ANALYSIS OF LENIENCY PROGRAMS IN THE ANDEAN REGION AND DECISION 608 OF THE ANDEAN COMMUNITY:

THE TISSUE PAPERS CASE

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Washington DC

The George Washington University
GW Competition & Innovation Lab
805 21st Street NW
Suite 621, 6th Floor
Washington DC 20052
https://competitionlab.gwu.edu/

Executive Summary

I. Takeaways

- The SGCAN and TJCA's reliance on declassified leniency materials contravened Ecuadorian constitutional guarantees and domestic leniency rules, rendering the evidence tainted. Procedural deficiencies—most notably, denial of meaningful access to contested documents and insufficiently reasoned resolutions—violated CAN's laws, due-process norms, and transparency, and legal-certainty standards.
- Moreover, SGCAN exceeded its Article 5 mandate by aggregating independent national infringements into a single regional cartel without demonstrable cross-border "real effects," in breach of the subsidiarity principle. Its unilateral collection of fines likewise usurped the execution role reserved to Member States under Article 35.
- To remedy these failings, Decision 608 should be amended to
  - (i) codify supranational leniency procedures with robust confidentiality safeguards.
  - (ii) clarify the threshold for cross-border jurisdiction.
  - (iii) strengthen procedural guarantees (including adversarial hearings and detailed motivation); and
  - (iv) realign enforcement functions so that supranational bodies determine liability while Member States execute sanctions.
- In the meantime, a correct and principled interpretation of the existing legal framework is critical.

II. Background

Between 2018 and 2023, SGCAN investigated alleged price-fixing by tissue-paper producers in Colombia, Ecuador, and Peru. Central to its case was evidence obtained through Ecuador's domestic leniency programme. In late 2022, SGCAN declassified these materials—without notifying leniency applicants or securing their consent—and incorporated them into Resolutions 2006 (May 2018) and 2236 (November 2021). The TJCA upheld those resolutions in September 2024, dismissing challenges based on confidentiality breaches and procedural irregularities.

IV. Analysis

- **Confidentiality of Leniency Materials:** Ecuador's leniency framework—and the District Administrative Court No. 2 of Guayaquil's precedent—unequivocally protects applicant submissions from disclosure absent express waiver. By declassifying and deploying these materials without any formal consent process, SGCAN violated domestic constitutional guarantees. Under the "fruit of the poisonous tree" doctrine, evidence derived from that breach is inadmissible.
- **Procedural Guarantees:** Resolutions 2006 and 2236 fail to satisfy minimum due-process requirements: i) *Access and Adversarial Exchange:* Affected firms were denied full access to the declassified materials and no adversarial hearing was convened; ii) *Motivation &*

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Transparency: The Resolutions offer only cursory reasoning, omitting linkages between specific facts and legal conclusions, thus undermining predictability and legal certainty.

- **Supranational Competence (Article 5):** Decision 608 empowers SGCAN to investigate conduct producing "real effects" across two or more Member States. Here, however, the record demonstrates only isolated national price-fixing episodes. Absent clear evidence of cross-border harm, SGCAN's aggregation of independent infringements contravenes the subsidiarity principle and exceeds its treaty mandate;
- **Enforcement Role (Article 35):** By collecting fines directly, SGCAN encroached on the execution authority reserved to the Member-State governments in which the conduct takes place. Article 35 contemplates that supranational bodies issue final decisions, while national authorities implement sanctions—mirroring the EU model. SGCAN's unilateral enforcement thus lacks a legal basis.

V. Conclusions & Recommendations

1. **Integrate Leniency Safeguards into Decision 608**
   - Insert detailed procedures for declassification, including notice and waiver protocols for leniency applicants.
2. **Clarify Cross-Border Thresholds**
   - Amend Article 5 to require demonstrable economic effects beyond national borders and institute a subsidiarity review.
3. **Reinforce Procedural Protections**
   - Mandate adversarial hearings or written submissions on contested evidence.
   - Require resolutions to include point-by-point reasoning tied to factual findings.
4. **Realign Enforcement Functions**
   - Revise Article 35 to explicitly assign decision-making to SGCAN/TJCA and execution to Member States.
   - Establish a coordination mechanism between SGCAN and national authorities.
5. **Institutional Oversight and Transparency**
   - Create an independent review committee for declassification requests.
   - Publish non-confidential decisions and comprehensive summaries of reasoning to enhance legal certainty.
6. **Correct Interpretation of Decision 608**
   - In the meantime, a correct and principled interpretation of the existing legal framework is critical. The *Tissue Papers Case* should be an opportunity to reaffirm regional enforcement cooperation.

The following opinion identifies significant due-process and jurisdictional defects in the Tissue Papers Case.

The proposed reforms will safeguard fundamental rights, restore institutional balance, and reinforce the legitimacy of the Andean competition regime.

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I. INTRODUCTION

The issuance of sanctions in the *Tissue Paper Case* represents a watershed moment in the institutional development of the Andean Community of Nations ("**CAN**"), constituting the first instance in which supranational authorities penalized a cross-border anticompetitive practice under Decision 608. This unprecedented action by the General Secretariat of the CAN ("**SGCAN**"), and its subsequent endorsement by the Andean Tribunal of Justice ("**TJCA**"), has sparked significant legal and institutional debate throughout the Andean region. While the case was initially heralded as a milestone in advancing the regional competition agenda, it has also exposed critical procedural and substantive flaws in the enforcement process, particularly with respect to the handling of confidential information submitted under a national leniency program.

At the core of the controversy lies the question of whether the supranational institutions acted in accordance with the foundational principles of legality, transparency, due process, and respect for national jurisdiction. The use of unlawfully obtained evidence, the disregard for judicial rulings from national courts, and the misinterpretation of key provisions of Decision 608 have not only cast doubt on the legitimacy of the sanctions imposed but also threatened the integrity and viability of leniency programs throughout the region.

Given the broader implications of this case for legal certainty, regional cooperation, and institutional trust, this opinion offers a critical assessment of SGCAN's Resolutions 2236 and 2006 considering both CAN law and comparative competition frameworks. It further identifies key legal and competition policy risks posed by these decisions and outlines the urgent need for reform of Decision 608, particularly through the incorporation of clear rules on leniency and the delineation of supranational and national competences. By doing so, it aims to contribute to a constructive dialogue on how to restore confidence in the Andean competition system and ensure that its enforcement tools remain effective, credible, and aligned with international standards.

II. OBJECTIVE

This opinion has been prepared by the George Washington Competition and Innovation Lab[1] ("**GW CIL**"), an initiative housed within and established by the GW Institute of Public Policy at the George Washington University, at the request of Kimberly-Clark ("**Kimberly**"). The objective of this document is to analyze: (i) the legal framework and implementation of leniency programs in the context of competition law in the Andean region; (ii) the interaction between national competition authorities and supranational bodies of the CAN; and (iii) Decision 608 of the CAN, including both its current application and the potential need for reform.

To address these issues, the opinion focuses on the analysis of the *Tissue Papers Case*, which involved enforcement actions in Colombia, Peru, and Ecuador.

[1] More information about the GW Competition and Innovation Lab is available at https://competitionlab.gwu.edu/.

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III. FACTS

1. In 2013 and 2014, executives at Kimberly-Clark became aware that certain employees in the Andean region had engaged in improper conduct, dating back to 2011 or earlier, that violated both company policies and the competition laws of Colombia, Peru, and Ecuador.

2. In response, the company opted to voluntarily self-report the conduct to the relevant competition authorities in each country and cooperate fully under their respective leniency programs, which are designed to incentivize early disclosure and dismantling of cartels.

- **Proceedings in Colombia: Before the Superintendence of Industry and Commerce ("SIC")**

3. On November 24, 2014, by Resolution No. 69518,[2] the Deputy for the Protection of Competition of Colombia's Superintendence of Industry and Commerce ("**SIC**") initiated an investigation against Colombiana Kimberly Colpapel S.A. ("**Kimberly Colombia**"), Productos Familia S.A., Tecnoquímicas S.A., Tecnosur S.A.S., and Drypers Andina S.A. The investigation sought to determine whether the companies had violated Article 1 of Law 155 of 1959[3] and Article 47.1 of Decree 2153 of 1992[4] by engaging in direct or indirect price-fixing agreements.

4. During the preliminary phase of the investigation, Kimberly Colombia and Familia submitted applications under Colombia's Leniency Program, as provided for in Article 14 of Law 1340 of 2009.[5] Both companies admitted their participation, accepted responsibility, provided substantial evidence, and entered into Cooperation Agreements with the Deputy Superintendent for Competition Protection.

5. By Resolution No. 31739 of 2016,[6] the SIC concluded that the investigated firms, including Kimberly Colombia, had engaged in anticompetitive conduct in violation of Article 47.1 of Decree 2153 of 1992. Kimberly Colombia was fined COP 68.95 billion (approximately USD 31.96 million) but was granted full immunity from payment as the first whistleblower under the Colombian leniency program.

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[2] Deputy for the Protection of Competition, SIC, Resolution No. 69518 of Noviembre 24 of 2014, https://www.sic.gov.co/noticias/pliegos-de-cargos-contra-5-empresas-por-cartelizaci%C3%B3n-empresarial-en-papel-higienico-y-otros-papeles-suaves.

[3] See Law 155 of 1959, Colombia, https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=38169.

[4] See Decree 2153 of 1992, Colombia, http://www.secretariasenado.gov.co/senado/basedoc/decreto_2153_1992.html.

[5] See Law 1340 of 2009, Colombia, http://www.secretariasenado.gov.co/senado/basedoc/ley_1340_2009.html.

[6] Superintendent, SIC, Resolution No. 31739 of 2016: https://sedeelectronica.sic.gov.co/sites/default/files/estados/022018/RES_31739_DE_2016.pdf and Superintendent, SIC, Resolution No. 69906 of 2016 (motion for reconsideration): https://sedeelectronica.sic.gov.co/sites/default/files/estados/RESOLUCION_69906_PAPELES_SUAVES.pdf

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- **Proceedings in Peru: National Institute for the Defense of Competition ("INDECOPI")**

6. On December 1, 2015, the National Institute for the Defense of Competition (**"I**NDECOPI"**)**'s Technical Secretariat initiated *ex officio* administrative proceedings through Resolution No. 024-2015/ST-CLC-INDECOPI[7] against Kimberly Clark Perú S.R.L. (**"Kimberly Peru"**) and Productos Tissue del Perú S.A., for allegedly engaging in horizontal collusion through price-fixing agreements in the market for toilet paper and other tissue products, practices prohibited by Articles 1, 11.1(a), and 11.2 of the Peruvian Competition Act.[8]

7. On May 4, 2017, INDECOPI's Commission for the Defense of Free Competition issued Resolution No. 010-2017/CLC-INDECOPI,[9] finding both companies guilty of engaging in horizontal collusion.

8. Due to their cooperation and participation in Peru's leniency program, Kimberly Peru was granted full immunity from a fine of PEN 171.66 million (approximately USD 46 million), while Protisa received a 50% reduction on its fine of PEN 104.19 million (approximately USD 28 million).

- **Proceedings in Ecuador: Superintendency for Market Power Control ("SCPM")**

9. On June 24, 2014, Kimberly Clark Ecuador S.A. ("**Kimberly Ecuador**") submitted before the Superintendency for Market Power Control (**"SCPM"), ** now the Superintendence for Economic Competition ("**SCE**"), a leniency application under Article 83 of the Ecuadorian Organic Law for Market Regulation and Control ("**LORCPM**"),[10] disclosing its participation in a horizontal price-fixing cartel in violation of Article 11(1) of the LORCPM. This self-incriminating information was classified as confidential by the SCPM.

10. On July 1, 2014, the SCPM ordered inspections of Kimberly Ecuador's offices in Guayaquil and Quito, conducted on July 2 and 11. A formal investigation was opened on May 21, 2015, but was later archived on Nember 17, 2015, due to insufficient evidence.

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[7] Resolution No. 024-2015/ST-CLC-INDECOPI, https://cdn.www.gob.pe/uploads/document/file/2141586/Nota%20sucinta%20-%20Resolucion%20024-2015-ST-CLC-INDECOPI.pdf?v=1630084713.
[8] See Legislative Decree 1.034 de 2008, Peru, https://cdn.www.gob.pe/uploads/document/file/2076311/DL%201034.pdf.pdf?v=1628722871.
[9] Resolution No. 010-2017/CLC-INDECOPI, https://centrocompetencia.com/wp-content/uploads/2024/10/Res.-010-2017-Indecopi.pdf.
[10] See Organic Law for Market Regulation and Control, Ecuador, https://www.planificacion.gob.ec/wp-content/uploads/downloads/2012/10/Ley-Organica.pdf.

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11. Unexpectedly, on November 26, 2015, the SCPM opened a new docket (SCPM-IIAPMAPR-EXP-040-2015) and, by Resolution SCPM-IG-DES-001-2016 of October 14, 2016, declassified the confidential information previously submitted by Kimberly Ecuador.[11]

12. On October 19, 2016, the SCPM recused itself from the case due to potential cross-border effects and referred the matter to the SGCAN on October 20, 2016.

13. Kimberly Ecuador was not notified of the declassification decision. It was only on November 17, 2016, that the company became aware of the breach of confidentiality and requested SCPM to preserve confidentiality and notify the SGCAN of the confidential nature of the information. Kimberly Ecuador submitted a formal request for revocation on November 29, 2016.

14. The SCPM responded on December 13 and 14, 2016, asserting that the Ecuadorian investigative unit lacked jurisdiction to act. The revocation request was dismissed. Kimberly Ecuador filed an administrative appeal on January 20, 2017, which was also denied.

15. On March 24, 2017, Kimberly Ecuador filed an administrative lawsuit before the District Administrative Court No. 2 of Guayaquil seeking annulment of the declassification. On September 19, 2018, the court ruled in favor of Kimberly Ecuador, declaring the declassification null for violating the company's right to due process and defense.[12]

- **Proceedings Before the Andean Community (SGCAN and TJCA)**

16. On November 14, 2016, the SGCAN of the Andean Community initiated formal proceedings through Resolution No. 1883[13] under Article 7 of Decision 608,[14] concerning "the prohibition of anticompetitive conduct with cross-border effects."

17. On May 28, 2018, the SGCAN issued Resolution No. 2006[15] imposing a joint fine of USD 18.3 million on Kimberly Colombia and Kimberly Ecuador, concluding "a price-fixing agreement, as defined under Article 7(a) of Decision 608, occurred between January 2006 and at least December 2013. According to the SGCAN, the agreement originated within the Kimberly and Familia groups in Colombia and had anticompetitive effects in the Ecuadorian market."[16]

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[11] Decision N° SCPM-IG-DES-001-2016, SCPM's Complaint to the CAN (N° 2709), Decision N° 1883 of the SGCAN, Application N° SCPM-IDIAPMAPR-2013-277, File N° SCPMIIAPMAPR-EXP-2016-004, Judgement N° 09802-2017-00197, Judgement N° 09802-2017-00767, Judgement N° 09802-2017-00196, and Constitutional Court Case N° 2007-19-EP.
[12] Case No. 09802201700197, District Administrative Litigation Court based in the Canton of Guayaquil, September 20, 2018.
[13] SGCAN of the Andean Community, Resolution No. 1883, November 14, 2016, https://www.comunidadandina.org/DocOficialesFiles/resoluciones/RESO1883.doc.
[14] Decision 608, Andean Community, https://www.comunidadandina.org/DocOficialesFiles/Gacetas/Gace1180.pdf.
[15] SGCAN of the Andean Community, Resolution No. 2006 of May 28, 2018, p. 252, https://www.comunidadandina.org/DocOficialesFiles/Gacetas/GACE3292.pdf.
[16] Id at 252.

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18. On July 11, 2018, Kimberly Ecuador filed a motion for reconsideration. By Resolution No. 2236 of November 19, 2021,[17] the SGCAN partially granted the request and reduced the fine to USD 17.06 million.

19. Kimberly Ecuador challenged the resolution before the TJCA of the Andean Community, which dismissed the appeal on September 19, 2024, thereby confirming the sanction.[18]

IV. ANALYSIS

1. Leniency and Competition Law

In the context of competition law, leniency programs are legal mechanisms specifically designed to combat cartels and other forms of collusive conduct.[19] These programs empower competition authorities to offer immunity or reduced sanctions to economic operators that voluntarily cooperate in the investigation of anti-competitive practices, conduct that typically occurs in secrecy and distorts market competition. The effectiveness of leniency programs stems from their strategic application of game theory principles, particularly by exploiting the inherent distrust among cartel participants. By creating a "race to report," these programs incentivize firms to be the first to disclose their participation in exchange for immunity or a substantial reduction in sanctions. In exchange for the information provided, cooperating parties may receive full or partial immunity from fines and/or other sanctions.[20]

1.1. Origins of Leniency in Competition Law

Leniency programs have their origins in criminal law, where analogous mechanisms were developed to dismantle organized crime groups by offering incentives, typically in the form of reduced or waived penalties, to individuals who cooperated with authorities.[21] Within competition law, the adoption of leniency programs began in the second half of the 20th century, driven by the unique enforcement difficulties posed by cartels. These anti-competitive agreements among competitors, such as price fixing, market allocation, or production limits, are difficult to detect due to their secretive nature.[22]

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[17] SGCAN of the Andean Community, Resolution No. 2236 of November 19, 2021, https://www.comunidadandina.org/DocOficialesFiles/Gacetas/Gaceta%204369.pdf.
[18] TJCA of the Andean Community, September 19, 2024, 2024 https://www.tribunalandino.org.ec/decisiones/AN/Sentencia01-AN-2021Kimberly.pdf.
[19] International Competition Network, Anti-cartel Enforcement Manual, Chapter 2, Drafting and Implementing an Effective Leniency Policy, 2014, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMLeniency.pdf.
[20] Id.
[21] OECD, Leniency for Subsequent Applicants, 2012, https://www.oecd.org/content/dam/oecd/en/publications/reports/2013/05/leniency-for-subsequent-applicants_79548817/753b2664-en.pdf.
[22] Id.

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The United States pioneered this approach in 1978 to encourage cartel participants to self-report and cooperate in investigations, offering full immunity if the report was made before an official inquiry began.[23] In 1993[24] and 1994,[25] the program was significantly expanded to include post-investigation applicants and individual executives, with further improvements in 2004 limiting civil liability for successful applicants. Similarly, the European Commission established its own leniency program in 1996,[26] formally recognizing cooperation as a basis for immunity or fine reductions. The EU framework was further refined in 2002 and 2006 to enhance legal certainty and policy effectiveness.

Currently, more than 60 jurisdictions have leniency programmes in place with the objectives of detecting old cartels, deterring new ones, as well as reaching enforcement efficiency in prosecuting those cartels.[27] In the Andean Region, while Colombia, Peru, and Ecuador, as Member States of the Andean Community, have implemented leniency programs within their domestic competition regimes, Decision 608, which governs supranational competition matters in the Andean Community, does not incorporate leniency programs into its legal framework.

1.2. Key Objectives of Leniency Programs in Competition Policy

Leniency programs play a pivotal role in competition policy by helping to identify and dismantle cartels, thereby fostering fair and transparent markets. The overarching goal of these programs is to maximize the effectiveness of competition policies by uncovering existing cartels, preventing anti-competitive practices, and imposing sanctions when necessary.[28] This contributes to the creation of competitive environments that benefit both consumers and businesses.

One of the primary objectives of leniency programs is the detection and dismantling of collusive agreements that inflict significant harm on markets and economies by distorting market dynamics. Cartels are notoriously difficult to detect without precise information about the illicit activities, which is exactly what an effective leniency program provides. This tool significantly reduces investigation costs and timelines, helping to mitigate the negative effects of cartel behavior on the market. By facilitating quicker resolution of cartel cases, leniency programs protect competitors and consumers alike from the damaging effects of anti-competitive practices.[29]

Another key goal is deterrence. A well-structured leniency program creates incentives for firms to avoid engaging in anti-competitive agreements by increasing the likelihood of detection. The risk of

[23] Id.
[24] US Department of Justice, Corporate Leniency Policy, 1993, http://www.usdoj.gov/atr/public/guidelines/0091.pdf.
[25] US Department of Justice, Leniency Policy for Individuals, 1994, http://www.usdoj.gov/atr/public/guidelines/0092.pdf
[26] European Commission, Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, 96/C 207/04, 1996 O.J. (C 207) 4 (EC), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_1996_207_R_0004_01.
[27] OECD, Challenges and Co-Ordination of Leniency Programmes - Background Note by the Secretariat, 2018, https://one.oecd.org/document/DAF/COMP/WP3(2018)1/en/pdf.
[28] Supra note 21.
[29] Id.

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being reported by co-conspirators becomes a significant factor in reducing cartel formation.[30] This aligns with non-cooperative game theory, which emphasizes the role of strategic behavior and the potential for defection in cartel dynamics.

Leniency programs also contribute to the development of a competition culture within a region, which is essential for attracting foreign direct investment (FDI) and fostering market openness. Transparent and fair markets attract investment, improve consumer welfare, and strengthen the competitiveness of the market. The effectiveness of leniency programs in promoting these outcomes depends on institutional trust, which can be built by ensuring that the programs operate in a clear, consistent, and fair manner.

Finally, one of the most significant effects of leniency programs is their ability to generate confidence in competition authorities and legal institutions. This, in turn, promotes the entry of new competitors into the market, further enhancing national and regional competitiveness.

1.3. Foundational Elements and Benefits of Leniency Programs in Competition Law

As mentioned before, leniency programs have become a key tool for modern competition enforcement, rooted in a combination of economic theory, legal principles, and public policy objectives. Their goal is to uncover and dismantle cartels, whether domestic or cross-border, that operate in secrecy and are difficult to detect through traditional investigative means. The effectiveness of leniency depends on a delicate balance of incentives, procedural integrity, and institutional trust. These foundational elements can be grouped into five core principles:

1) *Economic Incentive through Game Theory*

Leniency programs leverage the logic of non-cooperative game theory, particularly the prisoner's dilemma, to destabilize collusion. Firms involved in cartels face a strategic decision: remain silent and risk heavy sanctions or cooperate and benefit from immunity or reduced penalties. The possibility of full exemption for the first applicant triggers a "race to report," creating mistrust among cartel members and increasing the likelihood of self-reporting. This economic incentive is essential to disrupt the cartel from within. Therefore, leniency programs tend to be effective when the competition authority has established a credible reputation for its ability to uncover and sanction cartel behavior, and when cartel participants believe there is a real possibility that such misconduct could be detected and proven by the authority,[31] even in the absence of a leniency mechanism.[32]

2) *Significant Fines and Reduction or Full Immunity for the First Applicant*

[30] Supra note 19.
[31] In a 2017 OECD Secretariat Survey on experiences with the OECD Recommendation concerning Effective Action against Hard Core Cartels (OECD Survey 2017), many competition authorities stressed the importance of ex officio investigations.
[32] Id.

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A credible and substantial benefit must be guaranteed to the first whistleblower. Therefore, sanctions for those cartel members who do not qualify for leniency must be significant.[33] In the same way, immunity or significant fine reduction functions as a clear and predictable reward for self-reporting. The greater the expected benefit, the stronger the incentive to defect from the cartel. Ambiguity or inconsistency in granting these benefits severely undermines the strategic logic of the program.

3) *Strict Confidentiality, Transparency, and Certainty and Predictability of the Leniency Process*

The credibility and effectiveness of any leniency program hinge on its ability to guarantee strict confidentiality while offering a transparent and predictable procedure.[34] Firms are unlikely to cooperate if they fear that their disclosures may lead to retaliation, reputational damage, or be used in parallel proceedings. To encourage participation, competition authorities must inspire trust by safeguarding sensitive information and ensuring that breaches of confidentiality are avoided at all costs. [35]

Equally important is the need for clarity and consistency in the application of leniency policies. Potential applicants must clearly understand the conditions under which immunity or fine reductions will be granted. Revisions made by authorities such as the U.S. Department of Justice and the European Commission, particularly through their 1993 and 2002 reforms, respectively, demonstrate how increasing transparency and reducing discretion can significantly enhance the attractiveness and effectiveness of leniency mechanisms.[36]

4) *Efficiency and Procedural Economy*

Just as leniency has an economic rationale and incentive for cartel members, it also serves as an efficiency-driven tool for competition authorities in the detection and prosecution of cartels. Leniency programs allow competition authorities to overcome the high evidentiary and investigative burdens typically associated with cartel enforcement. Because cartels operate clandestinely, acquiring direct proof is resource-intensive and often unfeasible.

At the same time, it is also essential to highlight that leniency is closely linked to what is known as procedural economy. Due to its nature and purpose, leniency programs enable competition authorities to significantly reduce the high costs typically associated with cartel investigations, particularly those related to obtaining evidence. By facilitating access to insider information, these programs allow agencies to uncover, dismantle, and sanction anti-competitive conduct that would otherwise remain

[33] Id.
[34] LÓPEZ GÁLVEZ, I., Leniency Program and the Concept of Cartel. Competition Yearbook 2010 (ed. CASES, LL.), Barcelona, 2011, p. 12.
[35] International Competition Network, Guidance on Enhancing Cross–Border Leniency Cooperation. Cartel Working Group: Subgroup 1, 2020, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/CWG-Leniency-Coordination-Guidance.pdf.
[36] Supra note 26.

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hidden and virtually impossible to detect or penalize. This, in turn, helps avoid substantial economic and social costs.[37]

5) *Deterrence and Prevention*

By increasing the risk of detection, leniency programs have a deterrent effect on the formation of new cartels and foster the dissolution of existing ones. The fear that a member may betray the group discourages future collusion and enhances market transparency. From a public policy perspective, this contributes to more competitive conditions and economic welfare.

Leniency programs have become, although not the only one, a powerful tool for competition authorities in their efforts to preserve economic order by detecting, dismantling, and in some cases penalizing anticompetitive conduct that is harmful to markets, competitors, and consumers alike. However, this strategic balance in how these programs are implemented is extremely fragile and can be severely undermined if confidential information is misused, if whistleblowers are exposed to sanctions or parallel proceedings, or if promised benefits are not honored. Such failures destroy the program's credibility, eliminate its strategic incentives, and ultimately render it ineffective. As a result, deterrence weakens, the probability of detecting cartels decreases, and firms may be more inclined to remain silent or engage in increasingly sophisticated and concealed forms of collusion.[38]

2. The Andean Community

The Andean Subregional Integration Agreement ("**Cartagena Agreement**"), which draws inspiration from both the Bogotá Declaration and the Declaration of the Presidents of the Americas, was signed on May 26, 1969, by the governments of Bolivia, Colombia, Chile, Ecuador, and Peru. Venezuela became a member on February 13, 1973, and Chile withdrew from the agreement on October 30, 1976. As such, the founding treaty of the CAN has now been in effect for more than five decades. Following Venezuela's withdrawal in 2004, the current member states of the CAN are Bolivia, Colombia, Ecuador, and Peru ("**Member States**").[39]

Decision 608 of the CAN, which sets out the competition rules for the Andean Region, was adopted on March 28, 2005, following a joint effort between the CAN, its Member States, and the European Union, as part of the 2004 program titled "Harmonization of Competition Rules in the Andean Region." It is worth noting that, at that time, neither Ecuador nor Bolivia had national competition laws in place.

2.1. Purpose of Decision 608

[37] Supra note 27.
[38] Id.
[39] MIRANDA LONDOÑO, Alfonso. Competition Law in the Andean Community of Nations - CAN. Analysis and Proposals, 2022, https://revistas.pucp.edu.pe/index.php/derechoadministrativo/article/view/26443.

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The purpose of Decision 608 is explicitly articulated in Article 2 of the Decision, which pertains to the public enforcement of competition laws within the Andean Community and its Member States. This provision delineates the primary objective of the Decision, which is the protection and promotion of free competition within the Andean Community, thereby fostering market efficiency.[40]

At this point, it is essential to recognize that competition rules within an economic integration framework do not pursue the same objectives as domestic competition laws. While national regimes focus on maintaining competition within a single jurisdiction, supranational rules are designed to safeguard the integrity of the integration process itself. As Professor Gabriel Ibarra Pardo observes in the context of the CAN "experience shows that as tariff barriers and other governmental obstacles to trade are removed, private actors tend to recreate the previously existing market segmentation through anticompetitive and restrictive practices. Therefore, to ensure fair and undistorted competition, it is necessary to establish a set of rules that respond to the specific needs of each integration scheme, as well as strong institutions with sufficient authority to enforce those rules."[41]

In this sense, such rules only become meaningful and legitimate insofar as the economic integration process has reached a sufficient degree of maturity (typically marked by sequential steps such as the establishment of a free trade area, followed by a customs union, and ultimately a common market) where the elimination of internal borders is both real and enforceable.[42]

2.2. Scope of Application of Decision 608

Decision 608 was issued to investigate and prevent anti-competitive practices that impact the Andean market. This regulation is designed to complement the national competition laws of each Member State. Accordingly, anti-competitive practices with effects confined to a single country should be investigated and penalized by the respective national competition authority. In contrast, when the effects of anti-competitive behavior are transnational, and the jurisdiction of a single national competition authority is insufficient to investigate such practices, the case is considered to have a regional dimension, and the SGCAN will have the authority to conduct the investigation. This interpretation is supported by the text of Article 5 of Decision 608, which provides:

> *Article 5: This Decision shall apply to conduct carried out in:*
>
> *(a) The territory of one or more Member Countries and whose real effects are produced in one or more Member Countries, except where both the origin and effect occur in a single country; and*

[40] Article 2, Decision 608 CAN.
[41] IBARRA PARDO, Gabriel. Competition Regimes and Competition Policies in Latin America, in CEDEC, Seminar Collection No. 5, Javegraf, Second Edition, Bogotá: 1997, pp. 84–85.
[42] Id.

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(b) The territory of a non-member country of the Andean Community and whose real effects are produced in two or more Member Countries.

Situations not covered by this article shall be governed by the national legislation of the respective Member Countries.

According to Article 5, the regulatory framework does not exclude the jurisdiction of national competition authorities, which retain full competence to investigate and sanction conduct that produces effects solely within their domestic markets. The SGCAN's jurisdiction is therefore limited to multi-jurisdictional conduct.[43]

One of the most important elements for the SGCAN to establish jurisdiction over a specific case is the existence of *real effects* in two or more Member States. Drawing inspiration from EU jurisprudence, the SGCAN has taken a cautious and effects-based approach, aligning with the European Commission's doctrine that regional jurisdiction depends on whether a given conduct is genuinely capable of appreciably affecting the pattern of trade between Member States.[44]

In the *Angelcom Case* in 2015,[45] the TJCA established that a "*real effect*" should be understood as: "a) Any impact, influence, distortion, or alteration of supply or demand in the relevant subregional market or trade, which may include the price of products or services, other marketing conditions, the quantity produced, the quality of products or services, the supply channels for inputs, or the distribution or commercialization channels; or b) Any other situation that affects consumer welfare."

Additionally, the TJCA also examined the scope of Decision 608 in response to a request for preliminary judicial interpretation made by a judicial authority in Bogotá.[46] This request concerned an annulment claim filed by Ingenio Carmelita against Resolution No. 80847 issued by the SIC.[47] In its analysis, the TJCA emphasized that for the application of Decision 608, the concept of "cross-border" is essential. In cases where the effects of anti-competitive conduct are confined to a single country, the relevant laws of that country apply. However, when the issue involves multiple countries, the SGCAN holds the authority to lead investigations, if the *non bis in idem* principle is not violated.

3. The *Tissue Papers Case*

As outlined in more detail in the factual section, the *Tissue Papers Case* involves a cartel in the tissue products market, with anticompetitive effects in Andean countries. Even though the case was

[43] Supra note 39.
[44] Id.
[45] TJCA of the Andean Community, No. 05-AN-2025, http://www.tribunalandino.org.ec/decisiones/AN/05-AN-2018.pdf.
[46] TJCA of the Andean Community, No. 484-IP-2018, 2020, https://www.comunidadandina.org/DocOficialesFiles/Gacetas/Gaceta%203961.pdf.
[47] Superintendent, SIC, Resolution No. 80847 of 2015, https://sedeelectronica.sic.gov.co/sites/default/files/normatividad/80847%20DEL%2007-10-2015.pdf.

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investigated in each one of the countries locally under their leniency programs, the supranational investigation was formally initiated following a request submitted on October 20, 2016, by Ecuador's SCPM to the SGCAN, under Decision 608. Notably, this request was based on confidential information obtained through Ecuador's domestic leniency program from Kimberly-Clark Ecuador and disclosed to the SGCAN without the leniency applicant's consent.

The proceedings at the Andean Community level culminated in two significant decisions. First, Resolution No. 2006, issued on May 28, 2018, imposed substantial fines on Kimberly-Clark and Productos Familia for their alleged involvement in a cross-border price-fixing cartel. Second, Resolution No. 2236, issued in response to a motion for reconsideration that addressed procedural concerns, including the controversial reliance on declassified evidence, and resulted in a partial adjustment of the sanctions. The TJCA dismissed Kimberly's appeal on September 19, 2024, thereby confirming the sanctions imposed by the SGCAN.

3.1. Applicable Principles to Proceedings Before the Andean Community of Nations

The integrity and legitimacy of proceedings conducted under the framework of the CAN, particularly those concerning competition enforcement, are anchored in a series of fundamental principles enshrined in Decision 425[48] and Decision 608.[49] Among these, Article 5 of Decision 425 and Article 3 of Decision 608 are of paramount importance, as they establish the minimum procedural guarantees to which all administrative procedures within the CAN must adhere. These principles include, among others:

- *Legality:* All actions must be based on pre-existing norms, and evidence must be lawfully obtained. Illegally obtained evidence is inadmissible and cannot be the basis of sanctions.
- *Due Process:* Authorities must conduct fair procedures, allowing firms to be heard, present evidence, rebut adverse claims, and appeal decisions.
- *Right of Defense:* Investigated parties must have full access to the evidence used against them and a genuine opportunity to contest its admissibility and relevance.
- *Contradiction:* The right to an adversarial process in which parties can meaningfully challenge both factual and legal grounds.
- *Motivation:* Decisions must be adequately reasoned, indicating the factual and legal basis for any sanctions imposed. That motivation must be aligned with the purposes of the law.
- *Legal certainty and predictability*: Demand that economic operators can foresee with clarity the legal consequences of their conduct.

[48] Decision 425, Andean Community, https://www.comunidadandina.org/StaticFiles/DocOf/DEC425.pdf.
[49] Supra note 13.

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- *Transparency:* Fostering trust in the authority by ensuring that rules, procedures, decisions, and their underlying rationale are accessible, understandable, and auditable, while simultaneously guaranteeing that legitimate confidentiality of applicants and the evidence they provide in good faith will not be compromised.

It is crucial to understand that the observance of these principles is not merely aspirational but essential for upholding the rule of law, fostering regional legal certainty, and safeguarding the legitimacy of enforcement mechanisms. However, considering these principles, both, Resolution 2006 and Resolution 2236 in the *Tissue Paper Case* represent significant procedural failures and legal misinterpretations that severely undermine the credibility of competition enforcement within the Andean framework, as explained in more detail below.

3.2. Resolutions 2006 and 2236 violated the Andean Community Principles by Using Confidential Information Provided by Kimberly Ecuador to the SCPM under a Leniency Program

In the *Tissue Paper Case*, the use of confidential information provided by Kimberly Ecuador under a domestic leniency agreement with the SCPM in Ecuador, subsequently declassified and used by the SGCAN, constitutes a direct violation of essential legal and institutional principles that govern administrative procedure and supranational competition enforcement within the CAN. As mentioned before, while several Member States, including Ecuador, have incorporated leniency programs into their national legal frameworks, the supranational competition regime of the CAN, as currently embodied in Decision 608, does not recognize or regulate such mechanisms. This omission raises substantial and legal concerns when confidential and incriminating information originating from national leniency programs is repurposed in the supranational sphere.

1) Breach of Confidentiality: Undermining the Foundations of Leniency

As previously discussed, the principle of confidentiality is the cornerstone of any effective leniency regime. Its success fundamentally relies on the assurance that self-incriminating evidence, submitted in good faith under guarantees of secrecy, will not be disclosed or repurposed without the applicant's informed consent.[50] This protection fosters trust and provides strong incentives for firms to break ranks with cartels, revealing conduct that would otherwise remain hidden. The importance of this principle has been formally acknowledged by the Ecuadorian competition authority itself. In 2019, through Resolution No. SCPM-DS-2019-38, the SCPM[51] adopted specific guidelines governing the leniency process, expressly stipulating that any disclosure of information to international competition authorities must be subject to the applicant's prior authorization.[52]

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[50] LÓPEZ GÁLVEZ, I., Leniency Program and the Concept of Cartel, Competition Yearbook 2010 (ed. CASES, LL.), Barcelona, 2011, p. 12.
[51] Resolution No. SCPM-DS-2019-38, the SCPM, https://nmslaw.com.ec/wp-content/uploads/2019/10/Resoluci%C3%B3n-No-SCPM-DS-2019-38.pdf.
[52] Id. see article 3.

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However, in this case, the evidence was declassified by the SCPM without the consent of the applicant, and the SGCAN relied on documents and proofs that had originally been submitted to the SCPM under strict confidentiality as part of a leniency application by Kimberly Ecuador. Importantly, this was declared null and inadmissible by Ecuador's District Administrative Litigation Court based in the Canton of Guayaquil.[53] Notwithstanding this national ruling, the SGCAN incorporated the same evidence into Resolutions 2006 and 2236, thereby violating the principles of legality and confidentiality. The subsequent endorsement of this practice by the TJCA not only normalized the use of unlawfully obtained evidence but also set a dangerous precedent that weakens judicial predictability and erodes institutional integrity across the CAN.

It is worth noting that the Government of Ecuador formally acknowledged the irregular nature of this conduct. In an official statement, it expressed that "after analyzing the relevant background of these cases, it is necessary to convey the Ecuadorian Government's concern that information classified as confidential under its national legislation was used to initiate an investigation by the General Secretariat into anticompetitive practices, an investigation that ultimately led to sanctions against companies that had, in good faith, provided such information through processes clearly regulated at the national level."[54] This official recognition highlights the seriousness of the breach and reinforces the need to uphold confidentiality as a cornerstone of leniency programs.

However, the decisions of both the SGCAN and TJCA directly undermine the confidentiality principle, as well as the credibility, functionality, and future viability of leniency as an enforcement tool in the Andean region. Furthermore, without robust and unequivocal guarantees of confidentiality, potential whistleblowers may be deterred from coming forward, fearing retaliation or exposure to legal risks in other jurisdictions.[55]

2) Breach of Legality: The Unlawful Nature of the Evidence

As previously outlined, the evidence that initiated the investigation by the SGCAN was derived from a confidential case file and process in Ecuador, rendering all such evidence unlawful, given that the applicant did not consent to the sharing of information it voluntarily disclosed in good faith within the context of a leniency program. Therefore, the breach of confidentiality by the Ecuadorian and CAN authorities flagrantly violated the principle of the "fruit of the poisonous tree," which asserts that illicit evidence, including both the evidence obtained through the violation and the evidence derived from it, is inadmissible and null.[56] The reliance on this unlawful evidence, coupled with the disregard for a binding judicial decision issued by a judicial authority of Ecuador, represents a significant breach of legal principles.

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[53] Supra note 12.
[54] Official statement No. MPCEIP-DM-2023-022-0, Letter from Minister Daniel Legarda to SGCAN, August 9th, 2023.
[55] Supra note 31.
[56] UPADHYAY, Prashanti, Unveiling Legal Roots: A Comparative Analysis of the Doctrine of Fruit of the Poisonous Tree Across Common Law Jurisdictions, 2024, https://legalegalitarian.com/author/advprashanti2808/.

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In its ruling of September 19, 2024,[57] the TJCA analyzed this point and applied two exceptions to the "fruit of the poisonous tree" doctrine: (i) the independent source rule, and (ii) the good faith exception. According to the TJCA, the first exception permits the admissibility of evidence obtained from independent sources that are untainted by the unlawful information. Regarding the second exception, the TJCA determined that the SGCAN had acted in good faith, as it had been assured by the Ecuadorian competition authority that the evidence presented was derived from a file distinct from that of the leniency program. In this instance, the TJCA also found that other pieces of evidence, obtained without any issues, sufficiently justified the initiation of the investigation and corroborated the finding of the anticompetitive conduct.[58]

However, the TJCA's reliance on the good faith exception overlooks the central issue: all the information ultimately derived from Kimberly's original disclosure under the leniency program. This failure to address the violation of confidentiality protections crucial to the effectiveness and credibility of leniency programs is concerning. If such interpretation persists, future cooperation from economic operators may be severely undermined, as they may fear that confidential, voluntarily disclosed evidence will be misused. This could erode trust in the Andean competition system and in the leniency programs of Member States.

The broader implications of this decision are also significant.[59] The misapplication of legal principles poses a threat to the integrity of competition law enforcement in the region. The use of illegal evidence, even under the cited exceptions, jeopardizes the functioning of leniency programs, which depend on trust and legal certainty to encourage cooperation and expose concealed anticompetitive practices. The actions of the CAN authorities and the TJCA's decision highlight the need for a more cautious and principled approach to ensure the continued integrity of competition law processes across the Andean region.

3) Breach of Due Process: Denial of the Right of Defense and Contradiction

The proceedings also raised serious concerns regarding compliance with fundamental due process guarantees, in particular the rights of defense and contradiction. In administrative proceedings, especially those of a sanctioning nature, it is essential that investigated parties are afforded a fair process, in which parties have full access to relevant evidence. Furthermore, the right to defense and contradiction requires that parties be allowed to examine and challenge the evidence against them, present their own arguments, and have those arguments meaningfully assessed. These elements form the backbone of the right to a defense, enshrined in international legal standards.[60]

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[57] Supra note 18.
[58] See GÓMEZ APAC, Hugo. First cross-border anticompetitive conduct sanctioned in the Andean Community: the cartel in the soft paper market, 2025, https://centrocompetencia.com/primera-conducta-anticompetitiva-transfronteriza-sancionada-en-la-can/.
[59] CeCo, Collusion in the Andean Community: The Winding Path of the TJCA's Ruling, 2024, https://centrocompetencia.com/colusion-en-la-can-y-la-sentencia-del-tjca/.
[60] Due process is considered "the right of every person to be heard, with due guarantees and within a reasonable time, by a competent, independent, and impartial judge or tribunal, previously established by law, in the substantiation of any criminal

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In the case at hand, Kimberly was denied an effective opportunity to challenge the authenticity, legality, and admissibility of the evidence employed against them. The SGCAN failed to provide adequate reasoning to justify the inclusion of nullified evidence, thereby violating the burden of proof and established evidentiary standards. The TJCA, in turn, endorsed these procedural omissions without demanding a rigorous justification, further undermining the adversarial nature of the proceedings and the right to be heard.

4) Breach of Motivation and Transparency: Insufficient Justification of the Decisions

The reasoning underpinning Resolutions 2006 and 2236 was also markedly deficient. Both decisions lacked the legal and factual justification required to support the use of controversial evidence and failed to engage meaningfully with the procedural irregularities previously identified by Ecuador's judiciary. This failure to meet the standard of motivation not only breaches Article 5 of Decision 425 but also compromises the transparency and accountability of the supranational enforcement process, which requires decisions to be accessible, auditable, and comprehensible.

5) Breach of Legal Certainty and Predictability: Eroding Trust in the Enforcement Framework

The principle of legal certainty requires that laws and procedures be sufficiently clear, stable, and predictable, enabling individuals and economic operators to foresee, with reasonable clarity, the legal consequences of their conduct.[61] This foundational element of the rule of law is particularly critical in administrative sanctioning procedures, where the stakes for the investigated parties are substantial.[62] Predictability ensures that enforcement is not arbitrary, that legal standards are uniformly applied, and that actors can plan their behavior accordingly, particularly in complex cross-border regulatory environments such as the Andean Community.[63]

In this case, the actions taken by the SGCAN and later endorsed by the TJCA significantly disrupted legal certainty. The reliance on evidence that was previously declared null and inadmissible by Ecuador's court, without a convincing and transparent justification, creates ambiguity about the stability and coherence of legal protections afforded to leniency applicants and other market participants. The inconsistent treatment of confidentiality obligations, the misapplication of evidentiary standards, and the failure to provide adequate reasoning all contribute to an unpredictable enforcement environment.

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accusation brought against them, or for the determination of their rights and obligations of a civil, labor, fiscal, or any other nature," as established in Article 8 of the American Convention on Human Rights. See Inter-American Court of Human Rights, Case of Genie Lacayo, Judgment of January 29, 1997, para. 74.

[61] United Nations Conference on Trade and Development, Enhancing legal certainty in the relationship between competition authorities and judiciaries, 2016, https://unctad.org/system/files/official-document/ciclpd37_en.pdf.

[62] Id at 3.

[63] Id.

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Moreover, the departure from established procedural safeguards, particularly in cases involving supranational coordination, undermines the trust that companies place in the integrity of competition law enforcement. When economic operators cannot reliably anticipate whether their confidential disclosures will be protected, or whether a decision from a national court will be respected by regional authorities, their willingness to engage in voluntary cooperation with competition authorities is likely to diminish.

Such uncertainty not only disincentivizes future whistleblowing and undermines leniency programs but also weakens broader institutional legitimacy. Effective competition enforcement depends on mutual trust among national authorities, supranational bodies, and the business community. That trust cannot be sustained in the absence of legal predictability, coherence in decision-making, and respect for established procedural rights.

3.3. Incorrect interpretation of Decision 608 of the Andean Community of Nations

1) Incorrect interpretation of Article 5 of Decision 608

As previously noted, the purpose of Decision 608 is not to replace the powers granted to national authorities by the Member States of the Andean Community. Rather, the Decision addresses the CAN's jurisdiction to investigate and address anticompetitive practices that have cross-border effects within the Andean market. In this sense, for the SGCAN to exercise its jurisdiction, it is not sufficient to identify multiple national infringements occurring independently in various Member States. Instead, a single anticompetitive practice must produce *real effects* in the common Andean market.

It must be noted, however, that the Andean Community has, in these recent interpretations subject to analysis, adopted a broader view of its jurisdiction. From the perspective of supranational law, the CAN has suggested that horizontal collusive practices may be considered cross-border even if the conduct affects only one Member State. According to this line of reasoning in this case, cross-border effects may be presumed when, for example, the instigation or planning of an anticompetitive agreement occurs in one country, while the execution or harmful effects are realized in another.[64]

However, as demonstrated above, the plain language of Article 5, the SGCAN's own practical guidelines,[65] and the comparative experience of more integrated systems such as the European Union all point to a jurisdictional threshold rooted in *real effects* on the Andean market, this is, on two or more Member States. The existence of separate anticompetitive conduct in different countries, even if involving the same actors, does not automatically generate a regional case. Without clear evidence that a single, coordinated practice produced appreciable cross-border effects, the matter must remain under the exclusive jurisdiction of national authorities. Extending supranational jurisdiction without this threshold not only risks duplicative enforcement (violation of *non bis in idem*) and legal uncertainty

[64] Supra note 52.
[65] Andean Community of Nations, Practical Guide for the Application of Decision 608 of 2005 (CAN, 2005).

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but also violates the principle of subsidiarity that underpins the structure of the Andean competition regime.

2) Incorrect interpretation of Article 35 of Decision 608

Article 35 of Decision 608 outlines the roles of Member States in enforcing competition-related sanctions and measures. It establishes that the responsibility for executing precautionary or definitive measures lies with the governments of the Member States where the companies subject to the measures are based, or where the effects of the anticompetitive practices occur, in accordance with their national laws. The SGCAN, according to this provision, does not have the power to enforce these sanctions. According to Article 35:

> *"The execution of precautionary or definitive measures provided for in this Decision shall be the responsibility of the governments of the Member States where the companies subject to the measure have their main business center in the Subregion or where the effects of the reported practices occur, in accordance with their national laws. The executing Member State is required to notify the Secretary General, who will inform the other Member States, and the parties involved in the procedure of the enforcement of the measures."*

Therefore, it is critical to note that the SGCAN is not authorized to be the beneficiary of the penalties as determined in Resolutions such as 2006 and 2236. According to the provisions of Decision 608, it is the Member State that must carry out the enforcement, not the SGCAN. In this specific case, Ecuador, as the jurisdiction where the penalties would be executed, is the competent Member State. The SGCAN, therefore, has no role in enforcing the penalty, which directly contradicts what is stated in Resolution 2236. In fact, the TJCA has reaffirmed this in its ruling of September 19, 2024.

However, given that the evidence used to support the sanctions in this case was obtained in an unlawful manner under Ecuadorian law, Ecuador is not authorized to enforce the imposed sanctions.

Therefore, considering this misinterpretation, and contrary to what is established by the SGCAN in its decisions, the penalties imposed in Resolutions 2006 and 2236 are unenforceable.

4. Implications of the CAN Decision in the Andean Region

The *Tissue Paper Case* has far-reaching implications for the economic and regulatory landscape of the CAN. It exposes critical challenges regarding the legitimacy and functioning of the region's competition policy framework and highlights the urgent need for reform within CAN's regulatory structure, specifically regarding Decision 608. The ruling has also amplified uncertainties related to national sovereignty over competition enforcement and the protection of leniency programs, which are integral to detecting anti-competitive behavior.

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4.1. Consequences and Impact on the Member States

1) Legal Uncertainty

One of the most significant consequences of the CAN's decision is the profound legal uncertainty it generates across CAN Member States. The diverging interpretations of regional and national laws have created confusion about the jurisdictional boundaries of CAN's authority, particularly in terms of the enforcement of penalties and the application of evidence obtained through leniency programs. The uncertainty surrounding the decision, especially considering Ecuador's judicial invalidation of evidence from a leniency applicant, has led to concerns that national courts may override regional rulings. This undermines the predictability and stability necessary for competition law enforcement and raises questions about the overall legal integrity of the CAN's framework.

2) Disincentive for Leniency Programs

According to the OECD, "the number of leniency applications has significantly declined between 2015 and 2021. OECD jurisdictions saw the number of leniency applications drop by 58%"[66] and some of the reasons for this are related to multi-jurisdictional investigations and the risks of uncoordinated leniency programmes.

In this case, the erosion of trust in the protection of leniency applicants represents a grave concern for the CAN region. Leniency programs, which incentivize firms involved in anti-competitive practices to cooperate with authorities in exchange for reduced penalties, depend on the assurance that confidential information will not be disclosed. The CAN's decision, particularly in relation to Ecuador's invalidation of evidence, sends a message that cooperation with competition authorities may expose companies to legal risks. If businesses perceive that engaging with the competition authorities could result in the loss of confidentiality, they are likely to be dissuaded from coming forward, thereby diminishing the effectiveness of the leniency programs across the region. This shift could significantly reduce the detection of cartels, hampering the region's ability to uphold competition law effectively.

3) Loss of Legitimacy for the CAN

The ruling has also placed the legitimacy of the CAN at risk, both within the Member States and in the eyes of the global investment community. The divergence between regional decisions and national judicial interpretations undermines the perceived consistency of the CAN's competition framework. As a result, Member States may begin to question the authority of CAN in competition matters, particularly when its decisions are not binding in local courts. The loss of credibility could weaken the CAN's role as a supranational body and hinder its capacity to promote regional economic integration.

[66] OECD, The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels, OECD Competition Policy Roundtable Background Note, 2023, www.oecd.org/daf/competition/the-future-of-effective-leniency-programmes-2023.pdf.

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Furthermore, foreign investors may perceive this inconsistency as a signal of legal instability, reducing their confidence in the region and making them more hesitant to engage with Andean markets.

5. The Need for Reform of Decision 608

Considering the challenges exposed by the CAN decision, a reform of CAN's Decision 608 is essential. This reform would serve to address the gaps in the current regulatory framework, strengthen the protection of leniency applicants, and ensure consistency between regional and national enforcement practices. The proposed changes should include the following elements:

5.1. Inclusion of a Leniency Program with Adequate Safeguards

A fundamental aspect of the reform should be the formalization and strengthening of leniency programs across the CAN Member States. These programs are critical tools for detecting cartel behavior, and their success hinges on the protection of confidential information provided by cooperating companies. A revised Decision 608 should introduce clearer safeguards to protect leniency applicants from the unauthorized disclosure of sensitive information. This would restore trust in the programs and encourage greater cooperation with competition authorities, thus improving the overall efficacy of competition enforcement in the region.

5.2. Defining the Competencies of Member States vs. the Supranational Authority

One of the key issues raised by the *Tissue Paper Case* is the lack of clarity regarding the respective competencies of Member States and the supranational authority of the CAN. A reform of Decision 608 should clearly define the division of responsibilities between national authorities and the CAN in enforcing competition law. This clarification would prevent further jurisdictional conflicts and enhance the predictability of enforcement actions. A comparative perspective with the European Union ("**EU**") regulatory framework emphasizes the pitfalls of the Andean regulatory regime as illustrated in the present *Tissue Papers Case.*

1) EU Leniency Programme and Confidentiality

The EU competition regime, chiefly via Council Regulation 1/2003,[67] operates a decentralized enforcement system with harmonized leniency tools. Regulation 1/2003 empowers the National Competent Authorities ("**NCAs**") to apply EU cartel rules in individual cases while the European Commission ("**the Commission**") enforces EU law in its entirety. The Commission Leniency Notice (2006, updated in 2013) sets out eligibility criteria: the first firm to provide evidence of a cartel may receive full immunity (0% fine), later applicants partial reductions, provided they furnish "significant added value" to the case. The ECN Model Leniency Programme (2006) – though non-binding – was

[67] European Union, Council Regulation 1/2003, https://eur-lex.europa.eu/eli/reg/2003/1/oj/eng.

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designed to harmonize core elements of national and EU leniency schemes (scope, marker system, reduction caps, etc.).

A cornerstone of EU leniency is strict confidentiality. Regulation 1/2003, Article 28(1) mandates that any information collected under the regulation "shall be used only for the purpose for which it was acquired". In practice, the Commission's leniency policy requires applicants to waive confidentiality as to the authority, but it never relinquishes control of leniency material to third parties. For example, new Commission guidance explicitly clarifies that leniency statements are never disclosed to EU or national courts and that the Commission will even resist non-EU discovery requests for such material. Moreover, Directive 2014/104/EU (the "Damages Directive") forbids any court or tribunal from demanding leniency statements as evidence in damages claims. Thus, EU leniency statements enjoy robust protection: the applicant must waive confidentiality for enforcement purposes, but authorities must preserve secrecy and may only use the evidence within the cartel investigation.

Procedurally, EU law provides safeguards for leniency applicants and other parties. For instance, the Commission's best-practice "data room" (confidentiality ring) procedures require a binding agreement that emphasizes Article 28's protection. Applicants also have rights of access and hearing: notably, the Pfleiderer judgment held that EU law does *not* categorically bar an injured party from seeking leniency documents for damages purposes but left it to national courts to balance interests. In short, the EU leniency regime combines the carrot of immunity/reductions with firm safeguards: confidentiality is maintained (even beyond EU borders) and applicants benefit from legal protections (*e.g.* the Damages Directive bars disclosure, and Commission FAQs reinforce these principles).

2) Division of Enforcement Competences in the EU

Under Regulation 1/2003, the Commission and NCAs share jurisdiction in principle ("parallel competences"), subject to coordination. Article 5(1) gives the Commission power to apply Articles 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**"), and Article 5(2) similarly empowers NCAs to apply them in individual cases. This reflects a subsidiarity principle: NCAs traditionally handle pure "national" antitrust infringements, while the Commission takes cases with a substantial cross-border impact. The legal threshold is that the conduct "may affect trade between Member States", a concept defined by case law and Commission guidelines as involving *appreciable* cross-border effects. In practice, if an agreement operates only within one Member State with no spillover, EU law need not apply; but where even a small export or cross-border market is affected, the Commission may assert authority (as in *Cartes Bancaires* and others).

The European Competition Network ("**ECN**"), created by Reg. 1/2003, provides the framework for allocating cases among authorities. ECN members (the Commission and NCAs) inform each other of investigations at an early stage (per Article 11 Reg. 1/2003) to avoid duplicative enforcement. Flexible, non-binding "case allocation" principles have emerged: generally, the authority "best placed" (e.g. where the harm is greatest, defendants are located, or evidence resides) takes the lead. However, neither Regulation 1/2003 nor the ECN Notice creates any right for a party to have its case heard by

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a particular authority. Transparency within the network is maintained by requiring NCAs to notify the Commission at least 30 days before adopting an antitrust decision, ensuring coherent application across the EU. All exchanges under Article 12 are "network-internal" and must remain confidential (*i.e.* evidence shared among enforcers cannot be further disclosed outside the ECN).

Importantly, Reg. 1/2003 provides for deconfliction: if the Commission is investigating or deciding a case, national authorities and courts must not conflict. Article 16(1) requires national courts to stay proceedings that would contradict an existing or contemplated Commission decision. Similarly, Article 16(2) bars NCAs from rendering a contrary decision if the Commission has already decided the matter. These provisions give the Commission primacy when European interest is at stake. Finally, case law ensures that national enforcers can defend their work: in *VEBIC* (C-439/08), the CJEU held that Member States cannot bar a national competition authority from intervening as a party in an appeal against one of its own decisions, since excluding the authority "jeopardises" the effectiveness of EU competition law.

3) Comparison with the Andean Community (Decision 608) and the Tissue Papers Case

In contrast to the EU, the Andean Community's Decision 608 (2005) lacks a unified leniency regime or detailed jurisdictional guidance. CAN's interpretation of Article 5 of Decision 608 broadly confers Andean jurisdiction whenever a practice occurs in one member but has "real effects" in other Member State – essentially any cross-border element triggers Andean competence, except when *both* origin and effect lie in the same country (in which case national law applies). Notably, Decision 608 contains no specific rules on leniency, confidentiality, or waiver: leniency programs exist only at the national level, and Decision 608 gives no procedure for sharing or protecting leniency materials.

The *Tissue Papers Case* illustrates the gaps. The cartel – price-fixing in soft-paper products (tissues, napkins, etc.) – was investigated separately by the national authorities of Colombia, Ecuador, and Peru (each with their own leniency system). On May 21, 2015, Ecuador's SCPM opened a formal investigation, which was later archived due to insufficient evidence. In October 2016, the SCPM filed a complaint with the SGCAN, explicitly "declassifying" the confidential leniency submissions. The SGCAN then opened a supranational investigation under Decision 608 (Resolution 2236, 2018). Crucially, at that time, the Colombian competition authority (SIC) had just closed its own cartel case in October 2016, finding *separate* national cartels rather than a single region-wide conspiracy. The SGCAN report nonetheless insisted there was a binational cartel (Colombia/Ecuador) and continued the case.

These events underscore two conflicts with EU practice. First, jurisdiction: in EU law, a purely domestic cartel (even if involving a foreign parent) might not meet the "affects trade" test. By contrast, Decision 608 was interpreted to extend to a case where the origin (Colombia) and effect (Ecuador) each lay in one country. In other words, a foreign company fixing prices in one Andean market was enough to trigger CAN jurisdiction, effectively lowering the cross-border threshold. Ecuador's cooperation guidelines had stated that if origin and effect are in the same country, national law applies,

The George Washington University
GW Competition & Innovation Lab
805 21st Street NW
Suite 621, 6th Floor
Washington DC 20052
https://competitionlab.gwu.edu/

but here, the SGCAN interpreted that there was a "regional" cartel. The OECD has warned that this vague standard and lack of coordination invites conflict: Member States "do not have any practical source to understand how or when" the CAN regime should be activated. Indeed, SIC and INDECOPI later cautioned that concurrent national and CAN decisions risk conflicting outcomes, harming leniency reliability and legal certainty.

Second, leniency confidentiality: EU law would never allow the scenario that unfolded. Under EU rules, leniency applicant's statements would remain confidential and could not be handed over to another authority without consent. In this case, however, Ecuador's SCPM unilaterally forwarded all evidence from leniency applications to the SGCAN. The SGCAN then treated that evidence as admissible – in fact, in its reports, the SGCAN proclaimed that *"any evidence which may lead to the truth must be admissible,"* and that the leniency documents were merely initial, circumstantial proofs. In 2024, the TJCA unanimously upheld the SGCAN sanctions, explicitly validating the use of leniency-program evidence. In stark contrast, EU policy and recent guidance (including Directive 2014/104) make such disclosure fundamentally impermissible. The *Tissue Paper Case* outcome has alarmed practitioners: it effectively "declassifies" materials that EU standards regard as sacrosanct.

Finally, *non bis in idem* and coordination broke down. Even though Decision 608 is supposed to protect the *non bis in idem* principle, in practice, the SGCAN pressed ahead after national cases had ended, arguing the national findings were different. Under EU law, if the Commission took over, national authorities would have to suspend further actions (Art.16) and vice versa; and double-penalization is avoided. In *Tissue Paper Case* , by contrast, the national leniency benefits (immunity and reductions) became moot, and companies were fined by the SGCAN as if the CAN's case was separate.

4) Recommendations for Reforming Decision 608

The *Tissue Papers Case* saga highlights the need for CAN reform, drawing on tested EU mechanisms: CAN reform would include amending Decision 608 (or associated regulations) to expressly protect leniency materials from disclosure. As in the EU, any leniency statement or evidence submitted to a competition authority should be used only for its original enforcement purpose. A safeguards provision could forbid a national authority from transferring leniency evidence to the SGCAN without the applicant's explicit waiver (or, preferably, prohibit transfer altogether unless legally compelled). The CAN should consider a leniency "marker" or "immunity plus" scheme, but always alongside strict data protection. Following EU practice, implement a CAN-wide equivalent of the Damages Directive: e.g. ban courts from admitting leniency statements in private claims, and limit their use to the competition authorities' proceedings. Overall, the SGCAN and Member States must treat leniency information as "network-internal," barred from public view – the opposite of the SGCAN's 2018 stance.

Also, if a national authority has investigated or sanctioned a case, the SGCAN should ordinarily refrain (or review only ancillary national measures). Likewise, if the SGCAN opens a case, Member States should suspend overlapping domestic actions. Explicitly rule out dual sanctions for the same behavior.

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This could mean giving firms full immunity for a national grant of leniency, thereby barring SGCAN fines for the same facts (as the EU's policy of crediting national fines does). At a minimum, the CAN should require the SGCAN to coordinate with Member States to agree on which level will act on any given cartel, as the ECN does informally.

There is a need to formalize the CAN Leniency Program. Adopting a Model Leniency Program (by decision of member NCAs, specifying markers, information thresholds, and benefits, as in the EU) could also standardize confidentiality terms and waiver conditions, enhancing predictability. Even if national laws govern the grants of leniency, an Andean model will signal that cooperative regimes are valued across the Community.

Also, SGCAN investigations need to provide the full rights of defense. For example, adopt the principle from *VEBIC* that parties should be heard by any reviewing court and that the relevant authority be allowed to defend its decision. The CAN should clarify that the national authority (or Ministry/Official) that brought a referral has standing to participate in SGCAN proceedings and subsequent appeals. In practice, this would let Member States counter overbroad SGCAN actions (just as Belgium's Competition Council can defend its rulings under EU law).

By importing these EU-tested safeguards, Decision 608 could preserve the integrity of leniency (ensuring applicants' trust), sharpen the border between national and Community cases, and guarantee fairness. The CAN's first meaningful cartel sanction under 608 – the *Tissue Papers Case* – serves as a cautionary tale. Aligning the CAN rules with EU practice would mitigate the "legal security" concerns OECD and national authorities have identified and foster a more reliable, transparent competition regime in the region.

5.3. Strengthening the Institutional Framework of the CAN

In addition to the technical adjustments to Decision 608, it is crucial that the CAN's institutional framework be strengthened. This involves ensuring that the Secretary General of the CAN and other bodies operate within clearly defined limits of authority. The reform should include provisions that prevent the Secretary General from interfering in national legal processes or imposing sanctions that contradict local laws. This would help maintain the legitimacy of the CAN and avoid future conflicts between regional and national legal systems.

V. CONCLUSION

The *Tissue Paper Case* marks a defining moment for the Andean Community's competition regime, not only because it constitutes the first sanction imposed for a cross-border anticompetitive practice, but also because it reveals serious institutional and legal tensions at the heart of Decision 608's enforcement framework. While the case could have strengthened the credibility of regional enforcement, the procedural irregularities and the misuse of confidential evidence have instead raised

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805 21st Street NW
Suite 621, 6th Floor
Washington DC 20052
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concerns about the erosion of foundational principles such as transparency, legality, due process, and respect for national jurisdiction.

These developments pose immediate risks to the effectiveness of leniency programs and threaten to weaken trust in both national authorities and CAN institutions. The precedents set by Resolutions 2236 and 2006 risk triggering a domino effect of legal uncertainty, reduced cooperation, and diminished investor confidence, not only within the Andean Community but across Latin America.

To restore institutional legitimacy and ensure the long-term viability of regional competition enforcement, a comprehensive reform of Decision 608 is imperative. Such a reform should include the explicit incorporation of a supranational leniency program, the harmonization of procedural safeguards, and a clearer allocation of competences between national and supranational bodies.

In the meantime, a correct and principled interpretation of the existing legal framework is critical. It is only through a faithful adherence to the rule of law and a coherent application of Decision 608 that the Andean Community can preserve trust in its institutions, protect the integrity of national enforcement efforts, and lay the groundwork for a more mature and effective regional competition policy.

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