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SUMMARY

SECOND ANNUAL MEETING OF THE LATIN AMERICAN COMPETITION FORUM

June 14-15, 2004

Inter-American Development Bank
Washington, DC, United States

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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