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Chapter XI: Regional Cooperation Agreement and Competition Policy - the Case of Andean Community



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Chapter XI

REGIONAL COOPERATION AGREEMENT AND COMPETITION POLICY—THE CASE OF ANDEAN COMMUNITY

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The Andean Community is the result of two historic and economic processes. The first is related to the need for a collective response to address and resolve the problem of underdevelopment in the region; the second is due to the successful experience of European integration. These movements formed the basis for the establishment of the Andean Community.

From an institutional point of view, Article 48 of the Cartagena Agreement defines the Andean Community as a subregional organization with its own distinct legal identity composed of five member States (Bolivia, Colombia, Ecuador, Peru and Venezuela) and regional bodies and institutions represented in the so-called “Andean System of Integration” (SAI). These five Andean countries have a combined population of 120 million, cover a surface of 4,710,000 km², and have a total GDP of approximately US\$ 300 billion.

Within the framework of the Andean System of Integration, regional bodies and institutions work in a coordinated manner with a view to deepening Andean subregional integration, promoting its external reach, as well as consolidating and strengthening actions related to the integration process.

As part of the SAI, the General Secretariat is the executive body of the Andean Community. It has the statutory capacity to initiate the legislative process, as it is authorized to formulate proposals for decision by the two Andean Community decision-making bodies, namely the Andean Council of Ministers of External Relations and the Commission of the Andean Community. Its functions also include promoting the interests of the subregion; giving technical support, whenever appropriate, to other bodies and institutions of the Andean Integration System so as to ensure the application of this Agreement and compliance with the provisions contained in Andean communitarian law, as well as resolving matters submitted to its jurisdiction in accordance with Andean law.

The principal objectives of the Andean Community as established in the Cartagena Agreement are that it should:

- Promote the equitable and harmonious development of its member countries under the principle of equity;
- Accelerate growth through integration, and economic and social cooperation;
- Facilitate the participation of member countries in the regional integration process with a view to the progressive formation of the Latin American Common Market; and
- Ensure the progressive improvement of the living standards of its population.

There have been several different stages in the evolution of the policies and focus of the Andean Community throughout its 35-year history, and these stages can be defined in the following manner:

- 1960-1970 – This period was characterized by regional developments based on the creation of a larger market to encourage industrial development through import substitution and protection of local industries.
- 1980s – This period was marked by debt crisis, adjustment policy and stagnation of intra-Community trade;
- 1990s – This period saw the opening of markets for international trade under the concept of “open regionalism”.

During this process, progress has been achieved in the following areas: intra-Community free trade has been accompanied by substantial and continuous improvements in the quality of trade (greater value-added that generates sources for employment); an export basis that allows learning and further outreach in third markets; significant progress towards a common market (free movement of persons, labour migration – Decisions 503 and 545 respectively); the constitution of Andean legislation and dispute settlement bodies; extension of cooperation into new areas (APEC, security, human rights fight against drugs); and, collective negotiations with third countries (GSP, ATPDEA, MERCOSUR).

Nonetheless, important challenges still remain both with respect to the internal agenda (e.g. overcoming poverty, exclusion and inequality, strengthening of democratic governance) and to the external agenda (e.g. compatibility with multilateral, hemispheric and regional relations with a view to negotiating free trade agreements with major trading partners). Both must be addressed to respond to the development needs of the region in the context of globalization.

Against this background, strategic programmes are being implemented to create regional synergies and to promote Andean subregional development through deeper integration. These programmes seek to achieve convergence towards free trade and deepening of the Andean Common Market; development of competitiveness in the subregion; the implementation of the Andean social agenda, and cooperation in new strategic themes such as, energy, biodiversity and sustainable development, and information society and the connectivity.

Various legal instruments form the foundation of a community legal order. These include:

- The Cartagena Agreement, its protocols and additional instruments;
- The Treaty of the Andean Community Justice Tribunal, its protocols and additional instruments;
- Decisions of the Andean Council of Ministers of External Relations and the Commission of the Andean Community;
- Resolutions of the General Secretariat of the Andean Community; and,
- Conventions adopted by the member countries within the framework of the Andean integration process.

The most distinctive feature of this judicial order relates to its supranational nature as expressed by the doctrine called "direct applicability" and "pre-eminence". The first manifestation of the concept of supranationality, direct applicability, implies that "the Decisions taken oblige member countries as of the date when they are approved by the Commission" and "the Decisions of the Commission will be directly applicable in the member

countries from the date of their publication in the Official Gazette of the Agreement, unless the same Decisions indicate a later date ...".

Accordingly, Andean norms are directly applicable to and obligatory for the Member countries in all their instances and to the institutions of the Andean Community. This means that the Andean norms apply to all the authorities of the Member States without distinction in all its territory and without limitation as regards state, regional or municipal order, and that the community citizen acquires obligations and rights that can be enforced by the national Courts as well as by the national authorities.

The second distinctive characteristic of Andean Community law, namely the concept of pre-eminence, establishes that community law takes precedence over national law regardless the level of the latter. Accordingly, when a conflict arises between national laws and community laws, pre-eminence requires that the latter prevail.

Competition law in the Andean Community

In Andean law, disciplines related to competition policy are currently being developed. At the national level, Colombia, Peru and Venezuela now have national legislation regarding competition policy. Bolivia and Ecuador are in the process of developing their respective norms.

At the community level, under the provisions of Articles 93 and 94 of the Cartagena Agreement, the Andean Community adopted Decision 285 with the objective of preventing or correcting distortions in competition caused by restrictive anticompetitive practices. The Decision applies to the following matters:

- Practices originating in a member country with effect on another member;
- Practices originating in more than one member country with effect on other members; and,
- Practices originated outside the subregion with effect on two or more member countries.

Furthermore, the Decision applies also to agreements, concerted practices or parallel actions among competitors, and the abuse of dominant position. The Andean Community is intending to update Decision 285 in the near future and this will further promote competition in the Andean Community.

It would be significant if national competition authorities could assist the General Secretariat in the first phase of its investigation by providing evidence for the determination of anticompetitive practices.

Agreements on international technical cooperation

In order to strengthen national and Andean competition law, the General Secretariat of the Andean Community has signed several agreements on international technical cooperation. Two of the most significant operative agreements of this sort are: the Andean Community – European Union Technical Cooperation Agreement “Harmonization of Competition Regulations in the Andean Region (Project Competencia)”; and the “Special Objective Grant Agreement between the General Secretariat of the Andean Community and the United States

for Participation of the Andean Community in the Free Trade Area of the Americas” (USAID Grant Agreement), of which competition policy is an integral part.

In the first of these technical cooperation projects, the General Secretariat, on behalf of Andean Community member countries, and the European Commission on behalf of the European Community, signed an Agreement on Financing for the Development of "Project Competencia". Launched in November 2002, the project has a budget of 2 million euros from the European Commission; countries benefiting from these three-year projects have contributed 1.5 million euros.

Five member countries are benefiting from the scheme: Bolivia, Colombia, Ecuador, Peru and Venezuela, as well as the Community institutions, including the General Secretariat, the Andean Community Justice Tribunal, and institutions responsible for the application and control of competition legislation at the community level. The project has the following objectives:

- To improve subregional and national competition laws;
- To strengthen Andean institutions responsible for the application and control of competition laws; and
- To promote a culture of competition.

To achieve these objectives, various activities are being implemented with the participation of European and Andean experts. These include subregional and national seminars; legal consultancies and sectorial studies; training of civil servants and judges responsible for the application and control of competition law; internships; providing equipment; improving the web pages of the beneficiaries; promoting competition forums and virtual networks; establishing libraries; and preparing publications.

The second programme is the “Andean Community – United States Agreement on Technical Cooperation / Competencia” which is being executed through USAID's Regional Office. The US Government began providing technical assistance to the project in July 2003, and the project is expected to end in February 2005. It is a part of the capacity-building assistance provided regionally to Andean Community member countries within the framework of the “Special Objective Grant Agreement between the General Secretariat of the Andean Community and the United States for Participation of the Andean Community in the Free Trade Area of the Americas”.

The objective of this programme is to support Andean Community member countries to develop harmonized competition policies criteria through workshops on advanced investigation techniques for different anticompetitive practices. These events are targeted at civil servants working in regional competition authorities or government institutions responsible for national competition law and General Secretariat employees.

As Bolivia and Ecuador still do not have any competition legislation on their statute books, the programme foresees special technical assistance to these countries to support them in the elaboration and dissemination of draft legislations on competition policy.

The General Secretary of the Andean Community and the Secretary-General of the UNCTAD signed a Joint Declaration in October 1999 to deepen the cooperation between these two institutions. On the question of competition, they agreed to formulate a specific programme to

strengthen competition policies in the Andean Region. As a result of this cooperation agreement, Andean Community member countries will be provided with modern and efficient instruments to respond to the demands placed on them as a result of the integration process and globalization.