

2004 **LATIN AMERICAN** COMPETITION FORUM

SECOND MEETING
14-15 JUNE 2004
WASHINGTON
UNITED STATES



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Background Note by the Secretariat



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SECOND ANNUAL MEETING
of the
LATIN AMERICAN COMPETITION FORUM
June 14-15, 2004

Inter-American Development Bank
Andrés Bello Auditorium
Washington, D.C., United States

AGENDA

Monday June 14

8:30 a.m.	Registration
9:15 a.m.	Opening Remarks Mr. Dennis E. Flannery Executive Vice President, Inter-American Development Bank Mr. Frédéric Jenny Chairman, OECD Competition Committee WTO Working Group on the Interaction between Trade and Competition Policy, France

SESSION I Institutional Challenges in Promoting Competition

Chair: Mr. Gonzalo Solana, President
Tribunal de Defensa de la Competencia, Spain

9:35 a.m. **Presentation by the OECD Secretariat:** Mr. Lennart Goranson, Head Competition Outreach

9:45 a.m. **Presentations by three countries:** Argentina, Panama and Mexico

10:45 a.m. **Coffee Break**

11:00 a.m. **GENERAL DISCUSSION:**
Moderator: Mr. Lennart Goranson, OECD

1:00 p.m. **Lunch:** Hosted by Mr. Dennis Flannery, Vice President, IDB (By Invitation Only)
The Americas Dining Room – 7th Floor

Keynote Speaker: Mr. José Angel Gurría, Former Minister of Finance and Public
Credit and former Minister of Foreign Affairs, Mexico

SESSION II

Peer Review of Peru's Competition Law and Policy

Chair: Mr. Frédéric Jenny, Chairman, OECD Competition Committee
WTO Working Group on the Interaction between Trade and
Competition Policy, France

Examiners: Mr. Daniel Goldberg, Secretary, Ministry of Justice, Brazil
Mr. José Tavares, Secretary, Ministry of Finance, Brazil
Mr. Caldwell Harrop, Attorney, U.S. Department of Justice

3:15 p.m.-3:30 p.m.

Opening Remarks by the Chairman
Presentation of the Peer Review by Mr. Walter Terry Winslow,
OECD Consultant

3:30 p.m.-3:40 p.m.

Opening Remarks by Peru

3:40 p.m.-4:40 p.m.

Question and answer session with the three examiners

4:40 p.m.-5:20 p.m.

Further questions by other delegations

5:20 p.m.-5:50 p.m.

General discussion on the overall merits of the chapter and its
recommendations

5:50 p.m.-5:55 p.m.

Peru's response to the assessment

5:55 p.m.-6:00 p.m.

Chairman sums up

6:00 p.m.

Reception offered by the OECD (By Invitation Only)
Terrace - 7th Floor

Tuesday June 15

SESSION III

Competition Advocacy in Developing Countries

Chair: Ms. Barbara Lee, Executive Director
Fair Trading Commission, Jamaica

9:30 – 10:00 a.m.

Issues Paper: Presentation by Mr. John W. Clark, Consultant, OECD

Lead Discussant: Mr. Ignacio De León, Econlex Development Strategies; Former
Chairman and General Counsel of PROCOMPETENCIA, Venezuela

10:00 a.m.-12 p.m.

GENERAL DISCUSSION:

Moderator: Mr. John W. Clark, OECD

SESSION IV

Conclusions and Future Work

Chair: Mr. Fernando Sánchez Ugarte, President, Comisión Federal de
Competencia, Mexico

12 p.m.-12:50 p.m.

GENERAL DISCUSSION

12:50 p.m.

Closing Remarks: Mr. Carlo Binetti, Representative, Special European Office, IDB
Mr. Bernard J. Phillips, Head Competition Division, OECD



SUMMARY RECORD



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SUMMARY

SECOND ANNUAL MEETING OF THE LATIN AMERICAN COMPETITION FORUM

June 14-15, 2004

Inter-American Development Bank
Washington, DC, United States

The Inter-American Development Bank (IDB) and the Organization for Economic Co-Operation and Development (OECD) brought together leading officials from Latin American and Caribbean Competition Agencies, as well as leading officials from Competition Authorities from France, Portugal, Spain and United States for the second annual meeting of the Latin American Competition Forum. Held over two days at the IDB's headquarters in Washington, DC, the forum provided participants a platform to discuss some of the most important issues facing authorities as they work to establish a deeper understanding and culture of Competition Law and Competition Policy in the region. This year, discussions focused on the challenges faced by competition agencies in their efforts to promote competition, and to what extent advocacy of free competition should be a responsibility assumed by the agencies. A peer review of Peru's Competition Law and Policy was also conducted.

IDB Executive Vice President Dennis Flannery welcomed the participants and remarked that the forum demonstrates the high priority in which the Bank holds competition. Frédéric Jenny, chairman of the OECD Competition Committee, in his welcoming remarks pointed out that no country has succeeded in sustainable economic development without opening up for trade, but that strong market institutions, safety nets, and effective market governance were needed to ensure that a country received the full benefits of international trade. It is in the last of these three categories where competition authorities can help development by ensuring that freedom of action does not turn into a license to exclude or exploit, according to Jenny.

After the opening remarks, the participants tackled "Institutional Challenges in Promoting Competition." Gonzalo Solana president of Tribunal de la Competencia of Spain who chaired Session I refers to the different institutional competition systems of European countries. Lennart Goranson, the head of Competition Outreach in the OECD's Competition Division, addressed the issue of independence among competition authorities, saying that while there is no such thing as a totally independent competition authority, it should not be susceptible to pressure from vested interests trying to protect themselves from competition.

In his country's presentation to the assembly, Mexican Federal Competition Commission (CFC) President Fernando Sanchez Ugarte listed several challenges facing his organization, including the absence of an integral competition policy, a lack of competition culture, excessive litigation, ineffectiveness of sanctions, legal limitations, and limited resources. Gustavo Paredes, the head of Panama's Commission on Free Competition and Consumer Affairs, noted that Panama had linked free competition and protection of consumers by establishing a government entity that has authority over both. This decision, Paredes said, had smoothed Panamanians' acceptance of free competition efforts.

In the ensuing discussion, many delegates took up a challenge common among Latin American countries: judiciary branches ill-equipped to handle competition cases. Some criticism of the region's judges were pointed, including a suggestion that Latin America's judiciary system was profoundly ignorant of economic, commercial, and competition affairs. Other participants were more moderate in their assessment. Jay Shaffer, a consultant with the OECD, said the judiciary owed its "uncomfortableness" with competition cases to the fact that such cases were examples more of economic problem-solving than legal judgments. One proposal to resolve the dilemma was to establish courts specialized in competition affairs. While the delegates from Honduras raised the possibility that such courts run the risk of being manipulated by political interests, Sanchez Ugarte responded that the risk indeed existed, but an even greater risk to free competition practices existed in having courts unfamiliar with the issues. Jenny, in the final intervention, suggested that the friction between the judiciary and competition authorities could be greatly alleviated through training seminars and dialogue.

At a stimulating lunchtime address, keynote speaker Jose Angel Gurria, former Finance Minister of Mexico, presented a politician's sometimes frustrated perspective on competition affairs by citing several cases where Mexico's CFC had issued decisions that scuttled the plans of the nation's political authorities. One such case was the government's proposed sale of Mexico's two largest airlines, Mexicana and Aeromexico, as a single company. The government anticipated a financial windfall from the sale, but was prohibited by the CFC on anti-monopoly grounds. Gurria also pointed to the example of the airlines as demonstrating an area in which politicians, who want to develop larger companies more capable of competing regionally and globally, and competition authorities, who are inherently anti-trust and anti-monopoly, naturally disagree. With this in mind, it is important to remember that independence among competition authorities should be tempered by a connection to policy-making entities.

The afternoon session on Monday featured a demanding peer review of Peru's federal competition authority, Indecopi. Terry Winslow, a consultant who prepared the peer review for the OECD, reported that the agency has many strengths, including admirable free competition and market access laws and a broad mandate. Nevertheless, important questions about its status as an autonomous, neutral arbiter and reliance on fines for funding existed. Thus, the Peruvian system has reached a point where reform is necessary to retain credibility.

Peruvian officials remarked that Indecopi has entered into a period of transition. After a decade of neoliberal policies, the gap between rich and poor has not narrowed, and it must be accepted that their application has not achieved the expected results. While convinced that competition and competition policy are essential instruments for development, Indecopi has begun to turn away from the

set of economic policies bundled under the term Washington Consensus and toward policies that are more attentive to poverty issues. The Peruvian delegation also pointed out that 60% of their country's economy is informal, which provides a challenge unique to Indecopi.

In the Tuesday morning session, delegates applied themselves to the discussion of advocacy among competition authorities. The central question was, exactly how strong an advocacy role should a competition authority play? Barbara Lee, the executive director of Jamaica's Fair Trading Commission, observed that advocacy is about persuading various sectors, public, business, even government, that a country benefits through competition. Consequently, styles will vary from country to country, and each has to find its own way through a process of trial and error.

In the presentation of his issues paper entitled "Competition Advocacy: Challenges for Developing Countries," OECD Consultant John Clark noted the central dilemma developing countries face is that competition advocacy is especially important for new market economies, but that it is particularly difficult for them. In order to establish a foundation for competition advocacy, developing countries must focus on three prerequisites: independence, resources, and credibility, with the latter being the most elusive. There are many opportunities for the competition agency to engage in advocacy. They include participation in privatisations, in the formation of various government policies, including regulatory reform, in some aspects of regulation itself and, importantly, in the promotion of a "competition culture" within the country. Further, there is a close relationship between enforcement of the competition law and competition advocacy. These two aspects of the agency's mission reinforce each other.

Ignacio de Leon, former chairman and general counsel of Venezuela's Procompetencia, promoted a proactive view of advocacy for the region's competition authorities. These authorities tend to view competition issues through ideological lenses, which can leave advocacy on the margins; however, advocacy can be a powerful tool that could be more effective in implementing policies than formal sanctions and decision making.

The general discussion that followed displayed a broad range of opinions over the level of importance advocacy should be granted by competition authorities. Eduardo Lora, the principal advisor of the IDB Research Department, expressed skepticism, terming the prospect of free competition institutions involving themselves with public policy "complicated."

Mexico's Sanchez Ugarte bore the standard for advocacy. He said that competition policy possesses three prongs: advocacy, preventive powers, and the authority to investigate and sanction. All three are structurally necessary, and must work in harmony, in order to put together an effective policy. Others suggested selective competition advocacy approaches. Pedro Geraldès, the chief of staff at the Portuguese Competition Authority, noted that his country had concentrated on sectors where consumers would see immediate benefits. Such an approach makes active advocacy less urgent. OECD Competition Division head Bernard Phillips, finally, encouraged authorities to adopt a direct, "just the facts" approach and trust in consumers to realize the benefits of competition themselves.

At the forum's close, Sanchez Ugarte summarized the presentations and discussions of the previous two days. He observed that Latin American competition authorities find themselves in one of two stages. Some are still struggling to create free competition institutions, and others are struggling with the difficulties of implementing free competition policies. Competition authorities must be "marketers of the market" to business, commercial, economic, governmental, and public interests.

Next year's forum will once again be held at the IDB headquarters in Washington D.C. It will feature a peer review of Brazil, case studies of investigations conducted by competition authorities, and a discussion of a topic to be decided between transnational competition, intellectual property and competition, monopsony power in agricultural markets, and best practice research techniques.



SESSION I: INSTITUTIONAL CHALLENGES IN PROMOTING COMPETITION



BACKGROUND NOTE



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**Second Meeting
Of the
Latin American Competition Forum
(IDB Headquarters, Washington D.C., 14 and 15 June 2004)**

INSTITUTIONAL CHALLENGES IN PROMOTING COMPETITION

Note by the OECD Secretariat

INSTITUTIONAL CHALLENGES IN PROMOTING COMPETITION

Note by the OECD Secretariat

I. Introduction

1. The first session of the second annual meeting of the Latin American Competition Forum will discuss *Institutional Challenges in Promoting Competition*. Institutional challenges include various factors that prevent a competition authority from performing its duties in the most effective way like insufficient institutional and budgetary independence; overlapping jurisdiction with other regulators, or unclear division of responsibilities with other regulators; relations between the courts and competition authorities; insufficient investigatory or enforcement powers; and other factors that hamper the effective operations of the authority like insufficient resources or difficulties attracting and retaining qualified staff. Competition authorities also face challenges beyond institutional issues, such as in advocacy and communications or, more broadly, from the lack of competition culture. This second category of challenges will not be discussed until the third session of the meeting.

2. Latin-American participants have been invited to submit written contributions on the most important institutional challenges their country faces. Seven countries have submitted such contributions: Argentina, Chile, Colombia, Jamaica, Panama, Paraguay and Venezuela¹. The issue of institutional challenges in promoting competition has also been discussed in the recent OECD peer review of competition law and policy in Mexico². This report assesses the development and application of competition law in Mexico since 1998, updating an earlier review³.

3. During the meeting, following a brief introduction by the OECD Secretariat, Argentina, Mexico and Panama have been invited to give a presentation. The main part of the session will be devoted to a general discussion in which all participants are invited to share their experiences of institutional challenges.

II. Independence of the Competition Authority

4. The independence of competition institutions is an issue that has been widely discussed among competition experts, *inter alia* in the OECD Global Forum on Competition, where a

¹ Contributions are available at www.iadb.org/res/competition and will also be made available at www.oecd.org/competition.

² Competition Law and Policy in Mexico: An OECD Peer Review (2004), available at www.oecd.org/dataoecd/57/9/31430869.pdf.

³ Background Report on the Role of Competition Policy in Regulatory Reform in OECD, Regulatory Reform in Mexico (1999), also published as Wise, M., Review of Competition Law and Policy in Mexico, OECD Journal Competition Law & Policy, vol. 1, no. 4, p. 43 (1999). See country reviews under subtopic www.oecd.org/competition.

session in the meeting in February 2003 addressed the optimal design of competition agencies⁴. Those discussions seemed to indicate that the independence of a competition authority is a complex issue, which is not simply a function of the formal organisational status of the authority or its place in the governmental administrative structure. On one extreme, a status of total independence would be unconceivable, given that a competition authority is part of the administrative apparatus of government. On the other hand, undue interference from the political level – or indeed from other stakeholders – in individual cases of law enforcement or on advocacy initiatives would seriously harm the justness, transparency and credibility of the authority's action.

5. There are several ways in which the independence of a competition authority may be influenced – direct as well as indirect ones. Direct ways to limit the independence include higher levels of government giving instructions on how to deal with an individual case, or overruling the decision of the authority on political grounds. An indirect influence limiting the authority's independence may be exerted through the nomination of the Head and other leading officials of the authority or – in particular – through removing them from office. The budget process may also have the effect of limiting the authority's independence. Thus, the total budget envelope may have an effect on the capacity of the authority effectively to perform its tasks and will consequently be discussed later in this note. However, if changes in this envelope are perceived to reflect a reaction to the authority's position in individual cases, independence will certainly be hampered. Similarly, a budgetary mechanism that prevents the authority from using resources within the total budget frame in a way it sees fit may have the same effect.

Institutional independence

6. The contribution from *Argentina* states that the process for nominating the President and the four Members of the Commission for the Defence of Competition constitutes an institutional situation that is less independent than the one foreseen for the Tribunal for the Defence of Competition – the latter institution still not being created. In *Panama* the succession of political groups in the administration of the State with different economic orientations has endangered the institutional integrity of the competition authority. The attacks on the integrity of the organisation include both questioning the necessity of competition policy as such, and mechanisms for removing officials from the authority. And in *Paraguay* there is a lack of transparency in the selection of Members of the Competition Commission.

Economic independence

7. While most of the contributions quote the total level of funding as a factor limiting the authority's ability to perform its tasks in an appropriate manner, there are no concrete examples of budgetary mechanisms that create a situation of dependence. However, in *Argentina* the

⁴ The background note for this session is available at www.oecd.org/dataoecd/58/29/2485827.pdf and country submissions can be found at www.oecd.org/competition by following links to the Global Forum on Competition. Among other relevant topics dealt with in February 2003 GFC, the reader can find papers on Competition Policy in Small Economies. Relevant work in the February 2002 Forum include work on Competition Policy and Economic Growth and Development. Secretariat and country papers (including from Mexico) can be found on the challenges faced, the arguments heard against competition law and against various aspects of competition policy, and arguments for different kinds of competition regimes. There is also on the Website of the February 2002 GFC a study of an OECD Economics Department study on "The impact of competitive product markets on the overall health of OECD Members' economies".

Commission draws upon resources from the budget of the Ministry of Economy and Production allocated on an annual basis, which excludes budgetary autonomy. The competition authority of *Panama* is largely financed by transfer of funds from the central government budget, supplemented by donations and loans from international organisations.

8. In general, competition authorities receive the major part of their budgetary resources from the State budget. However, the mechanisms for allocating these resources to the authority may vary. For instance, a process where the legislator allocates an annual budget to the authority, giving it discretionary power to use it for various purposes, is perceived to grant a high degree of autonomy. On the contrary, mechanisms where the authority depends on detailed decisions by the responsible Ministry for current expenditures would imply a lesser degree of independence. In order to explore ways to enhance autonomy, alternative sources of funding are sometimes discussed like allowing the competition authority to keep fines imposed, to charge fees for notifications or complaints, or to charge fees for other services provided, for instance reports that are published. However, such alternative sources of funding may provide incentives that influence the priorities of the authority in a non-optimal way, like focussing on the number of notified cases rather than on their anti-competitive effects.

Suggested questions for discussion

- *What are participants' experiences of different mechanisms to impede a competition authority from performing its duties independently? Are there other ways in addition to direct instructions, overturning the authority's decisions, nominating officials, removing officials from office and 'rewarding/punishing' the authority through the budgetary mechanism?*
- *How does the competition authority's place in the administrative structure influence independence? Is there a trade-off between being influenced and being able to influence as part of competition advocacy?*
- *What effects have been observed on competition law enforcement and competition advocacy as a result of a lack of independence?*

III. Overlap with Other Regulatory Agencies

9. Although some sectors, like the financial sector, mostly have been subject to regulation by specialised institutions for long, the number of sector regulators has increased with the liberalisation of network industries. Typical examples of such sectors are telecommunications, electricity and other energy sectors, postal services, and various transport sectors. Some countries have assigned the task of sectoral regulation to the competition authority, but most separate these functions organisationally. As pointed out by *Panama*, there may equally be strong arguments for extending the tasks of the competition authority to include consumer protection. There are different ways to organise the interrelation between the competition authority and sector regulators. The power to enforce competition law is normally the sole competence of the competition authority, but not always. In some countries there are overlapping powers, and in others the regulated sectors are exempted from the competition authority's power to apply competition rules. In order to avoid conflict between competition law enforcement and the application of sectoral regulation, some countries have adopted detailed rules on competences, procedures and priorities, and others have arranged for close consultation and co-operation between the respective institutions. In other countries there is a situation of more or less open conflict between authorities and regulatory frameworks.

10. Several contributions quote problems with the interrelation between the competition authority and sector regulators. In *Argentina* there is no jurisdictional overlap, but practical experience shows that it is sometimes unclear whether a problem, such as a complaint on a possible anti-competitive practice, falls under the jurisdiction of the competition law or the regulatory framework of a specific sector. In merger cases the competition authority is obliged to ask for the opinion of the relevant regulatory body, and some *ex officio* investigations into specific economic sectors have been requested by the regulatory agency.

11. The contribution from *Colombia* reports on difficulties related to the large number of rules that regulate economic activities and competition in various markets. Also the large number of institutions engaged in the application of such rules present a major problem. As a consequence, there are grey zones where market actors rest uncertain about the competent authority to address in a specific situation.

12. In *Panama* the competence of the competition authority to investigate restrictive practices in any economic sector is clearly defined by law. However, also sectoral legislation may include rules on competition, although in a more vague and superficial manner. When sectoral regulators apply competition rules contained in special legislation, the competition authority may supplement such decisions by enforcing competition law.

Suggested questions for discussion

- *Do sector regulators have competence in parallel with the competition authority to apply competition rules contained in either the competition law or in sector-specific legislation? Are any sectors exempted from the competition authority's power to enforce competition law?*
- *Do the relations between the competition authority and sector regulators present particular problems and, if so, what kind of problems?*
- *Are there rules or procedures in place to overcome upcoming conflicts between the duties of the competition authority and sector regulators?*

IV. Relation to the Judiciary

13. The competition authority's relation to the judiciary is influenced by several factors like the general judicial system and traditions of the country, whether competition cases are adjudicated in general or specialised courts, and the sharing of competences between the authority and courts of justice. Thus, countries take different approaches to the competition authority's powers to take decisions in application of competition law, as well as to its role of a prosecutor bringing competition cases to the judiciary⁵.

14. In many countries there is a general perception that too many competition cases are rejected by the courts of justice. Competition authorities normally see this as a result of judges not being sufficiently acquainted with the specificities of competition law and analysis – or with economic legislation at large. From the judges' perspective, on the other hand, competition authorities are sometimes perceived to lack the necessary skills successfully to present and prove their case. A somewhat different argument claims that the rate of successfully adjudicated cases should not be too high, as that would be a sign of competition authorities not being prepared to test the limits of the law's applicability or to develop competition analysis and principles.

⁵ Relevant work on this issue can be found at www.oecd.org/dataoecd/34/41/1919985.pdf "Judicial Enforcement of Competition Law" (1997).

15. *Argentina* has remarked that neither the competition authority, nor the Secretariat of Technical Co-ordination, have rights to take action as parties before the courts. Consequently, in cases decided by the competition authority and appealed before a court of justice, the final judgement may fail to take into account the defence of competition.

16. The contribution from *Jamaica* describes the specific problem of the double role of the Fair Trading Commission, having both powers of adjudication and powers of investigation. A ruling by the Court of Appeal in 2001 found that any decision by the authority executing both these powers would be in breach with the principles of natural justice. As a result the Commission has been, and still is, prevented from investigating cases through hearings.

17. *Panama* reports a specific problem related to a model of preliminary hearings aiming at simplifying the oral proceeding. However, judges and litigation attorneys have not assumed their role as active supporters of this model and as a result there has been substantial delay of the process.

18. *Jamaica, Panama* and *Venezuela* have touched upon the issue of judges' understanding of competition problems. According to the experience of the Fair Trading Commission of Jamaica, courts have interpreted the competition law in a questionable way and there are significant limitations in comprehending complex economic analysis. In Panama the competition authority has included officials of the tribunals of justice in its training programmes, in particular with a view to enhance the understanding of economics. Another challenge in Panama has been to limit the judgement of competition issues to courts specialised in this area.

Suggested questions for discussion

- *Are there structural problems in the adjudication of competition cases, for instance relating to (i) the allocation of powers and competences between the authority and the court system, (ii) the role of general courts and specialised courts, or (iii) the number of instances and the role of the final instance?*
- *Is the proportion of competition cases rejected by the judiciary too high and, if so, what could be done to resolve this problem at the level of (i) the competition authority, and (ii) the courts of justice?*

Remedies for Private Parties

19. Most competition laws provide in some fashion for the direct participation by private parties in enforcement of the law. It is understood that some businesses and consumers are affected more directly than others by any given anticompetitive conduct, and many laws provide the means for those parties to pursue their remedies for these harms directly. There are obvious benefits to participation by private parties in enforcement of the competition law. The specific harms from competition law violations are more likely to be redressed. Further, these "private enforcement officials" enhance and complement the competition agency's limited resources. More generally, involvement by the private sector in competition law enforcement promotes greater respect for the law and for competitive markets.

20. In general, there are two types of procedures by which private parties can pursue remedies under competition laws: by participating formally in the enforcement proceedings of the competition agency through the submission of complaints or petitions and the submission of evidence and analysis; and by prosecuting private lawsuits in national courts against violators. In a system based on the former, private parties may have extensive rights to petition the

competition agency and to submit evidence to it, to require a formal response from the agency, to require the agency to initiate an investigation or proceeding in the petitioner's behalf and to participate formally in the proceeding, and to appeal from an adverse decision by the agency. In the second type of system, that based on private suits in court, private complainants do have rights to petition the competition agency and to present evidence to it, but they must otherwise pursue their remedies in a private lawsuit against the wrongdoer. They have no rights to intervene in or otherwise to interfere with an action by the competition agency.

21. There are both benefits and potential drawbacks to both types of systems. In a system based on participation in competition agency proceedings, the costs to the private petitioner are relatively small, and the petitioner benefits from the agency's expertise and investigative tools. On the other hand, depending on the discretion that the competition agency has in dealing with private complaints, such a system may unduly divert the resources of the agency to private disputes, limiting its ability to bring cases *ex officio*, and it could interfere with the efficient decision making process within the agency. A system based on private court cases avoids these problems while still encouraging participation by private parties in competition law enforcement, but it can introduce others, including imposing higher costs on private parties in order to pursue their remedies and the filing of frivolous cases in court.

22. A survey of OECD countries showed that few rely exclusively on one of the two models described above; in most cases the systems are hybrids, incorporating elements of both. The survey showed that there are common elements to all countries; however, including rights for private parties to petition the competition agency and to provide evidence and analysis to it, and to pursue private remedies actively either through participation in competition agency proceedings or in court, or both.

Suggested questions for discussion

- *Are private parties active in pursuing remedies to competition law violations in your country? If not, do you think that such participation should be encouraged, and if so, how should that be done?*
- *Do private complaints interfere with your agency's ability to institute investigations and cases ex officio and/or with the efficiency of your agency's operations? If so, how can the problem be remedied?*

V. Powers of the Competition Authority

23. The effective powers of a competition authority depend upon or are influenced by a large number of factors. The starting point is obviously the competences laid down in competition law or other rules like Government decrees. Such rules may give rights to demand information for the investigation, to impose sanctions, or to order certain actions to halt or remedy anti-competitive behaviour. Outside the law enforcement area, rules may provide rights for competition authorities to require consultation or opinions from other bodies of government. Rules may also define the competition authority's duties and scope of activities.

24. A competition agency's enforcement powers broadly fall into two categories: (i) investigative or information gathering powers, and (ii) sanctioning and remedial powers. An investigative toolkit should include the following powers:

- to conduct dawn raids or other types of unannounced visits to business offices for the purpose of examining and securing documentary and electronic (on computers or other electronic devices) evidence;

- to require the submission of documentary and electronic evidence to agency officials apart from dawn raids, by both the subjects of an investigation and third parties;
- to require businesspeople – both subjects and third parties – to submit to oral examination to answer questions or provide statements, subject to legal and constitutional safeguards;
- if the competition law provides for merger control, powers to be notified of and to acquire information about possibly anticompetitive mergers, in timely fashion sufficient to permit the imposition of adequate remedies against harmful mergers;
- in the case of cartel investigations, a leniency programme, or similar programme designed to encourage co-operation with an agency investigation in return for lessened sanctions.

25. An agency's remedial powers should include powers:

- to impose fines in cases involving hard core cartel conduct and especially harmful abuses of dominance; maximum fines should be sufficiently large to provide a deterrent to such conduct and to encourage co-operation with agency investigations;
- to impose fines for failure to comply with a lawful order of the agency or for wilful destruction or withholding of evidence;
- to impose remedial orders in cases involving abuses of dominance, restrictive agreements and anticompetitive mergers, both forbidding such anticompetitive conduct and requiring affirmative actions designed to remedy the harm caused by the conduct and to prevent its recurrence;
- in merger cases, to prevent consummation of anticompetitive transactions;
- in abuse of dominance and merger cases, to impose structural relief, including divestiture of assets or, in the extreme, the break-up of a dominant firm.

26. Given the regulatory framework for the competition authority, available resources set limits to the performance in practice. These resources include not only the budget in pecuniary terms and the number of staff. Skills, training and experience of staff have a major impact on what the authority is able to produce and the quality of its work. Sometimes access to external expertise can – at least partially – compensate for those competencies that are not available among permanent staff.

27. Finally, the status of the competition authority – how it is perceived by the general public, by the business community and by other government and regulatory bodies – has a significant importance on how effectively it will be able to perform its duties. This may be most obvious in the competition advocacy area, where success is more related to the power of persuasion than the power of decision. However, also the fight against anti-competitive practices depends much upon the access to information on possible infringements of the law, something that is clearly related to how the competition authority is perceived by economic operators and the general public. Factors having an impact on the status of the authority include the political support, the general competition culture in the country, the perceived independence of the competition authority, the quality of its work and its integrity.

28. Most of the contributions received indicate that the lack of sufficient resources prevents the competition authority from performing its duties in the most effective way. This in its turn limits access to qualified staff. *Argentina* states that a group of professionals specialised on mergers should be created when additional resources are available. Similarly, subject to the availability of resources, there are plans to establish a group of professionals specialised in tests and other investigation methodologies. *Jamaica* has problems retaining qualified staff for more

than three years due to current salary levels and is unable to train existing staff as a result of budget constraints. High staff turnover is a problem also in *Panama* and *Venezuela*. In Panama, the authority makes efforts to meet this challenge through a selection process, planned training and a quality assurance model.

29. *Jamaica* refers to problems making its voice heard in relation to the legislative process. The Commission may be invited to comment upon new laws being contemplated, but has not been successful in initiating such consultations with other branches of government.

30. Transparency and predictability are important characteristics of a powerful and respected competition regime. *Panama* recalls the need for clear rules, guidance and public hearings to this end. The need to strengthen transparency is also addressed among the recommendations of the peer review of *Mexico*.

31. *Venezuela* describes specific problems in making the competition law enforcement effective in all parts of the country. As a result of the current centralisation of competition institutions to the capital of the country, economic operators in remote parts – in particular smaller enterprises victimised by competitive restraints – find it difficult to get the protection that the competition law should offer.

32. Several contributions refer to the lack of both political and public support for competition. *Paraguay* mentions in particular the current confusion between competition policy and the policy on ‘disloyal competition’.

Suggested questions for discussion

- *Is there a need for new or revised rules in order to enhance the powers of the competition authority? Please consider the need for such rules in relation to , (i) investigating possible infringements, (ii) sanctioning and remedying anti-competitive behaviour, (iii) advocating for pro-competitive reform.*
- *Are there ways to increase the total resources of the competition authority or, if not, what could be done to use existing resources more effectively?*
- *What other incentives than salary could be used to make qualified staff stay longer with the authority?*
- *How could the competition authority help enhancing competition culture in order to raise public and political support for competition and ultimately acquire necessary resources and powers?*

VI. Conclusions – institutional challenges in promoting competition

33. It is important that competition agencies are able to perform their tasks effectively, and to address the most important competition problems that hamper growth, economic performance and consumer welfare in their country. The work they perform should have high quality and stand free from undue influence from those who benefit from competitive restraints. The number of staff and the quality of staff are key issues, which in turn relate to the resources allocated to the competition authority. But also the regulatory framework and the interaction with the judiciary and with other branches of government are important. Finally, all those factors are fundamentally linked to the competition culture in the country and whether the competition institutions, the competition rules and competition as such have backing from the political level and from the society as a whole.

34. Some of these things are outside the influence of the competition authority, but much can be done to strengthen the role of the authority and raise enhanced support. The contributions to the first session of the meeting provide many examples of concrete initiatives taken by competition authorities, and the objective of the general discussion is to exchange experiences and share ideas of how institutional challenges in promoting competition may be addressed.



CONTRIBUTIONS

ARGENTINA

Latin American Competition Forum

This paper describes the situation of the National Commission on Competition in regards to the various topics of discussion that fall under the theme, “Institutional Challenges for the Promotion of Competition,” a theme that will form part of the first session of the Latin American Competition Forum.

By way of introduction, it is worth mentioning that the Law on the Defense of Competition N° 25.156 in effect in Argentina was enacted in 1999. That same law provided for an enforcement authority, the National Tribunal for the Defense of Competition (or TNDC by its Spanish-language acronym), which has not yet been created. Once it is formed, the Tribunal’s decisions will not be amendable by any other entity of the federal government. The decisions made by the National Commission for the Defense of Competition (or CNDC by its Spanish-language acronym) are sent to the appropriate State Secretariat, in this case the Secretariat of Technical Coordination of the Ministry of Economy and Production.

Institutional Independence

In relation to this point, besides the information mentioned above, it should be mentioned that the highest authorities of the CNDC (its president and four members) are nominated directly through a Decree of the National Executive Power in terms similar to the designation of Ministers, Secretaries, and Undersecretaries of the State, which constitutes an institutional situation relatively less independent than the Law intended when it established the TNDC. Its members will be chosen by a Panel¹ responsible for conducting an open competition, from where an examining committee will send to the President a list of those qualified to form part of the Tribunal.

Economic Independence

Currently, the CNDC does not have budgetary autonomy. The monetary resources assigned to it annually come from the budget of the Ministry of Economy and Production. On one hand, it lacks the ability to generate its own financial resources, while Law N°25.156 establishes that the TNDC, besides elaborating its own annual budget projection, can charge fees for the services it provides.

Jurisdictional Overlap with Other Regulatory Agencies

¹ The Law establishes that the members of the Panel will be the Treasurer, the Secretary of Industry, Commerce, and Mining (which today corresponds to the Secretariat of Technical Coordination of the Ministry of Economy and Production), the presidents of the Congressional Commerce commissions, the president of the National Chamber of Commercial Appeals, and the presidents of the National Academy of Law and the National Academy of Economic Sciences.

The powers granted the TNDC by the Law on the Defense of Competition, and currently exercised by the CNDC, cannot be undertaken in any way by other regulatory organizations. These organizations can only act within the regulatory framework of the sector over which they have jurisdiction.

There exist some instances in which it is not entirely clear whether a problem, such as a complaint of a possible anti-competitive practice, falls under the jurisdiction of the Law on the Defense of Competition or the regulatory framework of a specific sector. Once clarified, the intervention of the CNDC is immediate.

One possibility specifically addressed in Law 25.156 is those anti-competitive practices originating in the violation of other regulations (such as laws tax and prevision laws, and standards for regulated sectors of the economy). In these cases the Law on the Defense of Competition is applicable once the violation of other regulations has been declared by administrative act or decisive verdict.

From a more general perspective, other types of situations that occurred recently in Argentina had their origin in the macroeconomic instability that resulted from the abandonment of the convertibility regime and the devaluation of the peso in January 2002. In this context, the Argentine government opened negotiations in certain unregulated sectors in order to control the price increases of certain basic goods such as flammable liquids, GLP, private medical services, and others. Such initiatives had as their legal framework Law N° 25.561, known as the “Public Emergency and Exchange Rate Regime Reform,” in which the temporary regulation of markets identified as inputs and critical goods and services is considered.

Overlap of Functions with Other Regulatory Agencies

As indicated previously, the central question facing the CNDC when it must intervene in a sector of economic activity where another public regulatory agency has authority is establishing whether a problem exists from a competition perspective, as it may relate to possible anti-competitive processes, the analysis of an operation of economic concentration, or a market investigation. There are no limits for applying the Law on the Defense of Competition to regulated sectors of economic activity.

In the case of accusations of possible anti-competitive practices, the CNDC undertakes the corresponding investigations. In recent years, officials have investigated accusations in sectors with specific normative frameworks and regulatory agencies such as telecommunications, medicines (with respect to their approval for entry into the market), shipping services, etc.

Similarly, officials have analyzed numerous activities of economic concentration in sectors such as telecommunications, transport and distribution of electricity, transport of gas, shipping services and infrastructure, airport services, etc. In these and other cases, the CNDC, according to Law 25.156, must solicit the opinion of the corresponding regulatory organization.

In regard to market investigations, which are initiated without the occurrence of a previous complaint, with the effect of establishing whether there exist competition problems, there are no restrictions in bringing them forward. By way of example, some of these investigations have been initiated at the request of regulatory agencies, as in the case of contracts for wellhead sales of gas.

Relations between the Judicial Branch and the Competition Authority

The relations of the CNDC and, in this case, the Secretariat of Technical Coordination (designated by the Spanish acronym SCT) with the judicial branch are basically referred in such a way that the relations of the former can be appealed before the courts. This involves those actions of the CNDC, ordering cessation of or refraining from possible anticompetitive conduct, the rejection of complaints and decisions relating to operations of economic concentration.

What can be observed in regard to this point is that neither the CNDC nor the SCT has special legitimization to take action as parties before the courts and that the decisions made by judges in regard to appeals do not always take into account the elements of judgment from the point of view of the defense of competition.

In this sense, as neither the CNDC nor the SCT has an expediting mechanism to bring technical elements of analysis beyond the judgments that it issues, this constitutes a limitation on adequately basing judicial decisions on the issue of the defense of competition, as the Resolutions of the Secretariat on the decisions issued by the CNDC issues may be cause for appeal.

Ability to Ensure Compliance with the Law and Power of Investigation

Without the risk that the decisions of the CNDC, as indicated, may be appealed before the courts, in practice of the application of the Defense of Competition Law there have not been observed significant difficulties in regard to carrying out decisions.

Nonetheless there exist some specific areas, such as making effective the decisions on the conditioning of operations of economic concentration, in which it would be advisable to form within the organization a group of professionals specialized in these tasks when greater resources are available. The effective completion of those tasks requires a process of discussion with the communicating parties to the operation in question to carry it out in practice, such as permanent supervision until the operation has been carried out in its totality.

An example is the eventual disinvestments called for by the CNDC in certain rulings, with the object of reestablishing conditions of competition in markets where those conditions were negatively affected as a result of a concerted concentration operation.

The operational improvement of the CNDC in this regard would not require any upgrading of the prevailing standards other than to some extent making available some extra professional resources and, on that basis, reorganizing existing resources.

It would be suitable to engage in similar reasoning in regard to the investigatory powers that the Law grants to the competition authority. In effect, these powers are very extensive, but the incorporation of a greater quantity of professionals would permit reorganizing the tasks usually undertaken in the generation of tests related to anticompetitive practices in such a way as to have available, perhaps, a group of technical experts of this type. At the same time, to develop fully the potential of a specialized team it is necessary to carry out methodological work that harmonizes the accounting focus and the economic focus, minimizing the risks that the evidence generated by these means might have a basis for being called into question.

While this type of work is currently being carried out, it tends to be undertaken in the presence of important restrictions, as undertaking tasks that do not allow for extensions of established legal deadlines (e.g., operations of economic concentration) inhibits fully addressing activities such as those mentioned.

INSTITUTIONAL CHALLENGES IN PROMOTING COMPETITION

NATIONAL ECONOMIC PROSECUTOR'S OFFICE

June 2004

INTRODUCTION

It is known that the main functions of competition authorities are enforcement and advocacy. However, it is not clear which is the limit between them. It is said that advocacy is almost everything except enforcement, but is not always obvious what exactly enforcement can mean and this can be different from one jurisdiction to another. For example, studying some decisions given by the Chilean Competition authorities, it was not clear when they enforced the law and when they promoted free competition.

Anyway, for the purpose of this presentation, enforcement involves both powers to investigate anticompetitive conducts and powers to impose sanctions for those conducts. The investigative powers include faculties related with:

- Confidentiality;
- Enforcement of the rulings, decisions and instructions issued by courts or tribunals;
- Mandatory collaboration of government entities;
- Compelling for oral and written statements from any entity or person;
- Etc.

In the subject of sanctions, generally, the competition laws authorize the Courts or the agencies to impose fines, imprisonment, corrective measures and injunctions.

According to the International Competition Network, advocacy means the promotion of a competitive environment for economic activities by means of non/enforcement mechanisms.

This possible definition involves, on the one hand, relationships with other governmental entities, that is, all of those initiatives undertaken by the competition authorities towards other public entities in order to influence the regulatory framework and its implementation in a competition friendly way, through, basically reports to the legislature, ministries, courts, sectorial regulators or municipalities.

On the other hand, promoting a competitive environment implies the strengthening of the public awareness about the benefits of competition. It covers all activities undertaken by competition authorities aimed at raising the awareness of economic agents, public authorities, the judiciary and the public in general of the benefits that competition can bring to society. It involves activities such as:

- Interaction with trade associations and academic institutions.
- Publications.
- Media strategy towards the explanation of the importance of competition.

THE CHILEAN COMPETITION SYSTEM

The first laws

The focus of the Chilean competition system has been enforcement, but since the first law, which was enacted in 1959, establishing an Antitrust Commission, we can find some rules of advocacy. Even the title of the law suggested the idea of advocacy: *"Rules to foment industrial and commercial free competition"*.

Four years later, in 1963, the position of the National Economic Prosecutor was created by Law N° 15.142, with the mission to prosecute and investigate anticompetitive conducts, acting on behalf of the general interest.

These entities didn't have much work because a central planned economy was established in those years.

Decree Law N° 211

In 1973 the Military Government gave a new economic orientation to the country, based on free market. The features of this new orientation were the privatization process, the liberalization of prices, a unilateral tariff reduction and the opening of the Economy to foreign trade.

Together with these new orientations, the Military Government improved the system of competition enforcement by Decree Law N° 211, which was enacted in December of 1973, that is, just two months after the coup. So, it was pretty clear that competition was going to play a central role in the economic system of that government.

Decree Law N° 211 established a tripartite competition system:

1. The **Preventive Commissions** which were administrative bodies which accomplished a very important task in the transitional period from a planned economy to a market economy, educating firms and entrepreneurs on competition affairs. So, these Commissions fulfilled an advocacy role. In fact, they did not have powers to enforce the law because their main function was to respond to consultations from legal entities or individuals on competition issues. They were composed of government officials, members of the civil society and the academic world, who served without payment with the technical support of the National Economic Prosecutor's Office.
2. The **Antitrust Commission** was a judicial body which resolved competition conflicts and had broad powers of enforcement and sanctions. It could impose fines (up to US\$ 500,000), modify and nullify contracts, or order the dissolution and termination of corporations. It was composed of 2 government officials, 2 members of the academic world, and one Supreme Court Judge. They also served without payment and with the technical support of the National Economic Prosecutor's Office.

3. The **National Economic Prosecutor's Office** is the competition agency with ample powers to investigate and prosecute anticompetitive conducts. Its head is appointed by the President of the Republic, but has statutory independence from any authority. In 1999 Law N° 19.610 was enacted and its investigative powers and budget were substantially improved. Its main faculties are:
 - To investigate and order confidential proceedings.
 - To request the Commissions to order injunctions.
 - To act in any case before the Courts and Tribunals.
 - To request the support of the Police.

The last reform

After almost thirty years of application of this framework, the globalization process, the new technologies and the concentration of markets, created the need for a new enforcement system, because competition issues became more complex. The improvement of the Competition Enforcement System, jointly with other micro-economic initiatives such as labor law reform, electricity reform, fishery reform, and others, was part, in 2001, of the so-called Pro-Growth Agenda, which consisted of a political agreement between the government and the private sector.

The focus of the reform of the Competition Law was the creation of a Competition Tribunal, which replaces the Preventive and Antitrust Commissions. This legal reform was officially published on November 14th 2003 and was in full effect on May 13th 2004.

The Competition Tribunal is a judicial body pertaining to the Judiciary, composed by three lawyers and two economists. Its chairman is a lawyer and is appointed by the President of the Republic from a list of five nominees established by the Supreme Court. One lawyer and one economist are appointed by the President of the Republic from a list of three nominees established by the Central Bank. The other lawyer and economist are designated by the Central Bank directly. In all cases there is a previous public contest where all candidates could apply.

The members will stand for a period of 6 years, which is renewable. They are remunerated. The law establishes a minimum payment of US\$ 3,700 per month and a maximum payment of US \$ 5,500 per month, depending on the number of sessions held.

Another important reform is the creation of the staff of the Tribunal. Remember that its predecessors - the Preventive and Antitrust Commissions - didn't have their own staff and received support from the National Economic Prosecutor's Office. Now the Tribunal will have a professional staff composed of two economists and three lawyers. This aspect of the reform increases the independence of the Tribunal in relation to the National Economic Prosecutor's Office.

The Competition Tribunal maintains the faculties of the Preventive and Antitrust Commissions. Consequently, its main function is to resolve conflicts and enforce the law.

Nevertheless, exceptionally, the Tribunal also fulfills an advocacy function when it responds to consultations about future contracts, or when it proposes to the President of the Republic the modification, approval or expiration of laws. Furthermore, it can promote competition principles when issuing general rules.

Regarding the sanctions, the reform abolished criminal imprisonment, because it had little application. As a counterpart, the reform substantially increases the maximum amount of fines: from a limit of US\$ 500,000 to US\$ 12,000,000.

The framework currently considers both the Competition Tribunal and the National Economic Prosecutor's Office for enforcing the competition law.

ADVOCACY

1. Rules of promotion of competition

Article 1° of law N° 19.911, establishes that “*the objective of the law is to promote and to defend free competition in markets*”. So, the law, expressly, confers to the Tribunal and the Agency the faculty and the duty of promoting competition. As I mentioned before, this new system came in full effect a few days ago, so we have a lot of expectations of the outcomes of this new framework.

With respect to the powers of the Tribunal, as I said before, the Tribunal has, in our opinion, some faculties related to competition advocacy. In fact, in the past, when the Preventive Commissions responded to consultations from firms or parties, they were, through their decisions, educating entrepreneurs and the public on competition affairs.

In relation to the faculty of issuing general rules, article 17 C N° 3 of the law establishes that the Competition Tribunal is empowered to issue general rules, according with the law, which individuals or firms should take into account in the acts or contracts they plan to sign or fulfill. As it can be observed, when the Tribunal issues general rules, generally, it is not enforcing any law or decision but rather it is promoting competition by establishing certain conditions in markets.

Regarding the faculty of proposing to the President of the Republic the modification, approval or expiration of laws, this doesn't need too much explanation about its relation with advocacy, due to the fact that one of the best ways to promote competition is, precisely, through the public policy of the government which is contained in laws and regulations.

With respect to the powers of the National Economic Prosecutor's Office, I have to emphasize the one related with the elaboration of technical reports for the Competition Tribunal. Indeed, the law authorizes the Agency to present technical reports to the Tribunal. Therefore, when it exercises this power, it fulfills an advocacy role rather than an enforcement one.

In utility sectors, such as telecom, electricity and water industries, prices should be free unless there are no competitive conditions. The laws that regulate these sectors empower the Competition Tribunal to authorize government intervention in prices. In fact, the Competition Tribunal must determine the competition conditions of those markets. The exercise of this legal duty is, in part, a competition advocacy task of the Tribunal.

2. Competition advocacy through the decisions of the Preventive Commissions.

I will explain briefly some decisions issued by the Preventive Commissions, in which we can find the way how those authorities have promoted competition principles in different markets. All of the following decisions were originated on consultations from firms or entrepreneurs.

1. *Dictamen* N° 995/96. This order was originated because of the level of concentration in the waste management market. The firm which controlled the garbage disposal market also controlled the waste transportation market. The Central Preventive Commission suggested that the bidding processes organized by the Municipalities for granting the waste management concession, should be consulted to the Commission before assigning the bid. Analyzing the bidding rules, the Commissions have recommended several rules which promote competition in the bidding processes.
2. *Dictamen* N° 1045/99: In 1998, three state-owned port companies consulted the Central Preventive Commission's opinion about the competition rules that they should consider in the bidding processes for the auction of harbor concessions in the dockage fronts. In the decision, the Central Preventive Commission laid down rules of horizontal and vertical integration in order to promote competition in both *intra* port operations and *inter* port services. For example, "important users" of a port may not have more than a 40 percent interest in the port operation business; or that which established that the concessionaire of a port terminal or its related companies can't have more than 15% of the share holds of another terminal in the same area or region.
3. *Dictámenes n°s. 202, 277, 979, 1133, 1211*. There have been many rules of parallel imports, the majority of them originated as consultations from private parties. Generally, importers have asked the Preventive Commissions about the legality of importing original products which are already commercialized in the country by virtue of a previous distribution agreement. The Preventive Commission established the criteria that the parallel imports of original products promote competition in markets, authorizing them.

3. Competition advocacy through the decisions of the Antitrust Commission.

The Antitrust Commission has promoted competition principles through its decisions, especially in regulated sectors.

Telecommunication Market

- Resolution N° 389. In 1993, the Antitrust Commission concluded that local and long distance telephone services could be operated by the same holding but through separate corporate subsidiaries, and it laid out various other principles to be incorporated into new provisions of the telecom law, especially the so-called *multicarrier system*, established for the consumer choice of the long distance service provider.
- Resolutions N°s. 394, 515, 611 and 686. The telecom law provides that in the local exchange telephone market, prices can be fixed by the telecom regulator if the Antitrust Commission finds that competitive conditions do not exist. Periodically, the dominant firm has consulted the Antitrust Commission in order to obtain a statement which allows it to set freely the price of its services. The

Commission has done far more than making these periodic determinations on the existence of competitive conditions, and has set some rules to promote more competition in this market. For example, it established principles to ensure open access to networks.

- Resolution N° 584 of September 27th 2000. It is a very interesting decision under the advocacy approach. Indeed, by this decision, the Antitrust Commission determined how the telecom regulator allocates spectrum in the mobile telephone market. The Commission ordered that the regulator has to use a bidding process to decide which firms should obtain rights to spectrum. Initially, the telecom regulator was going to give preference to some firms because they had applied first.

Electricity market

- Resolution N° 488 of 1997. The Antitrust Commission, assessing a case of vertical integration in the electricity market, issued general rules and ordered distribution companies to call for bids and buy their supplies on objective and non-discriminatory terms. In Chile, the generation market is potentially competitive, but the distribution one is not competitive. So, through this Resolution, the Antitrust Commission attempted to promote competition in the generation sector, not allowing the distribution companies to buy their supplies directly and not openly.
- By Resolution N° 592 of 2001, the Antitrust Commission decided that the prices of some complementary services offered by electricity distribution companies, had to be fixed by the authority because they were not provided in competitive conditions.

The Antitrust Commission has issued other general rules which have promoted competition in different markets.

For instance, in the pharmaceutical market, the Commission has issued general rules (Resolutions N°s. 634 and 729) about transparency in the commercialization conditions of pharmaceutical products between laboratories and pharmacies, and the conditions that the sellers of pharmaceutical products must fulfill to communicate or publish prices, rebates, forms of payment, etc.

Also, the Commission has attempted to introduce more competition and transparency in the credit market, particularly in relation to the financial services given by the Retail Stores. Through Resolutions N°s 656 and 666, the Commission concluded that the credits given by commercial stores to the public didn't have all the information which can allow the customers to compare the conditions and interest rates in order to choose the better for them.

4. The advocacy approach of the National Economic Prosecutor's Office: creating a culture of competition.

Publication of the decisions and rules in the Agency web page

One of the first measures taken by the current National Economic Prosecutor was to publish the decisions of the Commissions in the web page of the Agency. The idea was been to open and make available for the general public the work of the Commissions. The web page has a complete data index of jurisprudence ordered by date, matter and conduct, which allow the public in general to understand how the Competition System has addressed competition issues throughout the last thirty years.

Press conferences

The National Economic Prosecutor's Office has made a great effort explaining the importance of cases and the latest legal reform. Almost once a week, the National Economic Prosecutor holds press conferences where he explains the importance of the investigations of the Agency and the decisions taken by the Commissions to consumers and competitors. In this sense, last year, there were very important cases ruled where the consumer welfare was clearly protected by the Antitrust System. In this way, the Agency tries to create awareness of the importance of competition in the daily life of people.

One example of this practice, was the so-called Credit Card Christmas Promotion. It was a promotion given by credit card operators allowing the consumers to buy and pay in 3 payments without an interest rate. The 3 biggest departments stores refused to sell under this modality, because they have their own credit cards. The National Economic Prosecutor's Office filled a suit before the Antitrust Commission and the Commission finally impose fines to those department stores, because it considered that this parallel conduct was an exclusionary conduct. The Supreme Court confirmed this decision.

Another important case consisted in the modification of covenants contained in contracts celebrated between a mall and the stores which operated in it. These covenants imposed the prohibition for the stores to establish in another mall in a radius of 5 kilometers (territorial restraint). The National Economic Prosecutor's Office presented a suit before the Antitrust Commission which decided only in part in favor of the National Economic Prosecutor's Office. The Office appealed to the Supreme Court which overturned the decision and ordered the elimination of those covenants.

Also, in press conferences and in special media publications, the National Economic Prosecutor has described the importance of the new law, which created the Competition Tribunal. This strategy has made competition issues closer to consumers.

Competition day

In October 30th of 2003, the National Economic Prosecutor's Office organized, for the first time, a Competition Day, a seminar in which different experts could discuss competition affairs. The idea of the National Economic Prosecutor's Office is to celebrate this event every year, in order to create, precisely, a culture of competition. This year we expect to organize the Second Competition Day and the Iberoamerican Forum on the same day.

Speeches and publications

Every year, the National Economic Prosecutor's Office sets out some goals for its fulfillment. One of the main areas of interest is, indeed, the diffusion of competition policy. Last year, we made speeches to many academic institutions, explaining the system and the new reform. This year we have made speeches to trade associations and we expect to make more presentations of these kind to other organizations, and publish the Office's opinions in specialized journals.

Technical reports

Regarding the reports that the competition institutions can issue to different authorities promoting competition principles, I have mentioned how the Commissions, through their decisions, have issued some rules to regulators and municipalities in order to incorporate some competition principles in their public policies.

In relation to the National Economic Prosecutor's Office action in this field, the Agency has issued many reports on request by other State authorities. However, during this last period, the Agency has become more aware of its role in competition advocacy and has taken measures to fulfill this task in a better way. One example of this new orientation is the creation of a special unit within the Agency in charge of studying all those bills which are related with economic effects, with the objective of giving an opinion to the authority who heads the bill.

COLOMBIA

Institutional Challenges of Promoting Competition

Conflicts of Authority Among Regulatory Entities

1. Introduction - History.

For nearly 50 years, Colombia has had regulations on economic competition. In 1959, Colombia's Congress passed Law 155, which establishes the prohibition of "agreements or treaties that have as their object the limitation of production, supply, distribution, or consumption of primary resources, products, merchandise, or domestic or foreign services, and, in general, all types of practices, procedures or systems tending to limit open competition and to maintain or determine unfair prices."

In regard to economic integration, Law 155 required companies planning to undertake an operation involving any type of economic integration to inform the State of its plans. Consequently, the State would have the opportunity to analyze the possible effects of the operation on the market and, if it was determined that the operation may have a negative impact, to object to the pending integration.

Finally, Law 155 established regulations on unfair competition. These regulations were eventually overridden by Articles 75 to 77 of the Commerce Code, which were in turn substituted by Law 256, which was approved in 1996.

Thus, since 1959 Colombia has had regulations governing practices restricting competition. Nevertheless, for more than 30 years the application of Law 155 was practically nonexistent. On one hand, the country did not possess a culture of competition to make them effective, and, on the other, the mechanisms necessary to implement the law had not yet been adopted.

It was not until 1991, with the drafting of the new Political Constitution of Colombia, that the country began to take seriously the subject of economic competition. The duty of the State to prevent acts that constituted an abuse of dominant market position was established, and the right to economic competition was considered a collective right guaranteed by the Constitution. From that moment on, Colombia began to be conscious of the importance of regulations on practices restricting competition. This newfound awareness, given further stimulus with the approval in 1992's Decree 2153, was manifested through the approval of a series of regulations governing various aspects of economic competition, from the assignment of duties to various governing entities to the establishment of precedents, primarily through the Superintendent of Industry and Commerce.

2. Current Legislation On Promotion and Competition.

As stated earlier, although Colombia has had economic competition regulations for the last 45 years, they have only been actively and effectively enforced since the early 1990s. Once gravely ignorant of the regulations, Colombia has witnessed a proliferation of regulations and in particular, entities potentially authorized to resolve cases of restrictive competitive practices.

Among the principal regulations on restrictive practices, the following are the most important:

2.1. General Regulations

From the Political Constitution of Colombia, Article 333¹ expressly establishes the right to free economic competition and the responsibility of the State to avert and control activities that constitute abuse of dominant market position. Likewise, Article 334² of the Constitution establishes the possibility of State intervention in the economy, and Article 88³ determines that the right to competition is a collective right that must be protected through popular and group actions.

¹ Political Constitution. "Article 333. Economic activity and private initiative are free, within the limits of the common good. No one has the right to demand prior authorization or requirements to exercise them, without the authorization of the law.

Free competition is the right of all who assume its responsibilities

Business, as a basis for development, has a social function that implies obligations. The State will strengthen those organizations in solidarity with business, and will stimulate business development.

The State, under mandate of the law, will prevent the obstruction or restriction of economic liberty and will prevent or control any form of abuse that persons or businesses make of their dominant market position.

The law will restrict the scope of economic freedom when the Nation's social interest, state of affairs, and cultural patrimony demands it."

² Political Constitution. "Article 334. The general direction of the economy will be under the leadership of the State. The State will intervene, by law, in the exploration of natural resources; use of the land; production, distribution, utilization, and consumption of goods; and public and private services in order to manage the economy for the purpose of achieving an improved quality of life for its citizens, the equitable distribution of opportunities, and the benefits of the development and preservation of a healthy environment.

The State will intervene to utilize human resources and to assure that all persons, in particular those of lowest income, have access to basic goods and services, and also to promote the productivity, competition, and harmonious development of the regions."

³ Political Constitution. "Article 88. The law will regulate popular actions for the protection of collective rights and interests related to public patrimony, space, security, and health; bureaucratic ethics; the environment, free economic competition, and others of a similar nature defined by the law.

The law will also regulate the actions originating in the damage inflicted on a group of persons, without prior judgment of those actions.

Similarly, the law will define the cases of civil responsibility occurring from the damage inflicted on the collective rights and interests.

On a legal level, the general regulations that govern in Colombia are principally Law 155 (amended by Decree 1302 from 1964), Decree 2153, and Law 590 from 2000. These regulations are applicable to all of the economic activities not governed by a specific regulation. They regulate the agreements and unilateral acts contrary to free competition, abuses of dominant market position, and economic integration.

Given the wide scope of these norms, the entity of the State charged with enforcing these regulations is the Superintendent of Industry and Commerce. Due to the range and importance of its decisions, as well as the number of cases it faces, the Superintendent of Industry and Commerce is Colombia's central authority in matters relating to economic competition.

2.2. Specific Regulations.

In addition to the general regulations cited above, the Congress of the Republic, the National Government, and some regulatory authorities have approved regulations for particular sectors of the national economy in which they specify the range of certain actions or create obligations for participants in those sectors.

Without compiling an exhaustive list of Colombia's specific regulations on economic competitiveness, the following examples are illuminating:

2.2.1. Domestic Public Services.

Law 142, passed in 1994 (modified by Law 689 of 2001) establishes Colombia's regime of domestic public services,⁴ fixing rules and principles of economic competition for the regulated services and empowering the President of the Republic to allow the regulatory commissions (potable water and basic health; combustible gas and energy; and telecommunications) to develop the applicable standards in each sector.

Law 142 and its reforms charge the Superintendent of Domestic Public Services with the enforcement and application of its regulations since said institution is responsible for sanctioning violations of economic competitiveness in those sectors.

⁴ Law 142 of 1994 defines the following public services as domestic: water, sewage, garbage, electricity, gas distribution, basic fixed telephone service, and local mobile telephony in rural areas. The law also applies to other services such as national and international long distance telephone service.

It is important to remember that 1992's Law 143 establishes some guidelines in regards to competition in the electricity sector.

2.2.2. Financial and Insurance Sector.

The regulation governing Colombia's financial and insurance sector is Decree 663, approved in the year 1993. Decree 663 contains sectoral guidelines and grants the Banking Superintendent the power to oversee, control, and sanction noncompliance of its rules and anti-competitive conduct by sector participants.

2.2.3. Television.

For both open and closed television systems, the governing regulation is Law 182, passed in 1995. This law appoints the National Commission on Television as the entity responsible for the application and development of policies for television service. This includes policies related to economic competition. The National Commission on Television is also charged with supervising the conduct of television service operators and sanctioning noncompliance.

2.2.4. Others.

Finally, some specific regulations govern sectors such as shipping and transportation (Law 1 from 1991 and Decree 804 from 2001), or health (Decree 1663 of 1994), but the Superintendent of Industry and Commerce has the power of supervising and controlling the regulations.

3. Difficulties.

Obviously, multiple sets of regulations preside over economic competition in various markets in Colombia. It must be recognized that, in many cases, these specific regulations are required to regulate aspects of certain economic activities that are not generally applicable due to their specialized and technical natures. Nevertheless, it is important to take into account that the general principles governing the right to competition in Colombia remain in force in the majority of sectors. This demonstrates that Colombia has become aware of the importance of, and community benefits generated by, free and open market competition and market participants who conduct themselves according to established principles.

On the other hand, the greatest challenge to the right to competition in Colombia is the multiplicity of institutions charged with enforcing competition standards. In many cases, this multiplicity produces uncertainty among market participants as to which regulatory entity is actually in charge in their sector. This is especially true when one considers the existence of the many grey areas in which it is unclear whether a specific activity should fall under the authority of a sectoral entity or the Superintendent of Commerce and Industry. In addition, the multiplicity of authorities can generate a wide variety of interpretations of the law, which produces further confusion and uncertainty among economic actors and even the state entities themselves. This uncertainty manifests itself in bureaucratic delays that obstruct the flexibility required by the market to make decisions on economic competition.

4. Challenges.

Given the situation described above, the efforts being undertaken in Colombia to establish the right to economic competition are leading to the conclusion that the Superintendent of Industry and Commerce should be the sole authority charged with supervising compliance of the various regulations governing free economic competition. To ensure this objective positively affects the market, the existence of sectoral authorities is necessary to manage the technical aspects specific to their sector. For that reason, the authorities must stay in constant contact among themselves. They must also collaborate permanently with the Superintendent of Industry and Commerce to keep that entity informed of possible practices restricting competition in their markets. They must also collaborate with the authority in charge when specific technical information is needed.

The benefits that would result from these policies would be greater security for economic agents due to consistent legal interpretations and the certainty of knowing which entity legitimately supervises economic competition in each sector.

FAIR TRADING COMMISSION



THE MOST IMPORTANT INSTITUTIONAL CHALLENGES IN PROMOTING COMPETITION in JAMAICA

**Paper Prepared
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Topic:

Institutional Challenges in Promoting Competition

THE MOST IMPORTANT INSTITUTIONAL CHALLENGES IN PROMOTING COMPETITION IN JAMAICA

But for the acuity of the organizers of this forum, in delimiting the challenges in promoting competition, by insertion of the word “institutional”, there would be no end to this paper. And even with the limits imposed, one still needs to exercise rigid discipline of thought in order to comply with the “less than 10 pages” stipulation.

Jamaica established a competition regime in 1993, as a response to the international trend of the time, which saw more and more governments seeking to embrace the concept of a market driven export-led economy. The stated objective of the Jamaican Government was to create an institutional framework within which the country could achieve economic gains through reliance on market forces. Accordingly, certain structural adjustments were required. These included:

- (a) tariff reform which eliminated quantitative restrictions; the removal of requirements for excessive import licensing; the significant reduction of tariff levels;
- (b) removal of price controls and the deregulation of certain industries e.g. motor vehicle, tourism, banking, air and ground transportation;
- (c) privatization/divestment of certain para-statal agencies e.g. media houses, Government printing services, Sugar Redundancy Housing Programme;
- (d) subjecting state enterprises to greater commercial pressure.

Competition legislation was considered to be central to the implementation of those measures as indeed it is. It would be through **The Fair Competition Act** that *inter alia*:

- (i) the need for the Government to re-enter into the regulatory process in the future would be reduced;
- (ii) private firms would not replace the Government as the new regulators;
- (iii) the benefits of deregulation are shared by all members of the society;
- (iv) the arrangements of private firms do not distort the market.

LEGISLATIVE FRAMEWORK

It does not admit of discussion that once anti-competitive laws are established it is very difficult to get rid of them. Naturally, established stakeholders would resist change. Given the high degree of Government regulation that predates the promulgation of the **Fair Competition Act (FCA)** in 1993 there would continue to exist, unless successfully challenged by the FTC, a large body of laws, supportive of various anti-competitive conducts by various state agencies, in particular.

One major challenge facing the Commission therefore would be to have provisions offensive to competition amended or repealed. Between resistance and the slow pace at which such processes go, the prospects for success are consistently grim. After several years of effort to have meaningful discussions regarding a number of Pre-liberalization Commodity Boards, for example, the Commission was forced to discontinue its investigations. Neither human nor financial resources were available to justify continuing. The Commission lacked

the resources to conduct proper research into the relevant sectors; and persuasion was not effective.

Until 2000 when the **Telecommunications Act** was passed, no piece of legislation in Jamaica had given consideration to the role of the Fair Trading Commission. Intensive advocacy is required in order to sensitize lawmakers to the value of having the Commission's input in the process of lawmaking; and without specific provision being made, possibly under statute, the Commission's intervention will more often than not, be seen as interference.

Within the present legal framework, there is no official means by which the Commission's voice can be heard. From time to time, various arms of Government will invite comment. Essentially, the Commission has to await such invitations. In a few instances when it has become aware of new laws being contemplated or new arrangements being entered into by the Government, it has sought to be included in the discussions; but officials are not always forthcoming with essential information.

All this having been said, I must concede that there is evidence of small steps being made toward proper recognition of the role of the Commission but change cannot come fast enough. The legal framework needs to be improved to support the promotion of competition in Jamaica.

THE FCA

In clear support of the Government's objectives, the FCA not only addresses fundamental anti-competitive conduct like abuse of dominance; cartel activity and the protection of consumer rights, it stipulates in Section 54 that *"Subject to any provision to the contrary ... this act binds the Crown."* As time would come

to reveal however, the structure of the Act itself would present the Fair Trading Commission (FTC) with perhaps the greatest challenge that a Commission could face, as it tries to promote competition.

Having established the Commission as a quasi-judicial body, the FCA makes no mention of a staff or of the Commission having any powers of delegation. This *lacuna* led the Court of Appeal to hold in a 2001 judgement, that the Commission, being vested with powers of investigation as well as powers of adjudication, any decision which it makes in execution of both those powers in any one case would be in breach of the principles of natural justice: **The Jamaica Stock Exchange v The Fair Trading Commission.**

As a consequence the Commission has not been able to hold Hearings for the last three years. Surely investigations have been conducted; but heavy reliance has had to be placed on moral suasion and the level of co-operation which a firm is minded to exhibit. To its credit, the staff of the Commission has in the interim, been able to procure a number of consent agreements. The FCA is being amended to resolve this and other issues.

Highlighted too by the aforementioned **Stock Exchange case** was the issue of jurisdictional boundaries of the Fair Competition Act in relation to other bits of legislation and the specific groupings which they govern.

The Court held that the Jamaica Stock Exchange is governed by the **Securities Act of 1993** and therefore the jurisdiction of the FCA is ousted. Similarly, when the General Legal Council challenged the jurisdiction of the Fair Trading Commission the Supreme Court held that the Council is governed by the **Legal Profession Act** and not the **Fair Competition Act**. It is my view that clear words in the Competition legislation would have prevented such confusion. Appropriate amendments are being considered.

The precedent has therefore been firmly established, for various so-called self-regulated groupings to challenge the jurisdiction of the FCA and the FTC. Section 3 of the FCA exempts from its application, among other groups and activities, *“activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public”*. Anything less than a strict interpretation of this provision will result in the various professional associations escaping the reach of competition. The exempt activities must serve the specific purposes mentioned in the provision; and there must be no equivocation in that respect. This brings me to another of our important challenges – the relationship between the Courts and the FTC.

THE COURTS

Until the judiciary is fully seized of the importance of competition in the Jamaican market place, the FTC will be challenged by questionable interpretation of the law; by attitudes which are inimical to competition promotion; and by significant limitations in comprehending complex economic analysis.

In the **Jamaica Stock Exchange Case** the Court's interpretation of the word “services” was limited by the definition of the word “goods”, so that the services provided by The Stock Exchange were considered to be exempt, on the basis that the definition of “goods” exempts, *inter alia*, money and securities. The Court applied such an interpretation even though services is clearly defined as services *“...of any description whether industrial, trade, professional or otherwise.”* A real appreciation of what competition seeks to achieve would no doubt have produced a different; and with respect, an accurate interpretation of the provision.

In one misleading advertising case before the Court, the judge at first instance held that to the extent that the Respondent had intended to provide the facilities advertised, it could not be guilty of misleading advertising. Happily that judgement was overturned on appeal. Misleading advertising accounts for 90% of the cases investigated by the staff of the Commission. It was especially critical that the Court appreciate why intention cannot be considered in matters of this kind.

Much effort is being put into obtaining assistance to facilitate the training of judges. The importance of such projects cannot be overstated.

BUDGETARY

The FTC is a statutory body, wholly funded from the Government's Consolidated Fund, through the Ministry of Commerce, Science & Technology, to which it reports. While this arrangement is not peculiar to Jamaica; and indeed, most competition agencies rely on their Governments for funding, the point must be made that Government's resources are scarce and competition promotion is not likely to be considered an area of high priority for allocation of those resources. Understandably all aspects of the Commission's operations are affected, the most important of which are:

(i) Staffing:

It is no secret that but for the diehard nationalist or the committed student of competition very few persons remain at the FTC for much beyond three years, which is the contract period for the professional staff. By a long stretch, the meager salaries is the reason identified. For a whole year the Commission was unable to attract a Senior Legal Counsel; and the position of Competition

Bureau Chief has been vacant for nearly two years. In the meantime, the Government has put a freeze on employment. This situation has serious implications not only for the level of output from the Commission but also for its institutional memory. Regulatory capture is also a real and present threat.

(ii) Staff Training:

There is no delicate way to say that training as a budgetary item, was removed from the Commission's budget request from as far back as the year 2000; and there is no indication that it will be accommodated any time soon. Competition promotion is still new to Jamaica. There is no local academic institution which produces graduates trained to handle the complexities of this discipline. Training is hands-on and while that is happening anti-competitive conduct in the market could be proceeding without detection and therefore unchecked. In a matter which the staff sought to settle two years ago, the firm which was being investigated came to the negotiating table with its battery of legal representatives from local and foreign law firms; and this is the level of competency with which the staff has to compete. Here, I must pay tribute to the U.S. Federal Trade Commission, which provided us with much needed assistance in the person of skilled negotiator; and we managed to arrive at a consent agreement.

As the recently liberalized telecommunications market continues to expand, the relevant issues are becoming increasingly complex. The FTC is required to work alongside the sector regulator – The Office of Utilities Regulation, to ensure that the long history of monopoly behaviour is not perpetuated in the new liberalized market. The impact of competition can be truly realized only if the

competition agency possesses the required skill and expertise to address the highly specialized and technical issues that arise in this sector.

The absence of an allocation for training means too that the Commissioners and staff cannot participate in international conferences, seminars or workshops unless said participation is fully funded by others' generosity. It is highly unnecessary to multiply words about the value of being able to share experiences with other competition agencies; and gain insight into the variety of ways in which competition may be promoted.

Thanks to a number of donor agencies, which have from time to time facilitated training of the FTC staff in one form or another. Recent donor assistance has resulted in our having in our library at this time, a video taped recording of training provided by said donor; and this addresses the issues of both training and institutional memory, all at once.

CONCLUSION

Challenges to effective competition promotion and enforcement are not peculiar to the Jamaican experience. What might typify Jamaica's challenges, given its status as a developing country is the abject scarcity of expertise at all levels of the intricate societal web within which we seek to promote competition. More than anything else, Governments need to understand that to a large extent, the success of competition agencies depends on their being provided

with appropriate levels of funding. They need to be convinced that the competition legislation needs to be supported by other laws so that the work of the competition agency can be enhanced. Above all, there must be real commitment to the ideas that underpinned the establishment of a competition regime.



Federal Competition Commission

**Competition Law and Policy
Review of Mexico**

Fernando Sanchez Ugarte

**Latin American Competition Forum
Washington, DC, June 14, 2004**

Peer review exercise



- **The OECD's Peer Review exercise is a powerful instrument to assess Competition Law and Policy:**
 - It provides an independent evaluation by experts knowledgeable about the best experiences and most recent developments in the field worldwide; and
 - It constitutes a unique opportunity for competition authorities to receive feedback and establish a dialogue with international peers fully dedicated to competition law and policy.
- **Mexico has benefited greatly from two reviews in 1998 and 2004.**

The 2004 Report



- The 2004 report arrives in a key moment for Mexico's competition policy:
 - The CFC celebrated its tenth anniversary;
 - The President of Mexico has announced that competition policy will be a central component of his strategy to enhance the country's competitiveness.
 - Change of leadership in the CFC.
- The report reflects a careful, detailed and solid analysis of competition law and policy in Mexico, and goes to the heart of the CFC's priorities.
- The report recognizes key achievements and identifies important challenges that must be addressed.

Strengths (I)



- The report confirms strengths identified in the 1998 report:
 - The analytical quality of the Law and its regulations;
 - The establishment of an institutional setup to enforce the law that has gained in standing and credibility over time; and
 - The CFC's authority and its active role in participating in the formulation of competition enhancing public policies.
- The report notes that “the perception of an institutional reluctance by the CFC to engage powerful opponents has largely dissipated.”

Strengths (II)



- It identifies additional strengths :
 - The CFC has become a credible and respected organization, both domestically and internationally;
 - The CFC follows the best principles of management and the highest standards of public service; and
 - The CFC has effectively focused its limited resources to the most relevant matters in promoting competition policy in Mexico.
- The report concludes: “The CFC’s accomplishments are remarkable given the difficult environment in which it operates”

Some strengths have evolved in areas that were the focus of the 1998 recommendations



1998 recommendations

- “Maintain emphasis on regulatory issues and regulated and privatising sectors ...”
- “Broaden the base of support...”
- “Enter international co-operation agreements to improve enforcement efficiently in transnational matters.”
- “Make the CFC part of the Economic Deregulation Council ...”



2004 findings

- The CFC has “maintained a focus on regulated and privatised sectors,
- sought to broaden its base of support by publicising its actions to a wider audience and conducting outreach activities
- established important international antitrust co-op agreements ...”
- “... the Chairman of the CFC is a permanent member of the present Regulatory Improvement Council.”

However, there are key pending issues



1998 recommendations

- “Broaden the base of support...”
- “Provide for effective power to ensure that regulations to remedy market power actually achieve that aim ...”
- “Broaden the available enforcement resources by expanding the right of private action.”



2004 findings

- “ ... the degree of general support for competition policy is still an open question and remains a potential vulnerability. ”
- “... the CFC has a mixed record of participation in proceedings to establish price regulation for inadequately competitive market sectors. “
- “... further maturation of Mexico’s antitrust environment, especially in the courts, is necessary before private actions can become a significant feature of competition policy enforcement.”

The 2004 report identifies additional weaknesses



- “... certain statutes and judicial processes that constrain the CFC’s ability to remedy anti-competitive conduct and market conditions ...”
- “... decline in the Commission’s budget and staffing levels.”; and
- “...some deficiencies in the Commission’s own case litigation procedures, and in its interface with other government entities, that reduce the CFC’s efficacy as a law enforcement agency and competition advocate.”



The findings of the 2004 OECD report go to heart of key CFC's institutional challenges

Key institutional challenges



1. **Absence of an integral competition policy**
2. **Lack of competition culture**
3. **Excessive litigation**
4. **Ineffectiveness of fines**
5. **Legal limitations**
6. **Limited resources**

Integral competition policy



- Competition policy has not become a State policy
- Competition and efficiency principles must be included in all relevant economic and regulatory government decisions.
- Economic regulations and industry specific policies must be designed not as an alternative to competition, but as a complement in promoting market efficiency.
- The FCC would promote competition more effectively if all relevant economic and regulatory decisions by the government were consistent with competition principles.

Culture of Competition



- Competition is far from becoming the normal way of organizing national life.
- Competition increases efficiency and economic welfare, but it also implies the loss of privileges, which creates opposition.
- The FCC has undertaken efforts to promote competition, but better results would definitely be reached if the FCC had more allies in these efforts.



A culture that embraces competition is a must.

Excessive litigation



Between 1993 and 2003, 706 *amparo** cases were filed:

- 34% are pending for resolution and have been open, on average, for 1.9 years.
- Cases completed took, on average, 401 days to be resolved.
- There have been 1.2 *amparos* for each appeal for review.
- 49% are intra procedural.



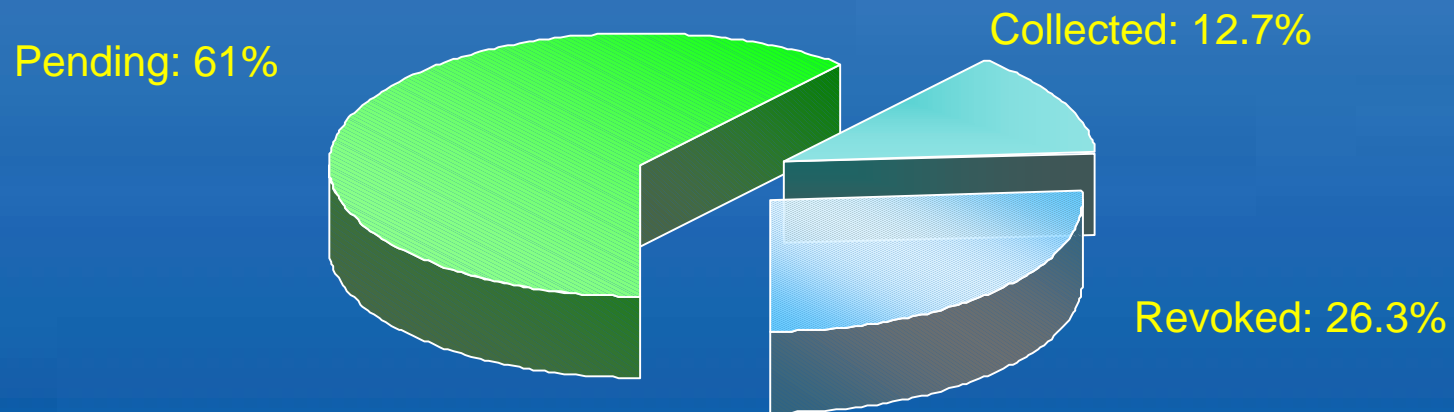
Excessive litigation delays the application of the Law, leaves public interest unprotected, while affecting third parties.

* The *amparo* is a proceeding established in the Constitution to protect individuals against unconstitutional acts by the government.

Ineffectiveness of fines



1993-2003: 493 fines imposed for 338 million pesos



Fines are practically not collectable

Legal limitations



The CFC is not empowered to:

- Stop or sanction the abuse of market power through excessive pricing or other commercial conditions;
- Impose structural remedies on monopolies, even though they are *per se* illegal;
- Order suspension of anticompetitive practices that are pending for final resolutions;
- Undertake on-site investigations;
- Carry out leniency programs

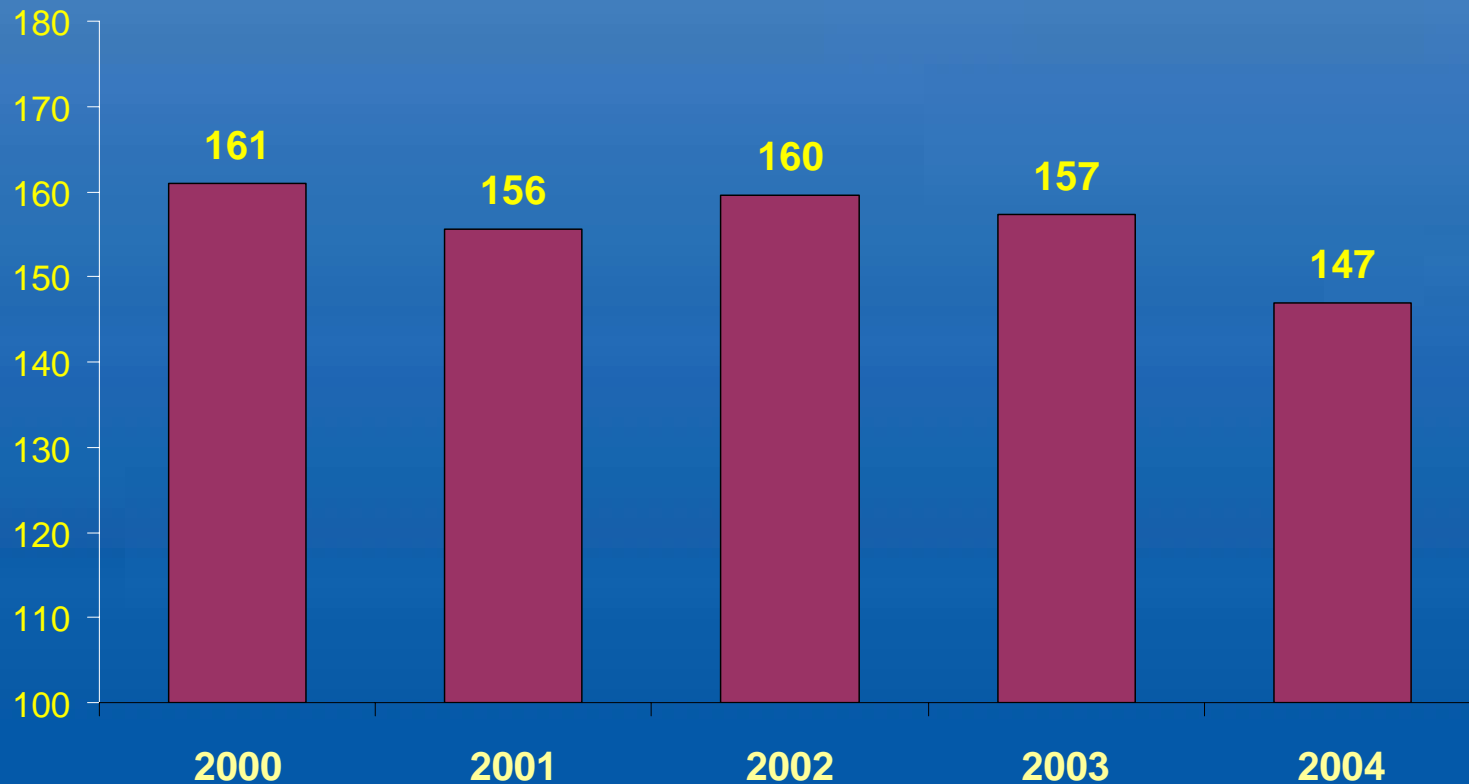


A more effective competition policy requires the enhancement of CFC's powers.

Limited resources: annual budget



2003 million pesos



Limited resources: personnel



Number of employees





Proposed reforms

Proposed reforms (I)



- The office of the President of Mexico is developing a package of legislative reforms that pursue the following objectives :
 - To consolidate CFC's autonomy;
 - To promote a comprehensive and consistent competition policy across all sectors;
 - To reinforce the authority of the CFC to prevent anticompetitive practices; and
 - To implement more effective administrative and judicial procedures.
- These reforms would address most of the recommendations presented in the 2004 report

Proposed reforms (II)



- In addition, the CFC is working on other aspects identified in the recommendations.
 - Merger notification procedures that fully meet ICN recommended practices;
 - An open dialogue with the Mexican Bar Association;
 - More active cooperation with COFEMER and PROFECO;
 - Greater international cooperation; and
 - Continuous advocacy activities: improving the website, additional publications, training seminars, conferences, etc.

Proposed reforms (III)



- Some of the recommendations in the report are not feasible at present.
 - Establishing the CFC as an agency with full independence in the management of its budget;
 - Creating a specialized *amparo* court with economic expertise.

Conclusions



- **Competition policy in Mexico faces important challenges and opportunities.**
- **The main challenge is to consolidate competition policy by renewing the leadership and by reforming the law .**
- **The great opportunity is to make competition policy one of the key policy tools that will allow Mexico to enhance its economic development.**

INSTITUTIONAL CHALLENGES TO COMPETITION POLICY IN PANAMA

By: Gustavo Adolfo Paredes Moreno
Commissioner
Free Competition and Consumer Affairs Commission

After seven (7) years of existence, the authority in charge of implementing competition policy in Panama continues to face institutional challenges in carrying out its functions. This document attempts to enumerate some of these challenges and the remedies utilized to address them. The list presented below does not necessarily represent the order of importance of those institutional challenges.

1. Independence in Administration and Management

Law 29 of 1996 clearly defines the form of organization of the institution, ensuring its directors continuity for a set period without being removed by the political authorities of the State. The nomination system of the directors of this entity is staggered to ensure that the top directors are not changed simultaneously, guaranteeing institutional memory and the continuity of the programs and projects undertaken.

Nonetheless, the succession of political groups in the administration of the State with different economic orientations has endangered the institutional integrity of the competition authority. These attacks on the integrity of the organization can be illustrated from various points of view. In the first, it may be considered that the directors of the organization should be functionaries who can be freely removed by the Executive Branch. This position leaves the organization independent in its decision-making process. A second and more serious attack is the questioning of the necessity of a competition policy as a State policy. This policy puts the organization at the mercy of pressure groups.

2. Funds for Performance

Without a doubt, this is the most important challenge facing our organization. The competition authority is largely financed by transfers of funds from the central government budget, and it is highly difficult to obtain financing at a level at which the administrative outlays might match the size of the economy and the possible instances of illegal conduct that should be investigated.

Additionally, the formulation and implementation of competition policies is not seen as a priority by the State and therefore sufficient resources are not destined to financing them, even at the time that the organization was created. In the case of Panama, this assistance has been obtained by means of donations and loans from international organizations such as the IDB and the World Bank.

3. Administrative or Jurisdictional Justice

The model of administration of justice in the application of competition policy creates a major institutional dilemma. The exercise of administrative justice has the advantage of speed in the finalization of proceedings, but the disadvantage of possibly violating the rules of due process and the risk that the judicial authority charged with reviewing decisions may not have the technical knowledge to understand the material under consideration.

In Panama we have adopted a jurisdictional justice model of administration. The competition authority undertakes an investigation in which it obtains the evidentiary elements of the commission of an illegal practice. For this purpose, the authority obtains authorization from a court of justice to gather information through any means of proof. In contrast to when the court is approached by a particular party, the competition authority is authorized by the court to set up an inquiry and undertake the necessary tests without the presence of tribunal officials. This administrative investigation, whereby the agency is only obligated to respect the constitutional rights of those investigated, does not create a change in the status of the rights or property of those under investigation.

The competition agency has faced two challenges in this regard. The first consists of limiting the judgment of competition issues to courts specialized in this area. This has been brought about by the creation of courts specialized in subject matter knowledge, and the ability of these courts to know in advance, at the plaintiff's request, when the goods or services under investigation have been commercialized in part or in whole within the jurisdiction of the specialized court. With this ability the plaintiff can prove that, although the defendant may be domiciled in a jurisdiction other than that of the specialized courts, the plaintiff can solicit the expertise of the specialized court when the goods have been commercialized in other jurisdictions.

The second challenge has been the training of the judges and officials who work in these specialized courts. The competition agency's training programs have been designed with the participation of the officials of the tribunals of justice, with the intention of accelerating their learning curve in the particulars of this material. Clearly identified are the problems of training judges in economics, which makes the presentation of cases more painstaking. Likewise identified is uncertainty in judges' decision-making because of the poor professional training in economics mentioned above.

4. Recruitment and Training of Personnel

The recruitment of personnel with the professional profile for the exercise of the functions pertaining to the competition agency is a highly relevant issue. While formulating a selection method that permits the identification of candidates with the ideal profile will certainly be an institutional challenge, more important is the certainty that the turnover of officials will be very high.

In formulating the selection methodology, three (3) fundamental elements should be taken into account: professional knowledge of the subject matter; the candidate's inclination

toward research; and the candidate's ability to work as part of a team. If the candidate does not meet these three criteria, he or she does not present the ideal profile.

Another important issue is the turnover of officials. We should expect high turnover of officials, above all because, after being trained, they are subject to offers of employment from law firms and from economists who invite them to join their professional practices. This leads to the conclusion that training should be designed on the basis of several assumptions. There should be an institutional record of every training so that, when officials are replaced, those with the greatest experience and time in the institution will become trainers of new officials. This practice will limit to the greatest possible extent the loss of investment in human resources. Likewise, each training should further the implementation of our processes and proceedings. It is imperative to demand of the organization that what is learned should result in some improvement in our daily performance. If pressure is not exerted for this to occur, training will be transmitted only to the trainees and not to the institution.

All of this leads us to adopt a method of continuously perfecting the institution's processes and procedures to make performance more effective every day. In order for this to be accomplished effectively, it is necessary to adopt some model of quality assurance. In our particular case the ISO 9001 quality assurance system has been adopted.

5. Jurisdiction and Relation with Other Regulators

The most serious problem in the relationship between the competition agency and other regulators is a reticence to exercise the instruments of competition policy for the benefit of the market. This reticence goes beyond the competence or jurisdiction of the competition agency, as it is a human attitude toward the relationship of collaboration that should exist among regulators. This attitude is manifested in a variety of forms. The normal tendency of the sectoral regulator is to ensure that it is the only authority competent to oversee the issues related to the regulated sector, including competition, even when this may not be a priority of the sectoral regulator. Even worse is a scenario in which an attempt is expressly made to exclude the competition agency from having knowledge of issues in the regulated sector. Clearly in evidence is the lobbying of pressure groups to obtain a favorable legal framework, above all when the competition agency has demonstrated efficiency in its performance.

While it is clear that there can exist the problem of jurisdictional overlap in the issue of the competency for regulated sectors, the greatest problem is that of inter-institutional collaboration among officials in public administration who should support one another in the benefit of a common end.

In the particular case of Panama this situation is not critical from a legal point of view, as the competition law clearly states the competition agency's power to investigate the commission of illegal practices in any sector of the economy, thus enabling it to take action in the name of and on behalf of society before the competent authority, whether administrative or judicial. Let us remember that Panama's competition law utilizes the

system of specialized tribunals within the judicial branch of government to resolve disputes, and even when the competent authority is found in an administrative headquarters, the competition agency is equally enabled to take action before it regarding the commission of illegal practices.

Any argument would center on establishing which is applicable: the special sectoral law or the general competition law. Experience has shown us that when sectoral law makes reference to issues of competition (antitrust), it does so only in a very vague and superficial manner. For this reason, the general norms of competition are generally applied. In the case that sectoral competition norms exist, these norms are applied, and general norms in a supplementary manner, although generally the latter should be applied for a coherent interpretation of the economic analysis.

6. Instruments for Compliance with the Law

An adequate competition policy cannot be carried out if the competition law does not provide the agency with the legal instruments to undertake tests and adequate procedures for the expeditious processing of investigations. In Panama, the competition law authorizes the competition agency to gather information or undertake trials by administrative or judicial means.

By administrative means, the competition agency is authorized to request information from any State party or administrative official. In the event that an information request is refused, the agency can issue a citation for an individual to testify before the agency and to present the documents requested in the citation. Failure to appear before the agency will provide grounds for contempt, which will be punished by a daily fine until the individual appears before the competition agency. The maximum amount of the reiterative daily fine is US\$1,000.

By judicial means, the commission can solicit from the specialized courts created by the competition law, or from any court of civil law, authorization to gather evidence by any appropriate means of examination, whether by exhibitory actions, visual inspections, inspection of records, expert assessment, or testimony, among other means. Once the request to gather evidence is granted, the competition agency can execute the authorization without the presence of the officials of the court of law and is obligated only to respect the constitutional rights of the party being investigated.

It is not only necessary that there exist efficient instruments to undertake tests, but there must also be an adequate procedure for the expeditious resolution of processes. As we explained above, in Panama the competition agency engages in an administrative investigation to determine the commission of illegal conduct. Upon establishing the commission of these acts the agency will take action before the courts of law, where in this instance the arguments will be heard and due process will be preserved. Panama's competition law has introduced a special summary process for dispute resolution.

The basis of this oral proceeding is the holding of a preliminary hearing for the simplification of the disputed points and an in-depth hearing to present evidence and hear arguments. Nonetheless, in practice these processes have been very long for the following reasons: the judge has not taken his role as director of the process in order to avoid dilatory actions and postponements of procedural stages; and litigating attorneys have abused the practice of dilatory actions in the process. I make the comments presented above without fear of error as the same legal norms are used in Panama for the maritime jurisdiction with excellent results regarding the time in which cases are resolved. The difference with the competition tribunals is the attitude and the personality of the judge, who does not take the same leading and disciplinary role as do the maritime judges, and the attitude of the litigating attorneys who, rather than seeking the resolution of the underlying dispute engage in a great number of dilatory actions. Nonetheless, I must comment that a change is being observed in the attitude of the competition judges with the goal of disciplining the proceedings.

7. Authority Exclusively in Competition or in Other Areas (Especially in Smaller Economies)

One topic that we consider addressing, especially for small economies, is the suitability of having an agency exclusively for competition or one that may also address other related topics. Here we face the dimension of the costs to the State of maintaining the agency, the public's perception of a bureaucracy that requires many resources, that the final products are not very visible in the short term, and the possibility of leveraging with other functions distinct from that of competition policy.

I can state with total certainty that the existence of Panama's competition agency would not be viable if it did not have the functions of a consumer protection agency as well. Both functions, which up to a certain point are complementary, give the agency a public profile with simple but visible actions from day to day. The perception of day-to-day action in consumer protection issues gives the agency community acceptance of the competition policy that requires many man-hours to reach a determination in an investigation. It should be added that the creation of agencies with exclusive knowledge of only one issue enlarges the State, creating greater bureaucracy. A multi-issue agency model allows the State to benefit from economies of scale in the construction of the organizational chart and makes it possible for the achievements and successes in areas of great public concern to strengthen the formulation of a policy, like that of competitiveness, which is not easily understood by the public.

8. Competition Law and Public Administration

The greatest efforts in advocacy of competition that our agency has undertaken have been directed at the public sector. The principal strategy has been active participation in the drafting of laws in the legislative branch in order to prevent new laws from introducing limitations into the process of free competition in the market. This action has been decisive, and many institutional resources have been employed. There has been the opportunity,

though in very limited cases, to introduce corrections to legal norms that present obstacles to free competition.

Another strategy that has been utilized is oversight of public contracting processes. Expense statements of State purchases have been examined at length, ensuring that this instrument does not become a limitation to the participation of all possible economic agents.

On the other hand, the agency has participated actively in the drafting of technical regulations that establish the requirements and minimum standards for products and services sold in the country. As in the cases noted above, this assures that these regulations do not present unnecessary requirements that might exclude the participation of all possible offers, or that regulations become the authorization for monopoly power for a particular firm.

9. Competition Law and a Culture of Competition in the Private Sector

A great challenge to the competition agency is to create a culture of competition among the economic agents that participate in the market. This culture of competition can only be developed by means of an aggressive dissemination strategy that makes it possible to transmit to economic agents the reason for being of competition policy. The dissemination strategy can have reactive or proactive components.

In the reactive component we may mention actions such as the following: visits to opinion programs on public communication media, the development of academic study programs with universities and professional unions, dissemination of research findings through public communication media, and the promotion of feasibility studies for economic agents.

The proactive component requires not only more determined action by the competition agency, but also willingness to cooperate on the part of the economic agent. In this sense, in Panama we have initiated a corporate compliance program that includes visiting different economic agents and reviewing contracts, commercial practices, or any issue that could produce any violation of the competition law. This action will call for the good faith of the economic agent, who will open his information for the scrutiny of the competition agency, but at the same time this will make it possible to correct any practice that might later be considered illegal in the short or medium term. The advocacy of competition will be exercised in an individualized form and in proportion to the economic agent. This corporate compliance program will not be limited to the initial assessment visit, as the program will be maintained through a periodic competition audit by the competition agency. The aggregate value for the economic agent, besides knowing that he is not in risk of violating the law, will be the authorization of a seal or distinction that will distinguish him from his competitors and which he will strive to maintain. This program has had great reception and economic agents very representative of the economy have voluntarily presented themselves for the pilot plan of this program.

10. Transparency and Predictability

The competition agency should be transparent in regard to the interpretation and fulfillment of the competition law, as well as the form of implementing the assumptions established in the law. Toward this end, the strategy has been managed at various levels. The first of these has consisted of developing by legal regulation the general norms of competition law. This adds greater clarity to the interpretation of the legal norm. Not only is the development of the legal norm important, but also the process for arriving at that norm. The utilization of the mechanism of the public hearing, in which participants include professional unions, chambers of commerce, professional litigators, consumer associations, and any other expression of civil society, will not only give all of those mentioned the opportunity to participate, but will also make their participation more clear and transparent.

At another level, the competition agency will be able to formulate guidelines and instructions for the interpretation and application of the law. Guidelines for economic concentrations, and for the analysis of vertical and horizontal practices, among others, will give economic agents the knowledge of the analytical methodology utilized by the competition agency.

These efforts by the competition agency to inform economic agents of its manner of proceeding will make its action more predictable and will facilitate the process of commercial decision-making.

Introducing Competition
Law and Policy in Trinidad and Tobago:
Some Institutional Challenges

Introduction

1. In 1997 the Government of Trinidad and Tobago issued a Green Paper proposing the introduction of a competition law and policy regime. The competition regime is not yet in force and the government is currently considering the second draft of the legislation, which, it is hoped, will be enacted later this year. The Green Paper is still regarded as the government's policy for a future competition regime and contains the proposals that inform the current draft of legislation, which will be entitled the Fair Trading Act. The Green Paper made recommendations for the establishment of certain institutions. In this regard, the Act would establish a Fair Trading Commission that would be staffed by a full-time Chairman and not less than four part-time members to be appointed by the President of Trinidad and Tobago. In addition the Act would establish a Fair Trading Court, referred to as the Tribunal in the current version of the legislation, which will be a division of the High Court, consisting of a judge and 2 expert laymen.

2. Certain aspects of the Green Paper as they pertain to future institutional challenges will be examined in this paper. It will be argued that the competition authority -the Fair Trade Commission, hereafter the Commission- will necessarily have to begin its work with a program of competition advocacy before the enforcement aspect of the Act comes into force. This is because the proposed competition legislation will introduce a new ethos in business transactions and will affect how the government implements decisions of an economic nature. It will therefore require that the officials of the competition authority have adequate prior training for the purpose of implementing the provisions of the Act and carrying out public education campaigns. In this connection, before the competition legislation is enacted, the Trinidad and Tobago public must be made

aware of the new demands of the competition policy and law in a society that does not have a culture or history of competition regulation. Equally important will be the task of working out beforehand the lines of functional jurisdiction between the Regulated Industries Commission and the Commission.

3. It is probably safe to say that the current business climate in Trinidad and Tobago is one where there is a proliferation of activities that would be condemned as anti-competitive abuses under the proposed legislation. It is against this background that for the first time in Trinidad and Tobago, there will be legislation that seeks to:

- Prevent monopolies, where they exist, from abusing their power
- Prevent new monopolies from being created through mergers
- Eliminate anti-competitive agreements
- Provide the Government with an expert source of advice on all Trinidad and Tobago's laws and policies having a bearing on competition.

Fair Trading Commission

4. Regarding the Commission's relationship with the government, the Green Paper only recommends that the Commission act independently of government. The Commission's members, the Commissioners, will be appointed by the President of Trinidad and Tobago who is not an executive President and is supposed to be politically neutral. This is one way in which the Commission will be insulated from possible political influences. The current draft however provides that the Minister of Trade and Industry may request the Commission to "carry out such other investigations as may be requested" and additionally, that funding of the Commission for special purposes, may be made available by the Minister of Trade and Industry. In view of these draft provisions, it may be concluded that the Commission may not be entirely insulated from political influence. That in turn raises the question of the circumstances in which political intervention will be appropriate.

5. Before the legislation comes into force, it is suggested that there be a cadre of personnel adequately trained and qualified in competition law and policy who will be available to staff the Commission and the Tribunal and to carry out in a competent manner the functions of both organizations. The concepts of competition policy and law will be new and complex; new enforcement procedures and techniques will have to be learnt. Once the Act comes into force, one will reasonably expect that there will be a smooth implementation of its provisions. That expectation will be fulfilled only if the Commission staff is already trained in applying the provisions of the Act. This approach to training was adopted when Trinidad and Tobago introduced WTO-compliant antidumping legislation in 1995. At the time the Ministry of Trade and Industry sent several officers abroad to various agencies to be trained in the specific anti-dumping enforcement procedures that were required by the legislation and that training took place well before the legislation was introduced.
6. Personnel to be selected for training ought not to be difficult to locate. Officials of the Ministry of Trade and Industry, where the initial work of locating foreign competition consultants and preparing the policy was done, are a likely source. However, the net can be cast among other Ministries (the Attorney General department, the Ministry of Finance, the Ministry of Public Utilities, and the Ministry of Consumer Affairs) and academia e.g. the University of the West Indies. Having undergone the necessary training, those personnel must be retained as staff for the Commission and the Tribunal. The importance of doing so is seen in the experience of having local personnel trained abroad to administer the domestic anti-dumping legislation. Fairly shortly after returning, the majority of those trained persons chose not to continue in the field in which they were trained. The value of training was therefore lost perhaps because sufficient incentives were not created to retain those persons.

7. Under normal circumstances, the enactment of legislation would bring into force all of its provisions simultaneously. Perhaps, in this case, in order to establish a Commission that would need a period of time to undertake the necessary preparatory work before entertaining complaints and conducting investigations, the legislation could schedule at different times the enactment of different sections, commencing with the establishment of the Commission and its advocacy functions, following up after a scheduled period with other provisions that deal with the establishment of the Tribunal and shortly thereafter the enforcement functions of the Commission.
8. Once it is duly staffed, the Commission should embark upon a campaign of competition advocacy that would raise public awareness of the benefits of the new competition regime. In point of fact, one aspect of the awareness program would have already taken place, that is, the public consultations on the draft competition bill that would have been undertaken by the Ministry of Trade and Industry. Such consultations are very important as they produce useful suggestions and modifications that could be incorporated in the draft bill. Moreover, they assist in shaping the legislation to suit the special features of a small island developing country. Previous efforts by the Ministry of Trade and Industry in 1998 to conduct public consultations on the Green Paper on competition were only partially successful. While several government departments and state agencies did respond, it is interesting to note that the most important stakeholder in the process- the business community- chose not to respond and stayed away from the consultation sessions. The local Manufacturers' Association however has informed the Ministry recently that their comments on the current version of the draft competition bill will be forthcoming. One suspects that on this occasion the private sector will be more responsive to such a process.
9. Competition Advocacy
The concept of competition advocacy is explained by The Advocacy Working Group of the International Competition Network as "*those activities conducted by*

the competition authority related to the promotion of a competitive environment for economic activities, by means of non-enforcement mechanisms mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.” In the decade of the nineties, successive governments in Trinidad and Tobago pursued a program of structural adjustment, trade liberalization, economic reform and liberalization, including the privatization of certain state enterprises, which has resulted in the growth of the non-oil sector of the economy. The Government’s current economic program has targeted the small business sector in Trinidad and Tobago for intensified development. That effort is currently occurring in a liberalized and deregulated environment, where in the absence of competition policy and law, the monopolistic power of privatized state enterprises and other firms enjoying dominant positions is amplified. Competition advocacy is therefore essential for the effective application and adoption of a competition culture in any country where private anti-competitive conduct or state intervention in the economy predominate.

10. Although the Green Paper does not fully develop the role that competition advocacy will play under the new regime, the current version of the Act does state that the Commission as part of its functions shall:
 - a. make available to persons engaged in business, general information with respect to their rights and obligations under the Act;
 - b. make available general information for the guidance of consumers with respect to the rights and obligations of persons under the Act affecting the interests of consumers;
 - c. co-operate with and assist any association or body of persons in developing and promoting the observance of standards of conduct for the purpose of ensuring compliance with the provisions of the Act.

To ensure that competition advocacy is aimed at all important stakeholders in the society, the Commission should have as one of its target groups, government officials, including the judiciary. The government is a major actor in the economy

and its decisions and the mode of applying decisions can have a profound effect on the competition environment.

11. The Commission could occupy itself initially with the development of strategies to raise public awareness and support for a competition regime in Trinidad and Tobago. That could be achieved via the following:

- educational seminars on competition policy and law for government officials, including the judiciary, and officials of state enterprises, as well as for businessmen and consumers;
- seminars and workshops at the University of the West Indies to stimulate academic discussion of competition issues in the local setting;
- development of legal commentary on the rules of competition law and policy;
- programs to increase the awareness of government officials of the need for market institutions and how markets are supposed to operate;
- discussion in specialized forums on the role of competition law and policy in good corporate governance;
- creation of public awareness of and the promotion of a competition culture through the dissemination of information on the web, the media, the publication of pamphlets, brochures and booklets.

12. Fair Trading Tribunal

In the assignment of functions for the Commission, the Green Paper characterizes that body as a quasi-judicial body that will have order-making powers that will range from orders to prohibit an agreement from being concluded to orders to prohibit the acquisition of another company. The Green Paper also states that the Commission will “initiate proceedings under the Act” and “will pursue its work through investigations.” The issue then arises whether the assignment of both the investigative and adjudicative functions in the legislation to one entity would be

in breach of the basic rules of natural justice. It is suggested here that the final version of the legislation address this particular problem by possibly placing the enforcement function in the Tribunal and not the Commission.

13. The Fair Trading Tribunal, the other competition institution envisaged by the Green Paper, is assigned the function of hearing appeals from the Commission and receiving applications from the Commission to impose penalties lying outside the Commission's own powers. It will also receive appeals from the Regulated Industries Commission that is responsible for licensing and setting standards for domestic service providers. The current version of the Bill allows appeals from the Fair Trading Tribunal to the domestic Court of Appeal.
14. The judicial officials of the Tribunal and indeed the Court of Appeal will need prior training in competition policy and law and should participate in competition advocacy programs before the Tribunal begins its work. As an example of the need for education when a new regulatory regime is introduced, it can be safely said that the local judiciary's unfamiliarity with the domestic trade remedy regime has led to decisions that tend to weaken the enforcement of the domestic antidumping legislation.
15. Regulated Industries Commission
The public utilities sector in Trinidad and Tobago had undergone a program of commercialization and privatization during the decade of the nineties and a new regulatory framework for public utilities was subsequently adopted. The Regulated Industries Commission was created in 2001 and the parent Act among other things, confers on the President of Trinidad and Tobago, the power to issue licenses to providers of utility services, with the explicit aim of fostering competition.
Under the proposed regime, competition law will apply to the public utilities in the same way as to all other sectors of the economy. The Green Paper indicates that it would not make for good administration if public utilities were to be

subject to regulatory intervention by both the Commission and the Regulated Industries Commission, as this would create confusion and role conflict. The enforcement function for both competition and regulation will therefore be assigned to the Regulated Industries Commission. The Commission will not deal with public utilities. It will be therefore important to ensure consistency in the work of the 2 Commissions. Therefore both Commissions should have one or more members in common. As noted before, an appeal from the decisions of both Commissions will be made to Fair Trading Tribunal.

16. The Regulated Industries Commission, (RIC), in its role as regulator, and in the absence of competition policy, has found itself making a decision recently on a new issue in telecommunications that could have future implications for competition in that sector. In that sector, technological innovation has begun to transform the monopoly aspect of telecommunications as Internet service providers, using Voice over Internet Protocol, are currently providing overseas calls at much lower rates than the monopoly telephone company. The legislation granting the telephone service monopoly however does not apply to Voice over Internet Protocol however the RIC has interpreted the legislation to require internet service providers offering that service to be licensed under the RIC legislation. One could characterize the RIC's decision as conservative and pro-monopoly. It is submitted that that decision might possibly have been different if the RIC were exposed to the benefits of a competition advocacy program.
17. The RIC's decision in the telephone monopoly case mentioned above was made in the absence of a competition agency. If there were a competition agency, the issue of jurisdiction between the RIC and the competition agency would have had to be worked out in the case under consideration, since the issue pits consumer interests and new competitors using a different technology against a firm enjoying a pre-existing monopoly. The relevant legislation should provide assistance in the matter of the division of labour but it might in fact be less useful if the functions of both agencies turn out to be very similar.

18. The foregoing is an examination of some of the challenges that will be faced in establishing and operating competition institutions in Trinidad and Tobago, in this case, the Fair Trading Commission and the Fair trading Tribunal. It is submitted that those challenges could be met successfully if the local environment has been sufficiently prepared by programs of competition advocacy.

Pro-Competencia's Mission and Activities

HISTORY

For a number of decades, Latin American nations were characterized by their protectionist economic policies: import substitution, price controls, monopolistic practices by the government, and state ownership of industries and services. Governments and the private sector operated within a set of rules that guaranteed corporate executives protection from competition and government officials the power to assign and distribute resources.

The majority of Latin American countries began the transition toward a more open economy in the 1980s as a reaction to the debt crisis. At the beginning of the 1990s, almost all of the countries had begun structural reforms such as reducing commercial barriers, privatizing State-owned enterprises, deregulating the economy and promoting competition. Without question, the process of liberalizing the commercial sector is far advanced today.

HISTORY

Promoting competition in these countries, however, requires more than simply enforcing an anti-monopoly law. To do so, federal authorities must discourage the behavior of monopolists accustomed to the protection of various presidential administrations. The government must undertake an education campaign aimed at influencing behavior, attitudes, and culture. The government must persuade consumers and producers that economic liberalization and competition benefit them both due to the greater efficiency they generate, and are a better option than a controlled economy.

In the case of Venezuela, competition policies originated as part of the economic reforms of 1989. In 1992, the Law to Promote and Protect Free Competition was passed, which created the Superintendent of the Promotion and Protection of Free Competition (Pro-Competencia), attached to the Ministry of Production and Commerce. Although Pro-Competencia functions autonomously, it is weakened by the fact that it is not independent and does not have financial or budgetary autonomy.

MISSION

**TO PROMOTE AND PROTECT FREE
COMPETITION FOR THE BENEFIT OF THE
NATION'S ECONOMIC ACTORS, PRODUCERS,
AND CONSUMERS OF GOODS AND SERVICES.**


Who are we?

PRO-COMPETENCIA is a functionally autonomous department of the Ministry of Production and Commerce. It was created in 1992 by the Law To Promote and Protect Free Competition. Its operation was authorized by Resolution N° 37.842, issued by the Minister on 18/12/2003.

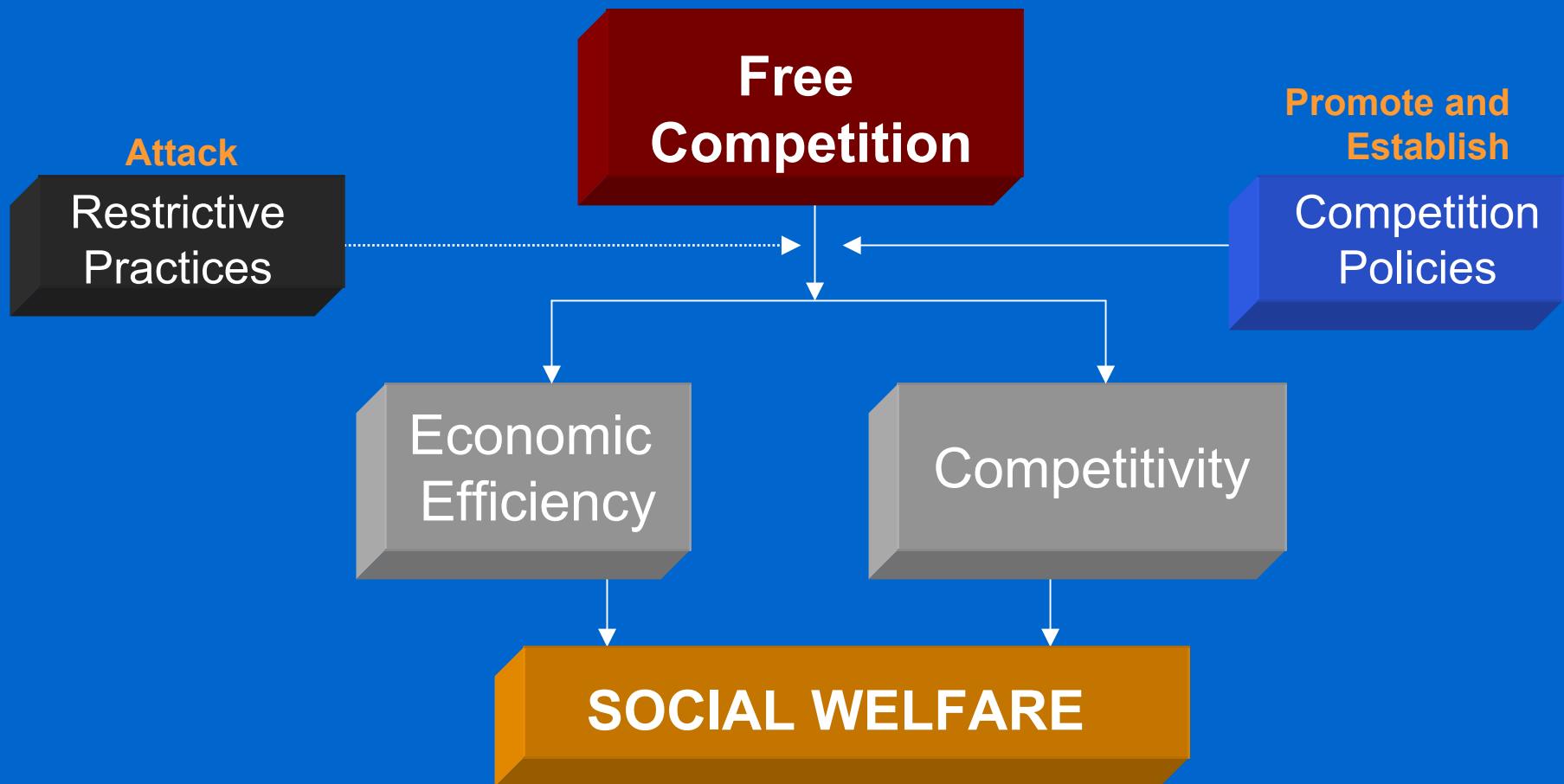
What is our legal basis?

- **Constitution of the Bolivarian Republic of Venezuela**

- **Law to Promote and Protect Free Competition G.O. N° 34.880**

- 
- Regulation N° 1 : Identify the governing regime
 - Regulation N° 2: Economic Concentrations
 - Global Exception to agreements on exclusive distribution and purchasing
 - Lines of evaluation of economic concentrations
 - Lines of evaluation of franchises

Objectives



What is our responsibility?

Prevent and attack market failures:

Failures

- Monopoly
- Oligopoly
- Externalities
- Public Goods
- Public Resources

Effects

INEFFICIENT
Distribution of
Society's
Resources

Action

State intervention
to correct market
failures.

How do we operate?

Promote Competition
and Efficiency

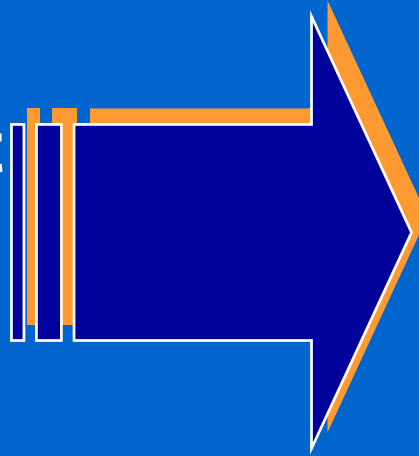
- Opinions and consultations
- Seminars
- Reports on Public Policy
- International Negotiation

Protect Free Competition

- Prosecuting anti-competitive practices through administrative procedures
- Ensuring that economic concentrations do not damage the market

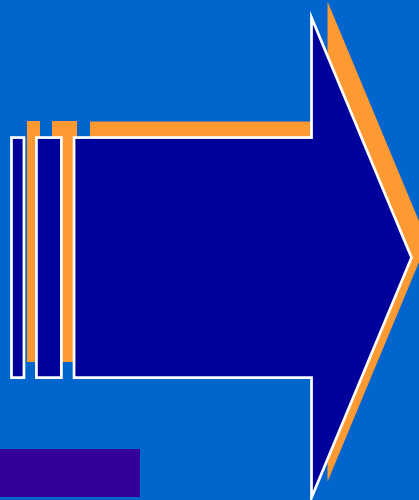
When do we take action?

For exploitative practices aimed at obtaining illicit profits



- Abuses of dominant market position
- Agreements among competitors

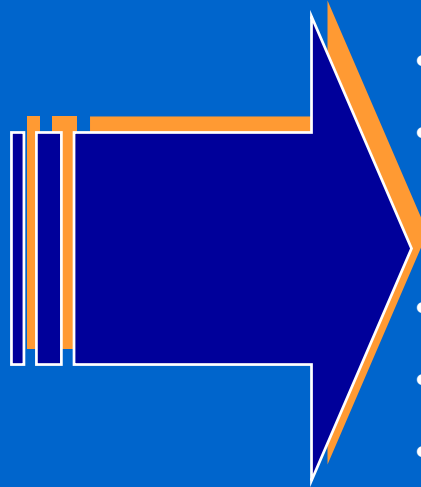
For exclusionary practices



- Abuses of dominant market position
- Agreements among competitors
- Unfair competition
- Boycotts

When do we take action?

**In unfair competition,
with displacement of
competitors:**

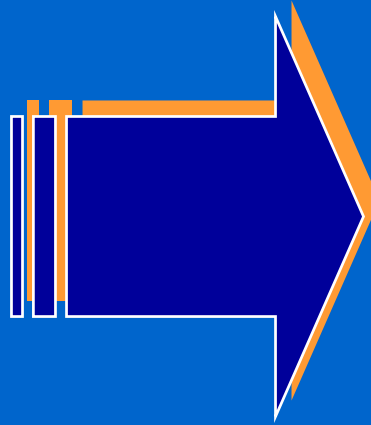


- Violation of industry secrets
- Copying products
- False or misleading advertising directed at the limitation of free competition
- Comparatively false publicity
- Commercial bribery
- Other unfair acts, such as:
 - Using foreign resources

When do we take action?

For economic concentrations, provided that:

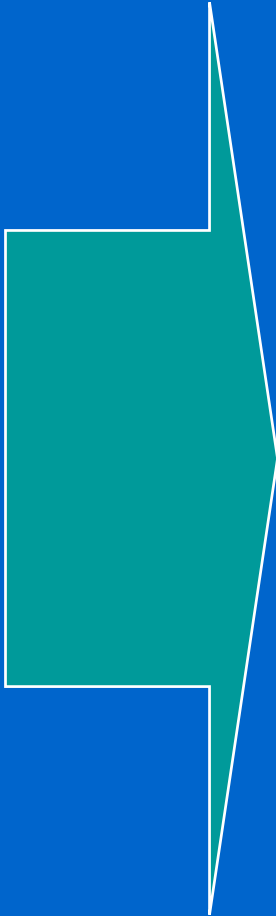
- They generate or reinforce a situation of market dominance.
- They effectively restrict free competition.



- Acquisitions
- Joint ventures
- Mergers
- Etc.

Who is subjected to the regulations?

- Individuals or groups
- Government sector
- Private Sector
- Any grouping of the above



Provided that they undertake economic activities, for or without profit, inside national territory.

How does Pro-Competencia act?

Consultations and opinions

Authorization Procedures

Official Investigations
By Complaint

Sanctioning Procedures:

Sanctions
Orders
Fines

Up to 20% of annual
gross sales

What is the “Sala de Sustanciación”?

- It is the office charged with conducting the investigation, admitting, rejecting, or soliciting the evidence needed to determine the existence or inexistence of restrictive practices.

The following processes are conducted:

**Notify
and send
questionnaires**

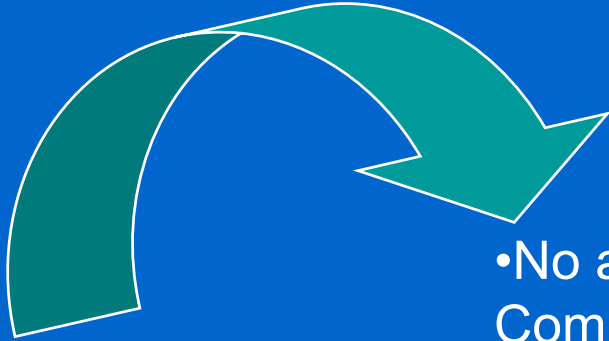
Collect Evidence

Assess Evidence


These processes must take place within 15 days. There is an option to extend the investigation for an additional 15 days.

What is the appeals process?

The decision of Pro-Competencia finalizes the administrative process.

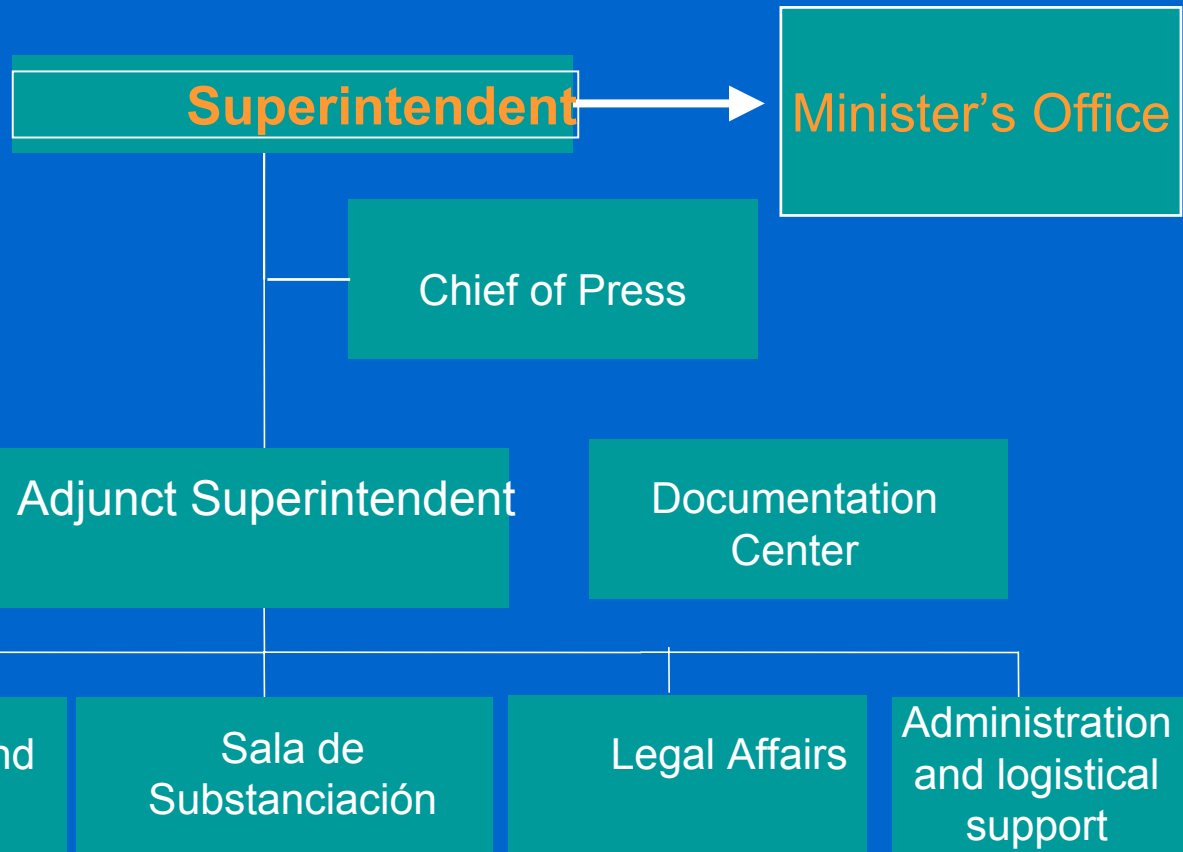


- No appeal to the head of Pro-Competencia or to the Minister of Production and Commerce is available.



- Appeals must be directed to the Administrative Appeals Court (Corte Primera en lo Contencioso Administrativo).

Our Organizational Structure



INSTITUTIONAL WEAKNESSES

i) The following should be viewed as inherent institutional weaknesses:

1.- Number of workers: Pro-Competencia, after nearly 12 years in existence, has nearly the same number of workers as when it originated. Consequently, although staffers are formally assigned specific duties, they must work in other areas outside their principal focus, such as market investigations, merger and acquisition analysis, enforcement of sanctions, and legal representation. In other words, in practice, the Pro-Competencia staff must perform any and every activity required of them, regardless of subject.

INSTITUTIONAL WEAKNESSES

Additionally, the workload at Pro-Competencia has increased due to new support duties for regulatory authorities in telecommunications, electricity, and gas stemming from the processes of liberalization occurring in those sectors.

2.- Budgetary and financial resources: While Pro-Competencia's budget has remained steady in real terms, it can be asserted that it has diminished in real terms. As stated, the agency does not possess financial autonomy, which limits its financial expenditures. It is also important to note that 80% of the budget is devoted to the payroll. This situation weakens the functional autonomy of the institution and hinders the implementation of decisions and rulings.

INSTITUTIONAL WEAKNESSES

3.- Staff Rotation: It is a goal of the agency to hire and maintain the highest-quality staff, not only with respect to its academic and professional qualifications, but also with respect to its competitiveness and attitude (goal-oriented, committed, driven, flexible, versatile, knowledgeable and highly-motivated). Nevertheless, a lack of competitive salaries and the minimal opportunities for promotion within a horizontally-structured organization operating on a skeleton staff encourage employees who have achieved a certain level of experience to move to more lucrative positions elsewhere.

This makes Pro-Competencia an excellent institution for learning about subjects related to economic competition, but, with the exception of a very few cases, it does not maintain its best and brightest for very long. The result is time and resources wasted in the training of staff whom the agency hardly has the chance to utilize.

INSTITUTIONAL WEAKNESSES

4.- National Presence: Although the Law to Promote and Protect Free Competition permits the formation of state-level competition agencies, in practice these agencies have never been created. This prevents many small economic interests from filing complaints about anti-competitive practices, since they would have to travel to the capital to do so.

In addition, the scarce funds available to organize promotional discussions and presentations in Venezuela's interior leads to the perception of Pro-Competencia as an agency that deals only with large economic interests.

The situation becomes particularly challenging in those cases in which complaints have been filed by economic interests with few resources in the interior of the country. Given the limited financial and human resources of the agency, on many occasions Pro-Competencia staff can not travel to the region to investigate the complaint.

INSTITUTIONAL WEAKNESSES

ii) Weaknesses inherent in the organizational framework

1 - Political Sector's misunderstanding and lack of support: Although the Law to Promote and Protect Free Competition and Pro-Competencia has existed for almost 12 years, there is still a significant lack of knowledge about the subject of competitiveness. Neither Pro-Competencia nor the decisions it makes are adequately understood by the official political sector. As a result, there is little support for providing the agency with sufficient financial, technical, and human resources.

INSTITUTIONAL WEAKNESSES

2. Lack of a culture of competition: Promoting competition as a meaningful value for economic interests to pursue is one of the essential functions of the agency ...

This situation is best reflected in the courts authorized to revise Pro-Competencia's decisions. Frequently, the courts' understanding is so poor that they issue decisions that contradict the agency's technical requirements.

What are the challenges?

- Search for mechanisms that solve:
 - The lack of preparation among judges on competition matters, with the goal of effectively protecting competition.
 - The lack of promotion on a national level of the Law to Promote and Protect Free Competition as a strategic public policy tool that allows affected economic interests to denounce practices restricting free competition.
 - The agency's budgetary limitations, which prevent it giving adequate attention to the growing number of cases.
 - The heavy turnover of personnel unable to find adequate incentives to ensure they remain with the agency.
 - The current weaknesses in the legal framework. This could be achieved by passing a new Law to Promote and Protect Free Competition that grants greater budgetary and financial independence.



SESSION II: PEER REVIEW OF PERU'S COMPETITION LAW AND POLICY



COUNTRY STUDIES

Peru - Peer Review of Competition Law and Policy 2004

Introduction

“Peer review” is a core element of OECD work. The mechanisms of peer review vary, but it is founded upon the willingness of all OECD countries and their partners to submit their laws and policies to substantive questioning by other members. Peru’s competition law and policy have been subject to such review in 2004. This report was prepared by Mr. Terry Winslow for the OECD.

Overview

Related Topics

Competition Law and Policy in Peru



A Peer Review



INTER-AMERICAN
DEVELOPMENT BANK

OCTOBER 2004





ORGANISATION FOR ECONOMIC CO-
OPERATION AND DEVELOPMENT



INTER-AMERICAN DEVELOPMENT
BANK

COMPETITION LAW AND POLICY IN PERU

A PEER REVIEW

This report was prepared for the OECD by Terry Winslow, who is now a consultant to the OECD after six years as the member of the OECD Competition Division in charge of activities with non-OECD countries.

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed:

- to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
- to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

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Foreword

“Peer review” has always been a core element of OECD co-operation. The mechanisms of peer review vary, but OECD co-operation has always been founded upon the willingness of all OECD countries to submit their laws and policies to substantive questioning by other members. This process not only promotes transparency and mutual understanding for the benefit of all, it also provides the peer reviewed country with valuable insights about possible improvements.

The benefits of this process are particularly clear in the area of competition law and policy. As a result of the activities of the Competition Committee, OECD countries that once had real conflicts on competition issues have become partners in seeking to halt harmful international cartels and mergers. The Committee has also become an important forum for assessing and demonstrating the usefulness of applying competition policy principles to economic and other regulatory systems.

The peer review report that follows reflects the fourth application of the peer review process to a non-OECD country. South Africa and Russia were reviewed at meetings of the OECD Global Forum on Competition (GFC). Chile, and now Peru, were reviewed at meetings of the Latin American Competition Forum (LACF), organised by the OECD and the Inter-American Development Bank (IDB). All four reviews confirm that the peer review process is an extremely useful means of promoting co-operation and voluntary convergence among OECD and non-OECD economies, providing both transparency and a candid discussion of what constitutes “best practice” in different situations.

In order to expand this form of co-operation beyond GFC meetings, the OECD needed to find a partner. For work in Latin America, the IDB was the logical partner, and the OECD was very pleased when, in 2002, preliminary discussions led to an IDB/OECD co-operative programme that included annual LACF meetings with peer review as an important element. The overall goals of IDB/OECD co-operation in this area are to help promote economic growth and employment, greater economic efficiency, and a

higher average standard of living in the medium to long term. There is increasing consensus that sound competition laws and policies are important to achieving these goals. LACF meetings that include peer reviews permit the IDB and OECD to combine their resources and use each institution's comparative advantage in promoting competitive markets and economic development. Chile's and Peru's peer reviews were financed by the IDB.

We want to thank the Government of Peru for volunteering to be peer reviewed at the second LACF meeting, which was held in Washington, D.C. on 14-15 June, 2004. It was encouraging to hear Peru's Delegation confirm at the meeting that the report's recommendations were helpful and to hear from Delegates of other countries that this review has improved their understanding of Peru's competition law and policy. Finally, we want to thank the many competition officials whose written and oral contributions to the Forum have been so important to its success.

Eric Burgeat
Director
OECD Centre for Co-operation
with Non-Members

Carlo Binetti
IDB Special Representative
in Europe

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EXECUTIVE SUMMARY

Peru is a developing country with a history of protectionism, “import substitution,” and substantial governmental involvement in the economy. These precluded sustained economic growth by cutting off foreign investment while wasting its own resources by subsidising inefficiency. By the late 1980s, Peru had a rapidly declining GDP and a four-digit inflation rate.

Competition law and policy was formally introduced to Peru in 1991 as part of a broad economic liberalisation programme, but the real beginning came in 1993 with the opening of a new “autonomous” government agency, the Institute for the Defence of Competition and Intellectual Property. Indecopi, as it is known, became responsible for the “free competition law”; a “market access law” against government rules that impose unwarranted barriers to entry; and a wide range of other laws with some relation to market reform. With strong Presidential support, Indecopi soon became a powerful force for reform within Peru and one of developing world’s most articulate competition advocates.

Peru’s free competition and market access laws represent the core of competition law and policy – the banning of anticompetitive conduct by enterprises and the key principle that governments should not restrict economic activity more than is necessary to achieve other social goals. The breadth of Indecopi’s mandate has helped the agency as a promoter of competitive markets in a broad sense, but many of its activities – particularly those concerning bankruptcy, the standardisation and accreditation process, and intellectual property protection – are much less closely related to core competition policy issues than many other government activities, such as creating interconnection rules or privatising state assets, over which Indecopi has no authority. Thus, even Indecopi’s broad mandate fails to include some important competition policy matters, and some of Indecopi’s functional areas contribute little to the agency’s policymaking or its operational efficiency.

During the 1990s, Indecopi’s competition-related activities consisted primarily of education, advocacy, and both voluntary and quasi-judicial resolution of disputes between firms or between one or more consumers and a firm. The agency brought a number of significant cases, but was criticised by some for not engaging in more law enforcement. Today, there appears to be increasing consensus (within and outside Indecopi) in favour of a more proactive law enforcement approach, and some view Indecopi as having already moved in this direction. Although education and advocacy continue to be vital, Indecopi should indeed be seeking to bring more *ex officio* free competition and market access cases that can demonstrate the value of its work in concrete terms.

.../

Reform to strengthen Indecopi is also necessary, however. During the 2000-2001 transition government and the current government, several events have confirmed what some have warned for years – that the agency has insufficient safeguards of its autonomy. As a result, Indecopi's stature as an autonomous, neutral arbiter has been undermined. It is important, therefore, for Peru to revise the law governing Indecopi to increase the actual and perceived independence of both Indecopi's first instance decision-makers, such as the Free Competition Commission, and its second instance decision-maker, the Tribunal for the Defence of Competition and Intellectual Property.

Moreover, Indecopi no longer receives any funding from the Treasury. The agency has always been largely self-financing, and the profound incentive problems inherent in this system became more obvious and more serious when public funding stopped completely in 2003. Indecopi can now conduct its core competition work (and other non-remunerative activities) only by overcharging for its registration and other services and/or setting the level of its fines so as to cover its own costs rather than to punish and deter illegal conduct. This approach will not permit Indecopi to revive or maintain the confidence of Peruvians or the international community.

Despite the many important demands for public funds, Peru should provide at least enough funding for the Free Competition and Market Access Commissions to handle their "denunciation" cases and devote additional resources to *ex officio* cases. Funding this casework can more than pay for itself and benefit all Peruvians by both increasing efficiency and reducing the size of Peru's informal economy, which is 60 percent of GDP (and apparently growing). Both Commissions should continue to ground their decisions in economic efficiency while considering that some previous decisions may have relied too much on "Chicago School" concepts.

A Working Group at Indecopi is currently considering a variety of possible amendments to the Free Competition Law. There is a particular need for the introduction of some sort of merger control system and for a legislative clarification of the legal standard applicable to hard core cartels. Other amendments may also be appropriate.

In addition, in continuing the competition advocacy for which it is justifiably famous, Indecopi should place separate and increased emphasis on its Free Competition and Market Access functions, and should explain as clearly as possible how these functions can and do benefit the entire Peruvian economy, not merely the "formal complainant or other direct "victims" of particular violations. The public must learn that these cases involve important economic policy matters in which they have a stake, rather than being essentially private disputes (as may be the case in unfair competition cases).

.../

The challenge before Indecopi and Peru is great. The official Individual Action Plan (IAP) Peru recently submitted to APEC states as follows:

“Competition and market oriented policies in Peru and the Andean Region are facing opposition from the majority of the impoverished population who do not have a clear perception of the benefits of a market economy.... The increasing opposition has stopped any attempt to implement necessary reforms and improve competition environment.”

Reform activity has not completely stopped, of course, and the IAP offers the optimistic conclusion that “there is an opportunity to change the population’s negative perception of competition and market-oriented policies.” But the IAP’s description makes it clear that market reform requires not merely a strengthened Indecopi, but increased, visible support from the government and its ministries for what the government continues to describe as its market liberalisation programme. Government officials should seek to explain the benefits of a market economy, and should strongly reject, rather than repeat, populist criticism that contributes to the public’s fears and misperceptions.

Among other possible strategies, the government should stress that market reform is improving the standard of living of most Peruvians by, for example, reducing the cost and improving the extent and quality of telephone service and of electricity. IDB-funded research showing the benefits of Indecopi’s competition work should also be publicised. Moreover, the recently proposed judicial reform programme should be explained in part as a means of improving the ability of the market to provide real benefits to the public. Both Indecopi and the rest of Peru’s government should seek every available opportunity to show that despite transitional difficulties that sometimes need separate attention, Peru’s citizens will be better off when the market – rather than opportunists, monopolists and bureaucrats – determines the price and quality of the goods and services they seek.

1. Context for and History of Competition Policy

Competition policy was introduced to Peru in the early 1990's as part of a general programme of economic liberalisation. Decades of protectionism and government involvement in the economy had led to economic collapse, but the newly elected President who introduced these policies had campaigned against such a programme. Moreover, the free competition law and other aspects of this reform programme were adopted by Presidential decrees, many of which were issued during a period when Congress had been dissolved. One result of this situation is that the laws reflect a clearer commitment to economic efficiency than those of most countries, and throughout the 1990's Peru's competition officials received strong Presidential support. On the other hand, although the reforms were successful and sometimes popular, the laws and policies did not reflect a broad consensus within the public or even among government officials. In the last few years, an obvious fall-off in Presidential support and a number of events have undermined competition policy and other aspects of economic reform.

1.1 Economic and cultural context

Analysis of the challenges involved in introducing competition law and policy to Peru must begin with the country's recent political and economic history, which in turn must be understood in terms of Peru's size and its striking diversity in matters such as topography, ethnicity, language, wealth, and custom.

Located on the west coast of South America, Peru is in geographic terms the third largest country in South America and the 20th largest country in the world. (By way of comparison, it is slightly larger than South Africa; almost twice as large as Chile; and slightly smaller than France, Germany, and Spain combined.) Peru's northernmost point sits on the equator, bordering Ecuador and Columbia. From that point Peru extends southwest to include mild coastal plains and southeast to include part of the largely impenetrable Amazon basin. These two areas are divided by the Andes mountain range, whose tropical foothills give way to frigid peaks of up to nearly 7,000 meters.

Peru's population of almost 30 million is the 5th largest in South America and the 39th largest in the world. Mestizos (with mixed Native American and European ancestry) have become the predominant group and now comprise almost 50 percent of the population. Native Americans comprise 35 percent of the population, but this group is very diverse. For example, the Amerindians of the Andes are ethnically and linguistically

distinct from the diverse indigenous groups that live on the eastern side of the mountains and in tropical lowlands around the Amazon basin. The Caucasian population, which lives mainly in Lima and elsewhere on the coast, has fallen to about 10 percent of the population and has been losing its position as the political and economic elite. The ancestry of the remaining 5 percent of the population is mostly African and Asian.

In economic terms, Peru is considered by the OECD's Development Assistance Committee to be a Lower Middle-Income Country ("LMIC"). For comparison purposes, other LMIC countries from Central and South America and the Caribbean include Belize, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Paraguay, and Surinam.¹ Six Central and South American countries – Argentina, Brazil, Chile, Costa Rica, Panama, Uruguay, and Venezuela – are considered Upper Middle-Income Countries. In more concrete terms, Peru's GDP ranks fifth in Central and South America, and 47th in the world, but its *per capita* GDP ranks significantly lower – ninth in Central and South America, and 120th in the world. Approximately ten percent of Peru's GDP comes from agriculture, while industry makes up about 27 percent and services the remaining 63 percent. At least 60 percent of economic activity in Peru takes place within the informal economy, which among other things creates health and safety problems and deprives the government of tax revenue.

1.2 Background for Peru's market reform

Peru's political system and economic policies have also witnessed striking variations. Although a decentralisation programme is underway, Peru's government has always been highly centralised, and like many countries in the area, Peru has a strong tradition of state participation in or control of economic activity. Beginning in 1963, Peru focused particularly on an "import substitution" model of economic development that included trade and exchange rate manipulation as well as extensive regulation of price and entry. In the 1970's, Peru's military government strengthened ties to the communist world, becoming the Soviet Union's largest military client in Latin America.

A new Constitution was adopted in 1979, and in 1980 the new, democratically elected government began to seek closer relationships with its neighbours and other Western countries. After Alan Garcia was elected President in 1985, however, Peru reverted to nonalignment, economic populism, and "anti-imperialist" policies. Together with the growing violence of the Maoist-oriented "Communist Party of Peru – Shining Path" and a serious cholera epidemic, these economic policies contributed to the virtual disintegration of the economy, the political party system, and the

state. The result was a presidential election in 1990 between two political novices, Alberto Fujimori and the novelist Mario Vargas Llosa² – an election that Fujimori won in part because Vargas Llosa compromised his image as an outsider by joining an established political party.

1.3 Establishing the legal framework for a market economy

With no obligations to any traditional party, Fujimori was able to pursue a pragmatic approach to governing. During the campaign, he had opposed the “neo-liberal” economic reforms being advocated by Vargas Llosa, but the need to control inflation soon led Fujimori to undertake just such reforms. He eliminated most subsidies, renegotiated the payment of debts that Garcia had renounced, and succeeded in getting Congress to enact a new foreign investment law that eliminated most discrimination against foreigners. In addition, all direct quantitative restrictions on imports were lifted, and tariff rates were lowered substantially. These reforms led to substantial price increases, and Fujimori’s popularity plummeted for a while, but by the end of 1991 annual inflation had fallen to “only” 139 percent and Peru had begun a period of sustained economic growth.

Despite his ability to obtain Congress’ approval of some reforms and to enact others by Presidential decree, Fujimori regarded Congress as an obstacle both to economic reform and to effective action against the increasing intensity of Shining Path terrorism. Moreover, he regarded the 1979 Constitution as containing some undemocratic elements and providing for continued economic planning and government participation in the marketplace. Therefore, with the support of the Armed Forces, Fujimori engaged in a “self-coup” on April 5, 1992, suspending the 1979 Constitution and dissolving Congress. Although a matter of major concern to the international community, the self-coup was apparently popular with many in Peru, particularly the military, the business community, and the urban middle and lower classes. The revised Constitution, approved in December 1993, contains a variety of democratic reforms and also introduces a provision relating to competition policy. Article 61, Section 61 states:

“The state facilitates and oversees free competition. [It must] fight every practice that limits free competition and any abuse of dominant market or monopolistic positions. No laws can be enacted to authorise or establish monopolies.”

The Constitution also provides that the State may engage in economic activity only if (a) it is expressly authorized by law, (b) the private sector is unable to satisfy demand, and (c) the activity will serve the public interest and “national convenience.” (This third requirement apparently means that

the State should concentrate on essential functions such as national security and justice.)

Most of Peru's legal provisions regarding competition law and policy are "decree laws" (*decreto ley*) that Fujimori issued in 1991-92 as part of his initial push to lay the basis for a market economy. One of those decrees created a new agency, Indecopi (Institute for the Defence of Competition and Intellectual Property), to serve as an arbiter and promoter of market activity. He gave the agency a strikingly broad mandate that included dispute resolution and law enforcement in the following fields: (a) the competition law; (b) a "market access law" that bans government rules that impose unauthorised and unwarranted barriers to entry; (c) an "advertising and unfair competition law" to protect firms from "dishonest" practices; (d) a consumer protection law that governs not only unfair or deceptive practices, but almost all aspects of consumer activity; (e) antidumping and safeguard proceedings; (f) laws protecting copyrights, trademarks, and patents; (g) the establishment of voluntary and mandatory product standards and accreditation bodies; and (h) a "market exit law" that provides a quasi-judicial procedure for handling bankruptcies.

Although it reported for some purposes to the Ministry of Industry, Indecopi was created as an autonomous agency in order to limit interference from the traditional Ministries. Moreover, because the government wanted to provide an alternative to Peru's judiciary, which was (and is) considered slow, unpredictable, and corrupt, Indecopi was created at least as much to resolve private disputes as to engage in real law enforcement. These problems with Peru's judiciary (and more generally with accepting the rule of law) were and are significant impediments to Peru's economic development.

1.4 Economic reform and Indecopi's rise in the 1990s

Indecopi opened its doors in March 1993, and it quickly developed a reputation for transparency, efficiency, and predictability that is unusual in Peru. President Fujimori supported the agency's mission, respected its autonomy, and pushed the entire government to pursue market reform. Indecopi and Peru both experienced considerable success during the 1990s. Moreover, at least until 1998, when Peru's economy was hurt by international economic crises and "el Niño," the percentage of Peruvians living in extreme poverty fell considerably.³ The popular discontent that followed these setbacks indicated a lack of widespread understanding of, or support for, these reforms, however.

With respect to competition law and policy, unfair competition, and consumer protection, Indecopi's activities consisted primarily of advocacy, education,⁴ and both voluntary and quasi-judicial resolution of disputes

between firms, or between one or more consumers and a firm. The agency was much less active in actual law enforcement, though it took a strict approach to hard core cartels (*e.g.*, the famous “Chicken Case”)⁵ and in assessing whether government regulations were warranted (*e.g.*, striking down a municipal requirement that taxicabs be painted yellow). In the intellectual property area, Indecopi was again much more active in its promotional role than as a law enforcer.⁶ To some extent, Indecopi’s preference for promotion over coercive action (except in striking down anticompetitive government regulations) manifested the generally accepted approach to introducing competition law and policy, but it also reflected what may sometimes have been excessive reliance on “Chicago School” theories,⁷ and some experts argued for a more proactive, law enforcement approach.⁸

In other areas, the Antidumping Commission showed unusual respect for competition considerations. The Market Exit Commission is said to have been created and assigned to Indecopi for two reasons: (i) the courts were inefficient and had no process for dealing with bankruptcy other than liquidation; and (ii) liquidations and reorganisations can affect concentration levels. Since the competition law showed no interest in the effect of mergers or acquisitions on concentration levels, however, the latter explanation sounds dubious.

There has been a good deal written about Indecopi’s activities in the 1990s; a willingness to sponsor and engage in policy debate was apparently one of its hallmarks. In reviewing such materials from a competition law and policy perspective, however, some have come away with an exaggerated view of Indecopi’s “core” competition matters – the activities of the Free Competition and Market Access Commission. The problem is that many materials refer to *all* Indecopi proceedings except for those relating to intellectual property as “competition” cases simply because their appeals are heard by the Competition Tribunal. Thus, one report states that during 1993–1997 Indecopi completed 8,648 “competition” proceedings, but 51 percent were bankruptcy and 45 percent were consumer protection and unfair advertising and competition. Even combined with standards and antidumping cases, core competition matters were only 4 percent of the so-called competition proceedings.

Despite the relatively small number of core competition proceedings, by the end of the 1990s, Indecopi had developed into an institution that was respected both in Peru and internationally for its transparency, integrity, and competence with respect to core competition matters.⁹ There were already concerns, however, about what one observer call Indecopi’s “institutional fragility”¹⁰ and its ability to maintain its autonomy and effectiveness, particularly since some ministries continued to resist market reform, and the courts had the power to stall Indecopi’s work.¹¹

1.5 2000-2004 – Reform loses momentum and Indecopi loses power – The new challenges

Although Fujimori was re-elected to the presidency in 2000, corruption scandals (relating primarily to Fujimori's now-jailed spy chief, Vladimiro Montesinos) led him to seek sanctuary in Japan, where he remains. A transition government then operated from November 2000 until July 2001, when Alejandro Toledo took over as the democratically elected President. Both these governments have in principle continued to seek market reform, but they have been unable or unwilling to explain and successfully push for market reform agenda in the face of growing opposition. For example, electricity privatisation has brought widespread benefits, increasing the availability of electricity and thereby improving standards of living. However, the government in July 2002 found it necessary to call off two electricity privatisations because it was unable to persuade the local populace concerning these benefits and to address substantive objections, such as a lack of transparency in awarding concessions and allegedly improper tariff regulation.

The situation is serious. According to the Individual Action Plan (IAP) Peru recently submitted to APEC:

“Competition and market oriented policies in Peru and the Andean Region are facing opposition from the majority of the impoverished population who do not have a clear perception of the benefits of a market economy.... The increasing opposition has stopped any attempt to implement necessary reforms and improve competition environment.”

The IAP goes on to conclude that “there is an opportunity to change the population's negative perception of competition and market-oriented policies.” But the IAP's description makes it clear that market reform requires not merely a strengthened Indecopi, but increased, visible support from the government and its ministries for what the government continues to describe as its market liberalisation programme. At present, however, it is clear that high-level government officials are not uniform in support of such reform and are not contributing to public education concerning its benefits. For example, at a recent UNCTAD conference in Lima, Peru's Second Vice President made an introductory speech criticising market liberalisation and privatisation, complaining about abusively high telecomm rates without mentioning that they are lower as a result of economic reforms, condemning the WTO and multinational enterprises for destroying Peru's companies, and accusing Indecopi of not doing anything to halt dumping by foreign firms.

Moreover, a number of steps taken during or by the current government have significantly undermined Indecopi's authority. About two months into the current government, all of the members of Indecopi's Antidumping Commission resigned on the same day and were replaced four days later by Commissioners whose President was an oil executive and an official in Peru's National Industries Society. Shortly thereafter, the Commission's Technical Secretariat resigned. These events are important because it is widely believed that a government ministry orchestrated the changes at the commission level, and that the Secretariat resigned rather than implement the Commission's new, allegedly more protectionist policies. As a result of a recent division of the Ministry of Industry into a Ministry of Production and a Ministry of Trade and Tourism, Indecopi now reports to the President of the Council of Ministers rather than the Ministry of Industry, but concerns about the autonomy of Indecopi's first and second instance decision-makers remains.

In addition, whereas Indecopi's first three Presidents had all possessed relevant training and experience, the current government appointed a (then) little-known presidential advisor, César Almeyda. The appointment itself fuelled speculation that the government intended to control Indecopi, perhaps to thwart rather than encourage competition. Thereafter, Almeyda himself created controversy by making public pronouncements about the merits of cases that were still pending in Indecopi's "independent" quasi-judicial units. Also, Almeyda brought about considerable turnover in the Tribunal and the Commissions during the February 2002 – February 2003 period of his presidency. One result of this turnover is that of the four sitting members of the Competition Tribunal, only its President is widely seen as having substantial knowledge about competition law and policy. The other members are said to be respected academics, but there is some concern about their relative lack of expertise on competition issues and about whether this is an indication that Indecopi is not independent from the government. The impact of all these events remains unclear, since Almeyda has been jailed on corruption charges (having nothing to do with Indecopi), and Indecopi's former general manager, Fernando Arrunátegui Martínez, has been Acting President of Indecopi for well over a year. *[Subsequent to the 14 June 2004 discussion of this report, Tribunal member Santiago Roco was appointed President of Indecopi.]*

Due at least in part to concerns about Indecopi's autonomy, competition policy is a matter of some controversy in Lima today. For example, the Competition Tribunal and Indecopi are now widely seen as taking a more "hard line" approach to antidumping than either the Ministry of Economy and Finance, or the Ministry of Trade. Moreover, some recent Tribunal decisions created controversy by reversing its previous position that gave *per se* treatment to hard core cartels, reversing its previous position on

subjective comparative advertising, and appearing to imply (for the first time) that excessive pricing violates the competition law. Even the business community and defence bar that are the apparent beneficiaries of these rulings find them confusing and express concern that unpredictable rulings may reflect behind the scenes government influence. Supporters of economic reform advocate new legal protections for Indecopi's autonomy, and in the meantime its leadership faces the challenge of regaining actual and perceived independence.

Indecopi also faces serious budget issues. In 2003, the government stopped providing any public funding to Indecopi. The Treasury has never provided more than about 30 percent of Indecopi's budget. The remainder once came mostly from the fees it charges for intellectual property registrations and bankruptcy work, plus the very few premerger filings it has received in connection with acquisitions in the electricity field (the only area in which Peru has any form of merger control). At present, however, the fines Indecopi imposes make up 58 percent of its budget.

In the past, some have viewed Indecopi's self-financing as a benefit in that it could make Indecopi financially independent of the government, but it is now apparent that this system gives Indecopi an incentive to focus on (and overcharge for) its fee-based services and to impose heavy fines. There is no evidence that Indecopi has imposed or increased fines in order to finance its activities, but Indecopi's administrators of necessity seek to anticipate whether and when cases will result in fines. It is symbolic of both Indecopi's precarious financial status and the problem of self-financing from fines that the agency faces new and substantial problems because of new law that automatically suspends all fines throughout the judicial review process, which can easily last up to eight or so years.

This resource problem is exacerbated by the fact that Indecopi's Commissions were created in large part to provide an alternative to Peru's courts. Any individual or firm can begin a formal proceeding by submitting a "denunciation" and a fee. Thus, whatever resources Indecopi can find to subsidise core competition activities must be used first on cases that may have little public importance. Despite an apparent desire to engage in more *ex officio* competition law enforcement, Indecopi's dispute resolution mandate and its shortage of resources make such enforcement a very substantial challenge.

Despite the challenges it has faced in the last few years, Indecopi has had some significant successes in bringing some core competition cases; making the market more trustworthy through dispute resolution in advertising, unfair competition, and consumer protection cases; and engaging in competition advocacy. The issue today is whether Indecopi –

through its own work and through increased government support for its mission – can regain the actual and perceived independence and competence it needs to carry out a programme that will demonstrate the value of competition law and policy and of market reform generally.

2. Substantive Issues: Scope and Content of Peru's Competition Laws

Peru has two laws that deal with the two core competition matters – the prevention of anticompetitive conduct by enterprises, and the elimination of anticompetitive restrictions by government entities. The Free Competition Law is Peru's more conventional competition law, applicable to all individuals and entities that undertake economic activities, as well as to all individuals who direct or represent entities that engage in illegal activity. The law has no exemptions, but by its terms it does not apply to entities that do not undertake economic activities. This excludes governmental entities acting in a purely regulatory manner. Moreover, the law does not apply to access/interconnection issues in infrastructure monopoly markets that are under the jurisdiction of sectoral regulators. There is no special treatment for small businesses and no *de minimis* rule.

In addition, like a growing number of countries, Peru does not make competition advocacy the only means of eliminating anticompetitive regulation. Peru's Market Access Law provides a means of challenging anticompetitive executive regulations when they are unauthorised by law and lack a reasonable relationship to an authorised objective.

Indecopi also enforces a variety of other laws that relate in one way or another to market reform. Since it is often claimed that Indecopi's multiple functions improve its ability to promote competition policy and market reform, this section also addresses those laws, with the amount of discussion depending on how closely they relate to core competition matters.

2.1 The Free Competition Law

The goal of the Free Competition Law is stated in Article 1 as being to “eliminate monopolistic practices, controls, and restrictions of free competition in the production and marketing of goods and services, so that free private enterprise can flourish for the greatest benefit of users and consumers.” The Article's references to free competition and consumer benefits, together with the absence of any non-efficiency goals, make this provision a remarkably clear statement of intent to promote economic efficiency. This unusual lack of ambiguity may result from the law's being a Presidential decree rather than the product of the kind of compromise that legislators often find necessary.

Box A**The Competition Law Toolkit**

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: “horizontal” agreements among firms that do the same things, and “vertical” agreements among firms at different stages of production or distribution. The second category is termed “**monopolisation**” in some laws, and “**abuse of dominant position**” in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called “**mergers**” or “**concentrations**,” usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of supply and distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier’s product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance (or **monopolisation**) is concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified before the restructuring is actually undertaken.

As noted above, the law applies to all economic sectors. Indecopi enforces the law in all sectors except telecommunications, where it is enforced by the sectoral regulator, Osiptel (*Organismo Supervisor de la Inversión Privada en Telecomunicaciones*).¹² Osiptel's competition enforcement and regulatory roles are discussed in Part 4, below.

Article 3 of the law bans all conduct related to economic activity that constitutes an abuse of dominance or that restrains free competition in a manner that injures the general economic welfare. Article 4 defines dominance, Article 5 describes practices that “are” an abuse of dominance, and Article 6 describes the agreements and other practices that do or may restrain free competition. Article 3 is apparently based on Argentinean law. Indecopi describes Articles 5 and 6 as equivalent to Articles 82 and 83 of the Treaty of Rome, but despite the obvious “European” flavour of Articles 5 and 6, there are potentially significant differences between these two sets of provisions. For example, the Peruvian abuse of dominance provision contains no mention of “imposing unfair purchase or selling prices or other unfair trading provisions” or to “limiting production, markets, or technical development to the detriment of consumers.” Also, the Peruvian “restrictive practices” provision does not contain Article 81(1)’s important reference to

practices that have as their *object* the restriction of competition, and it has a somewhat different list of restrictive practices.

The law does not require advance notification of mergers or acquisitions, nor does it ban mergers or acquisitions that are or are likely to be anticompetitive. A separate law, also enforced by the Free Competition Commission, establishes a merger control regime solely for the electricity sector.

2.1.1 *Horizontal agreements*

Indecopi's only *ex officio* cases under the Free Competition Law have involved hard core cartels, and for a new competition agency, it has been unusually successful in such cases. Article 6 of the Free Competition Law contains a fairly conventional list of horizontal agreements, including collusion to fix prices or other terms of trade, limit production, divide markets, or rig bids. Originally, Article 7 contained an exemption provision comparable to Article 81(3) of the Treaty of Rome, but the only way to obtain such an exemption was through prior clearance by the Free Competition Commission. In 1994, as part of what is described as an attempt to shift from a European to a United States model, Article 7 was repealed.

Indecopi's first important cartel case was the 1996 "Bread Case"¹³ against wheat flour producers and their association. The association settled the case by agreeing not to make any more suggestions about the price of bread, and it therefore was not fined. However, eleven producers were found to have ended a price war through a price fixing agreement, and each was fined about USD 50,000. Private and public opponents of economic reform sought to have Indecopi abandon the case, even appealing to Fujimori, but the case went forward and helped establish Indecopi's reputation of independence.

Indecopi's most impressive case is the well-known 1997 Chicken Case,¹⁴ which found that Peruvian poultry firms and their association engaged in what amounted to price fixing by agreeing to prevent new entry, exclude some existing competitors, and limit the availability of live poultry for sale in order to raise or maintain prices. Total fines were initially set at slightly over USD 5 million, but were later reduced to slightly over USD 2 million.

Unfortunately, the Chicken Case is also a good example of the serious deficiencies in Peru's judicial system. The case was appealed to the courts in 1997, and there still has been no decision. The slow nature of judicial review is not a substantial problem with respect to most of Indecopi's functions because relatively few cases are appealed, but 90 percent of the competition law enforcement cases are appealed.

Indecopi's general approach to horizontal cases

1997 was also the year in which the Competition Tribunal explained Article 6's application to horizontal restraints in a number of "precedents of mandatory compliance" (decisions that are specifically declared to be binding precedents and are published as *de facto* rules). Relying exclusively on the writings of United States Judge Robert Bork, the Tribunal held that price fixing is "per se" illegal when it is "naked," but should be judged by the "rule of reason" when it is reasonably related to a potentially procompetitive integration.¹⁵ It also said that agreements in the per se category are condemned without regard to whether (i) they have, or are even capable of having, an actual harmful effect, or (ii) may in some sense be reasonable. This approach was broadly consistent with international practice, which increasingly condemns hard core cartels as illegal on a per se or absolute basis.

In a 2003 "Automobile Insurance" case, however, the Tribunal concluded that this approach was not legally correct under the Free Competition Law.¹⁶ The case involved price fixing in the automobile insurance industry, and the Tribunal held that although cartel agreements are presumed by law to harm the general economic welfare, defendants must be given an opportunity to prove that their agreement did not have that effect. This decision is said to be compelled by Article 3 and to reconnect Peruvian practice with its European origins by giving cartel members the same opportunity they have under Article 81(3) and European Regulation 1/2003.

This decision has caused controversy in Lima's growing community of competition experts. Unless the decision portends some further change, however, it seems unlikely to have any real effect on Indecopi's cartel cases. The terminology may be more European, but the European Commission has for some time treated hard core cartel agreements as essentially "per se unexemptable." Therefore, if the Tribunal follows the European Commission's approach, the law's opportunity to provide a defence may be largely theoretical. Indeed, its only apparent application would be in the very rare case when parties agree to fix prices but then abandon the agreement before taking any steps to implement it. Although Indecopi describes the Tribunal's decision as requiring a case-by-case, "rule-of-reason" analysis, it applied at most a "truncated" rule of reason, condemning the agreement after rejecting any justification but without enquiring into market power or the other elements of "full-blown" rule-of-reason analysis.¹⁷

Thus, it appears that cartels will continue to be condemned on a summary basis. Indeed, the Tribunal's new approach did not help the defendants in the Automobile Insurance case, who had argued in favour of

this change and contended that it required reversal of the Free Competition Commission's decision. Despite its reversal of precedent, the Tribunal affirmed the Free Competition Commission's finding of illegality and fined the eight cartel members a total of approximately USD 235,000.

Some regard this sanction as low, given that the cartel consisted primarily of large firms (many affiliated with banks) that were selling to captive consumers (in the sense that the insurance is mandatory). On the other hand, the Tribunal noted that very little of the insurance whose price was being fixed had actually been sold to consumers.

As a general matter, the Tribunal has a tradition of reducing the Free Competition Commission's fines, apparently because it disagrees with the Commission's deterrence-based approach.¹⁸ In this connection, it is noteworthy that there is considerable consensus in the international community that fines in cartel cases should be large enough to deter such conduct, and that this implies that fines should be 2-3 times as large as the cartel's harm or the cartel members' illegal gain.¹⁹

The "Pilots" case

Less controversial, but more clearly problematic, was Indecopi's handling of a case involving anticompetitive conduct engaged in by the 36 individuals who are licensed to pilot ships in Lima's Callao harbour – the most important harbour in Peru. The pilots had traditionally operated as individual competitors or 1-2 person firms, but market reform introduced real competition and dramatically reduced the fees pilots could charge. In January 2001, in order to increase their fees, the pilots created three corporations (fearing that a single corporation might be considered a monopoly), and decided that one firm would "hire" all 36 pilots and the others would hire one or two pilots each. All 36 pilots held themselves out as working for the first corporation, but there was no real integration of their operations; they merely charged the same price. The other two corporations existed only on paper. A few months later, a new firm decided to enter the market, and persuaded two of the pilots join its firm. The other 34 pilots and their association sought to prevent this by engaging in various forms of harassment, including making a criminal charge of inducing a breach of contract.

In February 2001, the Free Competition Commission began investigating the pilots' association and the three companies on a price fixing theory, and shortly thereafter Maersk Peru, S.A., a firm that purchases pilots' services, denounced their conduct as illegal price fixing and abuse of dominance. The Commission declined to open the case on the abuse of dominance theory, and Maersk appealed. The Tribunal initially reversed the

Commission, stating that it had not adequately explained its reasoning, but in December 2001, after the Commission had clarified and reaffirmed its decision, the Competition Tribunal ruled that the Commission had been correct in rejecting the abuse of dominance theory. In June 2002, the Commission held that the pilots and their association had engaged in price fixing, and their creation of the corporations could not camouflage their illegal conduct. This ruling relied in part on the Chicken Case, in which the Tribunal had rejected the poultry firms' argument that their pricing had merely been a step towards merger. This approach to the case focuses on the conduct of the pilots when they were competitors and decided to eliminate price competition among themselves by creating the firms; it could also focus on the conduct of the three corporations.

In April 2003, however, the Tribunal overruled its previous decision and reversed the Commission. The Tribunal's new reasoning was that since the pilots had formed a corporation and were now part of a single enterprise, their conduct could not be considered price fixing. This approach does not consider the conduct that occurred while the pilots were competitors (or the conduct of the three corporations), but rather focuses on the pricing decision made by the largest corporation. In the Tribunal's view, the case should be treated as an abuse of dominance, and it had to be dismissed because the Tribunal's previous ruling had rejected the abuse of dominance approach. Currently, there is a new Free Competition Commission proceeding that is going forward on the abuse of dominance theory.

Whether the conduct of the pilots is better characterised as a cartel or an abuse of dominance is beyond the scope of this report, but the case does raise a number of questions. Why has an apparently simple case taken so long? Even if the parties were not "pushing" the case, the delay hurt Indecopi's reputation. Moreover, the Tribunal's quick change of mind concerning the proper legal theory also undercut its reputation with the business community and others who value predictable decision-making. Respectable arguments can be made under each theory, and they might even have been alternative grounds for a quick decision. Instead, two years of litigation reached the conclusion that a whole new case will be necessary to reach a decision concerning the pilots' plainly anticompetitive conduct.

A recent, successful, and important price fixing case – involving road transport – was handled under the Market Access Law rather than the Free Competition Law because the price fixing had been compelled by the Ministry of Transport. (See Part 2.2, below.) Indecopi is currently considering a major case involving alleged price fixing by the four firms that manage the retirement funds of Peruvian workers. This conduct was also denounced as an abuse of dominance, and that allegation is considered below.

Box B**Other Horizontal Restraint Cases**

In a 2000 case, three construction firms were found to have engaged in bid-rigging. They were ordered to cease and desist such conduct and fined USD 2,000 apiece. Resolution No. 017-00. The case exemplifies a reluctance to impose serious sanctions that has reportedly been diminishing since 2002.

Operators of urban public transportation systems agreed to stop providing services due to an increase in the price of fuel and the introduction of new motor vehicle emissions standards. The complaint against them was dismissed on the ground that the conduct was merely an expression of the operators' liberty of expression. Resolution No. 016-00. If the agreement to stop providing service was for only a short, pre-defined period (such as a day or a few days), the Commission's decision to treat it as "expression" is not remarkable. However, if the agreement was to use the operators' economic power to disrupt transportation until the city responded to their demands, the agreement would be illegal in at least some jurisdictions.²⁰

Taxi firms and their association were found to have agreed to increase their fares. Resolution No. 003-00. All but one firm signed an agreement to cease and desist. The firm that did not sign was fined USD 1 000.

In a 2003 case, the association of public notaries in Lima was found to have engaged in illegal price fixing by negotiating an agreement with the Urban Estate Registry that it would pay notaries a specified fee. Resolution No. 002-03. The Commission condemned the agreement on a per se basis, and the Tribunal – applying the approach announced in the Automobile Insurance case – condemned it using a truncated rule of reason.

2.1.2 Vertical agreements

Article 6's list of "restrictive practices that affect free competition" contains only three obviously vertical practices – price discrimination, tying arrangements, and refusals to buy or sell. The list includes agreements relating to market division, quotas, and product quality, but it is unclear the Article is intended to include vertical agreements in these categories. The list also refers to "other similar practices," but the meaning of this provision is also unclear, particularly since the list does not include the most commonly banned vertical restraint – resale price maintenance.

Interpretation of these provisions is further complicated, but also rendered less important, by the fact that Indecopi has never applied Article 6 to a vertical restraint. Until this year, the Free Competition Commission has apparently taken the position that vertical restraints never harm competition unless one of the parties has a dominant position, and it had an unwritten but

recognised policy of refusing to scrutinise vertical restraints under Article 6.²¹ Earlier this year, the Commission opened its first such case, apparently signalling a policy shift, but there has been no decision and thus no indication of what the Commission's approach will be.

The Commission regularly considers vertical restraints in abuse of dominance cases, however. For example, in one of the abuse of dominance cases summarised in Box C, the alleged abuse included resale price maintenance. The Commission found that the firm had a dominant position but that the practices were not abuses.

2.1.3 *Abuse of Dominance*

Most of the complaints the Free Competition Commission receives relate to abuse of dominance, and the majority of these are resolved without a final decision by the Commission on whether the conduct was illegal. In the last five years, for example, the Commission has opened 18 formal proceedings and found violations in five of them. Given the small number of cases, it is difficult to present a nuanced description of Indecopi's approach to routine abuse of dominance cases.

The Free Competition Commission and the Tribunal both seem to take an approach to market definition that is consistent with that taken, *e.g.*, by the European Union and the United States. However, unlike Osiptel, the regulator that enforces the competition law in the telecom sector, Indecopi has no guidelines or mandatory precedents concerning how it defines markets and assess market dominance.

One early and very popular case involved Lima's airport, which configured its access road in such a way that people needed to pay a parking fee even if they were going to the airport merely to make a quick drop-off or pick-up.

Another early case charged the administrator of a harbour with abusing its dominant position by forbidding other undertakings to offer towing services. The conduct was found to be an abuse.²²

A more recent case also involved charges that the public undertaking in charge of a harbour refused a firm access to the harbour's facilities and otherwise discriminated against it. The Commission declined to accept the complaint on the ground that under the Law on Access to Public Infrastructure, sectoral regulators have exclusive jurisdiction over access issues that arise within their sector.²³ The precise scope and importance of this exemption from the Free Competition Act are unclear.

Two recent abuse of dominance cases have been highly controversial. One of the controversies concerns whether the Free Competition Law bans “excessive” (or “monopolistic”) pricing. One difference between Article 5 of the Competition Law and Article 82 of the Treaty of Rome is that the former does not list excessive pricing as an abuse. The omission is clearly deliberate, and although a 1996 amendment to the Article added a reference to “other similar cases,” it seems to have been generally accepted that the law did not ban excessive pricing.

When a Congressman denounced Peru’s pension funds for engaging in price fixing and excessive pricing, the Commission accepted the price fixing claim but did not admit (or explicitly reject) the excessive pricing charge. Rather, it apparently treated the complaint as if it alleged price fixing and a tying arrangement, and it rejected the tying claim that had never been made. On appeal, the Tribunal reversed the Commission’s decision and sent the case back using language that most competition experts, the business community, and the public regarded as implying that the law *does* ban excessive pricing.²⁴ The language caused a firestorm because it was seen as a reversal of precedent, a hint of the possible price controls through Indecopi, and a signal that Indecopi was being controlled by the government. The Tribunal eventually issued a clarification, stating that it merely intended to reject the Commission’s failure to rule on the excessive pricing claim, but controversy continues because some see the clarification as a pretext for backing away from an unexpectedly controversial decision. Even those who are less suspicious of the Tribunal’s intent are troubled by what they see as decisions that are unpredictable and not well reasoned.

On the merits, another abuse of dominance case is more questionable. The case involves a dispute between Peru’s only airline and the branch of a bank located in Puerto Maldonado, an isolated town in Peru’s jungle area. After concerns were expressed that the airline was involved in illegal drug trafficking, the bank asked the airline for information on the sources of its funds. Instead of complying, the airline closed its account, but two years later it produced the relevant paperwork and asked to open a new account. The bank refused; the airline filed a complaint alleging abuse of dominance; the Free Competition Commission refused to accept the complaint; and the Tribunal reversed the Commission’s decision. The Tribunal referred to the bank branch as an “essential facility” and ruled that it could not simply refuse to open an account without examining the proffered documentation.²⁵

The bank responded by opening an account, and the economic impact of the case is minor, but many have questioned how the bank branch could be considered an essential facility (or in any way dominant). In the first place, there is another bank in town (albeit a branch of the National Bank, which had much higher charges). Even if the other bank was not a realistic

alternative, there was no showing that the airline needed an account at a bank branch in that town and no explanation of the refusal's competitive effects. The decision seems to many to have more of a regulatory flavour (a ban on refusals to deal by banks) than a grounding in competition principles.

Box C

Other Abuse of Dominance Cases

A state-owned enterprise with the legal monopoly for selling coca leaves was found to have abused its dominant position by refusing to sell leaves to firms that wanted to sell ground coca leaves in infusion filter bags ("tea bags"). Resolution No. 16-94.

A more conventional case involved a complaint by the National Association of Industries alleging that Centromin Peru abused its dominant position in the market for refined lead used in preparing lead oxides. The alleged abuse was price discrimination. The Commission found that Centromin had a dominant position but that the practices were not abuses. Resolution No. 001-98.

In another case involving the same firm (but a different product), the Commission rejected a claim that Centromin had abused its dominant position when it decided to stop selling refined zinc and instead use all its zinc to manufacture refined zinc products. The Commission held that Centromin did not have a dominant position. Resolution No. 013-97.

Another case in which the alleged abuse was a refusal to sell was rejected on similar grounds. The Commission held that Minsur, a mining enterprise that was Peru's only producer of concentrated and refined tin, did not have a dominant position since it faced considerable international competition. Resolution No. 007-98.

Peru's Official Gazette, which publishes official legal documents, was denounced for refusing to publicise notices a claimant's trademarks and patents. The Commission found the refusal an abuse, but the Tribunal reversed the Commission on the ground that the refusal was reasonable. Resolution No. 007-2002.

The only rail transport operator from Cuzco to Machu Piccu and another town was denounced for abusing its dominance by providing services different from those it offered. The Commission found the claim inadmissible because it did not affect competition, but noted that the conduct could be condemned under the Consumer Protection Law. Resolution No. 046-2003.

Two important abuse of dominance cases are currently pending, one at the Commission and one at the Tribunal. The case that is pending at the Tribunal involves the claim that a firm that sells construction materials has abused its dominant position by selling price discriminating between affiliated and unaffiliated firms, and by tying the sale of cement to the sale of construction materials. The Commission found that the firm has a dominant position but rejected the claim of abuse, finding that the price discrimination was justified in light of the services provided by affiliated firms and that there was no tying arrangement.²⁶

The Commission is currently considering a case involving Backus, a brewer of beer (and soft drink firm) whose acquisitions over the last few years have made it the only Peruvian brewer. One of the world's largest brewers has filed a complaint alleging that Backus' "bottle exchange programme" – under which buyers receive a credit when they return bottles and buy more – is an abuse that prevents it from being able to enter the market through investment rather than imports.

2.1.4 *Mergers and acquisitions, including prenotification*

As noted above, the Free Competition Law does not even apply to mergers or acquisitions, making Peru one of a diminishing number of countries with no merger control. However, Indecopi is considering a proposal to make the law apply to such transactions and create a premerger notification system. This section first reviews the debate in Peru on the desirability of such a proposal and then discusses Indecopi's experience in the one area in which Peru *does* subject mergers to competition law analysis and premerger notification.

Debate over merger control in general.

Although Indecopi has in the past opposed the creation of a merger control system in Peru, many experts inside and outside Indecopi now regard merger control as necessary. There appear to be two reasons for this increased interest in merger control.

First, the old arguments against merger control are now more widely understood to be either incorrect or exaggerated.

- One old argument was that merger control might be harmful in small, open economies in which domestic firms may need to engage in mergers in order to achieve economies of scale and compete effectively against foreign firms. This argument has been discredited, and it is generally recognised that merger control does not prevent such mergers.²⁷

- It was also argued that premerger notification systems impose high costs on governments and firms. In fact, such systems can be costly, but the cost can be minimised by setting high reporting thresholds. Moreover, some countries reduce costs even further by banning anticompetitive mergers but not establishing a premerger notification system.
- The third traditional argument against merger control in Peru was that since merger analysis is particularly complex, there is an undue risk that competition enforcers will make incorrect decisions. The premise of this argument is questionable, and the argument has lost some of the force it may have had now that Indecopi has been operating for more than ten years and has some experience in merger analysis.
- The fourth and final argument is that the complexity of merger analysis provides discretion that can be used to control the economy in ways that are inconsistent with the economic reform programme. For example, the government might block mergers it does not like on the pretext that they are likely to be anticompetitive. Given Peru's history of government control and its apparently incomplete commitment to liberal economic reform, it is understandable that Peruvian reformers are particularly sensitive to this risk. However, this risk exists in all countries, and international experience provides methods for addressing it. Political interference is generally combated by giving decision-making authority to independent quasi-judicial agencies or the judiciary, implementing transparent procedures and principled policies, and providing for judicial review of particular cases and legislative oversight of agency policies.

Second, there have been a substantial number of mergers in Peru since the late 1990s, some of which raised considerable competition concerns.

- In the last few years, the number of firms that manage retirement funds shrank from 7-8 to four, and now those firms have been being accused of engaging in price fixing. There has been no finding of price fixing, but collusion is easier with four firms than with 7-8.
- A single brewer has recently acquired all of Peru's other brewers and is now accused of abusing a dominant position in the beer market. There has been no finding of dominance or abuse, but without some of those mergers, there would be no possibility of dominance.

- Telefónica, Peru's monopoly provider of fixed telephony, recently acquired Bell South, one of Peru's major cellular firms. Peru's absence of merger control means that it has no opportunity to consider whether this acquisition will hurt Peru's consumers and the Peruvian economy as a whole.

It is noteworthy that the competition law in Argentina, which was the main Latin American model for Peru's law, did not originally apply to mergers. Argentina added merger control to its law in 1999, after a Carrefour merger with another French firm gave it 70 percent of the market in one Argentine city. Without any merger control provision, Argentina had no way to defend the interests of its citizens. The same is true for Peru.

Merger control in the electricity market

Since 1996, Peru has had a separate law applicable to mergers and acquisitions in the electricity sector.²⁸ It has been suggested that this law was enacted "because of political reasons relating to the fact that Chilean producers supply a significant portion of the electricity in Peru."²⁹ The law bans mergers that are likely to harm competition in electricity or related markets, defining "merger" in a seemingly conventional manner except for a provision that excludes all acquisitions of shares that do not result in "control" of another company.³⁰ Mergers include acquisitions of state assets that are being privatised, making this the one area in which Indecopi has an important role in the privatisation process. The law contains a comprehensive and conventional list of the factors the Free Competition Commission must consider in making its decisions and authorises the Commission to forbid anticompetitive mergers or to authorise proposed mergers subject to conditions that address the Commission's competitive concerns.

The law also establishes a premerger notification system. All mergers must be notified unless (a) a horizontal merger will not result in a firm's having a market share of 15 percent or more; (b) a vertical integration merger will not result in a firm's having a market share of 5 percent or more; (c) the merger involves the acquisition of assets valued at less than 5 percent of the acquiring firm's total assets; or (d) the merger gives the acquiring firm less than 10 percent of the shares of the acquired firm. Exclusions based on market share are often criticised, because they permit the parties to define the market and may thereby permit them to avoid notification. This may be less of a problem when dealing with regulated firms, however. The low threshold for vertical mergers apparently reflects the widespread belief in Peru that there is currently too much vertical integration in the electricity field.

The law specifies some information the parties must provide, and the Commission has prepared a questionnaire that must be completed and submitted as part of the notification. Thereafter, the Commission has five days to determine whether the notification is complete, and after this period has expired or any deficiencies are corrected, the Commission has thirty days to make its decision. An additional ten days may be taken in particularly complex cases. During this process, the Commission may compel the parties to provide additional information and require public institutions to provide studies or opinions, but the deadlines on Commission action are not extended until such information is provided. The parties are subject to fines for provide “inexact” data in their notification, and to much larger fines for merging without the Commission’s authorisation or failing to fulfil conditions ordered by the Commission.

Premerger notifications must be accompanied by the payment of a fee amounting to 0.1 percent of the value of the transaction, up to a maximum of about USD 45,000. Since 1992, the Commission has received 8 notifications, and the fees (and one fine) accompanying them have been very important to Indecopi in light of its general resource problems and its largely (now completely) status as a self-financing institution.

Six of the merger notification received by Indecopi related to privatisations. One recent privatisation was cancelled because of protest by the local populace, which tends to support the left-leaning policies of the 1980’s. Another notified transaction was determined to be outside Indecopi’s jurisdiction. The other four acquisitions were authorised without conditions. One international expert has questioned Indecopi’s conclusion that these mergers were not anticompetitive because they lowered the HHI index, noting that in light of the State’s large share of the market, any privatisation would have this effect.³¹ The acquisitions have increased the HHI index if one considers only privately owned firms. Indecopi defends its approach, however.

The other two mergers Indecopi considered were international transactions that were not originally notified but which Indecopi eventually authorised with conditions. Additional information on some of Indecopi’s merger cases is set forth in Box D.

Box D**A Sample of Indecopi's Merger Cases**

Two international mergers in the late 1990s increased the level of vertical integration in Peru's electricity sector. The Commission fined the parties approximately USD 120,000 for initially failing to notify the transaction, but it authorised the mergers with two requirements intended to minimise problems the integration might cause. One requirement was that under certain conditions, one of the generation firms would need to abstain from voting in an industry association on the allocation and transfer prices of electricity. The conditions triggering this requirement have not occurred. The second requirement was that the distribution firm acquire electricity through public bidding open to all generators. Resolution No. 012-99. It appears that the regulator for the energy sector, Osinerg, monitors compliance with this requirement.

A public tender of stock in an electricity generation enterprise resulted in a vertical merger that the Commission considered unobjectionable and authorized without imposing any conditions. Resolution No. 31-2001.

A more recent acquisition of an electricity generation enterprise constituted a horizontal merger that the Commission authorized without imposing any conditions. Resolution No. 20-2002.

Even more recently, Peru privatised two important electricity transmission enterprises, one of which operated in the south, the other in the north. The firm that acquired these enterprises was already in the electricity transmission business, but the Commission authorised the transaction without conditions. Resolution No. 16-2002.

2.2 The Market Access Law

Although the competition laws of most countries do not include bans on anticompetitive government regulations, taxes, or activities, such bans (of varying scope) are contained in the general competition laws of Russia, Mexico, and a number of other countries, as well as in the Treaty of Rome. In Peru, such bans are included in Legislative Decree 807, which applies to regulations and other activities, and Legislative Decree No. 776, which applies to taxes that limit access to the market. Both laws are currently enforced by Indecopi's Market Access Commission.³² Such enforcement means that Indecopi has sometimes been able to compel the kind of procompetitive regulatory reform most competition authorities can only advocate.

The Commission was originally authorised to make administrative decisions striking down governmental barriers to market access, and its

decisions were a major part of Indecopi's core competition mission, both directly (by increasing efficiency) and indirectly (by showing the business community that competition policy can be good for business). In October 2001, however, the Commission's administrative power to ban regulations was removed. The Commission could and did continue to analyse regulations and advocate reform of those it found to be unjustified, but it began receiving fewer complaints and its recommendations were often ignored. In July 2003, a new law reinstated some of the Commission's powers. At present, the Commission may issue reports finding that municipal or regional ordinances, and certain Ministerial orders, are unjustified barriers to access to the market. The reports are sent to the responsible council – Municipal, Regional, or the Council of Ministers. If the council does not respond in 30 days, the ordinance is automatically invalidated. If the council issues a decision to retain the restriction, the Commission may bring a legal action to require its elimination.

This new system appears on its face to be a constructive way of providing competition officials with powers going beyond "mere" competition advocacy but at the same time giving regulators an opportunity to defend their rules publicly and in court. Moreover, the system appears to be functioning well. Between July 2003 and March 2004, the Commission has issued 46 reports. In 44 of the cases, the report led to the elimination of the rule, almost always because of council inaction but in one instance by a rule adopted by the Council of Ministers. There were two council decisions to retain the rules, and in both of those cases the Commission has taken legal action them.

As was discussed in the peer review of Russia during the February 2004 meeting of the OECD's Global Forum on Competition, laws containing enforceable bans on anticompetitive regulations require some means of taking into account the governmental needs that the regulation was intended to meet. In Peru, there is a legislative framework for this analysis.

First, the Market Access Commission examines whether the regulation is "legal" in the sense of being within the authority of the entity that enacted it. If not, the regulation can be condemned without further analysis. For example, the Ministry of Labour charged firms a fee for processing information it required them to submit. The Market Access Commission found that the fees were not authorised, because Peruvian law forbids government entities from charging fees except to cover the costs of services they provide for the person from whom the fee is demanded.

Second, if a regulation is within the government entity's authority, the Commission examines whether it is "rational" in the sense of being reasonably related to its proper goals. For example, the Commission struck

down a requirement that cotton fibre imported into Peru be fumigated in vacuum chambers based on its finding that fumigation in atmospheric pressure was equally effective and significantly less expensive.

For obvious reasons, challenges to government regulations can raise political problems. It is therefore notable that Indecopi has been successful in challenging a number of actions by Ministries as well as municipalities. For example, it eliminated a variety of non-tariff barriers to trade imposed by the Ministry of Agriculture and other entities.³³ It also struck down a requirement that exporters pay a fee for having the Ministry of Industry review their receipts.³⁴ Since Indecopi was officially part of the Ministry of Industry at the time, this action illustrates the autonomy it once had. The Commission's cases have not always been so successful, however. In an *ex officio* case, the Commission ruled that the Ministry of Economy and Finance was illegally charging fees in excess of its costs for issuing and revalidating passports.³⁵ Although the legal case was successful, the result was reversed by special legislation.

The Market Access Commission is also able to deal with government actions that compel anticompetitive conduct by enterprises. In a recent, important case, the National Society of Industries filed a complaint challenging Ministry of Transport rules that in essence fixed prices in the market for road freight transport. There are significant problems in this market, partly because of “informal” firms with unlicensed drivers, unregistered and unsafe vehicles, etc., but also partly because of lax enforcement of the safety and other rules vis-à-vis the legitimate firms. As a result, the informal sector had cost advantages over legitimate firms, and the Ministry's response was to fix prices. In principle, this directive could help the legitimate truckers by increasing their fees, but it would also permit illegitimate truckers to increase their fees and to impose unnecessary and unjustified costs both on Peruvian firms that hire truckers and on Peruvian consumers generally. The Commission found the decree to be both unauthorised and irrational, and the decision was affirmed by the Tribunal.³⁶ The case illustrates the importance of Indecopi's work by revealing (i) the Ministry of Transport's failure to consider competition policy principles, and (ii) and the large scale of some of the barriers that have been eliminated.

Many of Indecopi's cases have involved smaller but clearly anticompetitive and illegal taxes on interregional trade and the use of public roads. In addition, many cases have involved attempts by municipalities to impose illegal charges on utilities for installing poles to carry electrical or telecom cable.

Indecopi has also used the Market Access Law to compel government entities to become more transparent. Peruvian law requires each government entity to have publicly available TUPAs (Texts of Administrative Procedures) – written descriptions of what a person must do to get the entity to act within its field of competence. A TUPA might, for example, list all of the information that must be submitted when applying for a license to create a new business, explain how the information is analysed, state what costs are involved, and estimate how quickly a decision can be expected. Early on, Indecopi was very active in seeking to compel government entities to create TUPAs and make publicly available, as well as in challenging anticompetitive requirements contained in TUPAs. There is a perception that Indecopi for a time backed away for this very useful form of work, but Indecopi says that the programme is now active (though the Commission's staff has been reduced to only three people).

A prominent local case arose after the municipality of Lima adopted a requirement that all buses and “combis” (minibuses that in theory run fixed but overlapping routes and will stop anywhere to pick up passengers) needed to use the municipality's terminals. Previously, many of the companies in this business (some of them individuals who had purchased a single bus or minivan) had on their own or collectively created their own terminals, and Lima's new rule threatened to make that investment worthless and to harm companies that owned particularly advantageous terminals. The Commission found that Peru's law on municipalities authorised Lima to assign obligatory routes and to regulate firms' creation of terminals through zoning and licensing procedures, but did not authorise it to mandate use of *its* terminals. Since the rule exceeded the municipality's authority, it was illegal.³⁷

Market access cases are more complex when they involve an assessment of whether an authorised rule is reasonably related to its legitimate goal. During the 1990s, the Commission was apparently very strict in applying this part of this test, giving relatively little weight to government entities' regulatory goals. In one well known 1997 case, for example, Indecopi struck down a municipal ordinance that required taxicabs to be painted yellow. The taxicab market is one that most countries view as having market failures that call for some regulation in order to protect consumers, and the ordinance would have provided some such protection. However, Indecopi condemned the requirement as an “irrational” barrier to market access because (a) the cost of repainting would have been prohibitive to some drivers, and (b) it would have prevented the use of family cars as part-time taxis.³⁸ Although the case has been cited as exhibiting how Indecopi's multiple functions permit a balanced approach that recognises consumer and competition perspectives,³⁹ it is also criticised as exhibiting an over-simplified, anti-

government approach associated with the “Chicago School” of economics. A more nuanced approach, for example, might have permitted the regulation to be phased in to reduce costs and could have exempted family cars used as part-time taxis.

More recently, the Commission is said to have taken a more balanced approach, and it is clearly being more proactive. In the period 1993-1998, the Commission handled 265 cases, 93 percent of which involved complaints and 7 percent were *ex officio*. Currently, about 50 percent of the cases are *ex officio*.

2.3 The Unfair Advertising and Unfair Competition Laws

Peru’s laws banning Unfair Competition⁴⁰ and Unfair Advertising⁴¹ are both administered by Indecopi’s Unfair Competition Commission. This administration consists primarily of proceedings to resolve disputes between two or more businesses; there is very little *ex officio* enforcement of the Unfair Competition Law and only a little more of the Unfair Advertising Law. Moreover, since it costs approximately USD 180 to file a formal complaint before the Unfair Competition Commission, it is rarely used by consumers, which is significant because this Commission has exclusive jurisdiction over advertising cases. An increasing share of the Unfair Competition Commission’s work involves advertising cases, but in 2003 unfair competition cases still represented 55 percent of the Commission’s work.

The Unfair Advertising Law generally covers false or deceptive advertising claims. Unfair Competition disputes are said to fall into four main categories, three of which are related in one way or another to false or deceptive claims. One important category is “passing off” that does not involve infringement of a registered trademark. (When a registered trademark is involved, the case is handled by Indecopi’s Trademark Office.) Other forms of deception (*e.g.*, false claims of a product’s origin or contents) are a second major category. False disparagement of a firm or product is the third main category of cases. The fourth category – misusing business secrets and inducing breach of contract – does not have many cases.⁴²

As is generally the case in other countries, unfair competition and false or deceptive advertising are illegal in Peru without regard to whether the conduct has any effect on the market as a whole. Moreover, many of the Commission’s cases are essentially private disputes. Nonetheless, the Commission’s activities do make a valuable contribution to Peru’s market reform, because they help establish “the rules of the game” and discourage forms of conduct that reduce citizens’ confidence in the market.

One of the efficiencies of combining unfair competition (and consumer protection) work with core competition enforcement is that the former is a reminder that markets do not work perfectly, and the latter is a reminder that regulations intended to protect firms or individual consumers may cause more harm than good if they unnecessarily restrict firms' activities. One context in which these issues have arisen at Indecopi involves the application of the advertising law's restrictions on comparative advertising.

Indecopi's original approach was established in the 1990s in a case involving an advertisement claiming that one product was "softer" and provided "more protection" than another. The Unfair Competition Commission regarded the claims as legitimate subjective judgments that would not mislead a reasonable consumer. The Tribunal took a different approach, holding that advertisements are not comparative within the meaning of the law unless they make objective claims. Since the law's special provision on comparative advertising was inapplicable, the advertisement should be analysed as a "common" advertisement, meaning that it was lawful unless deemed misleading. The Tribunal agreed with the Commission that the advertisement was not misleading, and dismissed the case.⁴³ The theory underlying both of these approaches was that advertising promotes competition and should not be banned unless it is false or misleading.

Although a 1997 amendment supposedly codified such an "American" approach, a recent Tribunal case is apparently part of an attempt by the Tribunal to realign itself with a European model. The advertisement at issue showed people drinking a dark soft drink and exclaiming how good Coca Cola is, only to be told that they have in fact been drinking Peru Cola. The Tribunal found the advertisement illegal, and issued a mandatory precedent saying that subjective comparative claims are essentially illegal per se; that is, they inherently pose a risk of "confusion" and are therefore illegal without the need for evidence that they are false or misleading.⁴⁴ On its face, this decision seems consistent with the most recent European Union directive.⁴⁵

One interesting aspect of this case is that by some standards at least, the advertisement's claim was not subjective. The implicit claim of the advertisement can be seen as being that a significant number of Peruvians cannot taste the difference between Coca Cola and Peru Cola. That claim is neither subjective nor unverifiable. Peru Cola offered no survey or other evidence to back up the claim, and the claim might justifiably be condemned for being false. However, by treating the claim as subjective, the Tribunal apparently made the truth of the claim irrelevant. As it develops its approach in this area, Tribunal should consider that combining an essentially per se ban on subjective comparisons with an expansive view of what is subjective could lead to decisions that hurt competition by banning claims that are verifiable, verified, and non-deceptive.

2.4 The Consumer Protection Law

Peru's Consumer Protection Law⁴⁶ is applied by Indecopi's Consumer Protection Commission. Although the law does not apply to false or deceptive advertising, it is in other respects quite broad. It declares a broad range of consumers' rights – including a right to be protected from unhealthy and unsafe products – and suppliers' obligations – including the need to issue an invoice for all transactions; display prices; maintain price lists and make available to consumers on demand; warn consumers about possible problems in promptly obtaining parts or accessories; deliver services speedily; provide sufficient information about products and services; ensure that foreign products have warranty information and warnings in Spanish; make repairs, replacements, or reimbursements for defective products; and compensate consumers for damage caused by inadequate service. It also regulates consumer credit transaction.

The Consumer Protection Commission's Secretariat spends much of its time handling informal inquiries from consumers and businesses. In addition, during 2003 it handled 4,700 disputes through informal conciliation, satisfactorily resolving about 80 percent of them. Consumers can commence formal proceedings before the Commission by filing a complaint and paying a fee of approximately USD 9, and 1,150 such complaints were filed in 2003. These 1,150 complaints plus 50 *ex officio* matters gave the Commission a total of 1,200 proceedings in 2003, of which 216 were found to be outside the Commission's jurisdiction, 300 were resolved by post-complaint conciliation, and 684 required formal resolution. The complaints were determined to be unfounded in 264 of these cases, and 420 cases resulted in findings of illegal conduct.

Among Indecopi's innovative consumer protection projects in the 1990s was a campaign against racial discrimination in Lima nightclubs.⁴⁷ Indecopi began the campaign by collecting and publishing information, and it initiated proceedings – and issued fines – only after a consumer organisation filed a complaint against firms that refused to change their policies voluntarily. The campaign was popular and successful, but for present purposes the competition policy analysis behind the campaign is most noteworthy. Obviously, inequality of opportunity to engage in business activities distorts markets and impedes efficiency, but Indecopi expanded on this and reasoned that markets and efficiency are also harmed when the value of money depends on the skin colour of its owner. In addition to the immediate harm from this inefficiency, such racial discrimination impedes the development of a competition culture because it makes people less confident that they may benefit from market reforms.

Another, more typical consumer protection initiative involved the collection and publication of information on the average amount of time consumers spent waiting in line to cash a check at banks. The result was increased consumer demand for prompt service and increased competition among banks.

As in other fields, Indecopi was initially very reluctant to engage in law enforcement. For example, it engaged in a programme in which its staff members would go to markets and offer to reweigh the meat and other products consumers had just bought. The programme helped some consumers directly and provided very beneficial publicity, but some questioned whether Indecopi's policy of not checking sellers' scales and fining "cheaters" had given up a useful added deterrent. Recently, Indecopi and the Commission have become more oriented to law enforcement, though the focus is still on dispute resolution.

It appears that the consumer movement in Peru is still at an early stage of development. One consumer organisation, ASPEC, appears to be both serious and active in working to help consumers learn about and protect their rights under a market economy, but many other so-called consumer groups combine some worthwhile activities with the pursuit of political or personal agendas. Indecopi is seen as useful but as doing too little and working too slowly, though the Consumer Protection Commission says that the average duration of its proceedings is currently only two months. Some of the concerns expressed by consumer organisations appear to reflect a desire that Indecopi protect consumers in ways that may be outside Indecopi's market-oriented mandate.

2.4 Antidumping and Safeguard Determinations

Indecopi's Antidumping and Safeguard Commission is, as its name suggests, responsible for making Peru's antidumping and safeguard determinations. In antidumping cases, it determines whether illegal dumping is taking place by comparing foreign firms' domestic and export prices, calculating the dumping price differential, and assessing whether and to what extent domestic firms are suffering injury caused by the dumping. If illegal dumping is found, the Commission determines a recommended additional import duty that will bring the "dumped" product's price up to its "normal value." The Commission makes such decisions pursuant to a delegation from the Ministry of Economy and Finance,⁴⁸ and although the Commission is autonomous in deciding particular cases, it must confer with the Ministry on policy matters, including the regulations it applies in those cases.

This delegation of decision-making power to Indecopi is very unusual. Competition policy officials and experts tend to oppose the antidumping process on the ground that it condemns prices that are low but not predatory, thus protecting domestic producers but injuring domestic consumers (individuals, firms, and governments). In addition, they believe that antidumping proceedings may lead to cartels in previously competitive markets. WTO rules give countries a certain amount of leeway in how they make the various calculations involved in antidumping cases, and competition policy principles seek to ensure that countries use approaches that minimise the harm antidumping proceedings have on consumers and the economy as a whole.

On its face, Peru's system provides an opportunity for competition considerations to be given some, and perhaps substantial, weight at various stages of antidumping proceedings. During the 1990s, Peru's approach to antidumping sought to minimise the anticompetitive effects of antidumping in various ways, such as declining to adopt some WTO-authorised policies and procedures, and strictly requiring complainants to prove injury and causation. There was a dramatic jump in antidumping complaints beginning in 1998, but that is not surprising given Peru's economic difficulties and China's growing presence in the global economy. The number of cases continued to grow substantially until 2003, when there was a significant decline.

It appears that Indecopi's involvement in antidumping matters continues to promote competition to some extent, but the system has experienced several ups and downs.

- As noted above, early in the current administration, all of Indecopi's Antidumping Commissioners suddenly resigned and were replaced by a new team presided over by an oil executive who held a prominent position in the National Industries Society. Shortly thereafter, the Commission's Secretariat resigned. It is widely believed that the Commissioners' resignation and replacement were the result from ministerial pressure, and that the Secretariat's resignation was a protest against the new Commissioners' policies.
- Controversy about and between the Commission and the Secretariat appears to have died down, and it is clear that the current Secretariat is inclined to give weight to competitive considerations. Moreover, ministerial pressure has apparently stopped, perhaps because Indecopi now reports to the President of the Council of Ministers rather than the Ministry of Industry.

- However, as a result of changes in its composition, the Competition Tribunal itself is now generally regarded as being more supportive of the antidumping process than the Ministry of Economy and Finance, or even the Ministry of Trade. Indeed, at Indecopi's urging, Peru has adopted rules that make more use of WTO-authorised policies and procedures that facilitate antidumping cases. There is nothing improper about Indecopi's actions, but as a policy matter competition officials generally regard the antidumping process as anticompetitive and do not seek to make it more effective.

2.5 Technical Standards and Certification Laws

The Technical and Regulatory Standards Commission operates as the National Standardisation Body, responsible for approving technical standards (voluntary) and regulations (mandatory) in accordance with Peruvian law and the rules of multinational bodies such as the WTO.⁴⁹ For example, the Commission seeks to ensure that the standard setting process includes representatives of producers, consumers, and public bodies, and that standards do not create entry barriers by imposing design rather than performance criteria. It also operates the national accreditation system, evaluating, authorizing, and monitoring the performance of certification bodies. In addition, it oversees compliance with WTO rules on health and safety standards that may be technical barriers to trade.

Domestic standards can promote competition by promoting consumer confidence, and internationally consistent standards can promote competition by increasing technical compatibility. On the other hand, standards can be anticompetitive, preventing market access by new or alternative products. Thus, there are some competition-related implications to the activities overseen by the Commission, but its work is basically technical and does not normally involve the application of competition policy principles.

2.6 Intellectual Property Laws

Peru's intellectual property laws were revised in 1991 because the government believed that sound laws and enforcement mechanisms were necessary to attract the foreign direct investment that would help create economic growth.⁵⁰ Indecopi enforces these laws through three offices, which are functionally the same as its commissions except that each is headed by a single individual. The Trademark Office promotes the registration of trademarks, registers them, and resolves trademark-related disputes. The Copyright Office and Patent Office engage in similar activities in their respective fields.

Indecopi has promoted respect for intellectual property and competently held proceedings to resolve complaints filed by individuals and firms, and the result has been both more registrations and less piracy. By 2000, the piracy rate for computer software had fallen from 85 to 60 percent, and the piracy rate for motion pictures and sound recordings was 50 percent and 85 percent, respectively.⁵¹ As in other fields, however, Indecopi received criticism for not being a more aggressive law enforcer. One commentator's 1999 criticism of the Intellectual Property Tribunal is very similar to what others said about the Competition Tribunal:

“[It] is considered technically skilled ... but perhaps not guided enough by the deterrence-oriented approach of the courts and too steeped in the administrative culture of Indecopi.”⁵²

Piracy rates have apparently continued to fall, and Indecopi is now participating in a broad, aggressive campaign against piracy.

2.7 *The Market Exit Law*

The Market Exit Commission was created in order to provide a more efficient and less corrupt alternative to the judicial bankruptcy process.⁵³ In addition, the Commission was intended to and did develop a reorganisation process, whereas the judiciary could offer only liquidation. The Commission's activities have contributed to the development of a market economy, but Indecopi's day to day work in this area has little or nothing to do with competition.

3. Institutional Issues

When Peru's market reform began in the early 1990s, the reformers feared that government ministries lacked the political will and the technically proficient professionals to implement the new and in some cases complex policies. They concluded that the agencies charged with these reforms should not be subject to ministerial control, should be able exceed normal civil service pay limits in order to hire qualified staff, and should draw on private sector expertise through volunteer advisory councils.

Indecopi was one of the first of these agencies. This section begins by describing Indecopi's internal structure, the procedures it uses in resolving complaint and *ex officio* proceedings, its investigative and remedial powers, and its caseload and resources. Thereafter, it discusses the potential for private remedies under the competition law, after which it considers the advantages and disadvantages of Indecopi's extraordinarily broad mandate. It concludes with comments on other means of handling competition law cases in Peru and on international issues relating to Indecopi's competition activities.

3.1 *Indecopi's organisational structure*

Indecopi is governed by a three-person Board of Directors. Its President and one other board member are appointed by the President of the Council of Ministers, and the third member is chosen by the Minister of Economy and Finance. The Presidency is Indecopi's highest office and a full-time position, and the President is charged with overseeing the agency's day-to-day operations and the refinement and implementation of policies whose broad outlines are set by the Board. The other two board members are paid to attend four-hour meetings that take place every other week. One of their major functions is to participate in selecting the individuals who serve as Indecopi's unpaid Commissioners. Both the President and the other board members are subject to removal without cause.

In theory, the Board is overseen by a nine-member Advisory Council. It was originally contemplated that the Council – made up of distinguished lawyers, businessmen, academics, legislators, etc – would play an important role in ensuring public scrutiny and responsiveness to the public and government. In practice, however, the Council has been almost completely inactive.

Indecopi's "jurisdictional" bodies

In broad terms, Indecopi is divided into two parts, the most important of which for present purposes is the "jurisdictional" part that handles cases. The highest "jurisdictional body" is the Tribunal for the Defence of Competition and Intellectual Property. Members of the Tribunal are nominated by Indecopi's Board of Directors and appointed by the President of the Republic. Officially, the Tribunal is an independent part of Indecopi with respect to its handling of particular cases. The original law protected this independence by providing that Tribunal members were appointed for a fixed five-year term during which they could be removed only for cause, but as amended in 1994 the law permits removal without cause.⁵⁴

Until recently, the Tribunal had two chambers – an "Intellectual Property Chamber," and a "Free Competition Chamber" (the latter being commonly and in this report referred to as the "Competition Tribunal"). The Intellectual Property Chamber handles appeals from the Trademark, Patent, and Copyright Offices. The Competition Tribunal has in the past handled appeals from all of Indecopi's seven commissions – Free Competition, Market Access, Unfair Competition, Consumer Protection, Antidumping, Technical and Regulatory Standards, and Market Exit (bankruptcy). Today, however, appeals from decisions by the Market Exit Commission are heard by a new "Bankruptcy Chamber" of the Tribunal.

The Tribunal's most obvious responsibilities relate to the disposition of cases that have been appealed, but it also establishes procedural guidelines and has developed a system of issuing *de facto* substantive guidelines. When a case before the Tribunal raises important legal issues, the Tribunal writes a statement of how the issue should be resolved and declares this to be a special "mandatory precedent." The Tribunal is also specifically authorised to make recommendations to Indecopi's President concerning legislative or regulatory measures "needed to guarantee competition and intellectual property rights," but the President has the final say on such matters.

The presidency of the Competition Tribunal is a full-time position, and the President runs the Tribunal on a day-to-day basis. The other four positions on the Tribunal are part-time, and members are paid to attend six 2½-hour meetings per month. The position of the Tribunal President therefore tends to be very influential.

There is a complex relationship between on the one hand, the Presidents of the Tribunal's Chambers, and the other hand, the President of Indecopi. The Competition Tribunal President, for example, is nominated by the Indecopi President, is independent of the Indecopi President in handling formal proceedings, typically has greater expertise in his field than the Indecopi President, but is subordinate to the Indecopi President on policy issues (such as the desirability of amending the competition law). If the Tribunal President and the Indecopi President do not work well together, this system could make policy planning very difficult.

Like the other commissions whose appeals are heard by the Competition Tribunal, the Free Competition Commission has six positions, all of them part-time and unpaid. Commissioners' work consists of attending one three-hour meeting per week, plus whatever preparation time is involved. The Commissions are independent from the Tribunal in their handling of individual cases except that they must follow procedural guidelines and mandatory precedents. They are also nominally independent from Indecopi's President and Board, though the Board can remove Commissioners without cause at any time.

Each of Indecopi's jurisdictional commissions and offices is served by its own staff, which is headed by a person designated "Technical Secretary." The staff evaluate, investigate, and prepare proposed resolutions disposing of the complaints that have been filed. When resources permit, the staff may also conduct *ex officio* investigations and consider policy questions raised by their work. The Free Competition Commission's staff consists of a manager, three lawyers, two economists, four students, and a secretary. The Market Access Commission's staff consists of a manager and two assistants (all lawyers), four students, and one secretary.

Indecopi's departments

Outside Indecopi's jurisdictional bodies, its personnel are for the most part organised into "departments" whose missions are mostly administrative, but which also include units that co-ordinate Indecopi's international activities and implement its public education and some advocacy functions. For present purposes, the most important of these departments is the Economic Policy Department. This department has about a dozen economists and has two important functions: (i) co-ordinating strategic planning and policy analysis (for advocacy and other purposes), and (ii) providing economic expertise to jurisdictional units when complex economic issues arise (*e.g.*, defining markets in a free competition case, or calculating the dumping margin and assessing injury in a dumping case). Because its work more frequently raises complex economic issues and because it is perceived as having particularly limited resources, the Free Competition Commission is a primary client and is currently receiving assistance in 4-5 cases.

Indecopi's "decentralised" regional offices

Indecopi's official office is in Lima, but in the 1990's it began a programme of "decentralising" and even privatising many of its functions. It created Decentralised Indecopi Offices (ODIs) by entering into joint ventures with various partners, mostly local chambers of commerce but also some universities, regional authorities, and a bar association. The programme was initially based on a commercial "franchising" model, with Indecopi providing its "brand" and oversight to respected local groups. So far, none of the ODIs has been delegated Indecopi's authority to decide actual contested proceedings except in the bankruptcy area; thus, the ODIs are not used on core competition matters. As economic problems increased following the crisis of 1998, Indecopi created new decentralised offices to handle bankruptcy proceedings, though these offices have now been closed down (except for three offices in different parts of Lima).

Indecopi initially had problems ensuring that ODIs's decisions were consistent with each other and with Indecopi policies, but this situation has apparently improved.

Observers have pointed out that the decentralisation programme's structure raises significant incentive issues.⁵⁵ Like Indecopi, the ODIs have a financial incentive to focus on bankruptcy and trademark registration, which provide income, and to skimp on free education and consumer complaint services. Unlike Indecopi, however, the franchisees are generally not public authorities, and they all have other functions that they may be tempted to subsidise with the fees they charge for Indecopi-related work. Preventing such conduct is very difficult. Nonetheless, there is apparently agreement

that Indecopi needed to find ways to reach beyond Lima, and it clearly lacks the resources to create offices of its own.

3.2 *Indecopi's case-handling and other procedures*

As is the case for most of Indecopi's commissions, Free Competition Commission proceedings usually begin with the filing of a complaint and the payment of a fee. (The size of the fee varies by Commission. It costs about USD 275 to begin a free competition case, USD 118 to begin a Market Access case, USD 200 to begin an unfair competition case, and USD 9 to begin a consumer protection case.) The remainder of this section focuses on the powers and procedures of the Free Competition Commission, with relevant variations noted in footnotes.

The Secretariat may also open *ex officio* proceedings, but as a matter of policy this was rarely done during the 1990s. Indecopi reportedly decided to become more proactive in 2002, but resource limitations make this difficult, and the Free Competition Commission currently has only one *ex officio* proceeding. This does not, however, mean that the Commission and staff have no ability to favour cases with real importance over purely private disputes. Formal complaints accompanied by a fee are often preceded by inquiries or informal complaints, and the staff can use this time to emphasise either the difficulties or the importance of a formal proceeding. In addition, staff resources are allocated in part on the basis of cases' relative importance, and if a complaint is filed in an important matter, the Commission can and does pursue it even if the complainant chooses not to press the case or resolves its dispute with the defendant.

When the Secretariat concludes that a formal complaint contains reasonable indications of violation, it notifies the defendant of the charges, which are a matter of public record but are not publicized. The defendant then has 15 working days to reply to the charges and present evidence, and other parties with a legitimate interest in the matter may intervene as formal parties to the proceeding. Investigations that are opened *ex officio* are not a matter of public record until the Secretariat has notified the defendant and received its reply. In either situation, this reply period is followed by an evidentiary period that in theory consists of 30 working days. Thereafter, the Technical Secretariat prepares a proposed resolution for the Commission, which must in theory issue its ruling within five working days after receipt of the Secretariat's report.

These deadlines are frequently ignored, however, and both investigations and proceedings can take years.⁵⁶ In fact, the only common complaint about proceedings before the Free Competition Commission is that they take too long – a complaint that is consistent with the often

expressed view that this Commission is particularly understaffed. Indecopi says it has taken steps to speed up the process, but complaints continue. In other respects, the Commission and its Secretariat are highly regarded. Lawyers who represent clients before the Commission (and other Indecopi commissions) describe the process as fair and the staff as professional. Business and consumer groups consider Indecopi a basically trustworthy and useful agency (though too slow and insufficiently proactive).

In one recent case, the Tribunal for the first time asserted the power to issue interim relief – orders that the parties cannot engage in particular forms of conduct during the pendency of the proceeding.

As noted previously, decisions of the Free Competition Commission may be appealed to the Competition Tribunal. Appeals must be filed with 15 days of receipt of the Commission's ruling. The Tribunal's decisions may also be challenged, first in the Administrative Chamber of the Superior Court of Lima, and secondarily in the Civil Chamber of Peru's Supreme Court. Exceptionally, there may be third-instance appeals to the Court's Constitutional and Social Chamber.

With respect to matters other than case-handling, Indecopi has general policies and procedures intended to ensure transparency and fairness. It publicizes its more important decisions, and reports those decisions and other relevant information on its web site. By law, all of the Competition Tribunal's mandatory precedents are also published in the Peru's Official Gazette.

3.3 Indecopi's investigative and remedial powers

All of Indecopi's commissions and offices have quite extensive investigative powers. Indecopi can summon and interrogate individual suspects and representatives of firms under investigation. It can also demand the production of documents (broadly defined to include computer records and the software necessary to access it), and it can order that documents be "immobilised" for 2-4 days. With judicial authorisation, it can also remove documents from a company facility for up to six days. Finally, Indecopi has the power to make unannounced inspections of company records, during which it can obtain copies of documents and interrogate company representatives. Indecopi can if necessary call upon the police to overcome resistance, and with judicial authorisation it can compel closed facilities to be unlocked by force. Both the police and the judiciary have sometimes proved less than co-operative during the 1990s, and it is unclear whether this continues to be a problem.

Indecopi's investigative powers are backed up by strict sanctions. Making false statements to Indecopi, destroying or failing to produce a document

demanding by Indecopi, and obstructing Indecopi's investigative functions in other ways is punishable by fines not less than USD 1,000 and not more than USD 50,000.

When Indecopi finds a party has committed a violation, it is authorized to issue cease and desist orders and order the payment of fines.⁵⁷ Any firm found to have committed a violation is subject to a fine of up to 10 percent of its sales or revenues from the previous tax year. In addition, when a firm or association commits the violation, Indecopi can impose fines of up to USD 100,000 on each firm or association representative who engaged in the illegal conduct. If the illegal conduct continues, Indecopi can double the fines and keep doubling them without limitation.

In addition to these administrative sanctions that the Commission can impose directly, it can make a criminal complaint to the public prosecutor's office. Such complaints can be made only after a person has been found to have violated the Free Competition Law, but the Peruvian Penal Code does provide for imprisonment for up to six years for violating the Free Competition Law.

In general, the Free Competition Commission and Indecopi's other quasi-jurisdictional bodies – especially the Tribunal – have been cautious in ordering fines. Two of the firms in the Chicken Case were fined USD 450,000, but in other cases cartel members have not been fined or received fines of around USD 1,000. Moreover, the Free Competition Commission has never fined an officer or other individual representative of a firm. (The Market Access Commission has fined the mayors of municipalities, however, and the Unfair Competition Commission has fined officers of firms.) The only criminal referral for a competition law violation occurred long ago and did not result in a criminal proceeding. Arguably, this cautious approach is consistent with the widely accepted view that it can be counterproductive to impose what the public sees as harsh fines for conduct that it does not regard as harmful. Some regard Indecopi as having been too cautious, however, and after ten years of enforcement, Indecopi says that it is now beginning to take a stricter approach.

3.4 Indecopi's core competition resources and caseload

The resources of Indecopi's core competition commissions have grown in a fairly steady manner over the years, but both commissions have always had a very small number of staff members. In 1996, the Free Competition Commission had an authorised staff of 4, which grew to 5 in 1999 and 7 in 2003. Understandably, the Commission has not handled a large number of cases. The Market Access Commission's authorized staff grew from 2 in 1996, to 3 in 1999, to 4 in 2003.

Table A

	Horizontal Agreements	Vertical Agreements	Abuse of Dominance	Mergers	Unfair Competition
2003					
Matters opened	5	0	4	0	130
Orders or sanctions imposed	3	0	0	0	97
Total sanctions imposed	US\$ 208 590	0	0	0	US\$ 891 272
Average sanction	US\$ 69 530	-	-	-	US\$ 9 100
2002					
Matters opened	3	0	6	3	129
Orders or sanctions imposed	5	0	3	0	37
Total sanctions imposed	US\$ 793 235	0	US\$ 10 941	0	US\$ 344 395
Average sanction	US\$ 158 647	-	US\$ 3 647	-	US\$ 9 307
2001					
Matters opened	4	0	5	2	125
Orders or sanctions imposed	0	0	0	0	62
Total sanctions imposed	0	0	0	0	US\$ 270 942
Average sanction	-	-	-	-	US\$ 4 402
2000					
Matters opened	5	0	2	0	127
Orders or sanctions imposed	2	0	1	0	52
Total sanctions imposed	US\$ 5 800	0	US\$ 16 571	0	US\$ 216 080
Average sanction	US\$ 2 900	-	US\$ 16 571	-	US\$ 4 155
1999					
Matters opened	1	0	1	3	125
Orders or sanctions imposed	1	0	1	1	70
Total sanctions imposed	US\$ 2 058	0	US\$ 25 533	US\$ 82 353	US\$ 486 122
Average sanction	US\$ 2 058	-	US\$ 25 533	US\$ 82 353	US\$ 6 945

The Free Competition Commission

In 2003, the Free Competition Commission had a budget of USD 183,000 and 7 full-time staff positions. There are currently six staff members: a manager, three lawyers, and two economists. (Support personnel are covered by another budget category). There are also 6 Free Competition Commissioners, of course, but they are unpaid and work only a few hours per week. The Commission's staff is sometimes assisted by the Economic Policy Department, meaning that on average there may be 9-10 Indecopi employees doing Free Competition Commission work. Indecopi has done a

good job in supplementing its resources with student interns, and the Free Competition Commission staff now has four such interns.

Given the small size of the staff and the relative complexity of competition investigations, it is not surprising that the Commission resolves only a small number of cases per year. The first four columns of Table A provide data for the 1999-2003 period on the number and kind of competition cases, as well as information on sanctions. For comparative purposes, the fifth column contains the same information for unfair competition cases.

The Free Competition Commission's relatively high number of horizontal cases reflects the previously noted policy of focusing on cartels. Indeed, as noted above, the only *ex officio* cases the Commission has began involved alleged cartels. The lack of vertical cases also reflects a previously noted policy decision to pursue such cases only as possible abuses of dominance. Otherwise, the small number of cases makes it difficult to discern trends or make generalisations.

The Market Access Commission

The Market Access Commission had a (reduced) budget of only USD 147,000 (and four work-years) in 2003. It currently has a staff of three. Since the Market Access Commission's legislative authority changed in late 2001 and again in early 2003, a five-year historical presentation of the Commission's cases would be of little value. Between October 2001 and July 2003, the Commission issued 36 reports, many of which were ignored. Between July 2003 and March 2004, the Commission has issued 46 reports, all but two of which resulted in the almost immediate elimination of the anticompetitive rule.

Resource levels and sources

The two Indecopi Commissions doing core competition work had a combined budget in 2003 of USD 320,000 (11 work-years), and currently there are apparently only nine staff members assigned to these two commissions. If one attributes one-fourth of the Economic Policy Department's 12 work-years and one-half of the Competition Tribunal's eight work-years to the core competition mission, one gets a total of 18 authorised positions. It appears that at present, 16 people are doing all of Indecopi's core competition analysis and investigation.

(Osiptel, the telecomm regulator that enforces the Free Competition Law in all cases in which a telecom firm is a party, has 5-6 people doing competition work, but they also have regulatory responsibilities. Including

Indecopi and Osiptel, it appears that the number of work-years devoted to competition enforcement is about 20.)

Over the period 1999-2003, these numbers have been growing,⁵⁸ but for a country of its size – even a developing country – Peru’s competition enforcement resources are very small, particularly if one focuses on the seven work-years assigned to the Free Competition Commission. As noted above, Indecopi’s Economics Policy Department regards the Competition Commission as particularly understaffed.

Neither competition principles nor international experience provide any basis for estimating how much of a country’s scarce resources should be devoted to competition law and policy, and since different countries have different enforcement systems, it is not possible to make precise work-year comparisons. However, a 6-7 person competition law enforcement staff is very small, and even the 20 work-year number (including Osiptel) is small compared to the allocation in other countries (such as Romania and Chile) with comparable GDP levels or even to some countries (*e.g.*, Bulgaria) with much smaller GDP levels. Because South Africa was recently the subject of an OECD peer review, there is data for a more precise comparison, and the comparison may be a good one because South Africa and Peru are considered to be at the same level of economic development. Peru’s GDP is about one-third that of South Africa, but it allocates only one-sixth as many work-years to its core competition mission.⁵⁹

3.5 *Private actions for damages*

Even when Indecopi proceedings are initiated by a private party claiming that the defendant’s illegal conduct has caused it injury, the Commissions are not authorized to order the payment of damages. However, if a Commission finds that a defendant has engaged in illegal conduct, the Commission’s finding will be conclusive proof of the violation if a complainant files suit in civil court for damages. It is unclear whether any such cases have ever been brought.

3.6 *The breadth of Indecopi’s mandate*

Although it has been claimed that Indecopi’s many functions were assigned to a single agency merely because then-President Fujimori had promised to decrease the size Peru’s government, the combination of functions has been seen by many as efficient and as a possible model for developing countries. Explore the nature and extent of the efficiencies is therefore important.

It is useful to begin with some idea of the absolute and relative size of Indecopi's various parts. Annex Table 1 provides detailed information on the budget and personnel allocations to each of Indecopi's commissions and offices in 2002 and 2003. Annex Table 2 provides the same information for Indecopi's Tribunal. The most meaningful measure is the allocation of personnel among the commissions and offices. The data show that close to 75 percent of these staff members are engaged in bankruptcy or intellectual property work.

- The Free Competition Commission had 7 authorised work-years, and the Market Access Commissions had four. Together, they had 7.6% of the 146 employees in this category.
- The Unfair Competition and Consumer Protections Commissions had 6 and 13 authorised positions, respectively, for a combined 11.6%.
- The Antidumping and Standards Commissions both had 6 authorised positions, for a combined 8.2%.
- The Bankruptcy Commission had 40 authorised positions (32.6% of the total).
- The Intellectual Property offices had a combined total of 76 authorised positions (45.2% of the total).

It is also important to bear in mind that discussion at the OECD Global Forum on Competition indicated that there is no single, optimal design for a competition agency, and that the structural design of a competition agency is not key to its performance. Independence from political influence of law enforcement is important, but may be achieved without structural independence. Proper funding levels and qualified personnel are crucial, as is the establishment of principles such as transparency and predictability.

Some of the most important advantages and disadvantages of Indecopi's mandate and structure stem from the realisation of economies of scale:

- Given the small size of these Commissions, making them part of any larger agency would produce efficiency benefits by holding down administrative costs.
- Placing the competition policy function in a larger agency whose mandate relates to even indirectly to economic reform presumably produces additional efficiency benefits by creating synergies in connection with the promotion of market reform in general.
- On the other hand, placing the competition policy function in a larger agency inevitably means sacrificing some degree of autonomy. Even if the independence of decision-making units is protected, which it is not

in the case of Indecopi, the agency officials who may have no competition policy expertise make budget and policy decisions that can undermine competition policy.

- When Indecopi was being created, there were some who feared that an agency with such broad powers could become “a Frankensteinian thing,” though it was decided that the Advisory Council would be able to control it. In fact, the Advisory Council has been almost completely inactive, and instead of being unduly powerful, Indecopi needs strengthening in various ways.

The other potential benefits to Indecopi’s structure are efficiencies that may result from combining the specific functions assigned to Indecopi.

- The Free Competition Commission and the Market Access Commission both combat anticompetitive restraints and apply core competition principles in their work. There are clear efficiency benefits in having these two Commissions in a single agency.
- Core competition analysis (assessment of market power, etc.) is relevant in antidumping and safeguard proceedings. The applicability of competition principles to such matters is limited by international treaties, but it appears that Indecopi has sometimes been able to inject some competition analysis into these proceedings. On the other hand, some of Indecopi’s recent positions in this area have apparently been less procompetitive than the positions taken by the Ministry of Economy and Finance and the Trade Ministry.
- Core competition analysis is also relevant in some intellectual property issues and in assessing some product standards, but it is not clear whether these potential efficiencies are more than theoretical. The vast majority of Indecopi’s intellectual property work does not call for core competition analysis, though familiarity with basic market concepts can sometimes be helpful.
- Core competition analysis is not used in Indecopi’s unfair competition or consumer protection work. Nevertheless, research conducted in connection with the OECD Global Forum on Competition reveals that competition agencies that have these functions believe that they complement each other, with competition principles serving as a reminder that government actions intended to protect consumers can instead harm them if they are unnecessarily restrictive, and the consumer protection function serving as a reminder that markets do not operate perfectly.

- Core competition analysis is much more relevant to the work of other government entities, including privatisation and the access regulation done by Peru's sectoral regulators, than it is to the work done by Indecopi's commissions and offices other than the Free Competition Commission. (For this reason, some countries combine sectoral regulation and competition policy.)
- A basic competition policy principle – that governments should not restrict competition more than necessary to achieve other goals – can be a useful tool in all of Indecopi's functional areas. However, since this principle is equally applicable to all other government regulatory functions, combining competition policy with Indecopi's other functions does not provide any specific efficiency benefits.

In sum, there are some advantages to assigning Indecopi responsibility for various fields involving market reform. Even when the fields have little substantive relationship to each other, there are advantages relating to scale economies in such things as administration and promotion of market reform in general. There are also real some efficiencies stemming from the substantive relationship of one group of functions (free competition, market access, antidumping, unfair competition, and consumer protection). Combining that group with intellectual property and standards may produce some limited efficiencies, and the inclusion of market exit adds no particular efficiencies. Moreover, the substance of Indecopi's core competition work is less closely related to Indecopi's other work than to many regulatory activities that are not part of Indecopi. The disadvantages to this structure relate primarily to the fact that as part of a larger entity, competition officials necessarily lose some budgetary and policy-making autonomy. Indeed, under the current law, even the first and second instance decision-makers have no protections of their independence. These disadvantages and recommended ways of minimising them are discussed Part 6, below.

3.6 *International issues*

Article 3 of the Free Competition Law bans all abuses of dominance and restrictive practices that injure the general economic interest in the national territory. Indecopi takes the position that this includes conduct that occurs outside Peru, though the matter has not been litigated. Article 9 of the law establishing merger control in the electricity sector specifically includes “acts of concentration made abroad.”

In practice, international issues have been very rare in Peru. This is partly the result of Peru's lack of merger control except in the electricity sector, and partly the result of the Free Competition Commission's small staff and caseload. International firms that have been involved in Indecopi's

cases have had local subsidiaries in Peru. Substantively, Indecopi takes international competition into account when defining markets and assessing market power.

Indecopi has no bilateral co-operation agreements with competition authorities in other countries, but Peru is seeking a competition chapter in its FTAA negotiations with the United States. With Bolivia, Columbia, Ecuador, and Venezuela, Peru is a member of the Andean Community, which has established a free trade area and is seeking to develop a common market. Peru is also associated with MERCOSUR and is a member of APEC. Indeed, Peru was APEC's "convening economy" for competition policy in 1999-2001. Peru is also a member of the Iberoamerican Competition Forum.

4. Competition Policy in Regulated Sectors

The Free Competition Law does not exempt any sectors, but the role of Indecopi and the applicability of the law are not straightforward when dealing with infrastructure monopoly sectors. In the telecom sector, Indecopi does not enforce the law but the telecom regulator, Osiptel, enforces an essentially identical law whenever one of the parties to a dispute is in the telecom industry.

Indecopi enforces the Free Competition Law in other infrastructure monopoly sectors, but the Law on Access to Public Infrastructure gives sectoral regulators exclusive jurisdiction over all access issues. These regulators include: in the transportation sector, Ositran (*Organismo Supervisor de la Inversion en Infraestructura de Transport de Uso Publico*); and in the energy sector, Osinerg (*Organismo Supervisor de la Inversion en Energia*). These agencies are all administratively independent, meaning that – like Indecopi – they report to the President of the Council of Ministers rather than to any Ministry, and they are not bound by normal civil service pay scales. Except for Osiptel, none of the sectoral regulators has competition law enforcement authority.

All of these sectoral regulators are apparently charged with promoting competition in their sectors, but their ability to do so is limited by the fact that Ministries retain the power to issue licenses or concessions and make other key decisions (*e.g.*, spectrum allocation in telecom). It is not clear to what extent the Ministries seek or consider independent regulators' (or Indecopi's) views on their decisions. In any event, whereas the competition authority in Chile was able to sue the government to compel it to allocate spectrum by means of an auction, it appears that Peru provides no such method for a competition agency to compel attention to competition issues.

4.1 *The Telecom Sector*

In 1991, a new telecommunications law was adopted in order to bring about the progressive demonopolisation and privatisation of the telecom sector.⁶⁰ A 1994 privatisation gave Telefónica a five-year monopoly in fixed telephony and domestic and international long distance, during which cross-subsidies between long distance and local telephony were to be eliminated and Telefónica was to expand and improve fixed telephony service. Competition was permitted in other services, including mobile telephony, pay-phones, beepers, and cable television.

Telefónica gave up its legal monopoly in 1998, one year before it was due to expire. Osipitel reports that there are now eight providers of fixed telephony, three mobile providers (down from four, now that Telefónica has acquired Bell South's Latin American operations), 52 long distance carriers, 24 local carriers, 126 cable television firms, and around 180 registered companies providing other services, including 72 internet service providers. Moreover, the penetration rate has greatly increased, average waiting time has decreased from 118 months to less than two months, and the system is 90 percent digital. These are for the most part impressive numbers, but competition problems may exist even in fields where there are many providers. Examination of these various fields is beyond the scope of this report.

In 2002, Telefónica had almost a 99 percent share of the local fixed telephony market, a 31 percent share of international long distance, an 86 percent share of domestic long distance, and a 34 percent share of local mobile telephony. Its acquisition of Bell South's Latin American operations has caused great concern in Peru because Bell South had just entered the market for fixed local telephony and had an 18 percent share of local mobile telephony. A consumer group is seeking to mitigate the effects of this acquisition by arguing that under the Telecommunications law, Telefónica is not allowed to hold two licenses to provide mobile telephony, but the lack of a merger control system prevents Osipitel from directly reviewing the acquisition's impact on competition and consumers in Peru.

Osipitel's regulatory responsibilities include resolving interconnection issues, setting quality standards, establishing maximum tariffs when no effective competition exists. To help implement its law enforcement responsibilities, Osipitel has issued formal guidelines explaining its approach to free competition and unfair competition enforcement. The free competition guidelines cover some of the same subjects as the mandatory precedents issued by Indecopi's Competition Tribunal, but they also explain the criteria by which Osipitel defines markets and assesses whether a firm is

dominant. Originally, Osipitel did not have as strong investigation or sanctioning powers as Indecopi, but those problems have been corrected.

Osipitel data indicate that it has issued sanctions in 20 proceedings. Nine of these were for failing to comply with investigatory demands or misconduct in the course of a proceeding, which is a commentary on the lack of maturity of the regulatory process. Of the other 11 fines, five were in free competition cases, one was in an unfair competition case, two were in interconnection cases, and three related to other regulatory matters. The fines in two of the free competition cases were revoked in second-instance appeals, and a fine of about USD 940,000 – by far the largest against a single firm – is currently pending on appeal. The two confirmed fines were for about USD 45,000 and USD 22,500.

Osipitel and Indecopi are in the same building complex, and at least two Osipitel officials have worked at Indecopi as staff or on a commission. Informal co-ordination between the two is said to be adequate but could use improvement.

4.2 *The transportation sector*

The transportation sector in Peru exhibits everything from continued government ownership and operation of infrastructure monopoly (*e.g.*, ports) to complete privatisation and deregulation in markets (*e.g.*, taxis and buses) that most countries regulate on market failure grounds. Overall policies are set by the Ministry of Transport and Telecommunication. In 1998, Peru created Ositrán to review compliance with concession obligations, set tariffs where necessary, and promote competition. In 2001 Ositrán adopted rules governing access to essential facilities, including ports, and new rules were adopted in November 2003.

Ports are an important infrastructure monopoly in Peru, and the government had planned to privatise them some time ago. It has expressed interest in offering concessions to operate some ports after electricity liberalisation is completed, but the prospects for this are unclear. It has been estimated that even in Lima's relatively efficient port, inefficient access and government "red-tape" add a 3-7 percent cost to the value of commodities in transit. Indecopi's Market Access Commission has previously taken some steps that reduce exporters' costs, and perhaps it could do so again.

Peru's railway company was privatised in 1999. Previously, low investment in maintenance had led to poor service and greater use of alternative modes of transportation, but World Bank financing of the concessionaire is expected to increase competition between rail and trucking, reduce transportation costs, decrease domestic prices, and increase

the competitiveness of exported goods. The government owns and operates an airline that is used to provide subsidised passenger and freight service to remote areas.

Peru has one of the lowest levels of paved road density in Latin America. Public-private partnerships may provide some assistance for high volume highways, but not for rural and municipal roads. Problems with Peru's roads – together with problems in other transportation sectors – are important. A 2001 World Bank study identified the high cost of transport and business logistics as a major reason for high prices and low competitiveness.⁶¹ The ratio of logistics costs to total revenues in Peru was 30.7 percent, compared to 23 percent in Argentina and 8 percent for OECD countries. Such costs help explain why Peru is doing less well than one would expect in exports than one might expect in a number of areas, such as fruit; Peru's exports of fruit are USD 40 million, compared to USD 800 million for Ecuador and USD 1.3 billion for Chile.

Although this section focuses on ways in which competition law and policy are being or might be applied to benefit consumers in regulated sectors, it is noteworthy that Indecopi's invalidation of a municipal ordinance requiring taxis to be painted yellow may have given insufficient attention to the need for regulation when market failures exist.⁶² Taxi and bus transportation in Lima and Peru's other cities is almost completely unregulated, whereas most countries regard these markets as requiring some regulation to address market failures. Peru's consumers might gain from taxi and bus (or "combi") regulation that is not more restrictive than necessary to protect riders.

4.3 The energy sector

Ministry of Energy and Mining sets policies and issues concessions in the energy sector. Although Peru has recently embarked on a major natural gas development programme, electricity has been and remains the focus of its energy programme.

The 1992 Energy Law sought to promote competition and efficiency in the electricity sector. The law set the stage for privatisation by requiring that except in isolated areas, the electrical industry be divided into separate generation, transmission, and distribution units operating under concessions from the Ministry. The goal was for the generation market to become competitive, whereas transmission and distribution would be regulated monopolies. At the national level, ElectroLima was divided into four distribution units and one generator, while ElectroPeru was divided into four generation units. The transmission assets of both enterprises were combined into a single transmission enterprise.

Privatisation began at a good pace in 1994, slowed down in 1999, and in 2002 two privatisations were called off due to local protests. Currently, there are a large number of companies competing in the generation market, including privatised enterprises and some new concessions. The government, however, continues to own the huge Montaro hydroelectric plant which generates 35 percent of Peru's electricity. The transmission enterprises for two Peru's two interconnected systems are both still government-owned, but there is now some private participation in the transmission market. About 50 percent of distribution is majority-owned by private interests. (The State typically retains a 30-40 percent share of the stock of privatised enterprises.)

Notably, the 1997 and 1999 acquisitions involving the Chilean and Spanish firms brought vertical integration to Peru (as it did to Chile). There is some real competition in the wholesale power market, in that generators are free to negotiate price and others terms in their contracts with large buyers. Regulation governs transfers between generators and to distribution companies. The regulated price is not permitted to vary more than 10 percent from the market price. Small residential consumers have subsidies of about 50 percent of their cost of service, but most consumers pay rates that cover the cost of service.

Osinerg was created in November of 1996 to supervise the privatization of energy firms and monitor the firms' compliance with legal requirements. In 2000, Osinerg merged with the Comisión de la Tarifas Eléctricas, which was and is responsible for setting tariffs. Recently, Osinerg has created a new Research Department that focuses policy studies and policy-making in the energy field generally. In general, Osinerg apparently does promote competition when possible, in part because even those who are not competition advocates believe that it is harder to control one huge firm. Some observers have expressed concern that Osinerg lacks real autonomy and is therefore subject to political interference. It has also been suggested that poor co-ordination between the privatisation agency ("Pro-Inversión"), Osinerg, and Indecopi has sometimes been a problem.

As discussed above, a 1996 law made electricity the only area in which Peru has merger control, and Indecopi has authorised all of the mergers it has considered. Some believe that Indecopi may have been unduly lenient in this respect.⁶³ Osinerg officials are divided on the desirability of such control, and the Research Department is studying the issue. The same law provided for the government's retention of a "golden share" in all privatisation, thus giving the government control of corporate decisions to shut down the company, bring in new shareholders, reduce capital, register on the stock exchange, or merge with other companies.

4.4 Other sectors

Banking and finance. The banking sector has experienced considerable concentration, largely through mergers, but there has been no opportunity to review such mergers to assess their effect on competition. Of the 25 banks operating in 1997, only 15 remain, and the largest four have 75 percent of the market. The Superintendency of Banking regulates the market, focusing mainly on solvency and other systemic considerations, but its hiring one of Indecopi's foremost former economists may signal increasing interest in competition issues. The financial sector (and some banks, indirectly) have been involved in two of Indecopi's recent price fixing cases – the automobile insurance case, in which price fixing was confirmed, and the ongoing case involving price fixing by pension fund managers. It has been suggested that the banking industry itself (including the Banking Association) merits closer scrutiny by the Free Competition Commission.

Small and medium-size enterprises account for 42 percent of GDP and employ 76 percent of the economically active population, but the capital market in Peru is such that even medium-size enterprises find it almost impossible to obtain capital. An IBD project is seeking to improve the regulatory environment, encourage a corporate governance code, and educate market participants.

Mining. Peru's minerals industry is key to its development both economically (generating more than 45 percent of Peru's export earnings) and socially (helping some of Peru's poorest regions). A World Bank report notes, however, that investment has dropped, due in part to regulatory problems. For example, the lack of a clear regulatory framework creates confusion and high transaction cost for mining firms, and Peru's environmental regulators are not seen as credible by the public. Competition policy principles would support resolution of these problems, because clear rights and duties, enforced in a transparent manner, are important to the development of healthy, competitive markets.

5. Indecopi's Competition Advocacy

As used in this report, the term “competition advocacy” refers to activity designed to promote understanding of the overall benefits of a competitive market economy, as well as the value of competition law enforcement and the importance of the core competition policy principle that government regulation should not interfere with firms' ability to respond efficiently to consumer demand except to the extent necessary to satisfy other social goals. It does not include Indecopi's legal proceedings in and of themselves, but does include the dissemination of information about such proceedings.

Competition advocacy in the broadest sense – demonstrating or explaining the benefits of a competitive market economy – has always been a major part of Indecopi's role and its activities. This broad approach to competition advocacy reflects the concept underlying Indecopi's organisation as an agency with a mandate that includes fields that are quite diverse but that all relate in one way or another to market liberalisation and the promotion of competition. Thus, Indecopi's promotion of its bankruptcy work is not what would usually be thought of as competition advocacy, but by reducing exit barriers it also encourages new entry. Similarly, Indecopi's promotion of trademark registration and respect for intellectual property informs firms about competing through product differentiation and educates the public about the risks of buying pirated goods. This kind of activity is very important in Peru, where major portions of the public and the government do not understand the benefits of a competitive market economy and in fact oppose liberal market reform.

Despite the contribution that these activities have to promoting market reform in general, this section focuses on Indecopi activities that focus more directly on competition law and policy. In this respect, Indecopi's consumer protection and unfair competition mandates have definitely complemented its advocacy of competition law and policy. For example, Indecopi's publishing information on the waiting time to cash checks at different banks stimulated competition and educated both consumers and banks. More broadly, promotion of Indecopi's consumer protection and unfair competition activities discourages opportunistic conduct by sellers and reassures buyers that they have remedies in case they are unfairly treated.

Indecopi also engages in more explicitly educational activity. First, the "Indecopi Educa" programme trains school teachers to help students become more sophisticated consumers and develop a better understanding of the benefits of competition policy and other economic reforms. Second, "Indecopi Empresa" is an education programme aimed at small and medium sized enterprises, including many that operate in the informal sector. The objective is to promote awareness of competition and intellectual property rules and the policies behind such rules.

Indecopi's conventional competition advocacy work with the government has also been important. In 1999, for example, the agency provided other Government bodies with 150 competition policy analyses on a wide range of topics. Most of the analyses were submitted to Congress. Other government agencies have generally been less likely to seek Indecopi's advice. In particular, although competition policy considerations are obviously important when a government considers the privatisation of state assets, Peru's privatisation agency has not consistently consulted with Indecopi. The

consultation process Indecopi and the autonomous regulators for telecom and energy, Osiptel and Osinerg, apparently works more smoothly.

It should be recalled, however, that Indecopi is not always perceived as a competition advocate in relation to antidumping and safeguard matters. The Competition Tribunal is viewed as more supportive of antidumping actions than the Ministry of Economy and Finance or the Ministry of Trade, and Indecopi advocated the rule-changes that facilitate such actions.

Much of Indecopi's recent competition advocacy has related to the Constitutional provisions that prohibit the state from engaging in economic activity unless the activity is expressly authorized by law and is "subsidiary" to private sector activity. To ensure adherence to these and other principles, the government in 2001 created a process for reviewing the activities of all state-owned enterprises (SOEs). The National Financing Fund of State Managerial Activity (Fonafe) was placed in charge of this process.

During 2001-2002, Indecopi's Free Competition Commission prepared reports analysing 13 SOEs in a variety of sectors, including the postal service, commercial aviation, ship building, and the commercialization of coca leaves. A total of 115 separate activities were analysed, of which 24 were found not to be expressly authorized by law. Of the 91 activities that met the express authorization requirement, Indecopi concluded 41 failed to meet the subsidiarity requirement.

Indecopi's reports were both forwarded to Fonafe and publicly released. Fonafe is known to have made some decisions, but the decisions have not been made public. It is not even known when or whether the decisions will be made public. Their publication would, it appears, promote public confidence that constitutional requirements are being followed, clarify the government's interpretation of the requirements, and encourage domestic and foreign investment.

Regardless of what decisions Fonafe made and whether it makes those decisions public, Indecopi's reports received considerable public attention when they were released and thus have helped to shape public opinion respect to the proper role of the State and the private sector in the Peruvian economy.

Indecopi's reputation for performing sound economic analysis has also permitted it to be influential in other ways. For example, the parties that challenged the Ministry of Transportation's directive for price fixing in the road transport industry not only filed a complaint with the Market Access Commission, but petitioned the Constitutional Court to find the Ministry's action a violation of the State's duty to facilitate free competition. In ruling in favour of the petitioners, the Court relied in significant part on the Market Access Commission's analysis of the impact and justification for the price fixing requirement.

A project that began in 1997 with IDB funding sought to assess the impact of Indecopi's actions on the Peruvian economy.⁶⁴ The research showed that the economic benefits of Indecopi's activities during its first seven years were about USD 120 million, which is at least six times the agency's operating costs. Of all Indecopi's functional areas, the two that made the greatest relative contributions were the Free Competition Commission and the Market Access Commission. During the 1993-1994 period alone, Free Competition Commission decisions reportedly created benefits of USD 28.6 million. This kind of information could have helped explain the benefits of competition, and in particular could have supported requests for greater public funding for Indecopi's core competition mission. It is unclear whether Indecopi used the information in its general competition advocacy, however, and it presumably did not use it in seeking greater funding because Indecopi then regarded self-financing as a benefit.

6. Evaluation and Recommendations

6.1 *Protect the real and perceived autonomy, credibility, and technical competence of Indecopi's quasi-judicial bodies by enacting legislation to revise the process for selecting and removing first and second instance decision-makers.*

- *The process for selecting Tribunal members should be transparent and include checks and balances. The establishment of specific qualifications requirements should also be seriously considered.*
- *The process for selecting first-instance decision-makers should also be revised, perhaps by having them selected by Tribunal members.*
- *All first and second instance decision-makers should be selected for fixed (and preferably staggered) terms and should be removable only for cause.*

Although Indecopi is nominally an independent agency, it has no legal protection for its independent status, and the independence of its quasi-judicial units has not always been respected. Indecopi now reports to the President of the Council of Ministers, rather than any Ministry. This system may be satisfactory vis-à-vis Indecopi's Presidency and Board insofar as they oversee the agency's administrative, investigative, analytical, and promotional units. It is not unusual for agency officials in charge of these activities to be removable at will and thus subject to some degree of government influence.

However, Peru's current system clearly falls down in its failure to protect the independence of Indecopi's quasi-judicial positions – its Tribunal members and its Commissioners. The 1992 law establishing Indecopi provided some protection for Tribunal members, since they were given five-year appointments during which they could be removed only for cause, but that protection was removed in 1994. These protections should be re-instituted and new protections should be afforded to commissioners.

In addition to protecting the autonomy of those individuals who have been selected to serve as quasi-judicial decision-makers, Peru should introduce some transparency into the selection process, apply relevant selection criteria, and subject the process to a system of checks and balances. Currently, the system by which Indecopi's quasi-judicial positions are selected – by the President of Peru (for Tribunal members) or the Indecopi Board (for commissioners) – has none of these elements. This system contributes to general fears – and some specific rumours – of “behind-the-scenes” government intervention. It also undermines confidence in Indecopi's technical competence; the Competition Tribunal's reputation has suffered because of concern that only its President has real knowledge of competition law and policy issues. This report makes no judgment on these other members' qualifications, but the existence of the concern underscores a problem with the current, non-transparent selection process.

In this regard, it is notable that Chile, whose competition policy system was the subject of a peer review at the first meeting of the IDB-OECD Latin American Competition Forum, faced precisely the same problem and has adopted legislation to deal with it.⁶⁵ Chile's overall system is different from Peru's, but its new law's provisions provide a useful starting point for analysis. First, the law requires that all candidates for its Tribunal have expertise in competition issues. Such a requirement is not unusual in countries with new competition systems. Second, the law provides checks and balances in that the Supreme Court and the Central Bank screen all candidates on the basis of a public competition; only individuals nominated or selected on the basis of this process may become Tribunal members. This is, of course, only one way of providing checks and balances; presidential nomination and legislative confirmation is another, more common, model. Third, members of the Tribunal have terms of six years, and may be removed for only cause during their terms. Such protection is standard in many countries.

A formal, transparent system of checks and balances would be a logical approach for Peru to take with respect to its Tribunal, but might not be practical as a means of choosing and protecting the autonomy of the unpaid commissioners and office heads who are Indecopi's first instance decision-makers. One possible solution with respect to these quasi-judicial officials

would be to provide that they be selected for fixed terms by the Tribunal and be removable only by the Tribunal and only for cause.

Some in Peru argue that in order to assure Indecopi's continued existence and independence, the Peruvian Constitution should be amended to provide specifically for the agency (as is now done for the Central Bank and, apparently, the Superintendency of Insurance). In considering this proposal, it is important to bear in mind that the real need is to ensure that Indecopi's quasi-judicial units are independent. Declaring Indecopi itself independent seems neither necessary nor sufficient to accomplish that goal.

6.2 *Peru's system of funding Indecopi should be changed, and more funding should be allocated to the Free Competition and Market Access Commissions.*

- *Peru should eliminate or substantially reduce Indecopi's reliance on fines as a source of revenue. Fines should go to the Treasury, and public funds should be given to Indecopi.*
- *Peru should provide public funding for Indecopi's Free Competition and Market Access Commissions because it is an investment that can pay for itself. Indecopi should allocate more funding to core competition work, even if this means cutting back on other useful work, because core competition cases generally have a more substantial market impact.*

Sources of funding

The percentage of Indecopi's budget that is represented by the fines it imposes has increased over time and is now almost 60 percent. This *highly unusual* system undermines efficient administration difficult and is certain to create domestic and international concern about the integrity of Indecopi's decisions.

More broadly, it seems highly likely that Indecopi's initial belief in self-financing contributed to underinvestment in core competition activities (see below), and the government's 2003 decision to cut off all funding for Indecopi makes it even harder to provide adequate funding for these activities. Except to the extent that it relies on the fines it imposes, Indecopi can carry out its core competition work only by charging fees that exceed the cost of its registration and other services (which is contrary to one of the laws Indecopi enforces). Although fees are preferable to fines as a funding source, this practice seems unlikely to permit Indecopi to maintain and increase respect for the integrity

Peru is a developing country with many important demands on its resources, but public funding for Indecopi's core competition commissions – at higher levels than they are allocated today – would be an investment that could be expected to pay for itself many times over.

In the next section, this report recommends that Peru at a minimum make mergers subject to the Free Competition Law. If it does so, and if it also establishes a premerger notification system along the lines of what it now has for electricity mergers, filing fees would be a legitimate though somewhat risky source of funding for the activities of at least the Free Competition Commission. Even if such a system is adopted, the government should commit to provide the necessary funding so that competition enforcement is not wholly dependent on filing fees.

Resource levels

Although unfair competition and consumer protection enforcement is beneficial in laying down rules that encourage confidence in the marketplace, the practices condemned in such cases do not necessarily have an adverse effect on Peru's economy. Free competition and market access cases are much more likely to benefit the market as a whole. Peru is in the unusual position of having empirical evidence on this point – an IDB-sponsored research project confirming that Indecopi's free competition and market access work made larger relative contributions to Peru's economy than Indecopi's other functions.

Despite these considerations, in 2003 the Free Competition Commission and Market Access Commission received only a combined 8 percent of the money and 7.5 percent of the personnel that were allocated to Indecopi's commissions and offices. Moreover, the Economic Policy Department views the Free Competition Commission as being particularly understaffed. Finally, Peru devotes fewer resources to these missions than other developing countries with comparable and even smaller GDP levels. There is no international or other objective standard for determining appropriate resources levels for competition enforcement, but the evidence suggests that Peru would benefit by expanding its core competition work, even if that means cutting back on some other activities by Indecopi or other government agencies.

6.3 *Indecopi should (a) be more proactive in enforcing the Free Competition Law, (b) issue guidelines on market definition and assessment of dominance, and (c) bring more market access cases to eliminate the many municipal barriers to market access by entrepreneurs and small businesses.*

Ex officio free competition cases

Because it was created in part as an alternative to the judiciary, Indecopi's commissions and offices must accept all formal complaints that are accompanied by the payment of the applicable filing fee. This requirement has some benefits, but it also makes enforcement less cost-beneficial by limiting the commissions' ability to open *ex officio* investigations that focus on matters of the greatest public importance. The problem seems particularly acute for the Free Competition Commission, which brings few *ex officio* cases despite a rising consensus that it should be more proactive. At a minimum, the effect of this requirement should be considered in deciding on the appropriate funding level for the Free Competition Commission. Moreover, Indecopi should consider whether there are other means it can use to maximise its cost-effectiveness while fulfilling its responsibilities to resolve formal complaints.

In addition, Peru should push ahead vigorously in pursuing judicial reform. In the first place, an efficient, predictable, and trusted judiciary is necessary for markets to perform competitively. In the second place, the establishment of a more accessible court system would take some of the decision-making responsibility from Indecopi and make the agency better able to pursue *ex officio* cases.

Sectors that have been suggested as warranting additional competition scrutiny are cement, liquid fuels, steel, and banking.

Guidelines

The Competition Tribunal's use of mandatory precedents is a useful way of clarifying how the Free Competition Law should be interpreted, but it provides guidance only on what the Tribunal sees as the key issues in a few cases. Although many free competition cases have required the definition of product and geographic markets and the assessment of market power, there is no mandatory precedent concerning these important topics. The text of the Tribunal's resolutions that do not contain mandatory precedent may provide some guidance on its approach, but any such guidance is not authoritative and is, as a practical matter, available only to competition experts in Peru (because the resolutions are public but unpublished). Given the importance

of market definition and the assessment of market power, the Tribunal (or Indecopi) should issue guidelines on these issues.

Market access cases

The Market Access Commission has succeeded despite a very small staff in bringing a large number and high percentage (50 percent) of *ex officio* cases. Moreover, the activities of this Commission can be very important to enhancing efficiency (because anticompetitive regulation abounds, particularly at the municipal level) and to demonstrating the value of competition policy to consumers (who could see new entry and lower prices), small entrepreneurs (who remain informal because of regulatory costs), and the established business community (whose domestic and exports prices are higher than necessary because of bureaucratic red-tape). In light of the substantive and educational, “public relations” benefits of eliminating anticompetitive regulation, the Market Access Commission should, if possible, be given additional resources and should embark on a major national campaign against such regulation. At present, the utility companies make most of the complaints to the Commission, and it is good that the Commission can clear away the administrative barriers they face. But one goal of the recommended campaign would be to expand awareness and acceptance of the Commission’s powers so that small entrepreneurs, and small and medium size companies, come to regard the Commission as an important ally.

- 6.4 *The Free Competition Law should be amended to provide for merger control and to clarify the legal standard to be applied to cartels and other horizontal agreements; there is no apparent reason to amend the law to cover excessive pricing,***

Merger control

A Working Group at Indecopi is considering a number of possible proposals to amend the Free Competition Law. One proposal the Working Group is considering is that the law be amended so that it (i) provides a legal basis for challenging anticompetitive mergers and acquisitions, and (ii) establishes a premerger notification system. This proposal should be made and accepted. Peru has witnessed increasing concentration in quite a few industries. Some of the markets in which Indecopi has found or is investigating price fixing and abuse of dominance have recently become significantly more concentrated because of mergers, and it is arguable that merger control would have prevented these problems. Moreover, neither Indecopi nor Osiptel has the authority to assess the likely impact of

Telefonica's recent acquisition of Bell South. The arguments against merger control are for the most part either wrong or outdated. The argument that small, open economies do not need merger control or that such control could interfere with domestic firms' realisation of scale economies has been thoroughly discredited. Merger analysis can be complex, but the Free Competition Commission's ten years of experience have prepared it for the process. And the cost of merger control can be managed by giving Indecopi the authority to set thresholds for pre-merger reporting.

If Peru adopts a premerger notification system, it should give careful consideration to how it establishes its filing thresholds. Its current law on electricity mergers bases filing obligations on the parties' market share, which may work well in a regulated market but which otherwise presents the problem that parties may manipulate the system by defining markets in ways that mean that they can avoid filing. Simple size and volume measures may be preferable, especially in a country in which data relevant to market definition may be scarce. In addition, Indecopi should consider proposing that the amendment not set a particular threshold, but rather that it authorise the Commission to establish such thresholds as it considers necessary and appropriate. This would permit the Commission to begin with very high levels as it first implements merger control and then to lower the thresholds – either selectively or across the board – based on its actual experience.

Cartels

The Working Group is also considering a proposal to clarify the legal standard applicable to hard core cartels and other restrictive practices. The current thinking appears to be that Peru should have a system that sounds something like Mexico's: cartels would be subject to an "absolute" ban, while other agreements would be subject to a "relative" ban. Clarification is definitely in order, and the contemplated system seems sensible.

Abuse of dominance

When it adopted the Free Competition Law, Peru apparently made a policy decision not to include a ban on "excessive pricing" or other means of exploiting a dominant position. Many countries do not have such bans, and many countries with such bans do not currently enforce them. The reason is not that these countries think excessive pricing or other exploitative practices are harmless or good, but that it is difficult if not impossible to enforce such bans in a manner that makes the situation better rather than worse. It is true that developing countries such as Peru cannot expect excessive pricing to stimulate entry as quickly as would be the case in developed countries. As a result, the harm from excessive pricing may be

greater in developing countries. Nevertheless, competition authorities generally have no workable remedy to use against excessive pricing unless it is able to remove the entry barriers that support an enterprise's dominant position. The Market Access Commission already has that power with respect to the most important entry barriers – anticompetitive regulations. Moreover, the lack of authority to condemn excessive pricing has apparently not been a problem in the past. In these circumstances, it appears unlikely that banning excessive pricing or other exploitative conduct would benefit Peru's consumers.

6.5 *Competition advocacy should continue, with increased emphasis on clarifying that Free Competition and Market Access cases halt conduct that injures the public at large, rather than being an efficient means of resolving private disputes.*

Indecopi is well known for its competition advocacy and for using the Indecopi “brand” to promote market reform. In some ways, however, the brand may have obscured the differences in its various functional areas. Although Indecopi's work in resolving unfair competition and consumer protection complaints is useful and important in establishing the rules of the game and providing remedies to complainants, many of the cases are essentially private disputes that in and of themselves have no market impact. Indecopi brings many more of these cases than it does free competition or market access cases, and it appears that much of its advocacy treats all of these (and other activities) as “competition cases.” This practice may help explain why the public does not for the most part understand that free competition and market access cases, even if they are begun in response to complaints rather than *ex officio*, are not merely private disputes but rather cases that affect the market as a whole.

In the future, Indecopi should seek in its competition advocacy to stress that its core competition cases represent Peru's commitment to consumers and the economy as a whole, not merely Indecopi's provision of an efficient means of resolving private disputes. Use of data on the impact of Indecopi's activities, such as that produced by IDB-sponsored research in the 1990's, should be useful in this regard.

6.6 *Peru's Government and its Ministries should provide increased, visible support for competition policy and economic reform.*

1. Indecopi is not the only proponent of competition policy in Peru. Policy offices within the Ministry of Economy and Finance and the Ministry of Trade and Tourism also support competitive reform – perhaps even more than the Competition Tribunal in the

antidumping area. Osiptel and at least some parts of Osinerg also support competition. Some representatives and parts of the government, however, seem not to understand the benefits of competition policy. For example, the Competition Tribunal was surely correct that ordering price fixing was “irrational” as a means of trying to address problems that legitimate truckers face from informal truckers.

2. In fact, competition policy and economic reform have brought tremendous benefits to Peru’s citizens over the last dozen years, but it is clear that the public and parts of the government do not understand how Peruvians are benefiting from this reform. Particularly in remote villages and rural areas, it is likely that the marketplace as they experience it does not show significant benefits. Even in these areas, however, those who have electricity or telephone service have in fact received enormous benefits.
3. Peru’s Government and Ministries should join with Indecopi and other competition advocates to explain that these and other benefits are the result of competition policy and market-based reform. They should also emphasise that competition policy does not interfere with social programmes, but rather helps make such programmes more efficient. Moreover, the government should take advantage of the public’s distrust of the judiciary by explaining that judicial reform will help Peruvians realise the benefits of market reform. Finally, since market reform has clearly benefited Peru’s economy overall, the government could usefully examine whether and to what extent its current tax or other policies interfere with the widespread dissemination of these benefits.

Table A – 1

Resource Allocation among Commissions and Offices

	2002		2003		2003 + 2003	
	USD	%	USD	%	FTE*	%
Free Competition	189 000	4.6	183 000	4.6	7	4.7
Market Access	186 000	4.6	137 000	3.4	4	2.7
Core CLP total	375 000	9.2	320 000	8	11	7.5
Unfair Ads Comp.	213 000	5.2	157 000	3.9	4	2.7
Consumer Pro.	248 000	6.1	270 000	6.7	13	8.9
Dishonesty total	461 000	11.3	427 000	10.7	17	11.6
Antidumping	226 000	5.5	186 000	4.6	6	4.1
Bankruptcy	1 403 000	35	1 398 000	35	40	27.3
Standards	297 000	7	254 000	6	6	4.1
Trademark Office	720 000	18	749 000	19	39	26.7
Copyright Office	171.000	4	237 000	6	7	4.7
Patent Office	409 000	10	411 000	10	20	13.6
IP combined	1 300 000	32	1 397 000	34	66	45.2
Total	4 062 000		3 982 000		146	

* FTE (full time equivalents) refers to the total number of authorised positions.

Table B – 1

Allocation of Resources among Tribunal Chambers

	2002		2003			
	USD	%	USD	%	FTE*	%
Competition Trib.	540 000	51	372 000	35	8	28
IP Tribunal	507 000	48	473 000	44	12	43
Bankruptcy Trib.	35 000	<1	231 000	21	8	28
Total	108 2000			1 076 000	28	

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ENDNOTES

- 1 LMIC countries that have participated in the OECD Global Forum on Competition include Albania, China, Egypt, Morocco, South Africa, Thailand, and Tunisia.
- 2 Vargas Llosa first became politically active in August of 1987, when he protested Garcia’s proposal to nationalize all financial institutions and insurance companies.
- 3 During 1993-1997, the percentage of people living in poverty fell from 27 to 14 percent.
- 4 *Indecopi-Educa* is a training programme through which the agency trains primary and secondary school teachers in how to explain free market concepts to their students.
- 5 See n. 14 and accompanying text.
- 6 See, e.g., Kwang Wook Kim, “Conflict of Interest: The Tension between Public-Private Cooperation and Multiple Principles in Peru” in *The Role of the State in Competition and Intellectual Property in Latin America*, Beatriz Boza, ed., (Indecopi 2000) (hereinafter “*The Role of the State*”), at 45. See also Ruth Lars Keppeler and Andreas Reber, “Information and Communication Technology in Peru: Building an Industry,” in *The Role of the State* at 383.
- 7 The Tribunal relied heavily on the writings of United States Judge Robert Bork Judge, and Indecopi appears to have taken a quite hostile approach to government regulation.
- 8 In 1998, one expert concluded that “Indecopi now needs to prosecute major cases of market abuse so the public can see how Indecopi’s regulatory interventions improve their living conditions.” Geoffrey Shepherd, “The Role of Indecopi: Proposals and Perspectives,” in *Peru’s Experience in Market Regulatory Reform, 1993-1998*, Beatriz Boza, ed., Indecopi (1998) (hereinafter “*Peru’s Experience*”), at 97. See also Mercedes Aroz Fernandez, “The Value of Formality, Investment, and Competition Policy,” in *The Role of the State* at 148 (warning about the possible cost of not taking a more preventive approach); Barak Orbach, “Competition Policy in Transition: Lessons from Peru,” in *The Role of the State* at 225 (expressing concern about Indecopi’s narrow behavioural approach)..
- 9 Peru was selected in 1999 to serve a term as APEC’s “convening economy” on competition law and policy matters.

- 10 Robert M. Sherwood, “Indecopi: The 21st Century Arrives a Little Early,” in *Peru’s Experience* at 140. See also Kwang Wook Kim, *supra* n.6, at 47 (referring to Indecopi’s “lack of political capital”), 50 (referring to the weakness of Indecopi’s legal mandate), and 57 (noting that historically in Peru, autonomous agencies have not fared well after changes in government)..
- 11 See, e.g., Aurora Belmore, “Indecopi in Partnership with the Inter American Development Bank,” in *Peru’s Experience* at 89 (expressing concern about Indecopi’s ability to maintain its independence from the government and to avoid being frustrated by the courts).
- 12 Technically, Osiptel enforces Decree Law 702, whereas Indecopi enforces Decree Law 701, but the two laws are essentially the same.
- 13 Resolution No. 163-96.
- 14 Resolution No. 001-97.
- 15 Resolution No. 206-97. Specifically, the mandatory precedent was as follows:

"Price fixing and market division agreements shall be illegal per se when they are intended to restrict the competition, i.e. when they are pure or naked cartels. On the other hand, the price fixing and market division agreements that are ancillary or complementary to an agreed association or integration and that have been made to improve the economic activity shall be analyzed case by case to determine if they are rational or not. In case they are not considered to be rational, they shall be deemed illegal.

If, depending on the economic activity to be analyzed, it is concluded that the integration agreed among the companies is essential for that activity to be carried out, then such integration agreement, as well as the restrictions on competition that would arise therefrom in order that such activity can be carried out, shall be allowed. However, when the integration is considered to be beneficial but not essential to carry out such economic activity, then the integration agreement and the ancillary or complementary agreements that restrict the competition shall be permitted only whether they meet the following three conditions:

 - i) the agreement fixing prices or dividing market is ancillary to a contract integration; that is the parties must be cooperating in an economic activity other than the elimination of rivalry, and the agreement must be capable of increasing the effectiveness of that cooperation and no broader than necessary for that purpose;
 - ii) the collective market of the parties does not make the restriction of competition a realistic danger;
 - iii) the parties must not have demonstrated a primary purpose or intent to restrict the competition.

When these three conditions are not met, the agreement shall be considered to be unlawful."
- 16 Resolution No. 224-03.

- 17 *See FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). *See also California Dental Ass'n v. FTC*, 526 U.S. 756 (1999). *See generally* Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17*, 8 Sup. Ct. Econ. Rev. 265 (2000); Timothy J. Muris, *GTE Sylvania and the Empirical Foundations of Antitrust*, 68 Antitrust L.J. 899 (2001).
- 18 At least in the past, the fines imposed by the Intellectual Property Chamber of the Tribunal were said to be so low that it is profitable for pirates to continue their illegal activities and treat the fines as a cost of doing business. Whereas the Offices used deterrence criteria in setting fines, the Tribunal apparently chose not to impose fines that exceeded the harm resulting from the illegal conduct. Elvia Patricia Gastelo, "Recent Developments in Peru's Response to Intellectual Property infringement," in *Peru's Experience* at 143, 162.
- 19 OECD, *Hard Core Cartels* (2003); OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions, and Leniency Programmes* (2002).
- 20 *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).
- 21 Armando E. Rodriguez and Kelly A. Hoffman, "Why is Indecopi Focused on Competition Advocacy?" A Framework for Interpretation," *Peru's Experience* at 197.
- 22 Resolution No. 14-93.
- 23 Resolution No. 15-02.
- 24 Resolution No. 429-04.
- 25 Resolution No. 870-02.
- 26 Resolution No. 006-03.
- 27 OECD, OECD GLOBAL FORUM ON COMPETITION: *Preventing Market Abuses and Promoting Economic Efficiency, Growth, and Opportunity* (2004).
- 28 Antimonopoly and Antioligopoly in the Electrical Sector Law, Decree Law No. 25,965 (1996).
- 29 Barak Y. Orbach, "Competition Policy in Transition: Lessons from Peru," *The Role of the State*, at 235 n.48.
- 30 The law refers to "direct or indirect" control, but does not require notification of a stock acquisition that gives the acquiring firm the ability to appoint board members who could monitor the acquired firm's activities and influence its decisions.
- 31 UNCTAD, *PERU: Informe sobre las necesidades y prioridades en el area de Políticas de la Competencia*, Documento preparado para el Seminario Subregional Bolivia – Perú (Lima, del 22 al 24 de marzo de 2004), at 27 *et seq.* El Informe

refleja los hallazgos de la misión exploratoria realizada por Diego Petrecola (Consultor de la UNCTAD, Ph D. Economics. University of Illinois at Urbana – Champaign. Director del Centro de Estudios Económicos de la Regulación. Universidad Argentina de la Empresa.

- 32 The Market Access Commission was created as a separate unit in 1996. Before then, Indecopi's powers under Decree Law 776 were exercised by the Free Competition Commission and the Consumer Protection Commission.
- 33 Armando Caceras, "Indecopi's First Seven Years: The Challenge of Changing the Paradigm of Succeeding in the Market, in *The Role of the State* at 108.
- 34 Resolution No. 02-1998.
- 35 Resolution No. 03-98.
- 36 Resolution No. 448-03.
- 37 Resolution No. 34-98.
- 38 Resolution No. 182-97.
- 39 Beatriz Boza, "The Role of Indecopi in Peru: The First Seven Years," in *Peru's Experience* at 3, 23.
- 40 Decree Law No. 26122.
- 41 Legislative Decree No. 691.
- 42 As of 1998, Indecopi had apparently not developed a system to assure trade secret protection. Robert Sherwood, Indecopi: the 21st Century Arrives a Little Early, in *Peru's Experience* at 138. It is unclear whether such a system exists today.
- 43 Resolution No. 163-96.
- 44 Resolution No. 547-03.
- 45 See Directive 97/55/EC of European Parliament and of the Council of 6 October 1997, Article 3a.
- 46 Legislative Decree No. 716.
- 47 Beatriz Boza and Welby Leaman, The Promotional Role of Government in Market Discrimination Cases: Lima nightclubs, self-esteem, and civil society empowerment, in *The Role of the State* at 173.
- 48 Supreme Decree No. 133.
- 49 The Commission's activities are based on Decree Law No. 668.
- 50 At the time Peru had some intellectual property laws and an intellectual property office, but the military government of the 1970s had used the office to prevent the

- import of goods that were based on intellectual property. The current laws are Copyright Law, Decree Law No. 822 (1996); Trademarks Law, Decree Law No. 823 (1996); Patents and New Technologies Law, Decree Law No. 823 (1996).
- 51 Michael P. Ryan, “Intellectual Property Institutions and the Public Administration of Knowledge in Developing Economies: The Case of Indecopi in Peru,” in *The Role of the State* at 319.
- 52 *Id.* at 334.
- 53 The law administered by the Commission was issued by Presidential decree in 1992. Decree Law No. 26116. *See also* Decree Law No. 845 (1996) and Legislative Law No. 27146 (1999).
- 54 Removal without cause requires a “favourable opinion” by Indecopi’s Board, its Advisory Committee, and the President of the Council of Ministers. Since the Advisory Committee is essentially non-functional, and since the Board members are all removable without cause, it seems unlikely that this requirement would provide any real protection to a Tribunal member whom the government wanted to remove.
- 55 *See* Frank Pasquale, “Indecopi as Brand and Holding Company: The Business Model of Governance,” in *The Role of the State* at 83, 98; Ross Lipson, “Innovation in Public Sector Reform: The Decentralisation of Indecopi,” in *The Role of the State* at 273, 284-87; Kwang Wook Kim, “Conflict of Interest: The Tension between Public-Private Cooperation and Multiple Principals,” in *The Role of the State* at 295.
- 56 Understandably, the duration of proceedings varies considerably both with a given Commission and among Commissions. For example, proceedings before the Consumer Protection Commission are usually resolved in 2-3 months.
- 57 The Consumer Protection Commission is also authorised to order simple remedial actions such as repairing or replacing a defective product.
- 58 Precisely comparable historical data are not available throughout this period, but it appears that only 8 or so staffers were engaged in competition investigation and analysis in 1999.
- 59 South Africa’s Competition Commission has 91 full-time positions, and its Tribunal has 13 full-time positions – two Tribunal members and a support staff of eleven. Since South Africa’s telecomm regulator has competition law enforcement power (though not exclusive, as in Peru), South Africa’s total of 103 seems most fairly comparable to Indecopi’s 15 work-years.
- 60 Law 26285 – Law of the Progressive Demonopolisation of Public Telecommunications Services.

- 61 See World Bank, Country Assistance Strategy for the Republic of Peru, Annex C: Private Sector Strategy, para. 22 (2002).
- 62 See Part 2.2, above.
- 63 See Part 2.1.4, above.
- 64 Armando Caceras, *supra* n.21, at 123.
- 65 In Chile, the Tribunal will be an independent entity that has judicial powers but is not formally part of the judiciary. It will have five members. The President of the Tribunal, who must be a lawyer with at least ten years of experience in the competition law field, will be appointed by the President of the Republic from a list of five nominees established by the Supreme Court through a public competition. The other members (two lawyers and two economists) will be chosen as follows. One lawyer and one economist will be chosen by the President from a list of three nominees established by the Central Bank (Council of Governors), also through a public competition. The other lawyer and economist will be appointed directly by the Central Bank from candidates selected by this same public competition. The Tribunal will also have four surrogate members, selected by the President of the Republic and the Central Bank from the same lists of nominees. All candidates are required to have expertise in competition issues. The members of the Tribunal have terms of six years, and may serve more than one term. During their terms, they can only be removed for cause. Neither public servants nor officers or employees of publicly held corporations (or their affiliates) are eligible.

Competition Law and Policy in Peru

Despite transitional difficulties, Peru's citizens will be better off when the market – rather than monopolists and bureaucrats – determines the price and quality of the goods and services they seek. This report, which provides an overview of competition law and policy in Peru, was the basis of an in-depth peer review at the first meeting of the OECD/IDB Latin American Competition Forum on 14-15 June 2004.

This review is part of the OECD's ongoing co-operation with non-OECD economies around the world.

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SESSION III: COMPETITION ADVOCACY IN DEVELOPING COUNTRIES



BACKGROUND NOTE

COMPETITION ADVOCACY: CHALLENGES FOR DEVELOPING COUNTRIES

I. Introduction

It is conventional wisdom that a competition agency must do more than simply enforce its country's competition law.

. . . [C]ompetition may be lessened significantly by various public policies and institutional arrangements as well. Indeed, private restrictive business practices are often facilitated by various government interventions in the marketplace. Thus, the mandate of the competition office extends beyond merely enforcing the competition law. It must also participate more broadly in the formulation of its country's economic policies, which may adversely affect competitive market structure, business conduct, and economic performance. It must assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace.¹

It is said that it is especially important for competition agencies in developing countries to engage in competition advocacy. The economic policies in these countries are undergoing fundamental changes; markets are becoming more open; new government and regulatory institutions are being formed; trade is assuming greater influence; and state owned enterprises are being privatised. Competition policy should have a fundamental role in this transition process, but it is difficult for a new competition agency to acquire the influence and the skills that it needs for this purpose.

II. A Foundation for Competition Advocacy

There are certain prerequisites for effective advocacy by a competition agency. At least three can be identified:

1. The agency should have a significant degree of *independence* from political influence from both inside and outside the government. It has long been recognised that independence is important for the law enforcement function of a competition agency, but it is a necessary component of effective advocacy as well.

There are two aspects to independence, structural and operational. An agency that is created as a separate entity, not part of a ministry and responsible directly to the parliament or legislature for its budget, is structurally independent. All else being equal, it will enjoy relative freedom in carrying out its enforcement and advocacy functions. At the same time, however, structural independence can have ambiguous effects on competition advocacy. An agency that is entirely separate from other parts of government may lack good access to the decisionmakers in the executive and legislative branches. It might not have the influence in government circles that it would have if it were part of a powerful ministry. It might even suffer from lack of information about activities in other parts of government that would benefit from its input. In

¹ The World Bank, OECD: *A Framework for the Design and Implementation of Competition Law and Policy*, Chapter 6, at 93, 1998.

any case, however, there are many countries in which the competition agency is not structurally independent, but experience has shown that an aggressive, competent agency can acquire a significant degree of independence regardless of its place within the structure of government.

Operational independence, in the context of competition advocacy, refers both to the freedom that the agency has to make comments and otherwise to participate in government and regulatory matters, and, in the course of those activities, to take positions that are independent of those held by others in the public and private sectors. The importance of operational independence was highlighted in a comprehensive report on competition advocacy by the International Competition Network, which was based on a survey of 50 ICN member countries. The report found that operational independence can be bolstered by laws that specifically authorise the competition agency, even require it, to comment on legislation or regulation that is being proposed.² Conversely, the agency is at a disadvantage in situations where it can comment or participate in a matter only if invited or authorised to do so by another government entity.

2. The agency should have sufficient *resources* to support both its enforcement and advocacy functions. The resource issue is well understood as critical to all aspects of a competition agency's work. Competition agencies, whether in developing or developed countries, seldom have enough resources. Given this scarcity, the competition agency must constantly make decisions about how to allocate resources between its law enforcement and advocacy functions.

It is sometimes said that a successful competition advocacy effort, for example in regulatory reform, can bring about economic benefits far in excess of a single successful enforcement action, or even more than one. If that is so, then it is logical that an agency should focus most of its resources on competition advocacy, but the ICN survey showed that this is not the case. Of those countries (both developed and developing) that could identify the proportion of their resources spent on advocacy, most (62%) spent less than 20% on that activity. The remainder spent between 20% and 30%. There are good reasons for this apparent disparity, however. Agencies, especially in developing countries, lack the technical expertise necessary for meaningful participation in many proceedings. Administrative and regulatory matters often take a long time, and can consume vast amounts of resources. And, as in enforcement matters, an agency may in the end be unsuccessful in a given advocacy effort. The agency must, therefore, select its advocacy projects with care, with an eye toward the importance of a matter to the country's economy, the resources that participation will require and the likelihood of success.

But the question remains as to what is the optimal proportion of a competition agency's total resources that should be devoted to advocacy, and more to the point of this paper, whether that proportion should be relatively greater for developing countries. Those issues are explored further in the concluding section below.

² International Competition Network, *Advocacy and Competition Policy*, at vi-vii, 2002, available at <http://www.internationalcompetitionnetwork.org/> (hereafter, "ICN Report"). The survey respondents included both developed and developing countries. The ICN's work on competition advocacy is the most comprehensive to date on this topic. On its website, in addition to the report noted above, can be found the responses to the questionnaire by some of the countries, a *Toolkit for Effective Advocacy*, some case studies on competition advocacy in the telecommunications, air transport, energy and legal profession sectors, a *Report on Model Advocacy Provisions*, and a report based on a second questionnaire, *Competition Advocacy in Regulated Sectors: Examples of Success*.

3. The agency must acquire *credibility* as an effective and impartial advocate for competition. Its reputation must extend throughout the public and private sectors; policymakers and their constituents – businesses, workers and consumers – must understand how competition benefits an economy, and have confidence in the competition agency as an advocate for sound competition policy. This requires a multi-faceted effort from the agency. It is in part an educational effort – the imparting of information about how competitive markets work and the benefits that result. But at least as important is the experiential factor – there must be observable gains to consumers that derive from the actions of the agency. In other words, the competition agency must achieve some demonstrable success in both its law enforcement and advocacy efforts. That topic too is explored further below.

Suggested question for discussion

- *What strategies for acquiring the necessary independence, resources and credibility for effective competition advocacy have been successful in developing countries?*

III. Competition advocacy in practice

The opportunities for competition advocacy are numerous, and take several different forms. Below is a brief discussion of four principal forums in which a competition agency may practice advocacy: i) privatisation; ii) legislation, government policy and regulatory reform; iii) competition policy in regulation; and iv) building a competition culture. These classifications are not mutually exclusive, of course. Privatisation issues, for example, may arise in the course of regulatory reform in a given sector. Again, the emphasis in these discussions is on advocacy in developing countries.

Privatisation

The economies of many developing countries are characterised by a significant degree of participation by the state through state owned enterprises. Market reforms in these countries inevitably feature the privatisation of these SOEs. The competition agency should have a role in the privatisation process. It is important, it is often said, that publicly owned monopolies not be converted into private ones through the privatisation process. The state has an interest in maximising its revenues in privatisation sales, however, and thus it has an incentive to create and sell an enterprise that has market power. Such an entity has more value than one that is introduced into a competitive market. The competition agency is well placed to offer resistance to this tendency. It is in the agency's interest to participate in the privatisation process if only because "getting it right" at the privatisation stage – creating competitive markets from the outset – will lessen its enforcement burdens later on.

The agency can probably be most effective in this regard if the competition law applies directly to privatisation transactions. That is, the agency can review and block, or require modifications to, a proposed privatisation just as it could with regard to any other merger or restrictive agreement. This is not the case in many countries, however, which means that the agency has available only its powers of advocacy. Ideally the applicable law will permit the competition agency to participate formally in privatisations – to receive timely notice of proposed transactions, to request the submission of information and to submit formal statements or opinions regarding the competitive effects of the proposal.

The competition agency should limit its review of a proposed transaction to its competitive effects. Privatisation can be an intensely political process. There may be powerful interests arrayed in support of an anticompetitive transaction. The competition agency's review, therefore, should be professional and impartial. If a transaction is deemed to be anticompetitive, the agency should pay particular attention to the remedy that it proposes. Blocking the transaction, or a wholesale breakup of the entity to be sold, may be politically unpalatable. An acceptable alternative may be to encourage measures to lower barriers to entry in the affected market or markets, including trade barriers. The agency should also resist attempts by the privatisation agency to grant concessions or privileges to the purchasing entity in a privatisation that will interfere with the efficient operation of the market.

The privatisation process points up most acutely the dilemma facing the competition agency in a developing country. The agency's participation as advocate for competition is probably nowhere more important than in privatisation, but that process usually comes early in a country's market reforms, at a time when the new competition agency may have relatively little influence. It also presents an opportunity, however. A successful intervention by the agency in a high profile privatisation can significantly enhance its reputation and standing in the country.³

Suggested questions for discussion

- *Is it necessary for effective intervention in privatisations that the competition agency have a formal role in the process, for example that the competition law apply to privatisations? If the agency does not have such a formal role, how can it most effectively participate?*
- *Please briefly describe an instance of a successful intervention by the competition agency in a privatisation in your country. What strategies were most effective?*

Legislation, government policy and regulatory reform

This is a broad category, generally encompassing all initiatives by the legislative and executive branches of government that have a competition component.

Legislation

The procedures in many countries provide for a regular review and comment by the competition agency of proposed legislation that can affect competition. The output of a legislature or parliament can be huge; hundreds, perhaps thousands of laws may be proposed in the course of a legislative session. It is not a good use of scarce resources for the competition agency to even read, never mind comment upon, all of these pieces of legislation. Moreover, it is sometimes the case that the substance of a proposed law is effectively shaped in the drafting process, and will not be subject to significant change thereafter. Thus, there should be procedures in place that permit the agency to identify and concentrate on those relatively few proposals that present significant competition policy issues and that permit the agency to

³ See generally, ICN Report at 67-69. The ICN's survey asked the respondents to rank in order of importance the effect if their various competition advocacy activities on developing a competition culture within the country. At the top of list was "participation of the competition agency in the privatisation and regulatory reform processes." Id. At 80.

intervene in those instances early in the legislative process. This in turn may depend on the agency's ability to develop allies in the legislature who are supporters of a strong competition policy and who are willing to act on that conviction.

Suggested questions for discussion

- *What procedures does your agency employ in the legislative review process? How can such procedures be made both efficient and effective?*

Other government policies

There is a range of government policies that affect competition and markets (not including formal regulation, which is discussed separately below), to which the competition agency could provide useful input. These include trade policies, state aids and subsidies, and procurement procedures. As noted above, trade can provide important competition in newly opened markets in developing countries. The competition agency is well placed to promote trade liberalisation, but this position is likely to be controversial as well. Domestic producers and sellers, who may enjoy positions of dominance and who are well connected politically, will resist the lowering of barriers to efficient foreign competitors. Similar issues exist regarding state aids and subsidies to powerful domestic businesses. In this regard, however, there may exist policy reasons unrelated to competition, including social concerns such as protection for local workers, offered in justification for protectionist measures and state subsidies. The competition agency cannot ignore these issues; it can urge, however, that these restraints be strictly related to restructuring programs, that they be temporary and that policymakers consider more direct ways of achieving social goals rather than by interfering with the efficient operation of markets.⁴

An area of government policy in which the competition agency can especially helpful is in procurement policy. Governments are notoriously inefficient buyers. Their procurement procedures may invite collusion and corruption. They may reject competitive procedures in favour of long-time suppliers. The competition agency should be active in advocating reforms in procurement procedures that introduce market disciplines. These reforms will translate directly into savings for the country's citizens. Successful advocacy in this arena will also be visible, and will contribute to the enhancement of the agency's reputation.

Competition advocacy in government policymaking can extend beyond the national government, to regional and local governments as well. The economic power and influence of these government bodies varies across countries, but in some it is significant. Local governments may be participating directly in local markets through publicly owned enterprises, or they may exert significant regulatory control on these markets. Such activities are worthy subjects for advocacy by the competition agency, to the extent that the agency cannot intervene directly through the competition law.

Suggested questions for discussion

- *What role should the competition agency have in the development of trade policy? How can it counteract powerful domestic business interests that support unnecessary restraints on imports?*

⁴ See, World Bank, OECD, *supra*.

- *Does your agency have a formal programme for assisting government bodies in fashioning effective procurement practices? Please briefly describe it.*
- *In what other areas of government policymaking has your agency participated as competition advocate?*

Regulatory reform

One of the most significant forums for competition advocacy is in regulatory reform or deregulation, and again this has special importance in developing countries. The economies of most less developed countries are characterised by state owned monopolies in infrastructure industries, including telecommunications, electricity, railroads, air transportation, ports and maritime transport and petroleum and natural gas. Other markets, including financial markets, are also characterised by a high degree of government participation and control. Privatisation and deregulation of these sectors is usually a priority in countries that are progressing toward a market economy, and for obvious reasons it is critical that these processes incorporate sound competition policy principles.⁵ There are at least three subject areas that should receive the attention of the competition agency during the regulatory reform process:

- Privatisation. As discussed above, the tendency of governments in the privatisation process is to confer market power, if not monopoly, upon the entity to be divested in order to maximise its value. It is now understood, however, that competition is possible in almost all markets; natural monopoly exists in only a few network infrastructure contexts, such as electricity and natural gas distribution and railway track and signaling infrastructure. Thus, it should be the goal of the competition agency to introduce as much competition as possible into these newly liberalised markets in the privatisation process. The opportunity should exist for multiple competitors in those segments where competition is possible, and attention also should be given to separation of the ownership of natural monopoly and competitive entities within a sector.
- Application of the competition law. Because competition can exist in most markets it is logical that the competition law should have equally broad application. It is not uncommon, however, that exemptions from the competition law are created for certain aspects of operations (such as mergers) in newly liberalized, regulated markets. At the extreme, complete exemptions are created for some sectors (banking sometimes is one). It is obviously a function of competition advocacy to resist this tendency, again in a manner consistent with good governance. The competition law should apply in most situations. Of course, regulation is clearly necessary in some markets, including both economic regulation (prices, access) and “public interest” regulation (safety, universal service, environmental, financial viability, etc.). There will be tension between regulation and competition policy where they meet, and it may be necessary to restrict the application of the competition law in some circumstances, but this should be done only when it is necessary to permit a legitimate regulatory scheme to operate.

⁵ The economic benefits from regulatory reform are well known. Studies have shown that regulatory reform results in higher productivity, lower prices, the elimination of shortages, the stimulation of innovation, while ultimately boosting GDP. OECD, *Report on Regulatory Reform, Volume II*, 1997.

- Structural relationship between regulatory bodies and the competition agency. The competition agency should have the opportunity to provide regular input into the work of regulatory bodies when it is useful to do so. This is, fundamentally, a structural issue. What role should the competition agency have in the formation and application of regulatory policy? Should that role be formalized in laws or regulations, or can it be developed on an ad hoc basis? There is no structural template that can be applied in all countries and situations. There is anecdotal evidence, however, found in the ICN Report, that the competition agency is more effective as an advocate in regulatory matters when its role is formalised, that is, laws or regulations require that the agency receive timely notice of relevant regulatory decisions or rulemaking and that the agency can comment or participate in the proceedings as a matter of right.⁶ But such a formal structure apparently exists in a minority of countries.⁷ The evidence shows that productive relationships between the competition agency and regulators can be built informally, but such a process takes time and energy, commodities that are in short supply in competition agencies in developing countries.

Suggested questions for discussion

- *What are effective strategies for ensuring that the competition law is given the maximum application in sectors where there is also regulation? For ensuring that the competition agency has access to regulators to advocate for competition?*

Competition policy in regulation

This activity refers to participation by the competition agency in the rulemaking and implementation functions of a regulatory body, and is to be distinguished from regulatory reform, discussed above, which involves the fundamental restructuring of an industry and its regulatory scheme. It would seem that there are limited opportunities for competition agencies to participate directly in regulatory activities, and this may be especially true for agencies in developing countries. Competition agency officials often lack the industry expertise that is necessary for providing useful input into technical regulatory decisions. But there may be some matters before a regulator that fundamentally involve competition policy, and this is especially true where, as discussed above, the industry is exempted, in whole or part, from the application of the competition law. A regulator may have primary responsibility for merger control in the sector, for example. It is clear that the competition agency should participate in matters of this type as much as it is legally and practically possible.

Apart from participating in specific cases, there may be opportunities for the competition agency to engage in broader studies or evaluations of regulated sectors. The regulator may initiate such comprehensive review, and this would be a good opportunity for the competition agency to present the case for maximising competition in the sector. The competition agency could itself sponsor a conference or seminar on competition in a particular regulated sector, at which both industry and competition experts, from both within the country and abroad, could speak and present papers.

⁶ ICN Report at 58-67.

⁷ Id. at 63.

One of the principal activities of the OECD's Competition Committee is to study the application of competition policy in regulated industries. One of the Committee's working parties regularly conducts policy roundtable discussions on competition policy in regulated sectors. Recent roundtables have been conducted in the airline, airport services, banking, broadcasting, electricity, insurance, natural gas, postal services, railroad, road transport and telecommunications sectors. A roundtable also studied the topic of the relationship between regulators and competition authorities. The documentation from these roundtables is an excellent resource for competition agencies in their advocacy activities. All of it is available on the OECD website, at www.oecd.org/competition. The OECD can also provide a CD-ROM containing this documentation.

Suggested questions for discussion

- *What types of regulatory matters are most likely to benefit from intervention by the competition agency, and how can the agency decide when it should become involved in a matter?*
- *What other types of competition advocacy are useful in regulated industries? Has your agency sponsored or participated in industry-wide conferences or reviews?*

Building a competition culture

A cornerstone of a successful market economy is the existence of a “competition culture” within a country – an understanding by the public of the benefits of competition and broad-based support for a strong competition policy. An important focus for competition advocacy by the competition agency is the development of this competition culture. All parts of a society – consumers, businesspeople, trade unions, educators, the legal community, government and regulatory officials and judges – should be addressed in this effort. This proposition is now widely accepted. Competition officials in most countries are diligent about informing their citizens about the value of competition and of their efforts in promoting it.⁸

This paper will not dwell on the mechanics of a programme for developing a competition culture – there are several resources that can be consulted for that purpose.⁹ The tools that can be employed in the effort are generally well known, and include: publication of competition agency decisions, promulgation of enforcement guidelines, publication of pamphlets and information booklets for the general public, publication of annual reports, publication of market studies and of technical papers, regular communications with the press and electronic media, Internet web sites, speeches by senior enforcement officials, and seminars and conferences, including workshops for judges.

Building a competition culture is important in every country, but once again it seems that it is especially critical for developing countries. There is more education to be done in these

⁸ See, for example, a description of Jamaica's experience, in Barbara Lee, *Competition Advocacy for a Knowledge-Based Society*, 2002, available at www.jftc.com/news&publications.

⁹ They include the work done by the ICN in this area, cited above. Recently the OECD Competition Committee held a roundtable discussion on Communication by Competition Authorities. The documentation from that roundtable is available as described above.

countries because, in most cases, the public has not been heavily exposed to competition and competitive markets. The ICN survey bears this out. The responses indicated that consumers in developed countries are more familiar with the benefits of competition than are those in developing countries.¹⁰ Fortunately, there is good evidence that competition officials in developing countries understand the importance of competition advocacy for this purpose. In many developing countries there exist sophisticated programmes targeted at building a competition culture.

Suggested questions for discussion

- *Many developing countries employ some or all of the communications tools listed above. Is there anything more that can be done? Is it realistic to expect that a developing country can build a competition culture quickly, or is it essentially an evolutionary process?*

IV. The Relationship Between Competition Advocacy and Competition Law Enforcement

A commonly accepted definition of competition advocacy is that it includes all activities of a competition agency that are intended to promote competition apart from those that involve enforcement of the competition law.¹¹ Such a definition suggests that advocacy and enforcement are mutually exclusive, but they are not. In many ways they are interdependent. Thus, as noted above, effective competition advocacy in the privatisation and regulatory reform processes can favourably impact enforcement by creating competitive markets, in which future abuses of dominance and collusion are less likely to occur. Success in building a competition culture has obvious benefits for enforcement: businesses will more readily comply voluntarily with the competition law; businesses and the public will more willingly co-operate with enforcement actions, by providing evidence and the like; and policy makers will more enthusiastically support the mission of the competition agency, in particular by giving more resources to it.

Perhaps less well appreciated is how competition law enforcement can affect competition advocacy. Noted above is the importance of the agency's credibility and reputation to successful competition advocacy efforts. Such credibility cannot be gained through advocacy alone; it must be enhanced by success in enforcing the competition law. It is imperative that the agency select and successfully prosecute cases that are widely viewed as beneficial to consumers, whether they involve destructive cartels, high profile, anticompetitive mergers or abusive conduct by notorious dominant firms. In the end, a competition agency's reputation will be built largely upon its record in enforcing the competition law, and this reputation will significantly affect its influence as an advocate in other forums.¹²

¹⁰ ICN Report at 79.

¹¹ ICN Report at 25.

¹² See, ICN Report at 75-76; but see, William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 Brooklyn Journal of International Law, 408 (1997), in which the author points out the great difficulties facing new competition agencies resulting from the lack of experience and resources, and suggests a gradualist approach to law enforcement by these agencies.

Suggested questions for discussion

- *Do you feel that your agency can be successful in competition advocacy without having built some credibility on the enforcement side?*
- *How can a competition agency rationally allocate its resources between enforcement and advocacy? Indeed, is it necessary to do so, or can the agency essentially be opportunistic, selecting the most promising of either type of matter as they arise?*

V. Conclusions – challenges for developing countries

It is important that competition agencies in all countries engage in competition advocacy, but the discussions above suggest that it is especially critical for those in developing countries to do so. There are certain events that occur in the formative stages of a market economy, including privatisation and regulatory reform, which will significantly impact how the new economy develops. It is better to accomplish these changes properly at the outset than to try to amend them later, and the participation of the competition agency as an advocate for competition has obvious value to that end. Further, most developing countries lack suitable competition cultures, and it is important for the agency to begin the process of building one. These circumstances suggest that competition agencies in developing countries should be relatively more active in competition advocacy than their counterparts in developed countries. At the same time, however, they may lack the foundation for doing so – they may not yet have acquired the independence, the resources and the credibility necessary for effective advocacy.

There is no obvious solution to this dilemma. The agency must simply exercise good judgment in selecting and pursuing its advocacy projects. It must seek out matters that are economically important, politically visible, that will not occupy too many resources and in which the agency has a reasonable chance of success. It must give ongoing attention to building a competition culture through aggressive public relations and dissemination of information. And importantly, it must not neglect its law enforcement responsibilities. It must exercise the same care and expend at least the same amount of energy in finding and prosecuting violations of the law as it does in its advocacy efforts.