

Antitrust and the Americas
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Antitrust Cooperation in the Americas:
The Experience of the
United States Federal Trade Commission

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* The views expressed herein are the authors' and not necessarily those of the Federal Trade Commission or any Commissioner.

Thirty years ago, only a handful of jurisdictions in the Americas had functioning competition enforcement regimes. In the intervening years, there has been widespread recognition that market-driven economic competition offers a better path to productivity, economic growth, and greater consumer welfare than state control. Some twenty nations in the hemisphere have a competition laws,¹ and several more are on the way. As antitrust law coverage has grown, the United States Federal Trade Commission has built and maintained cooperative relationships with its counterparts throughout the hemisphere. Many relationships are built on formal cooperation agreements, while others take place through staff cooperation on cases, joint efforts in multilateral organizations, and technical assistance.

I. Antitrust Cooperation Arrangements

A. Formal Agreements

The United States is party to antitrust cooperation agreements with four countries in the Americas -- Canada,² Brazil,³ Mexico,⁴ and the most recent with Chile.⁵ These agreements provide, among other things, for the parties to notify each other when their law enforcement activities affect each others' interests, coordination of related investigations, investigative cooperation, positive comity, and obtaining evidence in each other's jurisdiction under certain conditions. They do not, however, override the confidentiality protections of national competition legislation, and therefore do not authorize sharing confidential information. While the United States and Canada have legislation that would permit their antitrust agencies to share confidential information and

¹ Argentina, Barbados, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Trinidad & Tobago, United States, Uruguay, and Venezuela.

² Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (August 1995), available at http://www.ftc.gov/bc/international/docs/agree_canada.pdf. The United States and Canada are also parties to a 2004 agreement on enhanced positive comity, available at <http://www.ftc.gov/os/2004/10/0410comityagreeenglish.pdf>.

³ Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between their Competition Authorities in the Enforcement of their Competition Laws (October 1999), available at <http://www.ftc.gov/os/1999/10/BrazilUSTreaty.htm>. The agreement became effective in 2003, following ratification by the Brazilian Senate.

⁴ Agreement Between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of Their Competition Laws (July 2000), available at <http://www.ftc.gov/os/2000/07/usmexagreeeng.htm>.

⁵ Agreement On Antitrust Cooperation Between the United States Department of Justice and The United States Federal Trade Commission, of the One Part, and the Fiscalía Nacional Económica of Chile, of The Other Part (March 2011), available at <http://www.ftc.gov/os/2011/03/110331us-chile-agree.pdf>.

to conduct investigations on each other's behalf,⁶ no "second generation" agreements authorizing this have been reached to date.

The United States is also a party to free trade agreements that contain competition provisions with Canada and Mexico (through NAFTA),⁷ Chile,⁸ and Peru⁹; the unratified agreement with Colombia also has a competition chapter. The competition provisions provide for competition laws aimed at economic efficiency and consumer welfare with an enforcement mechanism, and general commitments to notification, cooperation, and coordination. These provisions are subject to consultation but not dispute resolution. The competition chapters also include trade disciplines over the activities of officially designated monopolies and state enterprises that could distort competition and cross-border trade, subject to dispute settlement.

B. Case Cooperation

Cooperation agreements provide a valuable framework, while effective cooperation most importantly develops at the working level in the context of specific cases. Reflecting the degree of cross-border commerce, the FTC works most frequently with the competition agencies of Canada and Brazil, but is glad to work with any agency whether or not our countries have a formal agreement.¹⁰

Many wonder what takes place when agencies cooperate. Cooperation typically proceeds in stages. The FTC and a counterpart agency normally contact each other as soon as they realize that they may both be reviewing the same transaction. While they are precluded from revealing confidential information, including the fact of filing under the U.S. premerger notification rules, they typically are able to exchange a significant amount of information that is not so protected, such as the fact that an investigation is open, the timetable of the investigation, the general identity of the markets under examination, and initial theories concerning anticompetitive harm. In some cases, nothing more is required. In other cases, where both agencies conduct simultaneous investigations, the parties often facilitate cooperation by granting waivers of confidentiality that authorize the agencies to share confidential information. Parties grant waivers because they realize it is in their interest for the agencies to be able to have a

⁶ International Antitrust Enforcement Assistance Act, 15 U.S.C. § 6201 *et seq.*, Competition Act (R.S. 1985, c. C-34) §30.01(d) (ii) (Canada).

⁷ North American Free Trade Agreement, Chapter 15, available at <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=146>.

⁸ U.S. Chile Free Trade Agreement, Chapter 16, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file616_4010.pdf.

⁹ U.S. Peru Trade Promotion Agreement, Chapter 13, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file729_9536.pdf

¹⁰ For example, the first agency in South America with which the FTC shared confidential information pursuant to waivers was the Venezuela competition agency. See Resolución N° SPPLC/0028-2003 (Superintendencia para la Promoción y Protección de la Libre Competencia (Nov. 14, 2003), available at <http://www.procompetencia.gob.ve/images/282003.pdf>.

well-informed discussion, which typically leads to compatible analyses and outcomes.¹¹ Waivers are granted routinely between the United States and Canada, and with increasing frequency between the United States and Mexico.

The FTC's experience in case cooperation is weighted heavily towards mergers investigations. Cooperation in merger cases has been routine between the FTC and Canada for years, and is becoming so with Mexico -- among numerous examples:

- Last year, the FTC worked closely with Canada and Mexico in the *Novartis/Alcon* merger, involving contact lenses,¹²
- In 2010, the FTC worked with Canada on the *Danaher/MDS* merger, which involved the laser microdissection devices.¹³ Canada determined that the remedies obtained by the FTC were adequate to resolve competition concerns in Canada.
- The FTC worked with Canada and Mexico, among others, in the *Pfizer/Wyeth* merger, involving animal health products,¹⁴
- In the 2005 *Procter & Gamble/Gillette* merger, the FTC worked with Canada, Mexico, and other jurisdictions on a case that involved thousands of consumer products, and that created different overlaps in different countries;¹⁵ and
- In 2008, the FTC worked with Mexico and Canada on the *Huntsman/Hexion* merger, which involved the chemical industry.¹⁶

Perhaps of equal or greater importance are the cases that are never acknowledged. In some cases, early contact leads an authority to conclude that the remedies resulting from the investigation conducted by a counterpart agency are sufficient to resolve their own competition issues resulting from the merger, so that no additional remedy is necessary. The Canadian Competition Bureau has been a leader in implementing this kind of policy.¹⁷

¹¹ See generally John J. Parisi, Enforcement Cooperation Among Antitrust Authorities, before the IBC UK Conferences Sixth Annual London Conference on EC Competition Law, London, England, 19 May 1999 (updated October 2000), available at <http://www.ftc.gov/speeches/other/ibc99059911update.shtm>.

¹² FTC Docket No. C-4926; <http://www.ftc.gov/opa/2010/08/novartis.shtm>.

¹³ Canadian Competition Bureau Press Release dated March 8, 2010, available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03209.html>. See also <http://www.ftc.gov/opa/2010/01/danaher.shtm>.

¹⁴ FTC Docket No. C-4267; <http://www.ftc.gov/opa/2009/10/pfizer.shtm>.

¹⁵ FTC Docket No. C-4151; <http://www.ftc.gov/opa/2005/09/pggillette.shtm>.

¹⁶ FTC Docket No. C-4235; <http://www.ftc.gov/opa/2008/10/hexion.shtm>.

¹⁷ Information Bulletin on Merger Remedies in Canada (2006), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02170.html#PartVII>. See also *id.*; OECD Global Forum on Competition, Roundtable on Cross-Border Merger Control: Challenges for Developing and Emerging Economies -- Contribution from Brazil ¶ 17 (2010), available at [http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=DAF/COMP/GF/WD\(2010\)83&doclang=ua&en](http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=DAF/COMP/GF/WD(2010)83&doclang=ua&en).

C. Multilateral Cooperation

The FTC works closely with its counterparts in the hemisphere through many international networks and organizations. In 2010, the FTC was instrumental in forming the Inter American Competition Alliance, a network of all of the competition agencies in the Americas. The Alliance hosts a monthly conference call / webinar in Spanish in which participants share experience with particular enforcement issues, bring each other up to date on recent developments, and network about matters of common interest. Topics to date include cartels, leniency, merger investigations, and merger guidelines.

Most agencies in the Americas, including the FTC, participate in two other regional bodies, the Latin American Competition Forum,¹⁸ organized by the Organization for Economic Cooperation and Development, and the Ibero-American Competition Forum. In both groups, agency heads and senior officials meet to discuss competition policy topics of common interest and, in the former, conduct peer reviews of members' competition laws and policies. For example, Panama was the subject of a peer review in 2010.¹⁹

Beyond the region, the FTC cooperates closely with its counterparts in the Americas in multilateral organizations including the International Competition Network, the OECD Competition Committee, the UNCTAD Intergovernmental Group of Experts, and APEC's Competition Law and Policy Group. Brazil and Mexico have been particularly active leaders in these organizations, which have fostered consensus around best practice in competition policy in areas including mergers, unilateral conduct, anti-cartel enforcement, and competition advocacy. We look forward to participating in the 2012 annual ICN conference in Brazil.

D. Informal Cooperation

The FTC frequently consults with our colleagues in competition agencies in the Americas about cases in which one agency can learn from another based on experience with particular types of practices or in particular sector. Thus, even when the FTC is not involved with a particular investigation, it is glad to discuss our knowledge or analysis with others who may be confronting similar practices or issues.

II. **Technical Assistance**

During the past 20 years, the FTC has conducted a robust technical assistance program to aid newer agencies in the development of their capacity to design and enforce competition laws and policies. The program focuses on sharing the FTC's institutional experience in effectively detecting, investigating, analyzing, and remediating suspected

¹⁸ See <http://www.oecd.org/competition/latinamerica>.

¹⁹ See http://www.oecd.org/document/12/0,3746,en_2649_34685_46569932_1_1_1_1,00.html.

anticompetitive conduct.²⁰ Using FTC resources and in partnership with the United States development agencies, the United States Agency for International Development and the United States Trade and Development Agency, the FTC has conducted extensive programs in Argentina, Mexico, Brazil, the Andean countries, and Central America, and have taken initial steps in the Caribbean region.

The nature of the assistance provided depends on the needs of the recipient agency. In some cases, the FTC has placed long-term advisors to work alongside their colleagues and provide advice and assistance with cases in real time. This has occurred in recent years in Peru, Colombia, and on a regional basis in Central America. In other cases, the FTC, together with the Antitrust Division of the Department of Justice, has conducted interactive workshops that simulate investigations of cases such as mergers, anticompetitive agreements, cartels, suspected monopolization, and distribution arrangements. These programs have taken place in Argentina, the Andean countries, and Central America. The FTC has provided experts to help agencies build capabilities in particular areas, such as econometric analysis.

Recognizing that effective competition law enforcement does not depend on competition agencies alone, the FTC launched an initiative several years ago to work with counterpart competition agencies and with the help of United States judges to help Latin American judges strengthen their ability to review competition matters. Successful programs of this type include a multi-part program for Mexican judges that was publicly recognized²¹ and programs in Central America and the Caribbean.

FTC International Fellows Program

Provisions of a recently enacted U.S. law known as the US Safe Web Act have made it possible for the FTC to host staff of other competition (as well as consumer protection and privacy) agencies for long-term fellowships.²² The first International Fellow hosted under this program was from Brazil's CADE, followed by others from Canada, Mexico, Argentina, Colombia, Peru, and a colleague from Brazil. Pursuant to these statutory provisions, FTC staff have also spent several months working in agencies in Canada and Mexico. While these programs have gone a long way to share best practices and skills in the investigation of competition cases, they have gone even further in building the kind of practical enforcement networks that make it easy to contact colleagues in other agencies. The Fellows program has been mutually beneficial, as the FTC has been enriched by the deep contact with our colleagues. The relationships built

²⁰ See generally, U.S. Federal Trade Commission's And Department of Justice's Experience With Technical Assistance For The Effective Application of Competition Laws (2008), available at <http://www.ftc.gov/oia/ftcdojtechnicalassist.pdf>.

²¹ "Monopolies in Mexico: Compete—or else," *The Economist* (May 5, 2011).

²² Federal Trade Commission Act, Section 25a, 15 U.S.C. 57c-1 (2010). See <http://www.ftc.gov/oia/safeweb.shtm>.

through the program further cement relationships that lead to even more successful cooperation.

III. **Looking Ahead**

As cross-border commerce in our hemisphere grows, our competition agencies have strengthened our ties, providing the foundation for deeper and more effective cooperation. We look forward to working with the agencies in the Americas to promote cooperation, convergence, economic growth, and well-functioning competitive markets that best serve our citizens.