. The early founders of this process were conscious of the fact that free competition was one of the most important tools in the integration process that began in 1957 (and its predecessor in 1951 through the European Coal and Steel Community)[3]. So much so, that the Treaty of Rome included specific provisions about activities that were considered to be harmful to this concept.[4] Through the years, the European Union's policy and regulations on competition, currently outlined in the Treaty on the Functioning of the European Union (TFEU), has been far reaching enough to be held as the world's international benchmark. In addition to clearly influencing lawmaking structure and implementation in its member countries, the treaty has managed to greatly expand its scope, especially since the 1990s, by inspiring the design of regulations and providing case law references on an international level. This can be plainly seen in the regulatory framework of many Latin American and Caribbean countries, and for purposes of this paper, it has basically been the benchmark for the Andean Community, the Southern Common Market (MERCOSUR), and the Caribbean Community (CARICOM), as well as for proposals that are in the works for a Central American Integration System.

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2 Bilateral Trade Agreement between Peru and Colombia, on the one part, and the European Union and its member countries, on the other part, signed on 26 June 2012 in Brussels, Belgium. It became effective on 1 March 2013. Specifically, Article 259 on Objectives and Principles recognises: *"... the importance of free competition and that anti-competitive practices have the potential to distort the proper functioning of markets, to impact economic and social development, economic efficiency and consumer welfare, and diminish the benefits that could be gained by applying this Agreement."* Also, Article 4 of the Trade Agreement (Objectives), Number 1, Paragraph (h) has defined one of its main objectives as: *"The development of economic activities, specifically as pertains to the relationship between the Parties, in accordance with the principle of free competition."*

3 Articles 65 and 66 of the Treaty of Paris, signed 18 April 1951, which address agreements that restrict competition and company merger transactions, in that order, as well as Article 67 which addresses Aids Granted by States that could distort competition.

4 Article 85 and subsequent articles in the Treaty of Rome, signed 25 March 1957 addressing agreements that restrict competition, abuse of dominant position, as well as Aids Granted by States. These were later amended to be Articles 81 and subsequent articles. Currently, these are mainly Articles 101, 102 and 106, as they appear in the Treaty on the Functioning of the European Union (TFEU). It is worth noting that the Treaty of Rome does not contain any provisions with regard to controlling mergers and market concentrations. This was placed in effect as of 21 December 1989 with Regulation 464/89 which contains specific guidelines on this subject (substituted by Regulation 139/2004 from 20 January 2004, the union's regulation on concentrations, which is the most current).

2. Competition Law within Latin American and Caribbean Integration Processes

2.1 MERCOSUR

2.1.1 Main aspects of Mercosur's system to protect competition

7. The Southern Common Market or MERCOSUR began with the Treaty of Asunción in 1991, the ultimate goal of which was the creation of a common market among its members. According to the original plan, this agreement was to be in effect until 2006. Article 4 of the Treaty of Asunción provided for co-ordination of national policies by the member countries, in order to develop common rules for trade competition.

8. A few years later, in December1996, the Fortaleza Protocol was signed, which is the legal instrument created to address the subject of protecting competition within the region.

9. Article 2 states that the Protocol applies to anti-competitive conduct that affects trade among the MERCOSUR member countries. The scope of its application is defined in Article 3, with member countries being at liberty to regulate any anti-competitive practices that originate or have an effect in their own territories. In other words, cross-border efforts are required in order to apply the Protocol. Therefore, MERCOSUR's Competition Protection Agreement clearly adopted the "local effect" theory with regard to national competition laws, whereby these would be applicable even if an act was committed in another member country but had an effect in their own national territory.

10. Article 4 of the Protocol defines anti-competitive conduct (Protocol infringement) as "individual or concerted acts, in any form, whose purpose or final effect is to limit, restrict, falsify or distort competition or access to the market, or which constitute abuse of dominance in the relevant goods or services market in the MERCOSUR sphere and affect trade between the member countries." Then, Article 6 includes an open-ended list of different practices that restrict competition, including practices traditionally considered to be restrictive or cartel oriented (i,ii,iii,iv,v,vi), conduct traditionally classified as abuse of dominance (vii, viii, ix, x, xi, xii, xiii) and other practices that are incompatible with the Protocol (xiv, iv, xvi, xvii).

11. Technically speaking, the wording in some of the definitions of anti-competitive practices strays from the traditional code used in Competition Law. The absence of a clear distinction between collusion and dominance abuse cases adds to the challenge of interpreting the trade bloc's competition rules, which has drawn some criticism to its legislative technicalities.[5]

12. Article 7 of the Protocol specifies that the member countries must adopt common rules for controlling anti-competitive conduct in the regional market, including acts of market concentration, even though these are not included in the list of prohibited practices. However, in 2007, Uruguay did form an independent set of regulations to protect competition[6] and Paraguay did the same in 2013.[7] These rules, however, lack provisions on how to apply the regional competition rules within their territories, an area where Argentina[8] and Brazil's regulations also fall short.[9]

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5 Gustavo Carrizo, "*El Desarrollo del Derecho de la Competencia en el Mercosur", Revista Latinoamericana de Derecho* ["The Development of Competition Law in Mercosur", *Latin American Law Journal*], N° 3, January-June 2005, p.16.

6 Law 18.159. Law on the Promotion and Protection of Competition (Uruguay).

7 Law 4956/13. Law on the Protection of Competition (Paraguay).

8 Law 25.156 on the Protection of Competition (Argentina).

13. The Committee for the Defence of Competition is the entity responsible for applying the Protocol. It is an intergovernmental organisation made up of each member country's authority responsible for applying the Protocol. Investigations which are entrusted to the Committee, however, are conducted by the national authorities who, if the investigation applies to their country, must send a preliminary technical assessment to the Committee. The Committee, will then send reports to the Trade Commission, a body of four full members and four alternates who represent the ministries of foreign relations and economy, and the central banks from each country.

14. Once investigations are complete, the appropriate national competition authority sends a report to the Committee for the Defence of Competition, which then will decide whether the practice in question is an infringement of the Protocol and, if so, determines any applicable sanctions or corrective measures. However, in order for this to happen, the Committee must reach a consensus among all the national authorities that are represented. Otherwise, the Trade Commission must then determine the sanctions and measures, if applicable, through a Directive. It is worth noting that neither the Committee nor the Commission have the power to directly enforce these sanctions or measures. This must be done through the authorities in each country where the violating party is domiciled.

15. Since it is an inter-governmental organisation that does not possess supranational powers per se, there is a chance that the Commission may never reach a consensus, in which case the proposed alternatives must be brought before the Common Market Group, the executive body of MERCOSUR. And if this higher authority does not reach a consensus, the specific case would follow the dispute resolution procedure pursuant to Chapter IV of the Brasilia Protocol.

16. This set of rules covering failure to reach consensus is especially noteworthy because of its path through the hierarchy of yet other intergovernmental organisations in order for decisions to be rendered on a regional competition rule; decisions that aren't even directly enforceable, other than by the competition authorities in each individual country.

17. This illustrates how the MERCOSUR system to protect competition is a far cry from being a supranational system,[10] in fact, on the contrary; the complicated organisational system greatly hinders the goal of developing a truly effective regional competition policy.

18. The Fortaleza Protocol also addresses the obligation by member countries to adopt measures to provide co-operation and technical consulting. Nevertheless, the co-operative measures are “soft issues,” which involve the sharing of experiences, training and technical assistance as well as compilation of case law. The Protocol does not contain any obligations with regard to joint investigations of anti-competitive practices, or the ability to share relevant information (which is sometimes confidential in nature) between authorities regarding such investigations. However, the MERCOSUR Competition Protection Agreement does include some rules that are conducive to collaborative efforts between the countries' competition authorities for conducting investigations, again, without limiting their individual freedom to act on their own accord. Although there is no concrete obligation to share information, the Agreement goes farther than the Protocol by stating that the member countries are to “make their best effort at providing the other member country's authority with information and data regarding specific cases upon its request.” As far as the ability to share confidential information goes, this is neither imposed nor forbidden by the Agreement, which provides that neither member country will be obligated to provide this kind of information if it “were forbidden by law or incompatible with relevant public interest or policies...”

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9 Law 12.529, Brazilian Structure or System for the Protection of Competition (Brazil.).

10 OECD, Mercosur Agreement on Competition Policy – How Effective has it been and How to Promote Future Co-Operation, Oct. 7 2005, p.6.

19. Also, there are more formal co-operation mechanisms built into the Agreement which incorporate *positive and negative comity* principles. As such, Article 7 of the Agreement regulates "requests for consultations" between the national competition authorities for cases where one member country believes that an investigation or action taking place in another member country's jurisdiction has an impact on its interests *(negative comity*), and for cases where one member country believes that the anti-competitive practice originating in another member country affects its interests, and therefore, requires consideration by the competition authority in said country (*positive comity*).

20. In both positive and negative comity situations, the Agreement states that this principle in no way limits the freedom of either country's activity, whether it is the one making or receiving the request.

21. Along general lines, the Agreement has made significant regulatory progress with regard to co-operation among competition authorities in the member countries, but only with regard to the application of the respective national competition laws. In other words, it isn't far-reaching enough to deal with conduct on a sub-regional scale. Therefore, the Agreement does not solve the shortfalls of the Fortaleza Protocol which has a different scope. The Agreement, while important, has a limited scope as far as providing a competition policy and controlling anti-competitive practices on a supranational level.

22. Finally, on the topics of advocacy and public restrictions of competition, the Fortaleza Protocol and the Agreement are silent. Only Article 32 of the Protocol mentions the commitment to a 2 year deadline for adopting common rules to rein in aids granted by states. As of today, this commitment has still not been met.

23. To date, there is no data showing the Protocol's procedures being put into practice with regard to investigations and application of the regional competition rules. From a review of the minutes from Mercosur's Committee for the Defence of Competition (CT N° 5) available on their website, one can see that most of the activities conducted within this Committee are dedicated not to the enforcement of the competition laws, but rather to updating and exchanging information about each country's laws and their application in generalities, that is, without referring to an actual case.

2.1.2 Challenges and problems with MERCOSUR's regional competition policy

24. One obstacle to the convergence of a regional competition policy and true supranational unity in this area is a natural feature of any community or unified market, which is the fact that different trade policies do exist in each country; policies that still create hurdles for foreign trade. For example, allegedly over one third of anti-dumping actions filed in Argentina between 1991 and 2000 were due to imports from within the trading bloc, in particular, from Brazil.[11] An OECD study done in 2005 highlighted the high incidence of internal anti-dumping measures within the bloc, a key weakness in this integration process which is supposed to be a self driven liberalisation of regional free trade.[12]

25. Therefore, as mentioned before, the complex enforcement procedure outlined in the Fortaleza Protocol greatly hinders the potential for having an organisation or system that truly protects regional competition. The simple fact that determinations by the regional competition authority, the Committee for the Defence of Competition, are not directly enforceable in the member countries, and that it is not an independent agency, but rather a collection of national competition authorities, weakens this regional body from an institutional perspective.

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11 *Ibid.*, p.3.

12 *Ibid.*, p.9-11.

26. Finally, and as it happens in several Latin American regional integration agreements, the significant differences among the MERCOSUR member countries' progress in their respective competition policies represents a challenge that reduces the chances of achieving an effective regional system to protect competition. At the time that the Fortaleza Protocol was ratified, as mentioned before, only Brazil and Argentina had a legal framework and agencies to protect competition, and the Brazilian laws did have a strong influence on the text for the Protocol.[13] Also, Brazil's legislation has undergone a considerable amount of reforms; positive changes that place this country in a more advanced stage of protection of free competition. The Argentine practice has been a little more limited in recent years, while Uruguay, with a law dating back to 2000 but a recently formed independent regulatory body in 2007, is still limited, although much farther along than Paraguay, which has only recently enacted its first ever competition law.

2.2 Andean Community

2.2.1 Main aspects of the Andean Community's system to protect competition

27. In May 1969, five South American countries (Bolivia, Colombia, Chile, Ecuador and Peru) signed the Subregional Andean Integration Agreement or Cartagena Agreement, currently known as the Andean Community or CAN.

28. In 1973, Venezuela joined the Cartagena Agreement, but after more than three decades of membership, it announced its withdrawal in 2006. This was made official in 2011. Chile, on the other hand, as a result of the shift in its economic model in the mid 1970s, withdrew in 1976, although in 2006 it announced its re-incorporation as an associate member. Today, Bolivia, Colombia, Ecuador and Peru are full member countries of this integration process.

29. The goal of the Cartagena Agreement is "aimed at bringing about an enduring improvement in the standard of living of the subregion's population",[14] for which, among other things, it establishes that the purposes of the Andean Community are "to promote the balanced and harmonious development of the Member Countries under equitable conditions, through integration and social and economic co-operation; to accelerate their growth and the rate of creation of employment; and to facilitate their participation in the regional integration process, looking ahead toward gradual formation of a Latin American Common Market…".[15]

30. One tool for achieving growth and economic co-operation in the regional bloc is to have a competition policy. Article, 93 of the Agreement uses the boilerplate provision to adopt "the essential provisions to guard against or correct practices that may distort competition within the subregion...".

31. CAN Decision 608 is the specific regulatory instrument that establishes the System for the Protection and Promotion of Free Competition in the Andean common market. This regulation, approved in 2005, replaces its predecessor, Decision 285, which was in effect since 1991, and in turn, had replaced Decision 230, issued in 1987. None of the three regulations have been applied in actual occurrences, so Andean development in this area can only be discussed theoretically. In fact, Decision 230 was never applied; therefore this paper will focus on analysing the institutional and procedural framework discussed in Decision 608, with reference to changes from the previous version, Decision 285.

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13 Carrizo, *supra 5*, p.3; OECD, *supra* 10, p.13.

14 Third paragraph of Article 1 of the Cartagena Agreement. Hereinafter, whenever the Cartagena Agreement or the Andean Community regulations are mentioned, it will be referring to the Official Text of the Cartagena Agreement, adopted through Decision 563. Published in the Official Gazette of the Cartagena Agreement N° 940 dated 1 July 2003. Period 114 of the Commission's Special Sessions.

15 First paragraph of Article 1 of the Cartagena Agreement.

32. First of all, Article 5 of Decision 608 defines its scope by limiting it to (i) any anti-competitive conduct originating in the territory of a CAN member country which generate a real effect in another or other member countries, and (ii) any anti-competitive conduct originating in the territory of a non-member country of the Andean Community which generates an effect in two or more member countries.

33. This regulation reveals two important aspects about Andean competition law. On one hand, it is applicable to cross-border conduct and, on the other, it adopts the "effects" theory. This way, if an anti-competitive practice happens to occur and generates an effect in only one CAN member country, the applicable regulation would be the national law in that country and not Decision 608.

34. With regard to its content, Decision 608 sanctions agreements that restrict competition and cases of abuse of dominance, including a list for each category of conducts that are considered to be anti-competitive in nature. This list of conducts, outlined in Articles 7 and 8 of the Decision, follows the usual classification that is accepted on an international level (price fixing, dividing markets, boycotts, bid rigging, exclusivity agreements, tie-in sales, discrimination, unequal treatment, predatory pricing, etc.).

35. Even though the common rules do not dictate harmonisation of the national laws, Decision 608 and subsequent Decision 616 contain provisions aimed at ensuring that the member countries do have national competition regulations and authorities in place.

36. In addition, Article 49 of Decision 608 also gave Bolivia the ability to apply the Decision to anti-competitive conduct cases that originated and had effects in its territory. Article 1 of Decision 616 also provided the same thing for Ecuador. In this same vein, Decisions 608 and 616 stipulated that Bolivia and Ecuador both needed to set up interim competition authorities that would be responsible for upholding the provisions in the Decision and would become members of the Andean Competition Committee. This took several years to get done.

37. Currently, all of the member countries of the Andean Community bloc do have competition laws and agencies in place, so the Committee can now potentially be activated. Nevertheless, the regulatory reality is not homogeneous.

38. Colombia is the country with the most experience in this group, since it has had a competition law since 1959, however the recently enacted 1992 Law restructured the Ministry of Industry and Trade (*Superintendencia de Industria y Comercio* or SIC) and updated the system to protect free competition in that country. At around the same time, in 1991, Peru enacted its first ever competition law, which went through significant reforms in 2008 in order to adjust to the most recent trends and case law judgements that were being applied by the national authority, the Peruvian Institute for the Protection of Competition and Intellectual Property (*Instituto Peruano de Defensa de la Competencia y de Protección de la Propiedad Intelectual* or INDECOPI). In 2009 Colombia went through a similar reform process to update its competition law.

39. Ecuador, on the other hand, is in the initial stages with regard to competition law. This is due to the very recent enactment of an all-encompassing set of regulations in this area.[16] Bolivia has had a law in place since 2008[17] but its wording, and especially, its practical application resemble more of a programme to regulate price fixing rather than a system to protect competition as described throughout this paper.

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16 *Ley Orgánica de Regulación y Control del Poder de Mercado (Ley de Competencia)* [Organic Law for the Regulation and Control of Market Power (Competition Law)]. Enacted on 29 September 2011.

17 The Bolivian legal structure is based upon existing provisions in the Sectorial Regulation System Law (*Ley del Sistema de Regulación Sectorial* or SIRESE) N° 1600 enacted in 1994. As it pertains to free

40. Going back to the discussion of cross-border investigations of anti-competitive conduct, these are conducted by the General Secretariat, the governing body of the Andean Community, which can officially initiate these on its own, or upon the request of any member country's national competition authority, individual or entity. So, a broad enough legal structure is set up, which should theoretically facilitate this type of investigation. Now, in the case of requests from other entities, these must provide certain information about the conduct in question and the agents involved.

41. Even though the General Secretariat is responsible for the investigation; it is handled through the intermediation of the national competition agencies, with whom it co-ordinates an Investigation Plan[18] Although Decision 608 authorizes the national agencies and the Secretariat to conduct different types of due diligence, including requesting information from the parties, conducting depositions and, also, unannounced inspection visits (dawn raids); the common regulation itself introduces the limiting factor that national competition laws must be adhered to in doing all of the above.

42. The fact that Decision 608 stipulates that the investigation must conform to the national competition laws is a self-imposed hand tying clause, since the common regulation could have set up its own procedure for the national structure of member countries to follow. Certainly, case law from the Andean Community Court of Justice has repeatedly shown that the common regulations supersede a national regulation in the event of a conflict, are able to be applied immediately with a direct impact, creating obligations for the member countries as well as individuals and entities under its jurisdiction.[19] However, it doesn't seem that this fact was taken into account when the Andean regulation for competition was drafted.

43. Once the General Secretariat completes the investigation, it issues a report which records the findings. This document is communicated to the parties, the national competition agencies involved in the investigation, and members of the Andean Committee for the Protection of Competition. After this has been done, the General Secretariat calls for a meeting of the Committee members. After this meeting takes place to review the case, the Committee must issue a technical report with its own conclusions on the case or, as the case may be, to state its agreement with the content of the General Secretariat's initial report.

44. Finally, the General Secretariat is the body that renders a determination through a resolution based on the case file's merit. Although the General Secretariat does play a critical role in this process, the influence that the report from the Andean Committee could wield cannot be underestimated. In fact, Article 22 of Decision 608 specifies that the General Secretariat must expressly state the reasons behind any departure from the Committee Report's conclusions and recommendations. Another way to describe it is that the General Secretariat's power to make determinations fits the mediating hierarchy model.

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competition, the main section and general statute on free competition is found in the provisions of Section V, Articles 15 through 21 of the SIRESE Law which applies to sectors that are governed by this law; these include telecommunications, electricity, hydrocarbons, transportation and basic water and sewage.

18 Article 15 Decision 608.

19 Pierino Stucchi, "*La Integración en la Comunidad Andina y su Sistema de Protección y Promoción de la Libre Competencia: Aspectos Institucionales y Procesales", Revista de la Competencia y la Propiedad Intelectual* ["Integration in the Andean Community and its System of Protection and Promotion of Free Trade; Institutional and Procedural Aspects", *Competition and Intellectual Property Journal*] Nº 2, 2006, p. 83. A complete work on this subject by the same author, *Las normas de defensa de la competencia de la Comunidad Andina* [The Andean Community's Regulations for the Protection of Competition]. Analysis and proposals for strengthening inspired by the European model. 2012. A dissertation for completion of the Masters Degree in Law. Unedited, *Universidad de La Coruña*, Spain.

45. In this respect, the important thing to note is that the final determination is made by the General Secretariat and not the Committee. Even though the Committee is supposed to represent the Community as a whole with its own independent judgement, the fact that this body is comprised of one representative from each national competition agency must be taken into consideration. This could create problems when it comes to making determinations internally within this body. Therefore, there is a provision which specifies that if the Committee does not issue its report within 30 days, it is assumed that the Committee agrees with the terms in the General Secretariat report that was circulated. In this sense, at least it is a good thing that the final resolution of the case is entrusted to the General Secretariat and the Committee's role is appropriately that of an examiner.

46. The General Secretariat's final resolution, in the event that it does decide there was a violation of the Community's anti-competitive practice rules, is supposed to include the sanction (stating the applicable fine, which shall be no greater than ten percent of the violator's prior year's gross income). However, it will be up to the national authorities to enforce these measures, under their duty to notify the General Secretariat when these have been executed, as well as the other member countries and the specific parties who were involved in the action.

47. Another alternative for bringing an action to a close is through a commitment to terminate the practice in question. For this to occur, it must be approved by the General Secretariat (prior to the Committee's report), through a resolution that should include the commitments made, the time frame and other agreed upon terms and conditions.

48. In general, Decision 608 represents a significant improvement over its predecessor in terms of technical legislation, classification of anti-competitive conducts and the design of the investigation procedure. Decision 285 had a serious defect in its vagueness with regard to substantive elements, by not defining the community's authority to investigate and sanction, and because it introduced a procedure that strayed too far from traditional parameters held in international competition law. It bore closer resemblance to a procedure about dumping and subsidies. For example, to calculate a fine for a violation, it required information such as evidence of the harm or threat of harm to the national industry and grounds to link the "anti-competitive" conduct to the harm or threat, factors that might be appropriate in an anti-dumping investigation, but are totally foreign to an antitrust analysis.[20]

49. Despite the improvements in the technical legislative and procedural aspects, Decision 608 has had almost no practical application during its 8 years of being in effect. To date, the only case that has involved any application of this regulation was one initiated by Ecuadorian attorney, Alejandro Ponce, who filed an non-compliance action against the Andean legal structure due to the fact that as of the date of his complaint (September 2008), Ecuador had still not officially created an authority to govern competition matters internally within the country. However, the General Secretariat dismissed this action because of improper due process, since Mr. Ponce did not have a legal right that justified opening a non-compliance action against the Ecuadorian State.[21] This issue will be discussed further in the section about challenges facing the Andean competition policy.

50. Finally, one interesting point to note about the Andean Community regulation is the specific reference to Competition Advocacy. Article 36 states that member states may not impede, hinder or distort competition in the subregional market by enacting and applying regulatory market policies and measures.

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20 In this context, Javier Cortázar, "*Decisión 608 de la Comunidad Andina: Un Paso Adelante para el Sistema Antimonopolios de la Región*", *Rev. Derecho Competencia* ["Decision 608 and the Andean Community: A Step Forward for the Region's Antimonopoly Sytem", *Competition Law Journal*]. Bogotá (Colombia), Vol. 2, Nº 2, p.125, Janurary-December 2006.

21 General Secretariat of the Andean Community Report 03-2009, dated 8 June 209.

This, however, does not seem to be a direct obligation that could be the subject of a non-compliance action brought before the General Secretariat or the Andean Court of Justice.[22] Article 36 does describes the "remedy" for this kind of case by specifying that the Andean Committee may "propose recommendations meant to eliminate these procedures and requirements, when appropriate, in order to promote free trade and competition." This is basically referring to a typical competition advocacy technique, which is to make pro-competitive recommendations. However, no evidence exists to date showing that this has been done at all.[23]

2.2.2 Challenges and problems with CAN's regional competition policy

51. As mentioned before, despite having modern competition legislation that does overcome several of the typical institutional and procedural problems encountered in other integration agreements, the Andean competition regulations are lacking in practical application. The only case on record was not even one that involved an investigation of an anti-competitive practice. Perhaps the words of Cortázar, a scholar who has studied and analysed Decision 608, would help illustrate the situation: "it's like having a Porsche sitting in the garage, rusting away, while its owner needs a car to get around."[24]

52. Some authors have studied the reasons behind this phenomenon. One explanation points to the scarcity of resources as what is holding back the roll-out of Decision 608 and the official work that the General Secretariat could be accomplishing.[25] Although this wouldn't necessarily keep private operators from filing complaints as was the case with Decision 285.

53. Secondly, it is possible that there is a disconnect between private business and the community regulation, because there is little confidence in its practical usefulness. In this sense, small and medium-sized operators, for example, would prefer to tolerate anti-competitive conduct rather than deal with possible retaliatory actions by the dominant operators given their lack of confidence in or knowledge about the community system as an alternative.[26] Although this could be one valid reason, it still does not explain the entire competition situation, which ought to be fertile ground for complaints from large competitors in one territory with regard to competitors of similar size and scope from other countries in the subregion. Therefore, one must bear in mind the discrepancies in the evolution of Competition Law in this subregion, due to the relative maturity in countries like Colombia and Peru, and the appearance of the first laws ever on the subject in Bolivia and Ecuador.

54. Another argument has been general ignorance about the competition laws and policies as an explanation, citing the cases of Ecuador and Bolivia, who just have an emerging practice in this subject.[27]

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22 To see this in a different context, see Cortázar, *supra* 20, p. 138 (which says that Article 36 does allow for non-compliance actions to be filed if the member countries' governments issue regulatory measures in the market that impede, hinder or distort competition in the subregion.)

23 Pablo Carrasco, "*Análisis de la Decisión 608 de la Comunidad Andina sobre Protección y Promoción de la Competencia, y Perspectivas sobre su Aplicación en el Ecuador"* ["Analysis of Andean Community Decision 608 on the Protection and Promotion of Competition, and Perspectives on its Application in Ecuador"], Dissertation for Master's Degree from *La Universidad Andina Simón Bolívar*, 2011, p.82.

24 Paraphrased excerpt from Javier Cortázar, "Andean Competition Law: Looking for the Private Sector, or the Quest for the Missing Link in Antitrust," in *Competition Policy and Regional Integration in Developing Countries* pp. 133, 150 (Josef Drexl et. al eds., 2012).

25 Pablo Carrasco, *supra* 23, p.79-80.

26 *Ibid.*, p.80-81.

27 *Ibid.*, p.77.

However, this theory does not explain why countries with more experience, like Colombia and Peru have not driven the practice of Competition Law to a regional level through the Andean Community.

55. So the real reason for the scarce practice is probably due to an underlying condition that affects all aspects of the Andean agreement; the relative devaluation of the bloc from the divergent economic policies in these countries. While the decade after 2000 clearly showed that Peru and Colombia were aiming toward opening their economic policies through international trade liberalisation, Ecuador, to the greatest extent, Bolivia and Venezuela went in the opposite direction. The differences became even sharper in 2005 when Venezuela decided to withdraw from the regional bloc in response to Colombia and Peru's decision to enter into a free trade agreement with the United States of America. So, while those two countries have signed that trade agreement and a similar one with the European Union, plus others which have been signed in recent years, the other members of the Community have not done so. In this context, the separate negotiation of agreements, in response to the very divergent trade policies of the member countries, could be interpreted as a sign that the Andean Community has tempered or little relevance as a unified bloc. This obviously has an impact on the subregion's competition policy.

56. Even so, despite the lack of a uniform trade policy from within the subregion toward the outside world, it is expected that as trade continues to develop within the subregion, the member countries and their competition agencies will adopt co-operation agreements to discourage and eliminate anti-competitive conduct with cross-border effects.

57. Whether by inter-institutional collaboration or a subregional integration model, the Andean bloc faces another obstacle with the gap between national legislation and practices for the protection of competition. It has already been mentioned that Colombia and Peru have several years of experience under their belts in this area, while Bolivia and Ecuador are still in the initial phase. Also, the different economic policies in the latter two countries drive them even further apart from the goals to protect competition that Colombia and Peru might have, which in turn, makes the chances that their regulatory systems will co-ordinate even less realistic. Especially in the Bolivian case, the law and its practical applications are very different than the more traditional regulations and practices that protect competition in other territories, such as those in Colombia, Peru, the recently enacted law in Ecuador, or even the community rules. Another aspect that separates the national competition laws in the bloc is the system to control market concentrations. Peru and Bolivia have not adopted a general system to control concentrations and this has carried over to the community level in Decision 608 which also lacks this feature.

58. Furthermore, despite the direct application and supremacy of the community rules, Decision 608 does not obligate the national competition authorities to apply these. In other words, unlike the way it works in the European Union, in the Andean Community, only the common governing body has the power to apply the common regulations to protect competition, as opposed to each country's agency.[28] So, for example, if there happened to be a conflict between the national regulation and a community regulation in a national investigation, even when the latter should take precedence, this would not happen because the national authority is not empowered to enforce the community regulation. This shortcoming in practice creates a partial or incomplete supremacy situation for the community regulations.

59. Finally, depending on the practical development of the Andean policy to protect competition, the rights and resources of community organisations such as the Andean Committee and, especially, the General Secretariat, may be end up being even more limited in the future. If Decision 608 acknowledges the independent authority of the General Secretariat with regard to the national competition agencies, the first still depends on the latter in some respects such as the investigative work and supervision of the

28 Javier Cortázar, *supra* 24, p.136-137.

corrective measures. Therefore, as Cortázar advises, it needs to assemble a structure with trained personnel and adequate logistics; elements that require funds, time and institutional support.[29]

2.3 CARICOM

2.3.1 Main aspects of the Caribbean system to protect competition

60. The Caribbean Community (CARICOM) was formed with the Treaty of Chaguaramas in 1973, which was revised in 2001, and became effective in 2006. The revised version of the Treaty for this community, which includes most of the countries in the Caribbean,[30] lists the following as its objectives: improved standards of living and work, accelerated, co-ordinated and sustained economic development and convergence, expansion of trade and economic relations with third States, enhanced levels of international competitiveness, among others. Even though CARICOM's ultimate objective is the creation of a single market, this integration process has faced difficulties that stem from the cultural and economic differences between its member countries. It has been a long and gradual process.[31]

61. The topic of protecting competition is covered in Chapter 8 of the Revised Treaty of Chaguaramas. Article 177 prohibits anti-competitive agreements and abuse of dominance, but it doesn't make mention of any type of control over concentration transactions.

62. Even though Articles 170.b and 177 of the Revised Treaty stipulate that the member countries are to enact competition laws, only four have actually done this to date and this has been a gradual process: Jamaica (1993), Barbados (2003), Guyana (2006), Trinidad and Tobago (2006). Of these countries, only Jamaica and Barbados have their own fully functioning competition agencies. Guyana has almost completed the implementation process having elected the commissioners who will make up the national competition authority, while Trinidad and Tobago is still in the initial stages. Other countries like Suriname and Belize have drafted competition laws which are still in the approval process.[32]

63. It is worth mentioning that the Organization of Eastern Caribbean States (OECS), which was created in 1981 and includes some of the less developed countries in the Caribbean,[33] has agreed to establish a sub-regional authority that will function as the competition authority for each one of its countries, but this is still awaiting implementation.[34]

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29 *Ibid.*, p.134.

30 The only countries that are not members are the Dominican Republic, Cuba and the Netherlands and French Antilles, such as St. Maarten and Aruba. The South American countries of Suriname and Guyana, and Belize in Central America have also joined.

31 Taimoon Stewart, "Regional Integration in the Caribbean: The role of competition policy", in *Competition Policy and Regional Integration in Developing Countries* pp. 161, 171-172 (Josef Drexl et. al eds., 2012).

32 *Ibid.*, p. 177-178.

33 Antigua, Barbuda, Belize, Dominica, Granada, Montserrat, Santa Lucia, San Vicente the Grenadines, San Kitts, Nevis and Anguilla.

34 Fair Trading Commission of Barbados, State of Competition Law in CARICOM, p.1. Available at: http://www.ftc.gov.bb/index.php?option=com_content&task=view&id=209&Itemid=28, website visit on 22 July 2013).

64. Chapter 8 of the Revised Treaty sets the minimum guidelines for the national rules of competition which the member states are expected to adopt, giving them much flexibility in this regard. In other words, this is really a case of minimal regulatory harmonisation.[35]

65. The scope of application outlined in Chapter 8 is restricted to cross-border anti-competitive practices, that is, those involving more than one member country. Also, practices occurring in only one member country but which prevent the entry of companies into the markets of other member countries could also be included under this concept. [36] This way, anti-competitive practices on a national level would remain under the jurisdiction of each member country's national authority.

66. There are several bodies within CARICOM, with the most relevant of these being the Conference of Heads of Government (CHG) and the Council for Trade and Economic Development (COTED), comprised of the ministers of trade from the member countries.

67. The COTED is the body which is responsible for promoting trade and economic development, and for establishing the policies and competition guidelines in the Community, as per Articles 15 and 182 of the Revised Treaty, respectively. It also has the authority to suspend or exempt the prohibition of anti-competitive conduct for any of the sectors specified in Article 177.

68. However, the Competition Commission is the body in charge of the practical application or enforcement of Chapter 8 of the Revised Treaty as well as the CARICOM competition policy, pursuant to Article 171 of the Revised Treaty.

69. The appointed venue for the Competition Commission is in Paramaribo, the capital of Suriname. According to recent public studies, however, the Commission is not operational on a full-time basis, nor does it have a complete staff of professionals. It is a known fact that the procedural rules for the Commission are still under development.

70. Pursuant to Article 173 of the Revised Treaty, the Commission is supposed to apply the rules of competition in response to any anti-competitive cross-border conduct, in addition to its duty to promote and protect competition in the Community, and co-ordinate the implementation of the community competition policy. The Commission may also carry out any other function that one of the Community's governing bodies should entrust to it.

71. One of the first ways that the Commission and the COTED interact in the area of competition is addressed in Article 173.2.b, which says that the Commission is to review the community's competition policy and forwards its recommendations to the COTED, the administrative body with the last word on the subject.

72. As it pertains to investigative procedures for anti-competitive practices, the Commission is authorised to open official investigations, even though member countries and the COTED itself may request the opening of an investigation for anti-competitive conduct. Investigations by the Commission may take up to 120 days, from the date that the request to investigate was received, although this time

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35 Delroy S. Beckford, "Implementing Effective Competition Policy through Regional Trade Agreements: The Case of CARICOM," in *Competition Policy and Regional Integration in Developing Countries* pp. 185, 187 (Josef Drexl et. al eds., 2012).

36 Delroy S. Beckford (UNCTAD), Enforcement of Competition Law in CARICOM: Perspectives on Challenges to Meeting Regional and Multilateral Obligations. Regional Seminar on Trade and Competition: Prospects and Future Challenges for Latin America and the Caribbean Caracas, Venezuela, 20 - 21 April 2009, p. 5.

frame may be extended with prior notice to the interested parties. Within this procedure, it is also provided that the Commission is to give both parties a chance to defend their interests. When these inquiries are finalized, the Commission will communicate its determination to the interested parties and, if applicable, will ask that party to take the necessary measures to eliminate the effects of the conduct in question.

73. In the event of an official action brought by the Commission, Article 176 provides for the possibility that the Commission could ask the national competition authority to conduct a preliminary assessment of the company's conduct under investigation. The appropriate authority is supposed to advise the Commission of its conclusions within a time frame set by the latter. If the Commission is not satisfied with these results, it may initiate its own preliminary assessment of the company's alleged anti-competitive conduct.

74. One of the wrinkles that needs to be ironed out is whether the national laws need to expressly accept the Commission's instructions for national authorities to carry out such investigations, or whether the Treaty is the final word. Some experts suggest that in order to carry out these investigations it would be necessary for the national regulations to also be amended to allow for investigations and assessments of conducts with cross-border effects; that is, in order to investigate or request information from companies operating in their national territory whose practices have an impact on another country in the region.[37]

75. With regard to the mandate from the Commission, the parties must comply with it within 30 days of notification. If this doesn't happen, then the Commission would have to appeal to the Court of Justice in order to issue a court order. Nevertheless, the national authority is ultimately needed in order for investigation to get done.[38] This is partly due to the lack of clear supranational power in the Caribbean rules of competition and the fact that the national rules of competition in the CARICOM member countries do not acknowledge the direct effect of the Commission or Court's determinations, but rather, always require an additional internal action.[39]

76. Article 175.12 specifies that any party which is aggrieved by a determination of the Commission may apply to the Caribbean Court of Justice for a review of that determination. However, some member countries have not agreed to submit to the jurisdiction of this Court as a court of appeals, which creates the risk of having separate interpretation and enforcement rules for each member country.[40]

77. Since the COTED is not responsible for enforcing the regional competition rules itself, there is no further interaction between this body and the national competition authorities. However, since the COTED does have the power to establish the applicable competition policies and set specific industry rules, this could have an impact on the enforcement activities of national authorities.

78. Compliance with the Commission's instructions, however, has been entrusted to the national authorities and courts in the countries that are members of CARICOM. In other words, determinations made by the Commission have no force or direct effect. Clearly, this is hindering effective implementation of the regional competition policy.[41]

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37 Delroy S. Beckford, *supra* 35, p.195.

38 *Ibid.*, p.192.

39 *Ibid.*, p.192-193.

40 L. Menns y Decoursey Eversley, "The Appropriate Design of the CARICOM Competition Commission", Paper presented at the ACLE Conference, 20 May 2011, Amsterdam, p.17, 21.

41 Taimoon Stewart, *supra* 31, p.173.

79. The Commission's restricted powers are revealed if there is ever a dispute between this governing body and the any member country over the scope and effect of anti-competitive conduct that is under investigation. In this scenario, according to Article 176.5 of the Revised Treaty, the Commission must halt its investigation and refer the case to the COTED, which, as mentioned before, should be the body defining the competition policy in the first place, and not the regulation's enforcement; a job that should belong to the Committee.

80. Finally, since they are greatly dependent upon activities carries out by the national authorities, any investigation from the Commission can be frustrated by the absence of an authority, or even competition laws in some of the member countries.

81. With regard to advocacy for competition, although the Caribbean community rules do not contain a specific provision on this subject, there are a few articles that highlight the role that free competition plays in light of regulatory policies in the member countries.

82. Article 169 of the Revised Treaty states that, "the goal of the Community Competition Policy shall be to ensure that the benefits expected from the establishment of the CSME are not frustrated by anti-competitive business conduct." This article, as mentioned before, is the basic article upon which regional anti-competitive practices are prohibited. Article 79.2 of the Revised Treaty also states that: "Each Member State shall refrain from trade policies and practices, the object or effectof which is to distort competition, frustrate free movement of goods and services, or otherwise nullifyor impair benefits to which other Member States are entitled under this Treaty."

83. If it is true that the goal of CARICOM's competition policy is to ensure benefits derived from the elimination of anti-competitive business conduct, then Article 79.2 obligates the member countries to not adopt policies that distort competition and thereby nullify these benefits. In other words, they would not be able to adopt internal policies that specifically allow anti-competitive conduct that violates Chapter 8 of the Revised Treaty. This rationale is the basis of the doctrine of useful effect in the European Union, which prohibits the member countries from adopting any measures that are contrary to the community free trade regulations (such as, an internal law that permits collusion in the European market, for example), and forms one of the central points of competition policy and advocacy in the unified European market. However, it is important to remember that this obligation was the product of a long history and development of case law in the European Union; therefore it would not be easily carried over to the Caribbean model which does not have the practical experience yet in enforcing the community rules of competition.

84. When it comes to practical application, the Commission is still a very young agency. Up to now, the only information available is on one investigation under Chapter 8 of the Revised Treaty, in the cement market. The company under investigation, Trinidad Cement Limited (TCL), challenged the report issued by the Commission due to the fact that this recently completed report was communicated about two years after the Commission's investigation was opened, back in December 2009. Nevertheless, the Caribbean Court of Justice rejected TCL's appeal. Despite all of the above, this first case raises a red flag concerning the need to adjust and add transparency to the Commission's procedural rules for investigations of regional anti-competitive practices.

2.3.2 Challenges and problems with the Caribbean regional competition policy

85. The absence of rules of competition and authorities in several countries is obviously one of the biggest limitations. This, in turn, is a situation that can be explained by the limited funds and technical resources that many of the countries in the regions have at their disposal to devote to this issue.

86. The divergence between their national rules of competition is also a problem, in that the competition policy does not function as a true supranational and bonding policy for the member countries, and given that any enforcement efforts by the Commission would ultimately depend on what the individual country authorities and courts are willing to uphold.

87. One example of this divergence is illustrated in the area of control of market concentrations. While Barbados and Trinidad and Tobago have rules that permit review of anti-competitive mergers, Jamaican law does not have any such regulatory provision.[42] This, for example, would impede CARICOM from implementing a system to control mergers, since the CARICOM system to protect competition is dependent upon the national laws and authorities, as as stated above. Therefore, the regional rules do not obligate the CARICOM member countries in any way to implement their own system for the supervision of company mergers.

88. One peculiar feature is that the obligation to adopt national rules of competition in all the CARICOM countries, an obligation that was already addressed in the Revised Treaty of Chaguaramas, was also incorporated into the CARIFORUM-EU Economic Partnership Agreement (EPA) signed in 2009, setting a five year deadline for the Caribbean unified market countries to enact national competition laws.

89. CARICOM is facing the challenge of finding the right balance between flexibility for the countries with significant differences to enact their own versions of free market protection, and the goal of creating a unified market, a goal that does require a certain degree of harmonisation, and possibly even the functionality of a centralized body endowed with supranational powers to protect competition; all elements which it currently lacks.

90. Since there is no Caribbean Parliament or supranational legislative body, there is also a chance that the Revised Treaty's rules may eventually become obsolete, or it won't be possible to add more content to the general rules and text that already exist.[43]

91. From an enforcement point of view, one significant problem for CARICOM is the lack of clear definition of authority and hierarchy among its governing bodies, especially the little distinction between the COTED and the Commission. The vast majority of standards and best practices for competition law on an international level recommend structuring a certain level of autonomy for the the competition agencies, precisely to avoid the risk of having their work, which is essentially technical, become politicized. The Revised Treaty, however, subjects the Commission to a strikingly inferior level in the hierarchy in comparison to the COTED, a remarkably political body by nature.[44]

92. At the procedural level, it would be very helpful to establish an institutional mechanism for communication between the competition authorities in the member countries, without restricting any informal communication and co-operation. This would serve to co-ordinate the necessary investigation efforts (both at a national and regional level) at a lower cost. [45]

93. Finally, it has been a challenge convincing the citizens and companies of the CARICOM region to accept the competition policy as a common goal and part of their daily lives.[46] For example, the lack of a

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42 Delroy S. Beckford (UNCTAD), *supra* 36, p.195.

43 L Menns and Decoursey Eversley, *supra* 40, p.18.

44 *Ibid.*, p.17.

45 *Ibid.,* p.25.

46 *Ibid.,* p.26.

competition culture is one of the greatest obstacles to breaking up cartels in small economies, or effectively implementing clemency or whistle-blowing programs. With the absence of a competition culture, anti-competitive collusion is not perceived negatively, in fact, there can be negative reactions to any criticism that threatens against the traditional interpersonal relationships creating this kind of co-operation which is generally accepted, even though its purpose might be collusion.

2.4 Central America

2.4.1 Main aspects of the Central American system to protect competition

94. The Central American Integration System (*Sistema de Integración Centroamericana* or SICA) emerged in 1991 out of the Tegucigalpa Protocol which reformed the Charter for the Organization of Central American States (*Organización de Estados Centroamericano* or ODECA), originally signed in 1962. With SICA, the Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama) sought to adjust ODECA's legal framework to fit the current realities and needs, thereby creating a economic-political community. [47]

95. In this same "readjustment" context, the Guatemala Protocol was signed in 1993 which reformed the General Central American Economic Integration Treaty; a treaty that dated back to 1960 (the Managua Treaty) which had been the origin of the Central American Common Market (MCCA). Via the Guatemala Protocol, the Central American countries made a commitment to work in a voluntary, gradual, complementary and progressive manner toward the Central American Economic Union. To this end, they set up the Central American Economic Integration Subsystem (*Sistema de la Integración Centroamericana* or SICA), with its technical and administrative body, the Secretariat for Central American Economic Integration (*Secretaría de Integración Económica Centroamericana* or SIECA).[48]

96. The Tegucigalpa Protocol does not mention the protection of competition within the Central American market. Similarly, the Guatemala Protocol does not specifically mention protection of competition as one if the integration goals[49] even though in Article 25 it generically includes the promotion of competition within a summary of activities agreed upon by the member countries: *"In the trade sector, the Party Counties agree to adopt a set of common provisions to avoid monopolistic activities and promote free trade among the countries in the region."*

97. Beyond the brief mention in the Guatemala Protocol, there are no approved rules on the subject of protection of competition at the Central American level within the SICA system. In fact, in 2007 the Central American governments signed the Framework Agreement for Establishing the Central American Customs Union, which mentions in Article 21 that: "The Party States shall develop regional regulations on the subject of competition policy." Even so, said legislation has yet to be approved. Therefore, it is not possible at this point to make a full appraisal of a regional competition policy.

98. The member countries of SICA, together with the Inter-American Development Bank (IDB)[50], have been developing a process to establish regional rules of competition and potentially create a regional competition authority.

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47 Article 1 of the Tegucigalpa Protocol.

48 Article 28 of the Tegucigalpa Protocol; and Article 43 of the Guatemala Protocol.

49 Articles 3 and 4 of the Guatemala Protocol.

50 ATN/OC-1181-RG

99. These are preliminary studies and are not yet published. Therefore, this paper will include preliminary comments in its conclusion regarding potential obstacles and challenges that may stand in the way of the Central American bloc countries as they pertain to a solid competition protection policy with a regional scope. To this end, the individual experience of each country must be the starting point.

2.4.2 Challenges and problems with Central American regional competition policy

100. The first element to take into consideration is the relative newness of competition law in the Central American region. Costa Rica was the first country in the region to enact an anti-monopoly law in 1994[51] which clearly had a strong influence from the Mexican law. Under this law, the Commission to Promote Competition (*Comisión para Promover la Competencia* or COPROCOM) was formed, a pro-privatisation agency under the auspices of the Ministry of Economy, Industry and Trade, which was entrusted with complying with the Law to Promote Fair Trading and Consumer Rights. The Costa Rican competition law went through a significant reform in 2002 and recently in 2012, which introduced a system for controlling market concentrations.[52]

101. Competition law in Panama follows the Costa Rican model in terms of its history, although Panama is perceived as the country in the region having the most solid legal and institutional framework for defending competition. In addition to having anti-monopolistic provisions in its Constitution, the free competition law itself was enacted in 1996 as Law 29, which established a competition and consumer protection agency (*Comisión de Libre Competencia y Asuntos del Consumidor* or CLICAC). In 2007, a new law on the subject was passed, Law 45, and the agency's name was changed to the Authority of Consumer Protection in Defence of Competition (ACODECO)

102. In the first decade after 2000, competition laws were approved in El Salvador in 2004 and its authority, the Competition Superintendency, became operational in 2006[53]; Honduras enacted its law in 2006, creating the Commission for the Protection and Promotion of Competition[54]; and Nicaragua did so in 2006, with *Procompetencia* designated as the administrative court in charge of enforcing the law since 2009[55]. Lastly, Guatemala still does not possess a law for protection of free competition, even though toward the end of 2012, a bill was debated in its Congress, but was met with strong opposition.

103. So, as one can appreciate, the laws and institutions in place for the protection of competition are relatively young, including those in Panama and Costa Rica. In general, the Central American countries have devoted a greater effort to adopting instruments which protect consumers rather than those which protect competition,[56] and this is also evident in the fact that many of the competition authorities in these countries also perform the function of acting as the consumer protection agency, a task that usually ends up relegating their protection of competition duties to the back burner.

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51 Law to Promote Fair Trading and Consumer Rights approved as Law 7472.

52 Reform of Law 7472, the Law to Promote Fair Trading and Consumer Rights, approved as Legislative Decree 9072.

53 Competition Law, approved through Legislative Decree 528.

54 Law for the Protection and Promotion of Competition, approved through Legislative Decree 357-2005.

55 Law for the Promotion of Competition, approved through Ley 601.

56 René A. Hernández and Claudia Schatan, *Políticas de competencia y de regulación en el Istmo Centroamericano* [Competition and regulation policies on the Central American Isthmus]. CEPAL - SERIE *Estudios y perspectivas* [Studies and perspectives] – a journal published by the Subregional Headquarters of CEPAL in Mexico, 2002, p.5.

104. One of the lessons learned from the analysis of other regional integration processes, is that the relative lack of experience in some countries with applying their own competition laws tends to be a stumbling block for the application of a regional set of regulations or the execution of bilateral agreements between countries or competition agencies. The lack of experience subtracts from the common understanding and opportunities for collaboration, and makes it hard to identify priorities. These circumstances are highlighted as factors that limit the ability to achieve the synchronicity that makes a community set of rules easier to adopt.

105. Putting aside the individual legislative and institutional level of development for Central American countries, a second challenge facing the Central American bloc is their likelihood of adopting supranational regulations for the protection of competition and a regional authority.

106. One thing in its favour and of utmost importance for this goal is that Central American legislation and case law do support the concept of regional regulatory supremacy as it exists in theory in the Andean Community. The Central American Court[57] made the following ruling in a case involving the legal order of precedence for SICA and SIECA, over the internal laws of each member country: *"…community regulations take precedence over the national regulations, since their application is prioritized over the internal laws of the Member States, even having absolute overriding authority with regard to constitutional laws, since it would not make sense if their effects could somehow be annulled or eluded by the States…"*.

107. Nevertheless, it should not be forgotten that this would only empower a supra-regional enactment of regulations or competition authority, both of which do not exist yet. In this regard, something to bear in mind is that the Tegucigalpa Protocol does not define the protection of competition as one of its objectives for the community process, nor does the Guatemala Protocol include a Central American competition policy among its pillars or standards, limiting its language to say that the "Party States agree to adopt common provisions to avoid monopolistic activities and promote free trade in the countries of the region."

108. So, from a regional community perspective as well as a bilateral agreement point of view, it is important that the Central American countries identify those aspects of their respective competition laws that are open to co-operation for their enforcement, especially, as they pertain to cross-border practices. This is largely tied to the different levels of institutional development in each country. Also, if a country's institutional maturity is only partially developed, this becomes a double obstacle for co-operation. On the one hand said country would find itself to be limited in funds and ability to comply with a request for co-operation. On the other hand, the partner country could be wary of the advantages of co-operating with a country that has a weaker institutional system, if this implies sharing confidential or sensitive information, the inappropriate disclosure of which could set back its own enforcement activities.

109. Co-operation between competition agencies could also be limited by the countries' own competition laws, if these do not mention co-operation, or possibly even prohibit them.[58] Of all the Central American laws, only the Nicaraguan[59] and Salvadoran laws[60] expressly authorize their national authorities to request information from foreign authorities.

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57 CCJ (Central American Court of Justice), Ruling 8-03-06-1996 regarding University Degrees, Folio 289.

58 UNCTAD. "*Recomendaciones para Mejorar la Cooperación Regional en Centroamérica*" ["Recommendations for the Improvement of Regional Co-operation in Central America"]. Draft Document. 2011, p. 14.

59 Article 14 letter n) of the Nicaraguan Competition Law.

60 Article 14 letter g) of the Salvadoran Competition Law.

110. Despite this circumstance, the national agencies in the Central American bloc have signed several co-operation agreements among themselves, even though there is no further knowledge about the level of practical application that these have achieved. It is also unknown whether the national laws have been an obstacle along this path. This is covered in the following chapter about the co-operation agreements.

111. And finally, anti-competitive regulations within the regional market are a challenge that also faces the Central American countries' efforts to protect competition.

112. As mentioned before, a set of regional rules of competition does not currently exist and neither does a provision pertaining to the advocacy of competition. Therefore, if a community set of rules were to be approved in the future, there would also be a need to put some kind of mechanism in place in the event that the member countries decide to prioritize the interests of each country over the common interests of inter-regional trade.

113. Currently, the Guatemala Protocol wording restricts itself to a commitment to "improve and update the common trade laws that eliminate use of subsidies, dumping and other unfair trade practices," rules that only address one objective and are designed differently than antitrust laws. In the same vein, the Central American regulations also do not include special rules for the services that serve the general economic interest or the approval of state monopolies, which are included in the European Union.

114. However, Article 4 of the Tegucigalpa Protocol requires that SIECA and the member countries abstain themselves from establishing, agreeing to or adopting any measure that would go against its rules or that would block the fulfilment of the basic principles of the SICA. This abstention clause could be the basis for a control mechanism over public restrictions to competition, which acts in a similar way to the previously mentioned useful effect doctrine in European Union law. For this to happen, a regional rule would need to expressly recognize that the protection of competition is one of the fundamental principles or goals of the Economic Integration Subsystem or Central American Common Market.

3. Bilateral Competition Law in the Latin American and Caribbean Context: Free Trade Agreements and Co-operation Agreements among competition agencies

115. In recent years, international co-operation on a bilateral level has become a growing trend with regard to Competition Law, and early steps have also been taken toward convergence and an International Competition Law. This has basically come about in two ways: (i) the inclusion of competition chapters within the framework of free trade agreements (FTAs) or other trade agreements; and, (ii) the signing of co-operation agreements between competition agencies.

116. In some parts of the world, these agreements with a bilateral scope have come to take on greater relevance than the integration systems and multilateral trade agreements. As mentioned in the previous chapter, wherever regional integration agreements have stalled (CAN) or where supranational rules or institutions for the protection of competition have yet to be implemented (SICA), or have had little practical application (CARICOM, Mercosur), the free trade agreements and co-operation agreements have been the mechanisms that have brought about more progress in the international co-operation and "internationalisation" of Competition Law.

117. Although not the same in nature and usually with a different scope, the content in the chapters pertaining to competition built into the free trade agreements and co-operation agreements between competition agencies tend to coincide a great deal. In this sense, co-operation agreements are often signed with the goal of expressing the competition agencies' willingness to communicate and conduct activities in a co-operative way. In many cases, the relevant entities and players will be the same, since the staff at competition agencies also play a role as members of the technical teams that negotiate and draft the

competition chapters in the free trade agreements. This close interaction facilitates the signing of co-operation agreements.

118. Also, co-operation agreements between competition agencies seem to be the step immediately preceding the actual execution of co-operative activities. Furthermore, when co-operation agreements do not go much further than what was already provided for in the trade agreements, their execution can still lead to a closer relationship between the two agencies and establish the regulatory support, drafted by the agencies themselves, in order to cover activities such as sharing information, notifications, international internships and exchange programs for competition officials, etc.

119. This chapter will review the most noteworthy provisions and collaboration instruments that are found strictly in the FTAs between Latin American countries, regardless of the existence of some relevant provisions found in trade agreements that have been signed with other countries or jurisdictions such as the United States of America, Canada and the European Union.

120. Finally, reference will also be made to those provisions covered in the co-operation agreements between Latin American agencies, particularly, those that add new developments over and above what is already contained in the trade agreements.

3.1 Free Trade Agreements – Competition Chapters

121. Many agreements do not include independent chapters devoted to competition policy. However, there are several others (especially the older ones) that just include one or two articles with a statement of principles, and abstract or future commitments.

122. This review does not include some trade agreements that make reference to the protection of competition, but are truly only about unfair trade practices such as dumping and subsidies, which is the case in some of the agreements signed by MERCOSUR and Bolivia.

3.1.1 Regulatory obligation to protect competition

123. One of the most common elements in the free trade agreements that specifically contain a competition chapter is the obligation to maintain a competition law, a competition authority and to respect basic principles (transparency, non-discrimination, due process) in their application. This is the case in the FTA between Costa Rica and Peru,[61] Chile and Mexico,[62] Mexico and Uruguay,[63] Panama and Peru,[64] to mention a few.

124. Given the fact that most Latin American countries do have a law and authority in place to protect competition, the usefulness of these chapters lies in the obligation to keep a law in force at all times on the subject as well as an institution to apply it.

125. Some more abstract commitments are found in several pacts between Latin American countries, the kind that "encourage actions to define a regulatory framework to sanction anti-competitive practices." This is the case in most of the agreements signed by MERCOSUR, as well as agreements between

61 Article 11.2 of the FTA between Costa Rica and Peru.

62 Article 14.2 of the FTA between Chile and Mexico.

63 Article 14.2 of the FTA between Mexico and Uruguay.

64 Article 11.2 of the FTA between Panama and Peru.

CARICOM and Costa Rica,[65] agreements between Central America and Panama,[66] with the Dominican Republic[67] -which also calls for the creation of a Committee on Free Trade and Competition to seek the application of these goals-, and with Chile,[68] and the agreement between Colombia, El Salvador, Guatemala and Honduras.[69]

126. One particular case that was previously mentioned is the Economic Partnership Agreement (EPA) between the European Union and CARIFORUM, which set a deadline of five years after the effective date of the trade agreement for the parties (member countries of CARIFORUM) to make competition laws and authorities official in their jurisdictions.[70]

3.1.2 Co-ordination, convergence and territorial application

127. It is uncommon to find provisions in the free trade agreements that aim to achieve regulatory or legal harmonisation in the competition laws of the countries that are parties to the treaty. This is greatly due to the fact that to make a commitment to harmonisation would complicate the signing of a trade agreement that involves many other trade issues of a more sensitive nature. Therefore, since the essential components of protection of competition rules in most jurisdictions do not vary to a great degree, it does not seem to be a priority for countries to spend much effort in achieving regulatory convergence at the regional level.

128. One of the few attempts at regulatory convergence appears in the FTA between the European Union on one side and Peru and Colombia on the other. Although it is limited, this harmonisation can be seen in the declaration of anti-competitive practices that are incompatible with the Agreement: dominance abuse, collusion, and anti-competitive company concentrations, even though these are always subject to the definitions in the competition laws of the individual parties to this treaty.[71]

129. In the FTA between Panama and Singapore there is also a declaration of anti-competitive practices that each Party is to combat when applying their own rules of competition: anti-competitive horizontal agreements among competitors, misuse of market power, including predatory price fixing by companies, anti-competitive vertical agreements among companies, and anti-competitive mergers and acquisitions.[72]

130. There are similar circumstances in the FTA between Chile and Peru, which in addition to the typical commitment to enforce their own free competition laws, refers to agreements that restrict

65 Article 14.1 of the FTA between Costa Rica and Caricom.

66 Article 15.1 of the FTA between Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, on the one part, and Panama, on the other part.

67 Article 15.1 of the FTA between the Dominican Republic and Central America.

68 Article 15.1 of the FTA between Chile and Central America.

69 Article 16.10 of the FTA between Colombia, El Salvador, Guatemala and Honduras.

70 Article 127 of the EU - CARIFORUM EPA.

71 Article 259.2 of the FTA between the European Union and Colombia and Peru. For a more detailed analysis, see: Luis Diez Canseco and David Fernández. "*Políticas de Competencia", Capítulo 7 en: Acuerdo Comercial entre Perú y la Unión Europea. Contenido, Análisis y Aplicación* ["Competition Policies", Chapter 7 in: Trade Agreement between Peru and the European Union. Content, Analysis and Application] by Fernando Cantuarias y Pierino Stucchi, Comp., Lima, *Universidad del Pacífico*, 2013, p. 241 ff.

72 Article 7.1 of the FTA between Panama and Singapore.

competition and abuse of dominance as anti-competitive practices to which the parties must devote special attention.[73] This trade agreement also makes reference to a one type of practice that is of special interest in the sphere of international agreements: export cartels. With regard to these, the countries involved commit to putting this type of anti-competitive practice "under the coverage of its respective free competition laws, when anti-competitive business practices are found to be developing that create an effect in the other Party's territory."[74]

131. Finally, one noteworthy feature of the FTA between Chile and Peru is that it does include aspects of convergence, scope of application and positive comity, or the regulation of anti-competitive practices with cross-border effects. The trade agreement between these Pacific Rim neighbours recognizes that its parties will have the authority to open legal actions against anti-competitive conduct originating in their territory which has effects in the other party's territory, that is, they subscribe to the territorial theory, without dismissing or prohibiting the application of the effects theory, which is implicitly recognized later in the actual treaty[75]. And along these same lines, the agreement also provides for positive comity, which is the ability of one party to ask the other to open an investigation regarding practices in the latter's territory which has effects in the requesting party's territory[76]. The topic of positive comity will be discussed in further detail later.

3.1.3 Notifications and consultations

132. As previously indicated, it is through the designation of notices and consultations that the majority of the provisions on co-operation activities for competition purposes are incorporated into trade agreements.

133. In some, under the generic category of consultations, the possibility is provided for one country to request that the other consider opening an investigation of an anti-competitive practice in the requested country. In other words, a case of positive comity. This is how it works, for example, in the FTA between Central America with Mexico[77] and in the FTA between Costa Rica and Peru.[78]

134. In some agreements the obligation is also made for one country to notify the other about enforcement activities that could affect the interests of the other, in addition to taking their observations into consideration, although these obligations are not binding. Peru is one of the Latin American countries that usually include this type of negative comity provision in its FTAs, as is the case with those signed with Costa Rica[79] and Panama.[80]

135. Finally, some agreements allow for greater development through co-operation agreements between competition agencies, as the FTA between Costa Rica and Peru does.[81]

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73 Article 8.1 of the FTA between Chile and Peru.

74 Article 7 of the FTA between Chile and Peru.

75 Article 8.5 of the FTA between Chile and Peru.

76 Article 8.3 of the FTA between Chile and Peru.

77 Article 9.14.2 of the FTA between Central America and Mexico.

78 Article 11.6 of the FTA between Costa Rica and Peru.

79 Article 11.4 of the FTA between Costa Rica and Peru.

80 Article 11.4 of the FTA between Panama and Peru.

81 Article 11.3 of the FTA between Costa Rica and Peru.

3.1.4 Exchange of information

136. With regard to the sharing of information, several levels of commitment are possible between the parties of a trade agreement. The lowest level simply allows for this possibility to the extent that it does not violate any national laws.[82] That is, there is no concrete obligation, nor is there a specific procedure in place for sharing information.

137. On the opposite end of the spectrum, the FTA between Chile and Peru defines a more concrete set of commitments for exchanging information. First, it is expressly acknowledged that this exchange may include confidential information -one of the few treaties that specifically admit this- under the duty to not disclose such information without the consent of the party providing the information.[83] This exchange may even involve the countries' courts of justice, if their national laws provide as much.[84] The agreement between Chile and Peru specifies that the exchange of information is meant to be used to collect evidence for the effective enforcement of the parties' free competition laws, and as such it may done even in the preliminary phase of an investigation.[85]

138. Digressing from the exclusively Latin American arena a bit, the FTA between Mexico and the European Union also addresses the possibility of exchanging confidential information, subject to each party's confidentiality rules, and under the duty of confidentiality, unless it has the approval of the competition authority that provided the information.[86]

139. In most of the FTAs, however, the exchange of information is provided for as one of the goals of the co-operation, but limits itself to non-confidential information or strict adherence to whatever is provided in the national laws on the subject.

3.1.5 Technical Assistance

140. Several trade agreements do include a general commitment to mutual technical assistance. The FTA between the European Union, Colombia and Peru is one of the few that provides details about what this commitment entails, stating that technical assistance that would be focused on strengthening technical and institutional capabilities as they pertain to the enforcement of competition policy and upholding competition laws, education or training of human resources and sharing experiences.[87]

141. The FTA between Mexico and the European Union is also more specific than most of the other trade agreements, as it enumerates concrete forms of mutual technical assistance between the parties, such as training for officials at the competition authorities for both parties, seminars, conducting joint studies on competition and competition law, and the promotion of competition issues through specialized publications.[88]

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82 Article 11.5 of the FTA between Costa Rica and Peru, and Article 11.5 of the FTA between Panama and Peru.

83 Article 8.8.3 of the FTA between Chile and Peru.

84 Article 8.8.4 of the FTA between Chile and Peru.

85 Article 8.8.1 and 8.8.2 of the FTA between Chile and Peru.

86 Article 8 of Annex XV of the FTA between Mexico and EU.

87 Article 264 of the FTA between the EU and Colombia and Peru.

88 Article 10 of Annex XV of the FTA between Mexico and the EU.

142. In the case of the European Union - CARIFORUM EPA, the document calls for support in the following areas: efficient operation of the CARIFORUM competition authorities, assistance in drafting guidelines, manuals and, if necessary, legislation, with independent experts at their disposal, organised training for key personnel needed to implement and effectively enforce the competition policy.[89]

3.1.6 State Monopolies

143. It is not unusual to see clauses to clarify that the free trade agreements do not prohibit the existence of state monopolies or designed monopolies (or exclusivities). Such clauses are found in the treaty between Central America and Panama,[90] the one between the Central American countries and Chile, the one for Chile and Mexico,[91] and Mexico with Uruguay.[92]

144. In the FTA for the Central American countries with Panama and the one between Mexico and Uruguay, it says that if a monopoly could affect the interests of companies or individuals from the other party, new conditions would be sought that would minimise or eliminate this effect, but only to the extent allowed by national law. Again, as long as it is compatible with national law, the FTA for Central America with Panama seeks to ensure that the activities of these monopolies are not discriminatory, do not conduct anti-competitive practices, especially if they have government authority that could affect the market conditions.

145. Made in good faith, these are basically non-binding commitments to make improved efforts, since all of these clauses are subject to whatever the local laws of each country may dictate. On the other hand, in the FTA for the Central American countries with Chile,[93] the one between Chile and Mexico,[94] Chile and Peru,[95] Mexico with Uruguay,[96] these commitments make a stronger statement because even though they permit state monopolies, they also indicate that these monopolies must adhere to the competition and non-discrimination requirements in the treaty.

3.1.7 Special rules for sectors

146. It is less common to find specific rules of competition for sectors, but these do appear in the FTA between Chile and Central America,[97] the FTA between Mexico, El Salvador, Guatemala and Honduras,[98] and the FTA between Mexico and Uruguay[99] which specifically makes the parties responsible for ensuring that the state monopoly or dominant operator in the telecommunications market does not participate in anti-competitive practices.

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89 Article 130 of the EU - CARIFORUM EPA.

90 Chapter 15. Section B of the treaty between Central America and Panama.

91 Article 14.3.2 of the FTA between Chile and Mexico.

92 Article 14.3.2 of the FTA between Mexico and Uruguay.

93 Article 15.2 of the FTA between Chile and the countries of Central America.

94 Article 14.3.4 of the FTA between Chile and Mexico.

95 Article 8.10 of the FTA between Chile and Peru.

96 Article 14.3.4 of the FTA between Mexico and Uruguay.

97 Article 13.7 of the FTA between Chile and the countries of Central America.

98 Article 12.6 of the TFA between Mexico y El Salvador, Guatemala y Honduras.

99 Article 11.6 of the FTA between Mexico and Uruguay.

147. These treaties include references to prohibited anti-competitive conducts such as cross-subsidies, predatory conduct and discrimination in access to public telecommunications networks and services (except in the case of the FTA between Mexico and Uruguay), and they also list preventative measures such as separate accountability, structural separation, market access obligations and non-discrimination, transparency obligations, etc.

3.1.8 Supervisory Organisations

148. The FTAs signed by Mexico with Chile,[100] on one side, and with Uruguay,[101] on the other, are two of the few that mention the creation of an inter-governmental organisation (Trade and Competition Committee) to follow up with the commitments made and suggest recommendations to the Administrative Commission of the FTA advising on the relationship between the competition laws and policies as well as trade issues in the free trade zone.

149. Similarly, the FTA between Chile and Peru calls for the creation of a Working Group made up of representatives from each party. This Working Group is to submit a report on the status of its work to the Administrative Commission no later than 3 years after the Agreement's effective date.[102]

3.1.9 Dispute Resolution

150. Most of the trade agreements do restrict the general dispute resolution system from being used in potential conflicts that could emerge from enforcement of the competition chapter. No cases have been seen where a special channel for dispute resolution has been set up for the enforcement of the rules of competition and, as an exception to the rule, some agreements do allow the use of the general dispute resolution system in the treaty, such as in the FTS between Costa Rica and Peru.[103]

3.2 Co-operation agreements between Latin American competition agencies

151. Over the last decade, there has been a proliferation of co-operation agreements between national competition agencies. A timely development, of course, with the propagation of bilateral trade agreements.

152. None of the bilateral co-operation agreements examined had any reference to the subregional integration agreements or the rules of competition set in those agreements. It is remarkable, for example, that practically all the competition agencies for the Central American countries had signed bilateral agreements amongst themselves, however, there is no single multilateral co-operation agreement to date between the competition agencies in the subregion.

153. The exception to this clear bilateral tendency is MERCOSUR, which has adopted two inter-agency co-operation agreements that apply to the entire subregion. These are known as the Memorandum of Understanding (MoU) for Co-operation among Mercosur Member Country Competition Authorities for the Application of their National Competition Laws, and the MoU for Co-operation among Mercosur Member Country Competition Authorities for the Control of Economic Concentrations with a Regional Scope. It should be noted, however, that as far as it is known, the only concrete co-operation activities between authorities in the subregion have occurred within the framework of the bilateral co-operation agreement signed between the republics of Argentina and Brazil.

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100 Article 14.5 of the FTA between Chile and Mexico.

101 Article 14.5 of the FTA between Mexico and Uruguay.

102 Article 8.4 of the FTA between Chile and Peru.

103 Article 11.7 of the FTA between Costa Rica and Peru.

154. As mentioned before, most of the co-operation agreements reiterate - in different words - the declaration of commitments included in the competition chapters of the Latin American free trade agreements, such as: the declaration about the independence of each authority to apply its own national competition laws, the commitments to collaborate and provide technical assistance, the possibility of exchanging information and respect for the confidential nature of the information provided. Therefore, this section will try to include only those aspects that are not included under the trade agreements, or clauses that further develop the commitments analysed in previous section.

3.2.1 Notification

155. One of the most relevant features of the co-operation agreements between competition agencies where the commitments included in the free trade agreements are defined in greater depth, has to do with notification system used between agencies. In many cases, these go further than the natural limits of positive and negative comity notices.

156. Also, several agreements provide for notification by a competition authority regarding enforcement activities related to conduct that is either fully or partially taking place in the other party's territory. In other words, conduct that originates outside of the territory but has effects within the country,[104] as well as enforcement activities that require sanctions or corrective measure to be imposed in the other party's territory.[105]

157. Another type of notice has to do with conducting investigation activities in the other party's territory, such as the discovery of information.[106] Some that address this point are the co-operation agreement between Mercosur authorities,[107] the agreement between the Brazilian and Argentine

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104 Article II.2.b of the Memorandum of Understanding (MoU) for Co-operation among Mercosur Member Country Competition Authorities for the Application of their National Competition Laws; Article II.1.b of the Agreement between the FNE (Chile) and CADE, SAE and SEAE (Brazil); Article II.3.b of the Agreement between the FNE (Chile) and the Superintendency for Control of Market Power or SCPM (Ecuador); Article II.2.b of the Agreement between FNE (Chile) and the CFC (Mexico); Article 6.b of the Agreement between CADE (Brazil) and INDECOPI (Peru); Article IV.1.b of the Agreement between the Commission for the Protection and Promotion of Competition (Honduras) and Coprocom (Costa Rica). For concentration transactions, the cross-border effect is enough to trigger a duty to notify as per Article II.2.b of the MoU on Co-operation among Mercosur Member Country Competition Authorities for the Control of Economic Concentrations with a Regional Scope.

105 Article II.2.e of the MoU for Co-operation among Mercosur Member Country Competition Authorities for the Application of their National Competition Laws; Article II.2.d of the MoU on Co-operation among Mercosur Member Country Competition Authorities for the Control of Economic Concentrations; Article II.1.d of the Agreement between the FNE (Chile) and CADE, SAE and SEAE (Brazil); and Article II.3.d of the Agreement between the FNE (Chile) and the SCPM (Ecuador); Article II.2.d of the Agreement between FNE (Chile) and the CFC (Mexico); Article 6.d of the Agreement between CADE (Brazil) and INDECOPI (Peru); Article IV.1.e of the Agreement between the Commission for the Protection and Promotion of Competition (Honduras) and Coprocom (Costa Rica).

106 Article II.2.f of the MoU for Co-operation among Mercosur Member Country Competition Authorities for the Application of their National Competition Laws; Article II.2.e of the MoU for Co-operation among Mercosur Member Country Competition Authorities for the Control of Economic Concentrations with a Regional Scope; Article II.1.e of the Agreement between the FNE (Chile) and CADE, SAE and SEAE (Brazil); Article II.3.e of the Agreement between the FNE (Chile) and the SCPM (Ecuador); Article II.2.e of the Agreement between FNE (Chile) and the CFC (Mexico); Article IV.1.f of the Agreement between the Commission for the Protection and Promotion of Competition (Honduras) and Coprocom (Costa Rica).

107 Article II.3 of the MoU for Co-operation among Mercosur Member Country Competition Authorities for the Application of their National Competition Laws; Article II.3 of the MoU for Co-operation among

agencies,[108] and the Argentine and Ecuadorean agencies,[109] which expressly authorize officials from one party to visit the other party's territory during the process of an investigation pursuant to the provisions their respective competition laws; authorization that is subject to notice and consent by the notified party.

158. Along similar lines, other co-operation agreements go into some detail about comity issues. In the agreement between Brazilian and Chilean authorities, it says that in negative comity situations, the authority from the other country will be given the opportunity to be heard with regards to any enforcement activities that could have an effect on its interests. [110]

159. One type of notice that falls outside of the traditional concept of positive or negative comity has to do with the notice of any mergers and acquisitions involving one party who conducts transactions in the other party's territory, or that is controlled by a company incorporated in the other party's territory.[111] A typical case would be a multinational company requesting authorization for a concentration transaction in Country A. In such a case, the authority in Country A must notify the authority in Country B, since the requesting company also operates in Country B, which could imply the enforcement of rules governing concentrations by the latter's competition authority. This type of notice aims to notify the foreign authority so that it may apply its own competition law.

160. In the MoU between the authorities in Chile and El Salvador, reference is also made to these types of situations, describing these as cases where both authorities should co-ordinate, although it does not expressly obligate them to an official notice.[112]

161. Another particular scenario is found in the Co-operation Agreement among MERCOSUR agencies,[113] and several bilateral agreements among Central American competition authorities that require notice of "any conduct or transaction that was has supposedly been required, driven or approved by the other party." Although the text is not very clear on this point, presumably this is referring to cases where a conduct or transaction occurring or having effects in the other party's territory (a situation that would already be covered by the type of notice provision described above) also has authorization from the first party (the competition authority that is obligated to issue the notice).

Mercosur Member Country Competition Authorities for the Control of Economic Concentrations with a Regional Scope.

108 Article I.3 of the Co-operation Agreement between the Republics of Argentina and Brazil.

109 Article II.7 of the Agreement between the National Commission for the Protection of Competition (Argentina) and the SCPM (Ecuador).

110 Article IV.2 of the Agreement between FNE (Chile) and CADE, SAE and SEAE (Brazil).

111 Article II.2.c of the MoU for Co-operation among Mercosur Member Country Competition Authorities for the Application of their National Competition Laws; Article II.2.c of the MoU on Co-operation among Mercosur Member Country Competition Authorities for the Control of Economic Concentrations; Article II.1.c of the Agreement between the FNE (Chile) and CADE, SAE and SEAE (Brazil); and Article II.3.c of the Agreement between the FNE (Chile) and the SCPM (Ecuador); Article II.2.c of the Agreement between FNE (Chile) and the CFC (Mexico); Article 6.c of the Agreement between CADE (Brazil) and INDECOPI (Peru); Article IV.1.d of the Agreement between the Commission for the Protection and Promotion of Competition (Honduras) and Coprocom (Costa Rica).

112 Article V of the MoU between FNE (Chile) Competition Superintendency (El Salvador).

113 Article II.2.d of the MoU for Co-operation among Mercosur Member Country Competition Authorities for the Application of their National Competition Laws.

3.2.2 Other co-operation activities

162. Following the model of the free trade agreements, in some cases the co-operation agreements do include a set of general declarations in favour of co-ordinated enforcement activities on the same matter to the extent possible. This could mean activities responding to one practice that may involve the application of the law in both countries,[114] or activities related to other cross-cutting matters.[115]

163. In some other agreements, more specific commitments are made, such as to aid the other party in finding and obtaining evidence and (public) information that exists in the requested party's territory, as is the case in the agreement between the agencies in Honduras and Costa Rica,[116] Nicaragua and Costa Rica,[117] and Argentina and Ecuador.[118]

164. Therefore, quite a few agreements do provide opportunity to co-ordinate activities to further the promotion of competition, although no major developments materialized from implementing these commitments.[119]

165. The Brazilian and Argentine authorities take this kind of collaboration a step further by making the commitment to meet on a regular basis at least twice a year to promote the exchange of information with regard to their enforcement activities, information regarding the economic sectors in which they have a common interest, public policies with competition implications and general subject of mutual interest[120]

3.2.3 Exchange of information

166. With regard to the exchange of information, most of the co-operation agreements repeat the content of the competition chapters in the free trade agreements, where the possibility is open, but restricted to the respective national laws on the subject.

167. Nevertheless, certain co-operation agreements expand the relationship given between the competition authorities and the individuals who have furnished them with confidential information, in order to potentially share this information with a foreign authority. Also, in both the agreement between the Chile's National Economic Prosecutor's Office (FNE) and Ecuador's Superintendency for Control of Market Power (SCPM), and the agreement between Brazil's Administrative Council of Economic Defence (CADE) and Peru's National Institute for the Defence of Competition and the Protection of Intellectual

114 Article III.2 of the Agreement between the FNE (Chile) and CADE, SAE and SEAE (Brazil).

115 Article V of the MoU for Co-operation among Mercosur Member Country Competition Authorities for the Application of their National Competition Laws; and Article VI of the Agreement between the Republics of Argentina and Brazil.

116 Article V.2.a of the Agreement between the Commission for the Protection of Competition (Honduras) and Coprocom (Costa Rica).

117 Article V.2.of the Agreement between Procompetencia (Nicaragua) and Coprocom (Costa Rica).

118 Article III.3.of the Agreement between the CNDC (Argentina) and the SCPM (Ecuador).

119 Article VI of the MoU between the FNE (Chile) and the Competition Superintendency (El Salvador); Article IV of the MoU for Technical Assistance between the CFC (Mexico) and the Competition Superintendency (El Salvador); Article IV of the MoU for Technical Assistance between the CFC (Mexico) and Procompetencia (Nicaragua); Article IX of the Agreement between the Commission for the Protection of Competition (Honduras) and Coprocom (Costa Rica); Article IX of the Agreement between Procompetencia (Nicaragua) and Coprocom (Costa Rica).

120 Article III.2 of the Agreement between the Republics of Argentina and Brazil.

Property (INDECOPI), provisions specify that, in this context, the authorities must obtain the express authorization of the individuals who furnished the confidential information.[121]

3.2.4 Technical Assistance

168. Without assuming concrete obligations, several agreements do mention examples of co-operation in this area, such as: the exchange of specialists and educators, the joint organisation of seminars, conferences and training courses, staff exchanges among the agencies and internships, among others forms of technical assistance[122]

169. Beyond the specific obligations outlined in this and the previous section, the multiplication of bilateral trade agreements with a chapter on competition, and co-operation agreements between competition agencies, the conclusion could be drawn that the preferred approach to handling Competition Law issues at an international level within the Latin American context is a bilateral one.

170. On the other hand, there doesn't seem to be a strong tendency toward signing more agreements between the agencies of the same subregion, except in Central America. MERCOSUR seems to be the exception to the rule, however, by signing multilateral co-operation agreements in its own jurisdiction that involve all of the competition agencies in the subregion.

171. So far, there is little public information available about the practical implementation of the bilateral and multilateral commitments made by the Latin American countries and their respective competition agencies.

172. One of the few examples is the report by the National Commission for the Defence of Competition (CNDC) in Argentina, which told that in June 2011 it used the tools provided for under the co-operation agreement signed with Brazil, and received a response from the Brazilian authorities in August of the same year, in what could have amounted to exercising the consultation notice rights under the agreement; however, this wasn't actually stated in the CNDC press release.[123]

173. Another more recent example is the collaboration between the Colombian, Chilean and Mexican agencies, to analyse the acquisition of Pfizer's infant formula business by Nestlé, which concluded with the commitment by Nestlé to exclude the infant formula business in these countries from the deal.

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121 Article IV.4 of the Agreement between FNE (Chile) and SCPM (Ecuador); Article 8 of the Agreement between CADE (Brazil) and INDECOPI (Peru).

122 See, among others: Article III of the Agreement between the FNE (Chile) and the Ministry of Economy, Industry and Commerce - Commission to Promote Competition (Costa Rica); Article V.II of the Agreement between FNE (Chile) and the SCPM (Ecuador); Article IV of the MoU between the FNE (Chile) and the Competition Superintendency (El Salvador); Article VIII of the Agreement between the Republics of Argentina and Brazil; Articles II.a and II.b of the Co-operation Agreement between the Industry and Commerce Superintendency (Colombia) and the CFC (Mexico); Articles III.a and III.b of the Co-operation Agreement between the SCPM (Ecuador) and the CFC (Mexico); Article 3.1 of the MoU for Technical Assistance between the CFC (Mexico) and the Competition Superintendency (El Salvador); Article 3.1 of the MoU for Technical Assistance between the CFC (Mexico) and Procompetencia (Nicaragua); Articles 2.a and 2.b of the Co-operation Agreement between the CFC (Mexico) and the National Commission for the Protection of Competition (Dominican Republic).

123 See: http://www.cndc.gov.ar/ (News Section).

174. Other than these and a few other examples, the collaboration activities between Latin American competition agencies have been more focused around informal communications or training and technical assistance programs.

175. Regardless, some Latin American agencies have taken part in enforcement activities together with other international agencies. For example, in 2009, CADE conducted some unannounced inspection visits jointly and simultaneously with European and U.S. competition authorities, within the scope of an investigation regarding the compressor market. CADE reports that these inspections involved over 60 officials from the former Economic Law Secretariat (*Secretaría de Derecho Económico* or SDE), the federal police and federal prosecutors in Brazil. The case was opened as the result of a request for clemency.[124]

4. Conclusions

176. This study done on the development of competition policy in subregional agreements in Latin America and the Caribbean leads to the following conclusions which, certainly, do not claim to be definitive, since they are about processes that are constantly evolving:

- The evolution of competition policy and legislation at a regional integration level in the trade agreements is still **not assertive enough** even though there are 4 processes for creating unified markets, and multiple bilateral, plurilateral and regional trade liberalisation agreements. If the countries in the Region want to improve the integration processes of their markets, regionalism in competition policy and legislation is an absolute must.

- At the integration bloc level, their development is **asymmetrical**: Only CAN and CARICOM have supranational regulatory systems in the competition area. Mercosur, for its part, only talks about an inter-governmental organisation (which is still not functioning) and not a true supranational authority, and the Central American Common Market does not have regional regulations on this subject (the national authorities are currently analysing a regional system with IDB aid.)

- **There are not enough regional cases to study:** The regional rules for CAN and CARICOM would allow progress to be made in competition advocacy and the fight against anti-competitive public regulations by partially following the European Union model. However, practical advances have yet to be made in this area. In CAN's case there have not been any relevant cases, and in CARICOM's case, the Competition Commission has just begun work on its only investigation case.

- The scarce use and promotion of the subregional competition tools are a reflection of:

  – **Weak competition institutions.** Latin American integration efforts have suffered from weak regional institutional systems and the competition authorities' lack of experience in grappling with international conduct. Resources (both human and financial) devoted to subregional competition policy are very limited. The institutional weakness at some of the national

[124] OECD. Latin American Competition Forum - 3 and 4 September 2013, Lima (Peru) - Session III: Unannounced inspection visits in anti-competitive conduct investigations. Brazil Contribution, p. 4 (available at: http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/LACF(2013)14&docLanguage=Es).

authorities reduces the trust factor in exchanging sensitive information and developing joint investigation and enforcement activities.

- **The divergence between national rules** to protect competition, especially as they pertain to controlling company concentrations, affects international co-ordination efforts.

- CARICOM and Mercosur have designed **complicated co-ordination systems** between national competition authorities and trade authorities that may reduce the efficacy of regional competition policy application efforts.

- There is a **divergence in national economic policies** depending on the assimilation of the market economy model, level of mistrust in the competitive process, and liberalisation of international trade in each country.

- **The limited market knowledge** that economic agents have about current regional rules and regulations.

- A significant number of **free trade agreements include independent chapters devoted to the competition policy** which cover different aspects such as: obligations to maintain competition laws and authorities, each authority's independent right to apply its own national competition laws, collaboration and technical assistance commitments, the ability to exchange information and rules about the confidentiality of shared information, whether or not state or designated monopolies are admitted, general commitments in favour of training and technical assistance.

- Given the similar characteristics of some markets, where the same actors tend to be active, **there are great opportunities for South-South collaboration among the Latin American and Caribbean competition agencies**, from the perspective of co-operative investigation and enforcement in cross-border concentration or anti-competitive conduct cases. Even within the scope of exclusively national conduct and transactions, there is room for the exchange of experiences among the competition authorities from different countries. These opportunities are beginning to officially take shape with the signing of multiple co-operation agreements between agencies and with the founding of the Latin American Regional Competition Centre (*Centro Regional de Competencia de América Latina* or CRC).

- Regardless of the above, **effective collaboration between Latin American agencies** in investigations and application of their respective national competition laws **is still in the early stages** and there are few co-operation agreements that are actually being implemented in practice.

- **Co-operation agreements** between competition agencies many times **duplicate** the same type of declarations and commitments outlined in the **free trade agreements**. However, some co-operation agreements do delve deeper into some of the subjects, such as: notices and consultations (which go further than the traditional positive and negative comity), collaboration for accessing information in foreign territories, and exchange of information.

- The relationships between competition agencies have not necessarily been guided by geographical proximity or being a part of the same subregional integration project, but apparently have been driven by the identification of practical advantages, such as: similarities between certain national markets, and taking useful advantage of the expertise that certain national competition agencies may have.

- The newer competition authorities in the region recognize that signing co-operation agreements with the more experienced authorities provides a learning opportunity, which allows them to gain more insight into investigations and procedures that other jurisdictions have followed which could also be duplicated in their countries.

- None of the bilateral co-operation agreements examined had any **reference to the subregional integration agreements** or the rules of competition in those agreements. Only Mercosur has enacted co-operation agreements that apply to all of the agencies in the subregion. The few concrete examples of co-operation between competition authorities have come about through **bilateral co-operation agreements**.