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## Global Forum on Competition

### IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

#### Contribution from Peru

-- Session II --

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## IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- Peru --

### 1. Existing tools for international co-operation

1.1 *Please identify any formal mechanisms and/or co-operation agreements you have entered into with a foreign country or antitrust authority, the type of agreement (MLAT, MOU, RTA, etc) and the powers available under this agreement. For example, does the agreement allow your authority to conduct searches and inspections on behalf of a competition authority from another jurisdiction?*

1. In recent years, the Peruvian National Institute for the Defense of Competition and Protection of Intellectual Property Rights (Indecopi) has greatly improved its relations with antitrust authorities abroad by signing Inter-institutional Cooperation Agreements (ICA) and by incorporating to regional or international cooperation associations. In particular, between 2007 and 2011 Indecopi has signed ICAs with competition agencies from Chile, Colombia, Costa Rica, El Salvador and Panama<sup>1</sup>.

2. ICAs are written agreements between Indecopi and a foreign peer aimed at creating a mutual relation involving three main activities:

- Information exchange; including the commitment to absolve queries about the ways their respective competition laws are enforced and to send relevant documents like resolutions, decisions, technical reports, guidelines, directives, etc.
- Enforcement activities of competition laws; including the possibility to coordinate and collaborate with their enforcement activities and the commitment to notify the other party about the enforcement activities that could have an effect on their interests.
- Technical assistance; allowing each party to benefit from the experiences of the other party, including the possibility of meetings, conferences, seminars, courses, workshops, visits and internships, etc.

3. These activities are carried out in harmony with each party's respective legal systems and according to their financial possibilities. Any information exchanged is considered as delivered in a confidential manner and if any information has been declared as confidential (like personal information or trade or industrial secrets), the owner of such information must first authorize its delivery to the other party.

4. Also, in 2009 Indecopi signed a Memorandum of Understanding (MOU) with the United Nations Conference on Trade and Development (UNCTAD) and the Swiss Secretariat for Economic Affairs

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<sup>1</sup> The agreements were signed with Fiscalía Nacional Económica (FNE), Superintendencia de Industria y Comercio (SIC), Ministerio de Economía, Industria y Comercio (MEIC), Superintendencia de Competencia (SC) and Autoridad de Protección al Consumidor y Defensa de la Competencia (ACODECO), respectively.

(SECO) in order to continue the development of the Program for Competition and Consumer Protection Policies for Latin America (COMPAL).

5. In addition, Indecopi is part of the Inter-American Competition Alliance and the International Competition Network (ICN). Also, within the framework of trade or integration agreements signed by Peru, Indecopi is responsible for coordinating and cooperating with competition authorities from the other parties of such agreements. Peru has signed trade agreements with the Andean Community, Canada, Chile, the European Union, Japan, México, South Korea and the United States of America, among others.

6. Nevertheless, Indecopi has not yet had the opportunity to apply the provisions of these agreements into specific investigations and to effectively engage in cooperation activities to enforce its competition law with competition agencies abroad.

1.2 *Please describe the informal mechanisms your competition authority has in place for co-operating with other jurisdictions, and how these have helped in cartel investigations. For example, has your authority conducted any joint inspections/dawn raids in conjunction with another competition authority?*

7. Indecopi has not yet conducted joint inspections or dawn raids in conjunction with another competition authority. However, Indecopi has a Technical Cooperation Department that has been specifically established to create bonds with other agencies in the pursuit of joint purposes. In this regard, Indecopi is fully committed with the creation of bonds with competition authorities abroad.

1.3 *To what extent have you used OECD instruments, e.g. the 1995 Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade and the 2005 Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, in your investigations? For what purpose were they used and how helpful were they?*

8. Indecopi has used those OECD instruments as a reference to elaborate its ICAs and as an element to be considered in the negotiations of trade agreements.

## **2. Types of co-operation**

2.1 *What type of co-operation does your agency request from other agencies in cartel investigations? What type of co-operation is received? At what stage of the proceedings does this co-operation take place and on what issues? For example, is co-operation related to the exchange of relevant information, the organisation and execution of dawn raids, the setting of fines or to the discussion of substantive issues, such as market definition, theory of harm, etc?*

9. Indecopi has not yet conducted a joint cartel investigation or related activities like joint dawn raids or the discussion of market definition, fines, corrective measures or other substantive issues. Indecopi expects to have the opportunity to engage in these activities in the near future.

## **3. International vs. regional co-operation**

3.1 *Which competition authorities you co-operate with the most? How often do you co-operate? Do you co-operate more with authorities located geographically close-by?*

10. Indecopi is currently developing bonds primarily with other competition agencies in America, but is also willing to engage in negotiations with countries from other continents. Indecopi expects to engage in cooperation activities with other countries independently of their geographic location.

3.2 *Are you part of a regional competition network? If so, to what extent has this network assisted in the cartel investigations you have carried out?*

11. Indeed, Indecopi is part of Inter-American Competition Alliance along with Argentina, Barbados, Brazil, Canada, Chile, Colombia, the Caribbean Community, Costa Rica, Ecuador, El Salvador, the United States of America, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela.

12. The Alliance is an initiative from the Mexican competition authority, the Federal Competition Commission (CFC), “aimed at addressing competition enforcement and fostering cooperation among agencies within the hemisphere”<sup>2</sup>. The Alliance has started its activities by having monthly discussions via conference calls. Nevertheless, Indecopi has not yet had the opportunity to engage in cartel investigations within the frame of the Alliance.

3.3 *If you are a new/young agency to what extent do you co-operate with your neighbouring competition authorities, other new competition authorities in the region, and/or mature agencies either in the region or overseas? If you are a mature agency, which are the competition authorities with which you co-operate most, and how do you respond to and prioritise requests received from newer agencies?*

13. As a relatively young agency, Indecopi is currently developing bonds with other competition agencies and expects to engage in cooperation in the near future. No significant activity of cooperation has been conducted yet.

#### **4. Identifying gaps and improving the current frameworks**

4.1 *What are the current challenges faced by your competition authority in cartel investigations which have a cross-border dimension (e.g. anti-competitive cross-border effects or evidence located in foreign jurisdictions)? To what extent would international co-operation with other competition authorities overcome these challenges?*

14. Only recently Indecopi has had the opportunity to identify a possible cross-border cartel and is currently investigating that case. Indecopi expects that the near future will show how international cooperation could be useful in such cases.

4.2 *How do you deal with co-operation in cartel cases that encompass both criminal and civil enforcement regimes? For example, how do you ensure that the privilege against self incrimination is respected when using the information exchanged with other agencies in criminal proceedings against individuals? If you have a civil system in place for cartel enforcement, have you faced any particular problems coordinating with those jurisdictions with a criminal enforcement system and vice versa? What issues have arisen and how do the different systems affect the quality and/or intensity of coordination?*

15. Indecopi has not yet had the opportunity to engage in cooperation activities that encompass both criminal and civil enforcement regimes.

4.3 *How do you think your current system could be improved in relation to the way in which international cartels are investigated? In what way could liaising with competition authorities in other jurisdictions be improved?*

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<sup>2</sup> See: <http://www.cfc.gob.mx/index.php/en/CONTENIDOS/acerca-de-nosotros.html>. Please refer to this website for more information.

16. Indecopi expects to see how international cooperation activities operate in the near future. Cooperation could be improved by the effort of nations to have an appropriate legal framework in order to cooperate with efficiency and transparency, respecting each others' legal systems and the rights of the defendants and companies or persons under investigation.

4.4 *Have there been any instances in which a cartel investigation or case could have benefited from information or co-operation from a foreign competition agency, but your agency did not request such assistance because you knew that it could not or would not be granted?*

17. As stated before, only recently Indecopi has had the opportunity to identify a possible cross-border cartel that is currently under investigation. In this case, Indecopi could benefit from information exchange and cooperation from a foreign competition agency.

## 5. Information Sharing

5.1 *What are the main barriers to information sharing that you have encountered when requesting information from another jurisdiction? Please provide examples. How have these affected cartel investigations in your jurisdiction? Have you managed to obtain the information using any other means?*

18. Indecopi has not yet had the opportunity to engage in information exchange or other cooperation activities. However, confidentiality is a main issue to take into consideration, since it not only affects the development of investigations but could also harm legitimate interests and rights of defendants and persons or companies under investigation.

5.2 *Are there any legal constraints which would prevent your agency from providing information related to a domestic or international cartel to the competition authority of another jurisdiction? What are these constraints? Do you have any legislation preventing information exchange?*

19. The "Personal Data Protection Act" (Act 29733) has been recently enacted in Peru. The Act explicitly provides that cross-border flow of information is conditioned on the recipient country having similar measures to the ones provided in the Act in order to ensure the protection of the information exchanged (article 15). This is a minimum guarantee to the owners of information and to persons or companies under investigation, and therefore it does not constitute a strong constraint to the development of joint activities of cooperation and investigation.

5.3 *To what extent can your authority rely on information gathered in another competition authority's investigation in your own investigation?*

20. Indecopi has not yet had the opportunity to engage in information exchange or other cooperation activities. However, since Indecopi is strengthening bonds with reputable agencies, as a principle, it could rely on the information gathered by those authorities.

5.4 *Does your jurisdiction/agency have any legislation, rules or guidelines regulating the protection of confidential information which is exchanged with an agency in another jurisdiction? What safeguards do you have in place for the protection of confidential information when co-operating with foreign government agencies?*

21. ICAs contain provisions regarding the protection of confidential information. As mentioned before, any information exchanged is considered as delivered in a confidential manner and if any information has been declared as confidential (like personal information or trade or industrial secrets), the owner of such information must first authorize its delivery to the other party.

5.5 *What is your policy for exchanging information with other jurisdictions that has been provided as part of an amnesty/leniency programme? Do you request (and receive) waivers from companies being investigated in order to facilitate information exchange with other agencies investigating the same cartel? In practice do you request waivers as part of the leniency application? How important are waivers, and the information received from other investigating authorities as a result, to the effectiveness of the cartel investigation?*

22. Indecopi has not yet had the opportunity to exchange information with other jurisdictions in the framework of a leniency programme. However, the Peruvian Competition Act contains provisions regarding waivers for effective cooperation in the framework of a leniency programme that could eventually be applicable to cross-border investigations.

23. Specifically, according to the Peruvian Competition Act, the first economic agent (person or company) that provides evidence of the existence of an anticompetitive behaviour will be benefited by an exemption of punishment. The subsequent agents that provide such evidence could benefit by a reduction of their fines if their collaboration is in some way useful. Nevertheless, those provisions have not been applied yet. These provisions do not exclude the applicability of the benefits within the framework of a joint investigation with agencies abroad.

## **6. International co-operation within other policy areas**

6.1 *Are you aware of any other law enforcement areas in your jurisdiction (for example tax, bribery or money laundering) which face similar challenges in international co-operation as those faced by competition authorities in cross-border cartel cases?*

24. In 2007, the Peruvian Financial Intelligence Unit (UIF) was created as an agency aimed at receiving, analyzing, discussing, evaluating and communicating information for the detection of money laundering and terrorist financing, as well as at contributing to the implementation of a system that detects suspicious transactions of money laundering or terrorist financing. Nowadays, UIF is engaged in cooperation activities within the framework of the Financial Action Task Force (FATF-GAFI), the Financial Action Task Force on Money Laundering in South America (GAFISUD) and Egmont Group.

25. In its turn, Peru has signed Agreements for the Avoidance of Double Taxation with Brazil, Canada, Chile and Spain as a cooperation mechanism between nations and its tax authorities in order to prevent undue taxation. Such mechanisms are also often included in trade agreements.

6.2 *Does your authority liaise with any other regulatory authorities to discuss common problems/solutions? Please provide examples.*

26. Indecopi is permanently conducting coordination activities with other national regulatory agencies where they discuss common problems. For instance, Indecopi is developing bonds with the Peruvian Procurement Agency (OSCE) in order to address bid rigging practices in a more effective manner.

27. Also, Indecopi permanently absolves questions from authorities (especially Regulators, Ministries and Congressmen), regarding the effects of its proposals in the market.

28. Indecopi is also willing to collaborate with agencies abroad to discuss and address common problems and expects to improve its cooperation activities and mechanisms within the near future.