

# Peer Reviews of Competition Law and Policy in Latin America: A Follow-up

ARGENTINA, BRAZIL, CHILE, MEXICO, PERU



# **Peer Reviews of Competition Law and Policy in Latin America:**

## **A Follow-Up**

ARGENTINA, BRAZIL, CHILE, MEXICO, PERU

INTER-AMERICAN



DEVELOPMENT BANK



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## *Foreword*

The OECD has been active in promoting competition policy among countries in Latin America and the Caribbean and formed a partnership with the Inter-American Development Bank to further this aim. The principal feature of this partnership has been the annual Latin American Competition Forum, at which senior officials from countries in the region discuss, in roundtable fashion, issues of competition policy of interest to them. Each of the first four Forums featured a peer review of one country in the region.

“Peer review” is a core element of OECD work. The mechanisms of peer review vary, but it is founded upon the willingness of a country to submit its laws and policies to substantive questioning by other members of the international community. This process provides valuable insights to the reviewed country and promotes transparency and mutual understanding for the benefit of all.

There is an emerging consensus on best practices in competition law enforcement and in applying competition policy principles to regulatory systems. Countries now co-operate regularly in such areas as anti-cartel enforcement and international mergers. Peer reviews are an important part of this process.

The OECD and the IDB are pleased to have participated in this partnership for the promotion of competition policy in Latin America and the Caribbean. This work is consistent with the policies and goals of both organisations. Sound competition policy will promote economic growth and prosperity, bringing benefits to consumers in the region and substantially improving the business climate.

This volume comprises follow-up work on the four Latin American peer review reports which have been produced to date in the framework of the Latin American Competition Forum as well as the peer review of Mexico held in the OECD Competition Committee. This work assesses the impact

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that the peer reviews have had on competition policy and on the competition agencies in the countries concerned. A summary of the discussion at the 2007 meeting of the Latin American Competition Forum is also included.

Both organisations would like to thank the governments of Argentina, Brazil, Chile, Mexico and Peru for the co-operation of their officials in this process.



Bernard J. Phillips  
Head Competition Division  
OECD



Carlos M. Jarque  
Representative in Europe

IDB

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\* The original peer reviews on which this study is based, can be found in *Competition Law and Policy in Latin America: Peer Reviews of Argentina, Brazil, Chile, Mexico and Peru* which is available at [www.oecd.org/bookshop?9789264015142](http://www.oecd.org/bookshop?9789264015142)



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## PEER REVIEWS OF COMPETITION LAW AND POLICY IN LATIN AMERICA: A FOLLOW-UP

by the OECD Secretariat\*

Beginning in 2003 the Inter-American Development Bank and the OECD collaborated on a series of peer reviews of competition policy in Latin America. Five countries were reviewed, four in the Latin American Competition Forum and one in the OECD Competition Committee: Chile - 2003, Peru – 2004, Mexico – 2004, Brazil – 2005 and Argentina - 2006.

For the 2007 Latin American Forum it was decided to conduct a follow-up of these reviews – to try to assess the impact that they had on competition policy and on the competition agencies in those countries. To this end, short questionnaires were sent to each of the five. A generic questionnaire (they differed only slightly) is attached to this paper as an appendix. The questionnaires cited the recommendations that each peer review report contained and asked the respondents to indicate whether and to what extent the recommendations had been implemented, and if further implementation was planned, to describe those steps. A few other questions asked for general comments about the impact of the peer review. *The complete responses are provided in a separate document.*

This paper summarises the responses. The first section draws some general conclusions from them. In the following sections each country's response is separately summarised. The format in those sections is the same: a recommendation or set of recommendations from the peer review report is described, followed by a description of the country's response to it.

There are several common themes in the five peer review reports. Each is discussed separately below. First, two general comments. The five respondents all praised the peer review process and the reports. The reports were used in several ways: internally within the competition agency as a

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\* This paper was drafted by Mr. John Clark for the OECD Secretariat.



guide to best practices; as support for needed reforms requiring action from outside the agency, such as new legislation or larger budgets; and more generally in competition advocacy, such as by publishing the report on the agency's web site or in including it in communications with the press.

Second, the recommendations of the reports could be classified into two types: those that require new legislation and those that could be implemented unilaterally by the competition agency. For obvious reasons, the latter were easier to accomplish, and for the most part they were, at least in part.

Success with those that required legislation was mixed. In Mexico there were sweeping amendments to the competition law in 2006, two years after the peer review. The peer review had significant influence in shaping the legislation, and as a result that country could report substantial success in implementing the report's recommendations. In Chile, new legislation was enacted approximately simultaneously with the peer review, with the result that the report contained few recommendations requiring further law making. (The peer review report was a useful input into some of the provisions of the new law, however.) In Argentina and Brazil, on the other hand, new legislation was pending at the time of the review but it has yet to be acted upon. As a result, many of the recommendations in those reports have not been accomplished, though strong efforts are still being made to enact the necessary laws. In any case, as in Mexico and Chile, the peer review reports in Argentina and Brazil helped to shape those legislative proposals. In Peru, one legislative initiative recommended by the peer review report, to provide for merger control, failed.

## **Structure and independence of the competition agency**

Independence of the competition agency, a desirable goal, is elusive. It is partly a function of structure. An agency that is created as a separate entity, not part of a government ministry, answerable to the legislature for its budget and not to a ministry, is inherently more independent than one that is integrated more closely into the government. Other structural factors that promote independence include longer terms of office for commissioners and high level officials, a requirement that these appointed officials have professional qualifications suitable for the office, a requirement that appointments made by the government be approved by the legislature or an independent review commission, and a stable, permanent cadre of professional employees in the agency. But these structural attributes alone cannot guarantee independence. A government intent on unduly influencing the competition agency can do so.

The independence issue was raised in most of the peer review reports. In Argentina and Brazil there are definite structural impediments to the independence of the competition agencies, which are described in the sections below on those countries. Fixing these problems requires new legislation, which as noted above has not yet been enacted. The Mexico report also recommended two structural changes to enhance the agency's independence, but these recommendations, unlike most of the others in the Mexico report, have not been implemented. The Peruvian agency, on the other hand, has a great deal of structural independence, but the Peru report raised concerns about whether the agency was independent in fact. In its response to the questionnaire Peru disputed these findings.

## **Budget and resources**

This was a problem for each of the five countries, although in some it was more acute than in others. Each of the reports recommended budget increases for the competition agency, and with one exception there were increases, some substantial, in the years following the report. Whether they were adequate is another question, which cannot be answered in this summary review. It seems that this is one problem for which a peer review report can be put to good use. The countries stated that the report, sponsored by two respected international agencies, was useful in persuading the legislature or ministry responsible for the budget to increase it.

## **Cartels**

This topic too was raised in all of the reports. For several years the OECD has stressed that prosecuting hard core cartels should have the highest priority in a competition agency. It is not surprising that the OECD reviewers found the anti-cartel efforts wanting in some way in all of the five countries, at the same time recognising that building a vigorous anti-cartel programme is difficult. In general, the reports found that there had been few cartel investigations instituted and fewer successfully prosecuted; that leniency programmes were either non-existent or non-productive; and that the fines and other sanctions that had been imposed in successful cases were not large enough to provide a sufficient deterrent to future cartel activity. The recommendations were both general – to give a higher priority to prosecuting cartels and to begin to impose stiffer sanctions – and specific, such as adding necessary investigative tools, clarifying the legal standard applicable to cartels (hopefully adopting the *per se* rule or its equivalent), and making changes to leniency programmes to make them more effective.

Many of these recommendations were implemented; some, requiring legislation, have not been, but they have been proposed. For the most part it is too early to tell whether these changes have borne fruit, but some countries reported increases in the number of cartel investigations that they have underway.

## **Mergers**

This topic was also addressed in all of the reports but in different ways, because the countries differ significantly in the way that they control mergers, if at all. Mexico's form of merger control resembles that of many OECD countries, that is, it has a specific merger control provision in its competition law and it employs mandatory pre-merger notification. Peru, on the other hand, has no merger control. Chile has no separate merger control provision in its competition law, but the conduct provisions in the law are considered to apply to mergers. It does not have mandatory merger notification. In both Argentina and Brazil the principal issue is that merger notification is mandatory but not pre-merger, which has introduced inefficiencies in their review processes.

The recommendations in the reports varied according to the situation in each country. In general, they tended toward the adopting the model described above, having a specific merger control provision in the law accompanied by pre-merger notification employing rules that are consistent with those articulated by the International Competition Network and the OECD. This requires new legislation, of course, for which generating political support has proved difficult. A second theme in the recommendations was to make the merger review process faster and more efficient. Some countries reported progress in this area.

## **Guidelines**

Most of the peer review reports recommended that the competition agency issue or update guidelines elaborating the standards and procedures that it uses in such areas as mergers and horizontal agreements. In almost all cases case those recommendations were implemented.

## **Case handling procedures**

A recurring theme in the reports was that processing conduct cases and investigations (restrictive agreements and abuse of dominance) was inefficient and took too long. In countries in which private parties have the

right to initiate investigations and cases in the competition agency it is inevitable that many of these complaints will not have merit. If these cases are not handled efficiently they will clog the agency's docket and occupy too many of its scarce resources. An obvious response to this problem is to streamline the procedures that the agency uses to deal with these complaints, and especially to make it possible for the agency to summarily dismiss those that are clearly without merit. Of course, such procedures must be consistent with national due process requirements, a conflict that could be difficult to resolve.

An efficient means for resolving cases that do have merit is to settle them – to reach agreement with respondents on the remedies that will be imposed, obviating the need for formal, adversarial proceedings and eliminating the delays and risks associated with judicial appeals. At least three of the peer review reports included recommendations for increased use of settlement procedures. Settling cases is not common in most Latin American countries, however, and it may be some time before there is widespread use of these procedures.

## **Judicial review**

In some of the countries the reports identified significant problems associated with judicial review of decisions by the competition agency. Sometimes it took several years for cases to wend their way through the courts. Other problems related to laws that permit third parties to bring lawsuits in competition agency cases, or to challenge agency actions in collateral suits in court. These lawsuits can sidetrack an agency investigation and cause long delays. In Mexico the problem of collateral suits is particularly acute.

These problems are especially intractable, in that they are rooted in longstanding traditions and procedures of a third branch of government, and they may also involve constitutional issues. One recommendation for easing these problems is to create a specialised court that would hear competition cases. Such a step requires new legislation, of course, which probably would be difficult to obtain. Other recommendations relate to improving an agency's record in court, including providing more transparency and better analysis in agency decisions, improving relations between the agency and the courts and undertaking efforts to educate judges about the principles of competition analysis. These latter steps are easier to implement, and countries have begun doing so when they are indicated.

## **Competition and regulation**

This issue receives attention in all peer review reports. It is now well understood that competition is possible in all sectors, including those that are subject to regulation because some part of them is a natural monopoly. The competition law should apply in these sectors, save in those areas where it is fundamentally inconsistent with the regulatory scheme, for example in regulating the price of a product or service supplied by a true natural monopoly. Competition and regulation may overlap in other areas, for example in matters involving access. In this situation there could be tension between the sector regulator and the competition agency, but problems of this sort can be minimised through regular interaction between the two agencies, perhaps formalised in a co-operation agreement. Aside from applying the competition law in regulated sectors, the competition agency can have another role in those industries, that of providing competition-related advice on matters within the regulator's jurisdiction. Here the competition agency must be selective, however, careful to become involved only when it has the necessary resources and expertise.

There was significant variation across the five countries as to the involvement of the competition agency in regulated sectors. In Chile that had been the agency's principal activity; it had been less active in bringing competition cases in unregulated industries, though that was changing. In other countries the competition agency had seldom been involved in these sectors. In some countries the law explicitly provided for involvement of the competition agency in regulatory decision making. In others the agency could participate on a less formal basis. In general, the recommendations in the peer review reports urged the competition agencies to become more active in applying the competition law in regulated sectors, where they had not been doing so, and also to establish closer relationships with sector regulators. The agencies generally responded positively to these recommendations, especially noting that they were interacting more frequently with their sister sector regulators.

## **Competition advocacy and a competition culture**

Selective participation in regulatory rule making is one form of competition advocacy, but there are many others, including commenting on legislation, working with regional and local governments to eliminate unnecessary, anticompetitive regulation and entry restrictions, and educating various constituencies – the consumer, legal, business, labour and education communities – and the public at large on the benefits to them of competitive markets. This important function of competition agencies always receives

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attention in peer reviews. This was uniformly a bright spot in the five Latin American reviews; all of the agencies were judged to have active, effective competition advocacy programmes. Nevertheless, the reports noted that even more could be done, and recommended that agencies expand their advocacy efforts where resources permit.

At the same time, a finding in most of the reports was that the competition culture – the public’s appreciation for competition and its support of the competition agency – remained weak. This apparent anomaly might be explained in at least two ways. First, competition policy is still relatively new in most of these countries. It will take time and a sustained effort by the competition agency and by other parts of government for a competition culture to ripen. Second, perhaps not enough attention has been paid to the importance of successful law enforcement to competition culture. Arguably, nothing is more effective in generating support for competition than successful prosecution of important cases under the competition law – especially hard core cartel cases. Through such cases consumers can understand how they can be harmed by anticompetitive conduct and how they can benefit from a strong competition policy.

## CHILE

(2003)

Chile was the first country to be reviewed in this series. The review took place during the first Latin American Competition Forum, held in April 2003. A unique aspect of this review is that Chile was in the process of adopting significant amendments to its competition law at the time the review was held. The new amendments were published in November 2003. The Peer Review Report was not published until January 2004, and it included an addendum describing the major changes brought about by the amendments.

The Report described Chile as a “quiet pioneer” in competition policy in Latin America. It first adopted a competition law in 1959, and its second law, adopted in 1973, remains in effect, having been amended significantly in 2003. Throughout this 30 year period the economic policies of Chile’s governments – a military government until 1990 and a civilian government thereafter – focused on liberalising the economy. Price controls were removed and, in the late 1980s and early 1990s, infrastructure monopolies were privatised.

The structure of competition law enforcement under the 1973 law was unusual. It consisted of an enforcement agency, the National Economic Prosecutor (Fiscalía Nacional Económica – FNE), which conducted investigations and instituted cases, a specialised competition tribunal, the Antitrust Commission, and several Preventive Commissions, whose role was mostly advisory, although they had some powers (seldom used) to require the FNE to initiate investigations and to issue enforcement orders. The principal reform brought about by the 2003 amendments was to replace the Commissions with an independent, five-member Competition Tribunal.

In the early years of its existence the FNE was not active. Later it became more so, but its evolution was unlike that of most competition agencies in developing countries. As Chile’s infrastructure monopolies were privatised, the FNE, through the Antitrust Commission, concentrated its efforts in these sectors. Through both cases and competition advocacy

the competition agencies achieved some notable successes in telecommunications, electricity, water and sewer services and natural gas. On the other hand, the FNE brought relatively few “traditional” competition cases – restrictive agreements, abuse of dominance and mergers – in unregulated industries. That was beginning to change at the time of the peer review, however, and it has changed even more since then.

As noted above, the peer review report was published a few months before the adoption of significant new amendments to the competition law. The proposed amendments had already been submitted to the legislature, but it could be said that the report had some beneficial effect on the final version of the new law. As a result, however, the recommendations in the Peer Review Report were relatively fewer and less specific than those in the other reports. Still, there were several, and they are described below, as is Chile’s response to them. It should also be noted that Chile is again considering amending its competition law, which could be accomplished by January 2008. The proposed amendments are noted where appropriate.

## **The new Tribunal**

### ***Recommendations***

The 2003 amendments provided that the members of the new Tribunal were required to work only part time, specifically a minimum of two days per week. Their compensation would be commensurate – less than that for a full time position. The Report noted that this was an improvement over the situation that existed previously, but it suggested that Chile consider making the positions full time, if only because the job would be more attractive to the most highly qualified professionals in the field.

### ***Response***

Chile responded that in the three years of the Tribunal’s existence there had not been any significant problems associated with the part time status of commissioners, but that nevertheless the option of making the position full time with a higher salary is currently being considered as a part of the new amendment package.



## Clarifying legal standards

### *Recommendations*

The Report noted that there was some ambiguity about the legal standards that applied to various types of conduct under the law that existed prior to the 2003 amendments. It was not clear, for example, whether cartels were subject to a *per se* rule. The Report recommended that this confusion be clarified, and that the FNE assist in this process by publishing guidelines and policy statements, as well as by publishing decisions and reports on its website.

### *Response*

Recent decisions by the Tribunal have articulated applicable legal standards more fully. It is still not clear that the *per se* rule or its equivalent applies to cartel conduct, but there is a case pending in the Supreme Court that should help to clarify that question. Also, the FNE publishes on its website summaries of all decisions and other reports and documents generated in the office. The FNE recently published an “Internal Guide for the Analysis of Horizontal Concentration Operations.”

## Settling cases

### *Recommendations*

A defect in the 1973 law was that there were no procedures for the FNE and a respondent to agree to the resolution of a case, short of requiring a full adjudication by the Antitrust Commission. The 2003 amendments partially addressed this problem by providing for a settlement procedure, the result of which would have to be accepted by the Tribunal. It was not clear, however, whether the new procedure extended to agreement on fines, as well as consent orders, and the Peer Review Report recommended that, if necessary, new legislation be enacted that would include fines within the process.

### *Response*

This recommendation has not been implemented, though Chile responded that there is no specific prohibition of agreements on fines. There are no proposals to include such a procedure in the new amendments under

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consideration, but there is discussion of adopting procedures that would permit the FNE and respondents to enter into extrajudicial agreements.

## **Competition advocacy**

### ***Recommendation***

As noted above, the FNE has long been active in competition advocacy in infrastructure industries, where it has had notable success. The Report recommended that the FNE extend its advocacy to other activities of government, and also that it engage in a more broad-based effort to explain how competition law and policy benefits consumers, businesses, and the economy as a whole.

### ***Response***

The FNE has set as one of its main goals the increase of the scope of its competition advocacy. The agency has provided comments on legislation, and it has undertaken to establish closer relationships with sector regulators. It has also begun working with regional governments and regulators. Chile's response noted that the competition law establishes the power in the Tribunal to initiate a procedure that could result in a report or request to the Executive to repeal or modify a law or regulation that unnecessarily impedes competition, but the response did not state whether this provision has been used yet.

## **Law enforcement in non-infrastructure markets**

### ***Recommendation***

As noted above, the competition agencies had concentrated their efforts in infrastructure markets; there had been relatively little "traditional" enforcement activity in non-infrastructure markets. The Report recommended that the FNE increase its efforts in this second category.

### ***Response***

The FNE has done so, including in retail, transport, health and credit markets.

## Mergers

### *Recommendations*

The competition law does not specifically prohibit anticompetitive mergers, but the general provisions of the law apply to this conduct. Still, there had been few merger cases prosecuted by the agencies in the years preceding the Report. Moreover, merger notification is not mandatory, though voluntary notification is encouraged. The Report recommended that Chile consider requiring pre-merger notification – a requirement that mergers exceeding specified size thresholds be notified to the competition agency before the merger is consummated, and that the parties refrain from consummating for a specified period after notification, to permit the competition agency to evaluate the transaction and, if necessary, to impose a structural remedy.

### *Response*

Chile responded that its voluntary notification regime is working well – that it provides sufficient incentives for merging parties to notify their transaction to the FNE. There is some discussion in Congress about enacting a pre-merger notification requirement, but that proposal does not yet have sufficient political support.

Under the current law the only remedy for the FNE in the case of a merger that it considers to be unlawful is to proceed in an adversarial proceeding in the Tribunal, a process that is cumbersome and not well suited to the fast-moving pace of mergers. There is under consideration an amendment that would permit the FNE to initiate a “consultation,” or “non-contentious procedure” in the Tribunal, the result of which would be binding. Currently, only the merging parties can initiate such a non-contentious procedure, by means of their notification.

## Hard core cartels

### *Recommendations*

The competition agencies had not been active in prosecuting hard core cartels. The Report recommended that Chile give these cases a higher priority. It recommended such measures as imposing higher fines on cartel operators and applying a *per se* rule to this conduct.

### *Response*

Chile is in the process of implementing these recommendations. Under consideration are amendments to the law that would permit the FNE to conduct dawn raids after receiving judicial approval and to create a leniency programme. The amendments would also increase the maximum fines applicable to cartel conduct. The FNE has stepped up its anti-cartel activity, having brought four cartel cases to the Tribunal since 2005.

## **Budget**

### *Recommendations*

The Report noted that the FNE had been fairly small until 1999, when it received funding permitting it to approximately double its size (to about 60 positions). The Report recommended further increases, however, especially in light of the new responsibilities that the agency would have if the Report's recommendations were implemented.

### *Response*

The FNE's budget was increased in 2006, permitting the agency to add employees and to obtain expert economic and technical assistance for use in its cases in the Tribunal. Further, the President has announced that the agency will receive a "considerable and substantial increase" in 2008, which will be used both to enhance its law enforcement capabilities and its competition advocacy at the national and regional levels.

## **General comments**

Chile was very positive in its responses to questions 3 and 4 of the questionnaire, which asked for comments about how the Peer Review Report was used and its usefulness in bringing about improvements in competition policy in the country. The Report was disseminated broadly upon its publication; it was on the FNE's web site for a year and copies were sent to consumers associations, law firms, economists, large companies, the media and to other government agencies. The Report "has been and is still an important technical tool that the FNE uses for discussion and internal analysis. Its approaches have served as a benchmark to evaluate the FNE's actions and objectives." It has also been useful in the ongoing discussions relating to possible new amendments to the competition law.

## PERU

(2004)

Peru was the second country of the five to be reviewed; it was done in the 2004 Latin American Competition Forum. The Peer Review Report was published in October 2004.

Like most of the other countries reviewed in this series, Peru undertook significant market reforms in the early 1990s, which resulted in, among other things, a new competition law and a new enforcement agency. Peru's Free Competition Law became effective in 1991, but the real beginning came in 1993 with the creation of a new government agency, the Institute for the Defence of Competition and Intellectual Property, or Indecopi. Indecopi was given a substantial degree of autonomy and a broad portfolio, much broader than just competition law enforcement, which makes it unique among national competition agencies. Under the agency's umbrella, in addition to competition policy, are market access, unfair competition, consumer protection, technical and regulatory standards, antidumping and subsidies, patents, trademarks and copyrights and bankruptcy.

Within Indecopi, competition investigations and cases are handled by the Competition Commission, one of seven commissions and three offices in the agency. Its decisions can be appealed to the Competition Chamber, one of two chambers comprising the Tribunal for the Defence of Competition and Intellectual Property. The Competition Chamber, which handles appeals from all commissions, is commonly called the Competition Tribunal.

In addition to the competition law there is a second law that impacts competition policy in Peru, the Market Access Law, which bans government rules that impose unauthorised and unwarranted barriers to market entry. This law is enforced by a separate commission within Indecopi, the Market Access Commission. That commission's decisions are also subject to appeals to the Competition Tribunal.

The Peer Review Report noted that after Indecopi began operations in 1993 it quickly acquired a reputation, unusual in Peru, for transparency and efficiency. In its early stages, most of its work in competition policy was competition advocacy and education; Indecopi instituted few competition law enforcement cases, though there were some notable successes. Despite Indecopi's efforts in competition advocacy, however, there was not widespread support for competition policy; public understanding of the benefits of competition for consumers was weak. According to the Report, beginning in 2000 Indecopi's reputation for independence and competence in matters of competition policy began to suffer. It also faced serious budget problems. The Peer Review Report noted these and other issues. Its recommendations and the responses to them are summarised below.

## **Independence and competence of the Free Competition Commission and the Competition Tribunal**

### ***Recommendation***

The Report described some changes in high level personnel in Indecopi carried out by the government in 2002 and 2003 that suggested that the government intended to assume greater control over the agency. One result of this turnover was that of the four members of the Competition Tribunal only the President was understood to have competence in competition law and policy. It was also true that members of the Competition Tribunal and the Competition Commission could be removed at any time without cause.

The Report recommended that legislation be enacted revising the process for selecting the members of the commissions and the Tribunal (referred to generically as "quasi-judicial bodies"). They should be selected for specific terms, removable only for cause, and should be required to meet specific professional qualifications for their positions.

### ***Response***

Peru's response to the questionnaire takes issue with the findings in the Report that the competition law enforcement bodies lack independence. Peru considers that the commissions and chambers have "total autonomy" in decision making in matters of competition and intellectual property. While it is apparently true that these officials do not serve for fixed terms and are subject to removal without cause, members typically serve for relatively long periods – often five years – before they resign voluntarily. The appointment of members of these institutions is subject to the approval

Indecopi's Board of Directors, whose three members are appointed by President of the Council of Ministers and the Minister of Finance. Members of the Competition Tribunal are appointed by the President of Peru upon the recommendation of an Advisory Council, whose 12 members represent diverse sectors of business and civil society.

As for the technical qualifications of members of the Tribunal and the commissions, Peru's response states that members are selected on the basis of their experience and knowledge of competition policy. On the other hand, multidisciplinary composition is the norm in Peru; thus, members of a commission or chamber may have different but complementary expertise, such as competition policy, economics or procedural law.

Finally, the President of Indecopi has commissioned a study group to conduct an internal evaluation of the organisation, with the goals of enhancing its efficiency and strengthening public confidence in its autonomy.

## **Budget**

### ***Recommendations***

In 2003 Indecopi became self-financing; at the time of the Report it received no public financing, which in any case had never exceeded 30% of its budget. The principal source of its revenues was from the fines that it imposed, which accounted for about 60% of its budget. The remainder came mostly from fees that it charged for intellectual property registrations and bankruptcy work and from fees paid by private parties who filed complaints with Indecopi on competition matters.

In 2003 the Free Competition Commission had an authorised staff of seven professionals; the Market Access Commission was authorised four. This does not count the commissioners themselves, who were (and are) part time officials. To this total one should add portions of the staff of the Economic Policy Department of Indecopi, which provides economic analysis to the Competition and Market Access Commissions, and of the Competition Tribunal, which as noted above hears appeals from these commissions as well as others. This yielded a total of 18 authorised positions assigned to do all of Indecopi's core competition work. By any measure these staff levels were small.

The Report called the system by which more than half of Indecopi's funds came from fines that it imposed "highly unusual," and recommended that this reliance on fines be substantially reduced or eliminated, to be

replaced by public funding. Such a system negatively affects efficiency and undermines public confidence in the integrity of a competition agency's decisions. The Report also recommended that the budget and authorised staffing allocated to competition work in the agency be increased. It noted that Peru devoted fewer resources to this mission than did other developing countries with comparable or even smaller GDPs. It pointed to a study commissioned by the IADB which found that Indecopi's competition and market access work made disproportionately large contributions to Peru's economy relative to the size of these bodies. This study justified budget increases for these institutions.

### ***Response***

Currently, 85% of Indecopi's budget is derived from fees, 10% from fines and 5% from public funds (these data are for Indecopi as a whole, not just for the competition bodies). It is customary in Peru to charge fees in return for government services, and by law the fees must approximate the cost of providing the service. Many of the cases generated in the Competition Commission are instituted by private parties, and thus these cases are a source of fees for the agency.

In its response Peru rejects the notion that Indecopi would, or could, impose fines in its competition cases for the purpose of financing the agency. Fines are imposed only when the agency determines that there has been a violation of law. Their purpose is to deter unlawful activity. By law, fines may not exceed 10% of the respondent's total turnover in the previous year. An important safeguard against abusive fines is the right of respondents to appeal to the judiciary; pending such an appeal the obligation to pay the fine is suspended.

There have been budget increases since the publication of the Report. Between 2003 and 2007 the budget of the Competition Commission was increased by 86% and that of the Market Access Commission, 381%. The number of authorised positions in the two commissions rose by 128% and 150%, respectively.

## **Competition and market access cases**

### ***Recommendation***

As noted above, the Competition Commission had brought relatively few cases under the Competition Law, and most of its cases were the result of private complaints; few were instituted *ex officio*. The Market Access



Commission had been more active. About half of its cases were *ex officio*, and the results of these cases, which eliminate unnecessary, governmentally imposed entry barriers, were quite positive. The Report recommended that the Competition Commission become more proactive in bringing competition cases, and that the Market Access Commission be given more resources to expand its work as well. In particular, the Market Access Commission should reach out to small and medium sized enterprises, which had been less active than large companies in bringing complaints to the Commission.

The Report also noted that there existed relatively little guidance about how the competition law is interpreted and applied, for example, how markets are defined. The Competition Tribunal can make use of “binding precedents” for this purpose, but the Report also recommended that the agencies issue guidelines on various topics, as other countries have done.

### ***Response***

Peru responded that the Competition Commission has become more active in initiating competition cases. This year it initiated an investigation in liquid petroleum gas, and it has begun ten other investigations of possibly unlawful agreements. Between 2004 and 2006 it initiated 46 cases, of which 10 were *ex officio*. In 2007 the Competition Tribunal has issued three decisions in which violations of the competition law were found and sanctions imposed. Also, for the purpose of enhancing its enforcement capabilities the Commission is negotiating co-operation agreements with several other Latin American countries.

Indecopi has made it a priority to address unnecessary market entry barriers imposed by local governments. As noted above, it has increased resources directed to the Market Access Commission, and it has begun a public relations campaign to this end as well. The Commission initiated 190 inquiries into improper bureaucratic barriers in 2007, of which 22% were successful. Also, two new laws were enacted this year, giving the Commission additional powers to eliminate illegal regulations and requiring action by local authorities on applications for licences or approvals within certain time periods.

Regarding the transparency of decisions by the competition enforcement bodies, the Tribunal annually publishes its decisions. Under consideration is the expansion and possible revision of some of the Tribunal’s binding precedents to provide more guidance to the business and legal communities.

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## Mergers, horizontal agreements and excessive pricing

### *Recommendations*

The Free Competition Law does not include merger control. (Exceptionally, a separate law provides for merger control in the electricity sector.) The Report discussed some of the arguments that have been made against the adoption of merger control in developing countries and found them wanting. It noted that there have been some significant mergers in Peru in recent years that raised competitive concerns, and it recommended that Peru amend the law to provide for merger control and for a system of pre-merger notification.

The Competition Tribunal has considered some cartel cases, but its rulings have generated some confusion about the legal standard that applies to such conduct, in particular whether the *per se* rule or the rule of reason applies. The Report recommended that the law be amended to provide for the equivalent of a *per se* rule.

There was also some uncertainty about whether the competition law applies to abusive, or monopolistic, pricing. The Report reiterated the reasons why bans of abusive pricing are unworkable, and recommended that no such rule be created.

### *Response*

In 2005 Indecopi drafted a proposal for legislation that would have provided for merger control and for the application of the competition law to abusive pricing. The bill was sent to the Cabinet of Ministers and to the Congress for discussion, but both proposals were rejected. Objections to the abusive pricing proposal were that it would be unwarranted interference with the freedom of businesses to operate in the marketplace and that it could be a possible first step in the return to price controls. As for merger control, it seemed that the principal reason for the rejection of the proposal was the notification requirement. Regarding the legal standard applicable to cartels, the Superior Court of Lima has upheld a decision by the Competition Tribunal that the competition law does not permit the application of a *per se* rule to cartel conduct.

## Competition advocacy by Indecopi

### *Recommendations*

One of Indecopi's strengths has been its work in competition advocacy. The Report noted the several ways in which Indecopi has performed this important function. It seemed to be lacking in one respect, however: promoting the value to consumers of competition law enforcement – the prosecution of “core competition cases”. There seemed to be a perception that Indecopi, and the laws that it enforced, were primarily useful for resolving private disputes, whether through consumer protection and unfair competition cases or through competition cases initiated by private citizens. The Report recommended that Indecopi place increased emphasis in its advocacy on the benefits of competition and market access cases to the public at large.

### *Response*

Peru's response outlined Indecopi's extensive competition advocacy activities. They include publication of the agency's decisions, increased communications with members of the mass media, sponsorship of seminars and conferences, and regular interaction with competition agencies from other countries and international organisations, including the Andean Community and Mercosur. Indecopi is working to extend its services to more constituents and to provide more services, registering a 61% increase in the number of cases between 2004 and 2006. The response outlined in some detail how the various services offered by Indecopi complement each other, insofar as they help to enhance Indecopi's reputation with the public.

Indecopi is not specifically promoted as a resource for the resolution of private disputes, however. Rather, private complaints are seen as a source of information about anticompetitive conduct, to which the agency can respond.

## Competition advocacy by other government agencies

### *Recommendations*

The Report made the obvious but often unstated point that competition advocacy is a job not just for the competition agency. Many other parts of government – ministries of economy, finance and trade and sector regulators, for example – also have a stake in competitive markets, and they

too should be active in promoting competition and in educating the public about the benefits from it.

### ***Response***

Peru's response provided examples of how other parts of government are active in competition policy. In recent years Peru has entered into several free trade agreements with other countries, many of them including specific chapters on competition. The result of these agreements is to open local markets to more competition, as well as to open foreign markets to Peruvian producers. Also outlined in the response are the several ways in which Indecopi is interacting with other parts of government – sector regulators, government ministries and the judiciary – to promote competition policy.

Peru's response challenged the view expressed in the Report that the country's low income population is hostile to, or at least not interested in, competition. Rather, this group is focused on more basic and immediate needs – infrastructure, education, health, justice – which are the responsibility of other government agencies.

### **General Comments**

Peru responded positively as to the benefits that resulted from the Peer Review Report. For example:

The Peer Review has enhanced the prospects of improving Peru's competition system, highlighting areas for improvement, which have been the focus of recent work and are priorities on the current government agenda. Lastly, as some proposals are not necessarily viable in the short term, efforts to improve competition in Peru will continue. The Peer Review was used to support proposals to amend the Competition Act when these were put before the relevant administrative and legislative authorities.

Peru did express some negative reservations, however, about references in the Report to a lack of autonomy in Indecopi, which it felt were not justified by the evidence.

## MEXICO

(2004)

Mexico's peer review was funded by the IADB and conducted by the OECD Competition Committee (not as part of a Latin American Competition Forum) in 2004. It was preceded by a 1998 review of competition policy in Mexico conducted by the Competition Committee as a part of a larger OECD study of regulatory reform in Mexico. The 1998 Report noted that one of Mexico's strengths in competition policy was its elegantly drafted competition law, which was enacted in 1993. Weaknesses identified in the 1998 report included a lack of support for competition policy in the country and a perception in some quarters that the Federal Competition Commission (CFC) was unwilling or unable to challenge powerful economic interests that had long existed in the country, despite its having instituted some important cases against such parties. The 1998 Report also made some more specific recommendations regarding the CFC's law enforcement activities.

The 2004 Report found that many (but not all) of these recommendations had been addressed in the intervening years. It concluded that the CFC had matured into a credible and well respected agency, but that it continued to face an array of challenges. Public support for competition policy was still not strong; the Commission lacked certain statutory powers that it needed for effective law enforcement; it was hamstrung by legal rules that permitted respondents in its cases to bring wasteful and time consuming collateral lawsuits against the agency; and the agency continued to suffer from a lack of financial resources.

The 2004 Report's specific recommendations and Mexico's responses to them are described below. It is clear that Mexico has made considerable progress in addressing the problems identified in the Report. A major factor in this effort was the enactment in June 2006 of comprehensive amendments to the competition law. It is also worth noting that the OECD Secretariat provided lengthy comments on the draft amendments before their enactment (as it did on the original, 1993 law as well), which were apparently of material assistance to the CFC.

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## Anti-cartel enforcement

### *Recommendations*

The CFC lacked important statutory powers in order to effectively fight hard core cartels. It could not conduct office visits of suspected cartel operators, for example, and it could not create a leniency programme. The Report recommended that the agency be granted these necessary powers, and also that the CFC begin to prosecute cartels more aggressively, by imposing higher fines and referring guilty corporate officers for criminal prosecution.

The Report noted that the CFC was having difficulty collecting the fines that it did impose, because the procedures for doing so were cumbersome. It recommended that these procedures be streamlined.

### *Response*

The 2006 law addressed all of these statutory problems. It expanded the CFC's powers to acquire information, including granting the power to conduct office visits. It also gave to it the authority to create a leniency programme. The agency has not yet done so, but the process is underway. The legislation also changed the way in which fines are collected. It is now done by the federal tax authority; previously it was handled by municipal authorities.

Mexico's response to the questionnaire does not say whether these new powers have resulted in more cartel cases; perhaps it is too soon after the legislation to make that determination. The Commission has conducted an internal reorganization, which it is hoped will focus more resources on its anti-cartel work.

## Monopoly/Abuse of Dominance

### *Recommendations*

The discussion and recommendations in the Report relating to this substantive enforcement area were limited. Mexico's competition law does not separately address monopoly conduct; rather, various types of anti-competitive single firm conduct are prohibited in the law as "relative monopolistic practices" (cartel conduct is an "absolute" monopolistic practice). The Report recommended that the CFC be granted the power, which it did not have previously, to impose a structural remedy in the case of a monopoly. It also recommended that whether or not the Commission

could intervene directly to restructure a monopoly it should have the ability to initiate studies of industries that are suspected monopolies and to recommend appropriate remedies to Congress.

### ***Response***

The 2006 law gave the CFC the power to require divestitures in a monopoly case, but in its response the CFC noted that the burden of proof on the CFC in such a case is high. The CFC's questionnaire response also stated that the agency has always had the power to undertake studies of the kind recommended in the Report, but it had not previously used it. Since 2005, however, the agency has conducted two major studies, in the finance and telecommunications sectors. The agency's conclusions were given considerable weight in Congress and were instrumental in bringing about new legislation.

## **Mergers**

### ***Recommendations***

Again, the peer review Report's recommendations in this area were limited. Mexico's premerger notification procedures seemed to be working reasonably well. The agency had a good record in completing its merger reviews quickly. There was some confusion about when a transaction that essentially involved restructuring by foreign firms having Mexican subsidiaries had to be notified. The Report recommended clarification of those rules. The substantive standards that were applied to merger review comported with international norms, but there was no explicit recognition of the failing firm defence. The Report recommended that the agency adopt criteria for assessing this claim.

### ***Response***

The 2006 law adopted several changes affecting merger notification, including clarification of the restructuring issue noted in the report. (Others included raising the notification thresholds, creating a fast track procedure for mergers that clearly present no significant competitive issues and granting to the CFC the power to issue a cease and desist order to merging parties while it reviews a case.) Separately the CFC has issued new merger guidelines since the 2004 Report, which include a section dealing with the failing firm defence.

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## Collateral legal attacks against CFC decisions

### *Recommendations*

This was probably the most pressing problem identified in the Report. The Mexican constitution provides citizens with the power to challenge in federal court any action by government that is considered to be unconstitutional. This right of action, called an “amparo,” has been interpreted quite broadly to encompass both procedural (due process) and substantive issues. Thus, in the case of CFC decisions, amparo lawsuits have challenged all aspects of agency procedures, including information requests and evidentiary decisions, as well as final agency determinations and orders. The CFC was facing large and increasing numbers of such cases, which had the effect of dramatically slowing its case resolutions and occupying significant parts of the agency’s scarce resources.

Separate from amparo actions, respondents who are fined by the CFC have been able to contest their fines in separate actions in the Federal Court of Fiscal and Administrative Justice (Fiscal Court). If the CFC decision also contains injunctive provisions those injunctions may also be reviewed. The CFC has contested the Fiscal Court’s jurisdiction in these cases but has been only partially successful in this regard. Like amparo cases, the number of Fiscal Court cases had been growing, though the number was well below that of amparo cases.

The Report made several recommendations designed to alleviate the impact of amparo actions on CFC cases, recognising that the right of amparo is a constitutional one and can be fundamentally changed only by amending that instrument. The recommendations included enhanced efforts by the CFC to encourage parties to settle their cases rather than litigate; more transparent procedures within the agency to forestall amparo cases based on procedural irregularities; the creation of a special amparo court to hear cases from the CFC and other agencies that deal with economic issues; and preventing courts from implementing inappropriate stays of CFC decisions during judicial review. The Report made similar recommendations regarding Fiscal Court cases, most of which would require new legislation.

### *Response*

The CFC has acted on those recommendations that could be implemented without legislation. It is attempting to provide more incentives to parties to settle and it has worked to provide more transparency in agency procedures. Assisted by a grant from the IADB it is working with judges



and magistrates to enhance their understanding of competition law and policy, one result of which would be better outcomes in amparo and Fiscal Court cases. Further, the 2006 amendments made some changes to articles in the law that had been adjudged unconstitutional in amparo cases. It is too early to determine if these actions have had any favourable impact on the amparo and Fiscal Court caseload, however. Other recommendations in the Report that require new legislation have not been addressed.

## **Budget and agency independence**

### ***Recommendations***

The Report concluded that the CFC's budget was inadequate and recommended that it be increased. It also noted that the agency's budget was under the control of Economics Ministry, and recommended that its budget be approved directly by the Congress. Finally, the Report recommended that the Presidential appointments of the five members of the Commission (for terms of ten years) be subject to approval by the Congress. Providing the legislative branch with a role in the appointment process would bolster the Commission's legitimacy as an agency entitled to exercise significant federal power.

### ***Response***

The CFC's budget has not been increased; in fact, its 2006 budget was 8% lower than 2005 in nominal terms. The agency offset the effect of this decline on staff salaries by devoting a greater proportion of the 2006 budget to salaries.

There has been no action on the recommendation for budgetary independence, which requires new legislation. The 2006 law provided for Congressional approval of Presidential appointments to the CFC, as recommended in the Report, but that provision was challenged in court, which ruled that it was unconstitutional.

## **The CFC and regulatory policy**

### ***Recommendations***

Mexican law provides the CFC with an important power in regulated sectors. Before the regulator can regulate prices or access in its sector the

CFC must find that there is an absence of effective competition in the relevant market. The CFC had made some important decisions of this kind involving airports, airline passenger transportation, seaports, LP gas and telecommunications. Both the 1998 and 2004 Reports noted, however, that the CFC had not been actively participating in regulatory agency proceedings after it had made a finding that competition was lacking, and recommended that it do so. If necessary, legislation should be enacted specifically giving it that power.

In 1998 a new Regulatory Reform Commission (COFEMER) was created. Federal agencies are required to submit all proposed regulations to COFEMER, and other agencies, including the CFC, have the opportunity to comment on them. The 2004 Report recommended that the CFC become more active in commenting on proposals made to COFEMER. Finally the Report recommended that legislation be enacted that would empower the CFC to block anticompetitive decisions in trade law proceedings.

### ***Response***

In 2005 the CFC signed a co-operation agreement with COFEMER that provides for closer collaboration between the two agencies. The CFC's questionnaire response states that the agency has always considered that it has the power to participate in regulatory proceedings and to offer at least non-binding recommendations when appropriate. The 2006 law made these powers more explicit, however. The Commission does not have the power to block anti-competitive trade decisions, as recommended by the Report.

## **Competition advocacy**

### ***Recommendation***

As noted above, the both the 1998 and 2004 Reports urged that the CFC work on building stronger public support for competition policy. The 2004 Report made some specific recommendations in this regard. It recommended: that the CFC establish a closer relationship with PROFECO, the federal consumer protection agency, most importantly in order to use its access to the public to promote competition policy generally; that it open a dialog with the Mexican Bar Association to address perceptions that CFC procedures are biased against respondents; and that it develop closer relationships with business organisations in order to promote competition policy within the business community.

### *Response*

The CFC has acted on all of these recommendations. In 2005 it entered into a co-operation agreement with PROFECO, providing for more communication and interaction between the two agencies. It worked closely with the legal community in drafting the 2006 law, which addressed some of the concerns the community had about Commission procedures, and it continues to work on projects to make its decisionmaking more transparent. With assistance from the IADB and the Multilateral Investment Fund it is embarking on a programme aimed at small and medium-sized businesses for the purpose of enhancing their awareness of competition policy. Finally, the questionnaire response outlines the several ways in which the agency, through President Perez Motta, has promoted competition policy in recent years through meetings, seminars and news reports.

### **General Comments**

In response to question 4 of the questionnaire, which invited respondents to comment generally about the usefulness of the peer review process to them, Mexico stated the following:

The Commission considers that the report was invaluable in persuading the various public and private parties involved in the discussions to reform the Federal Law of Economic Competition (LFCE) about the need to update the law by increasing its fines, reforming unconstitutional articles, granting additional powers to the Commission, and improving its procedures. The OECD's peer review provided a neutral voice to the discussion by presenting a non-partisan analysis of the state of competition policy in Mexico and simply outlining best practices based on its experience in the area with OECD member countries. The Report was used and cited in communications with the legislature and federal public administration. Moreover, the OECD submitted a letter to the President of the CFC, which was shown to members of Congress, stating its opinion about the then proposed bill and signed by Bernard J. Phillips, Head of the Competition division at the OECD.

## **BRAZIL**

**(2005)**

Brazil was reviewed in the Latin American Competition Forum held in the summer of 2005. The Peer Review Report was published later that year. Competition policy in Brazil had been the subject of a review conducted by the OECD in 2000. A lengthy report was published as a part of that review, but Brazil was not subjected to the formal peer review process. The 2000 report provided some benchmarks against which progress could be measured in 2005.

Brazil has long had a competition law, but the modern era in competition policy in the country began in 1994, when the government embarked on a new program of tighter fiscal policies, privatisation of state-owned enterprises and market liberalisation. As a part of these reforms a new competition law was enacted (law no. 8884), which is still in force today.

There are some unusual features in Brazilian competition policy, most notably the structure of its law enforcement institutions. There are three agencies involved. The Conselho Administrativo de Defesa Econômica (CADE), is an independent, seven person council having the power to adjudicate cases and impose remedies. Two other agencies report to CADE and make case recommendations: SDE, the Economic Law Office in the Ministry of Justice, which has the principal investigative role; and SEAE, the Secretariat for Economic Monitoring in the Ministry of Finance, which also has investigative authority but is primarily responsible for providing economic analysis in competition cases (as well as for competition advocacy in regulated sectors). Collectively these three agencies comprise the Brazilian Competition Policy System (BCPS).

This structure was inefficient; procedures were cumbersome and it took a long time to resolve cases and investigations, a topic addressed in the 2000 report. The 2000 report noted other aspects of the law enforcement regime that needed improvement, including a lack of emphasis on prosecuting hard

core cartels, merger notification procedures that did not conform to international norms and high turnover and a lack of institutional knowledge at CADE, resulting from insufficient resources and short (two year) terms for CADE commissioners.

Implementation of some of these recommendations required new legislation, and while there were legislative proposals put forward in the years following the 2000 report, most were not enacted. The 2005 Peer Review Report found, however, that the BCPS “**has made substantial headway** during the past five years in implementing sound competition policy in Brazil,” and that . . . [m]ost of the recommendations in the 2000 Report to which . . . [the BCPS] could respond have been accomplished, including particularly the recommendations relating to increased efficiency in merger reviews and reallocation of resources to cartel enforcement.” The BCPS had made other improvements as well, including more effective remedies in merger and conduct cases, improved economic analysis and more emphasis on competition advocacy.

The 2005 Report was a comprehensive one, making several new recommendations. Those are summarised below, together with Brazil’s response to them. As with the 2000 report, some of the recommendations require new legislation, which unfortunately still has not been enacted. At the time of the 2005 Report there existed in the legislature a comprehensive Bill that addressed many of the issues raised in both reports. The Bill remains under consideration, and the BCPS has made some modifications to it to further take into account some of the 2005 Report’s recommendations. Many of the recommendations in the Report have been incorporated into the Bill. Its terms are described below where relevant.

## **I. Recommendations Requiring New Legislation or Action by other Parts of Government**

### *BCPS structure and operations*

#### *Recommendation*

As noted above, the tripartite structure of the BCPS produced inefficiencies. The BCPS has overcome many of them through reorganisation of internal procedures, but the structure remains unwieldy. The Report recommended that the investigative, prosecutorial, and adjudicative functions of the BCPS be combined into one autonomous agency.

*Response*

The proposed Bill would do so, transferring SDE's investigatory functions to CADE. Investigations would be conducted by a Director General within CADE. SEAE's function would be changed to focus primarily on competition advocacy, market studies, and matters related to regulated sectors of the economy. It would provide an opinion on conduct or merger cases at its own option or when requested by CADE.

*Recommendations*

Under existing law CADE commissioners serve only for a term of two years, and can be re-appointed for one additional term. The Report concluded that these features negatively affect the agency's independence, as well as contribute to high turnover in the commission. It recommended that the term for commissioners and for senior CADE officials, such as the Director General, be extended to at least four years. The Bill that existed at the time of the Report provided for such a four year term for commissioners, but only for a two year term for the Director General.

The Report also recommended that the terms be non-coincident, to prevent several vacancies occurring at the agency at one time, and that in making appointments (by the country's president, with approval by the Senate), due consideration be given to the importance of technical expertise in economics and law.

Also recommended, in order to enhance efficiency, was a reduction in the necessary quorum of commissioners from five to four.

*Response*

The revised Bill does provide for four year terms, non-renewable and non-coincident, for CADE commissioners and senior officials, including the Director General. Brazil's response to the questionnaire notes that the appointment process does take qualifications in law and/or economics into account. CADE's President is a leading Brazilian economist and is considered one of the country's foremost specialists in antitrust law, and all of the current commissioners hold Ph.D.s in either law or economics. Finally, the Bill does reduce the quorum from five to four.

*Recommendation*

The Bill that existed at the time of the Report provided that 50 percent of the fines collected by CADE would be given to it and to SEAE. Under

current law all fine revenue is credited to a central government fund. The Report recommended against changing this procedure, noting that if an agency directly benefits from the fines that it imposes it would adversely affect its reputation for impartiality.

### *Response*

The revised Bill eliminated the allocation of fine revenue to CADE and SEAE, as recommended.

## ***CADE staffing and organisation***

### *Recommendations*

A significant problem identified in the Report is that most of CADE's employees are not permanently employed by the agency; they are either on temporary status or are "borrowed" from other government agencies. The Report recommended that career positions be established within CADE, that they exist in sufficient number to handle the agency's caseload and that the salaries be sufficient to attract qualified people.

The Report also recommended that consideration be given to establishing regional offices of CADE outside Brasilia, given Brazil's immense geographic size and the number of regional population centres within the country.

### *Response*

The Bill would authorise a total of 200 positions for technical civil servants within CADE. Currently there is no serious consideration of establishing regional offices of CADE, mostly for budgetary reasons. The BCPS is addressing this issue in part through closer co-operation with other government entities, which could identify possible competition law violations in the regions and report them to BCPS officials in Brasilia.

## ***Mergers***

### *Recommendations*

Both the 2000 and 2005 reports noted deficiencies in Brazil's notification and review process, resulting in uncertainties about whether and when mergers must be notified, in misallocation of BCPS resources toward

merger review and away from anti-cartel work, and in inefficiency and delay in completing merger reviews. As noted above, between 2000 and 2005 the BCPS resolved many of these procedural problems, but some can only be addressed through legislation. The 2005 Report made several recommendations regarding merger review:

- Adopt a pre-merger notification regime.
- Revise notification thresholds, conforming them to accepted international practice.
- Adopt an explicit legal standard for reviewing the competitive implications of merger transactions.
- Eliminate notification of non-merger transactions.
- Provide for expedited review and clearance of transactions that do not raise competitive concerns.
- Establish a final deadline by which CADE must determine whether to block a merger.
- Establish formal settlement procedures for merger cases.

### *Response*

The Bill adopts all of these recommendations.

## *Cartels*

### *Recommendations*

Experience has shown that when countries adopt a leniency programme as a part of their anti-cartel effort the programme does not immediately bear fruit. There are probably several reasons for this, including the lack of a tradition within the country whereby wrongdoers can receive leniency when they co-operate with investigative officials, uncertainty in the business community as to how the programme will work and whether an applicant would be adequately protected from harsh sanctions, and perhaps most important, the lack of a credible threat of harsh sanctions for those who do not co-operate. Brazil has experienced some of these problems since it adopted a leniency programme in 2001, but more recently it has begun receiving some leniency applications.

The Report makes some technical recommendations on how the programme could be made more effective, relating to reducing exposure of



leniency applicants to collateral criminal and civil sanctions and to ensuring that the evidence that they provide will not be used against them.

### *Response*

Brazil continues to refine its leniency programme, and is working on implementing the recommendations in the Report. The draft Bill also contains provisions that would reduce the uncertainty facing potential leniency applicants about whether they would qualify.

## ***Competition and regulation***

### *Recommendation*

The Report noted that SEAE had provided useful input into actions by sector regulators on several occasions, but that often there were not formal procedures in place providing for SEAE's participation in these matters. At the time of the Report there was pending in Congress an omnibus sector agency bill that would have provided for such procedures, and the Report recommended that these provisions be enacted.

There has been uncertainty about whether, and to what extent, the competition law applies to the banking sector. In 2003 a bill was introduced that would have resolved the issue, granting jurisdiction to the BCPS in conduct cases involving banks and in mergers except those that involve a risk to the financial system. The Report recommended enacting this bill.

### *Response*

Neither piece of legislation has been enacted, unfortunately. The BCPS continues to support the bills, and it is taking other steps to strengthen its role in regulated sectors. SEAE is already refocusing its efforts toward competition advocacy, in anticipation of enactment of the proposed amendments to the competition law. In 2006 CADE and the Central Bank signed a co-operation agreement, pursuant to which they are working on a joint work plan for conducting merger reviews. They are also working on guidelines for reviewing bank mergers, and an important source of information for this purpose has been work by the OECD Competition Committee.

## II. Recommendations that the BCPS can implement without new legislation

### *Recommendations*

The Report contains several recommendations of this type, including:

- addressing anti-competitive restraints by state and local governments;
- updating its 2001 Horizontal Merger Guidelines to conform them more closely to accepted international practice;
- improving the transparency of CADE's decisions, including a more complete explanation of the rationale for its decisions;
- enhancing its ability to settle conduct cases, especially cartel cases;
- becoming more involved in private suits, which is permitted by the competition law, especially as vehicles for competition advocacy;
- continuing existing programmes: to strengthen anti-cartel enforcement and competition advocacy in regulated sectors; to enhance co-operation with the Public Prosecutor's Office; and to engage in competition advocacy with the public at large.

### *Response*

Brazil gave positive responses to all of these recommendations. Regarding the recommendation that the BCPS become more active in addressing anticompetitive restraints by regional and local governments, CADE took a recent decision relating to the operation of a tax free zone in Manaus. The BCPS is redrafting its Merger Guidelines, and in the meantime SDE has issued some reports that clarify issues that will appear in the new Guidelines. CADE is being more careful in drafting its published decisions, if only to strengthen its position in court if there is an appeal. Civil competition suits are still a novelty in Brazil, but CADE has become involved in three of them in the past three years. The BCPS' recent initiatives in cartel prosecution and competition advocacy are outlined above.

### *General Comments*

In its response, Brazil praised the Peer Review Report both for its usefulness within the BCPS and as an advocacy tool. The Report

. . . brought an opportunity for an open dialogue within the . . . BCPS, thus enhancing the coordination and interaction of the BCPS and a better understanding of key policy issues; [it] . . . made it possible for the BCPS to benefit from the international best practices in the competition policy field.

The Report has had an important role in the BCPS' promotion of the draft Bill amending the competition law.

. . . [E]very single congressman who was part of the Committee in charge of analyzing the draft bill received a personal letter [from one] of the BCPS's heads summarizing the main conclusions of the peer review, the report and a table showing the recommendations received and the section of the bill that attended them. Once most of the recommendations already were part of the bill, the report was very important to justify the proposed changes. From a political standpoint, it served as a "certification" that the proposals advocated by the Brazilian agencies were supported by other jurisdictions.

## ARGENTINA

(2006)

Argentina was the last of the five Latin American countries to be reviewed. The review was conducted in the 2006 Latin American Competition Forum.

The Peer Review Report noted that in the past 25 years Argentina has made considerable, if uneven, progress toward building a successful market economy. Its progress in competition policy has also been uneven, having been affected in many ways by the country's turbulent political and economic history. There was solid economic growth in the 1990s, following a period of hyperinflation. In 2001, however a severe economic crisis occurred, resulting in the devaluation of the Argentine peso and a default on public debt. The economy recovered quickly, however, and has enjoyed significant growth through 2006, albeit accompanied by more inflation.

In 1999 Argentina enacted a new competition law, which by any measure was well drafted. Full implementation of the law was interrupted, however, by the economic crisis of 2001. The 1999 law authorised a new, independent competition agency, the Tribunal for the Defence of Competition, but the Tribunal was never created. The substantive provisions of the law were, and continue to be, enforced by the competition agency that existed under the old law, the National Commission for the Defence of Competition (CNDC). The CNDC is not an independent agency, existing as part of the Ministry of Economy and Production. The CNDC has no independent enforcement powers; its decisions must be ratified by a secretariat within the Ministry.

The Peer Review Report noted that the CNDC and its commissioners are considered to be professional, competent and hard working, but that the Commission has languished in some respects since the 2001 crisis, largely because of a lack of independence and an inadequate budget. The Report's recommendations focused on these issues, but also addressed more specific aspects of competition policy in the country. Those recommendations, and Argentina's responses to them, are described below. It should be pointed

out that it has been only one year since the Report was released, leaving relatively little time for action on the recommendations. Also, many of the recommendations require some legislative action for implementation, a situation that also makes a quick response more problematic.

## **The Tribunal and agency independence**

### ***Recommendations***

The Report's first, and most important, recommendation was to create the Tribunal for the Defence of Competition, as provided by the 1999 law. The Report found it "anomalous that nearly seven years after the enactment of the competition law the competition agency that it created has not been established." Creating the Tribunal would address a fundamental problem facing the CNDC, its lack of independence. As noted above, CNDC decisions are not self-enforcing; they must be approved by the Ministry. Further, in recent years the CNDC has had to divert some of its scarce resources to the Government's battle against inflation. Separately from recommending that the Tribunal be created, the Report recommended that until that is done, the CNDC be freed from political influence as much as possible.

### ***Response***

Although the 1999 law provided for the creation of the Tribunal, it could not be done without new legislation. In 2005 a bill in the Congress that would have created the Tribunal narrowly failed. In 2006, after the appointment of a new President of the CNDC, a new effort was made in Congress; the legislation was approved by the Executive for discussion by the Congress in an extraordinary session in February 2007. Because of the press of other issues, however, it was not taken up.

As to the related recommendation that the CNDC be free of political influence, the questionnaire response states that the principal efforts in this regard have been to work to establish the Tribunal and to provide the CNDC with budgetary independence (see below). The response emphasises, however, that the agency performs its duties under the competition law "with as much independence as possible from any area of the government."

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## **The budget**

### ***Recommendations***

The Report noted that the CNDC's budget had declined in every year between 2002 and 2005, and this was made worse by the ongoing inflation in the country. The reductions led to low salaries for both employees and commissioners, causing high turnover in the agency, which adversely affected its performance. Another result of the low funding was that many of the CNDC's employees were working under short term contracts – as short as three months. This further affected staff morale and contributed to high turnover. The Report also noted that the CNDC had little discretion as to how to spend its budget; most decisions of this sort were made by the Ministry.

The Report recommended that the agency's budget be increased, at least to the 2001 levels in real terms, and that the agency have more independence as to how to spend its budget.

### ***Response***

Argentina has made progress on this point. The CNDC's 2007 budget was 3.3 million pesos, well above the 2005 level of 2.1 million, though still below that of 2001 in real terms. This additional money has enabled the Commission to hire professionals to replace those who had left, and also to give some of them permanent status. Also, beginning in 2007 the CNDC President assumed more authority over the agency's budget, the result of a series of negotiations at higher levels of government. It is too early, however, to measure the impact of these additional resources in any meaningful way.

## **Anti-cartel enforcement**

### ***Recommendations***

The Report noted that the CNDC had not been active in bringing cartel cases until 2005, when it brought two important cases in cement and liquid oxygen. The Report stressed the need to continue this momentum and to make fighting hard core cartels the top priority in the agency, especially in light of anecdotal evidence that cartels are operating in the Argentine economy. In this regard it recommended that in successful cartel cases the agency assess larger organisational fines, and begin to fine individuals as

well; that the statutory maximum fines for cartel conduct be increased; that the competition agency create a leniency programme; and that the agency consider the judicious use of proactive investigations (i.e., begun without direct evidence of cartel conduct), especially in public procurement markets, where cartel conduct is common in many countries.

### ***Response***

Argentina responded that its most significant fines to date remain those in the cement and liquid oxygen cases. No fines against individuals have yet been imposed, but in current investigations the agency has informed some parties of their potential liability in this regard. As for increasing the statutory maximum fine, Argentina's response acknowledges that inflation has eroded the significance of the current maximums. No specific action has been taken in the legislative arena to correct this situation, however. Legislation is also required to establish a leniency programme. The agency is gathering evidence for such an effort, but it acknowledges that programmes of kind are not common in Argentina.

As for proactive investigations in public procurement, the CNDC's scarce resources limit the number of such inquiries that it can undertake. In any case, there have been complaints of this type of activity in public procurement, which have generated some new investigations.

## **Non-cartel conduct investigations**

### ***Recommendations***

The Report noted that there was a significant backlog of such cases in the CNDC. This was due partly to a rising merger caseload – mergers have priority over conduct cases because of external deadlines – and the lack of a quorum of commissioners for a time. The backlog also reflected cumbersome procedures in the agency for handling such cases, however. Any private citizen can initiate such case by complaint, and the law obliges the competition agency to consider it. Many of these complaints are filed, and most of them have little legal merit. The Report recommended that the agency consider streamlining its procedures for considering these private complaints, permitting it to quickly dismiss those that are clearly without merit. Even as to those cases that must be investigated further, the Report recommended adopting procedures that permit the agency to dispose of them more quickly, consistent with the obvious need for transparency and fairness.

## *Response*

No specific steps have been taken to implement this recommendation. Argentina's response noted that the problem had been exacerbated by high employee turnover in the CNDC, which resulted in cases constantly being reassigned to new investigators. It is hoped that greater employee stability resulting from higher salaries and permanent status, described above, will help to alleviate this problem.

## **Mergers**

### *Recommendations*

The 1999 law introduced merger control to Argentina for the first time. The law requires notification of mergers meeting specified size thresholds, but notably it is not "pre-merger," that is, the merging parties need not wait to consummate their merger until they receive agency approval. The Report addressed two issues relating to merger review: efficiency and pre-merger notification.

After the enactment of the 1999 law the number of mergers notified to the CNDC grew rapidly. In 2001 the notification thresholds were raised, to good effect: the number of notifications dropped considerably. By 2005 the number was rising again, and the Report suggested that it might be time to increase the thresholds once more (which must be done by statute), though it did not recommend any specific levels.

The Report also noted that it was taking the CNDC 3-4 months to approve "easy" mergers – those that raised no obvious competitive issues. This was well above the norm in OECD countries, which on average take 30 days or less on these cases. The Report recommended that the agency streamline its procedures, especially the manner in which it requests information from the parties, in order to shorten this period.

Another procedural problem was highlighted in the Report: In a few cases third parties had appealed CNDC merger decisions in court, causing significant disruption and delay. The CNDC had opposed the right of these parties to bring these cases, with some success. The Report urged the CNDC to continue its vigorous opposition to these cases.

Regarding Argentina's lack of pre-merger notification, the Report pointed out the usual infirmities associated with such a regime – delay, and inability in the competition agency to completely deny a merger, in most cases. The Report recommended that Argentina consider adopting pre-



merger notification regime. If for political reasons this is not possible, the competition agency should consider expanding its use of preliminary orders forbidding consummation during the investigation, and/or hold separate orders.

### ***Response***

Regarding notification thresholds, Argentina responded with the obvious point that this requires legislative approval. As yet there have been no initiatives to that end. As for shortening the review period for non-problematic mergers, the response lays much of the blame for this situation on the merging parties, who do not submit the necessary information with their notification, requiring follow-up by the agency. The response notes, as did the Report, that the business sector is not especially critical of the time taken by the CNDC, suggesting that the merging parties are responsible for it, at least in part. The agency promises in its response to continue its vigorous opposition to third party intervention in its merger cases.

As for pre-merger notification, the obvious point again is that bringing it about requires new legislation. Argentina's response, however, suggests that the agency's lack of ability to prevent consummation before it completes its review is not a significant problem, because in most cases the merging parties understand the risks associated with their merging before they receive approval – that they might have to undo the transaction – and so they refrain from consummation, at least completely.

## **Competition culture/competition advocacy**

### ***Recommendation***

The Report applauded the several ways in which the CNDC was promoting competition policy in Argentina, and recommended that it expand these efforts, including through public conferences and seminars, press relations, publications and expanding its web site.

### ***Response***

The CNDC has stepped up its efforts in this regard. It organised public conferences in 2006 and 2007 on competition policy. CNDC members have participated in workshops and seminars. Important cases and decisions are announced by press release and are reported in the business press. The agency is in the process of uploading all of its opinions to its web site.

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## Relations with judges

### *Recommendations*

Most appeals from CNDC cases are made to a quasi-specialised court in Buenos Aires. The Report recommended that the agency contribute to the judges' understanding of the special issues in competition cases through seminars and conferences, and by inviting the judges to participate in public events sponsored by the agency.

### *Response*

Argentina responded that it has included judges in events that it sponsors, and that the judges exhibit strong interest in competition analysis.

## The competition agency's role in regulated sectors

### *Recommendations*

There are no specific exemptions from the competition law for regulated sectors, which means that there is a potentially significant role for the competition agency in these sectors. The Report recommended that the competition agency develop co-operative relationships with sector regulators, both to enhance its enforcement of the competition law and, where its limited resources permit, to permit it to engage in competition advocacy.

### *Response*

Argentina responded that participation by sector regulators in CNDC cases is usually not necessary, and that it receives good co-operation from regulators when it requires information from them. As for expanding its advocacy role in regulation, its limited budget and heavy caseload currently prevent it from doing so.

## General comments

Argentina described several ways in which the peer review report has been useful. As noted above, the CNDC has supported legislation that would create the new Competition Tribunal. Argentina stated in its response that

. . . [O]ne of the arguments used for this purpose was precisely the recommendation of the Peer Review Report stating that the Tribunal should be created as soon as possible.

The Report was also useful in CNDC's successful efforts to increase its budget and to gain more control over managing it, and it was also employed in its competition advocacy work:

The peer review report was discussed in a special seminar in the Ministry of Economy (October 2006); some business newspapers summarized its main conclusions, and it was also presented in private circles involved in competition issues (i.e. competition forum breakfasts). All these examples show the impact of the peer review in order to promote a competition culture in Argentina. . . .

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## *Appendix*

### **QUESTIONNAIRE**

The recommendations of the peer review report are set out in an annex to this questionnaire, together with the accompanying explanatory text. Please refer to the full report for background relating to these recommendations. In formulating your response, please feel free to group the recommendations or their subparts in a way that is most convenient for you.

1. For each recommendation and each subpart thereof, where applicable, provide the following information:
  - a. If the recommendation was implemented in whole or in part following the report, describe what was done.
  - b. What happened after the recommendation was implemented? To the extent possible, describe the effects of the changes made to implement the recommendation (for example, X number of new cartel cases or investigations begun in the past year, or Y number of new attorneys hired).
  - c. If further implementation measures are currently under consideration, describe the status of these considerations.
  - d. If the recommendation has not been fully implemented, describe those parts that have not been implemented and give the reasons why, in your opinion, they have not been implemented.
2. Describe the role or effect that the peer review report had in your accomplishing the changes described in response to question 1. For example, did the report provide new insight into problems and their solutions? Was the report used or cited in communications with the legislature or other government agencies about these new measures? Please be specific where possible.

A peer review report has two purposes: first, to provide evaluations of and, where applicable, offer solutions to specific issues relating to competition law and policy in a country, and second, to promote more generally a competition policy within a country. As to the second:

3. Describe how the report was used, if at all, in:
  - a. raising public awareness of competition policy;
  - b. communications or interactions with other parts of government (national, regional and local), the legislature, sector regulators and courts, to the extent not described in your response to question 2.
4. Please provide any additional comments that you would like to make about the usefulness of the peer review report to you and its effect on competition policy in your country.

## SUMMARY OF THE DISCUSSION

The **Chairman** of the roundtable, Frédéric Jenny of the OECD, asked **John Clark**, an OECD consultant, to introduce the background paper that he drafted for the discussion. Mr. Clark briefly reviewed the history of the peer review process in the OECD Competition Committee. The Committee has conducted many reviews of competition policy in its member countries and in selected non-member countries as well. The OECD joined with the Inter-American Development Bank to conduct peer reviews of five Latin American countries, four in Latin American Competition Forums and one in the Committee. The five countries, in the order of their reviews, were Chile, Peru, Mexico, Brazil and Argentina.

This year it was decided to conduct a follow-up of the five reviews. To that end, questionnaires were sent to the five countries. Each was asked to state whether, and to what extent, the various recommendations in each peer review report were implemented. The countries were also invited to comment on how the reports were used in their country and on their usefulness to the competition agency.

It is difficult to make too many generalisations from the questionnaire responses, because there are differences in the five countries in the way that they implement competition policy. Still, there were several common themes, which will be explored in the discussion. Two general comments can be made. First, many of the recommendations in the peer review reports have been implemented, especially those that the competition agency could act on unilaterally, without the need for new legislation. Second, the responding countries praised the peer review process. They found the reports useful both as a means of identifying and implementing best practices in competition law enforcement and competition advocacy, and as an aid in their dealings with other parts of government, for example in obtaining new legislation or larger budgets.

The **Chairman** began the discussion by stating that six topics of interest had been identified from the questionnaire responses: competition agency and independence, anti-cartel enforcement, mergers, case handling procedures, competition agency budgets and the use of economics in the

competition agency. Each would be discussed in turn, beginning with a question from the Chair to one of the five countries. Other countries would then be invited to join in the discussion.

## Agency structure and independence

The Chairman noted, by way of introduction, that independence of the competition agency is important. This can be achieved by making the agency structurally independent from other parts of government, but others hold the view that the agency can have more influence if it remains within a ministry, which places it closer to high-level decision makers. The Chairman also noted that at least one Latin American competition expert has contended that there has been a general weakening of competition agencies in the region in recent years.

The Chairman noted that **Chile** enacted a law in 2003 that created a new Competition Tribunal, which appears to be more structurally independent than was the case under the previous system. The Chair asked Chile whether the new agency is in fact substantially independent, and if it is, to describe the process by which this new independence was achieved.

The 2003 law, which became effective in 2004, reformed a law that had been in effect since 1911. Under that law competition law enforcement decisions were made by one or more quasi-independent commissions. The commissions were replaced by the Competition Tribunal, a five-member body currently composed of three lawyers and two economists. The Tribunal is independent of other parts of government, reporting to the Supreme Court, and having its own budget. The members of the Tribunal are appointed by a specialised panel of experts, not by the country's President. Investigations are carried out, as previously, by the National Economic Prosecutor (FNE), who is within the government. The FNE presents cases to the Tribunal, which renders the decisions. The system is an improvement upon the old one; the former commissions met sporadically, and their budget and administrative support were supplied by the Economic District Attorney's Office.

The new system is working well. Some problems have surfaced, however, notably in gathering evidence under Chile's 100 year-old civil code. Some proposed changes to the code are being discussed. A new process was introduced with the creation of the Tribunal, that of consultations. Parties can apply to the Tribunal for a decision on the legality of particular conduct, or of a merger. The Prosecutor conducts an investigation of the matter, and the Tribunal rules upon its legality. Also, there are stronger rules prohibiting conflicts of interest on the part of

members of the Tribunal. Finally, an important aspect of the independence of the Tribunal is the process for selection of its members. This is done in an impartial manner, with a focus on the expertise and experience necessary for the position.

The delegate from **Peru** discussed the independence of its enforcement agency, Indecopi. The agency, which has several other responsibilities in addition to competition law enforcement, is structurally independent. Within Indecopi, the resolution of cases is separate from the administrative function, and there are separate and independent responsibilities between the investigative (Technical Secretaries) and decision making bodies (Commissions and Chambers). Members of decision-making tribunal are proposed by Indecopi's Board of Directors, whose three members are appointed by President of the Council of Ministers and the Minister of Finance. Members of the tribunal are appointed pursuant to a resolution signed by the President of Peru and the President of the Council of Ministers, who also take into account the recommendation of an Advisory Council, whose 15 members represent diverse sectors of business and civil society. Indecopi has its own budget, most of which comes from fees assessed by the agency and not from public funds.

The Chairman summarised the discussion of this topic. There are at least three attributes that affect the independence of a competition agency: structure – existing apart from government ministries – having a separate budget, if possible not under the control of a ministry, and providing for appointment of senior members of the agency by a person or persons not part of government. Transparency of procedures is important to a well-functioning, independent agency, as are an adequate budget and effective, fair procedures for resolution of cases. Still, the concept of independence is a slippery one; it is not easy to define with certainty.

## **Anti-cartel enforcement**

The Chairman stated that since most of the morning session had been devoted to this topic he would spend relatively little time on it in the afternoon. He noted, however, that **Brazil** seemed to be especially successful in implementing its anti-cartel programme, and he asked that delegation to describe the measures that it has taken in that regard.

Fighting hard core cartels is a priority in Brazil. Several changes in the programme have been introduced since the beginning of this decade. New legislation has made it possible to implement a leniency programme, and as a part of that programme, to reach agreement with leniency applicants protecting them from prosecution in exchange for their co-operation. As a



result, the leniency programme has begun producing new cases. There have been a total of ten leniency agreements under the new programme. Leniency applications produce strong, direct evidence of cartel agreements, with the result that cartel cases are better able to withstand challenges in court. The new programme permits the use as evidence of corporate documents provided by the applicant.

Other improvements in the programme include expanded use of searches (dawn raids) and interception of electronic communications; the formation of special task forces in which representatives of the prosecutor, the police and the competition agency work together; using economic tools to identify and select cases and also to evaluate the costs from collusion in a given case; the ability to settle cases – to resolve cases by agreement with respondents on an appropriate sanction rather than through litigation; and the ability to temporarily incarcerate individuals in order to preserve important evidence. Thus far in 2007, 84 searches have been conducted and 30 people have been jailed under the evidence protection measure.

While Brazil is experiencing new success in its anti-cartel efforts it realises that much more is to be done.

## Mergers

The Chairman began this discussion by noting that there are fairly significant differences among Latin American countries in the manner in which they control mergers, if they do so at all. He noted that of the five countries that were peer reviewed, **Peru** was alone in not having merger control. A proposal to add merger control to the competition law was recently defeated. He asked the delegate from Peru about the current debate within the country as to whether merger control is desirable.

It was initially decided not to introduce merger control in Peru because the costs of such a programme were considered to outweigh the benefits. Peru's economy was relatively small, and influential decision makers, in both the public and private sectors, were opposed to the concept. In 2005, however, a proposal to begin merger control was introduced in the legislature. The proposal was combined with a second one, to add excessive pricing practices as a violation of the competition law. There was strong opposition to the excessive pricing proposal, and it had the residual effect of causing the defeat of the merger control proposal as well. Currently there is little debate on the subject, but some experts are beginning to consider the idea again, with a view toward introducing a new proposal in a few years.

The Chairman noted that **El Salvador**, a small economy, recently enacted its first competition law and it included merger control, including

premerger notification. He asked the Salvadoran delegate about the process that led to this result.

There was consideration of a competition law in El Salvador for 12 years before it was finally adopted in 2006. There had always been concern about market power held by large enterprises, and it was considered that merger control would be useful in limiting that. One feature of the law that contributed to the acceptance of merger control and of merger notification was to set notification thresholds at a high level.

The Chairman turned to the subject of premerger notification, and this prompted several interventions. He noted that **Brazil** does not have premerger notification but that there is a proposal in the legislature to create it, so far unsuccessful. He asked Brazil to describe the current state of play in the country on this issue.

The competition agencies recognise that the current system, in which notification is mandatory but need not be done premerger, is inefficient. Their efforts to move to premerger notification have met political opposition, however. The business community does not understand the benefits to it of premerger notification. It needs to be assured that the competition agency is equipped to administer such a process efficiently.

Like Brazil, **Chile** does not have mandatory premerger notification, but unlike Brazil it does not consider it to be necessary. Merging parties in Chile are encouraged to notify their transaction voluntarily in advance, using the consultation process described above. They usually do so, if their merger could be problematic. In making that assessment, the parties consult, among other things, publications by the OECD on identifying possibly problematic mergers.

**Honduras** recently enacted a new competition law, which includes merger control, but notification is voluntary. There was little debate about whether to include merger control. The drafters of the law were advised, however, of the experience in Spain and other OECD countries, where up to 95% of mergers that are proposed do not present serious competition issues. There was concern that having to process so many notification of benign mergers would require too many resources of the competition agency, and the decision was made not to require notification. An incentive to notify was included in the law however; a merger that is notified and approved cannot be challenged under the competition law for 18 months thereafter, unless the information in the notification is false or incomplete.

**Panama** is like Honduras, in that notification is voluntary, but businesses often notify under a consultation procedure like Chile's because they desire the certainty that comes with agency approval of their transaction.

**Mexico** employs premerger notification, and considers it to be necessary to permit the competition agency to prohibit anticompetitive mergers without having to “unscramble the eggs” if the merger has been consummated. It is important the process be efficient, however. For this purpose, Mexico has a “fast track” procedure for mergers that apparently present few competition concerns. Also, it is important to set the notification thresholds high, to exclude from the notification requirement small transactions, which are unlikely to be anticompetitive.

The delegate from the **United States**, a large economy that employs premerger notification, recalled a conversation that he had with a representative from a much smaller economy, in which that person said that merger notification was unnecessary in his country because major business transactions like mergers quickly became public knowledge, giving the competition agency the opportunity to investigate if it wanted to. It chose not to require premerger notification in order to conserve its scarce resources for dealing with conduct violations.

The delegate from the **Dominican Republic** described an experience different from its small-economy neighbors in Central America, who included merger control in their first competition laws. A proposed competition law is still being debated in the Dominican Republic, but there is strong opposition to merger control in the business community, and so it has been removed from the draft law. The revised draft is again under consideration and there is a better chance that it will be enacted. If it is, the possibility exists for adding merger control at a second stage.

**Costa Rica’s** current law lacks sufficient standards for control of mergers. There is a proposal for a new law, however, which would add important powers for the agency, including a leniency programme and search powers, and eliminate exemptions that now exist for some sectors and activities. Adding premerger notification is also proposed.

A delegate from **Spain** expressed the view that premerger notification is not necessarily indicated for all countries. The costs of imposing such a process must be weighed against its benefits, especially in small economies.

The Chairman concurred that the costs of merger control must be weighed against its benefits, noting, however, that the benefits should include the economic costs of anticompetitive mergers that are prevented.

The delegate from **Italy** made two points that are sometimes overlooked in the debate over whether merger control and premerger notification are necessary. First, in assessing the benefits of merger control one must consider not only those anticompetitive mergers that are prevented or modified by the competition agency, but also those that are never proposed

because they would likely violate the law. As for premerger notification, one benefit of it is that it removes the discretion that the competition agency otherwise would have to review a given transaction. Having to exercise that discretion could subject the agency to outside influences, interfering with the agency's independence.

## Case handling procedures

The Chairman noted that three of the reports recommended that countries adopt procedures for settling cases, that is, agreeing with respondents on an appropriate remedy without the need for litigation or a contested hearing. This process contributes to efficiency by shortening the time required for resolution of the case and it minimises the risk of appeal to the courts. **Mexico** was one of the three countries. The Chairman noted that a recent amendment to the Mexican law authorised the competition agency to enter into commitments with respondents and asked whether the procedure was working. He also asked about the effect of such agreements on third parties – market participants other than the respondent.

The Mexican delegate first expressed his view as to the usefulness of the peer review process to his country. The peer review proved to be very helpful, especially in influencing the content of the comprehensive amendments to the competition law in 2006. Responding to the chairman's questions about settlement agreements, it would be quite useful in theory to have the ability to resolve a case at an early stage by reaching agreement with the parties. Mexico's new law provides for the ability of parties to make commitments of either a behavioural or structural nature that can resolve the case. It is still too early to determine the usefulness of these new provisions, however. As to the effect of such agreements on third parties, the delegate said that all such agreements must be in the public interest, that is, they must benefit competition.

The Mexican delegate addressed other means besides settlement for reducing the risk from judicial appeals of competition cases. Two of them are increasing transparency of agency decisions and better preparation for litigation. The delegate noted that in the last six months the agency had been successful in 80% of the collateral lawsuits ("amparos") brought in its cases.

**Brazil** briefly described procedures that its competition agencies use to settle merger cases.

The Chairman noted that the introduction of procedures for settling cases is being considered in many countries because of the obvious efficiency benefits that they can have. He raised two possible difficulties that settlement procedures could introduce, however: first, the opportunity to

settle, especially on favourable terms, could reduce the incentive of market participants to obey the law; and second, settlement agreements require monitoring by the competition agency, which reduces the overall efficiencies generated by this process. He noted another, broader topic that this discussion raised and which could be the subject of discussion at a future meeting: the increasing role of courts in competition cases and means of dealing with it, whether by bypassing courts through settlement or becoming more efficient with better outcomes in court cases.

## **Budget and agency resources**

This was a common theme in the peer review reports. In all five reports the competition agency's budget was judged to be insufficient. In four of the five, the agency's budget was increased following publication of the report.

The Chairman noted that **Peru's** competition agency, Indecopi, is funded in an unusual manner. Only a small part of its budget is provided from public funds; most of its funds come from fees that the agency charges for the several types of services that the agency provides. A much smaller portion comes from fines that the agency imposes. The Chairman asked for more information as to how this system worked, and whether it created any incentives for the agency to impose fines that it might not otherwise impose.

The delegate from Peru explained that the agency's total budget is approved by Congress. That budget takes into account expected fees and fines, and adds a smaller amount of public funds to complete the total. The fines and fees imposed by Indecopi, are not paid directly to the agency, however, but to a central government fund. Currently, 95% of Indecopi's budget is financed by its activities, with the remaining 5% supplied by the central government. The Peruvian delegate stated that the system creates no incentive on the part of the agency to impose fines that it would not otherwise impose in the usual course of law enforcement.

The **Dominican Republic** has a system similar to Peru's. The government makes up with public funds the difference between the agency's total budget and the income generated by the agency from fees and fines. The ability of the competition agency to act strategically in imposing fines is limited by law, however, which imposes some restraints on the agency's fining powers.

The Chairman pointed out that if the law is too rigid regarding fines it could remove necessary discretion that the competition agency should have in imposing fines. The Dominican delegate agreed, and stated that the agency does have some discretion within the limits of the law.

## The use of economics in competition agencies

The Chairman noted that almost every competition agency employs economists on its staff of professionals, and that economic analysis is an important part of most competition cases. Competition agencies use economists in different ways, however. Among Latin American countries **Brazil** has a reputation for giving economists a prominent role in its cases. The Chairman asked the Brazilian delegation to elaborate on how it uses economists.

In Brazil the use of economics in competition cases is growing and becoming more sophisticated. Economic studies and analysis complement the direct evidence in a case, for example, on questions of market definition, entry and efficiencies. Currently there is a trend toward conducting more in-depth economic studies. Studies of the supermarket, banking and health care sectors have been conducted, for example. Because economic analysis is so important in competition cases the Department of Economic Studies, formerly part of the Ministry of Finance, was brought within CADE, the competition tribunal.

The Chairman commented that in Europe there has been some resistance to the use of economics in competition cases. An important issue is how to integrate economics into the enforcement mechanism, whether through special competition courts, special economic units within competition agencies, and so forth. In any case, it is important to employ economic analysis in a way that is understandable and useful to non-economists, and especially to the courts.

The **Brazilian** delegate agreed. Economic input in cases need not be too complex. It is especially important that it be presented in a way that is useful to judges. To this end Brazil intends to sponsor seminars in micro-economics for judges.

Other delegates picked up on the importance of making economics understandable for judges. In **Chile** the law requires that decisions of the Competition Tribunal have a basis in both law and economics, which is why the makeup of the Tribunal includes both lawyers and economists. A problem arises when cases reach the Supreme Court, however, because most judges have no background in economics. One proposal for overcoming this problem is to limit relevant issues in Supreme Court cases to issues of law. The Chairman responded that in competition cases issues of law and fact, including economics, are intertwined, and cannot easily be separated.

**Mexico** agreed that separating issues of law and economics is difficult. In Mexico the legal process is a highly formal one. The challenge in

competition cases is to make the economic issues clear and understandable for the judges.

In **Peru** there are economists at the first and second instances in Indecopi, but as in other countries problems arise when cases reach the courts. It is therefore necessary, as other delegates have said, to make economic concepts understandable for non-economist judges.

**Costa Rica** agreed with the other delegates that presenting economic issues to judges is a major challenge in competition cases. Its competition agency faces a challenge beginning next year, when competition cases will be subject to a different administrative process, which will require trials. In the past, the agency was represented in court by the Attorney General, but beginning next year the competition agency will also participate in the trials because of the specialised nature of competition cases.

The Chairman summarised this interesting discussion on economics by noting that it appears that the use of economic analysis in competition cases seems to be increasing in all countries, and that making economics understandable to judges in competition cases is an important and growing problem across countries. One source of information on economic issues, presented in understandable language, is the OECD web site, on which are posted many papers on various economic issues [<http://www.oecd.org/competition>].

More generally, the Chairman suggested that this topic – incorporating economics into the judicial process in competition cases – could be a topic for discussion in a future Competition Forum. The Chair thanked the delegates for their participation in the discussion and the Inter-American Development Bank for financing the peer reviews and the follow-up work that formed the basis for this roundtable.





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