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LATIN AMERICAN COMPETITION FORUM

Session II: Regional Competition Agreements

Contribution from UNCTAD

3-4 September 2013, Lima, Peru

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LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

Session II: Regional Competition Agreements

CONTRIBUTION FROM UNCTAD

1. Based on empirical evidence gathered by UNCTAD¹, it was established that in the last decade an "eager to ink" attitude from trade negotiators to include competition related provisions (CRPs) in regional and bilateral agreements but less 'ready to act' on those provisions on the part of the competition authorities despite few attempts to use such competition provisions as a main vehicle for cooperation on competition policy among regional trade agreement (RTA) members.

2. This conclusion held true later on with another UNCTAD report² when highlighting current problems facing developing countries in implementing competition provisions under bilateral and regional experiences. As shown in the 2007 report, competition provisions in RTAs, despite a significant potential for cooperation on a number of issues, have yet to prove their value. This is true for both North-South and South-South agreements.

3. In the case of South-South RTAs for instance, when trade is liberalized on a regional basis competition policy has an important role to play in ensuring that markets are not subjected to abuses of power and that inter-country trade and investment are welfare enhancing. In the case of North-South RTAs, regional competition rules can potentially reinforce the bargaining position of developing economies challenging anti-competitive practices of international corporations.

¹ Competition Provisions in Regional Trade Agreements: How to Assure Development Gains, UNCTAD (2005).

² Implementing Competition Related Provisions in regional trade agreements: is it possible to obtain development gains? UNCTAD (2007).

1. National implementation of CRPs in RTAs³

4. Broadly speaking, CRPs in RTAs may be classified into substantive and/or cooperation provisions. The first may entail harmonization schemes such as the ones emerging from the EU competition law system. Harmonization of the national CLP and its enforcement is a prerequisite for the candidate countries. Furthermore, enforcement activities are coordinated through the implementation of the European Competition Network (ECN).

5. Regional competition law may be difficult to enforce, and might require the domestic enforcement capability (that is the existence of a national competition authority). For example in the case of Caribbean Community and Common Market (CARICOM), ‘while the Commission is empowered to determine the existence of and remedy anti-competitive practices, to a large extent it is dependent on national competition authorities (NCAs) for enforcement’. The South African Customs Union (SACU) agreement does not require the creation of a supranational competition authority, but instead requires each country to adopt its own competition law, and then to cooperate on enforcement. Finally, the Andean Community (AC): *normativa andina* (Decision 608) applies to cross-border cases; but the regional law is to be temporarily used at national level in Bolivia and Ecuador (Decisions 608 and 616, respectively) while national competition law enforcement capability is still to be developed. In all of the aforementioned cases, there is a lack of operational procedures related to coordinated enforcement, especially as many of the member countries of the agreements do not have a competition law and/or authority.

6. The problems that have arisen with respect to these agreements may relate to incorrect expectations about what the competition provisions implied, or may be explained by the type of competition arrangements being envisaged in the agreements being inapplicable. For example, whereas, the CARICOM ‘supranational’ model may fit the small open economies of the Caribbean, the Mercado Común del Sur (Southern Cone Common Market) (MERCOSUR) ‘inter-governmental’ model, which proposes that national authorities sit together to determine cases with effects on the region and then make a non-binding recommendation to the trade authorities, might be inappropriate. The latter is mainly because of the difficulties in reaching a consensus among the national authorities. Furthermore, even if a consensus is achieved there is a risk that the trade authorities will modify the decision with non-competition goals in mind and then command the national competition authorities to enforce a decision with which they do not agree. In a nutshell, harmonization and policy transfer of CLP in RTAs require a better absorptive capacity that may entail best practices, a number of policy alternatives to better adapt the legal framework, an institutional set-up and a policy network.

7. In addition, the national implementation of cooperation provisions including CRPs may produce better preliminary results as it entails tangible and immediate results between the signatory countries or institutions. However, it is undoubtedly true that the absence of a law hinders cooperation, given that without a law there is no national competition authority and the exchange of information will therefore not be possible. In concrete terms, the creation of a supranational authority in a South–South agreement, when the countries involved have different levels of development in terms of their competition enforcement, for example CARICOM, MERCOSUR, Andean Community, Common Market for Eastern and Southern Africa (COMESA), and Southern African Development Community (SADC), raises a series of political economy problems in these settings which might make the implementation of CRPs difficult. This presents problems for the integration objectives of the respective RTA. In this regard, it should be noted that regional competition policy was and is still an important component of the creation of the European common market.

³ Paragraphs extracted from Horna and Kayali. "National Implementation of Competition-Related Provisions in Bilateral and Regional Trade Agreements. In chapter 2 of *Implementing Competition Related Provisions in regional trade agreements: is it possible to obtain development gains?* UNCTAD (2007).

2. **Problems that impede national implementation of CRPs in bilateral and RTAs**

8. The fundamental problem arising from the implementation of substantive CRPs in RTAs relates to the loss of policy autonomy, or space. This is accentuated in cases where the countries concerned have different levels of development and hence widely diverging priorities. The underlying obstacle has been identified as the problem of supranationality, that is, the relationship between regional and national laws. What is required is that ‘the benefits of effective enforcement against anti-competitive practices with cross-border implications (spillover effects) and the gains from economic integration must exceed the loss of domestic sovereignty’ for each country. Compounding this might be the lack of a national law and the difficulties in allocating competences.⁴

9. Some other common problems related to the implementation of CRPs in bilateral trade agreements merit some attention. A national competition agency might have a focus either on the enforcement of the competition law, or on competition advocacy, although it does not mean that these two might not also be complementary. The potential implications of the CRPs thus may vary depending on where the domestic competition focus lies. When designing competition policies at national level, policy makers, particularly in developing countries, often need to make a choice between enforcing competition laws and strengthening awareness of the benefits of introducing competition in a certain setting or in specific regulated sectors. In this sense, problems related to the lack of a competition culture and competition enforcement, such as the relative ineffectiveness of the national competition law or its agency due to limited powers, budget and resources are often to be found when assessing the national setting of the member countries of bilateral or regional trade agreements.

10. Whether one is looking at ‘regional’ or ‘bilateral’ arrangements, there is need to look at the potential implications of the competition agreement, depending on whether the agency is primarily focused on enforcement or advocacy. For instance, if the focus of the public policy is competition advocacy, the interplay between competition and industrial policies might have an implication. Similarly, if instead there is a focus on competition enforcement, then the level of technical capacity of the national competition authority to deal with anti-competitive practices might be more important.

11. Other problems related to the implications of provisions on trade remedies for the size and composition of caseloads of competition agencies are also found in the implementation of bilateral or regional trade agreements.

3. **Summarizing reasons why CRPs in RTAs have not been satisfactorily applied**

12. Summing up the foregoing discussion focusing on North-South RTAs, CRPs have not been implemented due to the following reasons:

- CRPs in RTAs were objected as part of market access and liberalization⁵
- An agreement taking long time to negotiate (3-5 years), but the content was limited to technical assistance rather than substantive cooperation in case-specifics. (ACP agreements)⁶

⁴ These issues have been considered at some length in Jenny and Horna (2005). Hence we do not pursue this topic further here, instead concentrating on case studies of the competition chapters of North-South bilateral trade agreements.

⁵ The need to evaluate the objective of the competition provisions in the trade agreement in order to evaluate the likelihood of their use was noted. In this regard, it is important to consider whether the main aim of the CRPs is market access, or whether the provisions are mainly trying to offset the possible negative impacts of trade liberalization. Furthermore, the CRPs might relate to commitments around services or investment

- Asymmetry in the level of institutions, enforcement and capacity to enforce the law
- Lack of coherence between north and south due to different legal systems, and governance issues

13. Concerning South-South RTAs, official intergovernmental group and treaties/agreements such as COMESA; SADC, West Africa (WAEMU), ECOWAS (Central Africa), CEMAC, EAC (East-African Community), Euro Asia (Russia, Belarus and Kasajstan), CIS (Armenia, Ukraine, etc); ASEAN working Group on Competition, MERCOSUR, Andean Community of Nations, CARICOM, SIECA, there are fundamental reasons as to why these agreements have not been implemented:

- Lack of capacity (staff and resources)
- Lack of independent agencies and relationship with other government bodies (lack of clarity on the roles and functions)
- Albeit convergence on substantive laws, procedure laws are different, divergent and incompatible (i.e. lack of inter-operatibility)
- Lack of mutual trust in the legal system and governance issues.
- Lack of coordination between competition authorities on the one hand and trade negotiators on the other. However, in the Mexican case example contains a detailed competition chapter which as comprehensive as an Agency-to-Agency Agreement (ATA).
- Most of competition issues were marginal in integration agreements
- Problems of coherence between industrial, trade, investment policies and concern between benefit and costs (Eg. Case of UEMOA) Compounded by the existence of LDCs within certain groups - uneven level of development within RTA partners and bilateral agreements make it impossible to implement competition policies in objective criteria. The reason for this, is that the costs are immediate and the benefits are long term (SADC - South Africa next to Lesotho, Swaziland)

4. A case study of Latin America

14. In Latin America, there has been some increase in coordination amongst national competition regulators at the sub-regional level such as in the case of the Central American Group of Competition and to some extent, at the Andean Committee for the Defense of Free Competition. Since the latter experience is a Regional Competition Law within a regional integration scheme in force for more than 7 years, it is worth reviewing briefly the lessons learned of this experience:

⁶ It is important to evaluate whether the provisions of the agreement at hand set out substantive competition provisions, or simply stipulate cooperation provisions. Cooperation in practice may depend on the trade flows between the signatory parties and the subsequent effects of anti-competitive cross-border business practices. However, the extent of cooperation through the CRPs in the agreements is not clear – instead the signatory parties might choose to use informal techniques, or other modes of cooperation (such as through an ATA). The relationship of the CRPs to trade remedies such as anti-dumping is a further important consideration.

5. Lessons learned of the lack of enforcement of the Andean Community Regional Competition Law⁷

15. On 28 March 2005, the Andean Community Commission approved its regional competition law (Decision 608 at its 90th ordinary session) and created the so-called "Andean Committee for the defense of competition ("The Andean Committee") with the support of the EU. The Committee was created upon the enactment of the Regional Competition Law in Bolivia, Colombia, Ecuador, Peru and Venezuela, the five founding countries. The Andean Committee formally approved its Internal Regulations (hereinafter the Internal regulations) in its October 2005 second ordinary meeting. Article 1 of the internal regulations prescribes the following:

- The primary function of the Committee is to provide recommendations and opinions to the Andean Community Secretariat (the executive body of the Andean Community System) in accordance with its mission statement to enforce regional law through investigations. In the event specific investigations in accordance to articles 21 and 27 of the regional law, the Committee can play a pivotal role of liaising with the heads of the five national competition authorities.
- Article 2 of the internal regulations sets out other functions of the Committee, including regional advocacy activities, and notably, formulating proposals to better protect competition in the Andean Countries.

16. During the second half of 2005, three ordinary meetings were held in September, October and November. The Internal Regulations of the Committee were approved at the second meeting. Unfortunately, from 2006 to 2009, the Committee ceased operations as a result of several factors, including the change of political vision of the Bolivian government and the withdrawal of Venezuela as a member of the Andean Community, in 2006 and 2008, respectively. However, from September to December 2005, the Committee did address several issues, including a cross-border investigation. The latter was conducted under Decision 285 and discussed at the request of the Colombian delegation.⁸

17. The output of the Committee, as envisaged in accordance with the work plan approved at the 2nd ordinary meeting of October 2005, issued the following documents:⁹

- Procedural Regulations of Decision 608 to apply the community competition law provisions,
- Procedural Regulations of Decision 608 as national law for Bolivia and Ecuador,¹⁰

⁷ Paragraphs extracted from HORNA, Pierre "Can Accountability and Effectiveness Go Hand in Hand? Lessons from Two Latin American Competition Networks". In Chapter 9 of *Informal International Law Making: Case Studies*. Torkel Opsahl Academic Epublisher. The Hager. Pages 313-348 Available at: http://www.ficlh.org/fileadmin/ficlh/documents/LOTFS/LOTFS_3_Web.pdf

⁸ Minutes of the 2nd ordinary meeting of the Committee on 3 October 2005. Document in Spanish called: "Acta de la Segunda Reunión Ordinaria del Comité Andino de Defensa de la Competencia" (CDC) 3 de octubre de 2005. Lima –Perú. SG/R.CDC/II/ACTA 2.17.28 on pages 11 and the following.

⁹ See Appendix III of the 2nd ordinary meeting minutes. Op. Cit. page 10.

¹⁰ Indeed, without the enactment of these guidelines, since 2007 to the present, Ecuador and Bolivia have been applying the substantive provisions of Decision 608 at the national level. For instance, in Ecuador, pursuant to the National Executive Decree No. 1614 of 27 March 2009, the substantive provisions of Decision 608 will be applied at the local level, and appointed the Ministry of Industries and Productivity and the Sub-Secretary of Competition as the investigation unit to deal with anticompetitive practices in Ecuador. The Deputy Secretary of Competition will be the representative before the Andean Committee for

- Follow-up on the consultancy work undergone to evaluate the feasibility of adopting a community law on mergers and acquisitions,
- Proposal for a draft decision that will deal with unfair competition,
- Training workshops on recent regional legislation for Andean Community officials and Competition officials. In addition it was envisaged to sensitize judges from the Andean Court of Justice. Particular reference to Bolivian and Ecuadorian government officials and Academics,
- Compilation of laws and jurisprudence on competition law in regulated sectors, and a Compilation of law and jurisprudence on competition law in order to continue the work of the EU Competition Project.

18. As can be seen from this ambitious work plan, the Committee's work has gone beyond policy coordination. Had all the output been completed under this framework, it would have had legally binding consequences under the meaning of the regional law and the Andean Community legal system. Unfortunately, none of this work was carried out because the planned meetings were not held. Nonetheless, the institutional framework and the legal provisions converged to promote an effective monitoring, compliance, and enforcement mechanism. In addition, the role of domestic institutions is envisaged in the enforcement of this internal regulation as the members of the Committee have legal and domestic constraints which hinders the effective implementation of the Internal Regulations

19. A lesson learned from this regional competition law enactment was timing. Formal cooperation was too early in the Andean Committee. The 2005 adoption of the regional law has clearly bypassed necessary stages (advocacy, confidentiality, and building trust among national competition authorities). This in turn has undermined the effectiveness and efficiency of the regional norm, thereby causing failure to tackle the ultimate goal of eliminating cross-border anti-competitive practices. The latter has brought about a "regrettable" and "paradoxical" situation at the Andean Committee within the Community Regional Competition Law Enforcement where the regional law (not having first solved the problem of confidentiality) became a "barrier to cooperation" rather than a vehicle for sharing information and experience. For instance, a member country might have an enormous resistance to cooperation with others regarding some case investigations as any commitment to cooperate might result in formal internal investigations against the country's own national enterprises.

20. Critically, one should strike a balance between the levels of formality and informality when dealing with previous steps in order to build trust among peer authorities and, at the same time, to raise awareness of the need for convergence of domestic rules that deal with confidential information. Thus, even if we solve the problem of confidentiality, there should be an additional level of convergence in investigation and on the imposing of sanctions and remedies. However, it is clear that securing confidentiality as prerequisite to establishing trust between competition authorities should be dealt with first and thereby smoothen up relations in the network as a whole. Again the issue of timing is of paramount importance in this regard.

the defense of Competition.
http://www.mipro.gob.ec/index.php?option=com_content&view=article&id=449&Itemid=11. Similarly, the Authority for the Control of Social Enterprises in Bolivia applies the Decision 608 and to date, they have been very active in sanctioning enterprises for the commission of anticompetitive practices in the market. A recent case concerns exclusive agreements (vertical restraints) that distort competition in the market in the airline industry. See http://www.elpaisonline.com/noticias/index.php?option=com_content&view=article&id=7840:la-aemp-sanciona-a-lan-chile&catid=2:nacional&Itemid=3.

6. Recommendations to further implement CRPs in RTAs

21. Further efforts are needed in the actual process of RTA negotiations and the ways in which competition provisions are tailored to a specific agreement. UNCTAD findings suggest that involving competition authorities in the negotiation of an RTA might help to make the competition chapter more effective. In this regard, it is worth noting the efforts made by the UNCTAD-SELA Working Group on Trade and Competition¹¹.

22. Furthermore, since both UNCTAD publications concluded that there is still a large untapped potential for cooperation under existing CRPs in RTAs, the remaining barriers to cooperation should be explored and strategies to overcome them designed. It is also important to compare the impact of CRPs with other instruments used to promote cooperation, whether in terms of informal arrangements, bilateral agency-to-agency agreements (ATAs) or Mutual Legal Assistance Treaties (MLATs) where possible. For instance, one could see whether the inclusion of competition-related provisions (CRPs) in RTAs leads to the signing of dedicated legal instruments for cooperation on competition matters.

23. In the light of the proliferation of RTAs and the recent increase in RTAs containing behind-the-border issues such as competition law and policy (CLP), a major issue discussed was the need to rationalize commitments relating to competition provisions. In view of the proliferation of agreements, it may be important to focus in the future on concrete policy recommendations aimed at better coordination among the agreements and harmonization where appropriate.

24. One other trade and competition issue that may be of relevance to RTAs is merger control. Despite the growth in cross-border mergers and acquisitions and its obvious implications at regional level, and the potentially useful role that merger control provisions could play in both South–South and North–South RTAs, the number of RTAs containing such merger control provisions remains limited and little is known about the potential for using RTAs as an effective way to promote intra-regional cooperation on merger control. This gap could partly be explained by disparities in capacities, approaches and objectives of domestic competition policies among RTA members with regard to merger control. Strengthening merger control, as well as other competition provisions with significant economic implications at regional level, could be facilitated by the inclusion of an evolving clause allowing members to adopt a gradual approach to enlarge the scope of regional competition provisions as this would introduce additional flexibility.

25. Another area is the impact of CRPs in RTAs on the development of national competition authorities. In this area as well, important questions remain unanswered. For instance, many North–South RTAs contain CRPs with regard to technical assistance (TA) and support to strengthen the institutional capacity in developing country members and improve the implementation of domestic competition laws. A more systematic analysis would be needed to identify practices that would be most appropriate for each country, depending on their needs and level of development. The effectiveness of such bilateral TA provisions could in turn be benchmarked against efforts by international organizations to strengthen competition law implementation in developing countries.

¹¹ The WGTC is regional forum for cooperation between authorities, and to increase coherence of trade and competition policies within the Latin America and the Caribbean regions. The main areas of intervention of the WGTC are: (i) Comparative analysis of national and sub-regional rules on competition; (ii) Comparative review of the efficiency of competition agencies in Latin America and the Caribbean; (iii) Role of government policies and their links with competition policies. Such policies include, for instance, subsidy programmes, monopolies, anti-dumping, concessions, etc.; and (iv) Needs and possibilities for technical assistance and cooperation, at the bilateral, subregional and multilateral levels.

26. Support advocacy measures that can show several examples showing that competition policy offers significant opportunities for development. However this potential remains partially untapped at domestic and regional level. While it is true that competition policy can be a powerful policy tool, getting the benefits from effective competition policy involves human capabilities and specialized expertise. A competition culture is another prerequisite for this potential to be realized. Tacit knowledge may be seen as being of equal or even greater value than formal knowledge, which is conveyed in its codified, structured and explicit form. Given the important role of tacit knowledge, cooperation on competition policy can also lead to a more effective transfer of expertise and skills, as well as an interactive process of learning by doing and learning by using. Therefore, further light should be shed on effective policies that lead to a higher level of expertise in the field of competition policy in developing countries. More efforts should be spent, for instance, on active policies designed to create training materials that are suited for local needs. If training materials are imported, care needs to be taken in how they are used in order to minimize any clash with local specificities.

27. Taking into account UNCTAD's focus on developing country competition law enforcement experiences, problems and priorities, thematic networks could be developed on specific competition-related issues that would create 'epistemic communities' for informal cooperation, leading in time to a strong basis for more formal cooperation under treaty provisions. In order to build effective national competition policy regimes, many different stakeholders from both the public and the business sectors should be involved. These include governments, business associations (including small and medium-sized enterprises (SMEs), financial institutions, aid donor agencies, and non-governmental organizations (NGOs) as well as regional groupings. Promoting partnerships may prove an effective way to ensure positive synergy among all concerned. Policy makers in developing countries often operate in a context in which their capacity for action is highly constrained both by established practices and by the urgent development problems that need to be addressed.

28. In order to be successful, innovative mechanisms may need to be applied to meet at the same time the rigors of effective competition laws and the development challenges faced by many developing countries, in particular least-developed countries (LDCs). This will involve partnerships between various stakeholders at national level, but also the commitment of donors and development partners in the North. UNCTAD will continue to promote such public-private partnerships in the context of regional integration and South-South cooperation, with a view to establishing a policy framework that addresses some of these issues that are likely to be of critical importance for developing countries in the years to come.

29. Finally, the impact of TA to better address the national implementation problems of CRPs in regional and bilateral RTAs is important. Strengthening human and institutional capacities may provide a conducive politico-socio-economic environment in the countries to fully exploit the benefits of the CRPs in the RTAs of which they are signatories, challenge the existing balance of power in trade decision making, empower developing countries to act independently in terms of their domestic reforms, ensure a level playing field in international trade, and take seriously the need to build developing country power in international negotiations. CRPs in bilateral agreements and the ATAs that develop out of these agreements may be effective instruments through which TA may be transmitted. As a way to better absorb TA, developing countries require:

- A team of technically competent, diplomatically savvy negotiators that can participate effectively and persuasively in ongoing negotiations and decision making.
- An equally informed back-up team to articulate the various national interests, negotiating objectives and strategies, as well as a layer of expertise external to government that can provide trade policy advice to government.

- An effective domestic policy-making process which involves a spectrum of relevant government agencies and draws systematically on expertise and advice external to the government.
- An ability to forge, maintain and service effective coalitions with other countries on particular issues of negotiation.
- The capacity to use an inter-operational strategy between national, regional and even multilateral approach (predominantly at the WTO and its dispute settlement process to defend and advance their rights).