

12. COMPETITION POLICY IN THE ANDEAN COUNTRIES: A POLICY IN SEARCH OF ITS PLACE

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In the Andean region, competition policy is the new kid on the block. It has come as a result of the trade liberalization and regulatory reforms developed in each country since the early 1990s. It has also been part of the “open regionalism” approach adopted by the Andean Countries. Effective competition is expected to develop by exposing the highly concentrated and protected markets of the region to international competition. Competition policy plays three important roles in this process. First, it enhances market access for new competitors. Second, it protects the competition process from restrictive business practices. Third, and most important, it fosters economic efficiency and consumer welfare. A complete policy in place will be instrumental in promoting an environment conducive to investment and business activities in the region.

To date, the approach to competition policy has varied, and the policy has been applied very differently in the Andean region. First, three of the five Andean countries—Colombia, Peru, and Venezuela—have adopted competition laws that are enforced by independent agencies. The other two countries—Bolivia and Ecuador—have made competition policy rely solely on trade liberalization and deregulation measures. Second, although the existing laws and institutions have been built on the same foundation, each country has set different policy priorities that have notably influenced the enforcement outcomes. Third, the lack of consideration for competition when framing other public policies has opened the way for exemptions and the reinstatement of protectionist measures at the behest of vested interests. Finally, competition policy has been pursued from a purely domestic point of view, and countries have lost the regional perspective to which they are committed by the Andean integration project.

This chapter analyzes the implementation of competition policy in the Andean region and its role in improving trade, investment, and market integration. By and large, the Andean countries have successfully harmonized most of their trade policies. In some cases, namely, investment, intellectual property, standards, and subsidies, the Andean rules are the reference for domestic enforcement. This has not been the case, in competition policy. Firms are subject to rules that are unevenly applied in some countries and which simply do not exist in others. The chapter will revolve around a basic message: to fully advance the integration of the Andean markets, competition policy must be enforced comprehensively and consistently both at the national and subregional levels. As firms expect to operate not in a particular country, but on the larger market provided by the integration scheme, institutional and enforcement harmonization is necessary. Otherwise, competition policy, as currently seen, may impair the benefits that a wider regional market promises for investors and consumers.

The first section in this chapter presents the background, including the common features of the competition policy existing in the region. The second section examines the experience of Colombia, Peru, and Venezuela in implementing and enforcing competition policy. The third section reviews the Andean Community’s competition policy. Finally, policy recommendations are provided as final comments.

SAME TRADITIONS, SAME LAWS, SAME INSTITUTIONS

Promoting the conditions for wider market access and efficiency through competition has been a difficult challenge for the Andean countries. Decades of government regulations and subsidies, tariff protection, and exclusive licenses for the development of infant industry stimulated private sector activities based largely on collusive and monopolistic practices. Most of these practices had only the illusion of success while being highly inefficient. In exchange for such policies, cooperative agreements among competing firms were developed to negotiate prices and other trade restrictions with governments. This government and business behavior is expected to change with the enforcement of competition policies and laws.

Market entry and access are the key elements of every transition toward open markets. In theory, the greater the access to new participants, the greater will be trade flows and therefore consumer options, quality, and

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prices. Inefficient firms exit, leaving those firms able to overcome the challenges of competition. In practice, however, this sequence is often affected in two ways. The first is through private anticompetitive practices like collusion between competitors and the abuse of a dominant position. The second is through government-based barriers, including such traditional tariff and nontariff measures as export cartel exemptions, import-export licensing restrictions, rules of origin, and government procurement and technical standards. In developed countries like the United States where entry is not such a relevant issue, competition policy has traditionally focused on preventing and prosecuting private anticompetitive or antitrust practices. In the Andean countries, however, where entry is indeed an issue, competition policy has a broader scope. It must focus equally on private practices and public policies affecting competition conditions (Khemani and Dutz 1996).

As just mentioned before, competition policy has been actively pursued by Colombia, Peru, and Venezuela. Since the early 1990s, policy has consisted of a blend of trade liberalization and enforcement of competition laws by independent agencies. Although these countries share many similarities in their general approach to competition, there are also many differences in the substantive implementation and enforcement of the rules, due in part to the early stages of policy formation and the political conditions of each country. In Bolivia and Ecuador, competition policy has been limited to trade liberalization and sectoral deregulatory efforts. Competition laws are nonexistent and, given the slowing of their reform process, progress in this area in the near future seems unlikely.¹ As this chapter addresses competition issues in unregulated markets, the remaining analysis will focus primarily on the former set of countries.

The competition laws of Colombia, Peru, and Venezuela narrowly aim to promote and protect competition in order to enhance economic efficiency and consumer welfare. In pursuit of these goals, the laws contain three components relevant to market access: business anticompetitive behavior, merger review, and promotion of competition conditions in the economy. The laws also provide for specific enforcement mechanisms and institutions to which both private firms and public entities are subject.²

With regard to anticompetitive behavior, all the laws are quite similar. Modeled on Articles 85 and 86 of the Treaty of Rome, these laws focus on business practices that are likely to restrict or affect competition, and they list specific conduct prohibitions. For enforcement and methodological purposes, these prohibitions are separated into two groups. The first group consists of bilateral practices that include horizontal and vertical restraints on competition. Horizontal restraints relate to collusive agreements among suppliers of the same or similar goods to restrict competition. Such practices include price-fixing, input or output restraints, market allocation, restriction of market access, and bid-rigging practices. Vertical restraints relate to agreements between suppliers and distributors to restrict competition. These include resale price maintenance, exclusive dealings, exclusive geographic designations, tying arrangements, boycotts and refusals to deal. The second group of prohibited practices focuses on unilateral restraints imposed by firms with a large share of market power, so-called abuses of dominant position. In such abuses of power, firms are not only able to restrict competition already in place, but are also able to prevent entry of potential competitors through predatory pricing and other means of raising the entry costs for rivals.

The concept of dominance is highly useful for enforcement in countries like the Andean ones. Following decades of protectionism, the Andean markets are highly concentrated. Typically a sector has a dominant firm. Placing emphasis for enforcement on behavior and punishing only the abuse of a dominant position make enforcement less traumatic than if emphasis is placed on correcting the market structure (number of competitors or degree of concentration), as is often the case under a U.S.-type approach. If the emphasis were not placed on the behavioral aspects of competition, there would be an increased risk of focusing more on corporate divestitures and other structural remedies. For the Andean countries, which are just beginning to open their economies to international competition, optimal firm size is still unknown. Markets, as well as institutional capabilities, must be able to develop further before we can understand better their structure and functioning.

Though the laws on anticompetitive behavior are similar, they actually differ radically in their approach to merger control. Differences in this area relate to the approach toward market power and industry concentration

¹ In Bolivia, for instance, the Sectoral Regulation System Law (SIRESE) provides an innovative and comprehensive approach toward competition for firms operating in the telecommunications, electricity, transportation, hydrocarbon, and water sectors. In these sectors, firms must operate according to principles of free competition and economic efficiency and, as in other competition laws of the region, conduct and merger transactions likely to restrict or distort competition are prohibited (OAS 1997b).

² For a comparative review of the competition laws and institutions existing in Latin America and the Caribbean, see Tineo (1997).

as a result of merger and joint venture activities. These transactions are a source of concern, as they may cause a reduction in the number of competitors and may increase market power and the likelihood for anticompetitive behavior. Given the high level of concentration and the small number of competitors established in the Andean markets, merger operations may have a great impact. Nonetheless, mergers and joint ventures can also strengthen the international competitiveness of firms and increase economic efficiency. In a reasonably open market with low barriers to entry, any action by the merging firm intended to raise prices or reduce output would be disciplined by the entry of new competitors.

Based on this range of concerns, the merger provisions vary. In most countries, despite procedural differences, merger analysis is based on the European concept of abuse of dominance. Under the European concept, mergers are of concern only as long as they have anticompetitive practices. In contrast, the U.S. merger system is based on the narrower concept of market power. Mergers in the United States are of concern because they lead to an increase in market concentration and a decrease in the number of competitors. Generally, the European dominance approach is more relaxed because it aims at encouraging firm integration and the formation of efficient large firms. The U.S. approach is more cautious about firm integration because it favors market structures that are based on rivalry. Not surprisingly, the threshold for premerger notification in Europe is substantially higher than in the United States. The combination of high thresholds and the use of the likelihood of dominance abuse not only leave European firms freer to merge, but also provides the Competition Commission with less technical standards for analysis than in the United States.

In the Andean region the competition agencies have not yet developed a clear approach to dealing with mergers. In practice, there has been an inconsistent mixture of the two systems. Depending upon the circumstances, each agency has shifted from the European practice of assessing dominance to the U.S. practice of assessing market power. For instance, Colombian law provides for a mandatory premerger notification system with extremely low thresholds, whereby the competition agency reviews either the likely restrictive effects or the economic efficiencies of the transaction in the relevant market to allow it or ban it before consummation of the merger. Venezuelan law provides for an after-the-fact review system by which the competition agency may prohibit a merger if it restricts or creates a dominant firm in the relevant market. Peruvian law does not provide for merger control. This divergent approach in such a critical area of competition policy has added new obstacles to investment and denied the region of a key tool for the integration of firms.

Concerning the promotion and creation of competition conditions, so-called competition advocacy, the approach of countries is similar. Policy in this area deals with the capacity of the competition agencies to watch over public policies that affect competition, particularly market entry conditions. Public policies—typically trade measures (tariff and nontariff barriers), sectoral regulation of natural monopolies, and privatization of public enterprises—may facilitate anticompetitive practices and decrease of competition. These measures may also raise the costs of entry and reduce incentives for new participants. Under these conditions, firms are more likely to lawfully collude or abuse their market power. Competition advocacy thus prevents anticompetitive practices by promoting the functioning of market mechanisms and rent-seeking behavior (Rodríguez and Coate 1997). In liberalizing economies, this is a chief pro-competitive policy because it provides a highly effective way of facilitating market access.

Promoting competition in highly regulated markets is a difficult task. Its success depends largely on how well the concept and values of competition are inserted into the policymaking process of each country. Competition policy is related to, yet is often in conflict with, core areas of industrial and trade policy, such as tariff protection, subsidies, antidumping, government procurement, and standards. Because these trade policies typically aim to protect domestic firms and restrict market access and foreign rivalry, a competition goalkeeper has to be part of the government structure. In many countries the competition agencies have found that this role is even more important than traditional law enforcement, at least during the transition period. Yet many cartel activities and abuses of dominant positions are lawful in many markets because of protectionist measures. Settling battles against more powerful government agencies and well-organized interest groups, however, requires committed institutions and political support from the very heads of governments. In an environment in which governments are still shifting from interventionism to open markets, competition advocacy has shown partial effectiveness only in Peru and Venezuela, where the competition agencies have contributed to regulatory reforms and opening markets.

As for matters of institution building, the competition agencies have followed a similar route. Law enforcement is carried out by independent agencies headed by fixed-term appointees. The competition agencies have two functions: investigation and adjudication. Investigation and proceedings are conducted by technical units or secretariats following procedural rules set out by law. The findings are submitted to the superintendents in the case of Colombia and Venezuela, and to the commission in Peru, for adjudication. Rulings of the agencies may declare illegal practices, order divestiture of mergers, and impose sanctions. All countries guarantee private rights of action to claim civil damages to those affected by anticompetitive practices. Likewise, these countries guarantee rights to affected parties to appeal the rulings of the agencies to courts of justice, including the supreme courts (OAS 1997b).

As part of their activities, the competition agencies devote a great deal of time to disseminating the goals of the laws and create a competition culture in each country (OAS 1997c). The agencies have also benefited from personnel training and technical assistance from various sources, including the United Nations Conference on Trade and Development (UNCTAD), the World Bank, the European Union, and the U.S. Federal Trade Commission and the Department of Justice. This assistance has allowed the agencies to learn enforcement standards and methodologies for market assessment widely applied in other jurisdictions (Kovacic 1997).

ENFORCEMENT: DIFFERENT PRIORITIES, DIFFERENT OUTCOMES

In this section we demonstrate that, although many goals, functions, and institutions seem similar, at least in design, significant differences in the enforcement records in each country come to light.

Colombia: Leveling the Field for Better Times

Colombia has the oldest competition law among the Andean countries.³ Law 155, passed in 1959, was intended to follow the U.S. antitrust approach against monopolies and large firm size. It deals basically with two antitrust areas: traditional business anticompetitive practices and mergers. After a general statement prohibiting all conduct aimed at restraining competition, the law sets a few specific prohibitions for cases of price-fixing, output restraints, market allocation, abuse of dominant position, and resale price maintenance. At the same time, the law gives the government power to allow restrictive agreements among firms aimed at stabilizing basic sectors or sectors of public interest to the economy. With regard to mergers, the law establishes a mandatory premerger notification system. Plans for mergers of firms whose combined productive assets are worth more than 20 million pesos must be submitted for government approval because of the likelihood that the merger may restrict competition.

Despite its straightforwardness, there has been no real enforcement of this law. According to the records, not even one case was prosecuted or solved by the government during the first three decades of its existence. Two factors prevented the law's implementation. First, infant-industry protectionism and import-substitution policies were actively pursued to foster the development of basic private industries, such as coffee, textiles, cement, agriculture, and beer. These policies, along with high tariffs, made the Colombian economy among the least open to foreign competition in the Andean region, second only to Ecuador. These results were two faces of the same coin: rapid industrial growth and consolidation of monopolies and oligopolies.

The second factor was a natural consequence of the first. The powerful firms, trade associations, and conglomerates that historically developed in the shadows of the industrial policy became the main constituency of governments. This bred a mutually cooperative relationship that did not mix very well with an independent competition policy. Competition law was seen more as a warning signal than as a serious remedy against the abuses of the existing government-promoted monopolies and oligopolies. The fact was that protection and collective rent-seeking behavior was more important than competition. As one former Colombian minister commented, "It [did] not make much sense to try to promote competition through the enforcement of antitrust legislation, when in the office next door, in the same ministry, they [were] trying to keep competitors out of the country and to protect domestic production with high tariffs and quantitative barriers." (Hommes 1996)

³ The Law on Restrictive Business Practices No. 155 (December 24, 1959). This law was regulated by Decree 1302 of 1964. Aimed at strengthening law enforcement, the government issued the Decree-Law No. 2153 of December 30, 1992, which granted broader powers on competition to the Superintendency of Industry and Commerce (OAS 1997b).

Within the scope of the economic reforms introduced by the Gaviria administration in 1991, competition was fostered through trade liberalization and economic and investment deregulation. Price controls were lifted, and prices began to be set at lower levels according to international reference. This dynamic led Colombian firms to restructure in order to gain international size and develop economies of scale. Although Law 155/1959 remained unaltered, new provisions enacted by Decree 2153 of 1992 supplemented the old law to update its concepts and reinforce the powers of the competition agency. Decree 2153 also significantly reduced the degree of government discretion in competition matters.

Concerning conduct, the decree expanded the list of prohibitions and provided specific standards for the assessment of infringements. Unlike the old law of 1959, the decree clearly defined the basic antitrust concepts related to conduct and structure. It provided a “de facto” standard against horizontal practices—such as price-fixing; discriminatory practices; market, supply, or quota allocations; tying arrangements; output restraints; refusals to deal; and bid-rigging—while leaving vertical practices to a “rule of reason” analysis. The decree also specified conduct that was considered an abuse of dominant position under a rule of reason standard of analysis. Finally, the decree exempted cooperative agreements for research and development. With regard to merger review, the decree introduced exceptions for efficiencies by which mergers that were found to be anticompetitive might nonetheless be allowed if the merging parties demonstrate that efficiencies are greater than the restrictive effects on the market.

From an institutional standpoint, Decree 2153 charged the newly created Superintendency of Industry and Trade with enforcement of the law. The superintendency is an independent body from the executive branch that is headed by a superintendent. Competition law enforcement is one of the three functions assigned to the superintendency; the other two functions are consumer protection, management of the intellectual property rights system, and supervision of the chambers of commerce. For competition matters, a deputy superintendent is charged with investigations and merger analysis. Once investigations are concluded, the deputy submits the findings to the superintendent for final adjudication. The superintendent may act on his own criteria with regard to opening and conducting investigations, and imposing sanctions and fines.

The agency’s decisions may be reviewed only by the courts of justice. Furthermore, the decree enlarged the superintendency’s functions by charging it with a role in competition advocacy. The agency may advise other government bodies on regulations affecting market entry and competition issues in natural monopolies and privatization. This upgraded the Colombian competition agency from an antitrust enforcer to a government advisor in competition policymaking. These improvements in enforcement and policy formulation promise more active competition in the Colombian economy.

Since 1992, when the superintendency began to operate under the new framework, there have been 142 cases related to conduct violations. In 1993, 22 cases were filed, 30 in 1994, 69 in 1995, and 21 in 1996 (OAS 1997c). According to the record, the majority of the cases were closed for lack of merit. Formal investigation has been conducted in 27 cases. Nine of these cases were dropped at the plaintiff’s request, and 18 cases were settled before the agency. The issues at stake were price-fixing, resale price maintenance, exclusive practices, and abuse of dominant position. The relevant investigations were carried out in the automotive, cellular, and health industries.

The superintendency has not reached a formal decision in any of the 27 cases examined. The agency’s practice has been to settle the cases by reaching consensual agreements with the firms involved in the investigations. Consensual agreements are a means of settlement for restrictive business practices. According to Decree 2153, the superintendent may close an investigation if the defendant pledges sufficient guarantees that it will cease or amend the allegedly anticompetitive practice. This is thought to be a positive approach to ease long-term changes in business behavior.

Consensual agreements have yielded a number of benefits in the Colombian transition process. They have minimized the impact that sanctions may otherwise have had in the economy. They have also provided the agency and firms with a mutual understanding of the laws and markets. This, in turn, has created a competition culture among the participants, as well as the conditions and expertise for stricter enforcement of the law. So far, the superintendency has reached consensual agreements with such powerful industries as cement manufacturers, breweries, and health service providers. The agency also has dealt with abuse of dominant position among important state-owned companies, such as railroads, and oil and energy companies. According to these settlements, the industries have pledged to end the alleged anticompetitive practices, being warned that further violations of the agreements will be punished.

A recent case, settled by the superintendency in April 1997, illustrates how this mechanism has worked. In the *Ferrovias* case, a Colombian state company, owner and operator of the national railroad network, was investigated for alleged abuses of dominant position in the transport of coal in Colombia's northern region. Drummond, one of the nine private firms dedicated to coal exploration and exploitation, had an exclusive contract with Ferrovias to transport a set amount of coal yearly for 30 years. The contract also conditioned the transport of other firms' coal upon Drummond's prior approval. At a firm's request, the superintendency examined whether Ferrovias' exclusive contract resulted in discriminatory treatment affecting the competition conditions of the other firms. The superintendency conducted a detailed analysis of the relevant market, demand and supply substitutability, and the effects of the contract in that market. Because of the absence of options for coal transport and given that the coal firms competed in markets other than the Colombian one, the superintendency found the contract discriminatory and restrictive of competition. Further, it found that the contract would give Drummond advantages in private and public coal procurement bids because it had exclusive rights to use the railroad system. Ferrovias accordingly agreed to drop Drummond's exclusive rights and allowed other firms to use Ferrovias' service without restriction (OAS 1997c).

Although the law provides for heavy fines for violations, the use of this power has been superseded so far by consensual agreements. This explains why the Colombian competition law has not had the impact seen in Peru and Venezuela. Rather, it appears dormant. Although beneficial in times of crisis, the exclusive use of consensual agreements has prevented the superintendency from developing sound criteria and enforcement precedents. Furthermore, it has deprived consumers from recovery of the social cost and injury caused by certain restrictive practices. Concerns about this practice arise out of its discretion and flexibility. The fact that the agency may settle its investigations, even those involving per se violations, is a risky exercise. In the long run, consensual agreements may well become new forms of cooperation in which the agency may tend to favor industry concerns rather than those of consumers. As they proliferate, the agency may be captured by this tool. This may reduce the credibility and limit the usefulness of the law.

Turning to the area of mergers, the superintendency has been busy processing the mandatory premerger notifications as described earlier. Since 1992, 212 notifications have been filed before the agency (OAS 1997b). All transactions have been either approved or simply not opposed. In most cases, the agency has found that the merging firms have little market power and that there is no need to worry about likely anticompetitive effects. In some other cases, notifications have targeted firms' conglomerate consolidations. One aspect of concern is the burdensome load of merger reviews carried out by the Colombian agency. Much of this workload stems from the excessively low thresholds set by the 1959 law. This has caused virtually every transaction to be submitted for approval. Merger analysis is the most time-consuming task in competition enforcement. So far, it seems that big mergers have not yet occurred, and merger review has turned out to be a bureaucratic routine that diverts important resources from the agency. As recognized by the superintendency itself, these thresholds need to be updated. This would allow the agency to focus effectively on transactions that are likely to impact the market and to develop methodologies accordingly.

With regard to competition advocacy, the agency has not participated actively in matters of public policy. Rather, it has dedicated its efforts to disseminating information about the scope and goals of the competition regulations among firms and the public across the country. The agency is a member of the Committee of Trade Practices in which antidumping and countervailing duty cases are decided. Competition considerations in such cases have not been addressed in this committee, and the agency instead has acted as any other trade enforcer. The participation of the agency in privatization and other regulatory processes has been rather limited and has had little impact on the competition conditions of those markets. An important issue to deal with is the lack of coordination among the number of agencies charged with competition matters as a result of sectoral regulations, such as in banking, insurance, public utilities, and telecommunications. As there is an agency for each of these areas, so there is a competition policy approach for each area. This diversity has yielded varied outcomes, which has sometimes cancelled out the decisions of one agency over those of the other. This has been reported, for example, between the competition agency and the banking agency on the treatment of certain practices under the competition law and the banking law (Alarcón 1997).

An assessment of Colombia's renewed commitment to competition policy shows that despite the improvements introduced by the new legislation, policy and law enforcement remains insufficient. The timid involvement of the agency in supporting the opening of the Colombian economy may enhance the

concentration and dominant position of the traditional conglomerates, and may add to government hindrance currently seen in the Colombian markets. The political weakness of the present government has contributed to this result. It seems that a more active antitrust enforcement of firms might boost an undesired opposition from the private sector, taking away the political constituency of the superintendency within the government.

Independent enforcement of competition law in a transition economy is not an easy task. The Colombian case shows it. The ability to prosecute collusion in a society as deeply rooted in government-private sector partnership as is the case in Colombia is a matter that must be addressed. While waiting for better times, however, Colombia should continue leveling the playing field and creating a competitive culture. This may include personnel training, development of methodologies for analysis, monitoring of market conditions, and more involvement in regulatory matters and government-based entry barriers. These quests will leave beneficial results when the current crisis is over.

Peru: Creating a Competition Culture

Trade and investment promotion have been at the core of the economic reform program launched by the Fujimori administration in 1991. Aggressive trade liberalization and privatization efforts were supported by decisive economic deregulation in all sectors. As a result, trade and investment flows increased significantly compared with the levels prior to the reform program. The laws of foreign investment and competition, both enacted in 1991, have been the main statutes for market access promotion.⁴ The foreign investment law establishes basic guarantees to free initiative, competition and access to all sectors, including sectors traditionally reserved for state-owned entities, such as public utilities, with a few exceptions in the natural resource and energy sectors. The law also declares that price-setting will rely on the market with the exception of public utility rates. Finally, the law provides guarantees against any government-based discrimination.

The competition law is the result of a constitutional prohibition against monopolistic practices. Seeking efficiency and consumer welfare as its objectives, the law focuses exclusively on anticompetitive conduct. Although monopolies and oligopolies are a concern, the target of the law is the actual performance of business practices that restrict or impede competition. Accordingly, anticompetitive conduct may come from two sources: bilateral trade restrictions and unilateral abuses of dominant position. Restrictive practices, considered per se violations, include price-fixing, output restraints, market allocation, and price discrimination. Other restrictive practices, such as vertical agreements, may be authorized under a rule of reason standard if they improve production and efficiency and do not harm consumers.

Concerning abuses of dominant position, the law focuses on the firms' ability to act independently from their competitors or consumers. The standard of analysis for these practices is quite flexible. The agency must determine the dominant position by measuring several factors, including, among others, market share, market concentration, entry barriers, and potential competition. Once dominance is verified, the agency must determine whether the firms have abused such dominance by means of anticompetitive practices. The law has left the determination of such conduct to the Competition Commission for which an illustrative list of practices was issued. It includes refusal to deal, price discrimination, and tying arrangements.

In Peru, mergers and other economic concentrations are not subject to the competition law.⁵ Therefore, firms may freely integrate, unify assets, or undertake joint venture efforts without being subject to official scrutiny under market structure considerations. Merging firms may nevertheless be examined under conduct standards. The reasoning behind this absence of merger policy has conceptual and practical considerations. Peru's efforts toward lowering entry barriers seem to be an adequate policy to offset the effects that some mergers may have in some markets. On the other hand, the Peruvian policy in favor of mergers seems also to encourage the rationalization of the production process and the achievement of firms' larger size and economies of scale.

In practice, merger policy is the most costly and complex enforcement mechanism. It focuses on measuring the likely effects that the increase of firms' size may have on the market. The goal is to prevent the acquisition of

⁴ The Law to Eliminate Monopolistic Controlling and Restrictive Practices of Free Competition, Decree-Law 701, November 5, 1991. Other competition regulations include the Law Creating the Institute for the Protection of Free Competition and Intellectual Property (INDECOPI), Decree-Law 25.868, November 18, 1992 (amended Decree-Law 26.116, December 28, 1992) (OAS 1997b).

⁵ Specific regulations dealing with merger control have been issued in sectors like public utilities and telecommunications.

market power that enables firms to easily restrict competition. Because it deals with future events, merger analysis is not an easy task. It requires precise information and accurate use of economics in order to properly define the relevant markets, the market power of the merging firms and measure whether competition is at risk. Limited resources, balanced against the foreseen low impact of mergers on the Peruvian market and the harm that erroneous decisions might inflict to the competition process, do not seem to justify a mechanism for merger review.⁶

The law enforcement role is undertaken by the Competition Commission of the National Institute for the Protection of Free Competition and Intellectual Property (INDECOPI). INDECOPI is a multifunctional agency, independent from the executive branch, in charge of promoting and enforcing a variety of newly passed market regulations. Under INDECOPI's jurisdiction are the laws on competition, antidumping and countervailing duties, consumer protection, unfair competition and advertising, technical barriers, and intellectual property rights. INDECOPI also deals with the removal of entry and exit barriers and economic deregulation. Each area has an independent commission. Each commission has a technical secretary in charge of conducting investigations and issuing preliminary findings for final adjudication. Final rulings may be appealed before INDECOPI's tribunal. This tribunal, also an independent body within INDECOPI, has the authority to uphold or overrule the commissions' findings. For all these tasks, the commissions and the tribunal count on the backing of INDECOPI's full-time staff. This wide jurisdiction over market issues facilitates a comprehensive policy and enforcement approach toward the issues affecting competition and market access in Peru (OAS 1997b).

The Competition Commission began its activities in 1994, and since then has focused on anticompetitive practices and abuses of dominant position. Between 1994 and 1996, 57 cases were investigated. Of these, 52 investigations were opened at the request of individuals and 5 at the commission's initiative. The investigations were broken down as follows: 21 investigations were for restrictive practices, 22 for abuse of dominant position, and 26 were a mix of both. Nearly 36 cases ended with a formal decision, while the rest were dismissed for lack of merit or relevance. Abuse of dominance cases centered around discriminatory treatment and refusal-to-deal practices, whereas restrictive conduct cases concentrated almost exclusively on collusive arrangements to fix prices. In seven cases the Commission found merits and fined the firms involved (OAS 1997c; INDECOPI 1994, 1995, 1996). Two cases, both initiated by the Commission, have had particular implications in shaping the policy toward conduct violations. The first one, decided in 1995, involved 18 wheat flour producers charged with price-fixing. The second case, decided in 1996, involved 16 poultry producers also for price-fixing. In both cases, the Commission found the firms guilty, and significant fines were imposed.

In the *broiler* case, the Commission *ex-officio* investigated the pricing practices of 16 poultry producers in Lima between 1995 and 1996. A six-month investigation, which included extensive examination of documents, interviews, and close monitoring of prices and other market conditions, concluded that the producers had coordinated actions to reduce poultry production and raise prices. To achieve that goal, the producers formed a cartel through which they agreed to reduce poultry production, limit sales to a fixed-weight poultry, discontinue breeding facilities, eliminate existing fertile eggs, and decrease their imports to force other firms to join the cartel or buy eggs from them. Furthermore, the producers agreed to reduce prices to encourage more poultry consumption to get rid of the surplus and avoid the entry of new competitors. The Commission found that soon after these practices yielded successful results, the cartel unlawfully increased the prices.

The case, a typical textbook example, provided an opportunity to deal with several important issues related to horizontal restraints. First, the Commission declared that price fixing, output restrictions, and raising of entry barriers were the most serious offenses to the Peruvian competition system. Second, it stated that price-fixing was a *per se* violation of the law, and that therefore, market power, efficiency, and other tempering considerations did not have merits in these cases. Third, the Commission improved its investigation methodology and defined some rules for evidence gathering. Finally and noteworthy, the Commission imposed the highest fines seen at present in Latin America for a price-fixing violation. For other countries in the region, the *broiler* case is a good example of how to approach cartel cases. In developed economies, agreements like the poultry cartel are solved in a straightforward manner, based solely upon the evidence of concerted actions. The

⁶ Arguments against the adoption of merger control in recent liberalizing economies have been presented by Rodríguez (1996). According to Rodríguez, the merger component is not essential during the transition period, but in the long run. During the transition to a market economy, mergers should not be controlled like in developed economies as they are driven by efficiency considerations rather than by monopolistic ones. This approach has been the basis for Peru's explicit spurning of merger control.

Commission instead solved the case with a more educative goal in mind. It explained the nature of the changes, the underlying goals of the anticartel provisions and defined the limits of cooperation among firms under the competition law.⁷

In addition, the case showed the Commission's degree of decisionmaking and enforcement independence. Poultry producers have traditionally been among the most powerful business groups of the country. In fact, poultry products are among those in highest demand, especially by the low- and middle-income population. In the past, poultry products were subject to price controls, which resulted in close links between governments and producers to coordinate supply. With competition rules in place, government and private sector are not collaborators any longer. To declare these collusive arrangements, which were formerly promoted by the government, unlawful was a difficult test for the Commission. President Fujimori himself publicly supported the independence of the Commission, despite the political lobbying for protection from the affected firms. The decision, still on a long road of appeals, clarified the role of INDECOPI in competition matters, and showed the stick that the agency could yield to enforce its decisions after two years of promoting the transition to competition.

Although the *broiler* case had a great impact in Peru, law enforcement is an activity still cautiously executed by the Commission. Many cases are dealt with by means of preventive consultation with the firms. The creation of a competition culture and the lowering of statutory entry barriers are activities on which the Commission spends most of its time and resources. In this regard, INDECOPI provides counseling services on contracts and other agreements likely to restrict competition. INDECOPI's Market Access Commission also contributes to these goals by identifying statutes and regulations likely to interfere in the market or discriminate against new participants. Efforts in this area have dealt with the elimination of market barriers created by regional and local governments. Among the most significant entry barriers have been the imposition of taxes on interregional trade and commerce, on local advertisement, and on the use of public roads, since such taxes increase business costs, especially for those small firms. In 95 percent of cases, the Commission has found such taxes in violation of market access regulations, and local governments have been fined. The main investigations involved Peru's two most important local governments, Lima and San Isidro (OAS 1997c). Such investigations have put INDECOPI on the front pages of the newspaper because they are seen as new forms of central government interference in local affairs. Nevertheless, competition and consumer welfare considerations have so far prevailed over strong political pressures.

An assessment of Peru's competition policy shows how effective this policy can be when approached with clear objectives and political support. The Fujimori administration's trade and regulatory policies are the most market-oriented in the region. Reforms in these areas have ranged from changes in constitutional provisions to complete dismantling of access barriers. Consistency and coordination among economic policymakers in both congress and in the executive branch have been key determinants in creating a stable environment for competition. The other element has been the innovative institutional setting provided to INDECOPI. As INDECOPI watches over all measures and regulations dealing with competition in the broadest sense, it has been easier to identify those bottlenecks likely to affect the functioning of the market. Given the emphasis on protecting consumer welfare by means of promotion of more competition, the activities have primarily focused on freeing markets of the obstacles still remaining in the economy.

The fact that protectionism has been soundly rebuffed by the government has assured that no big battles have taken place between INDECOPI and other offices. Therefore, the typical conflicts between trade and competition goals have been minimized. For instance, in the always-appealing area of antidumping and subsidies, the INDECOPI Commission has imposed duties on only a few occasions, and is the body that least makes use of these mechanisms in the region. The same can be said for technical standards, in which INDECOPI is also the least likely to use standards as protectionist measures. Of course, further coordinating efforts are necessary among INDECOPI's seven Commissions, as well as between INDECOPI and Peru's Privatization Commission on potential competition restrictions coming out of the regulatory framework for public utilities. Additionally, INDECOPI requires further strengthening of its market analysis and investigation capacity. As INDECOPI becomes a more utilized institution, enforcement, especially in the area of restrictive practices, should be more active.

⁷ In a recent paper, Rodríguez (1997) provides a review of this decision and examines Peru's challenges in going from interventionism to the market.

Thus far, competition policy has worked well in Peru. The political stability and the friendly approach of the president and his cabinet toward INDECOPI's role in the economy has contributed to the success of the agency's agenda. How dependable the approach will be toward competition with regard to particular individuals rather than to institutions remains an open question.

Venezuela: Getting Closer to the Right Balance

Competition policy in Venezuela started with an economic reform program implemented during the Pérez administration in 1989. The reforms were oriented toward trade liberalization, exchange rates, price controls, and foreign investment. Competition law, together with antidumping and consumer protection regulations, were important elements of the process. The law was enacted in 1991.⁸ Prior to its enactment, the constitutional rights of freedom of industry and commerce were suspended. By suspending such rights, the executive branch regulated private sector activities through decrees without congressional involvement. This empowered the government to manage the import-substitution and protectionist policies that had prevailed for almost five decades. Likewise, countless laws and regulations created monopolies or stimulated cooperation among competitors. Collusive and monopolistic practices were a consequence of the lack of entry of new competitors. To limit that power, governments relied on price controls, which were negotiated among the trade associations on a regular basis (Jatar 1994).

The Venezuelan law contains provisions dealing with restrictive practices and merger control. Restrictive practices are prohibited unless expressly authorized or exempted by the competition agency. Concerning conduct, the law provides a list of prohibited practices, which include price-fixing, price discrimination, abuse of dominant position, and resale price maintenance, among others. The law neither differentiates between horizontal and vertical restraints, nor provides analytical standards for conduct violations. This made the initial enforcement efforts of the agency difficult. Executive regulations issued in 1993 under the agency's advice clarified these ambiguities. Following the European model, the regulations declare all practices prohibited unless expressly authorized by the competition agency. To grant such authorizations, the regulations give the agency more discretion to evaluate practices. The agency thus has allowed certain agreements on a rule of reason basis, in spite of restricting competition, due to the economic efficiencies they generate. Examples of such agreements include exclusive dealings, franchises and other vertical restrictive agreements. On the other hand, the agency has developed rather strict *per se* criteria against price and output horizontal restrictions, whereby authorizations have never been bestowed (Pro-Competencia 1993b, 1994b, 1995b, 1996b).

With regard to merger control, the law prohibits economic concentrations when they create a dominant position in the market. As in conduct, the merger provisions were extremely limited and focused solely on preventing increases in market size. A first interpretation led to the conclusion that any merger was illegal, as any transaction would lead to a dominant position in the highly concentrated Venezuelan market. Departing from the European concept of dominance and adopting a U.S. consumer welfare approach, the agency then developed a second set of regulations. Based on the U.S. merger guidelines, the regulations provided a specific methodology to determine whether mergers resulted in sufficient market power to eliminate or restrict effective competition. Thus, changes in market structure through mergers, due to either the elimination of potential competition or the increment of efficiency and international competitiveness, would be monitored in a rational manner.

The law and its regulations are enforced by the Superintendency for the Promotion and Protection of Free Competition (Pro-Competencia). Pro-Competencia is headed by a superintendent with prosecutorial and adjudicative independence from the executive branch. In addition to law enforcement, Pro-Competencia devotes significant efforts to competition advocacy functions. This function has proved to be instrumental in the pursuit of competition policy goals, particularly in the initial transition stages. Soon after beginning its activities, the agency realized that competition was not only about restrictive practices, but more importantly about fostering competition. Although trade liberalization was effective in many sectors, many others were still protected from competition. Since its inception, Pro-Competencia has actively promoted deregulation initiatives, prevented

⁸ The Law to Promote and Protect Free Competition (December 1991). Additional regulations have been issued to deal with specific areas. Regulation 1 (January 1993) sets enforcement standards for prohibited conduct based on authorizations and exemptions. Regulation 2 (May 1996) sets standards for merger analysis and control. Guideline No. 1 (July 1993) provides information requirements to request authorization to perform certain prohibited conduct. Guideline No. 2 (May 1994) provides information requirements and methodology for merger analysis (OAS 1997b).

government policies contrary to competition, and proposed legislative reforms to encourage a more competitive environment. The same can be said with respect to the dissemination of competition goals among universities, academies, judges, trade and consumer associations, and the media.

Despite the politically troublesome environment in which competition policy has existed, the Venezuelan experience, after five years of activity, shows a positive record. In the Andean region, Pro-Competencia has been the agency that has dealt with more issues likely to both affect and foster competition. On anticompetitive conduct, the agency has conducted 54 investigations related to cartels, exclusionary and boycott practices, and abuse of dominant position. Of these 54 investigations, most at the request of firms, 23 were conducted in 1993, 15 in 1994, 8 in 1995, and 8 in 1996. In 36 cases, Pro-Competencia found merit to open formal proceedings and adjudication. Thirteen cases were opened in 1993, ten in 1994, nine in 1995 and four in 1996. The agency found violations of the law in 15 of these cases (OAS 1997c; Pro-Competencia 1993a, 1994a, 1995a, 1996a).

For Pro-Competencia, enforcement in a society that awoke to a law that suddenly made its common practices both illegal and subject to sanctions was thought to be counterproductive and unmanageable. In the initial stages, Pro-Competencia chose cases of evident collusion in which the main competition objectives could easily be understood by businesses and the public alike. Many collusive practices were still recognized openly on television and newspapers. Some others were detected in the price control offices where firms went to bargain deals. This helped Pro-Competencia communicate that its chief concern was to change the existing perception about the benefits of cartels (Jatar 1996).

By its second year of operation, Pro-Competencia had a better understanding of the law, and the initial message had been effectively conveyed to the public. Thereafter, the agency started to apply the law more stringently. A per se criterion has firmly applied to horizontal restrictions and a more relaxed rule of reason has applied to vertical agreements. The first case of collusion effectively sanctioned by Pro-Competencia involved nine cement producers operating in Caracas. In *Prenezclados*, the producers belonged to the same trade association within which prices were agreed. Pro-Competencia found the price lists for the firms' clients, verified that such prices were invariably honored and ascertained that cheating was considered a violation of the agreement. The agreement was voided, and severe fines were imposed (Pro-Competencia 1994a). The decision was helpful because it fully explained the per se approach toward cartels and set the interpretation that has guided the enforcement of the law on conduct up to the present. Recent investigations for cartel violations have been successfully conducted in industries like oil product transportation, movie theaters, travel agencies, pharmacies, construction equipment suppliers, newspapers, airlines, poultry, and cement (Pro-Competencia 1995b, 1996b).

Merger control has been the agency's most controversial law enforcement subject. With no mandatory premerger notification system in place and a law that does not provide clear rules as to how a merger could be treated, Pro-Competencia has had enormous difficulties in handling this area. To date, Pro-Competencia has evaluated 27 mergers. Of these, 19 have been approved, 4 banned, and 4 approved subject to some modifications (OAS 1997c). The first case was analyzed in 1993. The case of *Pinco-Pittsburgh* involved the merger of two major paint producers, Pinco-Pittsburgh (25 percent market share) and Corimon (28 percent market share). The merging parties alleged that Pinco-Pittsburgh was not a competitor any longer as its financial standing was close to bankruptcy. For Pinco-Pittsburgh to remain in business, it had to merge with a healthier firm. In addition, the transaction was planned on the brink of the severe banking crisis, price control, and currency devaluation in which Venezuela was immersed in 1994.

In a controversial decision, Pro-Competencia, using the U.S. market power approach based on the degree of concentration rather than the European dominance approach set out in the law, initially ruled against the merger. In this situation, according to the law, an order of divestiture followed. Pro-Competencia learned that such a measure was costly and hard to enforce. Thus, the agency, in view of the economic crisis of the country, reconsidered its decision and approved the merger several months later using the U.S. "failing firm" argument (Pro-Competencia 1994a). In the *Pinco-Pittsburgh*, Pro-Competencia was exposed to the hardships of merger analysis in a transition economy. Since many firms are on the verge of exiting the market because of structural changes or simply contradictory policies, a flexible approach based on dynamic (efficiencies and market entry and exit, among others) rather than on static (degree of concentration and market power) considerations should prevail in the analysis.

To avoid harmful divestiture actions once firms have merged, the government issued a regulation based on the 1992 U.S. Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines*, which allows Pro-Competencia to provide advisory opinions to the merging firms prior to the transaction. Merging firms, if so they wish, may submit the transaction to Pro-Competencia for guidance. The agency must in turn explain in detail the reasons for which a proposed merger may be illegal and the consequences to which the firms would be exposed if they decide to continue with the transaction. Still, there is a great deal of skepticism about the interpretation of the law to be overcome by Pro-Competencia. For business defendants, the law allows firms to merge freely, with Pro-Competencia's transactions scrutiny justifiable under an after-the-fact abuse of dominant position standard.

Tensions and uncertainty in this area have continued ever since. In the 1996 *PepsiCo v. Coca-Cola* case, Pro-Competencia initiated, at Pepsi's request, an investigation of the merger between Cisneros, a former bottling producer and distributor for PepsiCo, and Coca-Cola. In the transaction, Cisneros brought to the deal 18 bottling facilities, 60 distribution locations, and 14,000 employees, as well as its homegrown soda brands (representing 40 percent of the market). Coca-Cola brought its Coca-Cola, Fanta, and Sprite brands (representing a 14 percent market share), plus \$500 million in direct investment to improve the new company. To avoid anticompetitive charges, Coca-Cola put its 6 bottling facilities, 500 trucks, and 1,200 employees up for sale to anyone interested in them. PepsiCo, on the other hand, deemed the merger illegal, alleging restrictions on competition because of the dominant position acquired by the merging company, and asked Pro-Competencia to dissolve the transaction. The merger had left PepsiCo (which had a 70 percent share in the dark soda market) out of the market since, prior to the merger, all Cisneros facilities had been at the disposal of PepsiCo. PepsiCo's options to return to the market were either to buy Coca-Cola's facilities, build its own facilities, or find a replacement partner for Cisneros.

Although PepsiCo put forward countless arguments, for Pro-Competencia the only issue was whether the merger restricted competition in the soda market.⁹ After a five-month investigation, Pro-Competencia ruled against the merger. It considered that given the nature of the bottling and distribution system, which required a huge investment and a long time to settle real competition, the transaction would leave the soda market with basically one participant. The problem with the ruling was that it was issued months after the transaction was completed. As faced in the *Pinco-Pittsburgh* case, an order to dissolve the merger seemed costly and difficult to enforce. Therefore, Pro-Competencia compelled Coca-Cola to modify some aspects of the transaction. Among these measures, Coca-Cola was compelled to transfer its facilities, as well as either Cisneros' soda brands or Coca-Cola's Fanta and Sprite to an independent trusteeship.¹⁰ However, it sanctioned the merging parties (Cisneros and Coca-Cola) for breaching the competition law (Pro-Competencia 1996a).

The *PepsiCo-Coca-Cola* decision, certainly Pro-Competencia's most important, showed two failures in the approach toward mergers. The first failure comes from the legal approach. Since the law does not provide for a premerger notification, firms are free to merge, and Pro-Competencia can only review these transactions after mergers are concluded. In this scenario, the preventive nature of merger regulations is lost and Pro-Competencia will always be in the troubling position of being an arbitrator in the market. In this role, Pro-Competencia pleased no one. Cisneros-Coca-Cola were initially pleased as the decision allowed the transaction to continue with only minor changes. However, they considered the divestiture order of their nondark soda brands and the fines to be inconsistent with the conditioned approval of the transaction. PepsiCo was pleased as well, since the decision found the merger anticompetitive. However, PepsiCo held that the decision, to be consistent with the law, would have had to void the transaction altogether.

The second failure comes from the agency's technical approach. Pro-Competencia made several mistakes in measuring the impact of the transaction in the market. To mention one, in measuring the likelihood of PepsiCo's market reentry, Pro-Competencia underestimated the ability of PepsiCo to find a new partner. Just two months after the merger was disclosed, PepsiCo agreed to a \$380 million joint venture with Polar, Venezuela's largest brewing company, to bottle and distribute PepsiCo sodas. Soon thereafter, PepsiCo

⁹ As occurred in previous merger cases, the case absorbed the time and effort of all the agency's staff. Likewise, the agency was placed under siege by attorneys, top executives, and politicians.

¹⁰ Although this measure was part of the original plan of the merger, Pro-Competencia found that the trusteeship was not fully independent from Coca-Cola. Therefore, the agency decided to directly oversee the selling activities of Coca-Cola facilities under a trusteeship established under the agency's guidelines.

returned to the market and so did competition, as intense as ever, between the world's two largest rival firms. Again, Pro-Competencia focused its analysis on static considerations at the moment of the merger (basically the degree of concentration and market power held by the merging firm the day following the merger) rather than on dynamic considerations (for example, efficiencies, product substitutability, likelihood of entry, and nature of the soda market). Unfortunately, this approach made Pro-Competencia miss the broader picture.¹¹

The case was appealed by both parties in court. Beyond legitimate questions related to the methodology applied to evaluate the transaction and the legality of the fines imposed, the substantive issue of whether Pro-Competencia has statutory powers to stop or restructure mergers remains. If the decision were reversed by the courts, it would be very damaging to the credibility built so far by Pro-Competencia, not to mention the confusion it would bring to such a critical area of competition policy. Cases like this one fall easily into the hands of lawyers, whose advice, which is often unnecessary if the agency conducts its investigations properly, increases transaction costs. Also, these cases, for the most part, end up in the courts of justice, where the expertise to judge competition issues is limited. This brings the likelihood of rulings on a nonsubstantive basis and not always in keeping with the interests of consumers.¹²

Turning to competition advocacy, this is the area in which Pro-Competencia's actions have been most effective. Nearly three quarters of its efforts have pointed toward the deregulation and demonopolization of protected sectors. For instance, the Venezuelan securities market was protected from competition by a 1975 law that was still in force. According to that law, the members of the stock exchange had to agree on a fixed commission which in turn had to be approved by the exchange commission. The competition law did not automatically overrule this sort of provision. Each provision had to be amended or ousted on a case-by-case basis. Meanwhile, restrictive practices in those sectors remained legitimate. Pro-Competencia issued an opinion about the anticompetitive effects of these rules. The commission agreed to revoke the regulatory measures that interfered with the stockbrokers' free pricing.

Successful identification and review of the compatibility of valid rules with competition goals have been conducted, among others, in the pharmaceutical, sugar, coffee, and health sectors (Pro-Competencia 1996). Not so successful have been the efforts in the agriculture sector. Active lobbying has overcome Pro-Competencia's efforts to eliminate traditional price-fixing, quota allocation, and discriminatory practices. Pressure from farmers and producers made the government exclude the agriculture sector from application of the competition law, and the old practices continue (OAS 1997c).

Competition issues have also played a role in the privatization process. The privatization law deems void privatizations that may lead to high levels of market concentration. As a result, the privatization agency and Congress have informally conferred on Pro-Competencia the role of counselor on the potential effects on competition that would result if one of the actual rivals of the privatized company happened to procure the bid. Assessment of the regulatory framework designed for the privatization of natural monopolies has also been part of Pro-Competencia's role. In these areas, Pro-Competencia has issued 16 reports since 1992 (Pro-Competencia 1996c). These reports include opinions on the privatization of two state-owned airlines, a state-owned aluminum conglomerate, a state-owned dairy, and several state-owned financial institutions. They also include opinions on regulatory issues related to airfare tariffs and energy. Although nonbinding, these reports have earned a sound reputation among the public agencies and the investors involved in the privatization bids.

Competition policy in Venezuela has not been an easy task. Since 1992, two governments with a different orientation and under different political environments have been in power. The most damaging political and economic crisis in Venezuela's history reached its peak between 1994 and 1996. The newly elected government reversed the open trade policies. Controls were reestablished, as were foreign trade and investment restrictions. The government gave in to business pressure and implemented protectionist measures, especially against Colombian imports. The privatization process was also halted. This change in policies significantly slowed the rhythm of the reforms, and with it, the development and enforcement of a sound competition policy. Pro-Competencia meanwhile has been run by two superintendents. The first (1993–94) dealt with the creation of the agency and the application of the law in the midst of the transition. The second superintendent (1994–97) has

¹¹ For a detailed analysis of the technical aspects of this case, see Rodríguez (1997).

¹² Since Pro-Competencia's first decision back in 1994, almost all the decisions involving powerful firms have been appealed before the courts of justice. At present, 12 important cases are pending review. The first two decisions came out of the courts (an average of three year delay) in 1997. Both overruled Pro-Competencia's decisions (*Gason* cartel and the other *Pinco-Pittsburgh* on merger) because of the lack of legal standards. See OAS (1997c).

worked to keep the competition process alive, especially during the two years of controls. In both periods, the agency has learned how to overpower pressures and keep the underlying goals of its function in perspective.¹³

A new policy shift occurred in 1996. This shift portends Venezuela's comeback to a more market-oriented system. The reputation and independence gained by Pro-Competencia are key advantages in the much-needed reimplementation of competition policy.

COMPETITION POLICY IN THE ANDEAN COMMUNITY: A MISSING LINK FOR DEEPER INTEGRATION

The open regionalism approach adopted by the Andean Group free trade community envisaged the rebirth of a truly integrated market. Regional tariff and nontariff barriers were progressively reduced. Policy harmonization on rules of origin, transportation, export subsidies, antidumping and countervailing duties, intellectual property rights, and standards and investment, among others, supplemented the trade liberalization efforts of each country. Consistent with the market-oriented endeavors developed at the national level, the Andean Community integration project has been oriented to promote firms' growth on the basis of international competitiveness and efficiency. The development of common rules to organize business transactions and trade among countries is a major challenge in the region. Competition policy is a key instrument that has been missing in this effort.

This absence is surprising because the Andean Community integration project has tried to be a mirror image of the European Union. The experience of the European Union shows that the enforcement of competition laws at both the national and supranational level is essential to achieving changes in business behavior and institutions. Domestically, a healthy and strong competition policy stimulates local rivalry among firms, which is a key element for efficiency enhancement and international competitiveness. Subregionally, cooperation among countries in competition law enforcement encourages the development of common rules to regulate trade across the region. As the European Union experience shows, having a supranational framework and institutions represents a further step in limiting pressure from interest groups on governments, as well as in preventing transnational anticompetitive practices that may elude domestic enforcement.

In the European Union, competition policy has been used more to consolidate the unification of the European markets than to promote competition within the national markets. To reach this goal, the member countries gave up their powers of enforcing the Treaty of Rome's competition provisions to the Commission. By means of the well-known Regulation 17, the Commission became responsible for opening investigations on any matter concerning anticompetitive practices and the granting of exemptions within the single market. Thus, the powers of the Commission exceeded those of each country's competition authorities. The main purpose of this decision was to provide for firm specialization within the union and reinforce the notion of "one market" and "European firms." By encouraging the integration of firms, the framers expected an increase in the number of participants through free trade, which in turn would reduce the dominant positions of firms in domestic markets. This approach proved to be successful as increased competition created pressure to specialize through economies of scale and comparative advantage.

The Commission used competition policy as an important support. Enforcement activities have concentrated on different priorities over the years in efforts to consolidate the single market. During the 1960s, 1970s, and 1980s, priority was placed on the elimination of trade barriers among countries. Therefore, the Commission's enforcement emphasis was put on vertical restrictions, particularly to prevent the fragmentation of the single market through concerted practices by distributors in the supply of products to retailers. Mergers, cartels, and dominant firm activities were for the most part untouched as they developed into internationally competitive corporations. As the Commission has gained more independence and maturity, and as countries and interest groups have found it more difficult to impose particular policies, competition policy has begun to change its priorities. During the 1990s, enforcement has been stricter. Since the initial concerns of market fragmentation by national firms have disappeared and European firms have gone fully international, the priorities of the Commission have come closer to U.S. policies toward collusive restraints and mergers.¹⁴

Unfortunately, the Andean Community has not replicated this. The only attempt to address competition issues has fallen short. In fact, the Cartagena Agreement of 1969 does not contain rules on competition

¹³ For a recount of Pro-Competencia's institutional development during the period 1993–97, see Kelly (1997).

¹⁴ For an analysis of competition policy in the European Union and the lessons that can be learned for Latin America, see Jatar (1996).

similar to Articles 85 and 86 of the Treaty of Rome. It does, however, include a mandate to adopt regulations for dealing with business restrictive practices. On this ground and without properly knowing which business practices affected market integration, the Commission of the Cartagena Agreement enacted Decision 285 in 1991, which established common rules “to prevent or correct distortions in competition resulting from practices aimed at restricting free competition.”¹⁵

Decision 285 is the first effort to address competition issues at the subregional level in Latin America. Its substantive provisions and enforcement mechanisms are modeled after European Union competition rules. Therefore, supranationality principles applied by community bodies govern the system. Curiously, Decision 285 was enacted before the current national competition laws. Although it was seen as a model for policy harmonization in the region, its components and scope fall short compared to what was developed in each country later on. Nonetheless, the Decision, based on supranational principles, prevails over domestic law in cases of subregional dimension.

The Decision has a very limited scope. It deals with restrictive practices resulting either from collusive agreements or from abuses of dominant position as long as they affect competition in more than one country of the subregion. If the practice does not have extraterritorial implications, then national law applies. Concerted actions prohibited by the Decision include price-fixing, restraints on output, distribution, technical development and investment, market allocation, discrimination, and tying arrangements. Abuses of dominant position, on the other hand, include, besides the practices mentioned before, refusals to deal, withholding of input to competing firms and discriminatory treatments. The Decision, however, misses the most important practices affecting competition in integrated markets: vertical restraints and merger review.

The enforcement of Decision 285 is responsibility of the Board, which conducts investigations and proceedings at the request of countries or affected firms. To this extent, the Decision, in sharp contrast with the European Union model, provides the Board with a very peculiar rule of reason standard of analysis. In what looks more like an antidumping analysis than an antitrust one, joint consideration must be given to positive evidence of the existence of the practice, threat of injury or actual injury to a subregional industry, and the cause-effect relationship between the practice and the injury. Proceedings must be completed within two months after investigations are initiated. If the board determines that the practice is restrictive to competition, it may issue an order to cease it. It may also authorize the affected country to impose corrective measures, that is, to lower tariffs on the products exported by means of restrictive practices. In spite of these features, Decision 285 has been a total failure in promoting competition in the Andean market. In fact, only one case has been submitted before the board for examination, and its outcome was negligible. The case involved restrictions to competition in the formerly controlled subregional sugar market.

In *Imezucar v. Ciamsa* (OAS 1997c), Imezucar, a Venezuelan sugar trading company, requested an investigation in 1996 over allegedly collusive practices in the sugar market performed by Ciamsa, a sugar trading company owned by several Colombian and Venezuelan sugar producers. Imezucar claimed that Ciamsa-Colombia had concerted with Ciamsa-Venezuela to restrict sugar production and exports, fix prices, and allocate market and quotas among its affiliates in each country. It also showed that such collusive and monopolistic practices had injured its activities and reduced its market participation in both countries. Ciamsa, on the other hand, alleged that its affiliated companies competed on an individual basis with each other and that Ciamsa was an efficient system for importing and distributing sugar to its members. In its investigation, the board did not find evidence of collusive pricing, nor did it establish a relationship between the alleged injury and the concerted practices. The case was dismissed.

A number of institutional limitations have contributed to some failings. A first limitation is that the Board cannot initiate investigations on its own. Its actions have to be requested either by the countries or by firms that have a legitimate interest. This leaves the board with little power to oversee the Andean market. The ability to select cases and open investigations is the most important enforcement power. In addition, such power guarantees the independence of the board on issues affecting the integration process, competition, and consumer welfare. Competition rules do not envisage the protection of individual competitors. To the contrary,

¹⁵ Decision 285 on Standards for Preventing or Correcting Market Distortions Caused by Practices that Restrict Free Competition, April 4, 1991 (OAS 1997a).

they seek to protect the competition process. Under the decision's system, the board acts more like an arbitrator of conflicts between private parties than as a protector of the competition process.

A second limitation is that the Board has neither punitive nor coercive powers to force firms to adopt its decisions. It simply issues a finding with an explanation, setting forth its conclusions and a recommendation to cease the practice. This lack of a mechanism to prevent restrictive practices weakens the board's authority. The third limitation has to do with the unusual remedy the board may impose. It may authorize countries to grant preferential treatment to imports from third countries of products that are subject to investigation. This remedy seems to work in a protected scheme, but not in an open one where such preferences have been eliminated at the national and regional levels. Again, it is a remedy thought to address individual industry concerns and not competition itself.

These limitations have made the decision groundless and in need of review.¹⁶ The deepening of the Andean integration process will make it even more necessary to pay attention to such questions as the harmonization of domestic competition legislation and means of enforcement among the five countries. Extraterritorial restraints to competition are only one aspect. Many of these practices are successful because no country has jurisdiction over the firms. Firms act in a country, and the restrictive effects are seen in another country. With similar mechanisms and institutions placed in each Andean country, the ability of firms to affect competition is reduced.

Therefore, the participation of national competition agencies in future investigations would help to identify the roots of the problem properly and solve it coherently. Attention should also be paid to the role of the new general secretariat in fostering competition in the subregion. The harmonization process should consider the impact of subregional policies on competition conditions. As seen at the national level, many restrictive practices are facilitated by public policies aimed at promoting goals contrary to competition. The secretariat should play a subregional competition advocacy role in the elaboration of regional economic policies in which free competition is ensured.

For the new Andean Community, the use of a supranational competition policy should be a priority to consolidate free trade in the region. First, it would help in the enforcement of common provisions when anticompetitive practices involve firms from different countries. Second, it would limit pressure from interest groups on individual governments, which would make it easier to protect the competition process instead of the interests of competitors. Third, in the case of mergers, the enforcement of supranational regulations would allow for a better assessment of the optimal size of the firms according to the regional market.

FINAL COMMENTS

After nearly five years of implementation, competition policy is still finding its place in the Andean region. This chapter has shown how competition policy has been approached in each country, as well as in the subregional context. It has also shown that enacting competition laws is not enough and that there is a long road still ahead to make competition policy an effective instrument to promote rivalry and integrate the markets of the region.

To date, the existing laws are nicely drafted, and the new competition agencies have hired bright individuals with a modern understanding of markets and the public service. Nonetheless, the political will to enforce competition policy is still a main challenge. The differences in enforcement among the Andean countries nowadays reveal the degree of political will given to competition policy. As examined, this policy goes from virtually nothing in Bolivia and Ecuador to an uneven enforcement in Colombia, Peru, and Venezuela.

In absence of political support, the existing competition agencies, like many of the new institutions of the market-reform generation, are still struggling to define their role and space within both the business community and the government. Since these constituencies are rather weak, some agencies have tried to find oxygen through the triggering of often unnecessary investigations. In some instances, these investigations have led to erratic decisions, showing a lack of trained personnel, methodological learning, and institutional capabilities to intervene

¹⁶ In fact, a draft proposal to amend Decision 285 was put forward by the Venezuelan competition agency for discussion. Among its features, the draft proposes a system of exemptions based on the European Union model. According to it, authorizations may be granted on an individual basis to agreements among competitors or on a global basis to sectors provided they enhance economic efficiency and consumer welfare. By the same token, the draft proposes a premerger notification system also along the lines of the European model. For details of this proposal, see Garmendia (1997).

properly in the market. The scale and stage of development of the Andean markets may seem insufficient for firms to pay the high transactions costs to get into them. Consequently, groundless interventions by the competition agencies may certainly contribute to increasing such costs and making investment more difficult in the region.

In the context of the United States–Andean countries' relations, competition policy issues have not provoked any trade friction. Nonetheless, the increasing flows of trade and investment, particularly from the United States, may increase the potential for anticompetitive behavior and changes in market structure in the Andean countries. This may trigger investigations before the competition agencies, especially in the area of mergers, where most of the U.S. firms have concentrated their commercial interests in the region. It is noteworthy that although some of the competition investigations have had tremendous impact in each country, they have been conducted and solved fairly according to a rule of law and following internationally accepted standards. As for activities across national boundaries, no cases have been reported whereby business practices have had extraterritorial effects on the market conditions either in the United States or in any of the Andean countries. Furthermore, no firms in an Andean country have been involved in an investigation conducted under U.S. antitrust laws.

Four important points can be concluded from the Andean countries' experience. First, competition policy still depends heavily on individuals rather than on institutions. The president plays a determining role in policy shaping, which cannot easily be set apart by the supposedly independent agencies. The heads of the agencies are to some extent subject to signals hinging upon the government's will. The green light has been fully given in Peru where INDECOPI still enjoys the government confidence. The green light has selectively been given in Colombia and Venezuela, but a red light has been given where frequent shifts in government policies have forced the competition agencies to change priorities in their agendas.

Second, a lack of government conviction in competition policy has increased rent-seeking activities by the traditional business groups. Governments have given in to competition pressures. Accordingly, sectoral exemptions have been bestowed, new restrictions to trade and investment have begun to appear, sanitary and phytosanitary measures have halted imports, and threats of antidumping and countervailing duty actions have intensified, as have domestic industry lobbying for tariff protection. The economic turmoil of Colombia and Venezuela are clear examples of the protectionist answers that governments can provide against increases in competition coming from abroad.

Third, the laws have been applied very differently to similar situations. Although there are common grounds regarding collusive agreements, such agreements have been more effectively prosecuted in Peru and Venezuela than in Colombia, and they are freely employed in Bolivia and Ecuador. None of the countries has developed sound criteria toward vertical restraints. Finally, each country has tailored its own merger policy, which ranges from full freedom to merge in Peru, to an outdated system in Colombia where mergers are overlooked, to a forceful system in Venezuela where mergers matter. As a result, each country, with different priorities, has yielded different outcomes and therefore, provided firms with different signals.

Fourth, the Andean countries and existing agencies have missed the regional role that competition policy may play in the integration project. The Andean institutions have lost their leadership in this area to the extent that competition policy is left to each country. Extraterritorial problems originated by cartels and restraints at the distribution channels are increasing in the region. The Andean integration project is aimed at promoting the integration of regional firms that are able to compete internationally. Despite the fact that the increase of competition in the region is largely due to the Andean trade liberalization framework, the absence of a regional competition policy not only has not promoted the expected regional integration of firms, but, for the most part, its inhibition.

Efficiency and consumer welfare are the ultimate goals of both the economic reforms and the integration efforts. Such objectives will be rewarded as long as the markets work in open and transparent environments. Indeed, more competition is appreciated nowadays than ever before in the Andean region. However, it is not enough. The Andean markets still continue protected, highly concentrated, and run by fewer firms. Therefore, more consistent efforts are required. The existing competition agencies have learned important lessons during these recent years, such as how to lead a harmonization process in the region. This task will help enhance the attractiveness of the region for trade and investment.

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