

Unclassified

DAF/COMP/LACF(2016)32

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

30-Mar-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session III: Promoting effective competition in public procurement

-- Contribution from the IDB Secretariat --

12-13 April 2016, Mexico City, Mexico

The attached document from the IDB Secretariat is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 12-13 April 2016 in Mexico.

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JT03392989

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



**14th Latin American and Caribbean Competition Forum
12-13 APRIL 2016, Mexico City, Mexico**

Session III: Promoting Effective Competition in Public Procurement

Part 1 Co-operation between anti-corruption bodies and competition authorities in public procurement

CORRUPTION & COLLUSION: TWO SIDES OF THE SAME COIN AGAINST PRODUCTIVITY

-- CONTRIBUTION FROM THE IDB SECRETARIAT* --

Abstract:

In a context of economic distress and limited financial resources, a zero tolerance for corruption as well the traditional competition principles should stand as pillars of the new development agenda. These key pillars may contribute to ensure that goods and services are procured under conditions that attract private sector investments. To uphold these pillars, there is ample opportunity to improve the co-operation existing between competition and anti-corruption authorities.

To bring attention to this concern, this submission delves into the relationship between corruption and bid-rigging in development projects, particularly in the Latin America and Caribbean regions. The analysis will reveal that there is a tangible need to search for stronger synergies amongst national and supranational anticorruption and competition authorities. The submission also explores the diverse co-operating mechanisms that could help to articulate this co-operation, and to bring closer the expertise of anticorruption and competition authorities for the benefit of the new development goals.

* This background note was prepared by Marianela Lopez-Galdos (OII/OII) with the support of Maristella Aldana (OII/OII), and Mario A. Umaña, (INT) as a contribution for the discussion of Session III of the 2016 LACCF.

The views expressed in this paper are the personal responsibility of the author and should not be attributed to the IDB.

TABLE OF CONTENTS

1. Introduction4

2. The relationship between corruption and competition.....5

 2.1 Corruption and competition at the crossroads of development5

 2.2 The Experience of the IDB’s Office of Institutional Integrity.....7

3. Engineering Co-operation: Strata, Substance and Tools9

 3.1 Strata.....9

 3.2 Substance12

 3.3 Tools15

4. Conclusion16

1. Introduction

1. What makes nations grow? In answering this question, there is wide consensus that productivity stands as the quintessential pillar to boost development.¹ Empirical evidence shows that consumer oriented open and transparent societies have the highest levels of economic development.² It follows, that competition and anticorruption policies play a pivotal role in safeguarding consumer welfare, strengthening credibility in institutions and creating incentives for small enterprises to join the formal economy, all of which has an impact on nations' productivity.³ This is particularly the case considering that government procurement represents on average 12% of global economic activity in most countries.⁴

2. Undeniably, anticorruption and competition policies are different mechanisms to correct market dysfunctions that impair productivity, and development.⁵ While anticorruption and competition are distinct policy fields, experience in fighting collusive schemes corroborates that when combined, better policy outcomes are achieved.⁶ In fact, well-functioning markets make corruption hard to prosper as effective competition offsets the perverse incentives to engage in corrupt acts. In other words, anticorruption efforts and the fight against collusion represent two sides of the same coin.

3. Recognising that anti-cartel and anticorruption policies are paired elements that enhance national productivity levels, efforts to further co-operation between competition and anticorruption authorities should be welcome to unravel the synergies that joint competition and anticorruption efforts can bring about.

4. And there is ample opportunity to improve the limited co-operation that exists today. This paper delves into the relationship between competition and anticorruption measures, with a particular focus on procurement markets, and explores the opportunities for co-operation between national, transnational and supranational bodies responsible for the enforcement of competition and anticorruption mandates.

¹ Levy, S. "The Chicken or the Egg: Productivity, Informality and Growth in Mexico", presentation at Columbia University, Centre on Global Economic Governance, 2015. Lewis, W.W., "The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability", The University of Chicago Press, 2005.a.

² Soreidte T., "Competition and corruption what can the donor community do?", U4Brief, September 2007 No. 8.

³ Moreno, L.A., "A Latin American Spring", available at <https://www.project-syndicate.org/commentary/latin-america-protests-corruption-by-luis-alberto-moreno-2016-03>.

⁴ Anderson, Robert D., William E. Kovacic, and Anna Caroline Müller, "Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalisation", E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2016. www.e15initiative.org.

⁵ Levy, S. opening speech at the "Antitrust in Emerging and Developing Countries" event organized by Concurrences and New York University Law School, New York, 24 October 2014.

⁶ Jenny, F. "Competition and Anti-Corruption Considerations in Public Procurement," in OECD, Fighting Corruption and Promoting Integrity in Public Procurement (Paris, 2005), chapter 3, pp. 29-35 (distinguishing between corruption involving public officials and collusion between potential suppliers, and noting factors contributing to each problem). Related perspectives are provided in Jean Jacques Laffont and Jean Tirole, A Theory of Incentives in Procurement and Regulation (Cambridge, Mass.: MIT Press, 1993).

2. The relationship between corruption and competition

2.1 *Corruption and competition at the crossroads of development*

5. In order to fully grasp the importance of fighting corruption and promoting competition for development, it is useful to highlight how South Korea transformed itself into a global technological hub, and earned the sobriquet of the Miracle on the Hans River.⁷ South Korea's success is largely attributable to increased trade facilitation, robust implementation of anti-corruption policies, and enhanced market competition.⁸

6. During the Asian financial crisis of the nineties,⁹ South Korea was negatively impacted by high degrees of corruption and protectionism (national companies received preferential treatment). In the aftershock of the crisis, the South Korean government strived to regain competitiveness in the international markets by, amidst others, adopting strict regulations and measures against corruption¹⁰ and modernising its competition system.¹¹

7. For example, South Korea created the independent Commission against Corruption that reports to the President in its fight against corruption.¹² This anticorruption commission co-ordinates its efforts with other monitoring agencies, such as the South Korean Federal Trade Commission.¹³ As clearly stated by the former chairman of the South Korea Independent Commission against Corruption at that time:

⁷ Koske, I., I.Wanner, R. Bitetti and O. Barbiero (2015), "The 2013 update of the OECD product market regulation indicators: policy insights for OECD and non-OECD countries", OECD Economics Department Working Papers, OECD Publishing, Paris.

⁸ Kang, David C. (2002). *Crony Capitalism: Corruption and Development in South Korea and the Philippines* (PDF). Cambridge: Cambridge University Press. Focused only on explaining successful outcomes, the conventional model provided no analytic way to explain the 1997 crisis. Countries previously regarded as miracles now were nothing more than havens for crony capitalists (p.3).

⁹ Stiglitz J., *Some Lessons from The East Asian Miracle*. The World Bank Research Observer, 1996 and Muchhala, Bhumiika, ed. (2007) *Ten Years After: Revisiting the Asian Financial Crisis*. Washington, DC: Woodrow Wilson International Center for Scholars Asia Program.

¹⁰ "To cite but a few major pillars of the anti-corruption infrastructure of South Korea: the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions was enacted in 1999; the Anti-Corruption Act and the Money Laundering Prevention Act were enacted in 2001; the Korea Independent Commission Against Corruption (KICAC) was established in 2002; and Code of Conduct for Public Offices was established in 2003" as explained by Nam-Joo Lee, Chairman Korea Independent Commission Against Corruption, in 2003 available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019162.pdf>.

¹¹ Gerber, David J., *Anthropology, History and the 'More Economic Approach' in European Competition Law -- A Review Essay* (July 16, 2010). 41 *International Review of Intellectual Property and Competition Law* 441 (2010); Chicago-Kent College of Law Research Paper. Available at SSRN: <http://ssrn.com/abstract=2159339> or Gerber, David J., *Global Competition: Law, Markets, and Globalization* (2010). David J. Gerber, *GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION*, Oxford University Press, 2010. Available at SSRN: <http://ssrn.com/abstract=1605230>.

¹² http://www.iaaca.org/AntiCorruptionAuthorities/ByCountriesandRegions/K/RepublicofKorea/jgou/201202/t20120209_801731.shtml.

¹³ <http://eng.ftc.go.kr/>.

“It is necessary to build a multi-monitoring system for effective prevention of corruption. Given that political manipulation, nepotism and cronyism still exist in Korean society, anti-corruption efforts should not be exclusively exercised by one particular agency. For this reason, KICAC has set up an integrated information system that electronically co-ordinate anti-corruption activities of inspection agencies such the Board of Audit and Inspection, Ministry of Government Administration and Home Affairs, Public Prosecutors’ Office, Korean National Police Agency, as well as economic regulators such as the Financial Supervisory Commission and the Korea Fair Trade Commission. Through this innovation, we conduct systematic analysis of what they did and try to come up with alternatives and solutions.”¹⁴

8. By according higher priority to competition and anticorruption policies, South Korea supported rigorous innovation by the private sector,¹⁵ which contributed to advance sustainable economic growth and to reduce inequality.¹⁶

9. There have been certain positive developments in the international arena relating to increase co-operation between anticorruption and competition actors. Illustratively, the negotiated Transpacific-Trade Partnership agreement (TPP) has come to be a strong sponsor for the anticorruption and competition determinations. The TPP has raised the level of ambition in the anticorruption field by including a chapter on transparency and anti-corruption, setting standards not found in any other trade agreement that will serve to complement the more traditional competition chapter.¹⁷ As a result, signatories to the TPP will have to adhere to these standards to ensure that market distortions arising from anticompetitive and corrupt practices do not act as trade barriers.

10. In adhering to the TPP standards, authorities responsible for fighting corrupt and anticompetitive conducts will surely benefit from increased co-operation. Thus, it may be concluded that the TPP, in a way, conveys a robust message in support of the need to make a two-pronged co-ordinated effort from a competition and anticorruption standpoint to safeguard the level playing field. In the development context, this phenomenon is particularly true for those corporations that adhere to the highest anticorruption standards -set by e.g. the Foreign Corrupt Practices Act or the UK Bribery Act- that are willing to invest in foreign jurisdictions lacking anticorruption regulatory frameworks. In fact, this anticorruption regulatory disparity underpins economic development since engaging and incentivizing private finance is at the crossroads of the newly adopted Sustainable Development Objectives (New Development Goals). Expert commentary suggests that “[...]neither trade liberalization nor domestic competition and anti-corruption measures are likely to achieve full success in the absence of the other; rather, the maintenance of healthy competition and, thus, the attainment of maximum value for money for citizens in public procurement markets is most likely to be assured through the co-ordinated application of all three tools.”¹⁸

¹⁴ Nam-Joo Lee. Chairman Korea Independent Commission Against Corruption, Korea’s Anti-Corruption Strategies and the Role of Private Sector, December 9, 2003 available at <http://www.oecd.org/korea/korea-policy-priorities-for-a-dynamic-inclusive-and-creative-economy-EN.pdf>.

¹⁵ <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019162.pdf>.

¹⁶ Levy, S., opening speech at the Concurrences conference on Antitrust in Emerging and Developing Countries, New York University, October, 2014. More details on the event available at <http://www.concurrences.com/Photos/Antitrust-in-Emerging-and-1673/>.

¹⁷ The TTP is a landmark agreement that will contribute to expand the fight against corruption in trade with positive spillover effects for economic development. Indeed, chapter 26 of the TTPA titled “Transparency and Anti-Corruption” demands commitments from signatories that will help to fill in the existing regulatory gap under the WTO agreements that do not cover corruptive acts acting as trade barriers.

¹⁸ Anderson, Robert D., William E. Kovacic, and Anna Caroline Müller. Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalisation. E15Initiative.

11. Furthermore, OECD member countries have recently concluded that co-operation between competition authorities and anti-corruption bodies is crucial to the success of the fight against corruption in the context of competition enforcement.¹⁹ This idea is particularly important when fighting bid-rigging that generally entails a horizontal collusion element (cartel agreement) and a vertical collusion (bribe) component.²⁰

12. Against these international developments, the experience of the Multilateral Development Banks' (MDBs) integrity units serves to exemplify the benefits of combating bid-rigging with the anticorruption/competition two-pronged approach.

2.2 *The Experience of the IDB's Office of Institutional Integrity*

13. Effective and efficient co-operation between anticorruption and competition authorities becomes a key element for the successful achievement of the New Development Goals. These goals require the creation of a favorable investment climate for private sector investments that benefits consumers and levels the playing field. In this context, the experience of the Inter-American Development Bank (IDB) through its Office of Institutional Integrity (OII) reveals that there is tremendous value in tackling corruption and bid rigging simultaneously.

14. In this respect, it is important to highlight that the integrity units of the IDB and other MDBs are, responsible for preventing and investigating collusion (vertical and horizontal) in the projects they finance.²¹ As a result of these investigations, companies and individuals may be debarred from participating in MDB financed projects.²²

15. Bid-rigging generally comprises a horizontal element represented by the agreements between parties willing to participate in a public tender, as well as a vertical element that usually relates to the bribe paid to an official without which the cartel cannot effectively operate.²³

Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2016. www.e15initiative.org/.

¹⁹ <http://iacrc.org/procurement-fraud/the-most-common-procurement-fraud-schemes-and-their-primary-red-flags/>.

²⁰ Lewis, D. "Fighting Corruption and Promoting Competition - Background Note", OECD Global Competition Forum, February 2014 available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF\(2014\)1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2014)1&docLanguage=En).

²¹ Please visit http://www.iadb.org/en/about-us/departments/about,1342.html?dept_id=OII for further details on the IDB's integrity unit. For detailed history of evolution of the Bank's Sanction System, see *The World Bank Sanctions Process and Its Recent Reforms*, Anne-Marie Leroy, Frank Fariello, The World Bank Group, 2012. Also see, *Understanding the World Bank Group's Anti Corruption Measures in Project Financing*, Maria Barton, Bloomberg Law Reports, Risk and Compliance, Bloomberg Finance LP, Volume 4, 2011; *The Increasing Prominence Of World Bank Sanctions*, Timothy Dickinson, Corinne Lammers and Morgan Heavener, www.law360.com. The so-called prohibited practices that the IDB investigates are: corruption, fraud, collusion, coercion, obstruction.

²² To learn more details on the IDB sanctions systems please refer to the following website at <http://www.iadb.org/en/about-us/idb-sanctions-system,8619.html>.

²³ Frédéric J., "Competition and Anti-Corruption Considerations in Public Procurement," in OECD, *Fighting Corruption and Promoting Integrity in Public Procurement* (Paris, 2005), chapter 3, pp. 29-35. Heimler, Alberto (2012). "Cartels in Public Procurement," *Journal of Competition Law & Economics*, 11-23.

16. A common collusive pattern observed in projects financed by the IDB involves corporations making use of the same agent to prepare and submit the relevant offers in a particular public tender. Under these schemes, public servants are bribed to deliver inside information that would help in preparation of the bids. In the competition slang, these agreements are referred to as hub-and-spoke agreements (or A-B-C exchanges) where the spokes are active on the same product market and interact indirectly through the hub. Such types of indirect horizontal agreements reduce co-ordination failure amongst colluders and damp down competition.²⁴

17. While competition authorities usually probe these types of schemes by investigating the horizontal element of the cartel, OII goes a step forward to inquire into the vertical collusive elements both from a competition perspective (analysis of the agents' role) and from an anticorruption perspective (bribe). As a result, under the IDB's sanction system, not only cartelization but bribery may be sanctioned as well. The capacity to dismantle these agreements using a two-pronged approach contributes to enhance the deterrence effect mechanisms sought by the sanctions systems.

18. As it is observed from the foregoing example, the two-pronged approach in fighting these hub and spokes schemes allow integrity units to attack bid-rigging by adopting a holistic approach and covering both the anticompetitive and corrupt components that enable such schemes. At the same time, however, these experiences expose challenges during the investigative phases that could strongly benefit from increased co-operation between national competition and anticorruption authorities.

19. The first and foremost area which could benefit from such enhanced co-operation is market intelligence. OII has a first-hand knowledge of the context in which the development projects germinate. Nonetheless, this knowledge can sometimes be too narrow to inform an in depth investigation over a bid-rigging cartel that might extend beyond those bids that IDB finances. Further, OII may not always consult a research department that could help in understanding the dynamics of the relevant markets from a competition perspective.

20. Finally, OII lacks powers to conduct dawn raids, and do not offer leniency programs.²⁵ Unlike most of national competition authorities, OII is an investigative unit embedded in an MDB, and the possibility to develop this kind of tools is limited by the nature of these international organizations. Hence, although the standard of the evidence used in the MDB's sanctions systems which rests on the preponderance of evidence is lower than that used by most national authorities, the investigative tools that integrity units count with to find such evidence are fewer.

21. In view of the IDB's experience, it appears that MDB's integrity units are well positioned to carry out holistic investigations into the horizontal and vertical collusive elements of bid-rigging. At the same time, it is clear that there is room for improving these types of investigations by enhancing co-operation with national competition and anticorruption bodies and upgrading human skills of their units.

22. The following sections explore how to engineer co-operation that could yield synergies between anticorruption and competition bodies.

²⁴ Sahuguet, N. and Walckiers, A., Hub-and-Spoke Conspiracies: The Vertical Expression of a Horizontal Desire? (September 26, 2014). Available at SSRN: <http://ssrn.com/abstract=2502147> or <http://dx.doi.org/10.2139/ssrn.2502147>.

²⁵ The IDB has implemented settlement procedures that allow OII and the subjects of investigation to negotiate the resolution of a case when subjects provide substantive information that allow OII to uncover systemic integrity risk or other prohibited practices.

3. Engineering Co-operation: Strata, Substance and Tools

23. This submission has advocated for placing co-operation between anticorruption and competition authorities at the top of their agendas. To ease a roadmap towards the realisation of such co-operation, this section seeks to provide responses on whom, what and how such co-operation efforts should be engineered. To answer these queries, it becomes useful to bifurcate the answer by first addressing the levels at which co-operation might exist (strata), followed by a menu of areas (substance) and instruments (tools) through which the desired co-operation may materialise.

3.1 *Strata*

24. Broadly, there are three layers at which co-operation between competition and anticorruption bodies may exist, namely: (i) national and subnational; (ii) international; and (iii) supranational levels. Each of these levels of co-operation faces distinct challenges and opportunities, as discussed below.

3.1.1 *National and Subnational Co-operation*

25. National and subnational co-operation entails competition and anticorruption authorities within a nation. Enforcing co-operation mechanisms between distinct bodies within a nation should be the least challenging and most viable amongst the different possible layers.

26. Colombia exemplifies how enhanced co-operation between competition and anticorruption bodies may lead to better policy outcomes with regards to bid-rigging. In 2011, Colombia passed a new anticorruption statute that criminalises bid rigging related to public contracting in addition to being subject to the traditional competition sanctions.²⁶ The same year, the Colombian Competition Superintendency (SIC per its Spanish initials) initiated a confidential investigation into a bid-rotation case in the market for the provision of private security services. In 2015, the SIC decided to open a formal investigation against eight corporations based on this preliminary inquiry. In parallel, the Colombian State Attorney is carrying out an investigation relating to both the competition and corruption aspects of the same bid-rigging scheme against sixteen people.²⁷

27. In 2015, cognizant of the synergies and added value that co-operation between the Colombian State Attorney and the SIC could attain in this parallel investigations, both authorities signed an inter-institutional agreement to conduct joint investigations and share confidential information.²⁸ As a result of the execution of the inter-institutional agreement, current and future bid-rigging cases stand to benefit greatly and better outcomes can be expected.²⁹

²⁶ LEY 1474 DE 2011 (julio 12), Diario Oficial No. 48.128 de 12 de julio de 2011, por la cual se dictan normas orientadas a fortalecer los mecanismos de prevención, investigación y sanción de actos de corrupción y la efectividad del control de la gestión pública, available at http://www.secretariassenado.gov.co/senado/basedoc/ley_1474_2011.html.

²⁷ <http://www.sic.gov.co/drupal/noticias/fiscalia-general-y-superintendencia-de-industria-y-comercio-revelan-existencia-de-presunto-cartel-de-la-vigilancia-y-seguridad-privada>.

²⁸ <http://www.sic.gov.co/drupal/noticias/fiscalia-y-superindustria-firman-convenio-para-fortalecer-la-lucha-contra-la-cartelizacion-empresarial-y-otras-formas-de-colusion-en-contrataciones-publicas>.

²⁹ Miranda L. A., “Imbalance between Private and Public Enforcement in Colombia”, Webinar Series, ICN, 23 February, 2016.

3.1.2 *International Co-operation*

28. This layer of co-operation entails competition and anticorruption authorities of different nations either of the same region (transnational co-operation) or from different regions (inter-regional co-operation). At this level, the different nature and structure of competition authorities and anticorruption bodies represents the major challenge when articulating co-operation efforts.³⁰ Indeed, the diverse institutional design arrangements that exist across countries and regions poses challenges where, for example, some competition authorities follow the bundled decision making model and others follow the unbundled decision making structure.³¹

29. However, as evidenced by the European Competition Network (ECN), the competition community may serve as a leading example of how, despite existing differences, co-operation is possible when nations recognise the standard of each other's systems as the basis for co-operation.³² There is a window of opportunity to create international co-operation alliances between anticorruption and competition authorities that emulate other experiences such as the one of the ECN.

30. An example in Latin America of transnational co-operation is the Regional Competition Center (CRC) created under the auspices of the IDB³³. The CRC is made up of 14 competition authorities from 13 countries and offers the opportunity to consolidate this collaborative network through regional actions to support the work of each competition authority at the national level³⁴. These efforts include, among others, the preparation of technical guides in the principal areas of work of each authority; and the creation of databases of administrative, judicial, and doctrinal jurisprudence. In terms of bid-rigging, this platform could be used to bring together anticorruption experts such as the members of World Bank's International Corruption Hunters Alliance³⁵ to share their views with competition officials on how to fight cartels.

³⁰ Kovacic, William E. and Hyman, David A., Competition Agency Design: What's on the Menu? (November 21, 2012). GWU Legal Studies Research Paper No. 2012-135; GWU Law School Public Law Research Paper No. 2012-135; Illinois Public Law Research Paper No. 13-26. Available at SSRN: <http://ssrn.com/abstract=2179279> or <http://dx.doi.org/10.2139/ssrn.2179279>, and Kovacic and Lopez-Galdos, UNCTAD-Benchmarking Competition Authorities: A Global Survey of Major Institutional Characteristics available at http://unctad.org/meetings/en/Presentation/RPP2013_LopezGaldos_en.pdf.

³¹ "Competition law enforcement entails several discrete tasks: the investigation of possible wrongdoing, the decision to prosecute, the determination of culpability, and the imposition of sanctions. A jurisdiction can unbundle these functions, or combine them within a single entity. Some countries unbundle decision-making tasks, using a "prosecutorial model" in Kovacic E. W. and Mariniello M., "Competition Agency Design in Globalized Markets", E15Initiative, Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2016. www.e15initiative.org/ and Lopez-Galdos M, Yadav G., "Competition Authorities: Prosecutorial/Non-Prosecutorial Systems and the Fight Against Cartels" in *The Fight Against Hard Core Cartels in Europe: Trends, Challenges and Best International Practices*, Bruylant 2016.

³² The European Competition Network, more information available at <http://ec.europa.eu/competition/ecn/documents.html>.

³³ <http://www.crcal.org/>.

³⁴ <http://www.iadb.org/en/topics/trade/promoting-the-efficient-functioning-of-markets-regional-center-of-competition-for-latin-america.7750.html>.

³⁵ <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTD/OII/0,,contentMDK:23195265~pagePK:64168427~piPK:64168435~theSitePK:588921,00.html>.

3.1.3 *Supranational Co-operation*

31. Supranational co-operation comprises co-operation between the national, regional and international organisations bodies with a mandate to fight corruption and/or fulfill a competition policy mandate. The major challenges that may thwart the co-operation at a supranational level would be the bureaucratic burdens that arise from interactions between national authorities and complex international organizations. Nonetheless, with the appropriate political support and commitment, there are examples that prove that supranational co-operation is possible and commended.³⁶

32. For example, the MDBs have been co-operating consistently to harmonize their efforts to prevent and combat corruption and collusion. To this end, in 2006, the MDBs, together with other International Financial Institutions, established a Joint International Financial Institution Anti-Corruption Task Force that focused, inter alia, on the standardization of international investigation procedures, definition of sanctionable practices, and fostering co-operation in their anti-corruption efforts.³⁷ Another key development is the Agreement for Mutual Enforcement of Debarment Decision (“AMEDD”) signed in 2010. This agreement, commonly known as the Cross-Debarment Agreement, allows for cross debarment of sanctioned entities by the participating MDBs and has resulted in more than 600 sanctions imposed by all participants, further raising the cost of corruption and enhancing the deterrent effect of the sanction systems.³⁸ Yet other examples are the adoption of the ‘General Principles and Guidelines for Sanctions’ and the adoption of the ‘Harmonised Principles on the Treatment of Corporate Groups’, which offer guidance to sanctioning bodies to promote consistent application of sanctions.³⁹

33. Finally, it is worth referring again to the TPP that represents a leading example of how competition and anti-corruption can work together to impact interregional trade positively.⁴⁰ In this line, the TPP represents a valuable opportunity to jointly advance robust anticorruption and competition agendas, since it includes far-reaching standards that signatories will have to meet. It is therefore expected that the IDB will continue to endeavor to ensure that signatories to the TPP comply with such standards.

³⁶ Ronderos, J. G. and Ratpan, M. and Osorio Rincon, A., Corruption and Development: The Need of International Investigations with a Multijurisdictional Approach and the Involvement of Multilateral Development Banks with National Authorities (October 27, 2015). Osgoode Legal Studies Research Paper No. 19/2016. Available at SSRN: <http://ssrn.com/abstract=2681246>.

³⁷ See, <http://www.iadb.org/en/topics/transparency/integrity-at-the-idb-group/harmonization-efforts-with-other-international-financial-institutions,2708.html>.

³⁸ [See, AMEDD, Para 4, each participating institution will recognize the debarment decision imposed by another if the decision: \(i\) is based on a finding of the commission of a prohibited practice; \(ii\) is made public by the sanctioning institution; \(iii\) imposes a period of debarment that exceeds one year; \(iv\) is made within ten years of the date of the commission of the prohibited practice; and \(v\) is not made in recognition of a decision made by another authority. Available at http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35154738.](http://www.iadb.org/en/topics/transparency/integrity-at-the-idb-group/harmonization-efforts-with-other-international-financial-institutions,2708.html)

³⁹ See, <http://crossdebarment.org/oai001p.nsf/Content.xsp?action=openDocument&documentId=9898D652DCBD2B7C48257ACC0029D1BF>.

⁴⁰ Anderson, Robert D., William E. Kovacic, and Anna Caroline Müller. Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalisation. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2016. www.e15initiative.org/.

3.2 *Substance*

34. Having addressed the different levels at which co-operation to combat bid-rigging and corruption may exist, it is now pertinent to explore the areas over which such co-operation should focus. For simplification purposes, the substance of co-operation will be studied from two distinct angles. The first one focuses on preventive co-operation, and the second on enforcement co-operation.

3.2.1 *Preventive Co-operation*

35. Preventive co-operation aims at fostering advocacy, training and outreach activities with the goal of raising awareness and conducting trainings to share lessons learned from bid rigging investigations with a corruption component. The preventive co-operation may be divided into three subcategories, each of which brings about positive outcomes.

36. **Advocacy:** In the competition community, advocacy encompasses all those activities conducted by competition agencies that have to do with the promotion of a competitive environment for the pursuit of economic activity by means of non-enforcement mechanisms.⁴¹ Similarly, one could imagine that advocacy for the anticorruption community covers all those activities carried out by anticorruption bodies that are related to promoting transparency and corruption-free environments by means of non-enforcement mechanisms. When dealing with advocacy efforts relating to procurement markets, it should be natural to campaign for the promotion of transparent and competitive markets from a two-pronged perspective in search of desired synergies, i.e. competition and anticorruption.

37. For example, a joint advocacy effort carried out by competition and anticorruption authorities and MDB integrity units could focus on development projects financed through the private sector. More specifically, these efforts could focus on encouraging corporations to adopt compliance programs that cover both competition and anticorruption safeguards particularly vis-à-vis collusion.⁴² These efforts could be reflected in the adoption of best practices in terms of anticorruption and competition compliance programs and could bring about benefits to the enforcement units by (i) providing enforcement units with a tool to advance the transparency and competition agenda with a bottom up approach; and (ii) assisting the private sector to adhere to the highest standards on anticorruption and competition matters.⁴³

38. **Trainings:** Lessons learned from experience are mostly valued when turned into concrete training tools. Through experience, competition law enforcement officials become experts in recognising collusion red flags whereas anti-corruption officers excel at recognising corruption red flags.⁴⁴ Therefore, co-operation to bring about cross-pollination of expertise whereby competition officials become familiar with corruption red flags and anti-corruption officials learn about collusion red flags would bring about pragmatic and tangible know-how to fight against bid-rigging.⁴⁵

⁴¹ See ICN Advocacy Toolkit Part I: Advocacy process and tools, p. 3.

⁴² Guindos de-Talavera, B. and Lopez-Galdos M., “Derecho de la Competencia en los Organismos Multilaterales de Desarrollo: Una Perspectiva Holística”, Anuario de Competencia, Fundación ICO, Marcial Pons, 2015.

⁴³ Id.

⁴⁴ Kramer, M. “Collusive Bidding by Contractors”, OECD Global Competition Forum, February 2014, <http://iacrc.org/fraud-and-corruption/ensuring-that-anti-corruption-training-meets-the-needs-of-host-countries/>.

⁴⁵ Lewis, D. “Fighting Corruption and Promoting Competition - Background Note”, OECD Global Competition Forum, February 2014 available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF\(2014\)1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2014)1&docLanguage=En).

39. One path worth exploring on how to implement a concrete program to promote these trainings might be the creation of exchange programs mirroring the US Federal Trade Commission's International Fellows Program.⁴⁶ The implementation of an exchange program at a national, international and supranational level amongst anticorruption officials and competition experts, whereby applicants participate in investigations, enforcement actions and other projects, would allow them to gain a first-hand experience on how bid-rigging is confronted while also sharing insights into their own approaches.

40. Additionally, training efforts should surpass the traditional competition-anticorruption officials' equation. A leading example in terms of co-operation engagements that go beyond interactions between anticorruption and competition officials is the program for training judges in solving complex competition matters promoted by the CRC initiative.⁴⁷ A second generation of training programs could combine competition and corruption bundled components so that judges are better equipped to resolve complex bid-rigging cases from a wider perspective covering all illegal elements that normally enable the implementation of collusion schemes.

41. **Outreach:** Outreach as a specific advocacy tool merits individual attention since it is fundamental in the fight against bid-rigging that requires a co-ordinated effort of all relevant stakeholders, including national authorities, civil society and private practitioners.⁴⁸ Awareness of the prevailing transparency and competition standards in public procurement is crucial, and competition and anticorruption authorities should invest efforts to raise it.

42. Searching for opportunities to joint efforts regarding outreach activities should take advantage of existing international fora such as the "International Competition Network Fighting against Cartels Work Group" that could benefit from the inputs of anticorruption authorities' experts when discussing bid-rigging.⁴⁹

3.2.2 *Enforcement Co-operation*

43. The foregoing section has attempted to briefly describe how preventive co-operation could help to advance the precautionary agenda relating to the distortions in the markets arising from anticompetitive and corruptive behaviors. This section focuses on the redressing mechanisms that increased co-operation, through joint and parallel investigations and exchange of information, could bring about.

44. **Joint and Parallel Investigations:** It is a standardized practice between national competition authorities to assist each other during investigations. For example, at a transnational level, one National Competition Authority (NCA) may ask another NCA to collect information or carry out fact-finding measures on its behalf. The leading example in this arena is found within the European Union, where regional co-operation is regulated through the ECN to allow NCAs exchange information on investigations and to use such information as evidence in the home investigations.⁵⁰ In fact, the European Commission as

⁴⁶ <https://www.ftc.gov/internationalfellows>.

⁴⁷ Under the auspices of the Regional Public Goods Initiative of the Inter-American Development Bank, the Regional Center of Competition for Latin America was created to promote the development of competition policy and legislation that included specific trainings for the judges across the region.

⁴⁸ Guindos de-Talavera, B. and Lopez-Galdos M., "Derecho de la Competencia en los Organismos Multilaterales de Desarrollo: Una Perspectiva Holística", Anuario de Competencia, Fundación ICO, Marcial Pons, 2015.

⁴⁹ <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel.aspx>.

⁵⁰ The Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities which was adopted together with Regulation 1/2003, that all competition authorities are independent from one another and that co-operation takes place on the basis of equality, respect and

a supranational authority may request a NCA to carry out an inspection that NCAs could do by exercising its powers in accordance to national laws.⁵¹

45. By taking a leaf from the ECN achievements with regards to combating cartels, it might be worth exploring how to widen the scope of co-operation alliances between competition and anticorruption bodies. A good example of how to articulate these types of agreements is found within the MDB's integrity units such as IDB's OII. In this respect, OII, in an effort to increase co-operation in fighting against market distortions, has signed memorandums of understanding with competition bodies whereby the possibility to conduct joint or parallel investigations is contemplated.⁵²

46. These types of agreements not only contribute to enhancing investigations but also serve a more efficient use of the investigative resources which is of particular importance for authorities with limited resources.

47. Nonetheless, challenges of conducting joint or parallel investigations should not be underscored. For example, these joint or parallel investigations require close co-ordination between authorities to, i.e. align investigations timetables, agree on the treatment of evidence, or exchange and discuss different investigation analysis.

48. **Exchange of Information:** The key basis for the functioning of co-operation networks and/or alliances is based on the possibility to exchange and use information including confidential information. It is well known that the confidentiality of information gathered through investigations remains at the core of safeguarding due process rights of investigated subjects including the legitimate right of confidentiality of corporations' business secrets. Nonetheless, the legitimate right to confidentiality should not prejudice the disclosure of information to other relevant authorities with the mandate to combat illegal acts that distort the markets through an anticompetitive or corrupt behavior. An example on how to solve this issue is the ECN inclusion of a clause in formal agreements that relates to the treatment and use of confidential information exchanged between authorities. The existence of the so called "information gateways" which are national provisions that allow authorities to exchange confidential information without the need of seeking prior consent from the source of information significantly ease interinstitutional communications.

49. Finally, anticorruption and competition authorities could nurture the use of waivers to increase interinstitutional co-operation. The use of waivers is nowadays considered a consistent practice particularly in the merger review procedures entrusted to competition authorities.⁵³ In short, corporations provide waivers to competition authorities so that the information provided by the merging parties can be share with other authorities. In a similar fashion, leniency applicants in the context of cartel cases also may submit waivers. In this regard, many competition authorities provide for templates that interested parties use to grant such waivers. Such templates often include a list of authorities and/or jurisdictions for which the interested parties grant the waivers. A small but significant change arising from the inclusion in the waiver templates of

solidarity. In this field, National Competition Authorities have parallel competences to those of the Commission.

⁵¹ See, The Commission Notice on co-operation within the Network of Competition Authorities" (the "Network Notice"), to which all competition authorities in the network have adhered by a special statement.

⁵² <https://www.premiocoefce.mx/cofece/index.php/normateca/category/24-organismos-internacionales?download=750:cofece-bid-2015> or <http://www.lexology.com/library/detail.aspx?g=f51cb131-8358-494d-9167-26260d053fdc>.

⁵³ Askin M., W. Wong K., -Ervin, and Anne Newton McFadden, Seven Months In: The U.S. Antitrust Agencies' Joint Model Waiver of Confidentiality, International Antitrust Bulletin (ABA Section of Antitrust Law), May 2014.

anticorruption authorities and integrity units of MDBs could help to increase co-operation between anticorruption and competition bodies at national, international and supranational levels.

3.3 *Tools*

50. The two previous subsections have informed about the different layers at which co-operation could exist, in addition to providing for some example of the ingredients that such co-operation ought to have. Naturally, the subsequent query should focus on how to bring to reality the desired co-operation. In this respect, there are at least three instruments that serve the purpose of realizing the co-operation between the different authorities.

51. **Formal Agreements:** The most obvious tool to advance enhanced co-operation between and amongst competition and anticorruption authorities is the signature of formal agreements that would govern the desired interinstitutional co-operation. The advantages of regulating the co-operation through formal agreements are immense. As a matter of example, challenging topics such as the treatment of confidential information to observe due process rights can be detailed in such formal agreements to mitigate the risk of having the use of such information contested by the parties under investigation. Additionally, the mere public announcement of the execution of such agreements is, by its own nature, a deterrent instrument that sends a strong message to stakeholders.

52. However, by the same token, authorities may be ensnared by their own desire to sign a multiplicity of agreements that remain ineffective and are not translated into tangible co-operation. Indeed, the longing of authorities to enter into a multiplicity of co-operation agreements may be at the expense of effectively using existing agreements which may impair co-operation under existing frameworks.

53. **Ad-hoc Agreements:** A subsidiary tool to increase co-operation between competition and anticorruption authorities could focus on entering into agreements on an ad-hoc basis. This formula would be particularly useful for those cases that pertain to a particular market or situation, where it is not expected to yield to a continual and persistent interinstitutional co-operation, but nonetheless is beneficial for the case at hand. Although these types of ad-hoc agreements would not yield some of the advantages offered by more formal agreements, they do provide for benefits derived from having a more targeted objective, thus positively impacting the case outcomes.

54. **Regional Dialogues:** Finally, initiatives that foster regional co-operation by enabling platforms for promoting interinstitutional dialogue may serve as an additional tool to increase co-operation. For example, the IDB's regional public goods initiative covers activities that sustain formal regional initiatives and foster regional co-operation practices in areas where collective action adds value to national interventions, such as institutions and capacity building, standards, and regulatory harmonisation.⁵⁴ In fact, the latter represents a good example of the much needed South to South co-operation. As previously mentioned, the CRC was created as a regional public good under the auspices of the IDB.

55. Given the existence of numerous regional networks that have successfully helped to advance co-operation between authorities relevant in the fight against bid-rigging such as the ECN, it is reasonable to presume that similar regional initiatives could be advanced under the regional public goods umbrella, such as a future Latin American Competition Network or a Latin American Anticorruption Network.

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<http://www.iadb.org/en/topics/regional-integration/what-is-the-regional-public-goods-program,2803.html>.

4. Conclusion

56. In a context of economic distress and limited financial resources, competition and transparency principles should stand as pillars of the new development agenda to ensure that goods and services are procured under corruption free and competitive conditions. This would improve the investment climate and eventually increase private sector involvement.

57. The foregoing logic seems forthright; but implementing the logic rests a challenge. The analysis herewith provided has revealed that there is a tangible window of opportunity to search for stronger synergies amongst national, international and supranational anticorruption and competition authorities.

58. Surprisingly, in many countries, the enforcement of antitrust laws is entirely unrelated to the enforcement of anti-corruption statutes, with the latter usually entrusted to the judiciary or anti-corruption body. The same approach is found at international and supranational levels.⁵⁵ This lack of co-ordination unnecessarily diminishes the deterrent effect of both competition and anticorruption laws in two ways. First, the probability that a sanctionable practice will be identified is decreased. Secondly, the lack of concurrency when investigating and sanctioning the anticompetitive and corrupt components of bid-rigging could result in the absence of convictions or more lenient penalties for infringers as each individual authority would struggle to independently find relevant evidence or aggravating factors.⁵⁶

59. In conclusion, taking a cue of the success story of South Korea, it is suggested that competition and anticorruption authorities streamline efforts and seek to co-operate further with each other. This is particularly the case when traditional economic policy instruments are limited by fiscal, monetary, or financial factors that leave competition and anticorruption policies with a prominent role to improve the functioning of markets.⁵⁷ More explicitly, enhanced co-operation in the fight against collusive schemes should help to obtain fiscal savings stemmed from safeguarding public procurement from market distortions. It may be therefore concluded that the anticorruption-competition inter-institutional dialogue cannot further lag behind in the interest of productivity and development.

⁵⁵ Frédéric J., “Competition and Anti-Corruption Considerations in Public Procurement,” in OECD, *Fighting Corruption and Promoting Integrity in Public Procurement* (Paris, 2005), chapter 3, pp. 29-35.

⁵⁶ Id.

⁵⁷ <http://www.iadb.org/en/topics/trade/promoting-the-efficient-functioning-of-markets-regional-center-of-competition-for-latin-america.7750.html>.