Competition policy in the FTAA: progress in the working group*

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Resumen

El Área de Libre Comercio de las Américas (ALCA) tiene como objetivo unir en un solo mercado a las treinta y cuatro economías del Hemisferio. Las negociaciones deberán concluir en el año 2005. Sin embargo, el año 2000 es crucial dado que los temas a ser negociados serán fijados en la agenda de negociación. Inicialmente se establecieron doce grupos de trabajo y luego fueron transformados en nueve grupos de negociación. Uno de estos grupos es el de Políticas de Competencia, y probablemente sus resultados tendrán los efectos más duraderos en cuanto el control de las prácticas de las empresas dentro de y entre las economías del ALCA. En este trabajo se discute la razón por la cual se incluye en las negociaciones el tema de las políticas de competencia. En general, responde a la tendencia observada en las dos últimas décadas de desregulación económica y liberalización comercial. La remoción de barreras en las fronteras debe estar acompañada de la remoción de barreras privadas, de tal manera que se provea de condiciones equiparables a todos los competidores del Hemisferio. A pesar de que existen discrepancias entre las políticas de competencia y las políticas comerciales, también existen fuertes complementariedades, de tal manera que ambas son esenciales para la formación de un área de libre comercio. Los avances en cuanto política de competencia en el ALCA son evaluados aquí. Se muestra que entre los países del Hemisferio las condiciones varían mucho en cuanto la implementación de estas políticas. No todos los países poseen una legislación de competencia y los que la poseen difieren en sus instituciones y su aplicación. La experiencia peruana en la aplicación de este tema también es presentada. Finalmente, se incluye algunas recomendaciones de política para la negociación.

Abstract

The objective of the Free Trade Area of the Americas (FTAA) is to unit the thirty four economies of the Hemisphere into a single market. The negotiations are

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supposed to be completed by the year 2005.Though year 2000 is crucial since all the negotiated issues will be settle in the agenda Initially, twelve working groups were established and, later, transformed into nine negotiation groups. Competition Policy is one these negotiation groups and it is probably the issue that would have long lasting effects over the behavior of firms among and within the FTAA economies. This paper discusses why and how Competition Policy is included in the FTAA. The removal of domestic entry barriers must be accompanied by the removal of private barriers, so equitable conditions for competitors throughout the Hemisphere are provided. Though, it is shown that there are dissimilar conditions among countries in the Hemisphere in terms of competition policy application. That is, not all countries have competition legislation and competition institutions; and for those who have, provisions, implementation and enforcement also differ. The Peruvian experience on this matters is presented and some policy recommendations for the negotiation process are included.

INTRODUCTION

Latin America integration is not a new issue in this part of the Hemisphere. Right after the independence wars from Europe, during the formation of the national states of America in the XIX century, the idea of conforming a single nation, at least for some South American countries, was an important issue of discussion. But it was until 1960, with the formation of Latin American Association of Free Trade (ALALC), that the integration objectives became concrete economic targets: the elimination of all trade barriers among all country members. Though the objectives were not achieved, so after 20 years with the creation of Latin American Integration Association (ALADI) the decision was to promote a progressive integration process, through increased trade flows among country members and bilateral and multilateral trade liberalization agreements. It was not an easy road, especially during the eighties, with the debt crisis, when countries were more focused in their macroeconomic problems. Many of them were isolated from the international trade and capital flows, but during the late eighties and early nineties a wave of economic stabilization and structural reforms opened the road to more trade with the rest of the world and in particular, among countries of the region. ALADI exports to its country members grew from 9,9% of its exports to the world in 1965 to 17,5% in 1995[1] (Tables enclosed in the appendix show the increased importance of interregional and intrasubregional trade flows in the nineties).

However, the most immediate precedent of the Free Trade Area of the Americas (FTAA) was the Bush initiative of the Americas in 1990. This initiative was followed by a particular situation where the GATT negotiations in the Uruguay Round were locked and the formation of regional trade blocks appeared to be the only imperfect substitute of multilateral openness. After the culmination of the Uruguay round, the interest for a hemispheric agreement did not fade away; the possibility of increased trade and capital flows was now a reality, not only between the northern hemisphere and the south, but among southern countries.

Therefore, in December 1994, in Miami, at the Summit of the Americas, thirty-four countries of the Western Hemisphere agreed to unite their economies into a single free trade arrangement, the "Free Trade Area of the Americas" or FTAA, through negotiations that are supposed to be completed by the year 2005, though the progress is expected to be substantial by 2000.

1. Source: CEPAL, Data Base COMTRADE, United Nations.

Right after, the Hemisphere's Trade Ministers had their first meeting in June of 1995 in Denver, USA; the second in March of 1996 in Cartagena, Colombia; the third in May of 1997 in Belo Horizonte, Brazil; and the fourth in March of 1998 in San Jose, Costa Rica. The formal negotiations leading towards a FTAA began in April 1998, at the Second Summit of the Americas in Santiago, Chile.

The preparation process involved three essential components: the Trade Ministers of the Western Hemisphere, who developed an overall work plan; the Vice Ministers of Trade who coordinated the efforts of the working groups and made policy recommendations to the Trade Ministers; and the FTAA Working Groups (conformed of specialists in the subject) that gathered information and analyzed the current situation of trading relations among the countries in the Hemisphere.

Seven Working Groups were established in Denver; four in Cartagena and one in Belo Horizonte. Since the San Jose Ministerial, the twelve original Working Groups were transformed into nine Negotiation Groups. These are: Market Access (chaired by Colombia), Investment (Costa Rica), Services (Nicaragua), Government Procurements (United States of America), Dispute Settlement (Chile), Agriculture (Argentina), Intellectual Property Rights (Venezuela), Subsidies, Antidumping and Countervailing Duties (Brazil), and Competition Policy (Peru).

Now, it is possible to say that the FTAA process is moving in an integration context more developed than in the sixties when ALALC was formed. Trade and investment flows among countries in the region no longer depend only on their trade with USA but within themselves. Also many countries in the region had strengthened their trade and investment links with other partners outside the hemisphere, especially with Europe and Asia. Not only there are many bilateral agreements among countries of the region, but also among the different subgroups and markets. The most recent of these agreements is the one signed by MERCOSUR and the Andean Community, two days before the Presidential Summit in Chile. All these promote not only more incentives for free trade but also build a solid group with a clear objective: the total integration of the region.

1. WHY COMPETITION POLICY IN THE FTTA?

Competition policy has become a key issue in regional trade agreements because of the economic deregulation and trade liberalization policies that have been taking place since the beginning of these two last decades. The need to provide rules that ensure the confidence of

potential investors and provide correct mechanisms to protect the public interest is evident. The removal of domestic entry barriers requires equitable conditions of competitors within the members of a regional agreement; this means also the removal of private barriers to entry. Thus, cooperation among competition policy agencies is essential not only to promote these equitable conditions but also for a sustained process of economic integration.

There is an evident link between competition policy and free trade. The promotion of a competitive structure can be done mainly through competition policies or by opening the economy to the international markets, and many times the effects are similar. Competition policy can strengthen the trade policy by reducing private practices that obstruct the liberalization of the borders. Trade policy can help the competition policy open the market to compete with foreign products so the power of the domestic industries is reduced. Despite the previous, there are many situations in which the existence of only one of these measures is not sufficient for achieving domestic competition. Competition policies and free trade complement each other so both of them are essential in the formation of a free trade area.

Discrepancies between competition and trade standards can disturb the pattern of trade. This is the case of discrepancies in issues as regulations based in structure or conduct, lack of a legislation in some countries, the definition of the relevant market when analyzing regional effects of some practices, and the domestic approach towards subsidies, antidumping and competition policy issues.

In developing countries competition policy is as necessary as in developed countries. Although many countries do not have an antitrust tradition and others have been pursuing other aspects such as wealth distribution, deficiencies and the effects of a dominant market power are essentially the same.

The same can be said when referring to economies recovering from a crisis. An institutionalized competition policy with effective, predictable and transparent competition legislation reduces rent-seeking activities, collusion tactics and other forms of anticompetitive practices that usually arise during difficult periods. The vulnerable condition that is usually adopted by an economy in crisis can be diminished when a competitive atmosphere is preserved and local firms are protected from the potential abuses foreign firms can carry out in the domestic market.

Even with a liberalized trade regime, the elimination of entry or exit barriers to the markets, the welcome to foreign investment and privatizations do not ensure that no abuse of market power is taking place. There is a potential risk in the *ad hoc* responses from the market due to domestic and international pressures. Individual interests and nationalist

tendencies that come from the perception that reforms and deregulation have not been accompanied by an adequate wealth distribution determine the need for a competition policy. The new role of the government is to provide a competitive atmosphere with the previous establishment of clear property rights and a strong and an anticorrupted legal system. Sound economic and social policies need strong and capable institutions to implement those policies.

Another ingredient that plays an important role regarding competition policy is Competition Advocacy. The latter can be understood as opposing mainly to rent-seeking practices and is essential for consolidating the gains of the market reforms carried out especially after periods of crisis. The promotion of a Culture of Competition is an important competition advocacy function for the competition agencies as a way to preserve an atmosphere of competition.

The instrumentation of competition policy is also important. The existence of a supranational norm and agency will provide the right incentives and deterrence to reduce the risk of cross the border rent seeking behavior and will probably reduce the local political pressure on domestic agencies coming from the private and the public sector. Also a common law and institutional framework can reduce the friction among local interpretation of the facts among different countries. A higher jurisdictional power also assures some kind of balance and freedom to establish investigation and applying enforcement.

2. ADVANCES ON COMPETITION POLICY IN THE FTAA

The Competition Policy Working Group had the following assignments[2]:

- Promote understanding of the objectives and operation of competition policy.
- Compile an inventory of domestic laws and regulations that exist in the Hemisphere that deal with anti-competition conduct and, on the basis of that information, identify areas of commonality and divergence.
- Create an inventory of the competition policy agreements, treaties and arrangements existing in the Hemisphere.
- Identify cooperation mechanisms among governments in the Hemisphere aiming at ensuring the effective implementation of competition policy laws.

2. As established in the Joint Declaration at the Summit of the Americas Second Ministerial Trade Meeting in Cartagena, Colombia, March 21, 1996.

- Recommend ways to assist members to establish or improve their domestic competition policy regimes, as they may request.
- Exchange views on the application and operation of competition policy regimes in the countries of the Hemisphere and their relationship to trade in a free trade area.
- Make specific recommendations on how to proceed in the construction of the FTAA in this area.

So far, the advances accomplished are the diagnosis of the situation of competition policy in the hemisphere through the inventories of laws and agreements, the project of cooperation mechanism, and the definition of certain issues as the contribution of competition to trade or practical experience in the application of enforcement mechanisms[3].

It is clear from the diagnosis that the countries in the continent lie under dissimilar conditions in terms of competition policy. Some countries like Canada and the United States have a long experience on the subject, but the large majority of countries of the region (22) do not have a legislation in the matter. Only ten countries of the region, besides those mentioned before, have competition policy laws and institutions recently established or implemented (Table No. 1). Still, many of them are under economic reforms and the competition policy agencies are forging their public image. Among those with legislation, though based on the same principles, the diversity in terms of level of application and enforcement is wide. Some of them have independent competition agencies, other have agencies inserted in a sectorial ministry or some of their actions are divided among different sectorial ministries, as a result enforcement of the legislation varies from country to country. Not only that, they have different treatment in their legislation on issues like state monopolies, specific sector exemptions, merger and acquisitions, etc. (Table No. 2).

Given the dissimilar situation among competition policies and legislation throughout the Hemisphere, the countries have accepted the need of some technical assistance in the establishment, implementation and enforcement of competition policy in their respective countries. The requirement for some kind of assistance in the establishment of minimum levels of implementation and enforcement of the competition policy in countries without any and with intermediate levels of development, will help reduce the transaction costs. This is a previous step necessary for negotiating the way these domestic policies should converge in a competition policy for the FTAA.

3. See http://www.alca-ftaa.org for the three inventories.

Table No. 1
Countries in the Hemisphere that have Legislation and Institutions for Free Competition

Argentina	Created in 1919, amended in 1946 and 1980, and currently under review.
Brazil	Created in 1962, amended in 1990 and revised in 1994.
Canada	Created in 1889, and subsequent legislation and amendments.
Colombia	Created in 1959, supplemented in 1992.
Costa Rica	Created in 1994.
Chile	Created in 1959, amended in 1973 and revised and incorporated in 1979.
Jamaica	Created in 1993.
Mexico	Created in 1934, replaced in 1992.
Panama	Created in 1996.
Peru	Created in 1991, modified in 1994 and 1996.
Venezuela	Created in 1991.
United States	Created in 1890 and subsequent other legislation and amendments.

Note: Bolivia, the Dominican Republic, Ecuador, El Salvador, Honduras, Guatemala, Nicaragua and Trinidad and Tobago are currently designing and debating respective draft legislation on free competition.
Source: Inventory of Domestic Laws and Regulations Relating to Competition Policy in the Western Hemisphere from the Free Trade Area of the Americas Working Group on Competition Policy.
Elaboration: Centro de Investigación Universidad del Pacífico (CIUP).

The differences among the competition policies throughout the countries in the Hemisphere are not only at the national level; we can find them also in the regional trade agreements inside FTAA. The main differences are summarized in Table No. 3. The two extreme models in America are the one followed by NAFTA and the decision 285 of the Andean Community of Nations. The first one refers to cooperation at a national level, meanwhile the decision 285 is based upon a supranational authority. MERCOSUR has a similar model to NAFTA, but with some characteristics of enforcement that are worth to mention[4].

NAFTA

Chapter 15 approaches competition policy focusing in competition law, mutual assistance and dispute settlement, rules for monopolies and state enterprises, and a working group to deal with issues of trade and competition policies and laws in the free trade area.

It is established that Mexico has to develop the enforcement capabilities of the United States and Canada in order to discuss the existence of a regional competition policy.

4. For a complete review on these issues, see Tavares de Araujo, José Jr. and Luis Tineo, "Competition Policy and Regional Trade: NAFTA, Andean Community, Mercosur and FTAA", Paper presented at the *International Seminar on Competition Policy in Celebration of the V Anniversary of INDECOPI* held May 26-29, 1998 in Lima, Peru.

Table No. 2
Some Commonalities and Divergences in the Competition Policies Adopted by the Countries of the Hemisphere 1/

Countries where it is allowed the existence of State monopolies, sectors reserved for strategic or national security reasons and the exclusive exploitation of intellectual property rights	Countries where specific sectors and economic activities have been exempted from competition laws	Countries with legislations that do not contain provisions for controlling economic concentration	Countries with merger control regulations based on either mandatory prior notification or voluntary notification	Countries where the laws are enforced by independent bodies or agencies in the form of commissions or superintendencies	Countries where the laws empower other agencies with enforcement responsibilities	Countries that have a common regime when practices produce effects that limit competition in the sub-regional market	Countries where the enforcement bodies may provide comments and opinions on regulations, policy and programs which might prove adverse to competition, and recommend their amendment or elimination
Brazil, Colombia, Chile, Jamaica, Mexico, Panama and Peru	Canada, Colombia, Costa Rica, Jamaica, Mexico, the United States and Venezuela	Argentina, Chile and Peru (with control regime only for the electricity sector)	Brazil, Canada, Colombia, Costa Rica, Jamaica, Mexico, and Venezuela	Argentina, Brazil, Canada, Colombia, Costa Rica, Chile, Jamaica, Mexico, Panama, Peru, Venezuela and the United States	Brazil, Canada, Chile and Peru	The Andean Community and MERCOSUR countries	Brazil, Colombia, Costa Rica, Canada, Chile, Peru, Mexico, the United States and Venezuela

1/: They depend on the law adopted by each country as well as on the case law developed by each national enforcement body. There are absolute, non-authorizable or *per se* prohibitions and relative, authorizable or *rule of reason* prohibitions.
Source: Inventory of Domestic Laws and Regulations Relating to Competition Policy in the Western Hemisphere from the Free Trade Area of the Americas Working Group on Competition Policy.
Elaboration: Centro de Investigación Universidad del Pacífico (CIUP).

Table No. 3
Competition Policy in a Subregional Level

NAFTA	MERCOSUR	ANDEAN COMMUNITY	G-3	Canada-Chile
• Focuses on domestic law enforcement and mutual regional assistance. • Is based on joint commitments when dealing with international competition policy cases. • Recognizes that the conduct of firms is what usually acts counter to free competition rather than industry structure.	• In 1996 MERCOSUR countries have signed a protocol that sets guidelines to achieve a clear definition of competition policy in the subregion. • The goal is the convergence (not under supranational mechanisms) of national competition laws and the cooperation between countries. • MERCOSUR institutions could rule only under particular situations.	• Competition policy embraces the *open regionalism.* strategy recently adopted. • Decision 285 (established in 1991) provides a framework for harmonization competition policy in the subregion (by means of a supranational system). • The Decision is under revision due to its limited scope.	• Signed in 1994 and effective since 1995. • The dispositions in chapter 16 in competition policy are the same as in the NAFTA agreement. • A working group was established in 1995 to discuss the relation between trade and competition policy.	• Signed in 1996 and soon to be effective. • The dispositions in chapter J in competition policy are the same as in the NAFTA and the G-3 agreement. • A working group will be established as soon as the treaty is ratified by each countries' parliament.

Source: Inventory of Competition Policy Agreements, Treaties and Other Arrangements Existing in the Western Hemisphere from the Free Trade Area of the Americas Working Group on Competition Policy.
Elaboration: Centro de Investigación Universidad del Pacífico (CIUP).

According to Article 1501, NAFTA countries should outlaw anticompetitive business practices, but it does not provide any standards to be incorporated into the domestic laws[5]. Although the countries are to cooperate in the enforcement of competition law there are no specific national commitments. NAFTA does not imply an international scope on competition policy issues in the sense that the national law is placed above the agreement.

Articles 1502 and 1503 recognize the need of effective mechanisms to protect public interest. The convergence of merger guidelines among the three countries responds to the importance of having transparent criteria that reduces uncertainty. The undesired effect of a merge is a significant and non transitory increase in prices, although this trend towards market concentration is assumed to deal with the trend toward market concentration that is a consequence of economic integration.

Between Canada and the United States, the agreement signed in 1995 establishes cooperation by the exchange of information about activities that have effects on the interests of the other country.

Finally, the final report of the 1.504 working group -important results for the process of negotiation in the FTAA- is expected to examine anticompetitive activities that have cross-border implications in the region, mechanisms of bilateral or trilateral enforcement and the relationship between trade and competition in specific sectors.

Andean Community

With the new market oriented vision, the five countries of the Andean Community enacted the Decision 285 of the Cartagena Agreement in 1991 establishing common rules to protect free competition. It constitutes the first effort to face competition issues at a subregional level in Latin America and is seen as a model for policy harmonization in the region. Supranational principles govern the system under the Decision. It deals with restrictive practices that affect competition in more than one country of the subregion; national law applies if the practice does not have extraterritorial implications. The Decision is responsibility of the Secretariat and provides with a peculiar *rule of reason* standard of analysis. It does not include vertical restraints or merger review.

The enforcement of Decision 285 is limited: the Secretariat conducts investigations and proceedings at the request of countries of affected firms. The Secretariat does not have

5. Johnson (1994) as reffered in Tavares de Araujo, José Jr. and Luis Tineo, *op. cit.*

the independence to select cases and open investigations and lacks the power to force firms to adopt its decisions, so its enforcement power is diminished. Another limitation has to do with the remedy the Secretariat may impose: preferential treatment to imports of the product subject of the investigations of third countries. This remedy is in contradiction with the open scheme adopted at a national and regional level because it addresses individual industry concern rather than competition itself.

In spite of these limitations, Decision 285 has initiated the progress towards competition policy enforcement among the Andean countries[6]. A great deal has developed in each country ever since. The Peruvian government established in 1991 the Instituto para la Defensa de la Competencia y Protección de la Propiedad Intelectual (INDECOPI) to promote and enforce the newly passed market regulations. The latter concerns issues as competition, antidumping and countervailing duties, consumer protection, unfair competition and advertising, technical barriers and intellectual property rights, with an independent commission for each area. Also, in 1991, the government of Venezuela created the Superintendencia para la Promoción y Protección de la Libre Competencia (PROCOMPETENCIA). The law contains provisions dealing restrictive practices and merger control, and has had an important role in the privatization process. Following Peru and Venezuela, in 1992, the Colombian government enacted the Decree 2153, updating the provisions of the 1959 law. The Decree strengthened the powers of the competition policy agency, and charged the enforcement of the law to the Superintendencia de Industria y Comercio, and the investigation and merger analysis to a Deputy Superintendent.

Mercosur

In December 1996 the Mercosur countries signed a protocol that set the guidelines towards a common competition policy in the region, according to the agenda of the Asuncion Treaty, signed in March 1991. All member countries are supposed to establish an autonomous and strong competition agency and share a common view about the interaction between competition policy and the governmental actions. There is no supranational organism, so effectiveness of the system will rely on the levels of enforcement by the national agencies.

The Protocol provides mechanisms to control firms' anticompetitive practices and calls for convergent domestic laws to ensure similar conditions of competition among firms. It also provides an agenda to look after policies that distort competition conditions and affect trade among the member countries through the Trade Commission of Mercosur (TC) and the Committee for the Defense of Competition (CDC). Proceedings are initiated before the

6. It is expected to be reviewed in the short term.

competition authority of each country and if the practice has Mercosur implications then the agency may summit the case to the CDC. The CDC must decide if the practice violates the Protocol and recommends sanctions and measures to be imposed. A Directive of the TC elaborates the final adjudication. But several problems may arise, for example when each agency defines the relevant market or evaluates the evidence under different criterion. Also, the power of the TC to overrule the CDC and the little experience both have on the subject may lead to inconsistent results.

The Protocol contains provisions for the harmonization of domestic competition policy and law within the period of two years, though competition is assumed differently by Mercosur countries. For instance, Uruguay and Paraguay overall legislation does not contain competition provisions. Argentina's competition regime focuses only on preventing anticompetitive conduct and is currently being improved, freeing the Competition Commission from the Ministry of Economy. Finally, the amendments introduced to the Brazilian law in 1994, especially to the CADE status, have made of this country the only one with initial signs of a coherent approach to the Protocol.

Mercosur countries have a cooperation program similar to the one provided inside the NAFTA process. These guidelines for cooperation includes, aside from the enactment of a national law containing the provisions required by the Protocol, it stresses the need for an autonomous competition policy agency to approach operational routines in a transparent way, and the consolidation of competition advocacy in the subregion.

3. THE ROAD AHEAD AND THE PERUVIAN PERSPECTIVE ON COMPETITION POLICY IN THE FTAA

Peru appears in a unique position in the negotiations in the FTAA in competition policy. Peru's experience lies between countries with long experience in the subject and countries with no competition legislation. This makes possible for Peru to understand the position of the different countries and to dialogue in an understandable way. So it is not a casual leadership in this matter, Peru was given during the period 1998-1999 the chair of probably one the most important negotiating group, and after being chair of the working group before. Competition policy and dispute settlements[7] are regarded as the most important groups since they are going to establish the "rules of the game" for the private sector

7. After the Toronto meeting in November 1999 the chairs were rotated, Peru was designated as vice chair of two negotiating groups: Dispute Settlements and Services, meanwhile Colombia took the chair of Competition Policy and Canada is the vice chair of this group.

behavior once all official barriers are removed in the hemisphere. Only Venezuela has a similar position to Peru, but did not play an active role in the previous negotiations as Peru did. So Peru is trying to contribute in the building of a balanced and realistic program for FTAA that could be implemented in the near future for most countries in the region.

Negotiations inside the Competition Policy Group began on September 17-18, 1998, in Miami and, although no great advance has been attained in terms of agreements, it has been agreed upon an agenda of issues subject to future negotiation such as the relationship between Trade (including antidumping) rules and Competition Policy. The discussion concerning the jurisdictional system to be adopted is still pending. A supranational authority, similar to the European Community's experience, is not considered as a possible result of the negotiation process. There are difficulties in implementing it because of the lack of a competition policy in various countries and the scarce level of implementation and enforcement of the legislation throughout the Hemisphere. Such proposition is politically unpopular due to the great differences in the levels of economic, social and political development of the countries.

In the February 25-26, 1999 negotiations, there has been a clear interest in continuing the development, implementation and enforcement of the competition law in countries that do not have an adequate framework for the latter. The initial idea of a Regional Technical Secretariat has not been viable, but the United States has offered the assistance of its experts in the revision of the competition legislation proposals in each country. This implies some sort of unofficial technical cooperation system. Additionally, some parties are interested in implementing some kind of an amplified level of juridical coverage on the subject. If the scope of juridical application should be national, regional, hemispheric or some combination is not yet defined. Some hold the idea that each country must have its own national competition legislation with only national scope of application. Others find it necessary to have a hemispheric competition policy (to benefit consumers) that incorporates practices and cross border effects of the firms' conducts.

It is important to acknowledge the need for elaborating a minimum group of competition laws or principles to be established in all the countries in order to establish the cooperation channels in the near future. It will also be necessary to address another institutional issue, what kind of institutions must be in charge of the implementation and enforcement of the domestic legislation. Peru's preference is for an autonomous institution, which should be isolated as much as possible of political pressure, whether it comes from the private or public sector. But there is still reluctance for this proposition in some countries because the possible lost of control of industrial and commercial policies as protection devices.

From the V Trade Ministerial Meeting in Toronto in November 1999, comes the mandate for the negotiation group to prepare a draft text that should be an annotated outline of the different positions that will be negotiated after the third Trade Negotiation Committee (TNC) in 2001. This draft text should be as a reference to facilitate the work and not as a definitive or exclusive outline of agreement. That is why, it must be comprehensive in scope including all the aspects were consensus was reached and also should place between brackets the text on which consensus could not be reached. Also the modalities and procedures for negotiation should be proposed. It should pointed out that after the presentation of this draft, no new issue may be included in the negotiation.

Year 2000 first meeting of the competition policy group was held in Miami last January. All the preparations to achieve the mandate were established, South America is preparing a joint declaration about topics that should be included in the negotiations. Something that is worth mentioned is the shared interest across most countries in the region of considering the hemispheric dimension of competition policy and the inclusion of the importance of governments in terms of market access and regulation.

The upcoming discussions starting in April will probably addressed the issues already mentioned and will also try to focus on those related to the practices that should be incorporated in the group of domestic legislations and those which have cross border effects. Among the most important and controversial issues trade agreements contemplate are export cartels, price-fixing and restrictive practices and abuses of dominant positions. Although export cartels is a very controversial matter, especially due to an inherent political ingredient, governments may still use export cartel as a promotional instrument for local exports, but they forget the large impact that other countries cartels may have over their economy and in particular their ability to trade (for example transportation cartels). Price-fixing and restrictive practices will probably be discussed at the initial level, and most likely will be the first issue to be settled.

The abuse of dominant position is another complex subject because of the lack of concurrence in the type of relation between competition policy and antidumping measures. Competition policy condemns dumping activities as a predatory price practice when there is abuse of dominant position in the relevant market. When analyzing dumping practices the latter is not a requirement, so antidumping duties have usually been conceived as a way of "protection" from trade liberalization. There is a debate about whether or not these two subjects must be united in one, although the remedies imposed by the two of them differ completely: a raise in tariffs in the case of antidumping measures and sanctions specific to firms in the case of competition policy. It will be better to have antidumping

inside a predatory pricing practice, but there is great political resistance, especially if there is no clear signal that there will be a common competition policy. By the same token, the issue of what is the relevant market for the product and what is the geographic market will also be in the negotiation table.

Finally, and more complicated, is the area of mergers and acquisitions. Not all countries with competition laws (especially small economies) include guidelines for these practices. So if a merger and acquisition legislation is introduced in the group of laws of common implementation, there should also be a supranational institution (or a mechanism for the exchange of information among competition policy authority) in order to regulate the situations in which merges have effects that transgress domestic borders. The idealism and the difficulties in the application of this system have already been stressed.

Mergers and acquisitions are not regulated in Peru[8] and INDECOPI is not willing to consider its application in the near future. This perspective considers that in economies under development or recovering from a crisis, a process of managerial restructure must accompany structural reforms. In the case of firms, the Peruvian market is too small for some productive activities so economies of scale or scope may require holding a considerable market share or a dominant position. Also the relative youth of INDECOPI and the uncertain effects of legislating mergers and acquisitions sustain this point of view[9]. Nonetheless, there is a controversy about this issue among various prestigious academicians and private sector experts[10].

It may be irrelevant and sometime inefficient for a small economy to take into account mergers and acquisitions inside its borders. For Peru it is clear that what matters is not the structure of the market itself but the conduct of the firms. Markets may be contestable so the concentrated firms will not be able to abuse of their position. It is also a matter of competitiveness in a larger market. But the problem arises when a merge occurs in a large economy and its effects of monopolization appear not in the country of origin but in another country of the region. Who is going to control for this situation is not clear. It may

8. With the exception of the electricity sector.
9. See Bullard, Alfredo, "Los procesos de integración y el abuso de la posición de dominio en el mercado. ¿Cómo resolver el dilema de la competitividad?", in CEFIR, Seminario de Política de Competencia e Integración: Opciones y Necesidades, Montevideo, September 8 to 10, 1997.
10. See Diez-Canseco, Luis José, "Competencia e integración en América Latina. Reflexiones sobre su importancia y sobre los temas que deberían ser considerados", in CEFIR, Seminario de Política de Competencia e Integración: Opciones y Necesidades, Montevideo, September 8 to 10, 1997.

be possible for big countries to include clauses of cross border effects when dealing with these cases[11].

The difficulties in whether or not to legislate mergers and acquisitions cause the need to establish a mechanism that allows a country to regulate and correct the negative effects of these practices in their domestic markets and beyond their boundaries. In this sense, the inclusion of certain standards in the developed countries' mergers and acquisitions legislation in order to moderate the negative effects of economic concentrations in the region or in other countries is an interesting alternative.

4. CONCLUSIONS

It will be optimal if FTAA could set a supranational agency with common rules for all country members. However, it is not feasible at the moment because of the great misalignments in terms of existence, implementation and enforcement of competition policy among countries in the region, and its lack of political popularity. So we should look forward for the establishment of minimum standards or common principles for all country members. It also will be necessary, as it is already recognized, the implementation of an independent regulatory agency in each country participating in FTAA, trying to reduce the effect of political influence in their decision making and enforcement process.

The minimum principles for all countries should include the prohibition of collusive agreements and the abuse of dominant position in the market, at the national or across the border levels. These concepts are included in the Andean Community and in MERCOSUR, so it will be possible to achieve some agreement on these matters based upon the own Americas perspective. The prohibition –or at least control– of state help towards certain sectors should also be included, especially for export cartels since their effects are the same as any other price arrangement among private firms. As long there is a clear application of competition policy across FTAA countries, antidumping practices should be treated as a predatory pricing policy -as it is-, so it should be clear that there must be dominant position. The sanctions should be imposed to the firms and not applying tariffs to the imports; though it implies cross border sanction faculties for national competition agencies. Therefore, antidumping should be incorporated in the competition policy discussion. Finally, mergers and acquisitions should be contemplated, if not necessarily at its national level, at least

11. This last idea was suggested by my collegue F. González Vigil in the working group on competition policy of the ALCA-Peru Commission.

there must be clauses that include potential effects in a different jurisdiction where the merger takes place.

It is necessary to count with common competition policies especially in periods of distress, because that way the market assignment is secure and the risk of rent seeking behavior through monopolies and speculators may be reduced.

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APPENDIX

Table No. 1

Interregional Trade Flows
(Percentage of their own exports/imports to the world)

	MERCOSUR		NAFTA		CAN	
	Exports to (%)	Imports from (%)	Exports to (%)	Imports from (%)	Exports to (%)	Imports from (%)
NAFTA	25,63	27,37	46,19	40,41	50,12	43,52
MERCOSUR	18,49	16,38	2,27	1,32	3,94	8,21
CAN	5,02	2,78	1,75	1,84	12,15	12,80
Chile	3,63	2,24	0,51	0,27	1,83	2,19
MCCA	0,35	0,02	0,87	0,37	1,76	0,35
CARICOM	0,36	0,11	0,61	0,51	1,63	0,32
UE	45,70	39,50	19,72	15,07	22,63	21,95
Asia Norte	17,27	18,49	20,33	26,10	8,07	11,52
Asia Sur	2,75	1,19	2,65	4,14	0,49	0,29

Source: World Trade Analyzer, *Trade Statistics Yearbook 1989-1995.*
Elaboration: Centro de Investigación Universidad del Pacífico (CIUP).

Table No. 2

Intrasubregional Trade Flows
(% the total)

	1990	1995
MERCOSUR	8,9	22,0
GRAN	4,1	11,9
MCCA	17,3	22,5
ALADI	10,8	17,5

Source: CEPAL.

Table No. 3

Trade Exchange of the ALCA Countries

	Total Imports (Millions of U.S. Dollars)	Total Exports (Millions of U.S. Dollars)	Total Exchange with the World (Millions of U.S. Dollars)	Total Exchange with the ALCA countries (% of the country's total)	ALCA's Total Exchange with the World (% of the total)
NAFTA	1.203.291,18	1.011.032,00	2.214.323,18	44,84	84,86
CAN	45.349,20	50.797,80	96.147,00	70,01	3,66
MERCOSUR	99.514,60	83.631,30	183.145,90	50,61	7,02
MCCA	16.561,60	13.329,40	29.891,00	76,51	1,15
CARICOM	10.172,60	6.323,90	16.496,50	61,82	0,63

Source: Direction of Trade Statistics (IMFDOT).

Table No. 4

Imports and Exports of Latin American Trade Groups for 1998
(As percentage)

	Total Good Imports (% of GDP)	Total Good Exports (% of GDP)
Latin America	16,2	14,3
ALADI	14,8	13,4
CAN	15,6	14,5
MCCA	35,8	27,0
CARICOM	47,3	26,6
G-3	25,8	24,6
MERCOSUR	8,2	7,2

Source: Interamerican Development Bank (IDB), Statistics and Quantitative Analysis Unit.

Table No. 5

Total Exports and Imports of the ALCA Countries

	Exports of Goods (FOB) (Millions of U.S. Dollars)			Imports of Goods (FOB) (Millions of U.S. Dollars)		
	1990	1995	1998*	1990	1995	1998*
ALADI	127.499,0	209.062,4	254.987,7	93.408,3	201.018,5	280.592,3
CAN	31.577,8	40.650,4	39.969,0	17.437,6	38.272,7	43.981,5
MCCA	4.437,1	9.290,3	13.141,3	6.010,9	12.488,8	17.508,7
CARICOM	4.573,2	5.819,7	5.663,9	5.450,8	7.418,0	9.739,9
MERCOSUR	46.837,2	72.845,0	82.728,7	27.289,7	75.648,8	93.889,8
Other FTAA	12.719,5	26.032,7	26.421,0	12.828,3	27.063,4	33.300,4

* Projection.
Source: IDB Statistics and Quantitative Analysis Unit calculations.