

Munich Studies on Innovation and Competition 9

Julia Molestina

# Regional Competition Law Enforcement in Developing Countries

 Springer

# Munich Studies on Innovation and Competition

Volume 9

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Springer

Julia Molestina  
München, Germany

ISSN 2199-7462                      ISSN 2199-7470 (electronic)  
Munich Studies on Innovation and Competition  
ISBN 978-3-662-58524-5              ISBN 978-3-662-58525-2 (eBook)  
<https://doi.org/10.1007/978-3-662-58525-2>

Library of Congress Control Number: 2018965468

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# Acknowledgements

This thesis was written at the Max Planck Institute for Innovation and Competition and the Faculty of Law of the Ludwig-Maximilians-University of Munich. A large part of the research was done through field research in the Andean Community and the Caribbean Community in 2012/2013.

The work contributes to the research on effective competition law in developing countries and places special emphasis on the institutional framework of competition law enforcement.

A number of people have contributed to the realization of this thesis, to whom I am very grateful. I would like to thank, first of all, my supervisor Prof. Dr. Josef Drexl, LL.M. (Berkeley), Director of the Max Planck Institute for Innovation and Competition, for the possibility to investigate on the issue of competition law in developing countries, his support and above all his valuable advice. Moreover, I would like to thank Prof. Dr. Matthias Leistner, LL.M. for his interest in the particular topic of competition law enforcement in developing countries and for reviewing the thesis as second referee.

I would also like to thank Dr. Mor Bakhoun, my academic advisor, for not only providing me with insider information on competition law enforcement in West Africa but also for encouraging me to research further in this particular field of law. The same goes for Dr. Tania Zúñiga-Fernández, who with her exceptional enthusiasm and legal knowledge has been a great inspiration along the way.

I cannot thank enough the people who accompanied me along the long and often-times burdensome process: Philipp Schautschick and Lisa Fey, you have become trusted and dear friends. Christian, Dora and Alois Aichner, thank you for providing me a substitute family in Munich.

Finally, and above all, I want to thank my family for not only their emotional support but also for challenging me to rethink my ideas occasionally and putting this research in a broader perspective. Renate, Pablo and Luis, you are my greatest inspiration.

Munich, Germany  
November 2018

Julia Molestina

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# List of Abbreviations

ACF	African Competition Forum
Adpostal	Administradora Postal Nacional
Afr.	African/African(e)
ALADI	Asociación Latinoamericana de Integración
ALALC	Asociación Latinoamericana de Libre Comercio
AndeanC	Andean Community
ANDI	Asociación Nacional de Empresarios de Colombia
Antitrust L.J.	Antitrust Law Journal
Antitrust Rev. Americas	Antitrust Review of the Americas
Brook. J. Int'l. Law	Brooklyn Journal of International Law
CAIPIR	Centro Andino para la Implementación de Políticas de Integración Regional
CAN	Comunidad Andina
CARICOM	Caribbean Community
CARIFTA	Caribbean Free Trade Association
CELAC	Comunidad de Estados Latinoamericanos y Caribeños
CEMAC	Central African Economic and Monetary Community
Chi.-Kent L. Rev.	Chicago-Kent Law Review
COMESA	Common Market for Eastern and Southern Africa
Comp.	Competition/Competencia
COMPAL	Competencia y Protección del Consumidor en America Latina—Competition and Consumer Protection for Latin America
Conc.	Concurrences
COTED	Council for Trade and Economic Development
CSME	CARICOM Single Market and Economy

ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
Eds.	Editors
EPA	Economic Partnership Agreement
Et seqq.	Et sequentia
EU	European Union
EUR	Euro
Eur. Comp. J.	European Competition Journal
FARC	Fuerzas Armadas Revolucionarias de Colombia
Fordham Int'l. L.J.	Fordham International Law Journal
FTAA	Free Trade Area of the Americas
GAR	Global Antitrust Review
GDP	Gross domestic product
GRUR Int	Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil
Harv. L. Rev.	Harvard Law Review
ICC	Incentives for the Colombian Currency
INDECOPI	Instituto Nacional de Defensa de la Competencia y de la Propiedad Intelectual
ISF	Sanitary Incentive for Flowers
Iss.	Issue
J. Comp. L. Policy	Journal of Competition Law and Policy
Jur.	Jurídica
J. W. Trade	Journal of World Trade
LORCPM	Organic Law of Regulation and Control of Market Power
Loy. U. Chi. L.J.	Loyola University of Chicago Law Review
MNE	Multinational enterprise
No.	Number
Nw. J. Int'l. L. Bus.	Northwestern Journal of International Law and Business
N.Y.U.	New York University
OECS	Organisation of Eastern Caribbean States
OHADA	Organisation pour l'harmonisation en Afrique du droit des affaires
OSIPTEL	Oficina Supervisor de la Inversión Privada de las Telecomunicaciones
Rev. Afr. de l'Intégration	Revue Africaine de l'Intégration
Rev. Comp. Propiedad Intelectual	Revista de la Competencia y la Propiedad Intelectual
Rev. Jur. Univ. Católica	Revista Jurídica Universidad Católica de Santiago de Guayaquil
R.I.D.E.	Revue Internationale de Droit Économique



RJLSC	Regional Judicial and Legal Services Commission
RTA	Regional Trade Agreement
RTC	Revised Treaty of Chaguaramas
SADC	Southern African Development Community
S. Cal. L. Rev.	Southern California Law Review
SIC	Superintendence of Industry and Trade
SIEC	Significant impediment to effective competition
SIRESE	Sistema de Regulación Sectorial
Sw. J.L. Trade Americas	Southwestern Journal of Law and Trade in the Americas
UNCTAD	United Nations Conference on Trade and Development
USD	United States Dollar
Vol.	Volume
WAEMU	West African Economic and Monetary Union
WAMU	West African Monetary Union
W. Comp.	World Competition
Wis. L. Rev.	Wisconsin Law Review
W.I.L.J.	West Indian Law Journal

# Part I

## Challenges of Competition Law in Developing Countries and the WAEMU, the AndeanC and the CARICOM

The fight against global poverty is the overall goal that drives development initiatives worldwide. The United Nations emphasizes the importance of reducing poverty and hunger in its Millennium Development Goals<sup>1</sup> and later in its Agenda of Sustainable Development (2015).<sup>2</sup> The fact that the UN “Agenda for Sustainable Development” should include the reduction of poverty as well as the enhancement of growth reveals the close entwinement between these two goals.

In a market economy, the private sector is the most important agent in the achievement of economic growth. It should be capable to sustain itself, independently of a central government. This calls for effective competition policy and enforcement structures. Competition law and policy reduce possible exploitations and enhance fair distribution of innovations that are made through economic growth. They protect the population, in particular the poor without economic or political power, from inflated prices of consumer goods and reduce barriers to market entry.<sup>3</sup> Competition law enforcement thus constitutes a crucial ‘development driver’. It is essential for markets to work. This especially applies to developing countries, in which markets are prone to corruption and tend to display high levels of concentration.

As a positive development, the number of developing countries that have implemented national competition laws is constantly increasing and the topic has received considerable attention in the last decades. Yet consistent and thorough enforcement has remained scarce for various reasons.<sup>4</sup> At the same time, developing countries started to engage more in South-South agreements creating regional integration groups with their own common markets in order to gain independence from the traditional North-South trade alliances. These regional integration regimes also

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<sup>1</sup><<http://www.un.org/millenniumgoals/>> accessed 11 November 2018.

<sup>2</sup><<http://www.un.org/sustainabledevelopment/development-agenda/>> accessed 11 November 2018.

<sup>3</sup>*Gal/Fox*, Drafting competition law for developing jurisdictions: learning from experience, 4 N.Y.U. L. Econ. Working Papers 2 (2014).

<sup>4</sup>Typical enforcement difficulties will be dealt with below in Sect. 2.2.

include competition laws and appear to offer an efficient instrument to overcome typical enforcement difficulties in developing countries.<sup>5</sup> Typical advantages brought forward in this context are: regional competition law has the potential to reduce the lack of resources by pooling them on the regional level, to create a credible threat in particular regarding international anticompetitive practices and to strengthen a common market by increasing legal certainty and by avoiding distortions of it.<sup>6</sup> Furthermore, a regional competition authority is structurally less prone to political interest and pressure groups.

Nevertheless, the actual enforcement success of the regional integration groups remained limited.<sup>7</sup> Gal identified inefficient institutional design as one of the major problems that plague regional competition law enforcement.<sup>8</sup> In fact, the allocation of competition law enforcement competences is a particularly sensitive and important issue, when competition culture is genuinely weak and a competition law system has to create incentives for the enforcers to actually apply the law.

In this regard, the AndeanC, the WAEMU and the CARICOM have not only adopted different approaches towards the allocation of competences, but actually display different extremes of the range of such allocation possibilities. Although they all relied on the European competition law system as a raw model, the enforcement systems differ in essential aspects. In the WAEMU the regional level is vested with far-reaching competences and thus constitutes a highly centralized system. The CARICOM's competition law's main characteristic is the lack of direct effect. Thereby enforcement mostly remains national and decentralized. The AndeanC has adopted an intermediate approach, in which member states without a proper national law were allowed to "download" the Andean competition law.

The aim of this research is to evaluate the potential of regional competition law systems as an enforcement mechanism in developing countries. Furthermore, it formulates recommendations regarding the optimal institutional design under given circumstances. The underlying research question is: under which conditions should a regional competition law system in developing countries be decentralized, when should it be centralized and to what extent.

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<sup>5</sup> Generally on the benefits and dangers of regional agreements of developing jurisdictions, see Gal/Faibish Wassmer, in: Drexler/Bakhom/Fox/Gal/Gerber, Competition Policy and Regional Integration in Developing Countries, 2012, pp. 291, 291ff.

<sup>6</sup> Gal/Faibish Wassmer, in: Drexler/Bakhom/Fox/Gal/Gerber, Competition Policy and Regional Integration in Developing Countries, 2012, pp. 291, 293ff.

<sup>7</sup> The competition law enforcement systems in the WAEMU, the AndeanC and the CARICOM will be analysed in Part II of this research.

<sup>8</sup> Gal/Faibish Wassmer, in: Drexler/Bakhom/Fox/Gal/Gerber, Competition Policy and Regional Integration in Developing Countries, 2012, p. 291, 311.

# Chapter 1

## Overview of the WAEMU, the AndeanC and the CARICOM



### 1.1 General History of Integration in the WAEMU, AndeanC and CARICOM

The institutional design of regional integration varies from bilateral cooperation agreements to custom unions.<sup>1</sup> The degree of centralization or decentralization usually correlates to the depth of integration.<sup>2</sup> Generally, South-South agreements tend to aim at deeper integration than North-South agreements. This finding is supported by the design of the WAEMU, the AndeanC and the CARICOM. They all constitute economic unions that aim at the creation of a common market.

#### 1.1.1 WAEMU

The integration movement in the WAEMU can be traced back to 1973 when eight States created the WAMU (West African Monetary Union), which aimed at the creation of a currency union. On 10 January 1994 seven member states (Guinea-Bissau only joined in 1997) signed the Treaty of Dakar, which further deepened integration by creating a customs and economic union, namely in form of a common market.<sup>3</sup>

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<sup>1</sup> *Cernat*, in: *Brusick/Alvarez/Cernat*, Competition Provisions in Regional Trade Agreements, 2005, pp. 1, 2. On a taxonomy of RTAs that contain competition related provisions, see *Cernat*, in: *Brusick/Alvarez/Cernat*, Competition Provisions in Regional Trade Agreements, 2005, pp. 1, 8ff.

<sup>2</sup> *Behrens*, Integrationstheorie, Internationale wirtschaftliche Integration als Gegenstand politologischer, ökonomischer und juristischer Forschung, *RabelsZ* 8, 40 (1981).

<sup>3</sup> Treaty of Dakar, see <<http://www.uemoa.int/Documents/TraitReviserUEMOA.pdf>> accessed 11 November 2018.

In Sub-Saharan Africa, colonialism has been the shaping influence on political and economic development.<sup>4</sup> It created a strong economic dependency of African States and a fragility of economies based on exports, which can still be felt today.<sup>5</sup> The abolishment of colonialism did not abolish the lack of political institutions and political culture.<sup>6</sup> Frequent state intervention on national markets and high economic concentration levels persisted. Generally, Africa is among the least-integrated regions in world economy.<sup>7</sup>

Regional integration in Sub-Saharan Africa did not only respond to spreading globalization, but also internal African incentives to integrate led to a high number of regional integration groupings in Africa.<sup>8</sup> However, not only have most integration groupings not lived up to their expectations, but the large number of the organizations has also created a situation of multiple memberships. In the context of the WAEMU, all WAEMU member states are also members of the ECOWAS and OHADA.<sup>9</sup>

Regional integration in Sub-Saharan Africa is closely entwined with the idea of economic growth and development.<sup>10</sup> The common market constitutes a priority that is supposed to create economic opportunities for member states while allowing for an efficient allocation of resources.<sup>11</sup> In this context, the formulated objectives of the WAEMU include the strengthening of the economic and financial competitiveness of member states, the achievement of convergence of economic policies and actions, the installation of coordination of national sectorial policies and harmonization of national legislations.<sup>12</sup>

In contrast to other integration movements, the WAEMU was able to rely on stable communitarian structures. Moreover, member states share a common cultural

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<sup>4</sup> Gerber, *Global Competition*, 2010, p. 249.

<sup>5</sup> Gerber, *Global Competition*, 2010, p. 252.

<sup>6</sup> Gerber, *Global Competition*, 2010, p. 249.

<sup>7</sup> UNCTAD, *Voluntary Peer Review on Competition Policies of WAEMU, Benin and Senegal*, 2008, p. 1.

<sup>8</sup> For example: COMESA (Common Market for Eastern and Southern Africa), OHADA (Harmonization for the Business Law in Africa), ECCAS (Economic Community of Central African States), ECOWAS (Economic Community of West African States), EAC (East African Community), CEMAC (Central African Economic Monetary Community), SADC (Southern African Development Community).

<sup>9</sup> OHADA has not implemented a regional competition law policy so far. Therefore, conflicts of jurisdictions are still of theoretical nature. For more information on the competition law developments in the OHADA, see *Drexl*, *Perspectives européennes sur la politique de la concurrence dans l'espace OHADA*, XXV R.I.D.E. 281 (2011).

<sup>10</sup> UNCTAD, *Voluntary Peer Review on Competition Policies of WAEMU, Benin and Senegal*, 2008, p. 1.

<sup>11</sup> UNCTAD, *Voluntary Peer Review on Competition Policies of WAEMU, Benin and Senegal*, 2008, pp. 3f.

<sup>12</sup> See Article 4 of the Treaty of Dakar; See also Webpage of the WAEMU, "Historique de l'UEMOA" <[http://www.uemoa.int/Pages/UEMOA/L\\_UEMOA/Historique.aspx](http://www.uemoa.int/Pages/UEMOA/L_UEMOA/Historique.aspx)> accessed 11 November 2018.

heritage and language.<sup>13</sup> Yet the integration movement suffers from several deficiencies. Member states still lack economic competitiveness and are highly concentrated and marked by state intervention. In a similar vein, inter-state trade is relatively weak within the common market. This is, not solely, but to a large extent attributed to the lack of diversification of production of the WAEMU's member states. In addition, tariff barriers persist.<sup>14</sup> Member states display different levels of economic development—Senegal constituting the economically strongest member state. Finally and among the most severe deficiencies for the West African integration movement and Sub-Saharan Africa overall remains political instability and internal political turmoil, which are capable of immobilizing an entire country and its administration.<sup>15</sup>

### 1.1.2 *AndeanC*

The integration process in the Andean countries started in 1969 with the signing of the *Acuerdo de Cartagena*<sup>16</sup> between Bolivia, Chile, Ecuador, Colombia and Peru. Venezuela joined later in 1973, however left the integration group in 2006 for political reasons. Chile also left the group in 1976, however regained a “partner status” in 2006.<sup>17</sup> The *Acuerdo de Cartagena* created a subgroup to the free trade zone ALALC (Asociación Latinoamericana de Libre Comercio),<sup>18</sup> in which the mentioned countries did not feel sufficiently represented. It moreover introduced a new focus on development-oriented policies instead of mere industrial policies. Among the most important institutional changes was the introduction of direct effect and the applicability of community law in 1979.<sup>19</sup> It was only in 1986 that the Andean Pact became an independent treaty and was separated from the ALALC. The signature of the

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<sup>13</sup>With the exception of Guinea-Bissau, where Portuguese is the official language.

<sup>14</sup>UNCTAD, Voluntary Peer Review on Competition Policies of WAEMU, Benin and Senegal, 2008, p. 3.

<sup>15</sup>For an overview of Sub-Saharan economic and political contexts, see Gerber, *Global Competition*, 2010, pp. 249ff.

<sup>16</sup>Acuerdo de integración subregional andino (Acuerdo de Cartagena) <[http://intranet.comunidadandina.org/IDocumentos/c\\_Newdocs.asp?GruDoc=14](http://intranet.comunidadandina.org/IDocumentos/c_Newdocs.asp?GruDoc=14)> accessed 11 November 2018.

<sup>17</sup>Decree No. 645, 20 September 2006. Further South American associated countries today are: Argentina, Brazil, Paraguay and Uruguay.

<sup>18</sup>Free trade zone in South America, which was established in 1960 with the signature of the Treaty of Montevideo. In 1980 it was replaced by the ALADI (*Asociación Latinoamericana de Integración*).

<sup>19</sup>Article 3 of the Treaty on the Creation of the Tribunal of Justice of the Andean Community (*Tratado de Creación del Tribunal de Justicia de la Comunidad Andina*) <<http://www.tribunalandino.org.ec/sitetjca/TCREACION.pdf>> accessed 11 November 2018.

Trujillo-Protocol<sup>20</sup> and the Cochabamba-Protocol<sup>21</sup> in 1996 led to a change of the institutional design of the Andean Pact, including the new title: the Andean Community (Comunidad Andina). In 1993, the principle of free circulation of goods was installed.<sup>22</sup> The Sucre-Protocol of 1997<sup>23</sup> implemented further reforming changes concerning a common external tariff and free movement of goods.

“Import-substitution Industrialization”, whose aim was to lessen the Latin American “dependency” on international capital centres, characterized the economic policy in the post-war period in Latin America and in the Caribbean.<sup>24</sup> This led to strong state intervention, central planning by the government or other related measures such as “price controls, detailed government regulation, stringent foreign investment rules, nationalization of broad sectors of the economy, and discretionary selection of winners”.<sup>25</sup> As a result, the Andean Pact did not only lack competitive markets, but also faced a general economic and political crisis.

While the Andean Pact had emerged rapidly at the beginning, its later development is marked by crises of economic, financial, trade and political natures.<sup>26</sup> Already in the 1970s and 1980s the evolution of the AndeanC stagnated and from 1983 inter-state trade declined drastically.<sup>27</sup> One of the major incidents was the oil crisis in 1973 and 1979/80, when the Andean Pact almost fell apart.<sup>28</sup> Moreover, in 1977 Peru and Ecuador gradually failed to comply with community laws because of unresolved political and territorial conflicts.<sup>29</sup> It was only starting from the 1990s when political and economic changes supported increasing liberalization in the member states.<sup>30</sup> The AndeanC also promoted cooperation with other trading blocs, most predominantly in 2002 with the European Union.<sup>31</sup>

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<sup>20</sup> *Acta de Trujillo Protocolo Modificadorio del Acuerdo de Integracion Subregional Andino*, 10 March 1996 <<http://www.comunidadandina.org/normativa/tratprot/trujillo.htm>> accessed 11 November 2018.

<sup>21</sup> *Protocolo Modificadorio del Tratado de Creacion del Tribunal de Justicia del Acuerdo de Cartagena* included changes to the organization of the Andean Court of Justice, 26 May 1996 <<http://www.comunidadandina.org/normativa/tratprot/cochabamba.htm>> accessed 11 November 2018.

<sup>22</sup> From 1992 to 1995 Peru was excluded from the Andean Pact and only held an observer status. This was due to the self-inflicted coup (“*autogolpe*”) of the Peruvian president Fujimori.

<sup>23</sup> *Protocolo de Sucre*, 25 June 1997 <<http://www.comunidadandina.org/normativa/tratprot/sucre.htm>> accessed 11 November 2018.

<sup>24</sup> *De León*, An Institutional Assessment of Antitrust Policy, 2009, pp. 22ff.

<sup>25</sup> *De León*, An Institutional Assessment of Antitrust Policy, 2009, pp. 24f.

<sup>26</sup> *Zúñiga-Feranández*, Fusionskontrolle in einer “small market economy” in Lateinamerika, 2009, p. 130.

<sup>27</sup> *Mancero-Bucheli*, Competition Law of Latin America and the European Union, 2001, p. 11.

<sup>28</sup> *O’Keefe*, Latin American and Caribbean Trade Agreements, 2009, p. 9.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Mancero-Bucheli*, Competition Law of Latin America and the European Union, 2001, p. 12.

<sup>31</sup> See for example the “EU-CAN Association Agreement”, *European Commission*, Andean Community Regional Strategy Paper 2007–2013, 2007 <[http://www.eeas.europa.eu/andean/rsp/07\\_13\\_en.pdf](http://www.eeas.europa.eu/andean/rsp/07_13_en.pdf)> accessed 11 November 2018.

The main goals of the AndeanC are the creation and encouragement of balanced and harmonic development, the acceleration of economic growth, and enhanced regional integration in order to gradually form of a common Latin American market. A common market is supposed to diminish economic vulnerability of member states in view of international trade, to strengthen sub-regional solidarity and to improve living standards of citizens in the member states.<sup>32</sup> The AndeanC adopted a system of “open regionalism”,<sup>33</sup> in which regional integration is conceived as an intermediate step towards global integration.<sup>34</sup> Yet the AndeanC is still struggling with the achievement of these goals. As free circulation of goods and people is still limping, inter-state trade similarly remains low. Moreover, national political turmoil remains an obstacle to integration. In this context, national security and defence conflicts arose between Ecuador, Bolivia and Colombia based on the hideout of the Colombian guerrilla group “FARC” (Fuerzas Armadas Revolucionarias de Colombia).<sup>35</sup> Moreover, the lack of legal convergence hampers the integration process. It also reflects a general lack of the member states’ political will to support and further Andean integration.<sup>36</sup>

### 1.1.3 CARICOM

Caribbean integration is an old process that goes back to 1958 when the West Indies Federation was created.<sup>37</sup> Originating from British colonialism, the West Indies Federation reflected the conception of its members that a move towards independence would be easier to achieve in conjunction within a political union.<sup>38</sup> Yet, it was not sustainable. The Federation was marked by the dominance of Jamaica and Trinidad and Tobago.<sup>39</sup> Jamaica withdrew from the Federation in 1961 and in 1962 the West Indies Federation finally collapsed. Nevertheless, integration movement in the region did not cease. Shortly after the collapse, in 1965, Antigua and Barbuda,

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<sup>32</sup> Webpage of the Andean Community, “Somos Comunidad Andina” <<http://www.comunidadandina.org/Quienes.aspx>> accessed 11 November 2018.

<sup>33</sup> Actually, there does not exist a common definition of the term “open regionalism”. This research refers to the term in the sense of “open membership”, according to which member states may enter other trading blocs as long as they fulfil the criteria of the RTA, of which they are already a member.

<sup>34</sup> For more information on the relevance of the creation of a common market among developing countries, see below Part III, Sect. 11.3.1.

<sup>35</sup> Zúñiga-Feránandez, Fusionskontrolle in einer “small market economy” in Lateinamerika, 2009, p. 130.

<sup>36</sup> Böttcher, Kartell- und Lauterkeitsrecht in den Ländern der Andengemeinschaft, 2004, p. 36.

<sup>37</sup> For more information on the West Indies Federation, see the webpage of the CARICOM <[http://www.caricom.org/jsp/community/west\\_indies\\_federation.jsp?menu=community](http://www.caricom.org/jsp/community/west_indies_federation.jsp?menu=community)> accessed 11 November 2018.

<sup>38</sup> O’Keefe, Latin American and Caribbean Trade Agreements, 2009, p. 10.

<sup>39</sup> *Ibid.*



Barbados, Guyana and Trinidad and Tobago signed the Caribbean Free Trade Association (CARIFTA).<sup>40</sup> Three years later other countries joined the CARIFTA as well. The main objectives of the CARIFTA included trade and development goals, in particular the promotion of industrial development and the rationalization of agricultural production.<sup>41</sup>

In 1973, Barbados, Guyana, Jamaica and Trinidad and Tobago signed the Treaty of Chaguaramas in order to transform the CARIFTA into a common market. The other eight member states followed. The Bahamas and Haiti became a member of the CARICOM, but not of the common market. This demonstrates the hybrid situation between the common market and the CARICOM, according to which states can become members to the community without participating in the common market.<sup>42</sup> Moreover, an additional organization, the CARIFORUM, was created, which encompasses not only the Caribbean member states, but also the Dominican Republic. It was created in order to represent the Caribbean States during negotiations concerning an economic partnership agreement with the EU.<sup>43</sup>

The CARICOM had, similar to the AndeanC, relied on an import-substitution approach.<sup>44</sup> Although the economic focus of the member states remained on exportation, there was an initial increase of intra-community trade through the creation of group.<sup>45</sup> Yet, with the global recession in the 1980s, also intra-Caribbean trade was struggling. As a consequence, the member states started to re-introduce import quotas and unilateral restrictions.<sup>46</sup> The implementation of a Common External Tariff by 1981 failed.<sup>47</sup> It was only in the 1990s when political and economic changes supported a recuperation of the CARICOM. In the late 1980s, initiatives regarding the establishment of a single market and economy re-emerged.<sup>48</sup> The Revised Treaty

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<sup>40</sup>For more information on the CARIFTA, see webpage of the CARICOM <<http://www.caricom.org/jsp/community/carifta.jsp?menu=community>> accessed 11 November 2018.

<sup>41</sup>*O'Keefe*, Latin American and Caribbean Trade Agreements, 2009, p. 11.

<sup>42</sup>Haiti and the Bahamas, which are members of the CARICOM, do not constitute signatories to the CARICOM Single Market and Economy (CSME). While Haiti was so far unable to comply with certain requirements of the CSME, the Bahamas opted out *inter alia* for national considerations related to the free movement of peoples and bigger trade interests with the North. Difficulties that stem from this hybrid situation will not be dealt with in this study. Likewise, the Bahamas and Haiti are not part of this study. For more general information see webpage of the CARICOM, "History of the Caribbean Community (CARICOM)" <<http://www.caricom.org/jsp/community/history.jsp?menu=community>> accessed 11 November 2018.

<sup>43</sup>For more information see <[http://www.caricom.org/jsp/community\\_organs/cariforum/cariforum\\_main\\_page.jsp?menu=cob](http://www.caricom.org/jsp/community_organs/cariforum/cariforum_main_page.jsp?menu=cob)> accessed 11 November 2018. More information on the CARIFORUM-EC Economic Partnership see below Part II, Dimension I: Section "The CARIFORUM-EC Economic Partnership Agreement".

<sup>44</sup>*O'Keefe*, Latin American and Caribbean Trade Agreements, 2009, p. 11.

<sup>45</sup>*Ibid.*

<sup>46</sup>*O'Keefe*, Latin American and Caribbean Trade Agreements, 2009, p. 12.

<sup>47</sup>*Ibid.*

<sup>48</sup>While the provisions of the original Treaty of Chaguaramas of 1973 also already addressed essential freedoms of a common market, they did not constitute obligations for the Member States

of Chaguaramas was signed in 2001.<sup>49</sup> It included the CARICOM Single Market and Economy (hereafter CSME), which arose as a distinct concept to the establishment of a common economic and political union.<sup>50</sup> Whereas the establishment of the latter entails the adoption of a common monetary and fiscal policy and the ceding of political power by the member states, the CSME covers those freedoms and harmonisations that are relevant for the installation of a common market.<sup>51</sup> Thus the CSME in theory includes the freedom of goods, services, labour, capital and persons, the right to establishment and a common trade policy.<sup>52</sup> Yet not only the principle of free movement of people, but also the right of establishment remains limited.<sup>53</sup> Moreover, CARICOM's member states differ in their level of economic development. Trinidad and Tobago constitutes the most dominant player *inter alia* due to its petroleum resources. In accordance, dominant enterprises in the common market originate mostly from Trinidad and Tobago. As a possible solution, the Revised Treaty of Chaguaramas entails several provisions on differential treatment for less-developed member states. While such provisions might be necessary tools in order to guarantee that all member states profit from the CARICOM and the common market, they also create loopholes for solely national considerations and increase legal uncertainty.<sup>54</sup> Slow and imperfect privatization has allowed member states to exercise influence on national markets.<sup>55</sup> Other impeding factors are the preponderance of foreign-owned economic activities, low entrepreneurship and

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for the lack of credible sanctions in case of non-compliance. Accompanied by unclear wordings, the integration process lacked the necessary political commitment, thus causing that "competent decision-makers were caught up in semantic, theory and concepts rather than the identification of practical measures to make regional integration a reality". See *Pollard*, *The CCJ and the CSME*, 24 May 2006, St. John's Antigua, pp. 4f.; *O'Keefe*, *Latin American and Caribbean Trade Agreements*, 2009, p. 12.

<sup>49</sup> Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy, see <[http://www.caricom.org/jsp/community/revised\\_treaty-text.pdf](http://www.caricom.org/jsp/community/revised_treaty-text.pdf)>. For more information see <<http://www.caricom.org>> both accessed 11 November 2018. The CARIFORUM-EU EPA also includes a chapter on competition policy, however the provisions of the EPA are quite "soft". For further information on the EPA, see below and see *Stewart*, in: *Drexl/Bakhoun/Fox/Gal/Gerber*, *Competition Policy and Regional Integration in Developing Countries*, 2012, pp. 161, 181ff.

<sup>50</sup> In fact, it arose in the context of the Grande Anse Declaration and Work Programme for the Advancement of the Integration Movement in July 1989. For more information on the CSME see <[http://www.caricom.org/jsp/single\\_market/single\\_market\\_index.jsp?menu=csme](http://www.caricom.org/jsp/single_market/single_market_index.jsp?menu=csme)> accessed 11 November 2018.

<sup>51</sup> The separation between the creation of a political and an economic union is *inter alia* explicable by the failure of the Federation of the West Indies.

<sup>52</sup> <[http://www.caricom.org/jsp/single\\_market/single\\_market\\_index.jsp?menu=csme](http://www.caricom.org/jsp/single_market/single_market_index.jsp?menu=csme)> accessed 11 November 2018.

<sup>53</sup> On the state of progress of the common market in the CARICOM, see below, Part II, Dimension I: Section "State of Progress of the Common Market".

<sup>54</sup> For an analysis of the provisions on preferential treatment of less developed member states or regions in the CARICOM, see Part II, Dimension I: Sect. 5.3.2.3.

<sup>55</sup> *Smith-Hillman*, *The Prospect of a Caribbean Competition Policy*, 40 *J. W. Trade* 405, 416 (2006).

generally low inter-state trade.<sup>56</sup> Moreover, the CARICOM is shaken by internal socio-political difficulties. Despite common culture and language,<sup>57</sup> the CARICOM suffers from a strong distrust of member states against each other.<sup>58</sup> Finally, social implications from drug trade and accompanying violence, as well as a predisposition for natural disasters have hindered fast economic growth.<sup>59</sup>

## 1.2 Development of Regional Competition Policy in the WAEMU, AndeanC and CARICOM and Main Enforcement Difficulties

### 1.2.1 WAEMU

The core competition law provisions in West Africa are codified in the Articles 88, 89 and 90 of the Treaty of Dakar, which was enacted in its actual version in 1994.<sup>60</sup> Further secondary legislation, Directives and Regulations, specify the competition law regime in the WAEMU.<sup>61</sup> WAEMU's competition law framework is strongly influenced by the European Union's legislation and jurisdiction. The Court of Justice of WAEMU in its opinion no. 003/2000<sup>62</sup> analysed the West African competition law provisions by comparing them to the European competition provisions as set out in the former articles 85 and 86 in the Treaty of Rome.<sup>63</sup> It thereby applied a

<sup>56</sup> Stewart, in: *Drexl/Bakhoum/Fox/Gal/Gerber*, Competition Policy and Regional Integration in Developing Countries, 2012, pp. 161, 169f.

<sup>57</sup> With the exception of Suriname and Haiti.

<sup>58</sup> Stewart, in: *Drexl/Bakhoum/Fox/Gal/Gerber*, Competition Policy and Regional Integration in Developing Countries, 2012, pp. 161, 162ff.

<sup>59</sup> Stewart, in: *Drexl/Bakhoum/Fox/Gal/Gerber*, Competition Policy and Regional Integration in Developing Countries, 2012, pp. 161, 170.

<sup>60</sup> 10 January 1994 signing of the treaty of Dakar, it entered into force on 1 August 1994, <<http://www.uemoa.int/actes/2003/TraitReviserUEMOA.pdf>>. The treaty was revised 2003; however, the changes did not concern the competition law provisions.

<sup>61</sup> Règlement No. 2/2002/CM/UEMOA "relatif aux pratiques anticoncurrentielles à l'intérieur de l'Union Economique et Monétaire Ouest Africaine; Règlement No. 3/2002/CM/UEMOA "relatif aux procédures applicables aux ententes et abus de position dominante à l'intérieur de l'Union Economique et Monétaire Ouest Africaine; Règlement No. 4/2002/CM/UEMOA "relatif aux aides d'Etat à l'intérieur de l'Union Economique et Monétaire Ouest Africaine et aux modalités d'application de l'article 88 (C) du traité; Directive No. 2/2002/CM/UEMOA "relative à la coopération entre Commission et les structures nationales de concurrence des Etats Membres pour l'application des articles 88, 89 et 90 du traité de l'UEMOA; Directive No. 1/2002/CM/UEMOA "relative à la transparence des relations financières entre d'une part les Etats Membres et les entreprises publiques, et d'autre part entre les Etats Membres et les organisations internationales ou étrangères; <<http://www.uemoa.int>> accessed 11 November 2018.

<sup>62</sup> *Avis n° 003/2000/CJ/UEMOA* of 27 June 2000, pp. 119ff. <[http://www.parcesmotifs.net/IMG/pdf/Recueil1996\\_2001.pdf](http://www.parcesmotifs.net/IMG/pdf/Recueil1996_2001.pdf)>.

<sup>63</sup> Since 2009 the European competition provisions are comprised in the Articles 101, 102 of the Treaty of the Functioning of the European Union (TFEU).

very literal interpretation of the Articles 88 lit. a) and lit. b) of the Treaty of Dakar, which vested the Commission of WAEMU with the exclusive competence to legislate on issues of agreement, abuse of dominance and state aids.<sup>64</sup> It moreover determined that regional competition law would apply to all allegedly anticompetitive practices within the WAEMU, irrespective a cross-border effect.<sup>65</sup>

The decision of the Court of Justice of the WAEMU caused several enforcement issues.<sup>66</sup> First, the regional competition authority is not vested with sufficient resources to adequately deal with the large number of practices that theoretically fall under the scope of community competition law. Second, national competition authorities are unwilling to efficiently cooperate with the WAEMU Commission in the enforcement of regional rules. In a similar vein, member states are still struggling to establish a competition culture. Third, the centralized system displays unresolved hierarchical problems with regard to national competition-related laws. Nevertheless, the WAEMU Commission was able to deal with a number of legal competition cases. It is noteworthy that the majority of these legal precedents involve state-related measures.

## 1.2.2 *AndeanC*

The AndeanC reformed its competition law provisions in 2005. In order to provide the regional competition authority with concrete sanctioning and investigatory powers, Decision 608<sup>67</sup> replaced the former Decision 285.<sup>68</sup> Decision 608 is the product of a “harmonization project of competition rules” (PROYECTO COMPETENCIA)<sup>69</sup> between the EU and the AndeanC, in which the former supported the reform of the

<sup>64</sup>In more detail see Part II, Dimension I: Sect. 5.1.5.1.

<sup>65</sup>*Avis n° 003/2000/CJ/UEMOA* of 27 June 2000, pp. 119ff.

<sup>66</sup>The following section only constitutes an overview of enforcement difficulties. The particular problems will be discussed in the respective section of the following analysis.

<sup>67</sup>*Comisión (CAN), Decisión 608, Normas para la protección y promoción de la libre competencia en la Comunidad Andina*, approved on 29 March 2004, published in the Gaceta Oficial del Acuerdo de Cartagena n° 1180 of 4 April 2005 <<http://www.sice.oas.org/trade/junac/Decisiones/DEC608s.asp>> accessed 11 November 2018.

<sup>68</sup>*Comisión (CAN), Decisión 285, Normas para prevenir o corregir las distorsiones en la competencia generadas por prácticas restrictivas de la libre competencia*, of 22 March 1991. <<http://www.comunidadandina.org/normativa/dec/d285.htm>> accessed 11 November 2018. On one of the main deficiencies of the former Decision 285, see Part II, Dimension I: Sect. 5.1.5.2.

<sup>69</sup>“*Proyecto Armonización de las Reglas de Competencia en la Región Andina*” - *Convenio de Financiamiento* (ASR/B7-3110/IB/98/0099), 2003, 2004, 2005; *European Commission, Andean Community Regional Strategy Paper 2007–2013*, 2007, p. 12 <[http://www.eeas.europa.eu/andean/rsp/07\\_13\\_en.pdf](http://www.eeas.europa.eu/andean/rsp/07_13_en.pdf)> accessed 11 November 2018; *Gallardo/Domínguez*, 20 *Boletín Latinoamericano de Competencia* 36, 36ff. (2005) <[http://ec.europa.eu/competition/publications/blc/boletin\\_20\\_1\\_es.pdf](http://ec.europa.eu/competition/publications/blc/boletin_20_1_es.pdf)> accessed 11 November 2018.

regional Andean competition norm by offering financial and technical support.<sup>70</sup> On the one hand, a supranational norm was considered to harmonize the objectives of competition in the sub-region in the medium terms and thus to increase the efficacy of the application of national laws.<sup>71</sup> On the other hand, the European Union specifically aimed at strengthening the common market of the AndeanC.<sup>72</sup> Additionally, from the European perspective, the implementation of an efficient competition law system was considered a necessary condition for the long-term goal of the creation of a free-trading zone.<sup>73</sup> Although the representatives of the European Union in the legislation process of Decision 608 underlined that the intention of the European Union was not to impose the European competition law system on the AndeanC,<sup>74</sup> the involvement of experts from the EU explains the large convergence between the Andean law and the European competition law provisions.<sup>75</sup>

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<sup>70</sup>Competition-law-related cooperation already began on 23 April 1993 with the signing of the “Acuerdo de Cooperación” in Copenhagen between the European Community (now: European Union) and the Acuerdo de Cartagena (now: Andean Community) and its member states, whose priority is the support and strengthening of the institutions of the AndeanC.

<sup>71</sup>*Secretaría General de la Comunidad Andina*, Informe de la Primera Reunión de Expertos Gubernamentales en Materia de Libre Competencia, 29 October 1998, Lima (SG/REG.LC/II Informe/Rev.1), p. 2 (available from the author).

<sup>72</sup>See Speech of the *Ambassador Mendel Goldstein*, Chief of the Delegation of the European Union of Peru, during the Reunion on the installation of the Competition Project between the AndeanC and the European Union, Lima, 3 March 2003: “Resultado de esta política [cooperation between the EU and the CAN and the institutional strengthening] es el convenio suscrito entre la Comisión Europea y la Secretaría General de la Comunidad Andina, que busca contribuir a consolidar el mercado común andino en el 2005, mediante el apoyo en material de libre competencia a las autoridades nacionales e instituciones comunitarias, dotándolas de instrumentos normativos y administrativos modernos y eficientes.”

<sup>73</sup>See citation of *Mendel Goldstein*, Chief of the Delegation of the European Union of Peru, in: *El Peruano*, 4 March 2003, “La UE buscará facilitar el comercio con andinos”.

<sup>74</sup>See Speech of the *Ambassador Mendel Goldstein*, Chief of the Delegation of the European Union of Peru, during the Reunion on the installation of the Competition Project between the AndeanC and the European Union, Lima, 3 March 2003: “No se pretende exportar el modelo europeo como está, a la Comunidad Andina (...) Realmente no tenemos ninguna intención de copiar, ni difundir nuestro concepto en la materia.”

<sup>75</sup>The “Proyecto Competencia” is also considered an important step towards the enactment of the “EU-CAN Association Agreement”. More information on the “EU-CAN Association Agreement” see *European Commission*, Andean Community Regional Strategy Paper 2007–2013, 2007, p. 15 <[http://www.eeas.europa.eu/andean/rsp/07\\_13\\_en.pdf](http://www.eeas.europa.eu/andean/rsp/07_13_en.pdf)> accessed 11 November 2018. A general cooperation between the EU and the AndeanC already started in 1983 with the “Agreement of the second generation”, which focused on trade relations between the two blocks. The “Agreement of the third generation” installed a legal framework for the cooperation between the two regional groups in 1992. In 2003, the “Political Dialogue & Cooperation Agreement” replaced the first declaration. In 2002 a EU-CAN summit took place in Madrid and in 2004 another one took place in Guadalajara. Both meetings inter alia aimed at the creation of the “EU-CAN Association Agreement”. The agreement’s main objectives are the intensification of political cooperation and trade. For more information on the cooperation between the EU and the AndeanC see <[http://eeas.europa.eu/andean/index\\_en.htm](http://eeas.europa.eu/andean/index_en.htm)> accessed 11 November 2018 <[http://eeas.europa.eu/la/docs/lima\\_en.pdf](http://eeas.europa.eu/la/docs/lima_en.pdf)> accessed 11 November 2018. See *Decisión 667 “Marco general para las negociaciones del Acuerdo de*

Decision 616 contains specific regulations on the competition law system in Ecuador.<sup>76</sup> Decision 456, 457 and Decision 283 deal with the competition-related matters, subsidies and rules on anti-dumping.<sup>77</sup> Procedural and administrative provisions are contained in further Decisions and Treaties.<sup>78</sup> A particularity of the Andean competition law is the “Downloading Option”, which allowed member states without a domestic competition law to directly apply the regional provisions as national law within their jurisdiction.<sup>79</sup>

Despite innovative elements and improvements to the former regional competition law, Decision 608 has not lived up to its expectations. First and above all, Decision 608 has remained unapplied and is actually ignored by national competition authorities. Second, although all member states have by 2011 enacted national competition law provisions (at least in their sectorial control) and have installed national competition authorities, a harmonization of national laws with Decision 608 has not been achieved. Rather the domestic laws reflect differing underlying economic market conceptions in Bolivia and Ecuador on the one hand, and Colombia and Peru on the other hand. Third, vertical and horizontal cooperation between competition authorities remains very low. This is also attributed to the fact that

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*Asociación entre la Comunidad Andina y la Unión Europea*”, 8 June 2007 <<http://www.comunidadandina.org/normativa/dec/D667.htm>> accessed 11 November 2018 and *Decisión 669 “Política Arancelaria de la Comunidad Andina”*, 13 July 2007 <<http://www.comunidadandina.org/normativa/dec/D669.htm>> accessed 11 November 2018.

<sup>76</sup> Comisión (CAN), *Decisión 616, Entrada en vigencia de la Decisión 608 para la República del Ecuador*, approved on 15 July 2005, published in the *Gaceta Oficial del Acuerdo de Cartagena* n° 1221, 25 July 2005 <<http://www.sice.oas.org/trade/junac/Decisiones/DEC616s.asp>> accessed 11 November 2018.

<sup>77</sup> Comisión (CAN), *Decision 456, Normas para prevenir o corregir las distorsiones en la competencia generadas por prácticas de dumping en importaciones de productos originarios de Países Miembros de la Comunidad Andina*, approved on 4 May 1999, published in the *Gaceta Oficial de Acuerdo de Cartagena* n° 436 of 7 May 1999; Comisión (CAN), *Decisión 457, Normas para prevenir o corregir las distorsiones en la competencia generadas por prácticas de subvenciones en importaciones de productos originarios de Países Miembros de la Comunidad Andina*, approved on 4 May 1999, published in the *Gaceta Oficial del Acuerdo de Cartagena* n° 436 of 7 May 1999; Comisión (CAN), *Decisión 283, Normas para prevenir o corregir las distorsiones en la competencia generadas por prácticas de dumping o subsidios*, approved on 21–22 March 1991, published in the *Gaceta Oficial del Acuerdo de Cartagena* n° 80 of 4 April 1991 <[www.comunidadandina.org](http://www.comunidadandina.org)>.

<sup>78</sup> Consejo Andino de Ministros de Relaciones Exteriores (CAN), *Decisión 623, Reglamento de la Fase Prejudicial de la Acción de Incumplimiento*, approved on 16 July 2005, published in the *Gaceta Oficial del Acuerdo de Cartagena* n° 1221, 25 July 2005; Consejo Andino de Ministros de Relaciones Exteriores (CAN), *Decisión 425, Reglamento de Procedimientos Administrativos de la Secretaría General de la Comunidad Andina*, approved on 14 December 1997, published in the *Gaceta Oficial del Acuerdo de Cartagena* n° 314, 18 December 1997; Governments of Bolivia, Colombia, Ecuador, Peru and Venezuela, *Tratado de Creación del Tribunal de Justicia de la Comunidad Andina*, approved on 10 March 1996.

<sup>79</sup> Generally on the “downloading option”, see *Marcos*, in *Fox/Sokol, Competition Law and Policy in Latin America*, 2009, pp. 453–468. For more details on the “downloading option” see Part II, Dimension II: Sect. 6.3.2.