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Greater Cooperation Among Competition Agencies in Latin America

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I. INTRODUCTION

The past decade has shown an increasingly greater level of cooperation among competition agencies in Latin America. This increase in the level of interactivity among Latin American enforcers has played a key role in the fostering of competition law in the region and the strong network developed will certainly be a relevant tool for the competition agencies to overcome the different challenges they face in the enforcement of their laws. Such growing interconnection should be followed closely by those doing business in the region since there are already different sectors that have received a similar treatment in various Latin American countries because of the cooperation among competition enforcers of the region.²

The increase in the levels of cooperation among Latin American competition agencies in the past decade has been true in at least three levels: i) intense regional fora, ii) within the framework of trade agreements, and iii) through a growing number of bilateral agreements. The purpose of this paper is to reflect how these three levels have developed and continue to do so.

II. REGIONAL FORA

Besides the existence of international institutions such as the International Competition Network, OECD (where Chile and Mexico are members and Brazil, Colombia, and Peru are Observers to the OECD Competition Committee), and UNCTAD, where different Latin American countries participate in one way or another, there are a number of regional fora that focus more specifically on the agenda of the Latin American competition agencies.

In the past decade, new initiatives such as the “Ibero-American Competition Forum” (*Foro Iberoamericano de la Competencia*), launched in Spain in 2002; the “Latin American Competition Forum,” created by the Inter-American Development Bank and the OECD in 2003; UNCTAD’s COMPAL Program of 2003; and, more recently, both the “Inter-American Competition Alliance” and the “Centro Regional de Competencia para América Latina” created in 2011, among others, have greatly helped the different agencies exchange experiences on a wide variety of competition-related issues. In June 2013, Peru called for the creation of a South American Competition Forum of Competition.³

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² For a deeper analysis on the matter please see Julián Peña, *The Role of International Cooperation in the Development of Competition Law in Latin America*, WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE—VOL. II, (Nicolas Charbit et al. eds., 2014)

³ OECD, *Latin American Competition Forum, Contribution from Peru to Session 2*, DAF/COMP/LACF(2013)20, 3 (August 19, 2013).

A. COMPAL

The Competition and Consumer Protection for Latin America (“COMPAL”) program is an UNCTAD-led technical assistance program on competition and consumer protection policies for Latin America supported by SECO (Switzerland). The COMPAL program assists [Bolivia](#), Colombia, [Costa Rica](#), Ecuador, Dominican Republic, [El Salvador](#), Guatemala, Honduras, [Nicaragua](#), Panama, Paraguay, [Peru](#), and Uruguay in strengthening their capacities and institutions in the areas of competition and consumer protection laws and policies.⁴ In other words, the only Latin American countries with competition laws that are not included in the program are Argentina, Brazil, Chile, and Mexico.

Through this program, UNCTAD is assisting different Latin American countries in relation to: a) promotion of cross-country experiences, b) preparation of sectoral studies, c) preparation of policy recommendations, and d) training activities.

Phase I of the COMPAL program started in 2003 and involved the assessment of the needs and priorities of the countries of the region in the areas of competition and consumer protection. In order to avoid duplication of international efforts, this phase also comprised a review of the status of technical assistance in the region. Phase II, which started in 2005 and renewed in 2009, involves the implementation of the objectivities and activities in these areas.

The COMPAL program has a regional component that includes the exchange of experiences and cooperation: “incorporating the three pillars of UNCTAD’s approach, these being activities, analytical content of capacity building and technical assistance and consensus building.”⁵

The different activities organized by COMPAL on competition law and policy deal with: a) programs on competition advocacy, b) preparation of sectoral studies used as reference for the design of public policies, c) support for the elaboration of competition laws, d) training for judges, e) training for officers in case analysis, f) advice on the establishment and strengthening of competition authorities, and g) implementing the recommendations of the Peer Review.

Within the framework of a COMPAL regional meeting held in June 2013, INDECOPI proposed to the other competition agencies from different South American countries the idea of creating a network of South American agencies in order to strengthen the cooperation to fight anticompetitive behaviors, especially transnational cartels.⁶

B. Latin American Competition Forum

The Latin American Competition Forum (“LACF”) was a joint OECD-IADB initiative launched in 2003 “to foster effective competition law and policy in Latin America and the Caribbean” and over the years has become a concrete means “to promote dialogue, consensus building and networking among policy makers and enforcers.”⁷

⁴ WELCOME TO THE COMPAL PROGRAMME 1, available at http://www.programacompal.org/e_welcome.html.

⁵ WHAT IS COMPAL—COMPAL II 1, available at http://www.programacompal.org/e_COMPAL_II.html.

⁶ Enrique Delgado, *Peru proposes cooperation against cartels*, GLOBAL COMP. REV. 203 (2013).

⁷ LATIN AMERICAN COMPETITION FORUM 1, available at <http://www.oecd.org/competition/latinamerica/aboutthelatinamericancompetitionforum.htm>.

The main activities of the LACF have been their annual meetings and Peer Reviews.

The annual meetings were first held in Paris in 2003. Since then, they have taken place in Spain, El Salvador, Panama, Chile, Costa Rica, Colombia, the Dominican Republic, and Peru. These meetings have been attended by representatives from Argentina, Barbados, Bolivia, Brazil, Chile, Canada, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, EU member states, Guatemala, Italy, Jamaica, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Spain, Trinidad and Tobago, Uruguay, the United States, Venezuela, Andean Community, CARICOM, ECLAC, UNCTAD, the World Bank, and WTO.

The topics discussed in the meetings cover a broad variety of issues and in most of the meetings the agenda has included an in-depth Peer Review of a Latin American country. As Daniel Sokol states, “these meetings encourage norm diffusion to Latin American agencies, and also provide a learning opportunity through discussions with both similarly situated and developed world agencies that have enforcement experience. The annual forum also provides an opportunity for agencies to learn about each other’s institutional structures and larger political-economic concerns.”⁸ The Forum, as Ignacio de León says, “promotes dialogue, consensus-building, and networking between competition policymakers and law enforcers, as well as the identification and dissemination of best practices in competition law and policy.”⁹

The Peer Reviews have been done on Chile (2003), Peru (2004), Brazil (2005 and 2010), Argentina (2006), El Salvador (2008), Colombia (2009), Panama (2010), Honduras (2011), and updates and follow-ups of these reviews in 2007 (also updating the reviews made by the OECD Competition Committee on Mexico in 1998 and 2004) and 2012. These Peer Reviews include a very detailed report made by a competition expert that includes a set of recommendations on different aspects of competition law and policy. In a recent follow-up to the nine Peer Reviews made in 2012 and published in 2013, the survey showed that different recommendations were made to Chile, Argentina, Honduras, Panama, and Mexico, and “in all of these cases, the authority in question has taken steps to implement and put the recommendations into practice.”¹⁰

Other OECD activities in the region include the Project to Reduce Bid Rigging in Latin America, with projects in Brazil and Chile, and a report on Mexico’s Institute for Social Security’s procurement regulations and practices in 2012.

Since 2009, the host agency of the LACF meetings also organizes their National Competition Day events.

⁸ Daniel D. Sokol, *The development of human capital in Latin American competition policy*, COMPETITION LAW AND POLICY IN LATIN AMERICA 18 (Eleanor Fox & Daniel D. Sokol eds., 2009).

⁹ IGNACIO DE LEÓN, AN INSTITUTIONAL ASSESSMENT OF ANTITRUST POLICY: THE LATIN AMERICAN EXPERIENCE 87 (2009).

¹⁰ Symposium OECD-IDB, Dominican Republic, July 15, 2013, *Follow-up to the Nine Peer Reviews of Competition Law and Policy of Latin American Countries—2012*, available at <http://www.oecd.org/competition/follow-up-of-nine-latin-american-competition-reviews-2012.htm>.

C. Ibero-American Competition Forum

In 2002, the competition agencies of Argentina, Brazil, Chile, Peru, Spain, and Portugal launched the Ibero-American Competition Forum in order “to promote debate and reflection on competition issues on a regional level”¹¹ among the Ibero-American competition agencies. This Forum organizes annual meetings of the competition agencies and an annual competition course that is held in Madrid. The Ibero-American Competition School is organized both by the Spanish competition authority and the IADB with the aim of training Latin American agencies’ staff members.¹² As Maher Dabbah recognizes, “notable work has also been achieved”¹³ with this school.

In their 2007 meeting in Puebla, Mexico, the authorities of the Ibero-American Competition Forum launched the Ibero-American Competition Network (“RIAC” or *Red Iberoamericana de Competencia*) with the idea of concentrating and promoting the information on competition cases in the region and exchanging information and experience among the participating agencies, helping to foster their capacity building by creating a knowledge network on competition law and economics issues.¹⁴

D. Inter-American Alliance

The Inter-American Alliance (*Alianza Interamericana*) is an initiative launched in 2011 by Mexico’s Comisión Federal de Competencia. The alliance is a network of competition agencies in the Americas dedicated to “facilitate the discussion of antitrust related matters in the region and to foster cooperation among its members.”¹⁵

The alliance members meet monthly through telephone conferences where the agencies discuss a pre-arranged topic that is presented by a representative of one of the member agencies. The topics cover a wide range of issues from general issues to specific sectoral problems. The first of these meetings took place in February 2011 and representatives from Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay, and Venezuela participated. In various occasions representatives from the U.S. Federal Trade Commission (“FTC”) or the U.S. Department of Justice (“DOJ”) have also participated.

E. Regional Competition Center for Latin America

The Regional Competition Center for Latin America (“CRCAL” or *Centro Regional de Competencia para América Latina*) was launched at the IX Latin American Forum Meeting held in Bogotá, Colombia, in September 2011.¹⁶ The original members of the CRCAL were the

¹¹ INTERNATIONAL COMPETITION SYSTEM, 1, available at http://www.concorrenca.pt/vEN/Sistemas_da_Concorrenca/International_Competition_System/Ibero-American_Competition_Network/Pages/Ibero-American_Competition_Network.aspx.

¹² X EDICIÓN DE LA ESCUELA IBEROAMERICANA DE COMPETENCIA (2012), available at <http://events.iadb.org/calendar/eventDetail.aspx?lang=Es&id=3485>.

¹³ MAHER DABBAH, INTERNATIONAL AND COMPARATIVE COMPETITION LAW, 407 (2010).

¹⁴ RIAC, available at <http://www.redeiac.org/quemsomos.asp>.

¹⁵ CRCAL, WHO ARE WE? (2013), available at <http://www.crcal.org/alianza-interamericana/quienes-somos>.

¹⁶ *Id.*

competition agencies of Argentina, Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Peru. Brazil, Ecuador, Panama, and the FTC joined the CRCAL afterwards; however, as of July 2014, Bolivia, Paraguay, Uruguay, and Venezuela have yet to become members.

The goal of the CRCAL is to “assist to the competition authorities in their capacity building and in the enforcement of their competition laws and policies.”¹⁷

The different activities performed by the CRCAL since its recent creation include organizing a seminar next to the annual LARF Meetings, seminars dedicated to train judges from the region on competition law and economics, and the preparation of a series of guidelines and sectoral studies. The CRCAL is also working on setting up a regional database containing rulings from national competition authorities.¹⁸

F. South American Forum of Competition Agencies

In a June 2013 OECD meeting held in Lima, the Peruvian competition authority called for the creation of a South American Forum of Competition Agencies.¹⁹

The objectives proposed by Peru for the Forum were: a) to hold at least one annual work meeting to create a Virtual Platform for rulings and sanctions of anticompetitive practices with cross-border impact, b) to draft a “Master Co-operation Agreement for the Investigation of Anticompetitive Practices with Cross-border Impact” for the exchange of information and a “Handling of Information Agreement,” c) to carry out joint investigations and actions, and d) to facilitate the exchange of officials among the agencies.

The invitation to create the Forum was sent to the agencies of Argentina, Brazil, Chile, Colombia, Ecuador, Uruguay, and Venezuela.

G. Lima Declaration

In September 2013, the competition agencies of Chile, Colombia, and Peru signed the Lima Declaration²⁰ where they agreed to create a space: (i) to exchange among these agencies experiences and training, (ii) to analyze both legal and economic issues of common interest, and (iii) to work together in improving the level of integration among the agencies.

This initiative was launched with UNCTAD’s support, agreeing to facilitate the meetings and offering to share its database of competition case law.

Pursuant to the Declaration, all other Latin American agencies are invited to adhere as long as there is a prior unanimous approval by the existing members.

¹⁷ CRCAL MISSION VISION (2013), available at <http://www.crcal.org/inicio/mision-vision>.

¹⁸ Aitor Ortiz, *Regional Competition Center for Latin America Presents: Regional Database Containing Rulings from National Competition Authorities*, COMP. POL. INT’L. (2012).

¹⁹ OECD, *Latin American Competition Forum, Contribution from Peru to Session 2*, DAF/COMP/LACF(2013)20, 6 (August 19, 2013).

²⁰ LIMA DECLARATION (2013), available at http://www.fne.gob.cl/wp-content/uploads/2013/09/dec_lima_2013.pdf.

III. REGIONAL AGREEMENTS

A. Trade Agreements

Different trade agreements in Latin America, either regional or bilateral, introduced special competition norms. However, as we will address in the below section, the implementation of these signed agreements has not yet shown any progress.²¹

1. Mercosur (Protocol of Fortaleza)

In December 1996, the Mercosur members (Argentina, Brazil, Paraguay, and Uruguay) signed the Fortaleza Protocol of Fortaleza of Defense of Competition to be applied to anticompetitive conducts affecting trade among its members that had a local effect in one of them. The Protocol established an intergovernmental decision-making process that allowed the government of the infringing party to block the process at any time by just not giving its support.²²

The Protocol was ratified by the Brazilian and Paraguayan congresses but was never approved by Argentina nor Uruguay. Furthermore, of the four original countries, only Argentina and Brazil had competition law regimes since it was not until 2007 that Uruguay had its own law and not until mid-2013 that Paraguay enacted its competition law. However, by the time Paraguay established its competition law regime, it was suspended from its Mercosur membership. Venezuela joined Mercosur in 2006.

Even though the Fortaleza Protocol was never ratified, the Mercosur working group for competition matters (CT N° 5) kept meeting at least twice annually. In 2002, Mercosur adopted the Agreement on the Implementation of the Fortaleza Protocol. In 2004, through C.M.C. Decision N° 4/2004, Mercosur approved the Consensus on the cooperation among competition agencies. In 2006, it approved CMC Decision 15/2006 establishing a system of exchange of information and consultation in the field of merger control. In 2010, Mercosur approved CMC Decision N° 43/2010 an Agreement for the Defense of Competition in Mercosur which replaced the Fortaleza Protocol. This agreement has been ratified so far only by Argentina (in April 2011) and Uruguay (in January 2014).

2. Andean Community

In March 2005, the Andean Community, then composed of Bolivia, Colombia, Ecuador, Peru, and Venezuela, enacted its Decision 608/2005, creating the “System for the Protection and Promotion of Free Competition in the Andean Common Market” replacing Decision 285/1991 which itself replaced Decision 230/1987.

This legislation is only applicable to cross-border anticompetitive cases that affect Andean Community countries and is to be enforced by the Andean Competition Committee, a supra-national entity.

²¹ See Verónica Silva, *Cooperación en política de competencia y acuerdos comerciales en América Latina y el Caribe (ALC)*, 49 CEPAL 1 (2005); OECD, *Latin American Competition Forum, Background Note by the IADB Secretariat*, DAF/COMP/LACF(2013)5 (August 28, 2013).

²² See Félix Peña, *Una política de competencia económica en el Mercosur*, 12 BOLETÍN LATINOAMERICANO DE COMPETENCIA 3 (2001).

The members of the Andean Community, similar to the Mercosur case, have very different levels of competition law developments. In fact, Colombia has had a regime since 1959, while Ecuador only enacted its law in 2012. Even more unclear, Bolivia enacted a law in 2008 which might or might not protect competition.

None of Andean Community competition regulations has ever been applied in practice.

3. Sistema de la Integración Centroamericana (“SICA”)

In 2006, the Vice-ministers of Economic Integration of Central America created the Central American Working Group on Competition Policy to design a regional competition policy in order to assure a greater transparency and open access to the economic agents that participate in the different inter- and extra-regional trade exchange activities. This group, later named the Central American Competition Network (“RCC” or *Red Centroamericana de Competencia*), has received technical assistance from UNCTAD, the FTC (with U.S. AID funding), ECLAC, the European Commission, and the Inter-American Development bank.

Since 2007, the RCC has organized annual meetings of the Central American Competition Forum, which gathers the competition agencies of different countries of the region. In August 2013, the conference took place in El Salvador. Competition authorities from El Salvador (Superintendencia de Competencia), Costa Rica (“COPROCOM” or *Comisión para Promover la Competencia*), Honduras (“CDPC” or *Comisión para la Defensa y Promoción de la Competencia*), Nicaragua (ProCompetencia, Instituto Nacional de Promoción de la Competencia), and Panama (“ACODECO” or *Autoridad de Protección al Consumidor y Defensa de la Competencia*) were participants, while the Dominican Republic (Pro-Competencia, Comisión Nacional de Defensa de la Competencia) participated as an observer. UNCTAD also participated during these events.

At the 2013 meeting, the authorities discussed the idea of having a regional competition regime authority, a compromise agreed to by the Central American countries in the Association Agreement. This also received signed endorsements from Central America and the European Union, with the support of the IADB.

Before the middle of 2013, there had been no international cooperation between the competition agencies through this platform.²³

B. Bilateral Cooperation Agreements

In the past decade, a growing number of bilateral cooperation agreements between different Latin American countries, besides the existence of specific competition related chapters in bilateral or regional trade agreements, have developed.

Argentina and Brazil were among the first countries to sign bilateral cooperation agreements in 2003. Although it has been a very limited formal cooperation, there has been some sporadic, informal communication regarding specific matters either through the postal system or

²³ OECD, International Enforcement Cooperation, Paris, 2013, *Secretariat Report on the OECD/ICN Survey on International Enforcement Cooperation*, p. 90.

by telephone.²⁴ In June 2011, the CNDC requested some information from its Brazilian counterparts using the mechanism established in the bilateral cooperation agreement, and the Brazilian agencies responded in August of the same year, though no information has been given on the content of the request.²⁵

Brazil later signed agreements with the competition authorities of Chile (2008), Peru (2012), and Colombia (2014),²⁶ and it is negotiating an agreement with Ecuador.²⁷ Chile has also signed cooperation agreements with Costa Rica (2003), Ecuador (2009), and El Salvador (2009).²⁸ Costa Rica has also signed agreements with Honduras (2009), El Salvador (2007), Nicaragua (2010), and Panama (2008).²⁹

Within the region, Mexico has signed the most cooperation agreements. It has signed agreements with Chile (1994), Colombia (2012), the Dominican Republic (2012), Ecuador (2012), El Salvador (2007), and Nicaragua (2011).³⁰ Mexico also maintains cooperation frameworks in its Free Trade Agreements signed with Chile (1999) and Uruguay (2004). A recent example of collaboration among several agencies includes the agencies of Colombia, Chile, and Mexico. They analyzed the acquisition of Pfizer's infant formula business by Nestlé, which resulted in the divestment of that business in those three countries.³¹

In June 2013, Peru signed a cooperation agreement with the Dominican Republic³² and Ecuador did so as well with Uruguay in November 2013.

Most of these bilateral agreements include technical assistance provisions as well as provisions about cooperation and information exchanges for enforcement.

Even though many bilateral cooperation agreements have been signed between the different competition agencies throughout the region, actual utilization of these agreements remains low. Though some informal cooperation has occurred, those cases are rare and did not necessarily take place between agencies with signed, formal cooperation agreements, but rather took place between officials with good personal, informal ties.³³

²⁴ OECD-IADB, *Competition Law and Policy in Argentina. A Peer Review*. Policy Brief 1, 37 (2006); MARCO BOTTA, MERGER CONTROL REGIMES IN EMERGING ECONOMIES. A CASE STUDY ON BRAZIL AND ARGENTINA, 297-314 (Kluwer 2011).

²⁵ See CNDC NEWS SECTION (2013), available at <http://www.cndc.gov.ar>.

²⁶ CADE (2013), available at <http://www.cade.gov.br/Default.aspx?2e0e0e121efc3f1b351e>.

²⁷ Brazil's presentation at the OECD-IADB Latin American Competition Forum, Lima, Peru (Sept. 4, 2013), available at <http://www.oecd.org/competition/latinamerica/SII-Brazil.pdf>.

²⁸ FNE (2013), available at <http://www.fne.gob.cl/internacional/participacion-internacional/acuerdos-america/>.

²⁹ COPROCOM (2013), available at http://www.coprocom.go.cr/documentos/convenios_acuerdos.html.

³⁰ CFC, TRATADOS Y ACUERDOS (2013), available at <http://www.cfc.gob.mx/index.php/cfc-quienes-somos/marco-juridico-cfc/tratados-y-acuerdos-internacionales-de-la-cfc>.

³¹ OECD, *Latin American Competition Forum, Background Note by the IADB Secretariat*, DAF/COMP/LACF(2013)5, August 28, 2013, p. 32.

³² *Perú dará asistencia técnica para aplicar ley de defensa de la competencia en RD*, LISTIN DIARIO, June 26, 2013, available at <http://listindiario.com.do/economia-y-negocios/2013/6/26/282200/print>.

³³ OECD, *Competition Law and Policy in Chile*, 1, 37 (2011).

IV. CONCLUSIONS

During the past decade competition law enforcement in Latin America has seen a significant development and the greater cooperation among Latin American agencies have played a relevant role. This is a fact that anyone doing business in the region should be aware of since this new reality will increasingly have a greater influence in the way decisions are taken. The greater cooperation among competition law enforcers is a trend that will continue growing and will thus continue to foster competition enforcement in the region.