COUNTRY STUDIES

Peru - Peer Review of Competition Law and Policy

2004

Introduction

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

Overview

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A Peer Review

INTER-AMERICAN DEVELOPMENT BANK

OCTOBER 2004

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INTER-AMERICAN DEVELOPMENT BANK

COMPETITION LAW AND POLICY IN PERU

A PEER REVIEW

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

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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

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

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Foreword

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

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

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

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

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

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

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EXECUTIVE SUMMARY

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

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

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

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

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

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

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

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

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

…/

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

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

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

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

1. Context for and History of Competition Policy

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

1.1 Economic and cultural context

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

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

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

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

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

1.2 Background for Peru's market reform

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

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

state. The result was a presidential election in 1990 between two political novices, Alberto Fujimori and the novelist Mario Vargas Llosa [2] – an election that Fujimori won in part because Vargas Llosa compromised his image as an outsider by joining an established political party.

1.3 Establishing the legal framework for a market economy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1 The Free Competition Law

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

Box A

The Competition Law Toolkit

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

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

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

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

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

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

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

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

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

2.1.1 Horizontal agreements

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

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

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

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

Indecopi's general approach to horizontal cases

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

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

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

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

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

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

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

The "Pilots" case

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

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

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

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

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

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

Box B

Other Horizontal Restraint Cases

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

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

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

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

2.1.2 Vertical agreements

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

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

recognised policy of refusing to scrutinise vertical restraints under Article 6.[21] Earlier this year, the Commission opened its first such case, apparently signalling a policy shift, but there has been no decision and thus no indication of what the Commission's approach will be.

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

2.1.3 Abuse of Dominance

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

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

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

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

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

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

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

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

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

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

Box C

Other Abuse of Dominance Cases

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

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

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

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

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

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

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

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

2.1.4 Mergers and acquisitions, including prenotification

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

Debate over merger control in general.

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

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

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

- It was also argued that premerger notification systems impose high costs on governments and firms. In fact, such systems can be costly, but the cost can be minimised by setting high reporting thresholds. Moreover, some countries reduce costs even further by banning anticompetitive mergers but not establishing a premerger notification system.

- The third traditional argument against merger control in Peru was that since merger analysis is particularly complex, there is an undue risk that competition enforcers will make incorrect decisions. The premise of this argument is questionable, and the argument has lost some of the force it may have had now that Indecopi has been operating for more than ten years and has some experience in merger analysis.

- The fourth and final argument is that the complexity of merger analysis provides discretion that can be used to control the economy in ways that are inconsistent with the economic reform programme. For example, the government might block mergers it does not like on the pretext that they are likely to be anticompetitive. Given Peru's history of government control and its apparently incomplete commitment to liberal economic reform, it is understandable that Peruvian reformers are particularly sensitive to this risk. However, this risk exists in all countries, and international experience provides methods for addressing it. Political interference is generally combated by giving decision-making authority to independent quasi-judicial agencies or the judiciary, implementing transparent procedures and principled policies, and providing for judicial review of particular cases and legislative oversight of agency policies.

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

- In the last few years, the number of firms that manage retirement funds shrank from 7-8 to four, and now those firms have been being accused of engaging in price fixing. There has been no finding of price fixing, but collusion is easier with four firms than with 7-8.

- A single brewer has recently acquired all of Peru's other brewers and is now accused of abusing a dominant position in the beer market. There has been no finding of dominance or abuse, but without some of those mergers, there would be no possibility of dominance.

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

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

Merger control in the electricity market

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

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

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

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

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

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

Box D

A Sample of Indecopi's Merger Cases

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

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

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

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

2.2 The Market Access Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3 The Unfair Advertising and Unfair Competition Laws

Peru's laws banning Unfair Competition[40] and Unfair Advertising[41] are both administered by Indecopi's Unfair Competition Commission. This administration consists primarily of proceedings to resolve disputes between two or more businesses; there is very little *ex officio* enforcement of the Unfair Competition Law and only a little more of the Unfair Advertising Law. Moreover, since it costs approximately USD 180 to file a formal complaint before the Unfair Competition Commission, it is rarely used by consumers, which is significant because this Commission has exclusive jurisdiction over advertising cases. An increasing share of the Unfair Competition Commission's work involves advertising cases, but in 2003 unfair competition cases still represented 55 percent of the Commission's work.

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

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

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

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

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

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

2.4 The Consumer Protection Law

Peru's Consumer Protection Law[46] is applied by Indecopi's Consumer Protection Commission. Although the law does not apply to false or deceptive advertising, it is in other respects quite broad. It declares a broad range of consumers' rights – including a right to be protected from unhealthy and unsafe products – and suppliers' obligations – including the need to issue an invoice for all transactions; display prices; maintain price lists and make available to consumers on demand; warn consumers about possible problems in promptly obtaining parts or accessories; deliver services speedily; provide sufficient information about products and services; ensure that foreign products have warranty information and warnings in Spanish; make repairs, replacements, or reimbursements for defective products; and compensate consumers for damage caused by inadequate service. It also regulates consumer credit transaction.

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

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

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

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

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

2.4 Antidumping and Safeguard Determinations

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

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

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

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

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

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

2.5 Technical Standards and Certification Laws

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

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

2.6 Intellectual Property Laws

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

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

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

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

2.7 The Market Exit Law

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

3. Institutional Issues

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

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

3.1 Indecopi's organisational structure

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

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

Indecopi's "jurisdictional" bodies

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

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

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

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

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

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

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

Indecopi's departments

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

Indecopi's "decentralised" regional offices

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

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

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

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

3.2 Indecopi's case-handling and other procedures

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

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

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

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

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

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

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

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

3.3 Indecopi's investigative and remedial powers

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

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

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

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

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

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

3.4 Indecopi's core competition resources and caseload

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

Table A

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

The Free Competition Commission

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

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

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

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

The Market Access Commission

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

Resource levels and sources

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

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

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

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

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

3.5 Private actions for damages

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

3.6 The breadth of Indecopi's mandate

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

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

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

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

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

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

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

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

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

- The Free Competition Commission and the Market Access Commission both combat anticompetitive restraints and apply core competition principles in their work. There are clear efficiency benefits in having these two Commissions in a single agency.

- Core competition analysis (assessment of market power, etc.) is relevant in antidumping and safeguard proceedings. The applicability of competition principles to such matters is limited by international treaties, but it appears that Indecopi has sometimes been able to inject some competition analysis into these proceedings. On the other hand, some of Indecopi's recent positions in this area have apparently been less procompetitive than the positions taken by the Ministry of Economy and Finance and the Trade Ministry.

- Core competition analysis is also relevant in some intellectual property issues and in assessing some product standards, but it is not clear whether these potential efficiencies are more than theoretical. The vast majority of Indecopi's intellectual property work does not call for core competition analysis, though familiarity with basic market concepts can sometimes be helpful.

- Core competition analysis is not used in Indecopi's unfair competition or consumer protection work. Nevertheless, research conducted in connection with the OECD Global Forum on Competition reveals that competition agencies that have these functions believe that they complement each other, with competition principles serving as a reminder that government actions intended to protect consumers can instead harm them if they are unnecessarily restrictive, and the consumer protection function serving as a reminder that markets do not operate perfectly.

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

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

3.6 International issues

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

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

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

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

4. Competition Policy in Regulated Sectors

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

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

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

4.1 The Telecom Sector

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

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

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

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

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

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

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

4.2 The transportation sector

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

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

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

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

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

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

4.3 The energy sector

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

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

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

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

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

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

4.4 Other sectors

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

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

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

5. Indecopi's Competition Advocacy

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

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

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

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

Indecopi's conventional competition advocacy work with the government has also been important. In 1999, for example, the agency provided other Government bodies with150 competition policy analyses on a wide range of topics. Most of the analyses were submitted to Congress. Other government agencies have generally been less likely to seek Indecopi's advice. In particular, although competition policy considerations are obviously important when a government considers the privatisation of state assets, Peru's privatisation agency has not consistently consulted with Indecopi. The

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

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

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

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

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

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

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

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

6. Evaluation and Recommendations

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

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

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

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

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

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

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

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

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

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

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

Sources of funding

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

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

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

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

Resource levels

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

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

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

Ex officio free competition cases

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

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

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

Guidelines

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

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

Market access cases

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

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

Merger control

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

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

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

Cartels

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

Abuse of dominance

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

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

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

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

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

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

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

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

2. In fact, competition policy and economic reform have brought tremendous benefits to Peru's citizens over the last dozen years, but it is clear that the public and parts of the government do not understand how Peruvians are benefiting from this reform. Particularly in remote villages and rural areas, it is likely that the marketplace as they experience it does not show significant benefits. Even in these areas, however, those who have electricity or telephone service have in fact received enormous benefits.

3. Peru's Government and Ministries should join with Indecopi and other competition advocates to explain that these and other benefits are the result of competition policy and market-based reform. They should also emphasise that competition policy does not interfere with social programmes, but rather helps make such programmes more efficient. Moreover, the government should take advantage of the public's distrust of the judiciary by explaining that judicial reform will help Peruvians realise the benefits of market reform. Finally, since market reform has clearly benefited Peru's economy overall, the government could usefully examine whether and to what extent its current tax or other policies interfere with the widespread dissemination of these benefits.

Table A – 1

Resource Allocation among Commissions and Offices

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

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

Table B – 1

Allocation of Resources among Tribunal Chambers

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

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ENDNOTES

1 LMIC countries that have participated in the OECD Global Forum on Competition include Albania, China, Egypt, Morocco, South Africa, Thailand, and Tunisia.

2 Vargas Llosa first became politically active in August of 1987, when he protested Garcia's proposal to nationalize all financial institutions and insurance companies.

3 During 1993-1997, the percentage of people living in poverty fell from 27 to 14 percent.

4 *Indecopi-Educa* is a training programme through which the agency trains primary and secondary school teachers in how to explain free market concepts to their students.

5 *See* n. 14 and accompanying text.

6 *See, e.g.,* Kwang Wook Kim, "Conflict of Interest: The Tension between Public-Private Cooperation and Multiple Principles in Peru" in *The Role of the State in Competition and Intellectual Property in Latin America*, Beatriz Boza, ed., (Indecopi 2000) (hereinafter "*The Role of the State"*), at 45. *See also* Ruth Lars Keppeler and Andreas Reber, "Information and Communication Technology in Peru: Building an Industry," in *The Role of the State* at 383.

7 The Tribunal relied heavily on the writings of United States Judge Robert Bork Judge, and Indecopi appears to have taken a quite hostile approach to government regulation.

8 In 1998, one expert concluded that "Indecopi now needs to prosecute major cases of market abuse so the public can see how Indecopi's regulatory interventions improve their living conditions." Geoffrey Shepherd, "The Role of Indecopi: Proposals and Perspectives," in *Peru's Experience in Market Regulatory Reform, 1993-1998*, Beatriz Boza, ed., Indecopi (1998) (hereinafter "*Peru's Experience*"), at 97. *See also* Mercedes Aroaz Fernandez, "The Value of Formality, Investment, and Competition Policy," in *The Role of the State* at 148 (warning about the possible cost of not taking a more preventive approach); Barak Orbach, "Competition Policy in Transition: Lessons from Peru," in *The Role of the State* at 225 (expressing concern about Indecopi's narrow behavioural approach)..

9 Peru was selected in 1999 to serve a term as APEC's "convening economy" on competition law and policy matters.

10 Robert M. Sherwood, "Indecopi: The 21st Century Arrives a Little Early," in *Peru's Experience* at 140. See also Kwang Wook Kim, *supra* n.6, at 47 (referring to Indecopi's "lack of political capital"), 50 (referring to the weakness of Indecopi's legal mandate), and 57 (noting that historically in Peru, autonomous agencies have not fared well after changes in government)..

11 *See, e.g.*, Aurora Belmore, "Indecopi in Partnership with the Inter American Development Bank," in *Peru's Experience* at 89 (expressing concern about Indecopi's ability to maintain its independence from the government and to avoid being frustrated by the courts).

12 Technically, Osiptel enforces Decree Law 702, whereas Indecopi enforces Decree Law 701, but the two laws are essentially the same.

13 Resolution No. 163-96.

14 Resolution No. 001-97.

15 Resolution No. 206-97. Specifically, the mandatory precedent was as follows:

> "Price fixing and market division agreements shall be illegal per se when they are intended to restrict the competition, i.e. when they are pure or naked cartels. On the other hand, the price fixing and market division agreements that are ancillary or complementary to an agreed association or integration and that have been made to improve the economic activity shall be analyzed case by case to determine if they are rational or not. In case they are not considered to be rational, they shall be deemed illegal.
>
> If, depending on the economic activity to be analyzed, it is concluded that the integration agreed among the companies is essential for that activity to be carried out, then such integration agreement, as well as the restrictions on competition that would arise therefrom in order that such activity can be carried out, shall be allowed. However, when the integration is considered to be beneficial but not essential to carry out such economic activity, then the integration agreement and the ancillary or complementary agreements that restrict the competition shall be permitted only whether they meet the following three conditions:
>
> i) the agreement fixing prices or dividing market is ancillary to a contract integration; that is the parties must be cooperating in an economic activity other than the elimination of rivalry, and the agreement must be capable of increasing the effectiveness of that cooperation and no broader than necessary for that purpose;
>
> ii) the collective market of the parties does not make the restriction of competition a realistic danger;
>
> iii) the parties must not have demonstrated a primary purpose or intent to restrict the competition.
>
> When these three conditions are not met, the agreement shall be considered to be unlawful."

16 Resolution No. 224-03.

17 *See FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). *See also California Dental Ass'n v. FTC*, 526 U.S. 756 (1999). *See generally* Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17*, 8 Sup. Ct. Econ. Rev. 265 (2000); Timothy J. Muris, *GTE Sylvania and the Empirical Foundations of Antitrust*, 68 Antitrust L.J. 899 (2001).

18 At least in the past, the fines imposed by the Intellectual Property Chamber of the Tribunal were said to be so low that it is profitable for pirates to continue their illegal activities and treat the fines as a cost of doing business. Whereas the Offices used deterrence criteria in setting fines, the Tribunal apparently chose not to impose fines that exceeded the harm resulting from the illegal conduct. Elvia Patricia Gastelo, "Recent Developments in Peru's Response to Intellectual Property infringement," in *Peru's Experience* at 143, 162.

19 OECD, Hard Core Cartels (2003); OECD, Fighting Hard Core Cartels: Harm, Effective Sanctions, and Leniency Programmes (2002).

20 *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).

21 Armando E. Rodriguez and Kelly A. Hoffman, "Why is Indecopi Focused on Competition Advocacy?" A Framework for Interpretation," *Peru's Experience* at 197.

22 Resolution No. 14-93.

23 Resolution No. 15-02.

24 Resolution No. 429-04.

25 Resolution No. 870-02.

26 Resolution No. 006-03.

27 OECD, OECD GLOBAL FORUM ON COMPETITION: *Preventing Market Abuses and Promoting Economic Efficiency, Growth, and Opportunity* (2004).

28 Antimonopoly and Antioligopoly in the Electrical Sector Law, Decree Law No. 25,965 (1996).

29 Barak Y. Orbach, "Competition Policy in Transition: Lessons from Peru," *The Role of the State*, at 235 n.48.

30 The law refers to "direct or indirect" control, but does not require notification of a stock acquisition that gives the acquiring firm the ability to appoint board members who could monitor the acquired firm's activities and influence its decisions.

31 UNCTAD, *PERU: Informe sobre las necesidades y prioridades en el area de Políticas de la Competencia*, Documento preparado para el Seminario Subregional Bolivia – Perú (Lima, del 22 al 24 de marzo de 2004), at 27 *et seq.* El Informe

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

32 The Market Access Commission was created as a separate unit in 1996. Before then, Indecopi's powers under Decree Law 776 were exercised by the Free Competition Commission and the Consumer Protection Commission.

33 Armando Caceras, "Indecopi's First Seven Years: The Challenge of Changing the Paradigm of Succeeding in the Market, in *The Role of the State* at 108.

34 Resolution No. 02-1998.

35 Resolution No. 03-98.

36 Resolution No. 448-03.

37 Resolution No. 34-98.

38 Resolution No. 182-97.

39 Beatriz Boza, "The Role of Indecopi in Peru: The First Seven Years," in *Peru's Experience* at 3, 23.

40 Decree Law No. 26122.

41 Legislative Decree No. 691.

42 As of 1998, Indecopi had apparently not developed a system to assure trade secret protection. Robert Sherwood, Indecopi: the 21st Century Arrives a Little Early, in *Peru's Experience* at 138. It is unclear whether such a system exists today.

43 Resolution No. 163-96.

44 Resolution No. 547-03.

45 *See* Directive 97/55/EC of European Parliament and of the Council of 6 October 1997, Article 3a.

46 Legislative Decree No. 716.

47 Beatriz Boza and Welby Leaman, The Promotional Role of Government in Market Discrimination Cases: Lima nightclubs, self-esteem, and civil society empowerment, in *The Role of the State* at 173.

48 Supreme Decree No. 133.

49 The Commission's activities are based on Decree Law No. 668.

50 At the time Peru had some intellectual property laws and an intellectual property office, but the military government of the 1970s had used the office to prevent the

import of goods that were based on intellectual property. The current laws are Copyright Law, Decree Law No. 822 (1996); Trademarks Law, Decree Law No. 823 (1996); Patents and New Technologies Law, Decree Law No. 823 (1996).

51 Michael P. Ryan, "Intellectual Property Institutions and the Public Administration of Knowledge in Developing Economies: The Case of Indecopi in Peru," in *The Role of the State* at 319.

52 *Id*. at 334.

53 The law administered by the Commission was issued by Presidential decree in 1992. Decree Law No. 26116. *See also* Decree Law No. 845 (1996) and Legislative Law No. 27146 (1999).

54 Removal without cause requires a "favourable opinion" by Indecopi's Board, its Advisory Committee, and the President of the Council of Ministers. Since the Advisory Committee is essentially non-functional, and since the Board members are all removable without cause, it seems unlikely that this requirement would provide any real protection to a Tribunal member whom the government wanted to remove.

55 *See* Frank Pasquale, "Indecopi as Brand and Holding Company: The Business Model of Governance," in *The Role of the State* at 83, 98; Ross Lipson, "Innovation in Public Sector Reform: The Decentralisation of Indecopi," in *The Role of the State* at 273, 284-87; Kwang Wook Kim, "Conflict of Interest: The Tension between Public-Private Cooperation and Multiple Principals," in *The Role of the State* at 295.

56 Understandably, the duration of proceedings varies considerably both with a given Commission and among Commissions. For example, proceedings before the Consumer Protection Commission are usually resolved in 2-3 months.

57 The Consumer Protection Commission is also authorised to order simple remedial actions such as repairing or replacing a defective product.

58 Precisely comparable historical data are not available throughout this period, but it appears that only 8 or so staffers were engaged in competition investigation and analysis in 1999.

59 South Africa's Competition Commission has 91 full-time positions, and its Tribunal has 13 full-time positions – two Tribunal members and a support staff of eleven. Since South Africa's telecomm regulator has competition law enforcement power (though not exclusive, as in Peru), South Africa's total of 103 seems most fairly comparable to Indecopi's 15 work-years.

60 Law 26285 – Law of the Progressive Demonopolisation of Public Telecommunications Services.

61 *See* World Bank, Country Assistance Strategy for the Republic of Peru, Annex C: Private Sector Strategy, para. 22 (2002).

62 See Part 2.2, above.

63 See Part 2.1.4, above.

64 Armando Caceras, *supra* n.21, at 123.

65 In Chile, the Tribunal will be an independent entity that has judicial powers but is not formally part of the judiciary. It will have five members. The President of the Tribunal, who must be a lawyer with at least ten years of experience in the competition law field, will be appointed by the President of the Republic from a list of five nominees established by the Supreme Court through a public competition. The other members (two lawyers and two economists) will be chosen as follows. One lawyer and one economist will be chosen by the President from a list of three nominees established by the Central Bank (Council of Governors), also through a public competition. The other lawyer and economist will be appointed directly by the Central Bank from candidates selected by this same public competition. The Tribunal will also have four surrogate members, selected by the President of the Republic and the Central Bank from the same lists of nominees. All candidates are required to have expertise in competition issues. The members of the Tribunal have terms of six years, and may serve more than one term. During their terms, they can only be removed for cause. Neither public servants nor officers or employees of publicly held corporations (or their affiliates) are eligible.

Competition Law and Policy in Peru

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

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

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