Competition policy in regional trade agreements? What is missing?

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A comparative analysis of Caricom, Andean Community and Mercosur

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Resumo: As últimas duas décadas testemunharam a rápida proliferação das necessárias legislações de concorrência em diversos acordos regionais de comércio. Apesar do consenso acadêmico e dos benefícios de uma política regional de concorrência para os acordos regionais de comércio, incluindo aqueles aos países emergentes/desenvolvimento, nenhum sistema de política regional de concorrência comprovou sua eficácia além daquelas da UE/EEA. Por meio de uma análise comparativa da política regional de concorrência introduzida no Mercosul, na Comunidade Andina e no Caricom, este artigo busca detectar as razões do fracasso. Em particular, devido aos diferentes níveis de desenvolvimento das leis nacionais de concorrência, um

Abstract: The last two decades witnessed the rapid proliferation of competition law provisions in several Regional Trade Agreements (RTAs). In spite of an academic consensus as to the benefits of a regional competition policy for the RTAs, including those entered into by emerging economies/developing countries, so far no regional competition policy system other than that of the EU/EEA has arguably proved to be successful in terms of enforcement. Through a comparative analysis of the regional competition policy introduced in Mercosur, the Andean Community, and Caricom, the paper aims at detecting the reasons of this failure. In particular, due to the different levels of development of national competition law, a regional system

sistema regional de cooperação é incompatível. Por outro lado, as autoridades regionais de concorrência podem ser exitosas apenas quando suas decisões têm efeito direto no sistema legal nacional, quando existe um amplo entendimento acerca das condições do comércio intrarregional e quando atividades anticoncorrenciais de Estados-membros são também monitoradas.

PALAVRAS-CHAVE: Antitruste – Acordos regionais de comércio.

of cooperation is unsuitable. On the other hand, regional competition authorities can be successful only when its decisions have a direct effect on the national legal systems, when there is a broad interpretation of the intra-regional trade condition, and when anti-competitive Member States activities are also monitored.

KEYWORDS: Antitrust – Regional trade agreements.

I. INTRODUCTION

I.1 Competition policy in Regional Trade Agreements

During[1] the last two decades, several developing countries/emerging economies have introduced a competition policy in the framework of the reforms undertaken to liberalize their economies.[2] A number of academics have argued in favour of the benefits that the enforcement of competition policy can bring to these countries. Jenny, for instance, has shown that developing countries are often affected by international cartels: by artificially increasing prices, cartels affect the consumption ability of consumers in developing

1. A previous version of the paper was presented in October 2011 at the IX meeting of the Euro-Latin Study Network on Integration and Trade (ELSNIT) in Saint Gallen (Switzerland). The author would like to thank Profa. Tania Zúñiga Fernández for her useful comments on the paper. Any remaining mistake stays on the author.

2. For instance, in 2007 Hilton and Deng counted 107 competition law jurisdictions in the world. HYLTON, Keith. DENG, Fei. Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects. *Antitrust Law Journal*, 74, 276, 326 (2007).

countries, by thus hampering their economic development.[3] Even though it is extremely difficult to quantify the effects of the enforcement of competition policy on the GDP growth of one country,[4] the existence of a positive causation between the enforcement of a competition policy and the economic growth of one country has generally been recognized.[5]

In parallel to the adoption of a competition policy at the national level, a number of Regional Trade Agreements (RTAs) including emerging economies/ developing countries as Member States (MS) have introduced regional competition rules.[6] A number of authors have pointed out the benefits of

3. JENNY, Frédérique. Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence. *World Competition* 29 (1), 109-137 (2006).

4. Some National Competition Authorities (NCAs) have tried to estimate the positive effect of their enforcement activities *vis a vis* the consumers welfare. For instance, in 2005 the UK National Audit Office published a report assessing the benefits generated by the enforcement action of the UK Office for Fair Trading in comparison to the costs for taxpayers caused by this institution. However, this type of analysis has been carried out only in few countries, due to its complexity. In particular, while the annual costs of the Competition Authority are well-known, the impact on the consumers welfare of the enforcement action by the Competition Authority can be hardly estimated, due to the indirect effect of competition policy enforcement on consumers welfare. In particular, competition policy sanctions anti-competitive practices which hamper the degree of free competition in the market, by thus causing a reduction of the consumers welfare (i.e. limitation of innovation; reduction of output; artificially raising costs). Secondly, the assessment is based exclusively on the anti-competitive practices sanctioned by Competition Authority. However, it is unclear what is the percentage of anti-competitive practices sanctioned by the NCA in comparison to the total number of anti-competitive practices which take place in the market. UK National Audit Office. *The Office of Fair Trading: Enfocring Competition in Markets.* Published on 17.11.2005. The text of the report is available at: [www.nao.org.uk/ publications/0506/the_office_of_fair_trading_en.aspx]. Last access on: 15.03.2013.

5. See, in particular: SCHERER, Frederique. Competition Policy Convergence: Where Next? *Empirica* 24, 5-19 (1997).
Nevertheless, in a recent study, Tay Cheng Ma has challenged this common assumption, by arguing that competition policy fosters economic growth only in the developing countries which can guarantee a sufficient institutional framework to enforce this legislation. On the other hand, the impact of competition policy on the economic growth of least developing countries in negligible. TAY-CHENG, Ma. The Effect on Competition Law Enforcement on Economic Growth. *Journal of Competition Law and Economics* 7 (2), 301-334 (2011).

6. CERNAT, Lucian. Eager to Ink, but Ready to Act? RTA Proliferation and International Cooperation on Competition Policy. In: _____; BRUSICK, Philippe; ALVAREZ, Ana

this choice. First of all, the creation of a regional competition authority may solve the problem with lack of human resources and lack of independence, which usually affect the national competition authority (NCA) of an emerging economy.[7] In particular, a newly established NCA usually lacks the "minimum level" of human resources and expertise required to conduct complex investigations;[8] meanwhile the lack of credibility of this institution leads the government to influence its strategic choices when the enforcement of competition policy clashes with national interests of industrial policy.[9] According to Gal, by pulling together resources from different MS, a regional competition authority would be better equipped than a NCA to enforce competition law.[10] Furthermore, being a "regional" rather than a "national" institution, a regional competition authority could preserve its autonomy, by thus more easily enforcing the competition policy in comparison to a NCA *vis a vis* the anti-competitive practices carried out by national champions. Furthermore, according to Fox, a regional competition authority may be more effective in imposing remedies in comparison to a NCA.[11] In fact, a regional

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Maria (eds.). *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*. Geneva: United Nations Conference on Trade and Development, 2005. At 1-34.

7. BOTTA, Marco. Fostering Competition Culture in the Emerging Economies, the Brazilian Experience. *World Competition* 32 (4), 609-625 (2009).

8. A study conducted in 2003 by the World Bank on 48 NCAs concluded that the number of human resources in NCAs of developing countries varies from country to country. In particular, the study found out that NCAs in East Asian countries had four times the staff of NCAs established in Latin American countries. On the other hand, Asian NCAs included a large number of administrative staff, which was not directly involved in the investigations carried out by the agency. The staff number varies with the tasks assigned to the NCA and the size of the economy. However, the study recognized that most of the NCAs analyzed were under-staffed in comparison to their tasks, and their staff needed further training. SEREBRISKY, Tomas. What Do We Know about Competition Agencies in Emerging and Transition Countries? Evidence on Workload, Personnel, Priority Sectors and Training Needs. *World Competition* 27(4): 651-674, 2004.

9. DABBAH, Maher. Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime. *World Competition* 33(3), 457-475 (2010).

10. GAL, Michal. Regional Competition Law Agreements: An Important Step for Antitrust Enforcement. *University of Toronto Law Journal* 60(2), 239-261 (2010).

11. FOX, Eleanor. In Search of a Competition Law. Fit for Developing Countries. *Law and Economics Research Paper Series*. n. 11-04 (2011). New York: New York Law School.

competition authority can effectively sanction cross-border anti-competitive practices, while a NCA can sanction only the local subsidiary of a corporation operating throughout the regional block.

The most successful example of enforcement of a regional competition policy is without a doubt the European Union (EU). The latter has been enforcing a competition policy since the entry into force of the Treaty of Rome of 1957. The EU competition policy was characterized by deep changes in the fifty years of its existence. In particular, Western Germany and United Kingdom (UK) were the only countries in Western Europe with a national competition law in force when the Treaty of Rome was signed.[12] The system of enforcement was "centralized" at regional level, and carried out exclusively by the European Commission and by the European Court of Justice (ECJ). Secondly, the chapter of the Treaty of Rome on competition policy remained under enforced for a long period of time. In a context where the economies of the EU MS were characterized by public State-owned monopolies in a number of industries, little space was left for free competition in the market.[13] Only

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Available in: [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1761619#]. Last access on: 15.03.2013. This statement is true if we take in consideration the scope of the fines and the structural/behavioural remedies that a regional competition authority can impose in comparison to a NCA. On the other hand, a regional competition authority would be unlikely to have the power to adopt any criminal custodial sanction to sanction a cartel violation. The latter represent the most effective form of cartel deterrence, even though only few competition law jurisdictions in the world (i.e. USA and UK) provide for this type of sanction against cartels.

12. GERBER, David. *Law and Competition in Twenty Century Europe: Protecting Prometheus*. Oxford: Oxford University Press, 2001. The German *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restraints of Competition, GWB) was enacted on 27.07.1957, and like the Treaty of Rome entered into force on 01.01.1958. Available in: [www.gesetze-im-internet.de/bundesrecht/gwb/gesamt.pdf]. Last access on: 15.03.2013. The protection of competition policy in UK has its origins in the common law jurisprudence, which sanctioned conducts which restricted trade (*Dyer* case in 1414). After World War II, a competition law was adopted in UK by 1948. The latter was replaced in 1998 by the Competition Act which is currently in force in the country. For an historical analysis of the evolution of the enforcement of competition policy in UK, see: SCOTT, Andrew. The Evolution of Competition Law and Policy in United Kingdom. *LSE Working Papers* 9/2009. Available in: [www.lse.ac.uk/collections/law/wps/WPS2009-09_Scott.pdf]. Last access on: 15.03.2013.

13. CINI, Michel; MCGOWAN, Lee. *Competition Policy in the European Union*. New York: Palgrave Macmillan, 2008. In particular, under art. 106(2) of the Treaty of the Functioning of the European Union (TFEU), the competition rules included in the

in the 1980s, in the context of the liberalization and privatization programs initiated in the majority of the EU MS and in the light of internal market goal, competition policy was revitalized.[14] Finally, following the entry into force of the Regulation 1/2003, the previous centralized system of enforcement was abandoned; the Treaty provisions on competition law are currently enforced in parallel by the European Commission and by the judiciary and NCAs of the EU MS.[15]

I.2 Objective of the paper

In spite of the benefits mentioned above, none of the regional competition regimes established during the last years has been as successful as the EU in terms of enforcement outcomes.[16] According to Cernat, developing countries have been "eager to ink" competition chapters in RTAs, but not particularly willing to enforce these provisions.[17]

The existing literature usually explains the lack of success of regional competition policy outside the EU due to the lack of political will of national governments.[18] The main obstacle to the establishment of a regional competition policy is thus the reluctance of national governments to transfer sovereignty to regional institutions in charge of implementing the RTA and

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Treaty of Rome had a limited application to public monopolies and undertakings "entrusted with the operation of services of general economic interest".

14. See, for instance, the substantial increase in the amount of fines imposed by the European Commission on sanctioned cartel agreements during the last decade in comparison to the previous decades of enforcement of the EU competition rules. Available in: [http://ec.europa.eu/competition/cartels/statistics/statistics.pdf]. Last access on: 15.03.2013.

15. Council Regulation n. 1/2003 of 16.12.2002 on the Implementation of the Rules on Competition laid down in arts. 81-82 of the Treaty. OJ L 1, 04.01.2003, p. 1-25. Available in: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:NOT]. 04.10.2012.

16. SOLANO, Oliver; SENNEKAMP, Andreas. Competition Provisions in Regional Trade Agreements. *OECD Trade Policy Working Paper*, n. 31, OECD Joint Group on Trade and Competition (2006). Available in: [http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&cote=com/daf/td%282005%293/final]. Last access on: 15.03.2013.

17. CERNAT (2005).

18. PAGOTTO UBIRATAN CARREIRO, Leopoldo. Regulation of Competition in Regional Trade Agreements; How This Can Be Best Achieved for the Benefits of an Expanded Market. *Revista Derecho Competencia* 4(4), 25-39 (2008).

enforcing the regional competition rules.[19] In particular, national governments may fear that certain anti-competitive practices may have diverging effects within the regional block, damaging the consumers of some countries while favouring the industrial economic development of others. Secondly, other authors have pointed out that even the EU competition policy was initially weakly enforced. In the same vein, a long period time is needed before other RTAs may start to effectively enforce a regional competition policy.[20] These arguments are certainly correct, but they are insufficient to explain the current lack of enforcement outside the EU. Although political support is initially essential in order to include regional competition rules within the RTA, once established the regional competition policy has to be enforced by independent institutions. It is important to stress that the EU competition policy was also enforced by the European Commission in a number of sensitive cases, in spite of the opposition of national governments of the EU MS.[21] A successful institutional design, therefore, should establish regional institutions capable

19. GAL (2010).

20. JENNY, Frédérique; HORNA, Pierre. Modernization of the European System of Competition Law Enforcement: Lessons for Other Regional Groupings. Competition Provisions. In: BRUSICK, Philippe; ALVAREZ, Ana Maria; CERNAT, Lucien. *Regional Trade Agreements: How to Assure Development Gains*. Geneva: United Nations Conference on Trade and Development, 2005. At 282-323.

21. CINI; MCGOWAN (2008). A good example from this point of view is the conflict between the EU Commission and the Spanish Government in relation to the EON/Endesa merger case. In 2006, the German energy operator EON tried to acquire the control of the Spanish energy operator Endesa. The transaction was cleared by the EU Commission under the EU Merger Regulation 139/2004. In order to avoid that the main energy operator in the country was overtaken by a foreign company, the Spanish Government adopted the Decree 4/2006. The latter subjected to prior approval by the competent regulatory authority any acquisition of more than 10% of the share capital of any company active in a regulated sector. The Spanish energy regulator (CNE) subject the transaction to additional condition in comparison to the unconditional approval priously granted by the EU Commission. The conflict between the Spanish Government and the EU Commission ended up in March 2008, when the judgement of the EU Court of Justice C-196/07 considered the measures adopted by Spain as incompatible with the exclusive jurisdiction granted to the EU Commission in the field of merger control by Reg. 139/2004. For further information concerning the EON-Endesa merger case see: EU Commission's press release, *Commission welcomes Court judgment on Spain's failure to withdraw illegal conditions imposed on E.ON/Endesa merger*. Memo 08/147, adopted on 06.03.2008. The text of the press release is available at: Available in: [http://europa.eu/rapid/press-release_MEMO-08-147_en.htm?locale=en]. Last access on: 15.03.2013.

to resist the "swings" of the national politics. Furthermore, the time horizon argument is a relative one, since unlike the first decades of the EU, nowadays free market institutions, such as competition law, are generally accepted worldwide. Consequently, the period of transition required to start enforcing a regional competition policy should be shorter in comparison to the one experienced by the EU.

The objective of the paper is to investigate the reasons why RTAs that have introduced a regional competition policy during the last two decades have not been as "successful" as the EU in enforcing this policy. The expression "successful" should be understood in terms of enforcement outcomes of the regional competition policy (i.e., number of anti-competitive practices sanctioned by the institutions in charge of enforcing the regional competition rules). As mentioned in the previous pages, it is quite difficult to estimate the impact of the enforcement of competition policy on the economic growth of one country; the enforcement outcomes, therefore, should be considered as "proxy" of how successful in a competition policy regime. The paper, therefore, analyses which features may improve the institutional design of a regional competition regime, by thus maximizing its enforcement outcome. Finally, the paper focuses exclusively on functioning of the competition regimes included in the RTAs which include emerging economies/developing countries. On the other hand, the reasons of the lack of cooperation among the NCAs of developing countries from a purely bilateral point of view have already been analysed by other authors, and thus will not be touched upon in this paper.[22] In addition, the paper will not discuss the harmonization of national competition law through the adoption of measures at the international or regional level;[23]

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22. SOKOL, Daniel. Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade. *Chicago-Kent Law Review* 83, 231-292 (2008).

23. A number of RTAs have opted for the harmonization of national competition rules, rather than establishing regional mechanisms of competition policy enforcement. For instance, the Association of Southeast Asian Nations (ASEAN) adopted in 2010 regional guidelines in competition policy. The aim of the non-binding guidelines is to foster the convergence towards the same model of competition policy in ASEAN MS. Similarly, Chapter 15 of the North Atlantic Free Trade Agreement (NAFTA) require its MS to introduce basic competition rules at the national level. However, neither ASEAN nor NAFTA provide for any institutional mechanism to directly enforce these rules against private undertakings.
Association of Southeast Asian Nations, *Regional Guidelines on Competition Policy*. Published in 2010 by ASEAN Secretariat. The text of the Guidelines is available at:

the paper will focus exclusively on the regional systems of competition policy enforcement established within RTAs.

From a methodological point of view, the *Mercado do Sur* (Mercosur),[24] the *Comunidad Andina* (Andean Community, CAN)[25] and the Caribbean Community (Caricom)[26] have been selected as cases study. These RTAs share a number of common features, and thus they are suitable for such analysis. In particular, they followed the same trends of development of competition policy: before the 1990s few countries in Latin America had introduced a competition policy. At the regional level, Caricom and CAN were established in 1973 and 1969 respectively, but they did not provide for any regional competition policy.[27] Under the influence of the so-called "Washington consensus"[28] and

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[www.aseansec.org/publications/ASEANRegionalGudelinesonCompetitionPolicy.pdf]. Last access on: 15.03.2013. North Atlantic Free Trade Agreement, concluded between USA, Canada and Mexico. The treaty entered into force on 01.01.1994. Chapter 15, Competition Policy, Monopolies and State Enterprises. Available in: [www.sice.oas.org/trade/nafta/chap-15.asp]. 15.11.2012.

24. Mercosur was established by the Treaty of Asunción, signed on 26.03.1991 by Brazil, Argentina, Paraguay and Uruguay. Venezuela is a candidate country since 2006, when the country left the Andean Community. Available in: [www.mre.gov.py/dependencias/tratados/mercosur/registro%20mercosur/Acuerdos/1991/espa%C3%B1ol/1.Tratado%20de%20Asunci%C3%B3n.pdf]. Last access on: 15.03.2013.

25. The *Comunidad Andina* was established in 1969 by the Treaty of Cartagena. The Treaty was signed by Colombia, Peru, Ecuador, Bolivia and Venezuela. The original text of the Treaty was revised by the Protocol of Trujillo, signed in 1996. In 2006 Venezuela withdrew from CAN and it applied for membership in Mercosur. Available in: [www.comunidadandina.org/ingles/normativa/ande_trie1.htm]. Last access on: 15.03.2013.

26. Caricom was established by the Treaty of Chaguaramas, signed on 04.07.1973. Today Caricom counts 15 MS and 5 Associate MS. The Treaty of Chaguaramas was substantially revised in 2001. Available in: [www.caricom.org/jsp/community/revised_treaty-text.pdf]. Last access on: 15.03.2013.

27. CELANI, Marcelo; STANLEY, Leonardo. Política de Competencia en América Latina. *Desarrollo Productivo*, n. 142. Santiago: Comisión Económica para América Latina y el Caribe, 2003.

28. The expression "Washington consensus" was coined in the 1980s by John Williamson, and soon it was used to indicate the new economic paradigm promoted by World Bank and International Monetary Fund in developing countries during the 1980s-1990s. Washington consensus is based on a number of principles that the Governments of developing countries should implement in order to stimulate economic growth: (1) Introduction of fiscal discipline in the State's budget. (2) Reduction of public expenditures. (3) Increase of taxes. (4) Interest rates should

due to the liberalization of world trade, Mercosur was established in 1991, while CAN and Caricom reformed their founding treaties in the 1990's in order to open themselves to external trade. Finally, during the last decade, the "post-Washington consensus" phase led to a revamped role of the State in the region, and consequently, the importance of competition policy decreased in most of Latin American countries.[29]

Besides the common trends in the development of competition policy, these RTAs share another common feature: they have introduced regional competition rules that mirror the EU rules from a substantive point of view.[30] During the last

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be determined by the market rather than by State agencies. (5) The exchange rate should be determined by the market. (6) Liberalization of imports. (7) Elimination of the barriers to FDIs. (8) Privatization of inefficient State-owned companies. (9) Deregulation of markets. (10) Safeguard of property rights. WILLIAMSON, John. What Washington Consensus Means by Policy Reform. In: _____ (ed.). *Latin American Adjustment. How Much Has Happened?* Washington: Institute for the Internal Economics, 1990. Chapter 2. Available in: [www.petersoninstitute.org/publications/papers/print.cfm?doc=pub&ResearchID=486]. Last access on: 15.03.2013.

29. The expression "post-Washington consensus" indicates the revamped role of the State's intervention in the economy which has characterized a number of Latin American countries during the last decade. Some countries in Latin America have re-nationalized industries privatized during the phase of the Washington consensus, increased public expenditure and reduced fiscal discipline, and encouraged the establishment of national champions rather than promoting FDIs. For an assessment of the impact of the post-Washington consensus on the enforcement of competition law in Latin America see: PEÑA, Julian. Competition Policies in Latin America Post-Washington Consensus. In: MARSDEN, Philip. *Handbook of Research in Transatlantic Antitrust*. Cheltenham: Edward Elgar Publisher, 2006. Chapter 28.

30. The EU has been an important source of influence for the development of the regional competition policy in the three selected RTAs, in particular, the EU promoted the inclusion of a competition chapter in the free trade agreements negotiated or concluded between the EU and these RTAs during the last years (i.e. Mercosur, Caricom). Furthermore, the EU Commission has supported projects of technical assistance in the field of competition law (i.e. Andean Community).
In the case of Mercosur, the negotiations concerning the introduction of regional competition policy went in parallel with the negotiations for the conclusion of an Association Agreement between EU and Mercosur. Even though the Association Agreement has still not been concluded, the EU Commission has always emphasized that the Agreement would include a competition chapter. This external pressure has encouraged Mercosur MS to discuss the introduction of a regional competition framework.
In the case of Andean Community, the EU Commission supported in 2000 a project aiming at providing technical assistance to the staff of the Secretariat of

two decades, in fact, the EU has tried to export its model of competition policy to a number of emerging economies/developing countries in the context of the EU enlargement, as well as by including competition chapters in the bilateral and multilateral trade agreements concluded with a number of developing countries/emerging economies.[31] The three cases study introduced substantive

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Andean Community in the field of competition law. Secondly, the officers of the EU Commission were directly involved in drafting the Decision of the Andean Community 608/2005.

In the case of Caricom, the Economic Partnership Agreement (EPA) concluded in 2008 between the EU and Caricom included a competition chapter, which required Caricom MS to introduce a competition law at the internal level. In addition, EPA directly referred to the role of the Caricom Competition Authority.Information concerning the EU-Mercosur negotiations to conclude an Association Agreement is available at: [http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/mercosur/]. Last access on: 15.03.2013.

Convenio de Financiación entre la Comunidad Europea y la Secretaria General de la Comunidad Andina de Naciones. Armonización de las Reglas de Competencia en la Región Andina. Project n. ASR/B7-3110/IB/98/0099. Available in: [http://secgen.comunidadandina.org/eCanDocumento/Grupo0038/D735.PDF]. Last access on: 15.03.2013.

Economic Partnership Agreement between the Cariforum States, of the one part, and the European Community and its Member States, of the other part. Signed in Bridgetown (Barbados) on 15.10.2008, provisionally entered into force from 29.12.2008. Art. 125-130. Available in: [http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=7407]. Last access on: 15.03.2013.

31. During the last two decade, the EU has actively exported its model of competition policy enforcement of developing countries and emerging economies. In particular, unlike US, the association/trade agreements concluded by EU with third countries usually include competition provisions. In particular, the competition chapter of the agreement usually requires the third country to establish a NCA and to introduce a competition law which includes basic competition law provisions mirroring the basic EU competition provisions (i.e. arts. 101-102 TFEU). Secondly, in the context of the EU enlargement, the EU Commission has requested countries or Central and Eastern Europe (CEEC) and of South-East Europe (SEE) to adopt a competition law, and it has closely monitored its degree of enforcement in these countries. Even in the lack of the EU membership perspective, the EU neighbouring countries have also adopted national competition law which closely resemble the EU competition model. Even though the EU Commission does not constantly monitor the implementation of the competition policy in these countries, other mechanisms (i.e. the programs of technical assistance provided by the NCAs of the EU Member States to the NCAs of the EU neighbouring countries) ensure that the latter progressively align their competition policy with the EU standards.

competition rules which mirror the EU competition model, even though they opted for different institutional models of enforcement of regional competition rules. Consequently, by comparing the regional competition policy enforced in the three RTAs, the paper aims at elaborating a number of lessons in terms of institutional design for other emerging economies/developing countries that are about to introduce regional competition rules.

A common issue in terms of research design is whether a selected case study well represents the broader category of subjects of the analysis. During the last two decades, several RTAs which include developing countries/emerging economies have introduced different regional mechanisms of competition policy enforcement. In particular, they either have adopted a regional system of cooperation among the NCAs of the RTA MS,[32] or they have established

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Although US antitrust rules pre-date the EU competition rules, US has been less successful than the EU in exporting its antitrust model to developing countries. This was due in particular to the judicial system of enforcement of the US antitrust system, which heavily relies on the enforcement of the antitrust law by private parties before State and federal courts. Due to the ineffectiveness of the judicial system in most of the emerging economies/developing countries, developing countries/emerging economies have usually found "easier" to enforce the EU administrative system of competition policy enforcement. The latter primarily relies on a public enforcement carried out by a NCA, which carries out investigations and adopts administrative decisions; at the same time, the role of courts is usually limited to cases of appeals against the decisions of the NCA. BOTTA, Marco. EU and Global Competition Networks. In: FALKNER, Gerda; MÜLLER, Patrick (eds.). *EU Policies in a Global Perspective: Shaping or taking international regimes? Forthcoming in Routledge in 2013.*
A list of the competition chapters included by the European Commission in the bilateral trade agreements concluded with third countries is available at: [http://ec.europa.eu/competition/international/bilateral/index.html]. Last access on: 15.03.2013.

32. For instance, in 2009 the Southern African Development Community (SADC) adopted a Declaration on Regional Cooperation in Consumer and Competition Policy. The Declaration entrusts SADC Secretariat to establish a framework of regional cooperation among the NCAs of the SADC MS in the field of competition policy. Similarly, in 2008 the Asia-Pacific Economic Cooperation (APEC) established a Competition Policy and Law Working Group. The working group aims at fostering the cooperation among the NCAs of APEC MS and at providing forms of technical assistance to foster the capacity building of APEC NCAs.
The text of SADC's Declaration is available at: [www.sadc.int/files/8513/3111/7663/SADC_Declaration_on_Regional_Cooperation.pdf]. Last access on: 15.03.2013.
Further information concerning the activities of APEC Competition Policy and Law Working Group: Available in: [www.apec.org/Groups/Economic-Committee/Competition-Policy-and-Law-Group.aspx]. Last access on: 15.03.2013.

regional institutions in charge of enforcing competition policy.[33] The three selected RTAs represent three different models of enforcement of competition policy at the regional level. As it will be discussed in the following pages, while competition policy in Mercosur is limited to a system of cooperation/consultation among NCAs of Mercosur MS, Andean Community has granted to its Secretariat the task to enforce competition policy, while Caricom has opted for the establishment of a separate regional competition authority. Therefore, the mechanisms of competition policy enforcement established in three selected RTAs well represent the different forms of competition policy enforcement adopted by different RTAs. Consequently, the study allows the elaboration of broader conclusions applicable to a wider number of RTAs.

II. CASE STUDIES

II.1 Mercosur: the failed inter-governmental approach

II.1.a From Fortaleza Protocol to the Decision 43/10

The Treaty of Asunción signed in 1991 established a customs union, but it did not include any competition law chapter. Only in 1996 the Protocol for the Protection of Competition in the Mercosur was signed in Fortaleza.[34] The Protocol established a regional competition policy in Mercosur; applicable when the anticompetitive behaviour had an impact on the intra-regional trade.[35] However, each Member State had exclusive competence in applying its own competition law when the anticompetitive behaviour exclusively affected its own territory.[36] This system was quite similar to the relationship between

33. For instance, the Common Market for Eastern African Countries (Comesa) has established a regional competition authority in charge of sanctioning anti-competitive practices which affect intra-community trade Similarly, in 2002 the European Community of Western African States (ECOWAS) adopted two regulations aiming at establishing regional competition rules. The latter require the establishment of ECOWAS Competition Authority.
For further information concerning the enforcement of competition policy in Comesa and ECOWAS. Available in: [www.comesacompetition.org/]. Last access on: 15.03.2013. [www.ecowas.int/publications/en/actes_add_commerce/1.Regional_Competition_Policy_Framework-final-P.pdf]. Last access on: 15.03.2013.

34. Signed in Fortaleza on 17.12.1996. Available in: [www.mercosur.int/msweb/portal%20intermediario/es/index.htm]. Last access on: 15.03.2013.

35. Fortaleza Protocol, art. 2.

36. Fortaleza Protocol, art. 3.

national and EU competition law. Nevertheless, the major difference with the EU model was that the Fortaleza Protocol was based on an inter-governmental framework of enforcement. The two institutions in charge of enforcing the Protocol rules were the *Comisión de Comercio del Mercosur* (Mercosur Trade Commission, CCM)[37] and the *Comité de Defensa de la Competencia* (Committee of Protection of Competition, CDC). The latter body included representatives of the NCAs or of the Ministries of the Economy.[38] The investigations concerning the infringement of the Protocol were carried out by the NCA of the country where the anticompetitive behaviour took place. The NCA would refer the result of its investigation to the CDC, which would deliver an opinion to the CCM.[39] The latter was the only institution in charge of imposing fines, which should be implemented by the MS where the company was established.[40] Within this complex mechanism, every decision was adopted by consensus. From a substantive point of view, the rules introduced by the Protocol were similar to EU provisions prohibiting anti-competitive agreements and forms of abuse of dominance.

Fortaleza Protocol was ratified only by Brazil and Paraguay.[41] The fact that Paraguay is still in the process of adopting a national competition law,[42] and that Argentina never ratified the Fortaleza Protocol, made the Protocol *de facto* unenforced. Following the failure of Fortaleza, in 2001 Tavares de Araujo argued in favour of an *agenda minima* (minimum agenda) in this area, which included the conclusion of a cooperation agreement between Brazil and Argentina.[43]

37. The *Comisión del Comercio del Mercosur* is the periodical meeting of the junior officials from the national Ministries of Trade.

38. Fortaleza Protocol, art. 8.

39. Fortaleza Protocol, art. 19.

40. Fortaleza Protocol, art. 20.

41. Available in: [www.mre.gov.py/dependencias/tratados/mercosur/registro%20mercosur/mercosurprincipal.htm]. Last access on: 15.03.2013.

42. A legislative project of a competition law for Paraguay has been drafted with the technical support of the UNCTAD Competition Policy and Consumers Protection Branch since November 2009. The draft bill is currently pending for approval in the Paraguay Congress. Available in: [www.unctad.org/templates/Page.asp?intItemID=4942&lang=1]. Last access on: 15.03.2013.

43. TAVARES DE ARAUJO, José. Política de concorrência no Mercosul: una Agenda Mínima. In: CHUDNOUSKY, Daniel; FANELLI, José Maria. *El Desafíon de Integrarse para Crecer. Balances y Perspectivas del Mercosur en su primera Década*. Buenos Aires: Siglo Veintiuno de Argentina Editores, 2001. At 145-160.

The approach suggested by Tavares de Araujo was followed in 2003, when a bilateral cooperation agreement was signed between the two countries with the objective to exchange non-confidential information between the two NCAs.[44] The model contained in the 2003 agreement was later extended at the Mercosur level, through the Decisions 04/04[45] and 15/06,[46] which established a system of exchange of information and consultation among Mercosur NCAs.

The process of "revision" of the Fortaleza Protocol was completed in 2010, when the Decision 43/10 abrogated the Protocol.[47] Unlike its predecessor, the 2010 Decision did not need any ratification by the national Parliaments.[48] The new agreement simply strengthened the forms of cooperation among the NCAs of the Mercosur MS introduced by the Decisions 04/04 and 15/06. Besides the forms of notification, technical assistance and exchange of non-confidential information already included in the previous Decisions, the 2010 agreement included a framework of consultation, whereby a NCA could request from the authority of another Member State some information concerning an open investigation which affected its national interest.[49]

The Decision 43/10 was designed to stimulate the cooperation among the Mercosur NCAs, rather than separate regional competition rules. Nevertheless, it is doubtful that this system will be successful, taking into consideration that so far there have been few examples of cooperation among the different Mercosur NCAs.

II.1.b Lack of cooperation among the Mercosur NCAs

So far there have been few examples of cooperation between the Mercosur NCAs. One of the few exceptions was the notification by the *Conselho*

44. Agreement signed on 16.10.2003 in Buenos Aires. Available in: [www.cade.gov.br/internacional/Acordo_Cooperacao_Brasil_Argentina.pdf]. Last access on: 15.03.2013.

45. Decision adopted in Puerto Iguazú on 07.07.2004. Available in: [http://siteresources.worldbank.org/INTCOMPLEGALDB/Resources/Decision0404.pdf]. Last access on: 15.03.2013.

46. Decision adopted in Córdoba on 20.07.2006. Available in: [www.mecon.gov.ar/cndc/control_concentraciones%20_esp.pdf]. Last access on: 15.03.2013.

47. Decision 43/10 of the Consejo del Mercado Común, adopted in Foz de Iguazú on 16.12.2010. Available in: [www.mercosur.int/show?contentid=2376]. Last access on: 15.03.2013.

48. Decision 43/10, art. 4.

49. Decision 43/10, chapter III.

Administrativo de Defensa Econômica (Cade, the Brazilian competition authority) of its decision in the case "Owens Corning-Saint Gobain". In this case, Commissioner Furlan asked Cade to notify its decision prohibiting the concentration to the other Mercosur NCAs "(...) in the spirit of the Decision of the Council of the Common Market n. 15/2006".[50] The reference to the Decision 15/06 is one of the few examples of reliance on the system of mutual notification provided by the Mercosur Decision.

The main factor that has affected the cooperation between the Mercosur NCAs is the lack of mutual trust among these national institutions, due to the different level of development of competition law enforcement in the different MS.[51] In fact, while Brazil has achieved during the last decade important results in this area,[52] in Argentina the enforcement of the competition law has been politicized since the financial crisis of 2001.[53] On the other hand, in Uruguay the NCA was only established in 2007,[54] while in Paraguay a draft competition law is pending for approval in the Parliament. Consequently, in the case of Paraguay, the national authority in charge of enforcing the Decision 43/10 is not a NCA, but rather the Ministry of Industry and Trade.[55] It is doubtful that any kind of cooperation may exist between the Brazilian NCA, the most advanced NCA in the region, and the Paraguay Ministry of Industry and Trade, institution in charge of coordinating industrial policies in the country.

The lack of mutual trust among the different NCAs is evident in the case of Brazil and Argentina. In Brasília, the general feeling expressed by the NCA's officials interviewed by the author was that the main obstacle to cooperation with Argentina was the lack of independence of the Argentinean NCA from the Government. According to Patricia Agra, former Cade officer, "each decision (of the Argentinean authorities) seems a governmental rather than

50. "(...) no espírito da Decisão do Conselho do Mercado Comum n. 15/2006." Case 08012.001885/2007-11. Voto *Conselhero-relator*, para. 261.

51. BOTTA, Marco. The Cooperation between the Competition Authorities of the Developing Countries: Why it does not Work? Case Study on Argentina and Brazil. *The Competition Law Review* 5(2), 153-178 (2009).

52. For instance, in 2011, the Global Antitrust Review elected Cade as the Antitrust Agency of the Year in the Americas. Available in: [www.globalcompetitionreview.com/surveys/survey/516/rating-enforcement-2011]. Last access on: 15.03.2013.

53. PEÑA (2006).

54. HARGAIN, Daniel. Nueva Ley de la Competencia en Uruguay. *Boletin Latinoamericano de Competencia* 23, 100-109 (2007).

55. Decision 43/10, art. 2(b)(iii).

an administrative decision".[56] In particular, bilateral cooperation between competition authorities can work only when there is a certain degree of "mutual trust", which at the moment is lacking between Brazil and Argentina.[57]

As mentioned above, authors like Tavares de Araujo have emphasized that the Fortaleza Protocol did not work since its objectives were too ambitious, and thus an *agenda minima* was required (Tavares de Araujo, 2001). During the last decade, such *agenda minima* was implemented in the Mercosur through the Decisions 04/04, 15/06 and 43/10. Nevertheless, even this type of approach has proved not to be successful. A regional enforcement system based on a mechanism of cooperation among different NCAs can be successful only if the NCAs have achieved a comparable level of development in competition law enforcement. On the contrary, the lack of mutual trust among the different institutions may hamper the degree of cooperation. The problem of the "asymmetric" development of NCAs is evident in the RTAs that include emerging economies/developing countries as MS: since the protection of free competition is a new policy in these countries, the existence of regional asymmetries in this area is inevitable. The real reason behind the lack of success of Fortaleza was not related to its ambitious objectives, but rather the lack of supranational institutions which could overcome the diverging national interests in cross-border competition cases, as well as the consensus based approach that created a stalemate in the decision-making process.

II.2 CAN: closer to the EU, but only in theory

II.2.a From regional anti-dumping to competition rules

The Treaty of Cartagena dates back to 1969, though it was substantially modified in the 1990s.[58] In order to establish an effective Andean common market, new supranational institutions were introduced in the 1996 by the Protocol of Trujillo.[59] In particular, the Protocol strengthened the functions of the *Secretaria General* (Secretary General); functions that became similar to

56. Meeting of the author with Patricia Agra, former officer of Cade, in Brasília on 04.06.2008.

57. Meeting of the author with Ana Paula Martinez, head of the competition law division of the *Secretaria de Direito Econômico*, in Brasília on 02.06.2008.

58. Fuentes Fernández, Alfredo. Contexto Histórico y Avances de la Integración en la Comunidad Andina. *Revista Oasis* (13), 177-196 (2007).

59. Signed in Trujillo on 10.03.1996. Available in: [www.comunidadandina.org/normativa/tratprot/trujillo.htm]. Last access on: 15.03.2013.

the tasks carried out by the European Commission.[60] In addition, a *Tribunal de Justicia* (Tribunal of Justice) was established with tasks similar to those carried out by the European Court of Justice (ECJ).[61] Following the example of the ECJ, CAN Tribunal of Justice recognized through its case law the supremacy of CAN legislation over the legal systems of the CAN MS.[62]

The original Treaty of Cartagena did not provide for any regional system of competition policy. Only in 1991 Decision 285 was adopted to sanction concerted practices and anti-competitive agreements, as well as forms of abuse of dominance.[63] The Decision was applicable only when the anti-competitive practice had an impact on intra-regional trade.[64] One of the main weaknesses of Decision 285/1991 was its system of sanctions: the Resolutions adopted by the *Secretaria General* were not directly applicable *vis a vis* the companies which carried out anti-competitive practices. Every Resolution should be implemented by the affected MS, which could limit the import of goods from the MS where the anti-competitive practice originated.[65] Therefore, even though Decision 285/1991 targeted anti-competitive practices, the system of sanctions followed the model of the anti-dumping duties.

After a long process of negotiations, Decision 285/1991 was replaced in 2005 by Decision 608.[66] The main innovation brought by this legislation concerned the system of sanctions. Unlike its predecessor, the new Decision introduced a fine that CAN Secretary General could directly impose on the

60. Protocol of Trujilo, section D.

61. The Treaty establishing the CAN Tribunal of Justice was concluded in 1979 and later modified by the Protocol of Cochabamba, signed on 28.05.1996. Available in: [www.tribunalandino.org.ec/index.php?option=com_content&view=article&id=52%3Atratado-de-creacion-del-tribunal-de-justicia-de-la-comunidad-andina&catid=37%3Anormativa&Itemid=77&showall=1]. Last access on: 15.03.2013.

62. The concept of supremacy of CAN law was recognized by CAN Tribunal of Justice in the judgement 491/1987, Sociedad Aktiebolaget Volvo v. Superintendencia de Industria y Comercio (0001-IP-1987). Available in: [www.tribunalandino.org.ec/index.php?option=com_wrapper&view=wrapper&Itemid=65]. Last access on: 15.03.2013.

63. Adopted in Lima on 21.03.1991. Available in: [www.intranet.comunidadandina.org/Documentos/decisiones/DE285.doc]. Last access on: 15.03.2013.

64. Decision 285/1991, art. 2.

65. Decision 285/1991, art. 16.

66. Adopted in Lima on 28.3.2005. Available in: [www.intranet.comunidadandina.org/Documentos/decisiones/DE608.doc]. Last access on: 15.03.2013.

company carrying out the anti-competitive practice. The influence of the EU competition model was visible in the system of enforcement provided by the new Decision. In fact, Decision 608/2005 established a *Comité Andino de Defensa de la Libre Competencia* (Andean Committee for the Protection of Free Competition), which included the representatives of the NCAs of the CAN MS.[67] The Committee would review the draft Resolutions of the Secretary General. However, the opinions of the Committee were not binding, and the Secretary General had exclusive competence in adopting the final Resolution.[68] Finally, another interesting aspect of Decision 608/2005 concerned its scope of application. Similar to its predecessor, the Decision was applicable only when an anti-competitive practice had an impact on intra-regional trade;[69] therefore local anti-competitive practices should be sanctioned by the national competition law. Nevertheless, to compensate for the fact that Ecuador and Bolivia did not have a national competition law in place, these countries were allowed to directly apply Decision 608/2005 at the internal level up to the moment they would adopt a national competition law.[70] From a substantive point of view, Decision 608/2005 covered every anti-competitive practice carried out by any economic actor.[71] However, the MS could unanimously agree to exclude from the scope of application of the Decision certain economic activities due to reasons of national interest.[72]

Decision 608/2005 introduced an effective regional competition policy in CAN. The latter was strongly influenced by the EU competition law model, not only from the point of view of the substantive rules, but also from the point of view of the enforcement system. Similar to the European Commission, Decision 608/2005 was enforced by the Secretary General. In addition, the *Comité Andino de Defensa de la Libre Competencia* was designed keeping in mind the system of coordination between the European Commission and the

67. Decision 608/2005, art. 38.
68. Decision 608/2005, art. 22.
69. Decision 608/2005, art. 5.
70. Under art. 50 of the Decision 608/2005 Bolivia should designate the national authority in charge of enforcing the Decision at the internal level. Such obligation was extended to Ecuador by the Decision 616/2005.
Decision 616 adopted in Lima on 15.07.2005. Available in: [www.intranet.comunidadandina.org/Documentos/decisiones/DE616.doc]. Last access on: 15.03.2013.
71. Decision 608/2005, art. 4.
72. Decision 608/2005, art. 6.

EU NCAs within the ECN. Finally, similarly to Regulation 1/2003,[73] Bolivia and Ecuador could directly enforce the Decision 608/2005 in the lack of a national competition law.

II.2.b Lack of enforcement of the Decisions 285/1991 and 608/2005

In spite of the progressive improvement of its institutional framework, so far the degree of enforcement of CAN regional competition policy has been disappointing. In particular, only three Resolutions were adopted by the Secretary General in relation to Decision 285/1991, while no Resolution has so far been adopted in relation to Decision 608/2005.

Among the three cases analysed under the framework of Decision 285/1991, two were rejected by the Secretary General since the alleged anti-competitive practices either did not fall in scope of application of Decision 285/1991 (i.e. unfair advertisement), or the appellant did not provide sufficient evidence to support the infringement. The only case that ended up in the imposition of a sanction concerned a price cartel established among the palm oil producers in Colombia.[74] The procedure started through a complaint submitted by a Peruvian association of oil producers. Since the oil was later exported to the other CAN MS, Decision 285/1991 was applicable. After having completed the investigations, the Secretary General recognized the existence of an infringement and it authorized Perú to limit for one year the import of palm oil from Colombia.[75]

The sanction imposed by the Secretary General in the case mentioned above clearly illustrates the limits of the enforcement mechanism introduced by Decision 285/1991. Regional competition policy aims at sanctioning the anti-competitive practices that restrict intra-regional trade. By authorizing a temporary blockage of the imports of oil palm from Colombia, the Resolution of the Secretary General had the effect of limiting intra-regional trade. In addition, there was no guarantee that the Colombian producers would stop concerting the oil prices due to the Resolution of the Secretary General, since they were not directly sanctioned due to their market behaviour. The imperfect system of sanctions provided by Decision 285/1991 may explain why CAN

73. Reg. 1/2003.

74. Through the Resolution 892 adopted on 14.1.2005 CAN Secretary General opened the investigations on the case. Afterwards, through the Resolution 984 adopted on 15.12.2005 it the sanction the anti-competitive practice.

75. Resolution 984/2005, art. 1.

Secretary General was particularly cautious in enforcing this mechanism, and it did not start any investigation *ex-officio*. In fact, a supranational authority in charge of supervising the market integration within the *Comunidad Andina* would certainly be reluctant to authorize the limitation of imports from one MS. The possibility to directly impose fine introduced by the Decision 608/2005 was intended to solve this problem.

Even though Decision 608/2005 established a regional competition policy closely in line with the EU model, in the last six years this Decision has never been enforced. Therefore, unlike the previous Decision 285/1991, the lack of enforcement was not caused by "defects" in the text of the Decision. Certainly, the current political climate in some MS of the *Comunidad Andina* does not support the enforcement of a regional competition policy. In particular, a revamped role of State intervention in the economy pursued during the last years by the Governments of Venezuela, Bolivia and Ecuador does not support the enforcement of a regional competition policy.[76]

One of the limits of the Decision 608/2005 was the list of exceptions that CAN MS could agree in relation to certain economic sectors.[77] In fact, even though CAN Secretary General is a supranational institution, the possibility to introduce exceptions discouraged the Secretary General from starting any investigation under Decision 608/2005, since the investigations could hurt the interest of CAN MS, which could react by exempting the economic sector under investigation from the scope of application of Decision 608/2005.

Besides the list of exceptions, another limit of Decision 608/2005 concerned its direct applicability in Ecuador and Bolivia. Decision 608/2005 was, in fact, designed for a regional system of enforcement of a competition policy. Even though Bolivia and Ecuador could apply at the internal level the provisions of the Decision sanctioning anti-competitive agreements and abuse of dominance, the lack of a NCA made the enforcement of these rules ineffective.[78]

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76. Peña (2006).

77. Decision 608/2005, art. 6.

78. Marcos, Francisco. Downloading Competition Law from a Regional Trade Agreement (RTA). A Strategy to Introduce Competition Law in Bolivia and Ecuador. *World Competition* 31(1), 127-143 (2008).
In 2009, the President of Ecuador adopted the Decree 1.614 to empower the newly established Secretariat for Competition to enforce the Decision 608/2005. However, the latter is not an independent NCA, but rather a body part of the Ministry of Industry and Productivity. On the other hand, in Bolivia the body currently in charge of enforcing the Decision 608/2005 is the *Sistema de Regulación Sectorial* (Sirese).

Furthermore, the fact that representatives of the Ministries of Industry of these countries sit in the *Comité Andino de Defensa de la Libre Competencia* together with the representatives of the NCAs of the other MS creates an asymmetry likely to block the functioning of this institution.[79]

Finally, a possible additional reason behind the lack of enforcement of Decision 608/2005 concerns the legal effects of a Resolution of the Secretary General sanctioning a private undertaking based in one CAN MS. As mentioned in the previous section, CAN Tribunal of Justice recognized through its case law the supremacy of CAN law over national law. However, as argued by Karen Alter, this doctrine has never been fully accepted by the national judiciary and the administrative authorities, recalcitrant in accepting the primacy of CAN legal system.[80] In addition, under the Treaty of Cartagena, the Secretary General can only adopt Resolutions;[81] it is questionable that these acts have direct effect on private individuals unlike the Decisions adopted by the European Commission. Under art. 35 of Decision 608/2005, in fact, CAN MS have the responsibility to ensure the correct implementation of Secretary General Resolutions. Therefore, even if the Secretary General wished to undertake an active enforcement policy of Decision 608/2005, his action would face an obstacle by the need to look for cooperation from CAN MS. In the current political climate that characterizes the *Comunidad Andina* such cooperation would be unlikely.

Sirese is a government body which supervises the sector regulatory authorities operating in network industries, and thus it is not a NCA.

Decree of the Ecuador President n. 1.614, *Normas para la Aplicación de la Decisión 608 de la CAN*, adopted on 14.03.2009. Available in: [http://lawprofessors.typepad.com/files/decreto-ejecutivo-1614-aplicaci%C3%B3n-decisi%C3%B3n-608-competencia.pdf]. Last access on: 15.03.2013.

Ley 1.600 del Sistema de Regulación Sectorial (Siresc). Published on the Official Journal of Bolivia on 28.10.1994. Available in: [www.vicepresidencia.gob.bo/Inicio/tabid/36/ctl/wsqverbusqueda/mid/435/Default.aspx?id_base=2&id_busca=1600]. Last access on: 15.03.2013.

79. LOZANO, Maria Clara. La Decisión 608 de la CAN y Sus Implicaciones en Bolivia. *Boletin Latinoamericano de Competencia* 21(1), 43-50 (2006). ZÚÑIGA FERNÁNDEZ, Tania. *Fusionskontrolle in einer 'small market economy'. Wettbewerbspolitische Untersuchung am Beispiel Peru*. Baden-Baden: Nomos, 2009.

80. ALTER, Katrin. Jurist Advocacy Movements in Europe: the Role of Euro-Law Associations in European Integration. In: _____ (ed.). *The European Court's Political Power. Selected Essays*. Oxford: Oxford University Press, 2009. At 62-91.

81. Cartagena Treaty, art. 29.

In conclusion, in view of the reasons mentioned above, Decision 608/2005 remains today a well-drafted piece of legislation that is still unenforced six years from the moment of its adoption.

II.3 Caricom: the "fatigue" of establishing a regional competition authority

II.3.a Peculiarities of Caricom integration process

The origins of the process of regional integration among the Caribbean islands date back to the 1950s, when a group of Caribbean islands established a Caribbean Free Trade Zone (CARIFTA).[82] This initiative, however, was not successful, and in 1973 it was replaced by the Caribbean Community (Caricom). In the 1990s, negotiations started to revise the Treaty, with the objective of establishing an effective Caricom common market. The long process of revision ended in 2001 with the signature of the Revised Chaguaramas Treaty.[83]

The rationale for establishing Caricom was connected to the peculiar features of its MS. The latter are small islands, characterized by a limited population and a low GDP per capita. As pointed out by Stewart, these peculiarities lead to market structures that are highly concentrated, where collusive practices among the few market operators that enjoy a dominant position in the market are common.[84] By establishing a regional market, the degree of market concentration would decrease; meanwhile, FDIs would increase as foreign investors would be attracted by the idea to invest in a regional, rather than in a small national market. Even though the benefits of regional integration for the Caribbean islands may be clear, "unfortunately Caricom has yet to live up its economic integration goals".[85] As argued by Mesquita Moreira and Mendoza, even a regional market including all Caribbean islands would still be equivalent to medium size Latin American countries like Ecuador and Chile, in terms of population and GDP.[86] In addition, Caricom MS are characterized by

82. MESQUITA MOREIRA, Mauricio; MENDOZA, Eduardo. Regional Integration. What Is in It for Caricom? *Report of the Inter-American Development Bank*. Available in: [www.iadb.org/intal/intalcdi/PE/2007/00212.pdf]. Last access on: 15.03.2013.

83. Revised Chaguaramas Treaty.

84. TAIMOON, Stewart. Is Flexibility Needed When Designing Competition Law for Small Open Economies? A View from the Caribbean. *Journal of World Trade* 38(4), 725-750 (2004).

85. BRAVO, Karen. Caricom, the myth of Sovereignty, and Aspirational Economic Integration. *North Carolina Journal of International Law and Commercial Regulation* 31(1), 145-205 (2005).

86. Mesquita Moreira, Mendoza (2006).

deep disparities in terms of economic development: while Jamaica, Barbados and Trinidad and Tobago have developed economies focussed on tourism and the provision of financial services, the majority of the other Caribbean islands are less developed economically, since they strongly depend on the export of a limited number of tropical agricultural goods, whose prices are subject to the oscillations of world prices of raw materials.[87]

A second rationale behind the process of integration of Caricom concerns the need to establish regional administrative authorities, since Caricom MS lack administrative capacity due to their small size.[88] Consequently, a peculiarity of the Caricom integration process has been the proliferation of a number of regional agencies in charge of technical tasks.[89]

A final peculiarity of Caricom integration process concerns the permanent tension between the need for further integration, due to the economic and administrative reasons mentioned above, and the "myth of sovereignty" that characterize Caricom MS. As argued by Bravo, even though Caricom is a "community" of Member States, the idea of a supranational regional integration has been only "aspirational" in the speeches of the Caribbean political leaders. However, such speeches were never followed by concrete initiatives to delegate sovereignty to supranational authorities (BRAVO, 2005). Caricom institutional framework is, in fact, characterized by the role played by the national governments, which decide by consensus in a number of different fora.[90] On the other hand, Caricom Secretariat only carries out administrative tasks, and it coordinates the regional technical agencies.[91] In addition, the Caricom Court of Justice was introduced in 2001, but its jurisdiction is still challenged today by a number of MS.[92]

87. STEWART (2004). Statistics comparing the level of economic development of the different Caricom MS are available on the web site of Caricom statistics office. Available in: [www.caricomstats.org/]. Last access on: 15.03.2013.

88. SMITH-HILLMAN, Vindelyn. First a Glimmer, Now a...? The Prospect of a Caribbean Competition Policy. *Journal of World Trade* 40(2), 405-422 (2006).

89. See the list provided in art. 21 and 22 of the Revised Chaguaramas Treaty.

90. The main organs of Caricom are the Councils of Heads of Governments and Foreign Ministers, followed by the Councils of the Ministers in charge of specific portfolios (i.e. Finance, Trade, Social Policy...). Revised Chaguaramas Treaty, art. 10 and following ones.

91. Revised Chaguaramas Treaty, art. 23.

92. MENNS, Katrin; DECOURSEY, Eversley. *The Appropriate Design of the Caricom Competition Commission. Paper presented at ACLE Conference.* Amsterdam/Netherlands, on

II.3.b The long waited Caricom Competition Commission

Chapter VIII of the Revised Chaguaramas Treaty introduced a regional competition policy. Similarly to the case of the Mercosur Fortaleza Protocol and the CAN Decision 608/2005, the Caricom rules mirrored the EU substantive provisions, by prohibiting anti-competitive practices[93] and forms of abuse of dominant position.[94] Chapter VIII also included a number of exceptions from the scope of applications of the competition rules (i.e. activities of professional associations).[95] Furthermore, additional exceptions could be introduced by the Council of Ministers for Trade and Economic Development (Coted).[96]

Caricom competition rules were enforced by a multilevel system: chapter VIII required Caricom MS to establish NCAs;[97] at the same time, when an anti-competitive behaviour had an effect on intra-regional trade, the rules provided by Chapter VIII would be applicable and they would be enforced by a newly established Caricom Competition Commission (CCC).[98] Therefore, while CAN Decision 608/2005 delegated to the CAN Secretary General the enforcement of the Decision, in line with Caricom approach to establish regional technical bodies, the Revised Chaguaramas Treaty opted for the establishment of a separate regional competition authority.

In relation to the system of enforcement, the CCC could directly impose fines on private undertakings,[99] but only through a complex mechanism of cooperation with the NCAs. The latter, in fact, would first be required to ask the NCA "to undertake a preliminary examination".[100] In case of disagreement between the evaluation of the CCC and the NCA, the dispute would be referred to the Coted.[101] The role of mediation played by the Coted in the Treaty was

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20.05.2011. Available in: [http://vi.unctad.org/files/studytour/stuwi11/Presentations/Tuesday%2024/Eversley.Menns.Appropriate%20Design%20of%20the%20CCC.ACLE.pdf]. Last access on: 15.03.2013.

93. Revised Chaguaramas Treaty, art. 177.
94. Revised Chaguaramas Treaty, art. 178, 179.
95. Revised Chaguaramas Treaty, art. 168.
96. Revised Chaguaramas Treaty, art. 183(2).
97. Revised Chaguaramas Treaty, art. 170(2).
98. Revised Chaguaramas Treaty, art. 171.
99. Revised Chaguaramas Treaty, art. 174(4)(j).
100. Revised Chaguaramas Treaty, art. 176(1).
101. Revised Chaguaramas Treaty, art. 176(5).

unclear, and it could certainly lead Coted to exercise political pressures on the CCC in cases involving MS national champions.

Even though the establishment of the CCC was provided by the Revised Chaguaramas Treaty, a decade after the date of signature of the Treaty there are still no cases of enforcement of Chapter VIII. This was mainly due to the fact that the CCC was established only in 2008,[102] after long years of negotiations on the location of the headquarters of this new agency.[103] Therefore, it could be argued that the Caricom competition policy has yet to prove to be successful, due to the fact that the CCC has only recently been established. Certainly, the CCC is currently facing the problems that usually characterize newly established institutions in the emerging economies, like lack of human and financial resources and lack of expertise in enforcing Chapter VIII.[104] However, a number of factors may lead to the conclusion that the CCC will have to overcome a number of obstacles in the coming years in order to enforce the competition rules of the Treaty. First of all, Chapter VIII requires a compulsory cooperation with the NCAs. Even though every Caricom MS is bound to establish a NCA, so far only Jamaica and Barbados have complied with this duty.[105] Similarly to the case of Mercosur and the Andean Community, the asymmetries in the development of national competition law thus hamper the enforcement of a regional competition policy.

Secondly, even though CCC can directly impose fines, the legal value of its decisions is unclear. Within an intergovernmental RTA, where the concepts of direct effect and supremacy of regional law are unknown; every decision adopted by the CCC would require its implementation by the MS. The latter

102. Only on 13.02.2007 an Agreement was concluded between Caricom and the Government of Suriname, which accepted to host the headquarters of the CCC is Paramaribo. Available in: [www.caricom.org/jsp/secretariat/legal_instruments/competition_commission_seat.pdf]. Last access on: 15.03.2013.

103. TAIMOON, Stewart. Special Cooperation Provision on Competition Law and Policy: the Case of Small Economies. Competition Provisions. In: BRUSICK, Philip; ALVAREZ, Ana Maria; CERNAT Lucien. Regional Trade Agreements: How to Assure Development Gains. Geneva: United Nations Conference on Trade and Development, 2005. At 329-359.

104. MENNS, EVERSLEY (2011).

105. LEE, Barbara. Caricom Competition Commission: Enhancing Competition Enforcement in the Caribbean Community. *Paper presented at ICN 8th Annual Conference*. Zurich/Switzerland, 03-05.06.2009. Available in: [www.docstoc.com/docs/83536553/12458757281Pre-ICN_presentation_-_Barbara_Lee]. Last access on: 15.03.2013.

would thus have the opportunity to obstacle the implementation of the CCC decisions which target their national champions.

Finally, the fact that the economies of the Caricom MS are not fully integrated may undermine the enforcement the regional competition policy, since the number of anti-competitive practices that satisfy the condition of the effect on intra-regional trade is likely to remain limited in the near future. According to a study carried out in 2010 by Caricom Secretariat, in fact, while the integration of Caricom into world trade has been constantly increasing during the last years, the quote of intra-regional trade remains low.[106] This is due, in particular, to the lack of complementarity among the products/services exported by Caricom MS, which causes a prevalence of external trade with other developed economies.

III. CONCLUSIONS

The last two decades recorded the rapid proliferation of competition chapters in RTAs. A number of authors have pointed out the benefits of the introduction of a regional competition policy for the RTAs that include developing countries/ emerging economies as MS. Most of the regional competition systems studied in this paper have mirrored the EU competition model, especially in relation to its substantive provisions. Nevertheless, no other regional competition law system has so far proved to be as successful as the EU in terms of enforcement outcome. The existing literature has not provided a satisfactory explanation of the reasons behind the gap between benefits and effective enforcement results of regional competition systems.

The case studies show how ineffective is a regional competition policy based exclusively on the coordination of the NCAs of the region. Competition law is a new legal concept in the majority of the emerging economies. Consequently, even if each MS of the RTA is bound to adopt a national competition law, asymmetries between the national competition law systems are inevitable. Such asymmetries were evident in the case of Mercosur (i.e. Paraguay still lacks a national competition law), CAN (i.e. Bolivia and Ecuador lack a national

106. The study points out that in 2008, the quote of intra-regional trade corresponded only to 16.3% of the total exports and 13.3% of the total imports carried out by Caricom MS. On the other hand, 67.3% of the exports and 63.5% of the imports of the EU derived from intra-regional trade. Caricom Secretariat, *Caribbean Trade and Investment Report 2010*. Page 2. Available in: [www.caricom.org/jsp/community_organs/ctir_2010_executive_summary.pdf]. Last access on: 15.03.2013.

competition law) and Caricom (i.e. Jamaica and Barbados were the only MS to have so far introduced a national competition law). These asymmetries undermine the cooperation among the NCAs of the region since there is lack of mutual trust among the authorities. In addition, such asymmetries have also a negative influence on the functioning of regional committees of the representatives of the NCAs (i.e. the *Comité Andino de Defensa de la Libre Competencia* and the Mercosur *Comité de Defensa de la Competencia*).

Following the example of the EU, a supranational enforcement system seems thus more appropriate for the RTAs that include emerging economies. Before de-centralizing the enforcement of competition policy to its MS through the Reg. 1/2003, the EU followed a centralized enforcement approach for more than forty years. For the emerging economies part of a RTA, the establishment of a regional competition authority with exclusive competence to enforce the regional competition policy has the advantage of maximizing the scarce human resources available, and to overcome the problem of the asymmetric development of national competition law mentioned above. CAN and Caricom opted for a supranational enforcement system, enforced either by the existing Secretary General of the organization in the case of the *Comunidad Andina*, or by a newly established body (i.e. the Caricom Competition Commission). However, in spite of the similarities with the EU enforcement system, neither CAN nor Caricom have so far been successful in enforcing a regional competition policy. The lack of enforcement of the CAN Decision 608/2005 and the difficulties faced in establishing the Caricom Competition Commission are "symptoms" of such failure. Concerns by Caricom governments about the transfer of sovereignty to the CCC, the opposition by some governments of the *Comunidad Andina* against free market policies, and the short period of existence of these rules in both regions may partially explain such failure. As argued in the introduction to this paper, these explanations can certainly be shared, but they are not exhaustive. Through the analysis of the cases study of CAN and Caricom, three additional reasons of this enforcement failure where identified throughout the paper:

• *Lack of direct effect of the decisions of the regional competition authority*: one of the preconditions of the successful enforcement of the EU competition policy is the direct effect and supremacy of the EU law over national legal systems. Although the principle of direct effect of int. law within the national legal systems characterizes countries outside of the EU which follow a "monist" approach,[107] the principle of supremacy of EU law over national law

107. Countries are generally divided in two groups in relation to the role of int. law within their national legal system: while "monist" countries (i.e. Germany, UK) recognize

is generally not recognized in other RTAs. Within a regional mechanism of competition enforcement, the direct effect and supremacy of the decisions of the regional competition authority are essential prerequisites for the successful functioning of this institution. A regional competition policy is effective only if the regional competition authority can directly sanction the anti-competitive conduct of private undertakings and if its decisions have a primacy over a possible divergent national decision. The cases of CAN and Caricom showed that outside the EU the principles of direct effect and supremacy are often not applicable. This was evident in the case of Caricom, where the "Community" of Caribbean States is *de facto* an inter-governmental organization. In such context, the decision of the Caricom Competition Commission imposing a fine on an undertaking would not have any direct effect; it should be rather implemented by the MS authorities. Similarly, even though the concept of direct effect has been recognized by the Andean Tribunal of Justice, this doctrine has not become widely accepted in the *Comunidad Andina*. The lack of direct effect of the decisions of the regional competition authority nullifies the autonomy of this institution, since a MS might obstacle the implementation of the decisions which sanction its national champions.

• *Literal interpretation of the intra-regional trade condition*: the triggering factor for the application of the regional, rather than national competition law is usually the effect of the anti-competitive practice on the intra-regional trade. The rationale behind this condition is clear: a regional competition policy is needed in order to complement the trade liberalization policies within the RTA, in order to sanction the business practices that may obstacle market integration within the RTA. In the EU, this condition has been broadly interpreted by the ECJ, which has included in the scope of application of the EU competition rules every anti-competitive practice that "directly" or "indirectly", "actually" or "potentially" restrict intra-community trade.[108] This broad interpretation provided a certain degree of "leeway" to the European Commission, which can enforce the EU competition rules against practices which have a national dimension and only an indirect impact on

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the direct effect of int. law within the national legal system, "dualist" countries require an international treaty to be implemented by a national legislation (i.e. Italy). In monist countries, a national judge can directly rely on an int. treaty ratified by his/her country as source of law, while in dualist countries a national judge can rely only on the national legislation which implements the int. treaty. CASSESE, Antonio. *International Law*. Oxford: Oxford University Press, 2001.

108. Case 56/65, *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH* (M.B.U.) [1966] ECR 00235.

intra-Community trade.[109] As argued by a number of economists, RTAs among developing countries/emerging economies are generally characterized by a low level of intra-regional trade.[110] Companies established in emerging economies are, in fact, often more interested to export their products to the markets of developed economies, rather than to the other MS of the RTA. This problem was evident in the case of Caricom, which includes economies that export agricultural and raw materials outside of the RTA.[111] In view of this economic structure, a literal interpretation of the intra-regional trade condition might lead to a reduction of the scope of application of the regional competition system.[112] Therefore, there is a positive correlation between the deficit in terms of cross-border trade within a RTA and the enforcement of regional competition policy: a limited intra-regional trade limits the number of cross-border anti-competitive practices, and thus the scope of application of the regional competition rules.

• *Lack of sanctions against the anti-competitive MS behaviours*: Besides sanctioning the anti-competitive behaviour by private undertakings, the EU competition rules monitor the subsidies granted by MS to their undertakings (art. 107-108 TFEU) and the market behaviour of public undertakings (art. 106.2 TFEU). No similar rules exist in other regional competition policy systems. On the contrary, the Revised Chaguaramas Treaty and the Decision 608/2005 provided a list of exceptions for the application of the regional competition rules in certain economic sectors (i.e. agriculture), and they grant to the MS the right to agree on further exceptions. If the introduction of a regional system of State aid control would probably be politically unfeasible in the early stages of enforcement of a regional competition policy, the RTA should at least limit the list of exceptions. In particular, the discretion granted to the

109. For instance, in Erste Group Bank v. Commission the CJ recognized that the European Commission could sanction a cartel involving exclusively undertakings operating in one MS, since the cartel had "the effect of reinforcing the partitioning of market on a national basis", and thus the intra-Community trade condition was satisfied. Case C-125/07, *Erste Group Bank v. Commission* [2009] ECR I-8681. Para. 38.

110. SHAMS, Rasul. Regional Integration in Developing Countries: Some Lessons Based on Case Studies. Hamburgisches Welt-Wirtschafts-Archi (HWWA), discussion paper 251. Available in: [www.econstor.eu/bitstream/10419/19223/1/251.pdf]. Last access on: 15.03.2013.

111. Caricom Trade and Investment Report 2010.

112. CORTAZAR MORA, Javier. Decisión 608 de la Comunidad Andina: un Paso Adelante para el Sistema Antimopolios de la Región. *Revista de Derecho Competencia* 2(2), 123-152 (2006).

MS to adopt further exceptions risks nullifying the enforcement activities of the regional competition authority. The latter should play a functioning of advocacy function *vis a vis* the MS, indicating which national rules restrict competition in the regional market.

It might be argue that these conditions are not the exclusive factors which allow a regional competition regime to be effectively enforced. However, under a legal perspective, these three pre-conditions allow to explain why the EU competition model has been more successful in terms of enforcement outcomes in comparison to the competition rules introduced by other RTAs which have introduced similar substantive rules. Without its direct effect, a broad interpretation of intra-regional trade condition and rules sanctioning MS anti-competitive behaviours, the EU competition model would never become as successful as it is today.

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