

IMPLEMENTING COMPETITION LAW AND POLICY IN LATIN AMERICA: THE ROLE OF TECHNICAL ASSISTANCE

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INTRODUCTION

Despite efforts to promote the adoption and enforcement of a national Competition Law and Policy (CLP) as a step preceding cooperation in this field, it has become clear that the adage “no one size fits all” holds true; each country adheres to its own domestic agenda.

Therefore, technical assistance (TA) entails a bottom-up, progressive approach. Countries looking to adopt and enforce a CLP need to establish their needs and priorities, while at the same time addressing the intricacies of when and how they will require TA. However, if they lack a well-cemented legal system and a strong institutional setting, CLP will not be able to achieve its goal of enhancing consumer welfare. This will also impede the process of reinforcing the developing country’s capacity to position itself in the world economy.

When discussing countries with a well-established legal system, it follows that enforcement should reach an optimal level in terms of deterring welfare-reducing or anti-competitive practices—namely, a point where the gain from these practices is lower than the cost of the imposed sanction. There is also the aspect of avoiding enforcement errors, which occur when harmful practices are allowed or when those anti-competitive practices that do not harm economic welfare are prohibited. Lastly, enforcement costs must be minimized such that the benefits of the competitive processes that are preserved outweigh the administrative costs of detecting and sanctioning violations of competition rules.¹

At the outset of implementing a CLP in developing countries, it is worth keeping in mind certain variables. Will the new regulation represent an additional burden to the already charged institutional setting, or will it be an additional rule capable of merging with the existing regulatory agenda? Can countries sign agreements that include competition provisions if they do not have a national law and if the adoption of a competition law is conditioned upon accepting a package of economic reforms? Does this represent a requirement under a Regional Trade Agreement (RTA)?² Finally, is it possible to promote CLP’s non-efficiency goals, which include benefits for consumers and better living conditions for the poor?

1. See William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 655–56 (1983); Warren F. Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075, 1075, 1077 (1980); Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & ECON. 255, 261 (1993).

2. In this paper, we define the term RTA to include bilateral and regional agreements.

All of these issues have been widely discussed in competition-related literature. This article addresses these issues through two perspectives: (1) CLP as a tool for ensuring efficiency and non-efficiency goals, and (2) cooperation in the field of competition either through formal (as part of an RTA) or informal channels. The national dimension, presented through an overview of Latin American competition laws, aims at sketching future lines with regard to enforcement constraints. In addition, it serves to establish possible commonalities that may lead to better cooperation and coordination between Latin American countries or between these countries and countries from other regions. To show how the different steps involved in establishing and enforcing a CLP should be applied, this article draws on the experience of an UNCTAD TA program: Competencia América Latina (COMPAL)³ This program aims to assist selected Latin American countries in strengthening their competition and consumer protection laws and policies.

With respect to the regional dimension, this article draws on UNCTAD research regarding competition provisions in RTAs; this research was supported by the International Development Research Centre (IDRC) and resulted in the first publication on this issue.⁴ More recently, there was a second publication (also supported by IDRC) that focused on implementation problems.⁵ As part of the research, UNCTAD and IDRC, together with local institutions, held a series of seminars in Turkey, Korea, South Africa, and Brazil, followed by an event in Geneva, Switzerland to disseminate the findings of the publication.⁶

This paper contains two sections. Part I deals with the national constraints of implementing CLP by examining the status of the current com-

3. COMPAL is a program on Competition and Consumer Protection Policies for Latin America supported by the State Secretariat for Economic Affairs (SECO), which is based in Switzerland and assists Bolivia, Costa Rica, El Salvador, Nicaragua, and Peru in strengthening their competition and consumer protection institutions and laws. This UNCTAD-led program, supported by Swiss cooperation through SECO, is implemented jointly with national coordinators from each beneficiary country.

4. U.N. Conf. on Trade & Dev. [UNCTAD], *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, U.N. Doc. UNCTAD/DITC/CLP/2005/1 (2005) (prepared by Philippe Brusick, Ana María Alvarez & Lucian Cernat), [hereinafter UNCTAD, *Competition Provisions in RTAs*] available at http://www.unctad.org/en/docs/ditcclp20051_en.pdf.

5. UNCTAD, *Implementing Competition-Related Provisions in Regional Trade Agreements: Is it Possible to Obtain Development Gains?*, U.N. Doc. UNCTAD/DITC/CLP/2006/4 (2007) (prepared by Ana María Alvarez & Laurence Wilse-Samson), [hereinafter UNCTAD, *Implementing Competition Provisions in RTAs*] available at http://www.unctad.org/en/docs/ditcclp20064_en.pdf.

6. Regional seminars were organized as part of the UNCTAD/IDRC dissemination with the following institutions: Yeditepe University, Istanbul, Turkey: July 31–August 1, 2006; Korea Fair Trade Commission, Gyeongju City, Republic of Korea: September 6–7, 2006; Trade Law Centre for Southern Africa, Cape Town, South Africa: October 4, 2006; and Getulio Vargas Foundation, São Paulo, Brazil: November 30–December 1, 2006. An inception event was organized with the Graduate Institute for International Studies in Geneva, Switzerland in May of 2006.

petition laws in Latin American countries and the experience of COMPAL. Arguments regarding competition as a tool for consumer welfare and poverty alleviation, a major Millennium Development Goal (MDG),⁷ are included in light of the significant role they play in justifying the adoption of competition laws. Domestic constraints include elements such as a weak and unpredictable rule of law or legal system, the large size of the informal sector, the relatively small size of the market, high barriers to entry, the legacy effects of state-owned enterprises, and rushed privatization. Additionally, a lack of competition culture, human capacity, and institutional constraints affect the successful adoption of competition laws. These constraints are inevitably reflected in the adoption and enforcement of competition rules at the national and regional level, as well as in the efforts towards cooperation in this field.

Part II addresses cooperation as a necessary tool for implementing CLP provisions at the bilateral and regional level. On cooperation-related issues, we draw on lessons from the aforementioned UNCTAD research and publications.

This article concludes with some reflections on how best to complement efforts by developing countries in implementing a CLP while dealing with constraints at both the national and regional levels. Furthermore, this paper aims to address the need for ascertaining appropriate TA programs.

I. ENFORCING COMPETITION LAWS IN LATIN AMERICA

CLP practitioners in Latin America—judges, competition officials, and lawyers—must face a number of local and external factors when implementing, enforcing, and applying competition rules. This is an area which juxtaposes both the two major disciplines (law and economics) to prevent harmful anticompetitive practices and enhance consumer welfare, and the two major western legal systems (civil law and common law). These two dimensions, which encompass both the effects of the interface between law and economics when enforcing competition rules and the influence of the co-existence of these two legal traditions, are often found in Latin America.

As previously mentioned, in addition to local factors, there are external factors that should be taken into account when enforcing competition

7. See The UN Millennium Development Goals, <http://www.un.org/millenniumgoals/> (last visited Oct. 23, 2007) (listing eight development goals, including eradicating extreme poverty and hunger; achieving universal primary education; promoting gender equality and empowering women; reducing child mortality; improving maternal health; combating HIV/AIDS, malaria, and other diseases; ensuring environmental sustainability; and developing a global partnership for development).

rules. Indeed, the way competition policies are enforced in the case of developing countries varies substantially when compared to the developed countries. U.S. antitrust laws and European Community (EC) competition laws are commonly used as references for those competition laws that are currently being implemented in developing countries. Moreover, the evolution of enforcement in the U.S. and EC jurisdictions, through legal and economic scholarship and case law, has also influenced its application by the competition authorities of developing countries. In general, it is argued that the tradition of importing more advanced regulations from developed schemes, or “legal transplants” in comparative law jargon, does not necessarily fit with the local traditions of developing countries.

In theory, the same rule in different legal systems should provide similar incentives for the agents subject to its enforcement. In practice, however, due to social, economic, cultural, and institutional differences, the effects of a rule can be significantly different.⁸ The more a legal rule corresponds to social values, the more effective it will be, and the legal sanctions imposed when it is enforced will not be as harsh. On the contrary, if a legal norm does not correspond with social values, it requires higher penalties upon enforcement, thereby increasing the social costs of enforcement. As is apparent now, developing countries face serious difficulties when enforcing a CLP.

Therefore, this section will address three issues: (1) the challenges in overcoming the pitfalls of enforcing competition laws in Latin America; (2) the need to consider two dimensions when enforcing competition laws (the law and economics interface and the co-existence of the two major legal traditions); and (3) the outstanding domestic constraints reflected in the regional setting.

A. *Addressing the Pitfalls of Enforcing Competition Laws in Latin America*

The reasons behind the enactment of competition laws in the Latin American region vary depending on the political, economic, legal, market-oriented, or development environment.⁹ Furthermore, once the law is en-

8. See Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997); Ugo Mattei & Alberto Monti, *Comparative Law and Economics: Borrowing and Resistance*, GLOBAL JURIST FRONTIERS, 2001, at vol. 1, issue 2, art. 5, <http://www.bepress.com/gj/frontiers/vol1/iss2/art5/>.

9. Latin American laws are said to be based on the civil law system, whereas, for example, the Caribbean countries are common law Jurisdictions. The difference may not be straightforward, as some jurisdictions may apply a combination of both juridical families. In view of space limitations, this article does not cover the Caribbean laws.

acted, the enforcement phase is of paramount importance to ensure the “efficacy of the norm.”¹⁰ Facing potential difficulties when enforcing competition laws is a challenge worthy of active engagement.

Subsequently, when enforcing competition rules, it becomes necessary to deliberate on the following aspects: (1) the debate over the goals or objectives that any competition law should pursue; (2) the need to interact between market structure and business conduct, which requires competition laws encompassing both structural and behavioral provisions; and (3) the enforcement constraints.

The debate over the goals of competition law has many observers from industrialized countries contending that the goal should be to enhance the static and dynamic efficiency of an economy by altering the allocation of resources.¹¹ However, for better or worse, many jurisdictions—particularly those of developing countries—have bestowed upon their competition laws a number of “non-efficiency-based objectives.”¹²

Regrettably, some jurisdictions follow old approaches and include imported policies, which are difficult to implement given local conditions. Instead, these jurisdictions have undertaken efforts to introduce reforms that seek benefits for the consumer and low income populations, social redress, and other non-efficiency-based objectives. The latter are perhaps implied goals, which have some relation to competition but not necessarily to economic efficiency.¹³ They can include, for example, protecting small businesses, preserving consumer choices, preventing increases in concentration, and ensuring that firms have the freedom to compete. There are some inconsistencies between them, as in the case of the alternative between consumer choices and the freedom to compete. Although the need to address the initially neglected social implications of adjustment has been captured in reform packages since the 1990s, there is still room for devel-

10. “Efficacy of the norm” is a technical legal term that refers to the enforcement of any norm, provision, act, or law. The implementation of the law can be regarded with respect to whether the norm, provision, act, or law has been enforced, and to what extent it has reached its ultimate goal.

11. William J. Baumol, *When is Inter-firm Coordination Beneficial? The Case of Innovation*, 19 INT’L J. INDUS. ORG. 727, 727 (2001); see Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 928 (2001) (discussing allocation of resources in intellectual property).

12. See, for example, the Mexican Federal Economic Competition law, which seeks “to protect the process of competition and free access to markets.” Comisión Federal de Competencia [Federal Competition Commission], Home, <http://www.cfc.gob.mx/english/> (last visited Oct. 15, 2007).

13. The goals of the Chile’s competition law include promoting economic efficiency with the expectation that in the long run this maximizes consumer welfare. Organisation for Economic Co-operation and Development [OECD] & Inter-American Development Bank [IDB], *Competition Law and Policy in Latin America: Peer Reviews of Argentina, Brazil, Chile, Mexico and Peru* 198 (2006) [hereinafter OECD/IDB, *Peer Reviews*], available at <http://www.oecd.org/dataoecd/38/15/37976647.pdf>.

oping countries to maneuver, even in the field of CLP.¹⁴ The latter has fostered new trends in the Latin American region, such as actively proposing economic and social policy alternatives with which a CLP should comply. However, these considerations go beyond the scope of the present article.

A recurrent observation is that effective competition requires institutions that are often too complex and costly to set up in countries that lack financial and human resources as well as proper enforcement institution settings. CLPs are not easily implemented and need strong government support. Keeping in mind that CLPs are not an automatic outcome of deregulation, efforts should be deployed to cultivate a CLP. In this regard, under the framework of a target-oriented TA program and the Model Law on Competition, UNCTAD has been able to assist in drafting or reforming laws, including those of Latin American countries.¹⁵ At the outset, the adoption of a national CLP in developing countries involves a competition act, which together with other regulations represents an effective instrument of competition policy.¹⁶

As shown in Table 1, the objectives of competition laws in Latin America include the promotion and defense of competition, the promotion of economic efficiency and consumer welfare, the freedom of initiative, the opening of markets, and the fair and equal participation of small and medium enterprises. Diminishing concentrations of economic power, preventing monopolies, and preventing the abuse of dominant positions that adversely effect economic growth are some of the other objectives commonly found in the laws. Furthermore, in certain cases, the promotion of other non-efficiency based goals are incorporated.

Given the cost burdens involved in adopting a CLP, and in some cases the absence of a national law, a regional legal instrument may be applied to challenge anticompetitive practices at the domestic level. For example, Decision 608 of the Andean Community (AC) will apply in the Bolivian and Ecuadorian territories on a temporary basis while national laws are

14. See UNCTAD, *Trade and Development Report, 2006*, at 41–42, U.N. Doc. UNCTAD/TDR/2006 (2006), available at http://www.unctad.org/en/docs/tdr2006_en.pdf.

15. UNCTAD, *Model Law on Competition*, U.N. Doc. TD/B/RBP/CONF.5/7/Rev.2 (2004), available at http://www.unctad.org/en/docs/tdrbpconf5d7rev2_en.pdf.

16. See generally World Trade Organization [WTO], Working Group on the Interaction Between Trade and Competition Policy, *Study on Issues Relating to a Possible Multilateral Framework on Competition Policy*, WT/WGTCP/W/228 (May 19, 2003) (prepared by Simon J. Evenett), available at <http://www.evenett.com/reports/w228.pdf>.

enacted.¹⁷ However, it is clear that this regional instrument cannot replace a national law legitimated amongst local stakeholders.

In Latin America, a great number of countries have enacted competition laws. These include Argentina (1919, amended in 1946 and 1980—current law enacted in 1999, amended in 2001), Barbados (2002), Brazil (1962, amended in 1990, revised in 1994, and amended in 2000), Colombia (1959, supplemented in 1992), Costa Rica (1994), Chile (1959, amended in 1973, implemented in 1979, and then revised and reorganized as recently as 2005), El Salvador (2004), Honduras (2005, implemented 2006), Jamaica (1993, amended 2001), Mexico (1934, replaced in 1992 by the Federal Law of Economic Competition), Nicaragua (2006), Panama (1996, amended 2006), Peru (1991, modified in 1992, 1994 and 1996), Trinidad and Tobago (2006), and Venezuela (1992).¹⁸ It is worth mentioning that in the case of Uruguay, there are several laws that contain references to competition—predominantly Law No. 17.243 (2000), which was implemented in 2001.¹⁹ Recently, in July of 2007, Law No. 18.159 on “Promotion and Defense of Competition” was adopted.

17. Andean Community Commission Decision 608, Bol.-Colom.-Ecuador-Peru, Mar. 29, 2005, [hereinafter Decision 608] available at <http://www.comunidadandina.org/normativa/dec/D608.htm>. In Ecuador, Decision 608 is enforced through Andean Community Decision 616, July 15, 2005, <http://www.comunidadandina.org/normativa/dec/D616.htm>.

18. See Free Trade Area of the Americas [FTAA], Negotating Group on Competition Policy, Organization of American States Trade Unit, *Inventory of Domestic Laws and Regulations Relating to Competition Policy in the Western Hemisphere*, FTAA Doc. FTAA.ngcp/inf/03/Rev.2 (Mar. 22, 2002), available at http://www.ftaa-alca.org/ngroups/NGCP/Publications/DomLaws_e.asp; OECD/IDB, *Peer Reviews*, *supra* note 13; UNCTAD, *Guidebook on Competition Systems*, U.N. Doc. UNCTAD/DITC/CLP/2007/2 (2007), [hereinafter UNCTAD, *Guidebook*] available at http://www.unctad.org/en/docs/ditcclp20072_en.pdf; UNCTAD, Trade and Dev. Bd., *Report of the Intergovernmental Group of Experts on Competition Law and Policy on its Seventh Session*, at 5, U.N. Doc. TD/B/COM.2/CLP/27 (2007), available at http://www.unctad.org/en/docs/c2clpd57_en.pdf; Juan D. Gutiérrez R., *La legislación de competencia en América Latina y el Caribe: historia, vigencia, aplicación y reformas* (Centro de Estudios de Derecho de la Competencia [CEDEC] Competition Law and Econ. Working Paper, Paper No. 07-05, 2007), available at <http://ssrn.com/abstract=1023811>; The World Bank, Competition Law Database—by Country, <http://go.worldbank.org/6UZCX6MBD0> (last visited Feb. 11, 2008).

19. Uruguayan legislation related to competition includes Articles 13, 14 and 15 of Law Number 17.243; Articles 157 and 158 of Law Number 17.296; Article 89 of Law Number 17.556; and Article 14(o) of Law Number 17.598. See UNCTAD, *Guidebook*, *supra* note 18, at 153; Normas Sobre Promoción y Defensa de la Competencia, No. 18.159 (2007), available at http://www.presidencia.gub.uy/_Web/leyes/2007/07/E732_28%2005%202007_00001.PDF.

TABLE 1:

OBJECTIVES OF COMPETITION LAWS (AS STATED IN THE ORIGINAL
LAWS/DECREES OR OTHER RELATED LEGISLATION)

Argentina	<ul style="list-style-type: none"> - The authorities must defend competition against any form of distortion in the markets (Article 42 of the Constitution). - Prohibit and sanction any behavior that limits, restricts, or distorts competition or access to the market, or that constitutes abuse of market position, in a way that could adversely affect the general economic interest (Article 1 of Law 25.156).
Barbados	<ul style="list-style-type: none"> - To promote and maintain and encourage competition; to prohibit the prevention, restriction, and distortion of competition and abuse of dominant positions in trade in Barbados and within the CARICOM Single Market and Economy; to ensure that all enterprises, irrespective of size, have the opportunity to participate equitably in the market place (Preamble of the Fair Competition Act).
Bolivia	<ul style="list-style-type: none"> - Ensure that the economic structure is in harmony with principles of social justice (Article 132 of the Constitution). - Stimulate and provide a clear context to foreign direct investment as a means to promote growth and economic and social development (Article 1 of the Law on Foreign Investment). - The objective of the Sectoral Regulation System is to regulate, control, and monitor activities in the telecommunications, electric, energy, transportation and water sectors, as well as others, to ensure that they operate efficiently, contribute to the country's development, and provide service to all (Article 1 of the Sectoral Regulation System Law). - The authorities in charge of the enforcement of the Sectoral Regulation System must promote competition and efficiency in the activities of the sectors regulated by the System (Article 10-b of the Sectoral Regulation System Law).
Brazil	<ul style="list-style-type: none"> - Prevent and prosecute infractions against the economic order as a means of promoting free enterprise, free competition, the social role of property, consumer protection, and restraint of abuses of economic power (Article 1 of Law 8.884).
Chile	<ul style="list-style-type: none"> - Promote and defend free competition in the markets. (Article 1 of Decree Law No. 211).
Colombia	<ul style="list-style-type: none"> - Ensure compliance with provisions on the promotion of competition and restrictive trade practices in domestic markets in order to improve efficiency of the markets, ensure that consumers have free choice and access to markets of goods and services, ensure that enterprises participate freely in the market, and ensure that there is a variety of prices and qualities of goods and services in the market (Article 2-1 of Decree No. 2153 of 1992).
Costa Rica	<ul style="list-style-type: none"> - Effectively protect the rights and legitimate interests of the consumer; monitor and promote the competitive process and free competition by preventing and prohibiting monopolies, monopolistic practices, and other restrictions on efficient market operation; and eliminate unnecessary regulations affecting economical activities (Article 1 of Law 7472).

Dominican Republic	<ul style="list-style-type: none"> - Protect the exercise of free enterprise, trade, and industry; prohibit monopolies of private corporations; and authorize the state to retain authority to exercise certain economic and strategic activities (Article 8.12 of the Constitution). - Impose penalties in cases where free enterprise or competition is threatened by acts of price-fixing, rumor-spreading, or collusion among business executives (Articles 419 and 420 of the Criminal Code). - Protect consumers through price controls for certain basic articles and services, and through measures to protect them against arrangements or conspiracy to set false prices (Law No. 13 of 1963).
Guatemala	<ul style="list-style-type: none"> - Prevent practices that are conducive to the concentration of goods and means of production that are detrimental to the community. (Article 119, ¶ h of the Constitution). - Prohibit monopolies and privileged relationships. The State will protect the market economy and limit associations that tend to restrain the free market or that harm consumers (Article 130 of the Constitution). - Penalize illegal actions that threaten injury to the national economy, <i>inter alia</i>, any behavior that restricts free competition and involves monopolies or speculation (Articles 340 and 341 of the Criminal Code). - Regulate matters relating to the freedom of contract and to unfair competition (Articles 361 and 362 of the Commercial Code).
Honduras	<ul style="list-style-type: none"> - Promote and protect the exercise of free competition in order to facilitate efficient market function and consumer welfare (Article 1 of Decree 355 of 2005).
Mexico	<ul style="list-style-type: none"> - Protect the competitive process and free competition by preventing and eliminating monopolies, anticompetitive practices, and other factors that restraint the efficient operation of markets for goods and services (Article 2 of the Federal Law on Economic Competition, amended in 2006).
Nicaragua	<ul style="list-style-type: none"> - Promote and monitor free competition among economic agents and guarantee the efficiency of the market and consumer welfare by encouraging the culture of competition, and by preventing, prohibiting or sanctioning anticompetitive practices. (Article 1 of Law 601 of 2006).
Panama	<ul style="list-style-type: none"> - Protect and secure the process of free economic competition, eradicate monopolistic practices and other constraints on the efficient functioning of the markets for goods and services, and safeguard the greater interests of consumers (Article 1 of Law 29 of 1996).
Paraguay	<ul style="list-style-type: none"> - Guarantee free competition in the market at a national level and forbid monopolies and the artificial rise or fall of prices in the markets (Article 107 of the Constitution). - The Ministry of Industry and Commerce, in case of emergencies, shall establish the necessary measures to avoid combinations that lead, <i>inter alia</i>, to price speculation and the suppression of free competition. (Article 2-j of Law 904 of 1963, amended by Law 2.961 of 2006).
Peru	<ul style="list-style-type: none"> - Eliminate monopolistic practices, controls, and restraints on free competition in the production and marketing of goods and the provision of services, so that free private enterprise can flourish for the greatest benefit of users and consumers (Article 1 of the Legislative Decree 701 of 1991).
Uruguay	<ul style="list-style-type: none"> - Prohibit agreements and coordinated practices between economic agents, joint decisions by business associations, and the abuse of a dominant position by one or more economic agents that obstruct, restrain, or distort competition and free access to the markets of production, processing, distribution, and trade of goods and services (Article 14 of Law No. 17.243 of 2000). - Prohibit all practices having the object or effect of preventing competition in the relevant present or future markets (Article 2 of Law No. 18.159 of 2007).
Venezuela	<ul style="list-style-type: none"> - Promote and protect the exercise of free competition and the efficiency that benefits the producers and consumers; and prohibit monopolistic and oligarchic practices and other means that could impede, restrict, falsify, or limit economic freedom (Article 1 of the Law for Promotion and Protection of the Exercise of Free Competition 1992). - Note: A new draft competition bill is under discussion by the National Assembly; it includes institutional strengthening, improves the law's social aspects and protects the small competitor.

Furthermore, Bolivia, Ecuador,²⁰ the Dominican Republic,²¹ and Guatemala are currently in the process of drafting and debating their respective competition laws.

Other pitfalls that need to be confronted are the behavioral and structural provisions contained within the competition laws. Confronting the behavioral conduct of firms would include, for example, sanctioning agreements that restrain competition, banning cartels, and prohibiting attempts by large incumbent firms to independently exercise market power (sometimes referred to as “abuse of a dominant position”).

Structural provisions give impetus to the concept of a hostile market structure, which in turn leads to market monopolization by virtue of unlawful concentrations through mergers, acquisitions, and joint ventures. In the interest of avoiding any unnecessary burden, sometimes only the largest transactions or proposals—usually by specified size thresholds—are controlled. These thresholds may be based on market share, assets, sales, or employment of the parties involved. Unfortunately, although it is true that the way behavioral and structural provisions are implemented in each jurisdiction differs widely and deserves an in-depth analysis, this topic lies outside the scope of the present article. However, we note briefly that in some cases, the competition authorities can impose divestiture measures on existing monopolies in order to reduce their market power. One commentator provides two examples:

[I]n Argentina, the competition tribunal may ask the courts to order the dissolution, liquidation, deconcentration, or break-up of companies in violation of the law. These provisions are complemented by restraints established in the infrastructure sector laws. . . . In Mexico, the law empowers the competition agency to order a partial or total divestiture of what has been improperly concentrated, regardless of the fine that may be applicable in such cases.²²

A common characteristic of Latin American economies is the small size of the market. It is more or less accepted that in those cases some concentration—to achieve economies of scale and competitiveness in both

20. Francisco Marcos, *¿Una política de competencia para la república de Ecuador? [A Competition Policy for the Republic of Ecuador?]* BOLETIM LATINO AMERICANO DE COMPETENCIA Feb. 2006, at 87, available at <http://ec.europa.eu/comm/competition/publications/blc/index.html> (follow “Part 2” hyperlink next to “Nr 21–February 2006”).

21. Fanny Solano Agramonte, *Analysis of the Needs of a Competition Law in the Dominican Republic*, (Berkeley Program in Law & Econ., Latin Am. & Caribbean Law & Econ. Ass’n [ALACDE] Ann. Papers, Paper No. 043007-4, 2007), available at <http://repositories.cdlib.org/bple/alacde/043007-4/>.

22. CARMEN FUENTE, COMPETITION POLICY IN LATIN AMERICA: IMPLICATIONS FOR INFRASTRUCTURE SERVICES 3–4 (2001).

domestic and export markets—needs to be at least temporarily tolerated.²³ For instance, Peru has no provision for merger control in its laws, whereas Argentina and Mexico do.²⁴ In some Latin American countries, the thresholds for merger notification follow schemes imported from Europe and the U.S.²⁵

In Costa Rica, a procedure to assist in the reformation of Law 7472 is being prepared with the support of the COMPAL program, among others. The current law establishes certain exceptions for economic agents who provide public services as a result of concessions and the state monopolies created by law. The latter exception is based on the fact that these monopolistic practices contribute to the efficiency of the market. With respect to vertical restraints, the law does not apply the rule of reason approach. As in some other Latin American countries, if there is an anticompetitive effect, the conduct is deemed illegal and must be dealt with accordingly.

Using the UNCTAD Model Law on Competition as a reference, the current process of law reform involves proposals for strengthening the Costa Rican competition agency (Comisión para Promover la Competencia), which are used in current international competition contexts to establish: (1) financial independence; (2) mechanisms to collate and utilize evidentiary documents in the event of an investigation; (3) the feasibility of introducing a leniency program; (4) the elimination of exceptions to the law; and (5) prior notification and thresholds in the case of resource concentrations. The importance of flexible thresholds and requirements on notification has already been discussed. In this regard, one might argue that to avoid unnecessary charges to economic agents, only concentrations that may cause an important effect in the market should be challenged.²⁶

23. See generally OECD, Global Forum on Competition, *Small Economies and Competition Policy: A Background Paper*, OECD Doc. CCNM/GF/COMP(2003)4 (Feb. 5, 2003) [hereinafter OECD, *Small Economies*], available at <http://www.oecd.org/dataoecd/57/57/2486546.pdf> (providing details about the discussion on competition issues in small economies).

24. FUENTE, *supra* note 22, at 3.

25. *Id.*

26. Econ. Comm'n for Latin Am. & the Caribbean [CEPAL], Mexican Sub-Regional Headquarters, *Ventajas y limitaciones de la experiencia de Costa Rica en materia de políticas de competencia: un punto de referencia para la región centroamericana [Advantages and Limitations of the Costa Rican Experience with Competition Policy: A Benchmark for the Central American Region]*, 57, CEPAL Estudios y Perspectivas Serie No. 69 (Jan. 2007) (prepared by Pamela Sittenfeld), available at <http://www.eclac.cl/mexico/publicaciones/xml/9/27749/L763.pdf>.

B. *The Interface Between Law and Economics and Two Major Legal Traditions*

1. The Interface

For a competition policy to materialize, instruments such as a competition law and sectoral regulations are necessary. Enforcing competition laws entails working at the so-called interface between law and economics and working within the two major co-existing legal traditions.

Indeed, the interface between law and economics found its optimal state in the application of CLPs.²⁷ Neither of these disciplines, taken individually, provide a unique solution for competition problems. Still, it would be desirable to see a closer link between the views of industrial economists and competition lawyers, which might facilitate an integrated approach towards competition. The key issue is that competition decisions should not be made solely on the basis of formalistic line drawing by using only technical legalities. Rather, to develop a consistent and efficiency-enhancing competition policy, the economic effects of legal rules and decisions in competition cases should be kept in mind.²⁸

Similarly, the application of competition rules, like any other law that combines economic, technical, and legal ramifications, requires that the link between the cultural environment, human behavior, and choices become a priority. This becomes even more important when there is an increased application of the rule of reason approach to penalizing competition law breaches, as well as an increased usage of sophisticated quantitative methods in assessing the impact of mergers.

Historically, there has been an intense debate over the goals of competition law and the manner of its enforcement. This debate includes views from the University of Chicago school tradition—most clearly voiced by Robert Bork—to the multi-valued tradition of European Competition law.²⁹ Scholars from the University of Chicago, who had a profound impact on

27. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 1–28 (Aspen Publishers 6th ed. 2003) (1973) (pointing out the need for economic analysis of the law in order to learn how people make decisions that can be better understood from a legal perspective).

28. Indeed, “[f]or a long time, European competition law was permeated by legal formalism. [Thus, t]he permissibility of certain business practices was decided upon the basis of technical legal distinctions rather than their economic effects.” ROGER VAN DEN BERGH & PETER CAMESASCA, *EUROPEAN COMPETITION LAW AND ECONOMICS: A COMPARATIVE PERSPECTIVE* 1 (Sweet & Maxwell 2d ed. 2006) (2001). This changed dramatically in the late 1990s when the European Commission started to focus on economic analysis by reinforcing capacities in this field. *Id.*

29. See generally ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (The Free Press 1993) (1978).

American antitrust law in the 1970s and the 1980s, rejected any goal of competition policy other than that of productive and allocative efficiency. On the other hand, European competition policy embraces a multitude of political goals, ranging from the traditional objective of market integration to emphasizing fairness (or equity) rather than efficiency.

In this regard, the 2007 report to the U.S. President and Congress by the Antitrust Modernization Commission stated:

In 1979 the Supreme Court once again chose to interpret the antitrust law to protect consumers, not small businesses, describing the Sherman Act as a consumer welfare prescription. Other courts have adopted similar views. For the last few decades courts, agencies, and antitrust practitioners have recognized consumer welfare as the unifying goal of antitrust law. Few people dispute that antitrust's core mission is protecting consumers' right to the low prices, innovation, and diverse production that competition promises.³⁰

2. The Co-existence

The manner in which competition rules are enforced remains the competition practitioners' prerogative, as it is interpreted and applied by them in specific cases.

This way of thinking relies not only on the interface between law and economics, but also on the application of the law in itself, whereby national courts provide their ruling according to legal and economic considerations.³¹ Thus, when applying competition rules, judges often tend to base their approaches on the basic principles of their national legal system. Consequently, even though current competition law development dynamics suggest an upward trend towards change in static legal traditions of interpretation (choosing the most important source of law), especially in the field of competition law enforcement, this shift is not straightforward at the level of judges and lawyers.

In other words, there seems to be some resistance from competition enforcers and practitioners in Latin America to the constant evolution of antitrust law. This can be attributed to the view that these sets of rules have been conceived in a different legal tradition than the one dominating Latin America. As a result, the two major western law traditions seem to co-exist

30. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 35 (2007) (quotations and references omitted).

31. It can be said that most antitrust cases are handled by the administrative courts (or competition agencies with an administrative dimension). However, these decisions are subject to appeal and judicial review, especially in the Latin American context where lawyers tend to bring almost everything to trial.

when enforcing competition rules derived from two different “sources” of tradition.

Moreover, competition experts, through the application of rules imported from the U.S. antitrust laws, may work under the influence of the common law system while having been educated and trained under the framework of European-lead laws—especially the “positivist reign,” which predates the civil law tradition of the *Code de Napoléon* or the Code of 1804.³² In fact, it is widely known that the majority of Latin American countries are part of the civil law judicial family, as opposed to the common law tradition. Nonetheless, in some Central American countries where the U.S. is the major trading partner, American antitrust law (such as the Sherman Act of 1890) have influenced the development of those countries’ competition laws. Undeniably, Latin American legislation has absorbed parts of this legal background as well as portions of European law.

Thus, while U.S. jurisprudence has played a significant role in shaping the ruling of a discipline that requires rigid legal tests and relies on sound economic considerations, Latin American enforcers, particularly judges at the level of judicial review, have put up some resistance due to the aforementioned reasons. Furthermore, administrative jurisprudence has a more significant impact than judicial review (as in the common law), whereas in most cases, it is judicial review that is the final authority in competition cases in the region. Based on this framework, when analyzing the objectives of competition laws in Latin America, there is an underlying need to strike a balance between the interactions of the aforementioned “legal families.”

Therefore, despite the frequent use of U.S. antitrust laws, in Latin America’s legal mind, the Code stands for and perpetuates the ties between this region and Europe. Moreover, it is important to seek potentialities, synergies, and cooperation between civil law and common law, particularly when Latin American competition enforcers are dealing with their Anglo-American peers.

32. Despite “the forces trying to bury the *Code*,” Latin American lawyers continue to state that their legal systems are based on the *Code de Napoléon*. However, in essence, their legal systems go beyond the scope of the French Civil Code of 1804. These values are reflected in the “codification process” that was the genesis of crucial values when applying law—rationality, progress, pedagogy, and utopia—thereby illustrating a positivist legal tradition. Similarly, the institutional setting for the judiciary and nature of the tribunal has also been influenced by the substance and structure of the *Code*. M.C. Mirow, *The Code Napoléon: Buried but Ruling in Latin America*, 33 DENV. J. INT’L L. & POL’Y 179, 191 (2005).

C. *The Outstanding Domestic Constraints Reflected in Regional Settings*

Contrary to the escalating growth trends elsewhere, Latin American countries are confronted with a number of bottleneck situations, particularly when it comes to competing in the world markets. Latin America and the Caribbean countries are beginning to take a more proactive stance towards assertive and integrated policies to attract foreign direct investment. However, in most cases, the institutional framework to promote foreign investment remains weak. Successful policies designed to attract foreign direct investment include national development strategy objectives, comparative advantages of the host country, and consideration for the investors' needs. CLP is one of the assets essential in promoting an active development strategy. Nonetheless, in Latin America and elsewhere, it needs to be addressed from the perspective of the more vulnerable sectors of the society and in accordance with the MDG.

Sectors such as health, education, financial services for low-income earners, infrastructure, housing, and food are particularly sensitive issues for the public in Latin American and other developing countries. Therefore, these sectors represent domestic constraints, some of which have been analyzed under the COMPAL program framework. In terms of market conditions, factors such as lack of industrial competitiveness, high transport costs, excessive licensing requirements, lack of technological infrastructure, high taxes, and weak government support systems have an impact on the status of competition within the market. Furthermore, large informal sectors can have implications for market power estimations, cartel detection, merger analysis and identification, and predatory pricing remediation. For instance, firms can identify informal competitors who practice unfair pricing due to tax evasion, fail to meet labor regulations, and so on.³³ Keeping this in mind, competition agencies can play the pivotal role of competition advocates by identifying areas of concern, including overtly restrictive regulations, and barriers to entry. Consumer protection measures might be required to ensure that competition is based on price and that quality is not compromised. The majority of Latin American countries face

33. Gesner Oliveira, Getúlio Vargas Foundation, Can Competition Help Nations Meet the Millennium Development Goals?, Discussion at the Development Dimension of Competition Law and Policy: Economic Perspectives Workshop (May 2, 2006), slides available at http://www.tralac.org/pdf/20060502_G_Olivieria_ICN020506.ppt. For instance, in India it seems as though a major spur for industry growth was the end of the "License Raj." However, growth was uneven depending on whether labor institutions were "pro worker" or "pro employer," with growth greater in the latter class. Philippe Aghion, Robin Burgess, Stephen Redding & Fabrizio Zilibotti, *The Unequal Effects of Liberalization: Evidence from Dismantling the License Raj in India* 2-3 (Nat'l Bureau of Econ. Research, Working Paper No. 12031, 2006), available at <http://www.nber.org/papers/W12031.pdf>.

the problem of informal markets. A related aspect is the problem of remittances, which represents the key source of income for a large population.³⁴ Furthermore, small- and medium-sized enterprises typically populate the economies of the region. Despite CLP's goal of promoting competition and not competitors, it is important to note that small and medium enterprises are often the most vulnerable to abusive practices by dominant enterprises.³⁵ All of these elements are part of the other non-efficiency competition goals contained in some Latin American laws.

As mentioned earlier, the significance of the small size economies of developing countries has been widely studied from the perspective of competition policy.³⁶ Some authors argue that this militates against merger control, while others contend that it simply means greater care must be taken in applying merger regulations.³⁷ Enforcement against abuse of dominant position takes on increased importance in the context of a small market, as the opportunities for numerous competitors are often severely circumscribed. Linked to the problems and differences in emphasis arising out of conditions of limited capacity, there are dominant barriers to entry in certain sectors of these economies. In some cases, foreign direct investment firms and joint venture companies receive concessions that discriminate against domestic producers, which demonstrates the importance of both domestic competition law and international cooperation in the enforcement of competition law.

When analyzing the competition policy for the Central American and Caribbean small economies, some argue that it is important to take into consideration their low levels of domestic competition, the effects of their exposure to international markets, the limitations of reproducing without variation, the developed country competition policies within these economies, and the potential advantages of a regional competition approach in this setting.³⁸

34. See generally OECD SECRETARIAT, *ISSUE PAPER: COMPETITION ISSUES AND REMITTANCES IN LATIN AMERICA* (July 2006), available at <http://www.oecd.org/dataoecd/31/54/38821508.pdf> (providing background information on competition and remittances).

35. In developed countries, and in some developing ones, there are specific laws and agencies to promote small business. A variety of jurisdictions also employ thresholds and other measures to exempt small businesses from the application of antitrust law.

36. See generally MICHAL S. GAL, *COMPETITION POLICY FOR SMALL MARKET ECONOMIES* (Harvard University Press 2003) (2000); OECD, *Small Economies*, *supra* note 23.

37. UNCTAD, *Voluntary Peer Review on Competition Policy: Jamaica*, at 3–4, U.N. Doc. UNCTAD/DITC/CLP/2005/5 (2005), [hereinafter UNCTAD, *Voluntary Peer Review*], available at http://www.unctad.org/en/docs/ditcclp20055_en.pdf.

38. Claudia Schatan & Marcos Avalos, *Centroamérica y el Caribe: En busca de una política de competencia adecuada para economías pequeñas en desarrollo*, in *CONDICIONES Y POLÍTICAS DE COMPETENCIA: ECONOMÍAS PEQUEÑAS DE CENTROAMÉRICA Y EL CARIBE* [CONDITIONS AND POLITICS

Young competition authorities in Latin American countries face a number of problems. The legacy effects of large inefficient state-owned enterprises and problems arising out of rushed privatizations have been well documented by authorities of many developing countries. These effects are often coupled with the long-term impact of an ineffective import-substituting industrialization policy, which results in highly concentrated sectors in small markets. The legacy of state-owned enterprises and the history of price controls may contribute to the absence of a competition culture,³⁹ as well as an increase in barriers to entry.⁴⁰ Competition advocacy has an important role to play in sustaining cultures that embrace the principles of fair and competitive markets. It is also widely recognized that there is a dearth of skilled industrial organizations and competition law experts in developing countries. These experts are fundamental in rationalizing and consistently and fairly enforcing the law,⁴¹ but budgetary constraints make this difficult.

Moreover, there are enforcement actions that can also be hampered by the legal powers accorded by the authority itself, the degree of autonomy enjoyed by the agency, and the composition of the adjudicating body. Conversely, enforcement can be strengthened through a well-designed leniency program that challenges the hard-core cartels. For example, Brazil has a leniency program which has been successfully applied in various cases.⁴²

These problems are reflected in the cooperation strategies involving a CLP. Domestic legislative shortcomings can hinder enforcement by inhibiting cooperation, which has been made apparent through provisions in a bilateral/regional agreement and in Agency-to-Agency (ATA) agreements.

OF COMPETITION: SMALL ECONOMIES OF CENTRAL AMERICA AND THE CARIBBEAN] 28 (Claudia Schatan & Marcos Avalos eds., 2006).

39. OECD, *Challenges/Obstacles Faced by Competition Authorities in Achieving Greater Economic Development Through the Promotion of Competition*, at 4, OECD Doc. CCNM/GF/COMP(2003)6 (Oct. 27, 2003), available at <http://www.oecd.org/dataoecd/36/32/21668683.pdf> (characterizing competition culture); see UNCTAD, *Voluntary Peer Review*, *supra* note 37, at 1, 13, 26.

40. UNCTAD, *Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia, Zimbabwe*, at 42, 46, U.N. Doc. UNCTAD/DITC/CLP/2005/2 (2005), available at http://www.unctad.org/en/docs/ditclp20052_en.pdf (noting that in Lao, “[m]ost of the barriers to competition exist due to the nature of public sector policies and how they are implemented,” and furthermore a “lack of clarity and precision is another problem in Lao Laws. . . . giving the officials wide discretion in applying the laws.”).

41. A shortage of economic knowledge and analysis can lead to a retreat into legalism. Dennis Davis, Judge of the High Court of South Africa and Judge President of the Competition Appeal Court, Keynote Address at the Competition Provisions in Regional Trade Agreements Workshop (Oct. 4, 2006), report available at http://www.tralac.org/pdf/20061012_tralac_CompetitionProvisionsWorkshop4Oct06report.pdf.

42. See BARBARA ROSENBERG, LENIENCY PROGRAM IN BRAZIL: CONSTRAINTS AND PERSPECTIVES (2005), www.mecon.gov.br/cndc/2005.pdf.

To find an appropriate solution to implementation problems, it is important to recognize:

[The] trade-off between an in-depth investigation of the economic effects of a certain practice, and the importance of administrative efficiency and legal certainty. This is simply a statement of why one size does not fit all—appropriate administrative requirements vary with administrative capacity and the abilities of economic analysis available to the authority. However, in a time of increasing economic integration, there is a further trade-off to be made in terms of international harmonization and lowering transaction costs of international transactions, and room in the domestic area to implement the type of CLP most suited to country-specific needs.⁴³

Those contemplating the way in which a CLP can meet the specific needs of developing countries can draw on the lessons and experiences in the COMPAL program, which also discusses the way to promote a more effective pro-poor oriented CLP in developing countries.⁴⁴

Careful case selection has already been cited as an important element and has been complimented by the increased sharing of experiences in prosecuting cases. Multilateral initiatives, such as the meetings of the Intergovernmental Group of Experts hosted yearly by UNCTAD, the Organisation for Economic Co-operation and Development (OECD) Global Competition Forum, the Latin American Competition Forum, and the Ibero-American Forum, among others, already play a role in meeting this need. Competition provisions in an RTA might provide an additional basis for greater international cooperation, particularly since the attempts to seek a multilateral setting have been eliminated from World Trade Organization (WTO) negotiations. These provisions do not necessarily involve the creation of supranational regional competition authority; it may instead consist of a cooperation agreement with compliant member countries and the inclusion of a national law. In the case of the Southern African Customs Union Agreement, an Annex to the treaty regarding unfair practices is being discussed.⁴⁵ Considerable progress can be made through a regional network of authorities, all of which can host workshops to analyze case studies in-

43. Ana María Alvarez, Simon J. Evenett & Laurence Wilse-Samson, *Anti-Competitive Practices and the Attainment of the Millennium Development Goals: Implications for Competition Law Enforcement and Inter-Agency Cooperation*, in UNCTAD, *Implementing Competition Provisions in RTAs*, *supra* note 5, at 84.

44. See generally TAIMOON STEWART, JULIAN CLARKE & SUSAN JOEKES, *COMPETITION LAW IN ACTION: EXPERIENCES FROM DEVELOPING COUNTRIES* (2007), available at http://www.idrc.ca/uploads/user-S/11781215481Competition_Law.pdf.

45. UNCTAD, *The Southern African Custom Union (SACU) Regional Cooperation Framework on Competition Policy and Unfair Trade Practices*, at 3, U.N. Doc. UNCTAD/DITC/CLP/2005/3 (Oct. 18, 2005) (prepared by James Mathis), available at http://www.unctad.org/en/docs/ditcclp20053_en.pdf.

volving competition problems common to the Latin American region and the associated enforcement techniques.

The UNCTAD Set on Competition⁴⁶ can play a significant role in this regard, and the seminars organized by UNCTAD and various institutions in Latin America and throughout the world provide stimulating avenues for exchanging experiences. The Set still constitutes the only universally applicable instrument in the area of antitrust, and its validity has been constantly reaffirmed by international conferences organized by UNCTAD.⁴⁷

Some of the problems of implementing a CLP at the national level are simply transferred to the regional setting. There is a “marked difference in experience and resource endowment[s] among national competition authorities. . . . [I]f the national competition authorities command neither national political support nor technical competence, then the intervention of the COMESA Competition Commission shall be met with constraints, thereby inhibiting the progress of regional trade and investment.”⁴⁸ There is a vast spectrum of bilateral and regional modalities when it comes to dealing with the competition problems of Latin American economies. In this regard, it is important to note that a CLP can also be used as a tool for governments wishing to target specific social objectives, such as those agreed upon by heads of state in the MDG initiative. However, it remains to be seen how CLP implementation attains pro-poor outcomes, so as to uphold the political legitimacy necessary for the enforcement authority to be independent.

Consequently, regional cooperation can also be a mechanism that promotes a regional ‘pro-poor agenda,’ and a CLP oriented towards poverty alleviation could be an important component of development and integration. Such cooperation would not only strengthen national enforcement regimes, but also facilitate in challenging cross-border anti-competitive practices. In addition, these initiatives need not necessarily be anti-business, as minimum standards for treating corporations in enforcement proceedings could be adopted. There is a substantial possibility for a win-win solution, as countries could gain from more effective enforcement of competition law while simultaneously enjoying benefits for the poor. Simi-

46. UNCTAD, *The United Nations Set of Principles on Competition and Rules on Competition*, U.N. Doc. TD/RBP/CONF/10/Rev.2 (2000), available at <http://www.unctad.org/en/docs/trbpcconf10r2.en.pdf>.

47. Ioannis Lianos, *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, 15 TUL. J. INT'L & COMP. L. 415, 429, 461 (2007) (analyzing the relationship of the UN Set to global antitrust law).

48. George Lipimile & Elizabeth Gachuri, *Allocation of Competences Between National and Regional Competition Authorities: The Case of COMESA*, in UNCTAD, *Competition Provisions in RTAs*, *supra* note 4, at 403.

larly, law-abiding firms would face clearer legal rules and stronger legal rights and protections.

In some cases, the adoption of a CLP was included in trade agreements because of the market-oriented policies supported by international financial organizations. However, in light of the more recent recognition of the role CLP needs to play in ensuring efficiency and non-efficiency goals, particularly in consumer welfare, recent analysis is more often dedicated to exploring competition as a tool for economic development and poverty alleviation.⁴⁹

D. Case Study: Strengthening Capacities and Institutions in the Area of Competition and Consumer Protection in Latin America: The Case of the COMPAL Program

Developing countries are usually keen on reaping the benefits of the TA programs, and it is common for their requests to exceed available resources. The effectiveness of both long and short term assistance has been extensively discussed.⁵⁰ Furthermore, it is well known that a TA program requires a need-assessment phase, where the country's priorities are examined and presented in proposals targeting donors' priorities. Where possible, an in-depth need assessment based on discussions with different stakeholders (e.g., government authorities, ministries, public offices) and civil society (e.g., private sector, academia, non-governmental organizations) may represent the most appropriate avenue in determining requirements and establishing programs to target priority areas. Expending time and resources in the need-assessment phase represents a key element for the major parties involved in TA, such as the beneficiary, the executing agency, and the donor(s).

The UNCTAD COMPAL program aims at strengthening competition and consumer protection policies in selected Latin American countries.. The program was introduced in 2005, following a need-assessment phase carried out from 2003 to 2004, which provided a comprehensive status of the laws and regulations relating to competition. At the time, only Costa Rica and Peru had national competition laws and an authority; today, they are joined by El Salvador and Nicaragua. Bolivia is currently in the process

49. See generally Alvarez, *supra* note 52.

50. Although there is no general agreement that one type of TA is more *effective* than the other, some studies propose that some forms of TA might be more *important* than others. While these studies and reports do not deny the importance of a needs assessment, much of what has been written also highlights the fact that the level of social and economic development, the extent of competition culture, and agency characteristics have a significant impact on the effectiveness of different types of assistance.

of preparing drafts of both a competition law and a consumer and unfair competition law with the support of the COMPAL Programme.

In the case of El Salvador, there is a Superintendency in charge of applying the law, which has quickly amassed considerable achievements. It has also benefited from worldwide exposure, including recognition at the level of the OECD and the International Competition Network. Nicaragua has enacted a law, and at present the General Direction of Competition and Market Transparency receives support (from COMPAL, among others) towards designing the authority.

Several factors help explain how the COMPAL program has been able to address the needs of each country. First, the program is demand-driven and based on a bottom-up approach, which has served as the basis for the activities carried out under the program thus far. Second, the program features a co-management structure aimed at sharing responsibilities between the executing agency (UNCTAD) and the beneficiaries, who are represented by national coordinators. This structure ensures the ownership of the program in each beneficiary country and has been elemental in the evolution of the program in the way it has instilled a feeling of ownership over the activities carried out under the program.

Placing the program in the current economic and political context of the beneficiary countries represented a key challenge. Thus, the activities of the program have contributed complementing structural reforms and have provided input for negotiations of integration strategies or free trade agreements (FTAs). In the case of Nicaragua, CLP was included in the complementary agenda to CAFTA-DR (which does not contain a chapter on competition). Through its diverse activities, this comprehensive program has been able to achieve visible results in the establishment of a competition and consumer protection law and policy strategy in Nicaragua as well as in the other four COMPAL beneficiary countries.

1. COMPAL Activities and Lessons

In 2006, COMPAL initiated and promoted the following activities: (1) preparation of sectoral in-depth studies aimed at assessing the conditions of competition in key markets within Bolivia, El Salvador, Nicaragua, and Peru; (2) assistance in the adoption of the competition law in Nicaragua; (3) preparation of law reforms as well as competition and consumer protection guidelines in Costa Rica; (4) establishment of academic programs, jointly with local universities in Nicaragua and Costa Rica; (5) establishment of an internship program with the Swiss Competition Commission (COMCO) and study tours with other Latin American competition authori-

ties; (6) offering of advocacy seminars on competition and consumer protection workshops for El Salvador; and (7) design of a decentralized system of consumer protection at the national level in Peru.⁵¹

COMPAL sectoral studies merit special consideration. These studies aim at identifying sensible sectors and relevant markets for a chosen product by using industrial organization theoretical frameworks.⁵² To adapt these instruments to local priorities when examining the conditions of the markets, COMPAL has proposed the use of methodologies according to the circumstances and availability of local resources in the field.⁵³ Sectoral studies represent a key instrument for the competition agencies and institutions dealing with a CLP, especially in preventing and challenging market distorting practices in key sectors. These studies also represent an important tool for enhancing the skills of the competition staff, as they could be used as a platform upon which a monitoring mechanism for the sectors may be built.

2. Sequencing the CLP Reforms

When establishing competition in a developing country, the need for progressivism and flexibility is crucial. Once the country's priorities are established through a TA proposal, a major issue regarding the enactment of the law and institution is sequencing the reforms. Various steps are involved in law implementation and institution building. For example, imag-

51. See COMPAL, UNCTAD, *EL COMPAL EN SU SEGUNDO AÑO: INFORME GLOBAL ANNUAL (IGA 2006) [COMPAL IN ITS SECOND YEAR]*, 7–8 (2007), <http://www.unctadxi.org/sections/DITC/COMPAL/Annual%20Meetings%20docs/IGA%202006/iga%202006%20version%20final%20280207.pdf>.

52. Each study must follow particular steps in the economic analysis of competition. In this regard, it is worth highlighting certain elements usually considered in the analysis of cases as carried out by a competition authority with jurisdiction in concrete cases. These elements have been used as guidelines for consultants to assess whether practices restricting competition exist in the markets under analysis. In this regard, the following illustrate the economic analysis of competition: (1) determination of the relevant market (geographic product) through the analysis of substitutability of demand and supply and its subsequent evaluation using a reasonable approach consistent with the concepts of substitution of demand and supply; (2) measurement of market shares or participation by identified actors in the relevant market using such methodologies as the HHI index or concentration ratio; (3) identification of possible anticompetitive practices such as agreements between competitors, exclusion of competitors or other types of abuse of dominant position in the selected relevant markets; (4) demonstration of the adverse economic effect of business practices; and (5) identification of appropriate policy responses by national authorities.

53. For instance, in Bolivia the market for used clothing was studied to establish the parameters of competition in this key market for the Bolivian economy. Nevertheless, during its implementation, the commissioned local consultant had difficulty finding the necessary data. Furthermore, in El Salvador, the study on interurban transport suffered the same fate, as the lack of data was a serious impediment to performing the economic analysis required to address relevant market considerations. For 2007, there are other studies in the pipeline, such as the sector of medical services and liquefied petroleum gas in El Salvador, the beef market and cement in Nicaragua, and others.

ine an escalator where each activity is a step leading to the top;⁵⁴ the first step is sensitization at the level of economic sectors.⁵⁵ However, the process of developing a culture of competition is continuous, and even developed agencies need to learn about CLP and its links with other policy issues.

The second step is drafting competition laws. This may involve building consensus towards the adoption of the law among the legislative authority and stakeholders at large. This is followed by the third step, in which the institution in charge of implementing the laws is designed pursuant to the adopted law.⁵⁶

The fourth step involves training officers who will be in charge of competition and consumer protection. An important consideration when delivering TA is the underlying need to foster national, human, and institutional capacities to better enforce the law. It is worth noting that effective antitrust enforcement requires a body of well-trained experts in law and economics, which is not always easy to find in Latin American countries. To this end, COMPAL has drawn lessons from national, regional, and international practices on promoting competition and consumer protection culture and strengthening the legal context.⁵⁷ Among the various activities COMPAL provides, training for judges, case handlers, and other practitioners have the greatest impact.⁵⁸

The fifth step relates to the enforcement of the law. This step requires some degree of specialization on the part of the agency. It includes the

54. Ana María Alvarez, UNCTAD Economic Affairs Officer, Address at the Chicago-Kent Law Review Symposium on Law and Economic Development in Latin America: Competition Law and Policies in Latin America: Experiences at the National and Regional Level (Apr. 14, 2007), available at <http://www.kentlaw.edu/latinamerica/webcast/latinamerica05.ram>.

55. This activity, which is part of the whole process of creating a competition culture, does not have a deadline; competition culture is a long process. In addition, an inventory of laws is part of the need assessment. Various laws contain competition elements or principles. For example, in Peru, the regulatory authority OSINERG has the responsibility of assessing mergers within the electricity sector. Examining the socio-economic situation is also crucial to initiate this process.

56. The design of an institutional framework to enforce an adoption of the law is of crucial importance to achieve a successful implementation of the law. Often laws required regulations and manuals to further develop the necessary institutional structure of the agency. In this regard, COMPAL has been particularly active in Nicaragua, which recently enacted a competition law. Regulations and manuals were prepared in which a major issue for the institution was its need for independence, especially on budgetary issues.

57. In this regard, it is useful to study in depth the reasons that prompted countries to adopt the laws, such as structural reforms upon entering into a regional or international agreement

58. Training programs at the national level provide a good indication of the country's sectors and regulations. Training at regional or international levels may represent a key tool for exchanging experiences. Within COMPAL, training programs are organized by the Swiss Competition Commission. Interns at the Commission participate in case investigation based on the Swiss competition law, EU competition laws, and other international laws. Thereafter, this experience becomes a "train for trainers" type of activity involving transferring knowledge to beneficiary countries.

practical use of investigative techniques that competition case handlers may use to settle competition disputes. This step also involves the application of sanctions and remedies, which also requires some specialization on the part of the authority. COMPAL beneficiaries have expressed interest in developing this particular expertise. The program has taken into account these steps to strengthen CLP according to the conditions and priorities of each beneficiary country.

The sixth and seventh steps relate to cooperation mechanisms in the field of CLP. Cooperation can be either formal, achieved through bilateral agreements and RTAs, or informal, as in the case of the International Competition Network. The sixth step, peer review, represents a step up in the evolution of inter-agency cooperation through the exchange of experiences. It allows competition agencies from developing countries to learn from more advanced countries, with a focus on the way advisory services to the agencies are introduced by the examined agency. OECD has carried out peer reviews in the case of Argentina, Brazil, Chile, Mexico and Peru.⁵⁹ UNCTAD peer reviews of CLP have proven to be quite successful, based on the practices adopted from the recommendations provided.⁶⁰ With regards to the seventh step, those countries which have included negative or positive comity in their cooperation agreements may attain interesting results in terms of challenging cross-border anticompetitive practices.⁶¹ In summary, TA programs need to comply with certain elements to ensure their efficiency. Figure 1 provides a “checklist” of the COMPAL program and its contributions to a pro-development approach to competition.

59. See generally OECD/IDB, *Peer Reviews*, *supra* note 13.

60. See generally UNCTAD, *Voluntary Peer Review of Competition Policy: West African Economic Monetary Union, Benin and Senegal (Overview)*, 22–34, U.N. Doc. UNCTAD/DITC/CLP/2007/1(Overview) (2007), available at http://www.unctad.org/en/docs/ditclp20071overview_en.pdf (noting the many positive gains, such as implementation of legislation, but also lamenting the lack of litigation of anticompetitive practices).

61. Inter-American Development Bank, *Dictionary of Trade Terms: Positive & Negative Comity*, http://www.iadb.org/research/Tradedictionary/term_desc.cfm?language=English&id=1068 (last visited September 1, 2007) (“Under the concept of positive comity, cases involving anti-competitive practices originating in one country but affecting another can be referred to the competition agency of the country where such practices have originated for appropriate action. Principles of negative comity mean that countries (Parties) would take into account the important and clearly stated trade interests of other countries before action is taken in particular cases.”).

FIGURE 1:

HOW THE COMPAL PROGRAM CONTRIBUTES TOWARD MAKING CLP A
PART OF THE NATIONAL AGENDA

- Sharing responsibility through co-management between UNCTAD and national coordinators
- Introducing corrective measures
- Ensuring the feeling of ownership
- Providing a national, regional, and international dimension
- Providing opportunities to strengthen consultation, exchange dialogue, and exchange experiences
- Widely disseminating the program as a reference for other TA programs and initiatives
- Providing the comparative advantage of program personnel (staff, experts, consultants)
- Targeting needs
- Providing opportunities for strengthening human and institutional skills
- Providing accountability and tools for sustainability

II. COOPERATION IN COMPETITION LAW AND POLICY IN LATIN AMERICA:
IMPLEMENTING COMPETITION PROVISIONS IN RTAS

The issue of competition provisions in RTAs has being widely analyzed, most recently by UNCTAD, as a means of assisting countries in their negotiations on trade agreements, which contain or aim to include such provisions. In 2005, initial research regarding the implementation of such agreements found that countries were “ready to ink” but “not ready to act.”⁶² Based on questionnaires sent to a number of competition agencies and competition-related institutions in developing countries, the lack of coordination between trade and competition negotiators was considered a key factor contributing to problems with implementation.

With the aim of further examining these problems, UNCTAD, with support from IDRC, conducted an in-depth analysis of the obstacles to implementation.⁶³ It argued that the implementation of competition provi-

62. See Lucian Cernat, *Eager to Ink, but Ready to Act? RTA Proliferation and International Cooperation on Competition Policy*, in UNCTAD, *Competition Provisions in RTAs*, *supra* note 4, at 1.

63. See generally UNCTAD, *Implementing Competition Provisions in RTAs*, *supra* note 5.

sions at a regional level relies on adequate enforcement of CLP at the national level. Additionally, cooperation may be hindered if there is no national instrument in place to provide support. As discussed, the conditions of competition at the local level are fundamental to understanding the general benefits that competition policy can provide for economic development. The connection between national and regional CLPs has encouraged UNCTAD to analyze competition in sensitive economic sectors of developing countries.⁶⁴ This led to the need to illustrate how competition law enforcement translates into realizing social objectives, as understood through the lenses of the MDGs.

The rationale for the emphasis placed on cooperation in the field of CLP is based on the impact of the increasing cross-border anticompetitive practices that affect developing countries. Irrespective of whether cooperation has been carried out through formal or informal channels, or within or outside of formal agreements, the need for a national CLP has become evident. Countries simply cannot ensure the full benefits of cooperation if there is no established competition law in place backed by an enforcement institution. For example, countries can cooperate on case investigations, legal treaties, exchange of staff, exchange of experiences and peer reviews, all while agreeing to comply with regional competition rules.

Cooperation in the field of CLP has been accompanied by the proliferation of RTAs. Bilateral cooperation has been carried out either through formal channels, as in the case of FTAs, or through informal channels. Particularly, FTAs signed between the U.S. and some Latin American countries have come to an end following the halt in the negotiations of a Free Trade Area of the Americas. The experience gained through those negotiations proved to be very valuable for the conclusion of current bilateral agreements. Consequently, a comprehensive compendium of laws was established, which has proven essential in the pursuit of work on CLPs.⁶⁵

A. *Cooperation Through Formal Regional Agreements*

Since 1996, the number of bilateral and regional agreements which include Latin American countries as partners has grown, and comprises a new chapter on competition law. A non-exhaustive reference to these agreements follows.

64. *Id.*

65. See FTAA, Third Draft FTAA Agreement—Nov. 21, 2003, http://www.ftaa-alca.org/FTAA/Draft03/Index_e.asp (last visited Oct. 17, 2007).

Latin American countries have negotiated competition chapters under two main schemes. On one hand, negotiation has taken place under agreements that focus on monopolies and state enterprises, such as NAFTA.⁶⁶ However, NAFTA does not contain community norms similar to Articles 85 and 86 of the Treaty of Rome. Instead, the national antitrust laws from the three member countries (Canada, Mexico and the U.S.) remain in force, but do not apply to the wider market of the FTA. These agreements have also given rise to ATA agreements that include cooperation on substantial issues and TA. In some cases, like Mexico, they include conflict prevention.⁶⁷

NAFTA has been considered a point of reference for negotiating other agreements, such as the bilateral agreement signed with Chile and Colombia. After thirteen years of bilateral conversations and two rounds of negotiations, the U.S.-Chile FTA entered into force on January 1, 2004.⁶⁸ Chapter 16 relates to “Competition Policy, Designated Monopolies, and State Enterprises.”

The U.S.-Colombia Trade Promotion Agreement was signed on November 22, 2006. Chapter 13 relates to “Competition Policy, Designated Monopolies, and State Enterprises.”⁶⁹ The U.S.-Peru FTA is still under negotiation.⁷⁰

The Canada-Chile agreement (signed in December 1996 and entered into force in July 1997) does not envisage a supranational norm or the application of national competition laws beyond the borders of each member country. Similar to NAFTA, the agreement refers to “Competition Policy, Monopolies and State Enterprises” and the need for cooperation and coordination among authorities in furthering the competition law enforcement in the FTA.⁷¹ The parties are required to cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification,

66. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

67. CEPAL, Division of International Trade and Integration, *Cooperación en políticas de competencia y acuerdos comerciales de América Latina y el Caribe: desarrollo y perspectivas* [Cooperation on Competition Policy and Trade Agreements in Latin America and the Caribbean: Development and Perspectives], CEPAL Comercio Internacional Serie No. 73 (June 2006) (prepared by Verónica Silva & Ana María Álvarez), available at <http://www.eclac.org/publicaciones/xml/4/26164/S73CI-L2559e-P.pdf>.

68. Free Trade Agreement, U.S.-Chile, June 6, 2003, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

69. Trade Promotion Agreement, U.S.-Colom., Ch. 13, Nov. 22, 2006, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/asset_upload_file552_10187.pdf.

70. United States Trade Representative, Bilateral Trade Agreements, http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Oct. 20, 2007).

71. Free Trade Agreement, Can.-Chile, Chapter J, Dec. 5, 1996, 36 I.L.M. 1067 (1997).

consultation and exchange of information relative to the enforcement of competition law and policies in the free trade area.

Accordingly, the competition chapter in the Canada-Costa Rica agreement (signed April 23, 2001 and entered into force in November 2002) encapsulates cooperation and coordination of enforcement actions, including notification, consultation and exchange of information.⁷² Despite the varying levels of socio-economic development between the partners, the agreement is being applied successfully.

The U.S.-Central American-Dominican Republic FTA, known as CAFTA-DR, does not include competition provisions.⁷³ However, the chapter on telecommunications, which refers to competition, (prohibiting suppliers from engaging in anticompetitive practices) specifically addresses the case of Costa Rica.⁷⁴ Costa Rica approved CAFTA-DR in an October 2007 referendum.⁷⁵

On the other hand, the European Union (EU) style agreement involves commitment from its members when applying competition law in trade agreements. To this end, cooperation and coordination (without pursuing harmonization among legislations) is a major goal.

It is worth noting that all the EU's recently concluded bilateral FTAs contain provisions on competition issues, "albeit to very different degrees of detail."⁷⁶ The EU and Mexico Economic Partnership, Political Coordina-

72. Free Trade Agreement, Can.-Costa Rica, Apr. 23, 2001, available at http://www.dfait-maeci.gc.ca/tna%2Dnac/Costa_Rica_toc-en.asp.

73. The United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua signed CAFTA-DR in August 2004. Implementing legislation for CAFTA-DR passed the U.S. Senate in June 2005 and the House of Representatives in July 2005. It was signed by the President in August 2005. CAFTA-DR entered into force for El Salvador, Honduras, Nicaragua and Guatemala. In the case of the Dominican Republic, the Senate has already approved the agreement and is expected to pass it soon after the Dominican administration adopts the implementation requirements. Pending ratification by Costa Rica. See Free Trade Agreement, U.S.-Cent. Am.-Dom. Rep., Aug. 5, 2004, available at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html; USDA, Foreign Agricultural Service, Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), <http://www.fas.usda.gov/itp/CAFTA/cafta.asp> (last visited Oct. 18, 2007).

74. See Free Trade Agreement, U.S.-Cent. Am.-Dom. Rep., ch. 13, annex 13, pt. IV(8), Aug. 5, 2004 available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file498_3933.pdf. ("Costa Rica shall maintain appropriate measures for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in anti-competitive practices, such as not making available, on a timely basis, technical information about essential facilities and commercially relevant information that is necessary for them to provide public telecommunications services.").

75. Press Release, Office of the United States Trade Representative, Ambassador Schwab Statement Regarding the Outcome of the CAFTA Referendum (Oct. 8, 2007), available at http://www.ustr.gov/Document_Library/Press_Releases/2007/October/Ambassador_Schwab_statement_regarding_the_outcome_of_the_CAFTA_referendum.html.

76. Stefan Szepesi, *Comparing EU Free Trade Agreements: Competition Policy and State Aid*, EUR. CTR. FOR DEV. POL'Y MGMT. INBRIEF, July 2004, at 6e-1, <http://www.ecdpm.org> (click on "Pub-

tion and Cooperation Agreement, (known as the “Global Agreement”) was signed on December 8, 1997, entered into force in October of 2000.⁷⁷ In its competition provisions, the Global Agreement is similar in spirit to the Agreement concluded with South Africa, known as the Trade, Development and Cooperation Agreement.⁷⁸ However, it substantially differs in certain provisions. In some areas, such as consultation and information exchange, the agreement is much more detailed. In others, like state aid and transparency, provisions are entirely absent. The so-called Global Agreement has the most extensive provisions with respect to the parties’ competition policies. Besides the explicit recognition of both parties’ competition laws, the agreement specifies coordination and cooperation in a variety of fields and lays out detailed procedures on how these provisions should be implemented.

The EU-Chile Association Agreement, signed in November 2002 and provisionally in effect since February 2003, mirrors the Global Agreement between the EU and Mexico.⁷⁹ In addition to the provisions on political dialogue and cooperation issues, the agreement is currently the most far reaching in the EU: “It stresses cooperation between competition authorities through (early) notification, consultation, exchange of non-confidential information and technical assistance, and recognizes competition laws and authorities in both territories.”⁸⁰

However, the EU-Chile Agreement notably differs from the Global Agreement, as the agreement with Chile provides for the exchange of information on state aid and entails a provision concerning public enterprises (including monopolies) entrusted with special or exclusive rights, which is

lications” hyperlink, then on “Publication Type”; select “In Brief” link, then choose “Show Complete List” and select “InBrief 6E: Comparing EU free trade agreements: Competition Policy and State Aid”).

77. Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, Dec. 8, 1997, *available at* http://ec.europa.eu/external_relations/mexico/doc/a3_acuerdo_en.pdf.

78. The EU and South Africa signed the Trade, Development and Cooperation Agreement on October 11, 1999; the agreement has been in force, “provisionally and partially,” since January 2000, and has been fully in force since May 2004.

[The Trade, Development and Cooperation Agreement] covers the main competition and state aid issues. However, the agreement emphasizes mutual recognition and cooperation/coordination in the Cooperation Council rather than any specific competition provisions in EU law. Its provisions concerning state aid offer scope for a broader interpretation due to the possibility to keep this in place in cases where ‘specific public policy objectives’ are pursued, which is in principle the aim of state aid.

Szepesi, *supra* note 76, at 3–4.

79. Agreement Establishing an Association Between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, Nov. 18, 2002, *available at* http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_111620.pdf.

80. Szepesi, *supra* note 76, at 5 (citations omitted).

not present in the EU-Mexico Agreement. It also provides for increased transparency on potential trade-distorting state aid.⁸¹

When discussing EU negotiations with regional groupings involving Latin American countries, it is worth examining the Andean Community (AC) agreement, which is aimed at harmonizing rules on free competition in the Andean sub-region. As a result of this agreement, the AC Commission Decision 608 (adopted March 2005) regulates free competition in the sub-region.⁸² It prohibits and sanctions behaviors restraining free competition, which would otherwise harm the sub-region. It is imperative whether these activities are exercised within the territory of one or more member countries, or of a country outside the AC. Practices originating in or affecting a single member country or other unforeseen situations are excluded from the effects of this Decision and will be governed by the respective member countries' national legislation. According to Decision 608, if there is evidence of behavior that could unduly hamper market competition the AC General Secretariat can initiate an investigation on its own, or at the behest of: (1) qualified national authorities in the area of free competition, (2) a member country's national integration bodies, (3) natural/artificial persons under public or private law, or (4) consumers' organizations or other entities.⁸³

Because Bolivia and Ecuador do not have competition laws in place, Decision 608 applies to these countries at a national level, and an authority in charge of its application is to be nominated by the country. Ecuador has already established this authority at the Ministry of Trade, Industrialization, Fish and Competitiveness, which is in charge of dealing with the decision. In addition, Decision 616 sanctions the application of the law in the national territory.⁸⁴ In the case of Bolivia, the Vice Ministry of Trade and Exports is in charge of the implementation of Decision 608.

Transferring a CLP from an RTA raises several issues, both with the transferred rules themselves and possibly with the national institutions that will apply the transferred rules. Others, however, are relegated to the background in which the transferred rules take root.⁸⁵ Therefore, it seems that

81. *Id.*

82. Decision 608, *supra* note 17.

83. Frédéric Jenny & Pierre M. Horna, *Modernization of the European System of Competition Law Enforcement: Lessons for Other Regional Groupings*, in UNCTAD, *Competition Provisions in RTAs*, *supra* note 4, at 304.

84. Pierre M. Horna & Bahri Özgür Kayah, *National Implementation of Competition-Related Provisions in Bilateral and Regional Trade Agreements*, in UNCTAD, *Implementing Competition Provisions in RTAs*, *supra* note 5, at 24.

85. See Francisco Marcos, *Downloading Competition Law from a Regional Trade Agreement (RTA): A New Strategy to Introduce Competition Law in Bolivia and Ecuador* 9 (Berkeley Program in

the adoption of an RTA is efficient only if it is used as a temporary measure, serving to push forward the national law.

In relation to the initiative taken by the Central American countries towards attaining harmonization of competition rules, the Secretariat for Central American Economic Integration has been providing support to a working group on competition policy that was established in May of 2006. As seen earlier, all Central American countries except for Guatemala have a competition law.⁸⁶ The discussions of the group are based on the Protocol of Guatemala, signed in 1993 and aimed at establishing and consolidating economic integration in this sub-region.

Given that Central American countries house small economies, they are negotiating on behalf of the Central American sub-region. Mercosur's Fortaleza Protocol aims at setting up a common competition regime among Mercosur countries (which include Argentina, Brazil, Paraguay and Uruguay).⁸⁷ However, one of the basic assumptions underlying that protocol is that the regional disciplines are to be enforced by national authorities, as the common regime does not include supranational mechanisms. Thus, any use of the protocol's instruments as substitutes for domestic enforcement must be temporary. For now, discussions are still underway; only Brazil has ratified the agreement, and Paraguay is positioned without a CLP. Recently, Venezuela joined the agreement, but remains inactive in non-central issues of a trade agreement (such as competition).

As demonstrated, there are countries that are quite active in the formalization of agreements, which are for the most part still in the process of negotiation. For example, Chile and Mexico have established agreements with other Latin American and developed economies, with the European Free Trade Association, and with Asian countries.⁸⁸ In the Asia-Pacific Economic Cooperation, there is a group on competition advocacy which provides a platform for exchange of experiences and includes Chile, Mexico, and Peru as members.

Law and Econ., ALACDE Ann. Papers, Paper No. 050107-8, 2007), available at <http://repositories.cdlib.org/bple/alacde/050107-8/>.

86. In Guatemala, the Direction on Competition has been working on this issue, in particular by carrying out advocacy functions with the aim of promoting a competition culture.

87. JOSÉ TAVARES DE ARAUJO, JR., TOWARD A COMMON COMPETITION POLICY IN MERCOSUR 1 (2001), http://www.iadb.org/sds/doc/IFM-Tavares_Jos%C3%A9-E.pdf.

88. Gary C. Hufbauer & Yee Wong, *Prospects for Regional Free Trade in Asia* tbls. 1-5 (Institute for Int'l Econ. Working Paper Series, Paper No. WP 05-12, 2005), available at <http://www.iie.com/publications/wp/wp05-12.pdf>.

B. Cooperation Outside Regional Agreements

Although RTA cooperation on competition rules has been useful, bilateral and informal cooperation outside the agreements has proven to be more effective in some cases. Some believe that agreements such as ATAs or Mutual Legal Assistance in Criminal Matters Treaties, directly negotiated and implemented by the legal competition authorities of the respective countries, may have more relevance.

The contact established between competition authorities resulting from their participation in the UNCTAD yearly meetings of the Intergovernmental Group of Experts on Competition Law and Policy, as well as membership in the International Competition Network, has been an effective means of furthering cooperation. In this regard, it is argued that even when two countries are party to an RTA with competition cooperation provisions, informal cooperation seems to be encouraged by the closeness of the competition authorities rather than by the wording of the agreement. Furthermore, inter-agency cooperation may also result from the network effect of the proliferation of RTAs, including competition provisions. UNCTAD/IDRC research in 2005 found that “competition authorities may effectively cooperate even if not intended, simply because they are both signatories to RTAs which have a common third party.”⁸⁹

Apparently, ATAs provide stronger links between authorities than the competition provisions in RTAs. This could be attributed in part to the fact that they are negotiated by competition authorities rather than by trade officials. This has two potential outcomes: competition authorities meet each other and open communication channels between the agencies; being aware of each other’s needs, in turn, means each is theoretically better situated to design enforceable agreements. This could have been the case in the Brazil–U.S. ATA, concluded outside of an RTA, which apparently formed the basis of the liaison between the authorities and encouraged cooperation between them.⁹⁰

Other recent experiences in the Latin American region include the ATA between Argentina and Brazil, which facilitates information exchange between the two competition authorities. This ATA was initiated because not enough cooperation was taking place within the framework of Mercosur. Moreover, Chile and Mexico have also signed other ATAs. The El

89. Lakshmi Puri, *Executive Summary* to UNCTAD, *Competition Provisions in RTAs*, *supra* note 4, at xvi.

90. See Barbara Rosenberg, *Competition Law and Policy Provisions in International Agreements: Assessing the Low Level of International Implementation*, in UNCTAD, *Implementing Competition Provisions in RTAs*, *supra* note 5, at 12–13.

Salvador Competition Authority has also strengthened its relations with the Brazilian Secretariat for Economic Law (part of the Brazilian Competition System), and encourages the exchange of experiences and practices. A recent agreement signed between the competition authorities of El Salvador and Chile aims at developing a process of formal and informal consultations on competition cases and sectors under investigation.⁹¹ The exchange of staff and activities, linked to competition culture, is also included. The agreement shows the results of a political will aimed at harboring ties within the two Latin American countries.

C. *Facing Implementation Problems at the Regional Level*

The implementation constraints faced by developing countries in establishing competition provisions in RTAs have been described above, and this section summarizes the exchange of experiences achieved through the series of seminars organized by UNCTAD (supported by IDRC) and aimed at analyzing the implementation of these agreements. The findings of the new publication are applied here in the context of Latin American countries.

The importance of an enhanced coordination between trade and competition negotiators is discussed first. This aspect has been reflected in various occasions, particularly since UNCTAD published its report on competition provisions in RTAs in 2005.⁹² Latin American countries need to ensure a coherent approach between negotiators, which would contribute to the efficient implementation of the agreements. Trade negotiators may have a general view of the main policy goals of the country in the agreement, related mostly to development issues and market access, whereas competition negotiators are able to provide insights into the potential cross-border anticompetitive practices affecting the country.

Secondly, the geographical reach of these agreements has gone beyond the traditional confines of the “regional/geographical proximity” dimension. An increasing number of RTAs today are negotiated and concluded between regional groupings of two or more distant countries, often separated by oceans.

91. *See* Acuerdo Complementario para la Asistencia Técnica entre el Tribunal Defensa de la Libre Competencia de la Republica de Chile (TDLC) y la Superintendencia de Competencia de la Republica de el Salvador (SC) [Supplementary Agreement for Technical Assistance Between the Defense Tribunal for Free Competition of the Republic of Chile and the Superintendent of Competition for the Republic of El Salvador], Chile-El Sal., May 14, 2007, available at http://www.sc.gob.sv/publicaciones/Convenios/conv_inshom_2.pdf.

92. UNCTAD, *Competition Provisions in RTAs*, *supra* note 4.

This proliferation has led to a veritable “spaghetti bowl” of RTAs and has resulted in a complex international trading environment for traders, policy makers, and trade negotiators. Although the duplication of commitments is seen mostly in the African countries, some Latin American countries are negotiating with different partners both at the bilateral and regional level. Therefore, it is necessary to be aware of the possible existence of overlapping agreements and negotiations.

This brings us to the discussion of the risks involved in importing certain provisions that are not adaptable to Latin American countries. To adequately mold RTAs into effective instruments of development, there is a need to clearly establish policies addressing development, trade, and financial needs. These policies build upon the current context of the multilateral trading system, in which regionalism holds an important place. Development objectives such as “special and differential treatment” provisions,⁹³ support for reforms, building of supply capacities, and increasing competitiveness deserve priority attention in RTAs.

Competition provisions are not only found in competition chapters. Some authors argue that their competition language is being increasingly used in non-competition-specific chapters of RTAs.⁹⁴ Such is the case in the EC-Chile Interim Agreement, which was adopted in 2002, and encompasses political and economic objectives.⁹⁵ The competition chapter seeks to ensure that competition laws are not applied in ways that diminish the benefits of liberalization. It contains procedural provisions such as negative and positive comity, similar to those seen in an ATA. Horizontal principles of the agreement (e.g., non-discrimination) not found in the section on competition may potentially be applicable in the domain of CLP.

When entering into a negotiation agreement, Latin American countries need to bear in mind that competition elements in RTAs are comprised not only of provisions in chapters dealing specifically with competition, but also competition principles embodied elsewhere in the relevant agreements. These include: (1) the nature and content of competition principles/instruments embodied in chapters of the agreement dealing with individual economic sectors (e.g., telecoms, transportation, financial services),

93. Alexander Keck & Patrick Low, *Special and Differential Treatment in the WTO: Why, When and How?* 3 (WTO, Econ. Research and Statistics Division, Staff Working Paper No. ERSD-2004-03 2004), available at http://www.wto.org/english/res_e/reser_e/ersd200403_e.htm.

94. Robert D. Anderson & Simon J. Evenett, *Incorporating Competition Elements into Regional Trade Agreements: Characterization and Empirical Analysis* 47 (July 24, 2006) (unpublished manuscript, available at <http://www.evenett.com/working/CompPrincInRTAs.pdf>).

95. Interim Agreement, EC-Chile, Nov. 18, 2002, available at <http://www.worldtradelaw.net/fta/agreements/ecchilfta.pdf>.

in addition to provisions found in general chapters on “competition;” (2) whether the application of competition law or policy is subject to general (as opposed to competition-specific) principles regarding non-discrimination, transparency, and procedural fairness; (3) whether the RTA requires the adoption of general competition legislation or establishes individual or common enforcement authorities; and (4) the emphasis placed on and enforceability of rules relating to designated monopolies and state-owned enterprises as compared to private anti-competitive practices.

As part of the reflections resulting from the aforementioned research, these references may be useful to on-going or future negotiations related to competition. For example, at the moment, there is an ongoing discussion on whether “new issues” (which include investment, competition policy, and procurement) should be included in the current negotiations of the Economic Partnership Agreements with ACP countries⁹⁶ (namely, former signatories of the Cotonou Agreement). Cuba and the Dominican Republic participated in these negotiations; the latter also participates in the CARIFORUM-EU Economic Partnership Agreement negotiations⁹⁷ and is currently discussing the General Bill on Antitrust (“Ley General de Defensa de la Competencia”). This draft is now awaiting approval at various institutional steps.

Another lesson learned from this section is the need for a general CLP before entering into an RTA. As seen earlier, cooperation can be beneficial only where a domestic CLP is in place. This will allow coordination and the strengthening of bargaining power within the RTAs. Coordination may be made easier through multilateral agreements, since negotiation rules accustom countries to a give-and-take approach, which in turn makes tradeoffs between different policy areas possible.

However, developing countries need to rationalize commitments relating to competition provisions while taking into consideration their national priorities. Competition provisions in RTAs may have an impact on bringing forward the date of enactment of a competition law, on strengthening the deterrent effect of the national law, on changing the political economy of

96. For a list of those countries, see The Secretariat of the African, Caribbean and Pacific Group of States, ACP Group of States, http://www.acpsec.org/en/acp_states.htm (last visited Oct. 23, 2007).

97. CARIFORUM includes fourteen of the CARICOM member states (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago) as well as Haiti and the Dominican Republic. Food and Agriculture Organization of the United Nations, Caribbean Forum (CARIFORUM) Fact Sheet, http://www.fao.org/spfs/pdf/fact_cariforum.pdf (last visited Nov. 16, 2007); Caribbean Regional Negotiating Machinery, Negotiating Theaters, <http://www.crn.org/acp.htm> (last visited Nov. 16, 2007).

domestic competition enforcement, or on contributing to the strengthening of the powers, budget, and resources of competition agencies.

To ensure that these potential benefits and the positive spillover effects are translated from the regional to the national level, local conditions should be improved. In this regard, countries would need to tackle the bottleneck scenarios resulting from: (1) weak competition; (2) culture; (3) problems with the overall effectiveness of other government institutions (apart from competition agencies); (4) the non-optimality of the negotiated competition provisions; and (5) the relative underdevelopment of domestic competition institutions. All of these elements provide an interesting insight into the nature of a well-founded TA agenda.

CONCLUSION

Through research and the experience gained through technical assistance in Latin American countries and other regions, this article has attempted to respond to some of the issues with a pro-development approach. Various arguments have been advanced to show the benefits of competition on development. In recent years there has been an exponential increase in the need for demonstrating how competition policy can contribute towards enhancing social conditions and alleviating poverty. For example, it has been argued that by removing barriers to entry competition policy helps create a fertile environment for entrepreneurial development. Competition also ensures a more efficient allocation of resources in the economy and allows for lower prices and better quality on an increased variety of available products. Effective competition law enforcement strengthens competition, which stimulates productivity, innovation, and ultimately growth. This brings us full circle, with growth being the key to poverty alleviation. These arguments regarding competition and development are the guiding principles of the present article. However, there are some aspects of competition that require further analysis.

Competition policy addresses the issue of poverty in two ways. First, it does so directly by preventing and punishing unfair practices in key markets for the poor (food, health, public transport, fuels, and housing). Poverty is also addressed by enhancing innovation and growth through tough market competition. Regulation and competition not only aim to protect markets and enterprises and to ensure firm rivalry, but they also strive towards establishing efficiency as a tool for consumer welfare. In some countries, promoting advocacy for competition and effective regulation is easier if it is seen through the lens of consumer protection, which targets the poorer sections of the population. Consequently, a CLP is beneficial and

will be strongly supported by citizens and politicians only if it is primarily enforced in response to local needs.

Furthermore, when carrying out their operations, multinational companies are used to their own regulations, which include CLPs. Developing countries need to create a framework within their national context to create a fair business environment suitable for attracting foreign direct investment. Additionally, their own enterprises need to learn to operate in a developed world-competitive framework, which would contribute to bringing them onto the international platform. CLP stops at borders while anticompetitive practices go beyond them. This is a handicap that needs to be overcome by both developed and developing countries.

This article also addressed the ways a CLP can be approached with a pro-poor orientation, so that it may be included in the menu of pro-poor policies proposed by the MDG initiative. This subject has not been addressed in detail here, and requires further research.

In summary, we may draw some policy conclusions in the context of successful implementation of a CLP. First, it is imperative to continue advocacy programs to raise awareness among policymakers, public officials, local businessmen, pro-consumers, NGOs, and citizens. If this is accomplished, the benefits of effective CLP enforcement at the national level (efficacy of the norm) will be established as a prior condition for the effective enforcement of cooperation in this field. Finally, a TA program to strengthen the CLP should be based primarily on local priorities. Once the factors addressing local needs are cemented in place, regional initiatives must be tackled. This depends heavily upon similarities between member countries and on the political will to cooperate.