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COMPETITION POLICY AND TRADE AGREEMENTS IN THE REGION: EXPLORING FORUMS FOR COOPERATION AND CONVERGENCE

The similarities of competition provisions in integration and other intraregional agreements and the dissemination of this information could serve as a basis for progress in cooperation and convergence on this issue in the region. The negotiation processes that have taken place for these agreements have also enhanced communication between the national agencies concerned, leading to processes of learning and harmonization; these processes could be strengthened as part of the current efforts of administrating and implementing trade agreements.

This edition of the FAL Bulletin reviews the information available in order to see how progress can be made on this issue on the basis of the analysis and bibliography of Álvarez and others (2006), and Silva and Álvarez (2006); the references may be found at the end of this Bulletin. Additional information on this subject may be found in issues of the *Comercio internacional* series, which are available from the publications section of the web site of the ECLAC Division of International Trade and Integration: http://www.eclac.org/comercio/default.asp?idioma=IN.

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I. INTRODUCTION: THE ADVANTAGES OF REGIONAL COOPERATION ON COMPETITION POLICY

Since the mid-1990s, and at an increasing pace since the beginning of the present decade, the Latin American and Caribbean countries have signed a large number of trade agreements, mostly free trade agreements (FTAs) (some with extraregional partners), which include commitments relating to competition. This trend is also apparent at the global level, according to documents produced in the past few years by the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Co-operation and Development (OECD). This process is taking place in the region at the same time as competition rules are being developed for subregional integration agreements, in addition to other arrangements between countries for cooperation on competition. These developments have taken place while national competition institutions are being strengthened, which is bringing some degree of convergence of countries' policies.

In fact, national legislations in the region are in line with current international practice, although competition policy –in contrast to the practice of more developed countries- is given less priority than other forms of economic policy and reflects some regulatory gaps and institutional problems (including narrower decision-making capacity and risks of regulator capture). Even more urgent is the need for stronger institutions to apply the rules, as the response to potentially anti-competitive conduct is developing to take into account the circumstances of the market in which they take place.[1] Overall, competition policy has been improved over the 1990s, which has in turn contributed to spreading a culture of competition, and to enhancing or improving the capacity to apply the regulations in accordance with the commitments made in the regional agreements.

In this context, concern has arisen as to the extent to which the progress made in coordination between countries –or between countries and blocs- in the region will contribute to developing regional cooperation of the broadest possible scope on competition policy. In the context of globalization and growing openness, this concern has become more urgent in view of the cessation of the efforts to construct a hemispherical agreement (Free Trade Area of the Americas , FTAA) which would have included competition-related provisions. In addition, the topic is beyond the scope of the negotiations in the context of WTO, where there are no comprehensive regulations on competition.[2]

The arguments which are usually put forward to justify cooperation on competition include the need to tackle anti-competitive practices that are increasingly taking on a cross-border dimension and to guarantee that the potential benefits of trade liberalization and investments are not damaged by such practices as economic integration progresses. For this reason, its inclusion in various types of provisions in trade agreements is spreading. The specific conditions of the countries of the region, according to the size and development of their economies and the sectors affected, add additional arguments: (i) the countries of the region, as developing economies, differ in their overall performance and in their competition policy; (ii) many of the smaller economies (such as those of the Caribbean) have difficulty in finding institutional resources to deal with the anti-competitive practices of large national and transnational

corporations; (iii) the anti-competitive practices which have been threatening the region in past years as the result of mergers or international cartels are found in a relatively broad range of sectors, such as: fuels, chemical and pharmaceutical products, construction materials and products, transport, telecommunications and financial services;[3] and (iv) this is especially the case in infrastructure sectors (such as ports and transport) which are so particularly important for integration.

Meanwhile, the region's countries have been affected by and have also quite often made use of trade defence mechanisms (antidumping, safeguards), often against their main regional partners. Such situations lead to disputes among the partners to the agreements or in larger contexts (such as WTO). Competition policy may contribute to reducing such cases and ensuring fairer trading conditions among partners, although its objectives are different to those of trade defence and may even be in conflict with it in some areas.[4]

The institutional limitations that hinder the countries' application of rules on competition policy make them less credible. These problems can be resolved by rules and incentives that are coherent and sustainable over time. These objectives could be supported by the trade agreements that include provisions on competition, to the extent that commitments in this area can make the rules more stable.

II. THE COORDINATES OF COMPETITION POLICY AND COMMERCIAL AGREEMENTS IN THE REGION

The region has been developing a national institutional framework for competition while also making efforts to include this issue in various arrangements within trade agreements. Most of the countries have created or redesigned their institutions since the 1990s,[5] while the rest have specific laws or rules on competition and/or are in the process of drafting the relevant legislation. The asymmetries that exist in terms of institutions are also found in their approaches and enforcement capacities, including the legal systems required for implementation.

FTAA has played a unifying role in this learning process since the establishment of the working groups that prepared for the negotiations in the mid-1990s. Its objectives included the establishment of legal and institutional coverage at the national, subregional or regional level, in order to proscribe anti-competitive business practices and to define mechanisms to facilitate and promote the development of competition policies in the hemisphere. In this context, progress was made in the identification, transparency and understanding of current laws and rules (see the 2002 inventories on the FTAA site). It also resulted in a more extensive awareness of competition issues and their relation to trade, progress in applying competition policies and laws in the hemisphere and cooperation and negotiation among developing countries.

As shown in table 1, competition policies have been included in various agreements in the region: the North American Free Trade Agreement between Canada, Mexico, and the United States (NAFTA); three integration agreements: the Andean Community (CAN), the Caribbean Community (CARICOM) and the Southern Common Market (MERCOSUR); and 23 economic complementarity agreements (ECAs)[6] and FTAs (mainly bilateral). This list of agreements accounts for about 50% of all the agreements signed. The FTAs, signed mostly in the current decade, incorporate a relatively greater number of competition provisions.

Competition provisions in trade agreements are generally intended to deal with anti-competitive practices, strengthen national competition authorities and promote cooperation and coordination among them.[7] The depth of the commitments varies widely, with provisions that range from best efforts at cooperation or legal commitment to cooperation, inclusion of positive or negative comity and recourse to dispute settlement,[8] to a supranational authority with power over private entities or restrictions on trade defence. There are also agreements between authorities (agency-to-agency agreement, or ATA) which include provisions similar to those of FTAs, and advanced agreements which may include provision for confidential information.

Table 1

SCHEDULE OF TRADE AGREEMENTS IN THE REGION THAT CONTAIN COMPETITION-RELATED PROVISIONS (CRP) * **

Type of agreement	1990-1995	1996-2000	2001-2004	2005-2009
A. Intraregional 1.Integration 2. ACE or FTA	(CAN)*	MERCOSUR [b] Chile-MERCOSUR Chile-Mexico Central America-Dominican Republic Chile-Central America	CARICOM [c] Central America-Panama Mexico-Uruguay CARICOM-Costa Rica	CAN [a] Chile-Peru
B. Extraregional FTAs	TLCAN [d]	Chile-Canada Mexico :[c] EU, AELC, Israel	Costa Rica-Canada Chile:[c] EU, USA, AELC, Korea	Chile-3 countries (P4) [d]

			Panama-Taiwan Mexico-Japan	Panama-Singapore Peru-United States Colombia-United States

Source: Prepared by the author, on the basis of V. Silva and Ana María Álvarez, "Cooperación en política de competencia y acuerdos comerciales de América Latina y el Caribe: desarrollo y perspectivas", *Comercio internacional series*, No. 73 (LC/L.2559-P), Santiago, Chile, Economic Commission for Latin America and the Caribbean (ECLAC), June 2006; inventories, Free Trade Area of the Americas, web sites of Foreign Trade Information Service of the Organization of America Sates(SICE/OAS) and national competition or negotiation agencies.

* The dates given indicate when the institutional framework for competition was established for a bloc.

** CRP indicates the inclusion in trade agreements of a chapter referring to competition, regardless of the extent of the commitments.

[a] Decision 608 of 2005 replaces Decision 285 of 1991.

[b] The regulations of the Fortaleza Protocol (1996) were signed in 2003.

[c] In 1997 the basis for the legislation was established and in 2001 the specific provisions were formulated in Protocol VIII of the Revised Treaty of Chaguaramas (which established the single market).

[d] Plurilateral agreement that includes Brunei-Darussalam , New Zealand and Singapore .

Almost all of the countries in the region are involved in at least one trade agreement with competition provisions (CRP) and they make up the following categories:[9]

- Participation in bilateral or plurilateral agreements, ECA or FTA only: Chile ,* Costa Rica ,* Mexico * and Panama
- Participation in a subregional integration agreement only: Argentina , Bolivia , Brazil *, Ecuador , Paraguay , Bolivarian Republic of Venezuela and the Caribbean countries*
- Participation in both categories of agreement: Colombia , Peru and Uruguay
- No participation as individual countries in agreements with CRP: El Salvador , Guatemala , Honduras and Nicaragua **

The three integration blocs with competition provisions in the region differ from the bilateral agreements in their objectives and scope. Integration agreements are signed among neighbouring countries with a similar level of development –all intraregional- and with a view to a closer connection among the participating partners than in the case of FTAs. Nevertheless there are significant issues that have not yet been finalized in terms of implementing the commitments and incorporating them into national legislation. Competition policy plays a role in the formation of single markets within the larger forum of the bloc. Despite their uneven development over the past few years, they have helped to strengthen the national policies of the participating countries (see box 1).

Box 1

COMPETITION POLICY IN INTEGRATION AGREEMENTS

The schemes follow different models depending on whether they aim for harmonization and supranationality (CAN, CARICOM) [a] or coordination between national authorities (MERCOSUR). The first two agreements include broad-ranging competition provisions, although they do not cover merger disciplines; unlike CAN, the Caribbean bloc requires the establishment of national provisions in the participating countries. MERCOSUR is explicitly moving towards cooperation and harmonization of laws, includes antidumping measures (as does CARICOM) and monitoring of public policies and establishes an intergovernmental agency for implementation.

CAN and MERCOSUR deal in a similar way with abuse of dominant position and agreements between enterprises in the subregion. The MERCOSUR protocol, however, has not entered into force (ten years after its formulation) as it has not been incorporated into some of the national legislations. Progress so far has therefore consisted of cooperation agreements between agencies in the subregion for the application of legislation and merger control.

External agreements signed by the blocs have included competition provisions which are at an early stage of development, or only support actions in this area within the ECAs (LAIA) or the agreements involving CARICOM. [b] In the case of FTAs and intra or extraregional agreements, broader or more extensive provisions have been included, as in most of the FTAs of Chile and Mexico , those of the CAN countries with the United States , or in the negotiation of MERCOSUR with the European Union.

[a] These schemes are based on the experience of the European Union, including the roles of regional and national institutions.

In general the FTAs establish competition policy disciplines that are broader than those of the bilateral ECAs but in some aspects they are narrower than the integration agreements. Bilateral agreements do not usually include action on State policies (such as subsidies), although they do refer to public enterprises or legal monopolies. With one or two exceptions, they make no explicit reference to the relationship between competition policy and trade defence and there is little recourse to dispute resolution. All in all, bilateral agreements have followed very different formats, but they basically can be divided into two approaches, which can be simply referred to as the "European Union model" and the "NAFTA model". They have some shared objectives and they also refer to the value of cooperation and coordination functions, which can contribute to the intraregional construction of rules in this area (see table 2).

Table 2

COMPARISON OF TWO STYLES OF AGREEMENTS WITH COMPETITION PROVISIONS IN THE REGION *

	European Union Style	NAFTA style
Agreements	▪ Chile with: EU, AELC, Korea , P4 ▪ Mexico with: AELC, EU, Japan ▪ Others: Costa Rica-Canada, Panama-Singapore **Total = 9**	▪ Chile with: Canada , Central America , United States , Mexico ▪ Mexico with: Israel, Chile, Uruguay ▪ Others: Central America-Panama, Panama-Taiwan, Peru-United States, Colombia-United States, Chile-Peru **Total = 11**
Objectives	Commitment to apply the laws to prevent anti-competitive practices from damaging the benefits of liberalization arising from the agreement. Cooperation and coordination should therefore be promoted.	Adoption/maintenance of legislation and its implementation for the purposes of the agreements, promotion of trade and investment, while recognizing the importance of cooperation and coordination. In some cases, there are explicit provisions for promoting efficiency and consumer well-being.
Basic content	Detailed commitments for cooperation and coordination, usually including: notification, coordination for implementation, consultations in the case of impact on a partner and technical assistance; may include "comity" instruments (positive or negative).	Detailed treatment of monopolies and State enterprises. ** The relevant chapter normally refers to these items in the title. Recognition of the importance of cooperation, with special reference to transparency and consultations. Some are complemented by ATAs.

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of V. Silva and Ana María Álvarez, "Cooperación en política de competencia y acuerdos comerciales de América Latina y el Caribe: desarrollo y perspectivas", *Comercio internacional series*, No. 73 (LC/L.2559-P), Santiago, Chile, Economic Commission for Latin America and the Caribbean (ECLAC), June 2006.

* This comparison does not include the three agreements that are basically intended to strengthen the partners' institutions in this area: Chile-MERCOSUR, Central America-Dominican Republic and CARICOM-Costa Rica. ** Many agreements also contain competition clauses in other chapters, for example in the telecommunication services chapter.

In any case, the scope of and similarities among competition provisions in integration agreements and in other intraregional agreements (of which there are eight, as indicated in table 1 (A.2), apart from those that are now being negotiated), would offer a basis for making progress towards convergence. This is clear from a recent exercise conducted in the context of the South American Community of Nations (SACN) (LAIA/MERCOSUR/CAN/14/2006). In addition, the negotiation processes for trade agreements have brought the responsible agencies into closer contact, which has generated processes of learning and cooperation; this could be strengthened by coordination between negotiators and those responsible for competition.

III. INTRAREGIONAL RELATIONS ON COMPETITION POLICY: PROSPECTS FOR COOPERATION (- AND CONVERGENCE?)

Generally speaking, significant progress is needed in terms of the institutional framework, incorporation into national legislation and compliance with rules that provide greater legal certainty to trade relations in the region. These challenges also affect competition policy, and in the absence of development at the multilateral level, region and subregional forums have a more important role in this area. In particular, regional cooperation on competition policy could actually become a tool for tackling existing asymmetries, helping to deal with some aspects of the restrictions of scale and facilitating capacity-building for competition policy. For this reason, the various models adopted in the agreements for dealing with competition policy have contributed to strengthening the national competition culture and institutions, which in turn enhances the processes of cooperation and coordination for their implementation.

The degree of development reached in FTAA offers a basis for establishing a core set of shared obligations, In addition to the subject of technical assistance –on which there had been a consensus until the last draft of the chapter (November 2003) – there had been some degree of convergence in relation to competition laws and authorities, cooperation and consultation. The topics that had been more extensively discussed were, in contrast: the applicability of dispute settlement in relation to some provisions; exclusions and exceptions in competition legislation; transitional measures and/or special and differentiated treatment; and, in particular, provisions on policies and measures to regulate the market, state enterprises and state assistance (see presentation by Araoz in ECLAC (2006)).

The dynamic of recent years in this area, within the bilateral and integration agreements, could bring the different viewpoints closer together and increase the potential for convergence, at a time in which the countries are focusing on implementation and administration of the agreements signed. In addition, a deeper analysis of the ECA (LAIA) agreements which include competition policy could strengthen the basis for cooperation in this area (for example, the recent FTA between Chile and Peru). Progress could thus be made towards a common legal instrument, as proposed by LAIA, in order to increase transparency and equity in trade (LAIA, 2005). Gradual work on the broad range of provisions in this area, from conflict prevention to cooperative action, could begin with more straightforward tasks such as exchange of information or notification of actions. Progress could also be made towards a common regulatory framework, as suggested in the context of the SACN.

Although there is a greater degree of development and harmony in domestic measures, whose relative convergence has had an impact on trade agreements (especially integration agreements), coordination problems are exacerbated by asymmetries and fear of loss of autonomy (which is restricted, for example, by the sharing of confidential information). There is still much to explore in the relationship of the specific competition provisions in trade agreements –especially those referring to infrastructure sectors- with the other provisions they contain (on services, investments or trade defence). Lastly, although the region is just beginning to acquire experience in cooperation on competition policy, the evaluation of the results so far indicate that the process of negotiation for the agreements – including FTAA, has brought those responsible for competition policy into closer contact. This may provide a basis for progress towards