

COMPETITION LAW IN LATIN AMERICA: MAIN TRENDS AND FEATURES

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ABSTRACT

Competition law has become increasingly important in Latin America. This article aims to portray the recent developments on antitrust legislation that have taken place in Latin American countries in the past years. Also, it briefly explains some important cases that competition authorities all over Latin America have taken care of.

Key words: *Latin America, Antitrust*

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EL DERECHO DE LA COMPETENCIA EN AMÉRICA LATINA: TENDENCIAS Y CARACTERÍSTICAS

RESUMEN

El derecho de la competencia se ha vuelto, cada vez, más importante en América Latina. Este artículo refleja los más recientes desarrollos de la legislación de derecho de la competencia en los países de este continente en los años pasados. De la misma manera, explica, brevemente, algunos casos importantes que las autoridades de competencia han analizado.

Palabras clave: América Latina, Derecho de la competencia

I. INTRODUCTION TO LATIN AMERICAN COMPETITION LAW

1.1 THE ORIGINS: ANTITRUST LAWS IN THE UNITED STATES

Competition Law as we know it nowadays, was created and forged in the United States of America. Thinkers such as Sir Edward Coke state that monopolies were forbidden since the times of Roman law, afterwards in the *Magna Charta* and in some laws issued by Edward III. Nevertheless, in light of the incipient state of economic theory, one cannot affirm that these laws enacted in a disorderly and occasional manner could be considered as a structured body of law with its own identity.

In the United States, between the civil war and 1890, the emerging corporate trusts and pooling arrangements that operated throughout the country and the anticompetitive agreements made between businessmen to fix prices and allocate markets, led to an increasing unrest among the citizens, accentuated by

powerless State Governments that had no powers to prosecute these conducts.¹

Although with time the *trusts* evolved into *holdings* as new tools that allowed market control by enterprises, the generic denomination of *trusts* continued to be used to describe any group of undertakings or corporate conglomerates that succeeded in monopolizing an economic activity. This is why American jurists continued to call this discipline *Antitrust Law*². In Europe and other jurisdictions, this area of knowledge has been called in contrast as *Competition Law* or *Competition Protection or Defense*, etc.³

As a consequence of the above situation, in 1890 the United States Congress passed a bill against trusts that was presented by Senator John Sherman from Ohio in 1888.⁴ The Sherman Act is still today the cornerstone of Antitrust Law in the U.S. It was created with the purpose of prohibiting any conduct that tended

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- 1 Trusts were used as a mean to control the different enterprises throughout the American federation. They were used in 1882 by the Standard Oil Company to control the oil market. In 1884 a trust was organized to control cotton oil market; in 1887 trust were created in order to dominate the sugar, whiskey, meat, clothing, gas, and other markets. For this matter reference to Lawrence M. Friedman. "A History of American Law", Touchstone, 1985, page 485.
 - 2 Outside of the United States there is a tendency to name this discipline in a positive manner: England speaks of Competition Law, example that has been followed by several Latin American countries.
 - 3 In the case of Colombia we can see an evolution between Law 155 of 1959 "*By which rules against restrictive commercial practices are enacted*", Decree 2153 of 1992 "*By which competition promotion and anticompetitive practices rules are enacted*" and Law 1340 of 2009 "*By which competition protection rules are issued*". It must be noted that Article 28 of Law 1340 of 2009, distinguishes between competition promotion and protection, that is not related to anticompetitive practices prosecution but with rules issued in the financial sector in order to promote competition.
 - 4 Although Sherman Act was the first federal law, it is important to take into account that previous antitrust state laws had been issued in Michigan, Kansas and Nebraska. Friedman, op cit. page 464.

to disrupt competition. In order to accomplish this objective, the Sherman Act prohibits “*every contract, combination in the form of trust or otherwise, or conspiracy in the restraint of trade or commerce among the several states, or with the foreign nations*” and that any person monopolizes or attempts to monopolize any part of trade or commerce.⁵

The Sherman Act and other Antitrust Statutes passed by the U.S. Congress, establish the general rules that have been developed by federal courts for more than a century, creating a complex structure of jurisprudence that offers and answer to a wide range of cases. American experience, as it is well known, is the basis and example for foreign jurisdictions including the European Union and Latin America.

1.2 COMPETITION LAWS IN EUROPE AND THE WORLD

It does not surprise that newer legislations around the world have used the same concepts, but have introduced substantial modifications to the basic structure of the Sherman Act. This can be seen in the original Articles 85 and 86 of the Treaty of Rome (*European Economic Community - EEC*), which were substituted by Articles 81 and 82 of the Amsterdam Treaty (*European Union - EU*) which include a general prohibition against anticompetitive practices and a non-exhaustive list of prohibited conducts. Nowadays European Competition Law is contained in the Treaty of Lisbon. Article 101 of the treaty forbids any anticompetitive agreement or practice; Article 102 bans any abuse of the dominant position and contains the basis for merger controls; and Article 107 regulates governmental aid to undertakings.

5 SULLIVAN, E. THOMAS; HOVENKAMP, HERBERT. “Antitrust Law policy and procedure”. The Michie Company, 1984 page 16.

1.3 COMPETITION LAWS IN LATIN AMERICA

The structure of EU competition law has been adopted by the legislations of the Latin-American countries and by the Andean Community of Nations - CAN. This multinational organization has enacted supranational competition laws that are enforceable in regard to anticompetitive practices that have community dimension⁶, through Decision 608 of 2005 that replaced Decision 285 of 1991.

Currently most countries around the world have developed a culture of free competition in the marketplace. Consequentially they have issued, are passing or modifying their Competition Laws, in order to guarantee markets in which consumers can access a wide variety and quantity of products of better quality and price, and that producers can also access the markets in conditions of equality and freedom.

It is therefore considered that Competition Laws are an effective instrument to improve the quality of life of the general population, increase efficiency, and guarantee the possibility that people have to participate in the markets within the limits established by the Constitution and the Law.

During the first half of the 20th century, some Latin American countries issued competition laws. This was a result of the political and academic influence given by the United States and the European Continent to the local legislation. The most representative legislations issued of the first era of Latin American Competition Law were: Mexico (1934), Argentina (1947), Colombia (1959), Chile (1959) and Brazil (1962). However, these laws had not been effectively applied, fundamentally due to the development strategy of “*Protectionism*” fostered by the *Economic Commission for Latin America and the Caribbean - ECLAC*⁷, theoretically explai-

6 Conduct that affects more than one member State.

7 The Spanish acronym for the ECLAC is CEPAL. The institution was initially

ned by the economic school of *Structuralism* in Latin America. This model was based in the principle of substitution of imports, which was to be achieved by the imposition of trade barriers such as tariffs aimed to the protection of the local markets from foreign competition. The protectionist development strategy created an environment that did not favor competition or the application of competition laws in Latin America.

After the *Washington Consensus* (1990), Latin American countries decided to change the *Protectionist Model* that ruled economic theory until then, and evolved into a development model based on markets that were opened to international free trade, and consequently more competitive pressure. Pursuant to this change of strategy, all Latin American Countries included a principle of free competition in their Constitutions and issued a new wave of competition laws that they have been increasingly applying since then.

Nowadays, nineteen (19) Latin American countries have issued competition laws: Argentina, Barbados, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Dominican Republic, Saint Vincent & Granadines, Uruguay, Trinidad & Tobago and Venezuela. Only Guatemala, Bolivia and Uruguay do not have a general antitrust regulation.

In general, all Latin American regulations prohibit both anticompetitive agreements and the abuse of a dominant position. With the notorious exception of Peru, all Latin American countries have issued rules for merger control.

Competition Law in Latin America is steadily evolving, due to integration treaties. In fact, many countries have reformed their

created as ECLA by Economic and Social Council resolution 106(VI) of 25 February 1948 and began to function that same year. Later on its scope was broadened in order to include the countries of the Caribbean and its name was changed to *Economic Commission for Latin America and the Caribbean* - ECLAC, by resolution 1984/67 of 27 July 1984. The Spanish acronym, CEPAL, was kept.

laws and issued regulation in preparation for the implementation of free trade agreements with the United States as well as other commercial agreements. The reason for this is that these agreements usually have a chapter on competition, which may include at least an obligation to have a competition law, an authority and a positive comity obligation.

As said before, at a supranational level, the *Andean Community of Nations* – *CAN* issued Decision 608, which replaced the old Anti-trust Statute, Decision 285. Decision 608 corrects many of the flaws that old 285 had such as the lack of fines and sanctions, deficiency of the authority's powers to conduct the investigation and the burden to prove the damages caused by the anticompetitive conduct.

According to the more recent Decision 616⁸, Decision 608 will be enforced in Bolivia until this country issues its own competition law.

Competition laws were issued recently for the first time in the following countries and jurisdictions: CARICOM's VIII Protocol (2000), Barbados (2000), St. Vincent and Grenadines (2004), Honduras (2005), El Salvador (2004), Trinidad & Tobago (2006), Nicaragua (2006), Uruguay (2007), Dominican Republic (2008) and Ecuador (2011).

The following countries and jurisdictions amended their Competition Laws: Brazil (2000 and 2011), Argentina (2001), Andean Community (2005), Mexico (2006 - 2011), Panama (2006 and 2007), El Salvador (2007), Peru (2008), Chile (2002, 2003 and 2009), Colombia (2009) and Costa Rica (2010).

New competition laws or their amendments are currently discussed in Argentina, Guatemala and Paraguay.

8 Decision 616 also allowed Decision 608 to be enforced in Ecuador, but this country issued its first national competition law on 2011.

2. MAIN FEATURES AND COMMON TRENDS OF COMPETITION LAWS IN LATIN AMERICA

2.1 MAIN FEATURES

2.1.1 Enforcement is mainly carried by the Competition Authority controlled by the Government

In the region, public enforcement of Competition Law prevails over private enforcement⁹. A Competition Authority of Administrative nature generally enforces the law using an administrative procedure subject to judicial review.

In general terms, the competition authorities are part of the executive branch and have little independence. In many cases the President can change the head of the authority at will. This feature is not convenient, for competition policy is certainly a public policy but should not be available as a tool of the incumbent government.

2.1.2 Responsibility is mainly civil and not criminal in nature

Responsibility for the breach of Competition Laws is generally civil in nature and not criminal. The most notorious exceptions to this characteristic are Argentina and Brazil. In Colombia, the new Anti Corruption Statute makes bid rigging in public contracts a criminal offense. Thus, sanctions are, in general, pecuniary and not criminal.

2.1.3 The Competition Authorities investigate and decide

With the exception of Chile and Panamá, the competition authorities in the region have a dual role: they investigate and decide

9 The use of civil actions in antitrust cases in Latin America is still very rare.

antitrust issues, which makes the defense of the investigated people and companies more difficult, and raises questions regarding fairness in the application of the law.

2.2 COMMON TRENDS

The common trends of the amendments introduced in the last decade and the projects currently being discussed are the following:

2.2.1 Introduction of leniency programs

The countries that have introduced leniency programs in their competition laws are: Brazil, Mexico, Panama, El Salvador, Peru, Chile, Colombia, and Ecuador.

2.2.2 Increase in the economic sanctions

The jurisdictions that have increased the capacity of the authority to impose fines are: the Andean Community of Nations - CAN, Panama, Mexico, EL Salvador, Peru, Chile and Colombia.

The maximum fines that can be imposed are as follows¹⁰:

Maximun Fine	U.S Dollar	Without detriment to
Mexico	6.813.869	Or 10% of sales or gross income of the previous period
Panama	1.018.952	
El Salvador	800.000	Or 6% of sales or gorss income of the previous year

¹⁰ The data gathered on Table No. I was taken from the competition laws from each country.

Peru	136.960	Or 12% of sales or gross income of the previous period
Colombia	32.311.955	Or 150% of the income from the operation
Ecuador	From 1% to 10% of sales or gross income of the previous period	
Costa Rica	194.016	Or 10% of sales or gross income of the previous period
Chile	13.537.800.000	
Argentina	34.956.886	
Brazil	From 1% to 30% of the gross domestic revenue in the last financial year	

The following table shows the fines that were imposed by competition authorities (2000-2003) in different Latin American Countries.

(USD)	2000	2001	2002	2003	Total
Mexico	390,301	1,051,829	437,329	59,330	1,938,789
Argentina	320,000	1,827,000	110,000	605,833	2,862,833
Brazil	28,893,774	236,347	9,244,813	700,950	39,075,884
Chile	105,898	18,826	25,533	494,077	644,334
Colombia	348,269	545,040	247,410	52,627	1,193,346
Venezuela	4,224,720	3,291,092	636,026	1,780,307	9,932,145
Costa Rica	182,139	20,331	419,918	307,128	929,516
Total	34,465,101	6,990,465	11,121,029	4,000,252	56,576,847

This table illustrates the fines imposed by competition authorities from 2004 to 2007:

USD	2004	2005	2006	2007	Total
Mexico	1,216,662	59,301,356	736,936	2,723,418	63,978,372
Argentina	-	117,715,717	191,919	22,360	117,929,996
Brazil	1,455,945	1,162,890	4,637,761	10,103,167	16,313,162
Chile	1,180,267	5,482	6,512	-	1,192,261
Colombia	6,132	5,786	6,132	7,699	5,749
C o s t a Rica	132,399	132,399	-	232	265,030
Total	3,991,405	177,277,029	5,579,260.40	12,856,876.85	199,704,570

It is clear that the fines imposed by the different authorities have increased throughout the years in Latin America.

2.2.3 More investigative powers for competition authorities

In Brazil, El Salvador, Chile and Costa Rica, the Competition authority has been granted more investigative powers, such as dawn raids and communication interception.

2.2.4 Increase of the agents/markets subject to the law

Panama, Peru, Colombia and Costa Rica.

2.2.5 Modification of merger notification thresholds

Argentina, Mexico and Colombia.

2.2.6 Inclusion of new exceptions and exclusions

Andean Community, Panama and Colombia.

2.2.7 Introduction of settlements

Andean Community, Panama and Ecuador.

2.2.8 Participation of third parties in the proceedings

Increased roll of competitors and consumers leagues in Panama and Colombia.

2.2.9 Introduction of ex ante merger control

Ecuador and Costa Rica.

2.2.10 More political autonomy for the competition authority

Chile.

2.2.11 Main focus

At the beginning, Latin American competition authorities focused on anticompetitive agreements (mainly price-fixing). Nowadays, they are also interested in the investigation of exclusionary conducts (with foreclosure effects):

- Abuse of dominance (i.e. discrimination and exclusivity cases)
- Vertical anticompetitive conducts (i.e. vertical price fixing cases).

Latin American Competition authorities have focused a lot of energy investigating agricultural cases. The main purpose of these investigations may be to protect farmers. This resembles one of the first eras of Antitrust Law in the U.S. when corporate trusts were prosecuted in order to defend small undertakings.

3. RECENT DEVELOPMENTS

Ecuador and Bolivia were two of the few countries in Latin America that did not have a competition law. By means of Decision

616 (2005) of the Andean Community, it was decided that while Ecuador and Bolivia issued their own laws, they would apply Andean Decision 608 as their internal Competition Law.

In Ecuador, President Correa issued Decree 1614, 2009, appointing a Competition Director and ordering the application of Decision 608, while Congress was engaged in the discussion of the law. During this time, no fines were imposed; nevertheless, the Sub-secretary for competition conducted several market studies. On October 2011, President Correa sanctioned Ecuador's first Competition Law.

The new Law is titled "*ORGANIC LAW FOR THE REGULATION AND CONTROL OF MARKET POWER*". It presents a general prohibition and a list of banned conducts, which should allow for the application of the *rule of reason* in the enforcement of the general prohibition, and the *per se* rule in the case of the specifically prohibited conducts.

It also prohibits anti competitive agreements and the abuse of market power, provides for *ex ante* merger control, and prohibits unfair competition. Additionally, the Organic Law for the Regulation and Control of Market creates block exemptions and specific exemptions for agreements that create efficiencies and promote progress, provided that they can be transferred to the consumers. It creates a Competition Superintendence with ample powers.

The new Law punishes among others the following conducts:

- (i) The creation of any barrier to entry or exit in a relevant market;
- (ii) Conditioning the sale of a product to the acceptance of exclusivity clauses in the purchase;
- (iii) Any conduct that prevents or difficult the access or permanence of a current or potential competitor to the market;

- (iv) Concerted and vertically suspend the provision of a market monopoly services to a provider of goods or services, public or private and finally
- (v) The imposition of trade conditions tends to have exclusionary effects.

Brazil's particular case is also worth analyzing: After two months of discussions, the new law No. 12.529 was enacted on November 30th, 2011. It modifies the structure of Brazilian Competition Law. The antitrust authorities are, now, CADE and the Secretary of Economy at the Ministry of Finance. The Competition Tribunal, the Competition Superintendence and the Department of Economic Studies compose CADE. The Law creates an administrative positive silence in case mergers are studied for more than 11 months.

4. IMPORTANT AND RELEVANT CASES

The main trends and recent developments in Latin American Competition Law reflect in the enforcement that authorities take into their hands. In this chapter, we present the main antitrust cases that have been investigated in the most relevant jurisdictions in the region.

4.1 ARGENTINA

The National Commission for the Defense of Competition, which is the Argentinean Antitrust Authority, fined Glaxosmithkline and Stiefel Laboratories for Gun Jumping, reflecting the importance than the region has put on Merger Control. In fact, although one can frame Merger Control as an *ex ante* intervention, Gun Jumping is more taken care of with a *ex post* vision and sanctioned as

a anticompetitive practice even if the merger had no anticompetitive effect in the relevant market.

As for illegal agreements, the Argentinean Antitrust Authority fined The Bahia Blanca Medical Association¹¹ for exclusivity clauses in the Association's Statutes, and fined Fox Sports America Network¹², for tying the acquisition right for one channel to the additional purchase of the right of another.

4.2 BRAZIL

Since 2003, CADE has intensified its efforts to identify and impose severe sanctions for cartel conduct. Since then, 27 Cartels have been condemned, and 34 executives were sentenced to imprisonment or to the payment of criminal fines, and a hundred other executives are facing criminal charges on the suspicion of cartel. The latter, specifically fines on executives, reflect in figures such as the 15 clemency agreements that have been signed since 2003.

One of the most important cases that were known by CADE is the AMBEV case.¹³ Facts of the AMBEV case, according to CADE's decision, were the following: AMBEV, a firm with dominant position in beer market of Brazil, implemented a fidelity program ("*Tô Contigo*"), which offered non-linear discounts to certain retailers in exchange for exclusivity of purchase from AMBEV products.

This conduct diminished competition, vertically foreclosed the market and artificially elevated competitors' costs. Thus, according to the CADE, the following articles were infringed by

11 Record 064-011494/2001, issued by the Ministry of Economy and Public Finances on October the 4th, 2011.

12 Record S01:0316202/2011, issued by the Ministry of Economy and Public Finances on August the 18th, 2011.

13 This case was ruled on July 23 2009, in the Record 08012.006274/2009-21.

this conduct: Law 8.884/94: art. 20, I y IV y art. 21, IV, V y VI. CADE charged AMEV with a fine of USD \$ 191.5 MM, which is the equivalent of 2% of AMBEV's sales in the year 2003, ordered the immediate termination of the conduct, and published the decision's extract in major newspaper in the country.

CADE has also ruled other important cases, such as the Frigelar Moto, Intercorp Comercio, Asociacion brasileira de productores de refrigeracao¹⁴, in which CADE considered that the exclusivity agreements in the distribution contracts, didn't break competition laws as long as the distributors were able to unilaterally terminate the contract, and the Industrias Dyno, Brasil S.A.¹⁵, where CADE considered that exclusivity clauses that allowed the buyer to demand an audit in order to find out whether the price given by the seller was according to what was agreed, was not a clause that breached competition law.

An interesting case of antitrust activities, which was also judged by CADE, is the case of the vitamins cartel. Between 1990 and 1999, the nine greatest worldwide vitamin producers (AG, F. Hoffman-La Roche AG, Aventis S.A., Merck KgaA and Solvay Pharmaceuticals) divided the market in separate regions that were allocated to each of them. As a consequence, competition was eliminated and consumers paid artificially higher prices for vitamins. The cartel was detected because one of its participants, Rhone-Poulenc (currently Aventis), reported its conduct to the U.S. and the European antitrust authorities and cooperated with the investigation in exchange for immunity. As a result of the investigation, F. Hoffman-La Roche and BASF, also part to the cartel, plead guilty and the U.S. Department of Justice imposed fines of, respectively, US\$ 500 million and US\$ 225 million.

14 This process was originally received on august the 5th. Its record number is 0033/1992.

15 The process number for this case is 08012.008842/2005-03.

CADE imposed fines in excess of R\$15 million against BASF, F. Hoffman-La Roche and Aventis for having taken part in a cartel that affected the Brazilian market. According to CADE, these firms had restricted the output and raised the prices of vitamins in Brazil.

4.3 COLOMBIA

The Superintendence of Industry and Commerce (henceforward SIC) is the Colombian Antitrust Authority. It must be noted that SIC is in charge of controlling anticompetitive and unfair trade practices, applying consumer protection laws and administering the trademarks and patents' registry. SIC is an administrative authority. In 1998 it was also given judicial authority to decide unfair trade and consumer protection cases. Some cases that were decided by SIC will be explained next.

In the Cement case¹⁶, there was a consciously parallel conduct regarding prices of three cement producers (Holcim, Argos and Cemex) in the period of time between June and December 2005. Supposed information exchange and meetings between the firms' executives were held. In this case, SIC didn't accept the firms' explanations for their pricing decisions. According to the SIC, the cement producers incurred in the conducts of price-fixing, market sharing and quotas; thus, it fined each firm with USD \$ 460,578.

Setas Colombianas, a mushrooms producer, was accused of Abuse of the Dominant Position through predatory pricing. SIC determined¹⁷ that although the firm did had a dominant position in the market, and that in some periods the prices were set below

16 The number of the record for this case is 051694; it was issued on December the 4th, 2008.

17 This decision was taken on the resolution number 30835, on December the 14th 2004.

the costs, Setas Colombianas didn't do it with the exclusory purposes. No sanction was imposed.

In the Terpel case¹⁸, a paraffin dealer brought the claim to the Constitutional Court. The paraffin dealer had claimed against government entities that there was an inconsistency between the agreed conditions of the product and the actual product delivered. In retaliation, Terpel cut off the paraffin supply to the dealer. He brought an action of fundamental rights protection against the Constitutional Court, which was dismissed by the Court, based on the fact that free competition wasn't a fundamental right, and it was out of its jurisdiction to rule such matter.

Sugar producers were fined for price fixing in the purchase of sugar cane, and acquitted for distribution of the lands dedicated to production of sugar cane.¹⁹ Chocolate Companies were fined for price fixing in the purchase of cacao to the growers, and acquitted for price fixing of chocolate. Rice Grinders were fined for price fixing in the purchase of rice.

The internationally known firm SABMiller was acquitted for abuse of dominant position in the launching campaign of the Peroni beer brand.²⁰ SIC found that even though SABMiller had dominant position, the fact that the company entered into promotion contracts with exclusivity of advertisement with selected bars and restaurants, did not produce a barrier to entry in the market. This case is similar to the investigations carried out in Brazil, El Salvador and Peru among others. The SIC preliminary report suggested that investigated company should be fined; nevertheless, the Superintendent considered on his decision that arguments presented during the investigation were sufficient, and, given the lack of evidentiary support during the investigation, it had not been pro-

18 With the judgment T-375/97, the Colombian Constitutional Court studied this case.

19 The SIC solved the named case in the resolution number 6839, on February 27th, 2010.

20 With the Resolution 11304 of 2007, issued on April the 25th,

ved beyond any reasonable doubt that SABMiller had incurred in the alleged conducts.

4.4 CHILE

FNE, Chile's Antitrust Authority has handled a case that has had a great importance worldwide. In this case, the accused firms had 90% market share of the drug retail business in Chile²¹. After a price war (during the year 2007) the three investigated drugstores supposedly coordinated price increases regarding 222 different products. They were supposedly aided by laboratories' suggested prices and by their public (and anticipated) announcements of prices increases. According to the FNE, the drugstores incurred in the conducts of price-fixing, for, though the accusation was based on circumstantial evidence, there was no alternative and reasonable explanation for the firms' conduct besides collusion.

FASA, one of the accused drugstores, signed a *Leniency settlement* with FNE in March 2009, which was approved by the Competition Judge of Chile (Tribunal de Libre Competencia) on April 2009. In this settlement:

- a. FASA accepted contacts between firms' executives with the objective to increase prices of certain products.
- b. FASA accepted that price lists were elaborated with its competitors
- c. FASA delivered evidence of the mechanism used to increase prices and accepted to collaborate in the elucidation of the facts.
- d. FASA accepted a reduced fine of approximately USA 1.08 MM

21 This case was solved on January 2012, with the sentence C-184/08.

e. FNE retired the charges against FASA and its directives

The procedure before the TDLC against the other two accused drugstores is ongoing. FNE could impose fines around USD \$100MM to each one.

4.5 EL SALVADOR

According to the Competition Superintendence, four travel agencies presented offer that contained identical prices (value of commissions) in two different public bids organized by the Ministry of Economy and CORSATUR²². The travel agencies had different cost structures: identical prices could not be justified with the argument that each agency had fixed individually the commissions according to its costs. Thus, the Antitrust Authority alleged that they incurred in the conduct of bid rigging (price agreements), and sanctioned the travel agencies with a total of US\$3,046.50 for each travel agency for each bid in which they participated, and ordered the communication of the decision to the Ministry of Economy, to initiate a proceeding to disqualify the agencies for future bids.

In another relevant case, the main 6 agricultural product brokers published a note on the local newspapers, informing to the public that they were about to increase their commission rates. After the investigation opened, they pleaded that the agreement was never performed, and that the rate was raised due to economical reason, as their level was very low. Each broker was fined with 5000 USD.

An investigation to the flour producers started based on leads of market allocation between the two flour producers of El Salva-

22 The Superintendence of Competition solved this case with the resolution number: SC-001-O/PA/NR-2009.

dor, in a ratio of 55-45%²³. The agreement was effectively proved based on sales information exchange, market share and a quota compensation system. The fine imposed was 3% of gross annual income. This case was very publicized due to the fact that it affected consumers' basic goods.

SALAZAR ROMERO Y BOSS VISION contractors began a series of projects and residential developments in the State of El Salvador. In the construction process was involved the construction of energy, water supply and Cable TV infrastructure. An investigation for Abuse of the Dominant Position was opened in light of the following facts: **(i)** the contractors established a subsidiary company in the Cable TV business, specifically for the areas developed. **(ii)** The competitors claimed that the constructors had physically blocked access to the infrastructure built. **(iii)** The constructors destroyed the equipment installed by its competitors. They were fined with US\$34,000.

The case of the Energy Distributors goes as follows: B&D wanted to compete in the south region of El Salvador market²⁴. In this area CAESS, a competing firm of B&D had a market share of 100%. In order for B&D to develop its business plans it had to share infrastructure with CAESS. A request was sent to CAESS, which was denied, claiming that for security reasons access couldn't be granted. The Superintendence questioned CAESS's motives, to which CAESS responded repeating the security argument, and that B&D was a competitor of his and there was no legal obligation to share infrastructure. The Superintendence considered that there was an abuse of dominant position for exclusory conducts regarding essential facilities, for which it imposed a fine for 170,000 USD.

23 The resolution number of this case was: SC-005-O/PA/NR-2008.

24 The resolution number was: SC-009-O/PA/R-2007.

The investigation for the Gas Pumps Case was opened based on almost identical gas prices in several regions of El Salvador²⁵. The Superintendence applied the connected markets theory in this case, as it noticed that consumers often had secondary sources of the product. Taking into account that Shell and Chevron and their market shares owned the refinery in the gas retail business, the Superintendence concluded that they had dominant position. The Superintendence also determined that Shell and Chevrons competitor weren't able to lower their prices, as this were controlled upstream by the investigated firms. So the prices established by Shell and Chevron allowed them to increase their competitor costs. For this case, the maximum fine of 850,000 USD was imposed to Shell and Chevron.

There are important undergoing investigations in this country:

- Sugarcane industry, for the abuse of dominant position and vertical price fixing.
- Telecommunications industry, for price fixing.
- Naval Services Firms, for collusion in public bids.

4.6 HONDURAS

The pharmacy and drug store association summoned an appointment to establish the maximum discount that could be given to customers. The investigation opened due to a complain regarding predatory prices, but the authority fined the firms for price fixing with 200,000 USD approximately. National Competition Authority disregarded the defense argument that the discounts had brought economic benefits to consumers, as it considered that this benefit had been limited by the agreement.²⁶

25 This case's resolution number is SC-004-D/PA/R-2006.

26 Resolutions' number: 004, 005 y 006-CDPC-2008-YEAR-III

Cement Companies were charged for price fixing and market allocation. The authority emphasized on how reprehensible was the fact of sharing information through the non-profit organization called the Cement Institute²⁷. Regarding this case is important to take into account that antitrust has recently focused on professional leagues and associations as important information exchange scenarios. This imposes one of the main challenges for Latin American authorities as they must prosecute anticompetitive conducts without overshadowing the benefits of this organizations and the precompetitive effects they can generate.

TV Cable Companies were charged with abuse of the dominant position, through exclusory practices against its competitors. They were fined with, approximately, 180,000 USD. As mentioned above, an investigation against Cerveceria Hondureña was opened because of a complaint brought to the Competition Commission, regarding an abuse of the dominant position through exclusivity clauses.²⁸

.7 MEXICO

On April 2011, the Federal Economic Competition Commission (henceforward CFC), Mexico's Antitrust Authority, imposed a record fine to Slim's America Movil for foreclosing competition to other telecommunications companies by raising the access fees to its network. America Movil has challenged the decision and it is possible that the company prevails.

The CFC issued two records²⁹ in which it has developed, mainly, two topics regarding violations of the Competition Law: The first one refers to fine imposed to the shipping companies

27 The resolution number for this case was 0022 CDPC/10.

28 The resolution number for this case was: 29-2008.

29 The record's number is DE-22-2003

and their legal representatives, for making price fixing in the cost of transport from Cozumel to Isla Mujeres. To impose the Fine, the authority took into account the following hints: **(i)** The announcement of the new tariffs was done on the same day, **(ii)** The rates varied on the same categories, and **(iii)** The announcements were made jointly in the same format that contained the logo of the two companies. In addition, in the route Playa del Carmen-Cozumel the CFC found a market allocation agreement to divide the time in which they operated. The amount of the fine imposed in this case goes over 2,062,529 USD.

4.8 PANAMA

The Authority for Consumer Protection and the Defense of Competition accused flour producers of price fixing; this was tacit collusion case, and the Commission fined the firms, as there was no reasonable economical explanation for the price identity than an anticompetitive agreement.³⁰

The consumer league sued a claim against the Credit Firms Association, as none of its members gave credit to the bad credit listed people. Commission considered that there was no competition law breach as there was a reasonable economic motive for this behavior.

Four meat producers agreed to follow the published prices on the local newspapers. The effects of this agreement took place on the retail market, as the meat producers owned the meat stores. The Authority for Consumer Protection and the Defense of Competition fined the investigated firms.

REFPAN, a gas refinery, had a supply system based on “*first come first served*”. On 2008 it established a system based on market shares. It has been claimed that this system unfairly benefits

30 This case was analyzed on the Entry 102-S.A.-2003.

Chevron, the downstream integrated firm. This case hasn't been ruled.

4.9 PERU

Local workers association filed a claim against AFPs (Pension Funds) for price fixing, regarding the commission rates for factoring.³¹ The court determined that there was a dominant position on behalf of the investigated firms but that this was a matter subject to state regulation, and antitrust laws could not be enforced. 2003.

INDECOPI, Peru's antitrust authority, opened an investigation against Peru Rail, Ferrocarril Transandino (Fetransa) and Peruval Corp, for not allowing access to the passenger transport markets. The second charge was the abuse of legal actions with anticompetitive goals, generating costs and delays to their competitors. The fine imposed was 800,000 USD.³²

Petro-Peru was charged with abuse of dominant position related to exclusive dealing and refusals to deal. Petro-Peru claimed that it did not had dominant position as its market share was only 37%, and that its legal obligations did no involved allowing its competitors to use its storage facilities. INDECOPI considered that, in this case, Vopak, a subsidiary of Petro-Peru, didn't compete with the claimants as it didn't distribute GLP, it only served as a storage firm. And that in light of this it could control the downstream market to which the claimants belong, consequently it did had dominant position.³³

The Peruvian Pilot Station hired 35 sailors and agreed a penal clause of 300,000 USD effective for those sailors who decided

31 Resolution number: 387-1998/TPI-INDECOPI.

32 Record: 009-2008/CLC

33 Record: 151-2010/CFD-INDECOPI

to resign or leave Pilot Station. This led to a scarcity of Sailors, which eventually generated serious consequences for its competitors. Pilot Station market share swayed between 75 y 69% in the investigated period. This became an important lead of the inexistence of an abuse of the dominant position. Nevertheless, Pilot Station actions allowed them to rise prices in some cases up to 75%. There was no economical reasonable explanation for Pilot Station hiring 35 sailors, as it needed much less than those. The Pilot Station brought against the local courts legal actions against former employees, which was another lead of the conduct.

In Peru, there is a Bottle Exchange System, which allows consumers to exchange bottles of one brand of beer for another with no additional cost. This permits consumers to access a wider number of beer brands, without having to buy new bottles, or to keep large inventories of such. A committee, whose members are the Grupo Backus firms, manages this system. This committee denied several requests from Ambev Peru to become a member, based on the conditions established in their statutes. INDECOPI considered that in this case, the denial of membership to Ambev Peru had the only exclusory purpose to close the Peruvian beer market for this firm, as it consequentially denied access to the bottle exchange system, and some of the brands that the committee managed. On 2009, Ambev withdrew its claim, closing the investigation against Grupo Backus.³⁴

5. CONCLUSIONS DRAWN FROM THE APPLICATION OF COMPETITION LAWS IN LATIN AMERICA

5.1 The actual trends in competition law enforcement in Latin America can generate legal contingencies:

- National competition laws are present in 19 countries

34 Record: 001-2004/CLC

- There are Higher fines and sanctions
- More prosecution powers for competition authorities have been given to them
- There is a broader scope of investigations: not only cases of horizontal agreements but also cases over other conducts that have foreclosure effects over the market have been studied.

5.2 Fines are nothing but the tip of the iceberg; fines imposed to a firm with a small operation in one country can have negative consequences for the whole organization. An antitrust investigation generates the following consequences:

- Lawsuit.
- Compensation of damages.
- Reputational damage.
- Stock value in international and local markets.
- Administration distraction – inefficient resource allocation

5.3 A globalized economy has lead Companies to establish their business around the globe in different jurisdictions.

5.4 Nowadays most countries have Competition Law legislations. On 2010, 115 jurisdictions in 110 countries will have merger review legislations.

5.5 Competition authorities have signed bilateral and multilateral cooperation and positive comity agreements, and International treaties in the E.U, CAN and Mercosur include an antitrust legislation.

- 5.6 The coordination and fellowship between competition agencies has reached a level in which they can coordinate simultaneous international dawn raids, to firms.
- 5.7 Competition authorities often meet in forums and organizations such as OCDE and ICN, in order to exchange information, review their proceedings and homologate their methods.
- 5.8 Competition law legislations around the world are quite similar, and so is the economic basis for its interpretation and enforcement by agencies.
- 5.9 Due to globalization, firms involved in certain industries have their business in several countries, with similar business practices, which can lead to multijurisdictional investigations.
- 5.10 Leniency programs increase the risk of antitrust investigations, and the risk of a fine eventually being imposed.
- 5.11 The globalized world and the trend for international competition law enforcement, make the establishment of an absolute competition law observance policy and zero tolerance for anticompetitive practices, necessary for national and international firms.
- 5.12 Latin American Competition Authorities show increased progress and development of their own doctrines and case lines. There are important cases and higher fines.
- 5.13 Competition policy is now well positioned as an important value for society and companies are more aware of the importance of being compliant.

- 5.14 Latin American competition law and enforcement have earned respect and importance worldwide. Competition is now an important value for Latin American economies.

