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REGIONAL COMPETITION ARRANGEMENTS: THE CASE OF LATIN AMERICAN AND THE CARIBBEAN

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The Case of Latin American and the Caribbean

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Regional Competition Agreements in Latin America and the Caribbean are mostly linked to current deep integration processes like CAN, CARICOM and MERCOSUR. These competition agreements are largely underutilized, and even anachronic in some cases. There are other integration models in the form of the new generations of Regional Trade Agreements (RTAs) like the Pacific Alliance or the USMCA where plurilateral competition policy may take a role. This paper explores the main current challenges of these agreements, the tensions between the regional and national schemes and finally offers some ideas to move forward.

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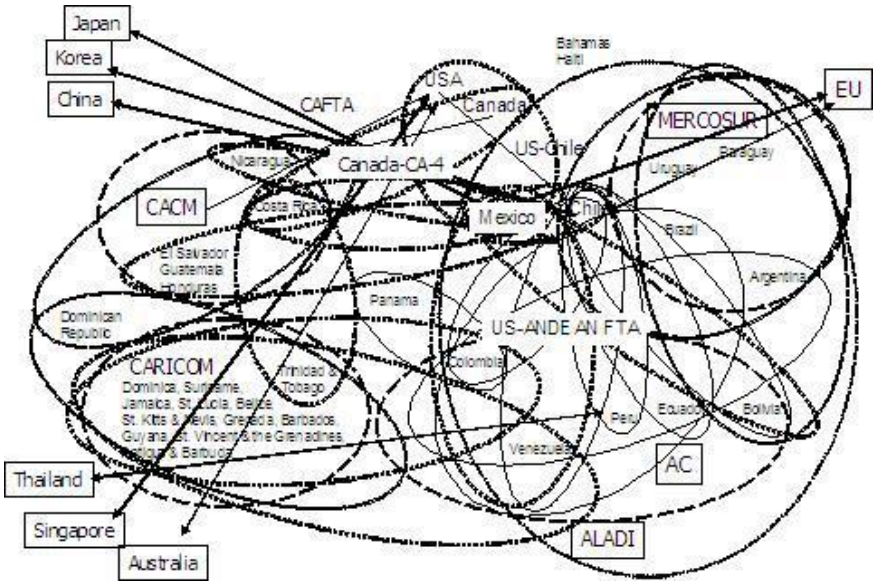
1. Introduction

1.1. Economic Integration in the Latin America and the Caribbean: The spaghetti bowl[1] (enhanced)

1. Latin American and Caribbean countries (LAC) have engaged in multiple economic integration efforts during the last 60 years[2]. These processes include: i) 4 major initiatives aiming at the formation of deep economic blocs in the form of customs unions and common markets: the Central America Common Market (CAMC), the Andean Community (CAN), the Caribbean Community (CARICOM), and the Southern Common Market (MERCOSUR); ii) multiple RTAs, including: CAFTA-DR, Economic Partnership Agreements with CARIFORUM and Central America, the brand new trade agreement among the US, Canada and Mexico (USMCA), and iii) new generation agreements such as the Pacific Alliance (AP), among others. It is well documented that the proliferation of RTA's is a cause of trade diversion[3]. More importantly for the purposes of this paper, in the case of the 4 deeper integration processes, the original single market and custom union goals are still unfulfilled. This reality complicates even more the functioning of modern regional competition agreements.

Figure 1. The Spaghetti Bowl[4]



[1] https://utopiayouarestandinginit.com/2014/06/17/jacob-viner-and-the-ambiguous-welfare-effects-of-preferential-trade-agreements/.

[2] The region has more than 132 trade agreements. See: http://sice.oas.org/agreements_s.asp.

[3] https://onlinelibrary.wiley.com/doi/full/10.1111/twec.12295.

[4] https://www.researchgate.net/figure/Spaghetti-bowl-RTAs-in-the-Western-Hemisphere_fig1_228430490.

2. This paper will update previous work on the developments in Regional Competition Policy Agreements in LAC[5], but first let's look at some basic data:

3. CACM[6]. The Central American Common market is the oldest integration process in the Americas, established in 1960 for the economic integration of Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica. It covers a market of 45 million people, US$210 billion GDP and more than US$10 billion in intra-regional trade.

4. CAN[7]. The Andean Community (formerly the Andean Pact) was established in 1969 and includes an economic integration process for Bolivia, Colombia, Ecuador, and Peru. There are five associate members: Argentina, Brazil, Paraguay, Chile[8] and Uruguay[9], and one observer: Spain. It coves a market of more than 100 million people and a regional GDP (PPP) of nearly US$1 trillion.

5. CARICOM[10]. The Caribbean Community was established in 1973 by the Chaguaramas Treaty signed in Trinidad and Tobago for the economic integration of 15 full members: Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St Lucia, St Kitts and Nevis, St Vincent and the Grenadines, Suriname, and Trinidad & Tobago, and 5 associate members: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, and Turks and Caicos; and 8 observers: Aruba, Colombia, Curacao, Dominican Republic, Mexico, Puerto Rico, St Martin and Venezuela. It covers a market of approximately 23 million[11] people and a GDP (PPP) of US135 billion.

6. MERCOSUR[12]. The Southern Cone Common Market is the newest bloc, established by the Treaty of Asuncion in 1991 for the economic integration of Argentina, Brazil, Paraguay and Uruguay. Venezuela is a full member but has been suspended since 2016. It has 7 associate members: Bolivia, Chile, Colombia, Ecuador, Guyana, Peru and Suriname, and 2 observers: New Zealand and Mexico. It covers a market of 264 million people and a GDP (PPP) of US$4.47 trillion.

7. New developments: The sophistication of trade agreements is increasing, yet the attention on the need of regional competition rules is not[13].

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[5] This is an updated of a previous paper presented in the 2013 Latin American Competition Forum. See http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2013)5&docLanguage=En

[6] http://sice.oas.org/trade/camers.asp

[7] http://sice.oas.org/Andean/instmt_s.asp

[8] Chile was an original full member but left the bloc a few years after, returning as an observer in 1976 and later as an associate member in 2006.

[9] Mercosur also granted similar associate membership to CAN members.

[10] http://sice.oas.org/CARICOM/instmt_s.asp

[11] https://data.worldbank.org/indicator/SP.POP.TOTL

[12] http://sice.oas.org/Mercosur/instmt_s.asp

[13] Except for the EU Association Agreement with Central America, where the EU pursued a regional competition arrangement.

8. Pacific Alliance (AP): Trade bloc formed in 2012 by Chile, Colombia, Mexico and Peru. It has 4 associate countries: Australia, Canada, New Zealand and Singapore, and 54 observer states[14]. It covers a market of 210 million people and a GDP (PPP) of US$3.75 trillion (35% of LAC's GDP). It is considered to have the latest generation of trade agreements in the world, with common regulations and policies in 17 areas, including consumer protection, services and capitals, and trade facilitation, but nothing specifically on Competition Policy, even though the 4 full original members are clear leaders on competition policy in LAC.

9. United States-Mexico-Canada FTA (USMCAN)[15]. This is the recent revision to the 1994 NAFTA, considered for many years as one of the benchmarks in RTAs in the world. It covers a market of 490 million people and a GDP (PPP) of US$24.8 trillion (21% of the world's GDP), and it is only second in size to the Regional Comprehensive Economic Partnership (RCEP), a proposed agreement between 10-member states of ASEAN and 6 trading partners: Australia, China, India, Japan, South Korea and New Zealand.

10. EU-Central America Association Agreement[16]. This partnership agreement is one of multiple similar agreements that the European Union has negotiated and signed with LAC countries which also include the Economic Partnership Agreement with CARICOM, with Chile, Colombia, Mexico and Peru.

2. Current challenges for the development of modern regional competition systems in LAC

2.1. Poor/dated normative framework and institutional design

11. Out of the 4 major trade blocs, only CAN and CARICOM have current regional competition enforcement rules and supranational bodies, but only CAN has had few actual cases adjudicated, albeit in the form of pre-judicial opinions of the Justice Tribunal of the Andean Community (TJCA). MERCOSUR has a competition regional intergovernmental body. In every case, the normative framework is becoming dated, and perhaps sclerotic due to the limited use.

2.1.1. CAN. A working progress process.

12. CAN has developed a basic, albeit functional regional framework based on art 93 and 94 of the Treaty of Cartagena and Decision 608 of the Commission. Art 72 to 78 of the Treaty promote the free trade of goods and art 79 and 80 the liberalization of trade in services. As freer trade promotes economic efficiency in the regional market benefiting consumers, anticompetitive conduct may hinder these goals. Chapter X on "Commercial Competition" gives the authority to the Commission to adopt competition rules upon suggestion from the General Secretariat of the Andean Community (SGCA).

13. Decision 608 was the culmination of a long process of 34 years in the making. It started with Decision 45 of December 18th, 1971, which put in place the first basic antitrust

[14] See https://en.m.wikepedia.org/wiki/Pacific_Alliance

[15] See https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico

[16] See http://www.sice.oas.org/Trade/CACM_EU/Text_Sept14/Index_s.asp

regulations. This norm was subsequently replaced by Decision 230, published on December 18th, 1987, and later by Decision 285 published on April 4th, 1991. Finally, on March 2005, Decision 608 (current antitrust regional framework) was approved. The scope of the system is layout in art 5 of the Decision based on the "Effects Doctrine" for cross-border anticompetitive conducts conceptually developed in the US and the EU antitrust models[17]. It covers: a) anticompetitive conducts practice originated in one or more members, with real effects in other(s) member(s); and b) anticompetitive behavior originated in non-member countries but with real effects inside CAN jurisdictions. Decision 608 is applied using the Practical Guidelines of October 2007 elaborated by the SGCA[18].

14. CAN has a relatively large, yet thin, communitarian apparatus which cover 9 areas and 21 topics[19] but lacks the adequate focus on Competition Policy enforcement. The institutional design of CAN includes the SGCA, and the Justice Tribunal of the Andean Community (TJCA). The SGCA structure was updated in 2014 and includes three General Directions covering 21 topics. It has a very small unit for Competition and Trade Remedies (1 of 7 within General Direction 1). The TJCA oversees the legality in all regional matters

15. Resources, both financial and human are very limited. The SGCA has a total annual budget of roughly US$5.6 million, mostly used for salaries of 71 staff. General Direction 1 has a staff of only 13 people for all 7 units it is responsible for. The Competition and Trade Remedies Unit (actual supra-national competition agency) is too small, probably compromising the ability of the SGCA to investigate regional cases. Yet, so far this is the only regional system within the LAC with actual cases/pre-judicial opinions.

2.1.2. CARICOM. When institutional design does not (necessarily) meet with actual enforcement.

16. This integration process has a regional competition scheme that includes the enforcement of regional rules (art 173 and 174 of the Rev. Chaguaramas Treaty). As in the case of CAN, CARICOM rules were included in the foundational treaty itself to prevent that anticompetitive behavior could derail the completion of the single market (CSME). It is very telling that the framers of the integration treaty included strong regulations on competition since the beginning, perhaps influenced by the EU experience where specific rules[20] were adopted since the creation of the European Communities. In 2011, Rules of Procedure were adopted to make enforcement possible and fulfill the objectives of the policy. Moreover, in 2013 some guidelines for investigations have been prepared but remain as an internal document. These important efforts have not produced major results

[17] http://www.ipglossary.com/glossary/effects-doctrine/#.W-M6uEtKhnI.

[18] Working paper SG/dt 396 "Norms for the protection and promotion of free competition in the Andean Community.

[19] http://www.comunidadandina.org/Prensa.aspx?id=3529&accion=detalle&cat=NP

[20] Art 81 and 82 of the EC Treaty, later revised and replaced by art 101 and 102 of the Treaty on the Functioning of the European Union. See https://www.slaughterandmay.com/media/64569/an-overview-of-the-eu-competition-rules.pdf

yet: no cases, few member countries (4 out of 15) with national competition laws, while markets show strong concentration and weak rivalry[21].

17. The institutional design includes a specific, yet modest, regional competition agency CARICOM's Competition Commission (CCC) headquartered in Suriname with both investigative and adjudicative functions, and the Caribbean Court of Justice (CCJ) who reviews the decisions on appeal. There could be a concern for the lack of Chinese walls between investigation and adjudication.

18. Annual budget of the CCC is very limited but the agency is pursuing some alternative technical and financial resources such as the EU-EPA Capacity Building Project, US Federal Trade Commission, and other extra regional sources.

19. The CCC has 6 Commissioners (from various member countries) and a small staff in Paramaribo of 5 members (2 of which are administrative officers and one accountant). After several years of being understaffed, the CCC is preparing the appointment of the Executive Director, the Senior Legal Counsel and the Registrar, all expected to start in January 2019. Given the agency's fragility, and despite being active for 10 years, it is not surprising that the CCC has issued no enforcement decisions so far. This inactivity may be coming to an end as there is one case before the adjudication panel and another one being investigated.

2.1.3. MERCOSUR. A divorce with best practices[22].

20. The Southern Cone Common Market has a relative light regional competition policy scheme more oriented towards coordination of national competition authorities rather than regional enforcement/adjudication. Initial Competition rules were adopted on December 1996 through the Protocol of Fortaleza of 1996 also based on the "Effects Doctrine".

21. This regulation has been updated by Decision CMC 43/2010 by the Common Market Council (highest authority of MERCOSUR), which include as an Annex the Agreement for the Defense of Competition of MERCOSUR[23]. The objectives of the Agreement are: i) promote coordination and cooperation among competition authorities, ii) mutual assistance among authorities when necessary, iii) identification of common interests in competition policy, and iv) eliminate anticompetitive practices through the enforcement of national laws.

22. On the institutional side, the Technical Committee for the Defense of Competition No 5 (CT5) is the entity responsible for applying the Decision. It is an intergovernmental group made up of a national coordinator from each member country's competition authority. The committee is in charge of discussing: i) consultations by a member country of competition related issues and investigations conducted at national level, ii) coordination of actions by each national authority in order to avoid possible contradictions (as possible), iii) technical cooperation and exchange of information, iv) notification of actions that may affect other member and v) confidentiality of opinions and right of each

[21] On concentration and lack of competition in the Caribbean see: http://www.centralbank.cw/index.php?eid=1734.

[22] https://revistas-colaboracion.juridicas.unam.mx/index.php/latinoamericana-derecho/article/view/21304/18978.

[23] http://www.loa.org.ar/legNormaDetalle.aspx?id=14094.

member to refuse to share information in cases national law prohibits it or is contrary to national interests. After 22 years from the Fortaleza Protocol and 8 years from the current Decision, there has not been cross-border investigations. CT5 met twice in 2017 and items of discussion included: i) presentation of new Argentinean Competition Authorities, ii) exchanges on the scope of Decision CMC 43/2010, iii) 2017 work program, including exchanges of information in cases of anticompetitive practices, mergers, procedural and institutional issues, market studies, iv) a regional system of peer review; new Argentinean competition law, and presentation by Brazil of relevant cases and their leniency program[24]

23. This institutional design aims more to cooperation and not enforcement of regional anti-competitive practices or regional merger control.

2.2. Tensions between the regional and national schemes, and between trade and competition authorities.

24. Every integration process will produce some level of tensions derived from the need of national systems to transfer competencies to the regional apparatus. Below there is a description of some the tensions in LAC major blocs when implementing competition policy.

2.2.1. CACM. A tale of unfulfilled commitments and gridlock regarding Competition Policy.

25. Even though Central America does not have a regional competition arrangement in place, it is worth to explore the various unsuccessful intents towards this goal. As of today, all countries have national competition laws except for Guatemala.

26. The Protocol of the General Integration Treaty, known as Protocol of Guatemala, contains language where contracting parties agree to adopt common rules to avoid monopolistic conducts and the promotion of competition within the member countries. Likewise, in the agreement Establishing the Customs Union in 2012, member states committed to adopt a regional regulation in Competition Policy and a regional competition authority.

27. The regional process was further reinforced in the European Union-Central America Association Agreement, where signatory countries committed to adopt regional competition rules and the creation of a regional Competition Authority.

28. All these efforts have not materialized, and the regional regulation is not in place despite substantial efforts by Central American Competition Authorities and their regional network RECAC with the support of the Inter-American Development Bank. The main reason for the lack of progress has to do with tensions between trade and competition authorities[25].

29. Between June 2016 and February 2018, RECAC and the Council of Ministers of Trade and Economy COMIECO have been going back and forth with a draft text for a regional competition regulation. Part of the tension comes from the fact that COMIECO

[24] Meetings of CT5 LXIII and LXIV of March and November 2017.

[25]The integration process in CACM is led by the Ministers of Economy/Trade. Competition Authorities under RECAC have not been able to become part of SICA and their technical recommendations for the regional competition regulation have not been addressed fully.

asked the Technical Group on Competition (GTC), composed of Trade (not competition) authorities, to review the draft text. An element of disagreement is the conformation to a supranational body to enforce the regional rules.

2.2.2. CAN. Tensions with national competition authorities resulting from the decisions of the TJCA

30. The best way to exemplify the tensions of regional and national authorities is the small set of competition cases reviewed by the TJCA.

- Case 78-IP-2018 of TJCA (Sep 2018). Interpretation on the scope of Decision 608. The issue was raised after the competition authority of Colombia (SIC)[26] sanctioned a group of firms for fixing prices in the baby diaper market. Subsequently, the competition authority of Ecuador requested CAN's SGCA to start an investigation for another cartel in the tissue and toilet paper markets. Some firms were members of both cartels. One of the executives of the firms in Colombia requested to annul the decision by the SIC and requested an interpretation by the TJCA of Decision 608, art 5 based on the following arguments: a) A National authority has jurisdiction only if the conduct is originated and produces effects in the territory, b) the cartel had cross-border nature, thus the SIC had no jurisdiction, c) the alleged illegal conduct had effects outside Colombia, thus the case should be tried before the SGCA, and d) the documents related to the leniency process in Colombia contains evidence that the cartel had activities in 2 countries. The SIC denied the existence of cross-border effect in this cartel. The TJCA issue a pre-judicial opinion based on the principle of *non bis in idem*, according to which no one can be investigated nor sanctioned twice for the same conduct, provided there is a triple identity and no impunity is facilitated: i) the economic agents should be identical; ii) the illegal conduct should be the same. The conduct is not the same if the products are not the same; and iii) the legally protected good should be the same, both at the national and regional level. This interpretation on the scope of Decision 608 and the conflict with national competition law is now on the hands of a local court in Colombia[27] for a final decision on the case. This case has implications for the ability of a national authority such as the SIC to implement leniency in the fight against local cartels. Even though it seems that the complete triple identity is apparently not plausible in this case as per TJCA decision, the potential for tension is real.
- Case 472-IP-2016 OF TJCA (Sep 2018). Interpretation on the scope of art 49 of Decision 608. The issue raises after the Minister of Productive Development and Plural Economy of Bolivia confirmed a sanction to the national Bolivian brewing company by the Authority for the Supervision and Control of Firms (AEMP) because of abuse of dominant position and exclusionary conduct. Bolivia did not have a national competition law at that time[28], so it used the communitarian rules

[26] http://www.sic.gov.co/.

[27] Sección Primera del Juzgado Quinto Administrativo Oral del Circuito de Bogotá, Colombia.

[28] Bolivia enacted an Executive Decree 29519 in 2008 but this is not considered a national competition law per international standards, but instead some regulation to control enterprises. https://www.lexivox.org/norms/BO-DS-29519.xhtml. In support of this view, the Bolivian AEMP was the one asking the TJCA to apply the regional rules instead.

instead. The case is before Bolivia's Supreme Court where the plaintiff (the brewing company) states that Decision 608 is not applicable because there are not cross-border effects per art 5 requirements. Upon request, the TJCA issued a pre-judicial opinion for the Bolivian Supreme Court. The Andean Justice Tribunal analyzed the scope of Decision 608 and its art 5, noting also that art 49 allows Bolivia and Ecuador to apply the Community rules on Competition (Decision 608) as their national laws since these 2 countries lack national rules. The opinion from the Tribunal was also an opportunity to confirm the concepts of direct applicability and direct effect as principles of Andean Community Law. The recent opinion will inform the case before the Court of Justice, mostly defending the primacy of the regional rules over the national laws. Further implications may appear when (if) Bolivia enacts a national competition law, something that the TJCA may have been indirectly pursuing in this decision.

- Case 05-AN-2015. Annulment petition by a local firm in Colombia (ANGELCOM SA) of a communication (not a formal Decision) by the SGCA rejecting to open an investigation for collusive behavior in public procurement against Transmilenio SA (Colombia). The SGCA considered that the request did not fulfill art 5 of Decision 608 which requires cross-border (real) effects. ANGELCOM also alleged that the communication was not motivated, violating the rules of procedure in art 12 of Decision 425. The TJCA concluded that there was no real cross-border effect and thus the community rules (Decision 608) could not be applied for this case. Moreover, it concluded that the communication was sufficiently motivated and did not constitute a violation of Decision 425. The TJCA also rejected an allegation by the SGCA that the case had prescribed per the statute of limitations. It also requested the SGCA to adopt formal decisions for similar future cases and not mere communications. Overall, the TJCA with these few decisions confirms it is now active on cases related to the scope of Decision 608, but the TJCA has yet to decide directly on a cross-border case of anticompetitive conduct.

3. Some ideas to move forward: Preparing for better regional rules and stronger regional agencies

31. With few exceptions, LAC region and sub-regions have shown the difficulties of effectively implementing regional competition schemes. Part of the problem may be explained by the economic deacceleration of major integration blocs and the relative weakness of regional rules. Nevertheless, markets are becoming regional and global, enhancing the need for regional rules.

32. At the institutional and regulatory level, CARICOM, CAN and MERCOSUR have put in place different models of regional systems, but only CAN shows some level of activity through few pre-judicial opinions.

33. Given these challenges, some ideas to move forward may include:

- **Preparation of technical work conducive to an update/overhaul of the Regional Competition rules** in CAN, CARICOM and MERCORSUR based on international best practices. In that regard, the region can benefit from its current partnership/association agreements with the EU and obtain more technical support from DG-COMP. Similarly, the IDB could continue the support to these efforts with technical cooperation programs. The fact is that it is time to review the

regional normative framework designed many decades ago for most of the blocs, and include, among other things, regional merger review when cross-border mergers, and leniency for cross border cartels investigations with permanent coordination with national authorities. MERCOSUR may also consider the benefits of adopting a supra-national body (similar to CAN or CARICOM) and improved regional substantive rules to complement the (good) recent developments of the national authorities of Brazil and Argentina, insufficient by themselves to tackle successfully cross-border anticompetitive activity. CARICOM's CCC may benefit from a clear separation of the investigation phase and the adjudication role. Given the fact that only 4 countries have adopted national competition laws, this bloc could also consider CAN's approach (art 49 of Dec 608) of using the regional regulation as national law for those countries who have still to legislate in this matter. The bloc could also adopt a regional merger control system given the size of the regional market and that most mergers have cross-border implications.

- **More attention is required to the political economy**. Because integration blocs are typically led by trade and foreign affairs ministers, an adequate interaction of competition agencies (national and regional) with these authorities is crucial and, if not addressed properly, it may become a barrier as the process in Central America has shown. As in most turf battles, the issue can be resolved when finding the value of achieving common objectives and assessing the cost of gridlock and failure.

- **Smart advocacy for more resources is needed**. It is essential to increase the financial and human resources of the regional competition authorities. Even in the case of CARICOM and CAN, it is clear from the evidence that the allocation of resources is limited. Regional authorities should improve their strategy to obtain larger budgets. The key for success here is the ability of the agencies to show greater accountability and independent evaluation to assess the benefits of competition, including the impact on fiscal spending, poverty fight and productivity efforts.

- **Focus on bringing cases.** Without actual enforcement there is no meaningful progress. The recent jurisprudence by the TJCA can be a preliminary incentive to CARICOM (and subsequently to CACM and MERCOSUR) to move quicker towards the benefits of regional enforcement of competition law. This tribunal has also proven the value of regional advocacy, after issuing some guidelines on unfair competition and intellectual property[29].

- **Other RTA schemes could also be helpful**. New RTAs could consider enhanced frameworks for the cooperation and joint action of national level authorities in actual cases, particularly in the implementation of leniency in international cartels as well as Merger control in cross border activity.

  - The Pacific Alliance (5th World's Economy in 2020) may be an opportunity. It is the more advanced integration platform with multiple coordination efforts in many areas. Its members have some of the strongest competition authorities in the whole region. Further work in regional competition arrangements could be explored to enhance the benefits of trade and cooperation in public policies.

[29] See https://lalibrecompetencia.com/2015/10/05/propuestas-del-tribunal-de-justicia-de-la-can-de-una-agenda-normativa-para-la-integracion/.

  - The USMCAN agreement includes a chapter on Competition Policy like the one NAFTA had, with the commitment to enforce national competition laws, but also with the possibility of cross-border enforcement when there is nexus to the local jurisdiction [art 21.1.2 and 21.1.5 (b) (c)].

- **Move to new generation of MOUs**. Many of the national authorities have moved to the signature of MOUs[30] but some of these may be symbolic or insufficient. There are new generation cooperation agreements, like the ones between FNE and INDECOPI of Peru, between FNE and COFECE of Mexico, and between the SIC of Colombia and INDECOPI with more substantive and useful content. Other agreements involve the CNDC of Argentina and various countries, and cooperation agreements within RAC in Central America.

[30] The OECD has a large inventory of current MOUs between competition authorities in the world. http://www.oecd.org/competition/inventory-competition-agency-mous.htm.